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

Richmond Division

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

**DEFENDANTS' BRIEF IN OPPOSITION TO
VIRGINIA HOUSE OF DELEGATES' AND
VIRGINIA SENATE'S MOTION FOR AN EXTENSION OF TIME
TO COMPLY WITH THIS COURT'S JUNE 5, 2015 ORDER**

Mark R. Herring
Attorney General of Virginia

Stuart A. Raphael, VSB # 30380
Solicitor General
sraphael@oag.state.va.us

Mike F. Melis, VSB # 43021
Assistant Attorney General
mmelis@oag.state.va.us

Trevor S. Cox, VSB # 78396
Deputy Solicitor General
tcox@oag.state.va.us

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-7240 – Telephone
(804) 371-0200 – Facsimile

Counsel for Defendants

July 29, 2015

TABLE OF CONTENTS

Page

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

ARGUMENT: THE COURT SHOULD NOT EXTEND THE COMMONWEALTH'S DEADLINE UNTIL NOVEMBER 16 2

A. Postponement is unnecessary because Governor McAuliffe has called a special session of the General Assembly for August 17 to comply with the existing deadline. 2

B. There are no changed circumstances because the Court accounted for the possibility of an appeal when it set the September 1 remedial deadline. 3

C. Extending the deadline would unduly compress the time for approving and implementing a redistricting plan. 5

D. The other considerations raised by the Interested Parties do not warrant a postponement. 6

1. There is no prejudice to the legislators in adhering to the September 1 deadline. 6

2. The cost of a special session will be the same either way and does not justify extending the deadline. 8

CONCLUSION 8

CERTIFICATE OF SERVICE 9

TABLE OF AUTHORITIES

Page

Cases

Alabama Legislative Black Caucus v. Alabama,
135 S. Ct. 1257 (2015) 3

Cosner v. Dalton,
522 F. Supp. 350 (E.D.Va. 1981). 2

Page v. Va. State Bd. of Elections,
No. 3:13-cv-678, 2015 WL 3604029 (E.D. Va. June 5, 2015),
appeal pending sub nom.
Wittman v. Personhuballah, No. 14-1504 (U.S. June 22, 2015) 1, 2, 5

Statutes

Va. Code Ann. § 24.2-506 (Supp. 2014) 6

Va. Code Ann. § 24.2-521 (Supp. 2014) 6

Constitutional Provisions

Va. Const. art. IV, § 6 .... 3, 7

Miscellaneous

Andrew Cain, *McAuliffe plans Aug. 17 special session to redraw congressional map*, RICHMOND TIMES-DISPATCH, July 14, 2015, http://www.richmond.com/news/virginia/government-politics/article_407d1c18-16b2-5ca3-bed2-5f6c1df23361.html 3

Governor Terence R. McAuliffe, Proclamation (July 16, 2015), http://hodcap.state.va.us/publications/downloads/public/2015/GovProclamation-Convening2015-SSI-08-17-2015.pdf. 3

PRELIMINARY STATEMENT

Almost two months ago, this Court ruled for the second time that Virginia's Third Congressional District ("CD3") is an unconstitutional racial gerrymander. Concluding that residents of CD3 "have suffered significant harm" and are entitled to vote "as soon as possible" under a constitutional plan, the Court ordered that new districts be drawn "forthwith."[1] It required the General Assembly to adopt a new redistricting plan "as expeditiously as possible, but no later than September 1, 2015."[2] Forty days later, the Virginia House of Delegates and Virginia Senate (the "Interested Parties") moved to postpone their September 1 deadline, promising to take action between November 9 and November 16.

The deadline should not be extended for four reasons. First, Governor Terence R. McAuliffe has called a special session of the General Assembly for August 17 for the purpose of adopting a redistricting plan by September 1. Second, the only purportedly "changed circumstance" is Intervenor-Defendants' appeal of this Court's June 5 order. But the Court accounted for that when it imposed the September 1 deadline, declining their request that it pick a deadline after resolution of their appeal. Third, if the legislature and the Governor do not reach agreement on a redistricting plan, postponing the deadline to November 16 would unduly compress the Court's time to develop a remedial plan, disproportionately burdening non-incumbents in the 2016 congressional-election cycle. Fourth, adhering to the current deadline does not increase the burdens and costs associated with the week-long special session, which will be incurred whether the session is held in August or November.

Accordingly, the motion to postpone the remedial deadline should be denied.

---

[1] *Page v. Va. State Bd. of Elections*, No. 3:13-cv-678, 2015 WL 3604029, at *18 (E.D. Va. June 5, 2015), *appeal pending sub nom. Wittman v. Personhuballah*, No. 14-1504 (U.S. June 22, 2015).

[2] Order (June 5, 2015), ECF No. 171.

ARGUMENT:
THE COURT SHOULD NOT EXTEND THE COMMONWEALTH'S DEADLINE UNTIL NOVEMBER 16

A. Postponement is unnecessary because Governor McAuliffe has called a special session of the General Assembly for August 17 to comply with the existing deadline.

When it found CD3 unconstitutional, the Court concluded that the General Assembly should act immediately to remedy the unconstitutional plan:

> [I]ndividuals in the Third Congressional District whose constitutional rights have been injured by improper racial gerrymandering have suffered significant harm. Those citizens "are entitled to vote *as soon as possible* for their representatives under a constitutional apportionment plan." *Cosner v. Dalton,* 522 F. Supp. 350, 364 (E.D.Va. 1981). Therefore, we will require that new districts be drawn *forthwith* to remedy the unconstitutional districts.[3]

Acknowledging that a State "should have the first opportunity to create a constitutional redistricting plan," the Court gave the General Assembly nearly ninety days to enact a remedial plan: from June 5, the date of the order, "until September 1, 2015."[4]

On July 14, 2015, Governor McAuliffe publicly announced his intention to call a special session of the General Assembly for August 17, 2015.[5] Two days later, he issued a proclamation "summon[ing] the members of the Senate and the House of Delegates . . . to meet in Special Session . . . commencing [August 17], for the purpose of redrawing the districts of the members

---

[3] *Page*, 2015 WL 3604029, at *18.

[4] *Id.*

[5] *See, e.g.*, Andrew Cain, *McAuliffe plans Aug. 17 special session to redraw congressional map*, RICHMOND TIMES-DISPATCH (July 14, 2015), http://www.richmond.com/news/virginia/government-politics/article_407d1c18-16b2-5ca3-bed2-5f6c1df23361.html.

of the United States House of Representatives."[6] It is the Governor's constitutional right to call a special session whenever, "in his opinion, the interest of the Commonwealth may require."[7] And here he did so for the express purpose of "meet[ing] the court's mandate to pass a fair and equitable map by the court's deadline."[8] Consequently, an extension of the deadline is unnecessary.

B. There are no changed circumstances because the Court accounted for the possibility of an appeal when it set the September 1 remedial deadline.

The Interested Parties assert that "changed circumstances" justify extending the remedial deadline[9] and claim support in this Court's previous postponement of the deadline from April 1, 2015. But as the Interested Parties concede, the Court postponed the deadline in that instance because the Supreme Court was considering *Alabama Legislative Black Caucus v. Alabama*[10]—a "case that presented issues directly bearing on the issues presented" here[11]—and it was clear that the Supreme Court was holding the appeal in this case "pending disposition of . . . *Alabama*."[12] Everyone expected that *Alabama* would both determine the outcome of the appeal in this case and produce "views and instructions of the Supreme Court" that would determine the constitutionality of any remedial redistricting plan.[13] Circumstances had changed in the five

---

[6] Governor Terence R. McAuliffe, Proclamation (July 16, 2015), http://hodcap.state.va.us/publications/downloads/public/2015/GovProclamation-Convening2015-SSI-08-17-2015.pdf.

[7] Va. Const. art. IV, § 6.

[8] *See, e.g.*, *McAuliffe plans Aug. 17 special session*, *supra* note 5 (quoting public statement of Governor McAuliffe).

[9] Br. of Interested Parties at 11 (July 15, 2015), ECF No. 193.

[10] 135 S. Ct. 1257 (2015) [hereinafter *Alabama*].

[11] Br. of Interested Parties at 3.

[12] Memorandum Opinion at 3 (Feb. 23, 2015), ECF No. 137.

[13] *Id.* at 4.

months between October and February, and, as the Court recognized, were "somewhat unusual."[14]

By contrast, with *Alabama* now decided, the "changed circumstances" asserted by the Interested Parties—that the Intervenor-Defendants have appealed this Court's decision[15]—are not unusual. The Court accounted for the possibility of another appeal when it imposed the September 1 deadline. The Intervenor-Defendants themselves expressly asked for a deadline beyond September 1 to accommodate their appeal, making the same arguments now relied on by the Interested Parties:

> [S]etting a remedial deadline during the pendency of a direct appeal deprives the Legislature, the Court, and the parties of "the views and instruction" of the Supreme Court and therefore is "wasteful" of legislative and judicial resources. Mem. Op. 4 (DE 137) . . . Given that the Supreme Court's Term expires on June 30, it will not decide this case on any second direct appeal by Intervenor-Defendants until after September 1.
>
> Moreover, the Legislature is currently not in session and is not scheduled to convene in regular session again until January 2016, *see* Va. Const. art. VI, § 6, so setting a September 1 remedial deadline would impose significant costs on the Legislature and Virginia taxpayers, *see* Mem. Op. 4–5. Thus, while September 1 was an appropriate deadline to allow the Supreme Court to take action in the *first* direct appeal, *see id.*, it is not an appropriate deadline at this juncture. Rather, if the Court finds a *Shaw* violation, it should decide any appropriate remedial deadline as events unfold and to allow sufficient time to secure the "the views and instruction" of the Supreme Court in any second appeal. *Id.* at 4.[16]

The Court thus knew that Intervenor-Defendants would likely appeal an adverse ruling but *rejected* their request to extend the deadline beyond September 1. Indeed, although the panel

---

[14] *Id.*

[15] Br. of Interested Parties at 7-9.

[16] Intervenor-Defendants' Response Brief Regarding *Alabama Legislative Black Caucus v. Alabama* at 17-18 (April 23, 2015), ECF No. 151.

disagreed on CD3's constitutionality, it was unanimous in concluding that September 1 was the appropriate remedial deadline.[17]

Almost two months have elapsed since the Court's order, but no reason has emerged for a different conclusion. The Supreme Court is not holding the Intervenor-Defendants' appeal this time, pending a decision in another case, nor is the Supreme Court expected to issue any additional "views and instructions" relevant to this case. The remedial deadline should remain September 1.

C. Extending the deadline would unduly compress the time for approving and implementing a redistricting plan.

Postponing the deadline to November 16 would greatly compress the time available to the Court to fashion its own plan if the legislature and the Governor fail to reach agreement. The Court will need time to elicit the parties' recommendations about what to do in that situation—whether to accept proposed plans or to appoint a special master to draw a new plan. And the Court will need to leave time for comments, hearings, and objections to any proposed judicial plan. Making all of that happen before January 1, when candidates begin collecting signatures to appear on the ballot, will be a monumental challenge even with a September 1 deadline. Although the Court previously concluded that it could "craft a plan in sufficient time to allow elections to proceed in 2016" if the State could not meet its September 1 deadline,[18] the same may not be true if the State misses a deadline in mid-November.

Delaying the implementation of a new plan also disproportionately burdens non-incumbents. After January 1, candidates for congressional office may start collecting the 1,000

[17] *See Page*, 2015 WL 3604029, at *40 n.47 (Payne, J., dissenting) ("Given that, under the majority opinion, the Virginia General Assembly must develop a new plan, I share the view that September 1, 2015 is the appropriate date for completion of that task.").

[18] Mem. Op. at 5, ECF No. 137.

signatures required to run in a party primary[19] or to be listed on the ballot as an independent.[20] Prospective candidates need sufficient lead time to contemplate whether to run, to organize their campaign, and to begin raising the funds necessary to compete with the formidable war chests of incumbents.[21] Indeed, until a new plan is approved, prospective candidates cannot even be certain *which* congressional district they may run in, particularly if they live in precincts that were moved from one district to another in the 2012 Plan.[22]

D. The other considerations raised by the Interested Parties do not warrant a postponement.

1. There is no prejudice to the legislators in adhering to the September 1 deadline.

The Interested Parties assert that it is "onerous to comply with the September 1 deadline because it requires the General Assembly to reconvene . . . during the summer months when Delegates and Senators are tending to their personal business."[23] Respectfully, that concern does not outweigh the need to proceed with dispatch to remedy the unconstitutional redistricting plan.

Notwithstanding their characterization of redistricting as a "herculean task,"[24] the Interested Parties concede that a special session would not be a lengthy affair. They ask for an

---

[19] Va. Code Ann. § 24.2-521 (Supp. 2014).

[20] Va. Code Ann. § 24.2-506 (Supp. 2014).

[21] In the 2014 congressional elections in Virginia, successful House candidates raised between $510,000 and $3.38 million, with the average about $1.5 million. *See* Exhibit 1 (Campaign Finance Summary—2014 Congressional House Races in Virginia) to Defendants' Brief in Opposition in Part to Intervenor-Defendants' Motion to Postpone Remedial Deadline Until September 1, 2015 (February 9, 2015), ECF No. 133-1.

[22] When the Court first set the remedial deadline as September 1, it noted that the Enacted Plan "was not adopted by January 1, 2012 and yet elections were held without a hitch." Mem. Op. at 5, ECF No. 137. That does not mean that the delay in the plan's adoption did not asymmetrically burden congressional challengers.

[23] Br. of Interested Parties at 11, ECF No. 193.

[24] *Id.* at 5.

extension of the deadline until November 16 on the basis that the General Assembly "will hold a Special Session beginning on November 9."[25] The General Assembly can call itself into session only if "two-thirds of the members elected to each house" apply to the Governor with that request.[26] Defendants are not aware that members of either house of the General Assembly have applied to the Governor for a special session in November. But assuming that two-thirds of each house were prepared to do so, the Interested Parties indicate that the task of redistricting will take only *seven days*. Attending a week-long special session in August to comply with this Court's September 1 deadline, rather than "campaigning in their respective districts ahead of the regularly scheduled November elections,"[27] would not be an undue burden.

In any case, the Interested Parties' concern is moot given that Governor McAuliffe has already called a special session for August 17. Whether it takes place in August or November, it will occur when legislators would otherwise be "tending to their personal business."[28] And while the September 1 deadline may disrupt "the summer travel schedule,"[29] the Court provided ample notice to legislators to plan for that deadline.[30]

---

[25] *Id.* at 2; *see also id.* at 6 (forecasting that the "Virginia General Assembly will hold a special session on November 9, 2015").

[26] *See* Va. Const. art. IV, § 6 (providing that the Governor "shall convene a special session upon the application of two-thirds of the members elected to each house").

[27] Br. of Interested Parties at 11, ECF No. 193.

[28] *Id.*

[29] *Id.* at 2.

[30] As it is, September 1 represents a more relaxed remedial deadline than the deadline to which the General Assembly was previously subject. Under the Court's February 23, 2015 order, the General Assembly could have been required to adopt a remedial plan within *sixty* days of Supreme Court action, *see* Mem. Op. at 5-6, ECF No. 137, rather than the almost ninety days allowed by the Court in its June 5 order.

2. The cost of a special session will be the same either way and does not justify extending the deadline.

The Interested Parties also argue that the Court should postpone the deadline "because it is costly for the Commonwealth to call a special session."[31] Even if Governor McAuliffe's call of a special session for August 17 did not moot that concern, the cost would be incurred under the Interested Parties' proposal as well. Postponing the special session does not reduce the cost; it merely jeopardizes the timely implementation of a remedial plan. And as this Court has previously noted, the expense of a special legislative session is "small" compared to the litigation fees in this case.[32]

CONCLUSION

The motion to postpone the remedial deadline to November 16 should be denied.

Respectfully submitted,

By: /s/

Trevor S. Cox, VSB # 78396
Deputy Solicitor General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-7704 – Telephone
(804) 371-0200 – Facsimile
tcox@oag.state.va.us

Mark R. Herring
Attorney General of Virginia

Stuart A. Raphael, VSB # 30380
Solicitor General
sraphael@oag.state.va.us

[31] Br. of Interested Parties at 9, ECF. No. 193.

[32] Mem. Op. at 4, ECF No. 137.

Mike F. Melis, VSB # 43021
Assistant Attorney General
mmelis@oag.state.va.us

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the counsel of record for the parties.

By: /s/
Trevor S. Cox