

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

<p>DAWN CURRY PAGE, et al.,</p> <p style="text-align: right;"><i>Plaintiffs,</i></p> <p style="text-align: center;">v.</p> <p>VIRGINIA STATE BOARD OF ELECTIONS, et al.,</p> <p style="text-align: right;"><i>Defendants.</i></p>	<p>Civ. No. 3:13-cv-678</p>
---	-----------------------------

MEMORANDUM IN SUPPORT OF INTERESTED PARTIES’ VIRGINIA HOUSE OF DELEGATES’ AND VIRGINIA SENATE’S MOTION FOR AN EXTENSION OF TIME TO COMPLY WITH THIS COURT’S JUNE 5, 2015 ORDER

INTRODUCTION

On June 5, 2015, this Court enjoined the Commonwealth of Virginia from holding congressional elections until such time as the congressional redistricting map is redrawn. *See Page, et al., v. Virginia State Board of Elections, et al.*, No. 3:13-cv-678 (Dkt. No. 171) (filed June 5, 2015). The Court further ordered that the General Assembly exercise its primary jurisdiction in adopting a compliant remedial map “[a]s expeditiously as possible, but no later than September 1, 2015.” *Id.*

The Virginia General Assembly respects the order and opinion of this Court and therefore the Virginia General Assembly will convene a Special Session of the House and Senate to adopt a new congressional map consistent with the Court’s remedial directive. Currently, however, the General Assembly is faced with the challenge to undertake the necessary deliberation with the full participation of the House and Senate prior to the Court’s end of summer deadline all while the Intervener-Defendants’ direct appeal to the U.S. Supreme Court is pending. As set forth in

greater detail below, the General Assembly requests this extension to accommodate the election calendar due to Virginia's regularly scheduled elections in November of this year, the summer travel schedule, and to benefit from any additional direction from the U.S. Supreme Court. These calendar constraints make it impossible to schedule a Special Session before the end of August. Furthermore, the request does not compromise the timeframe for completing the process in advance of the 2016 congressional elections. In fact, the requested extension will allow for more meaningful and focused deliberation during the Special Session.

Therefore, the Virginia Senate and the Virginia House of Delegates, who were not parties to this litigation, respectfully request that the Court extend the deadline to comply with this Court's June 5, 2015 order from September 1, 2015 to November 16, 2015. The General Assembly also respectfully notifies this Court that it will hold a Special Session beginning on November 9, 2015 for the purpose of considering and adopting a new congressional redistricting map consistent with this Court's opinion and order. *See Page v. Va. State Bd. of Elections*, No. 13-678, 2015 U.S. Dist. LEXIS 21346 *3 (E.D. Va. Feb. 23, 2015) (three-judge court) (granting Intervener-Defendants' request for a five-month extension of time to comply with this Court's October 7, 2014 order).

STANDARD OF REVIEW

"Courts have the power 'to modify an injunction in adaptation to changed circumstances.'" *Page*, 2015 U.S. Dist. LEXIS 21346 at *3 (quoting *United States v. Swift & Co.*, 286 U.S. 106, 114, (1932) ("[A] continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need."); *see also Hudson v. Pittsylvania County*, 774 F.3d 231, 234 (4th Cir. 2014) (Duncan, J.) (holding that courts have the "[i]nherent power...to modify or vacate their decrees as events may shape the need.")). Further, "The court's

inherent authority to modify a consent decree or other injunction is now encompassed in [Fed. R. Civ. P. 60(b)(5)]...[where] a court may relieve a party from an order if "it is no longer equitable that the judgment should have prospective application." *Thompson v. United States HUD*, 404 F.3d 821 (4th Cir. 2005).

Courts impose a flexible, less stringent standard when reviewing requests for modifications of injunctions. *See Freeman v. City of Fayetteville*, 971 F. Supp. 971, 974 (E.D.N.C. 1997) (citing *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992)). To obtain the modification, the party seeking the modification bears the burden of establishing that a change in factual circumstances make the enforcement of the injunction more onerous, unworkable "because of unforeseen obstacles", or in those situations where enforcement "[w]ould be detrimental to the public interest." *Freeman*, 971 F. Supp. at 974 (citing *Rufo*, 502 U.S. at 384). After satisfying this first prong, the party seeking the modification must demonstrate that its requested modification "is suitably tailored to the changed circumstances." *Freeman*, 971 F. Supp. at 974 (citing *Rufo*, 502 U.S. at 391).

Prior to the issuance of its June 5, 2015 opinion and order, this Court granted Intervener-Defendants' motion to postpone compliance with this Court's October 7, 2013 order. *See Page*, 2015 U.S. Dist. LEXIS 21346 at *8. This Court granted a five month extension of time for compliance thereby moving the deadline from April 1, 2015 to September 1, 2015. *Id.* The Court granted the extension because the Intervener-Defendants had fully briefed their direct appeal to the United States Supreme Court. *Id.* at *4. Also, pending at the Supreme Court was the case *Alabama Dem. Conf. v. Alabama*, No. 13-1138, a case that presented issues directly bearing on the issues presented before the three-judge district court here. *Id.* These developments presented multiple different scenarios where the Supreme Court could summarily affirm this

Court's ruling, the Supreme Court could grant review and then affirm, the Supreme Court could grant review and reverse this Court, or the Supreme Court could remand the case back to this Court for further proceedings. *Id.* at *5. The Court ruled that these scenarios put the “[G]eneral Assembly in a quite uncertain, and generally untenable, posture.” *Id.* at *5-6. The Court therefore concluded that:

[I]t is wasteful for the General Assembly to devise a redistricting plan without the views and instructions of the Supreme Court...To proceed with review before the parties and we know the views and instructions of the Supreme Court would be wasteful of the resources of the parties and the Court.

Id. at *6.

The General Assembly and this Court received the Supreme Court's guidance on May 1, 2015. The Supreme Court remanded this case to this three-judge Court for further consideration in light of the Supreme Court's ruling in *Alabama Legislative Black Caucus v. Alabama*, 575 U. S. _ (2015). (Dkt. No. 155). Approximately one month later, this Court enjoined the Commonwealth of Virginia from holding any congressional elections until the redistricting map is redrawn. (Dkt. No. 171) (*filed* June 5, 2015). The Court furthered ordered the General Assembly to exercise its primary jurisdiction in adopting a compliant remedial map “[a]s expeditiously as possible, but no later than September 1, 2015.” *Id.*

The General Assembly now comes before this Court requesting an additional, modest ten week extension of time to comply with this Court's June 5, 2015 order. The General Assembly requests that this Court extend the deadline for compliance from September 1 to November 16, 2015.

ARGUMENT

I. THIS COURT SHOULD POSTPONE ITS SEPTEMBER 1, 2015 DEADLINE EXTENDING IT TO NOVEMBER 16, 2015

The text of the Constitution vests in the State Legislatures the power of setting the time, place, and manner for holding elections. *See* U.S. Const. art. I, § 4. Therefore, “It is well settled that “reapportionment is primarily the duty and responsibility of the State.” *Miller v. Johnson*, 515 U.S. 900, 915 (1995); *see also* *Grove v. Emison*, 507 U.S. 25, 34 (1993) (“[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts.”). Redistricting represents a herculean task for legislatures and therefore “[S]tates must have discretion to exercise the political judgment necessary to balance competing interests.” *Id.* It is, therefore, unremarkable that “Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions.” *Id.*

Thus, it is not surprising that in several redistricting cases, courts have granted *stays* pending direct appeal to the Supreme Court, allowing time for the Supreme Court to provide guidance to legislatures prior to the legislatures embarking on remedial configuration of districts. *See, e.g., White v. Weiser*, 412 U.S. 783, 789 (1973).¹ Here, however, the General Assembly is merely requesting an extension of time to *comply* with this Court’s order, not stay its enforcement. *See Page*, 2015 U.S. Dist. LEXIS 21346 at *3 n.1 (noting the distinction between seeking a stay of enforcement of an injunction and seeking an extension of time to comply with

¹ *See also* Defendant-Interveners’ Memorandum In Support Of Its Motion To Postpone Remedial Deadline Until September 1, 2015, Dkt No. 125-1, 5-6 (citing several Supreme Court orders granting *stays* in redistricting cases pending direct appeal to the U.S. Supreme Court).

an injunction). For the following reasons, this Court should grant defendant's modest request for a ten week extension of time to comply with this Court's order.

First, the Virginia General Assembly will hold a special session on November 9, 2015. The General Assembly intends to address the concerns raised in this Court's June 5, 2015 opinion.

Second, pursuant to 28 U.S.C. § 1253, the Intervener-Defendants have filed a direct appeal to the U.S. Supreme Court of this Court's June 5, 2015 order enjoining the Commonwealth of Virginia from holding congressional elections. This Court should permit the General Assembly time to have the benefit of the Supreme Court's additional guidance before it endeavors to draw its congressional map.

Third, it is a substantial expense to hold a special session of the General Assembly. This Court should permit the General Assembly to preserve its scarce resources and not require the General Assembly to meet in special session during the summer months. This is especially true here because the General Assembly will likely, in the fall, receive additional guidance from the Supreme Court as to the map the General Assembly enacted as well as the two-judge majority's opinion. Similarly, it is an additional challenge for the part-time General Assembly to call everyone to Richmond to meet during the summer months, especially this year where the legislators are back in their districts campaigning ahead of Virginia's regularly scheduled November 2015 elections.

Fourth, the General Assembly's request is appropriately tailored so that the General Assembly's concerns are addressed without causing prejudice to the Plaintiffs. This Court can appoint a special master in late November or early December and promulgate a compliant map well in advance of the date the General Assembly enacted its map in 2012.

A. THE INTERVNER-DEFENDANTS HAVE APPEALED THIS COURT'S DECISION DIRECTLY TO THE SUPREME COURT AND THE PARTIES WILL LIKELY NOT KNOW THE OUTCOME OF THAT DECISION PRIOR TO THIS COURT'S SEPTEMBER 1, 2015 DEADLINE.

When the Intervener-Defendants filed their direct appeal on October 30, 2014, the Supreme Court distributed the case for its conference held on January 9, 2015. (Dkt. No. 125-1, at 3-4). Thus, in less than three months, the Supreme Court was ready to review and make—at least—an initial determination in the case. By March 30, 2015, five months after the Intervener-Defendants filed their jurisdictional statement, the Supreme Court issued its ruling remanding the case to this Court. (Dkt. No. 150).

Here, the Intervener-Defendants filed their notice of direct appeal to the United States Supreme Court on June 19, 2015. (Dkt. No. 174), and filed its jurisdictional statement with the Supreme Court on June 22, 2015. (Ex. A). The opposition brief is due next week on July 22, 2015. (Ex. A). The Supreme Court's recent practice indicates that the Supreme Court will have the appeal distributed for its September 28, 2015 conference, twenty-seven days *after* this Court's September 1, 2015 compliance deadline. *See* (Ex. B) (noting that cases distributed even as late as September 10 will be held for conference on September 28, 2015). Typically, if the Supreme Court summarily affirms a jurisdictional statement, it does so within two weeks of the conference. Although the General Assembly will not have the benefit of the Supreme Court's guidance by the September 1, deadline, the Supreme Court will have sufficient time to provide further guidance by the November 16, 2015 deadline.

The General Assembly requests that the Court provide it additional time to comply with this Court's June 5th order (Dkt. Nos. 170 and 171). Because redistricting is the duty of the State, the General Assembly requests that this Court refrain from acting on its own to impose a new

map. *See, e.g., Perry v. Perez*, 132 S. Ct. 934, 940-41 (2012) (“Redistricting is primarily the duty and responsibility of the State...The failure of a State's newly enacted plan to gain preclearance prior to an upcoming election does not, by itself, require a court to take up the state legislature's task.”) (internal quotation marks and citations omitted); *see also Growe*, 507 U.S. at 34 (“Absent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it.”). Should this Court enact its own map prior to the Special Session, any map adopted as a result of that Special Session by the Legislature and Executive of the Commonwealth would replace any map drawn by this Court prior to the upcoming Special Session. *See, e.g., LULAC v. Perry*, 548 U.S. 399, 416 (2006) (“[O]ur decisions have assumed that state legislatures are free to replace court-mandated remedial plans by enacting redistricting plans of their own.”).

More importantly, if the General Assembly were to pass a new redistricting map that was then signed by the Governor, the current appeal for the United States Supreme Court would be mooted. The General Assembly should be able to have the benefit of the Supreme Court's review of the General Assembly's duly enacted redistricting plan prior to developing a map that is compliant with this Court's June 5th order. To prevent the General Assembly from having this guidance forces the General Assembly to make a Hobbesian choice: wait for the Supreme Court to act but risk waiving the General Assembly's legal right to draw redistricting maps; or comply with this Court's September 1, 2015 deadline but moot the Intervener-Defendants' direct appeal to the Supreme Court. Even if the Intervener-Defendants' challenge is not mooted, the General

Assembly's enacted plan or the Court's remedial plan would be done without the benefit of the Supreme Court's guidance and, worse, "[s]ubject to vacatur or reversal in the Supreme Court."²

These circumstances present this Court with sufficiently weighty reasons to merit a modification of this Court's June 5, 2015 order. *See Page*, 2015 U.S. Dist. LEXIS 21346 at *6 ("[W]e conclude that it is wasteful for the General Assembly to devise a redistricting plan without the views and instructions of the Supreme Court...To proceed with review before the parties and we know the views and instructions of the Supreme Court would be wasteful of the resources of the parties and the Court."). The modification is necessary to avoid the onerous burden of having to comply with this Court's order without the Supreme Court's guidance and bearing the risk that the Supreme Court may overturn the two-judge majority ruling of this Court during or after the General Assembly seeks to enact a remedial map.

B. CALLING A SPECIAL SESSION OF THE GENERAL ASSEMBLY ENTAILS SUBSTANTIAL COSTS; SCARCE RESOURCES SHOULD NOT BE SPENT UNTIL THE SUPREME COURT HAS REVIEWED THE TWO-JUDGE MAJORITY OPINION.

This Court should also extend the deadline to comply with this Court's June 5, 2015 order because it is costly for the Commonwealth to call a special session and therefore the Order is onerous to comply with and detrimental to the public interest.

In its filing opposing the Intervener-Defendants' Motion to Postpone Remedial Deadline, The Virginia State Board Elections informed this Court that according 2014 estimates, "[e]ach day of a special session would cost \$40,999, and a one-week session would cost \$141,799." (Defs.' Oppn. To Intervener-Defendants' Mot. To Postpone Remedial Deadline) (Dkt. No. 133 at 12) (ECF pagination). The \$40,999 figure represents the \$25,200 in daily per diems (\$180 each

² Intervener-Defendants' Memorandum In Support Of Its Motion To Postpone Remedial Deadline Until September 1, 2015, Dkt No. 125-1, 7.

for senators and \$170 each for delegates) paid to each General Assembly member, plus the “\$15,799 for mileage for a one round trip to Richmond.”³

These costs make compliance with this Court’s September 1 deadline both onerous and detrimental to the public interest. It is onerous because to meet the September 1 deadline, the General Assembly is required to call a special session this summer. This means that the Commonwealth will hold and pay the costs of a special session this summer and risk having to hold and pay the costs of an additional special session if the Supreme Court overrules the two-judge majority opinion. (Dkt. No. 170). This Court should grant the extension to permit the General Assembly to convene a special session only after the benefit of the Supreme Court’s input whether to note probable jurisdiction, affirm the two-judge majority’s ruling, or remand for further considerations consistent with the Court’s opinion. *See Page*, 2015 U.S. Dist. LEXIS 21346 at *6 (“[W]e conclude that it is wasteful for the General Assembly to devise a redistricting plan without the views and instructions of the Supreme Court...To proceed with review before the parties and we know the views and instructions of the Supreme Court would be wasteful of the resources of the parties and the Court.”).

Furthermore, requiring compliance with the September 1 deadline is detrimental to the public, namely, taxpayers. Risking multiple special sessions because the Supreme Court reversed or modified the two-judge majority opinion bears additional costs that burden the taxpayer. Rather than burden these taxpayers potentially twice, this Court should permit the General Assembly the opportunity to benefit from the instructions of the Supreme Court and get a redistricting plan done correctly the first time. *See id.*

³ <http://wtvr.com/2014/03/24/special-session-costs-va-taxpayers-more-money-daily-than-many-make-annually/>

Additionally, the General Assembly is composed of part-time legislators who from January through February in odd-number years, and January through March in even-numbered years, leave their families and businesses to live in Richmond for those months to address the problems facing the Commonwealth. It is onerous to comply with the September 1 deadline because it requires the General Assembly to reconvene and recall all 140 Senators and Delegates during the summer months when Delegates and Senators are tending to their personal businesses and spending time with their families, taking pre-planned vacations, and campaigning in their respective districts ahead of the regularly scheduled November elections. Granting the modest ten week extension of time to comply with the injunction allows the General Assembly to meet after the elections and before the holidays to develop and enact a remedial map. It also allows the General Assembly to benefit from any guidance that the Supreme Court provides.

C. THERE IS NO PREJUDICE TO THE PLAINTIFFS BECAUSE EVEN IN THE EVENT THAT THE GENERAL ASSEMBLY IS UNABLE TO ENACT A MAP BY NOVEMBER 16, THIS COURT HAS SUFFICIENT TIME TO ENACT ITS OWN MAP.

The General Assembly's modest request for an extension of time from September 1, 2015 to November 16, 2015 is suitably tailored to the changed circumstances.

First, the extension provides sufficient time for the General Assembly to learn whether the Supreme Court will affirm the two-judge majority opinion's ruling in this case; will note probable jurisdiction in this case; or will reverse or remand back to this Court for further consideration. The Supreme Court will consider the Intervener-Defendants' jurisdictional statement at the Court's September 28th conference. (Exs. A and B). The extension request provides sufficient time for the parties to ascertain the import of the Court's decision at the September 28 conference.

Second, the parties will not be prejudiced. There are no congressional elections scheduled between now and January 1, 2016. Even if there were elections scheduled, courts have permitted elections to occur with a map that the district court declared unconstitutional while its ruling was on appeal. *See White*, 412 U.S. at 789. *See also* (Intervener-Defendants' Memorandum In Support Of Its Motion To Postpone Remedial Deadline Until September 1, 2015, Dkt No. 125-1, 6). Furthermore, even if the Virginia General Assembly fails to pass a map during its November special session, granting the extension still permits this Court sufficient time to enact a map by January 1, 2016, nearly four weeks earlier than when the Commonwealth of Virginia enacted its map prior to the 2012 elections. *See Va. Code. § 24.2-302.2* (enacted January 25, 2012, precleared by the Department of Justice, March 14, 2012); *see also Larios v. Cox*, 314 F. Supp. 2d 1357, 1359, 1363-64 (N.D. Ga. 2012) (three-judge court) (noting that after Georgia legislature failed to enact a map consistent with three-judge panel's decision, on March 1, 2004, the three-judge court appointed a special master to draw a map and the court approved the map on March 25, 2004).

As the Intervener-Defendants and Plaintiffs previously demonstrated, courts can draw maps in as few as 9 days and, generally, in a matter of weeks. (Intervener-Defendants' Reply Memorandum In Support Of Its Motion To Postpone Remedial Deadline Until September 1, 2015, Dkt No. 135, 5 (*filed* February 12, 2015)). Plaintiffs will not suffer prejudice should this Court grant a modest ten week extension of time to comply with the two-judge majority's opinion and order.

CONCLUSION

For the foregoing reasons, the General Assembly respectfully moves this Court to grant an extension of time to comply with this Court's June 5, 2015 order. The General Assembly requests that this Court move the deadline ten weeks from September 1 to November 16, 2015.

Respectfully submitted this 15th day in July, 2015,

/s/

Jason Torchinsky (Va. 47481)
Shawn Toomey Sheehy (Va. 82630)
Holtzman Vogel Josefiak PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20186
(540) 341-8808 (telephone)
(540) 341-8809 (fax)
jtorchinsky@hvjlaw.com
ssheehy@hvjlaw.com
Counsel for the Virginia Senate

Efrem Mark Braden
Baker & Hostetler LLP
Washington Square
Suite 1100
1050 Connecticut Ave NW
Washington, DC 20036
(202) 861-1504
(202) 861-1783 (fax)
mbraden@bakerlaw.com
Counsel to the Virginia House of Delegates

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2015, I electronically filed the MEMORANDUM IN SUPPORT OF INTERESTED PARTIES' VIRGINIA HOUSE OF DELEGATES' AND VIRGINIA SENATE'S MOTION FOR AN EXTENSION OF TIME TO COMPLY WITH THIS COURT'S JUNE 5, 2015 ORDER, and all attachments, with the Clerk of Court for the United States District Court for the Eastern District of Virginia by using the CM/ECF system, which will send notifications 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
Tel. (804) 786-2071
Fax (804) 371-2087
mmelis@oag.state.va.us
Counsel for Defendants

Trevor Stephen Cox
Hunton & Williams LLP
951 E. Byrd Street
Riverfront Plaza-East Tower
Richmond, VA 23219
Tel. (804) 788-7331
Fax (804) 343-4893
tcx@oag.state.va.us
Counsel for Defendants

Jonathan Andrew Berry
John Matthew Gore
Michael Anthony Carvin
Jones Day
51 Louisiana Ave. NW
Washington, DC 20001
Tel. (202) 879-3939
Fax (202) 626-1700
jberry@jonesday.com
jmgore@jonesday.com
macarvin@jonesday.com
Counsel for Intervener-Defendants

Virginia Congressional Representatives

Cullen Dennis Seltzer
Sands Anderson PC
1111 E. Main Street
24th Floor
P.O. Box 1998
Richmond, VA 23218-1998
Tel. (804) 648-1636
Fax: (804) 783-7291
cseltzer@sandsanderson.com

*Counsel to Interested Parties Clerk of the Virginia Senate, Clerk of the Virginia House,
and Division of Legislative Services*

Dated: July 15, 2015

/s/ _____

Jason Torchinsky (Va. 47481)
Shawn Toomey Sheehy (Va. 82630)
Holtzman Vogel Josefiak PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20186
(540) 341-8808 (telephone)
(540) 341-8809 (fax)
jtorchinsky@hvjlaw.com
ssheehy@hvjlaw.com