IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

DAWN CURRY PAGE, et al., Plaintiffs, v. CHARLIE JUDD, in his capacity as Chairman of the Virginia State Board of Elections, et al., Defendants.	)	Civil Action No. 3:13-cv-678-REP-LO-AKD

DAWN CURRY PAGE, GLORIA PERSONHUBALLAH AND JAMES FARKAS' REPLY IN SUPPORT OF BRIEF ON AVAILABLE REMEDIES

In their responses to Plaintiffs' brief on available remedies, SBE Defendants and the Cantor Intervenors largely fail to respond to Plaintiffs' argument on available remedies. Plaintiffs *agree* that, if it is possible for the General Assembly to enact a constitutional apportionment plan in time for use in the 2014 election, it should be given the first opportunity to do so. But if the task of remedial reapportionment were to fall to this Court because the General Assembly cannot or will not enact a constitutional plan in time, it cannot be seriously contended that the Court could not timely adopt a remedial map. Numerous courts from around the country have demonstrated that the current timeframe is more than sufficient for the Court to create and adopt a constitutional map. Moreover, the Court certainly has the authority to modify relevant election deadlines to ensure the implementation of a meaningful remedy rather than to require the citizens of the Commonwealth to suffer an election of their congressional representatives under a racially gerrymandered map. In short, this Court has the power and responsibility to resolve this litigation on the merits and ample time to fashion an appropriate remedy to ensure the 2014

congressional election is conducted pursuant to a constitutional apportionment free from the taint of racial gerrymandering.[1]

I. ARGUMENT

A. The Duty to Prepare a Remedial Map Will Only Fall to the Court if the General Assembly Is Unable or Unwilling to Enact a Constitutional Plan in Time for the 2014 Election

Plaintiffs agree that, if it is possible for the General Assembly to enact a constitutional map in time for its use in the 2014 election, it should be given the first opportunity to do so. *See* Pls.' Br. 3-5 (ECF No. 30). Only if the General Assembly is unwilling or unable to act in time, will the Court be required to impose a remedial map for use in the 2014 election. The Cantor Intervenors' speculative assertion that Plaintiffs have not offered a proposed remedial map because remediation in time for the 2014 election is impossible, Cantor Resp. [1] (ECF No. 33), is simply wrong.

In fact, the Cantor Intervenors' assertions about Plaintiffs' obligation to provide a "remedial map" confuses the issue, misunderstanding the claim that Plaintiffs make and conflating the liability and remedial phases of the litigation. Intervenors cite a slew of cases that considered claims that maps violated Section 2 of the VRA to support their argument that Plaintiffs are required to provide a constitutionally compliant map in briefing the issue of the proper remedy. Plaintiffs, however, do not make a Section 2 claim -- they allege that CD 3 was

[1] In their response briefs, both SBE and the Cantor Intervenors focus largely on their view of Plaintiffs' likelihood of success on the merits, arguing that the fact that the 2012 reapportionment plan was precleared by the Department of Justice and that Virginia was subject to Section 5 of the Voting Rights Act (the "VRA") at the time it was enacted insulates Defendants against a finding that CD 3 is an unconstitutional racial gerrymander. That is not the law and, in accordance with the Court's briefing schedule, Plaintiffs will address these issues in the merits briefing. As Plaintiffs will show, even if Defendants relied on Section 5 in drawing CD 3, that does not mean the district was drawn without an unconstitutional racial purpose. Indeed, Plaintiffs will demonstrate that the General Assembly increased CD 3's black voting age population by more than 3%, which Section 5 did not require.

an unconstitutional racial gerrymander. *See* Compl. ¶¶ 46-51 (ECF No. 1). And, unlike a Section 2 claim, which requires a plaintiff to demonstrate that an additional majority-minority district is possible in their case-in-chief, Plaintiffs' racial gerrymandering claim requires only that they prove that race was the predominant factor in the General Assembly's drawing of CD 3. Courts look to several categories of evidence to make this determination, namely, the district's shape and demographics, *see, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 905, 913-14 (1995); *Shaw v. Reno*, 509 U.S. 630, 646-47 (1993), direct evidence of legislative motives, *see, e.g.*, *Miller*, 515 U.S. at 917-18; *Bush v. Vera*, 517 U.S. 952, 960-61 (1996), and the nature of the apportionment data used by the legislative body, *Bush*, 517 U.S. at 962-63.

Thus, contrary to the Cantor Intervenors' suggestion, Plaintiffs are *not* required to affirmatively prove that Section 2 did not require the creation of CD 3 as drawn by the General Assembly. Rather, once Plaintiffs meet their burden of proving that race was the predominant factor in the creation of the district, the burden shifts to Defendants to satisfy strict scrutiny by demonstrating that (1) the Commonwealth had a compelling interest in using race as a predominant factor, and (2) the use of race was narrowly tailored to meet that interest. *Id.* at 976. To the extent the Cantor Intervenors contend that Plaintiffs have an obligation to provide an alternative map to disprove Defendants' anticipated Section 2 defense, they misunderstand the substantive standards governing this case and Defendants' own obligations to justify Virginia's race-based redistricting decisions.

In any event, Defendants' mistaken assertions in this regard refer to the question of liability, not -- as directed by the Court -- the remedial options for the Court assuming a finding of liability in Plaintiffs' favor. Dec. 3, 2013 Order 2 (ECF No. 27). A "remedial" map, by definition, is imposed only upon a finding of liability, and, of course, depends on the nature of

that liability. Accordingly, it would be premature for Plaintiffs to offer a remedial map at this point in this litigation. Indeed, it seems disingenuous for the Cantor Intervenors to assert, on the one hand, that the General Assembly should have the first opportunity to enact a remedial map if the Court deems the challenged district unconstitutional and, on the other hand, that Plaintiffs must submit a remedial map to the Court before any finding on liability has been made. They essentially invite Plaintiffs to prematurely usurp the very responsibility that they contend belongs to the General Assembly in the first instance. Plaintiffs, meanwhile, recognize that any remedial map will depend on the Court's determination on the merits and that, if sufficient time remains to implement a legislative remedy before the 2014 election, the General Assembly must be first given the opportunity to prepare a constitutional plan.

Plaintiffs further recognize that, due to the particular vagaries of the political process, legislative bodies cannot always act as quickly as courts in preparing and approving voting plans. For this reason, some courts facing an election that is near but not immediately imminent have given the legislature a defined period of time to attempt to redraw the map, while retaining jurisdiction with the understanding that the court would take over if the legislature is unable to complete the work in the time allotted. *See, e.g.*, *In re Apportionment of State Legislature - 1992*, 486 N.W.2d 639, 645 & n.31 (Mich. 1992) (appointing panel of retired and current judges to prepare plan if Legislature and Governor failed to enact one within five weeks); *McDaniels v. Mehfoud*, 702 F. Supp. 588, 596 (E.D. Va. 1988) (giving legislative body 75 days to submit an acceptable remedial plan to the court). Depending on when the Court reaches a decision on the merits, a similar approach could be an appropriate option here.

B. There is Time to Remedy the Current Plan's Unconstitutionality Prior to the 2014 Election

Neither SBE nor the Cantor Intervenors dispute that state and federal courts have consistently been able to prepare remedial redistricting and reapportionment plans in timeframes much more compressed than the one here. *See* Pls.' Br. at 6-7. Instead, they quibble with some of the cases cited by Plaintiffs, asserting that this litigation cannot be compared to ones in which the matter came before the court because the legislative body failed to enact a map in the first instance after a census, or that cases decided by state courts are so inherently different that they cannot serve as useful examples as this Court contemplates its available remedies.

But the point is that reapportionment can be and often is done by courts under extremely compressed timeframes. That some of those cases found their way to the court for different reasons, or were decided by state courts, is irrelevant. Indeed, the Cantor Intervenors *admit* that states (and presumably their courts) have a particular interest in reapportionment and redistricting. Cantor Resp., at 16. In each instance, those courts -- like this Court -- confronted similar cases under highly expedited schedules and, as a result, their experiences are highly instructive.

Tellingly, neither SBE nor the Cantor Intervenors cites a single case that supports their primary argument: that courts lack the authority or the ability to fashion expedited remedial relief in a litigation that either (1) challenges an enacted plan that was previously pre-approved by the Department of Justice, or (2) requires the court conduct an analysis under Section 2 of the VRA. The silence is telling but hardly surprising. Indeed, there are several examples of courts fashioning expedited remedial relief under *both* circumstances. *See, e.g.*, *Favors v. Cuomo*, Case No. 11-CV-5632 (E.D.N.Y.), Aff. of Prof. Nathaniel Persily, J.D., Ph.D. ¶¶ 4, 17-32 (ECF No.

223-1) (Mar. 12, 2012) (expert appointed by magistrate judge on February 28, 2012 providing full analysis of draft plan, including Section 2 analysis, less than two weeks later) (attached as Exhibit A); *Adamson v. Clayton Cnty. Elections & Registration Bd*., 876 F. Supp. 2d 1347, 1356-58 (N.D. Ga. 2012) (conducting Section 2 analysis on expedited schedule); *Stephenson v. Bartlett*, 582 S.E.2d 247, 251 (N.C. 2003) (same); *Henderson v. Bd. of Supervisors of Richmond Cnty*., Va., No. Civ. A. No. 87-0560-R, 1988 WL 86680, at **1-2 (E.D. Va. June 6, 1988) (considering appropriate remedy where county acknowledged that plan previously pre-cleared twice by the Department of Justice violated Section 2); *see also Miller*, 515 U.S. at 909, 918 (affirming decision that previously precleared plan included a district that was an unconstitutional racial gerrymander).

Perhaps more remarkably, the two cases upon which the Cantor Intervenors primarily rely to support their argument that *Shaw* violations in particular should be referred to the legislature for remediation -- even if that means holding an election under an illegal plan, Cantor Resp., at 4-5, 16-17 -- plainly *do not* support that proposition. *Moon v. Meadows* was decided over a year *before* the next congressional election was scheduled to take place, 952 F. Supp. 1141 (E.D. Va. 1997), and the Court explicitly *enjoined* the defendants from conducting that election under the unconstitutional plan. *Id*. at 1151. The case is instructive, but teaches a lesson quite different than the proposition for which it is offered by the Cantor Intervenors, as even a cursory review demonstrates.

Diaz v. Silver, 932 F. Supp. 462 (E.D.N.Y. 1996), is no more helpful to the Intervenors. The court in *Diaz* considered the plaintiffs' request for a preliminary injunction that was filed substantially closer in time to the general election and only *after* the qualifying deadlines had *already passed*. *Id.* at 466. Notably, even then, the court rejected the argument that the mere

proximity of the election alone would bar an injunction. *See id.* ("[W]hile the burden on election officials and candidates are certainly considerations, it would be difficult to accept them as controlling if there were in fact an effective and immediately available remedy to a constitutional violation."). The *Diaz* court's willingness to consider injunctive relief in fact *supports* Plaintiffs' position that there remains ample time to impose an appropriate remedy in this case, where the qualifying deadlines are still three months away, the primary and general elections are six and eleven months away, respectively, and the Court has indicated its probable intention to expedite its consideration of the merits.

The Cantor Intervenors also read *Cane v. Worcester County, Maryland,* 35 F.3d 921 (4th Cir. 1994), much too broadly and quote it out of context. Critically, the case had a peculiar history, and the court expressly "limited" its opinion "by the specific facts and circumstances presented." *Id*. at 928. When the matter first came before the district court, it found that the voting system that the plaintiffs challenged -- which had been used to elect members of the County Board -- violated Section 2 and ordered the County to implement a cumulative voting system within 60 days. *Id*. at 923. What makes the case particularly unusual is that, by the time the court ruled on the merits, the County was no longer using the plan that the court declared invalid. *See id*. ("[A]fter this action was filed but before the first hearing was held, the Board passed Bill 93-6, which amended the voting scheme[.]"). Thus, in the County's mind, it had already remedied the violation, and it submitted the voting system it was then using as its proposed "remedy." The district court, however, "properly rejected" Bill 93-6 as a legally acceptable remedy. *Id*. at 927.

The specific question before the Fourth Circuit was whether, under these unusual circumstances, the district court, which then adopted one of two remedial plans proposed by the

plaintiffs, had accorded the County's expressed preferred policies the appropriate amount of deference. *Id*. at 928. The Fourth Circuit ultimately concluded it had not and directed the district court to permit the County another opportunity to propose a remedy, explaining that while, normally, "[w]hen a political subdivision fails to submit a legally acceptable proposed remedy," the court has authority to fashion its own constitutional remedy, in this particular case "the district court failed to rule on the legality of the scheme set forth in Bill 93-6--*the electoral system in effect at the time the matter was pending before the court*." *Id*. at 929 (emphasis added).[2] There was no discussion of the district court's decision to give the County a limited time period in which to propose a remedy -- an approach that, as discussed *supra*, may be appropriate here, depending on when the Court reaches its decision on the merits.

Finally, the Cantor Intervenors' suggestion that the Court lacks the remedial power to ensure that Virginians are not forced to vote under a map deemed unconstitutional, because they believe that the allotted time does not sufficiently allow for Supreme Court review, Cantor Resp., at 4, 22, must be rejected out of hand. After this Court issues its decision on the merits, the Intervenors may, in accordance with the relevant rules of procedure, apply to the Supreme Court for an emergency stay. There is no legal basis, however, to urge this Court to decline to fashion a remedy in the first instance because the Intervenors have announced their intention to seek a second opinion if they do not like the final result.

C. If Necessary, Relevant Election Deadlines Can Be Modified to Allow the 2014 Election to Take Place Under a Constitutional Map

Neither SBE nor the Cantor Intervenors seriously contest that the Court has the power and authority to modify the relevant election deadlines to effectuate a meaningful remedy in time for

[2] The opinion's discussion of deference is not applicable to this case, which is governed by *Abrams v. Johnson*, 521 U.S. 74 (1997), as addressed in Section II.D, *infra*.

the 2014 election. While SBE argues that *it* is without the authority to unilaterally modify these deadlines, its response is curiously silent on *the Court's authority*, tacitly conceding the point.

The Cantor Intervenors, by contrast, argue that, even if the Court generally has the authority to modify deadlines to effectuate a remedy, "as a matter of federal law, [Virginia's candidate filing period] cannot be moved because this would not afford the [SBE] sufficient time to prepare the ballots that it must send to deployed military personnel" under the MOVE Act. Cantor Resp., at 19.

But the argument is based on a flawed understanding of the very statute upon which it relies: the MOVE Act explicitly allows states to apply for a waiver of its deadlines where the issuance of ballots are delayed due to litigation. *See* 42 U.S.C. § 1973ff-1(g)(2)(B)(ii). Nothing in the consent decree cited by the Cantor Intervenors denies SBE the right to seek such a waiver if it becomes evident that one will be necessary. *See* Cantor Resp., Ex. K. While SBE might be in violation of the MOVE Act if it were to choose not to seek a waiver once it becomes evident that a waiver may be required, that would be an injury of its own making. It's hardly a reason for this Court to refuse to fashion an effective and appropriate legal remedy.

Similarly, SBE's exaggerated litany of administrative burdens potentially resulting from Court-imposed relief in advance of the 2014 election is simply misplaced. A remedy would, unquestionably, inconvenience the election administrators involved, but that inconvenience hardly justifies a continuing constitutional injury. As the court in *Diaz* noted, "while the burden on election officials and candidates are certainly considerations, it would be difficult to accept them as controlling if there were in fact an effective and immediately available remedy to a constitutional violation." 932 F. Supp. at 466. *See also* Pls.' Br. 9-10 (discussing irreparable harm to voters if election is held under unconstitutional map).

Moreover, the argument simply proves too much. *Every state* has similar administrative mechanisms surrounding elections and yet, *somehow*, courts are routinely able to quickly craft remedial maps under which innumerable states have held orderly elections, often under much tighter timelines than the one at issue here. The unexplained suggestion that Virginia is different and somehow incapable of doing so is implausible and unsupported by experience.

SBE's ironic argument that ordering any remedy by the 2014 elections will necessarily carry too great a risk of disenfranchisement due to voter confusion should be viewed with a healthy dose of skepticism given SBE's recent representations in *Democratic Party of Virginia v. SBE,* Case No. 1:13-CV-1218-CMH-TRJ (E.D. Va. Oct. 1, 2013), that there was no meaningful risk of voter disenfranchisement when it implemented a purge of tens of thousands of Virginia voters mere weeks before a major state-wide election.[3] That voter purge program, like the administrative burdens that SBE now complains weigh against this Court fashioning remedial relief for elections still many months away, involved extensive use of the Virginia Election and Registration System ("VERIS"). *See* Ex. B at 3, 8, 16. But, there, SBE argued that the exceedingly short time frame for implementing the program did not risk voter disenfranchisement because SBE was so well versed in the use of VERIS and, in any event, sent notification to all purged voters. *See id*. at 3, 16, 24, 25-26. In fact, contrary to its argument to *this Court* that voter notification would be extremely difficult and seriously risk disenfranchisement, SBE defended its actions *before that court* in part by explaining that it routinely sends notices to large groups of voters close to elections, specifically citing its

[3] In the purge program, SBE required local boards of elections to cross check databases to determine whether over 57,000 registered Virginia voters could be removed from the voter rolls. *See* SBE Mem. Opp. Mot. for Prelim. Injunction 9, 12 (attached as Exhibit B). This process began in late August of this year and was completed shortly before the recent November election. *Id*. at 9. As a result, SBE cancelled the registrations of over 38,000 voters. *Id*. at 12.

obligation, pursuant to federal law, to mail change of address information to approximately 250,000 voters every summer. *Id*. at 4, 7. In addition to that annual distribution, SBE separately attempted to notify all 37,000 plus voters whose registration was cancelled during the months immediately before the general election. *Id*. at 11, 12, 23. If SBE could implement that extensive review and notification process so close to the general election, confident that voter disenfranchisement would not be a serious risk, it can certainly find a way to effectively implement a remedial map in this case to remedy a constitutional violation, where it is almost certain to have much more time to do so.

The practical effect of the Defendants' argument that the Court should not fashion a remedy if the General Assembly is unwilling or unable to enact a constitutional plan in time for use in the 2014 election is that a court should tolerate a continuing constitutional violation to allow the General Assembly to *belatedly* remedy the violation after another election under the racially gerrymandered district lines. But this is precisely what remedial maps are meant to avoid. Accordingly, courts have long recognized that remedial maps will often only be in place for only one cycle. *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 416 (2006) (Kennedy, J.) ("[O]ur decisions have assumed that state legislatures are free to replace court-mandated remedial plans by enacting redistricting plans of their own."). And yet, despite the concomitant added expense and administrative burdens, courts routinely order remedial relief in voting rights cases to address constitutional error. *See* Pls.' Br. 6-7 (discussing representative cases). Remedial maps are the only way to adequately protect against the irreparable harm caused when voters are forced to elect their representatives under maps judged unconstitutional. That's neither surprising nor unusual. Defendants' arguments to the contrary should be rejected.

D. If the Court Prepares a Remedial Map, *Upham* Will Not Restrict Its Map Drawing

Finally, throughout their response, the Cantor Intervenors repeatedly cite the Supreme Court's decision in *Upham v. Seamon*, 456 U.S. 37 (1982), for the proposition that the Court must hew to the General Assembly's policy decisions and "go no further than correcting the identified departure from the Constitution" in preparing a remedy. Cantor Resp., at 3. *See also id*. at 16, 21. This case, however, is controlled by *Abrams v. Johnson*, which explicitly distinguished *Upham*, finding that "[a] precleared plan is not owed *Upham* deference to the extent the plan subordinated traditional districting principles to racial considerations." 521 U.S. at 85. As the Court explained: "*Upham* called on courts to correct—not follow—constitutional defects in districting plans." *Id*. (citing *Upham*, 456 U.S. at 43). Thus, where the entity that prepared the original, unconstitutional map "adopted . . . [an] entirely race-focused approach to redistricting," using the illegal map "as the basis for a remedy would validate the very maneuvers that were a major cause of the unconstitutional districting." *Id*. at 85-86.

Moreover, although none of the Cantor Intervenors represent the gerrymandered CD 3, their very interest in this lawsuit indicates that, if that district were to be drawn free from racial gerrymandering, it could affect multiple districts in the Commonwealth. As the Court explained in *Abrams*, the deference announced in *Upham* was based in large part on the fact that only two contiguous districts out of 27 were affected by the lower court's decision. *Id*. at 86. In this case, the impact has the potential to be more wide reaching, which would justify the Court "in making substantial changes to the existing plan consistent with [the Commonwealth's] traditional districting principles, and considering race as a factor but not allowing it to predominate." *Id*.

II. CONCLUSION

Plaintiffs respectfully submit that the Court has the authority, responsibility and ability to resolve this litigation on the merits and approve an appropriate remedy to ensure that the 2014 election is held pursuant to a constitutional apportionment scheme, free of racial gerrymandering.

Dated: December 16, 2013

Respectfully submitted,

By /s/ _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December, 2013, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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