

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

DAWN CURRY PAGE, et al,)	
)	
Plaintiffs,)	
)	
v.)	
)	
CHARLIE JUDD, in his capacity as)	Civil Action No. 3:13-cv-678-REP-LO-AKD
Chairman of the Virginia State Board of)	
Elections; KIMBERLY BOWERS, in her)	
capacity as Vice-Chair of the Virginia State)	
Board of Elections; DON PALMER, in his)	
capacity as Secretary of the Virginia State)	
Board of Elections,)	
)	
Defendants,)	
)	
v.)	
)	
CONGRESSMEN ERIC CANTOR,)	
ROBERT WITTMAN, BOB GOODLATTE,)	
FRANK R. WOLF, RANDY FORBES,)	
MORGAN GRIFFITH, SCOTT RIGELL,)	
and ROBERT HURT,)	
)	
Intervenor-Defendants.)	

PLAINTIFFS’ OPPOSITION TO NON-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

I. INTRODUCTION

Plaintiffs respectfully submit that the Court should deny the joint motion of the Virginia Senate and House of Delegates (collectively, the “General Assembly”), neither of whom are parties to this lawsuit. The General Assembly asks the Court to extend the Commonwealth’s September 1, 2015, remedial deadline for complying with the Court’s June 5, 2015 Order holding that Congressional District 3 (“CD3”) is an unconstitutional racial gerrymander. The motion amounts to an untimely motion for reconsideration of the Court’s

Order. It is both procedurally and substantively baseless and should be rejected in no uncertain terms.

II. ARGUMENT

A. Non-Party General Assembly's Motion Is Not Properly Before the Court and Does Not Establish "Changed Circumstances" Warranting Modification of the Injunction Entered Last Month

As an initial matter, the motion should be denied as little more than an effort to circumvent this Court's procedural rules. The General Assembly is not a party to this lawsuit. Nonetheless, it asks the Court to alter its judgment and "extend the deadline to comply with this Court's June 5, 2015 order from September 1, 2015 to November 16, 2015."¹ Dkt. Entry No. 193, at 2. At the risk of stating the obvious, non-parties cannot file substantive motions. The motion should be rejected for this reason alone.

But more importantly, the General Assembly cannot meet its burden of showing that the Court should modify an injunction it entered just last month. This Court has previously recognized, and it is of course undisputed, that "[c]ourts have the power 'to modify an injunction in adaptation to changed circumstances.'" Dkt Entry No. 137, at 2 (quoting *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932)). That is, a court may grant a request to modify an injunction it has issued "where warranted by a change in the law or the circumstances." *United States v. Snapp*, 897 F.2d 138, 141 (4th Cir. 1990) (citing *Swift*, 286 U.S. 106). But "[a] court is, nevertheless, 'not at liberty to reverse under the guise of readjusting.'" *Id.* (quoting *Swift*, 286 U.S. at 119). Thus, a party who does not cite to "a change in the law or the circumstances which existed at the time" the injunction was entered cannot meet its burden of showing an injunction should be altered. *Id.*

In *RoadTechs, Inc. v. MJ Highway Tech., Ltd.*, 83 F. Supp. 2d 677 (E.D. Va. 2000), this Court quoted with favor an opinion of the Eighth Circuit putting these standards into plain language terms:

¹ Coincidentally, the General Assembly's preferred deadline to cure the unconstitutional racial gerrymander of CD3 is shortly after its members face voters in the November 3, 2015, General Election.

“Placed in other words, this means for us that modification is only cautiously to be granted; that some change is not enough; that the dangers which the decree was meant to foreclose must almost have disappeared; that hardship and oppression, extreme and unexpected, are significant; and that the movants' task is to provide close to an unanswerable case.”

Id. at 687 (quoting *Humble Oil & Refining Co. v. American Oil Co.*, 405 F.2d 803, 813 (8th Cir. 1969)).

Nothing—and most certainly nothing “extreme and unexpected”—has changed since the Court entered the June 5 injunction. To the contrary, the General Assembly offers a warmed over rehash of the arguments Intervenors offered in opposing the September 1, 2015 remedial deadline in the first instance. It is no more persuasive in its new iteration.

Intervenors, in their post-remand briefing, specifically objected to the Court setting a remedial deadline of September 1, 2015, Dkt. Entry No. 151, at 17, even though they were the ones who asked the Court to postpone the previous April 1, 2015 remedial deadline to September 1, 2015, in the first place. Intervenors argued against a September 1 deadline because they would likely file a “second direct appeal” to the Supreme Court if they lost on remand and the Supreme Court would not decide such an appeal “until after September 1.” *Id.* Intervenors therefore requested that the Court extend the remedial deadline beyond September 1 “to allow sufficient time to secure the views and instruction of the Supreme Court in any second appeal.” *Id.* (internal quotation marks and citation omitted). Intervenors also argued that the September 1 deadline “would impose significant costs” because the General Assembly was not in session, its next regular session is set for January 2016, and a special session would be necessary to comply with the September 1 deadline. *Id.* at 18.

The Court, in specifically requiring implementation by the existing September 1, 2015, deadline, thus had before it *and rejected* Intervenors' request for further delay of that deadline. *See Page v. Virginia State Bd. of Elections*, No. 3:13CV678, 2015 WL 3604029, at *18 (E.D. Va. June 5, 2015) (“[W]e allow the legislature until September 1, 2015, to enact a remedial districting plan.”).

In the instant motion, the General Assembly advances precisely the same rationale for further delay that Intervenors previously advanced unsuccessfully: Because Intervenors appealed the Court's June 5 Order (as they had indicated they would do), the General Assembly contends, the "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." Dkt. Entry No. 193, at 6.²

Although the General Assembly recognizes that it "bears the burden of establishing . . . a change in factual circumstances," Dkt. Entry No. 193, at 3, it fails to even argue—let alone show—that circumstances have changed since June 5, 2015. That is, of course, hardly surprising because nothing *has* changed. Intervenors have indeed appealed the Court's Order, but they already said they would do that before the Court entered its injunction, and this Court previously considered (and rejected) that basis for further delay of the remedial deadline. The Supreme Court's schedule remains the same as it was when this Court last considered the proposed delay; nothing on that front has changed either. The General Assembly's next regular session remains scheduled for January 2016.

Indeed, the only notable development is that, as further discussed below, Governor McAuliffe has called a special session, which will commence on August 17, 2015, to implement the Court's Order. *See* Declaration of Marc E. Elias ("Elias Decl."), Ex. A. That development hardly suggests further delay would be appropriate. Quite the opposite: given the impending special session, there is every reason to retain the existing deadline and allow the General Assembly to move forward rather than continuing to modify the deadline after the coordinate branches of state government have acted in reliance on the existing deadlines to call a special session.

² The General Assembly indicates its intent to hold a special session to address the Court's Order, thereby obviating any objections based on the cost to the General Assembly of curing the unconstitutional racial gerrymander. The General Assembly instead indicates that it will hold a special session (with the attendant cost of doing so), but prefers that the special session occur later than the Court-ordered deadline. Dkt. Entry No. 193, at 1-2.

Thus, in all relevant ways, the posture remains the same as when the Court entered the injunction and, to the extent it has changed, the change counsels maintaining the existing deadline, not modifying it. On this threshold basis alone, the Court should deny non-party General Assembly's motion.

B. In the Alternative, the Court Should Deny the General Assembly's Request for Further Delay on the Merits

The motion should be denied even if the Court considers the merits of the General Assembly's request that it alter the final judgment.

First, the General Assembly's motion ignores the provisions of the Virginia Constitution governing the initiation of special legislative sessions. Pursuant to Article IV, Section 6 of the Virginia Constitution, "[t]he Governor may convene a special session of the General Assembly when, in his opinion, the interest of the Commonwealth may require."³ Here, as noted above, Governor McAuliffe has called a special session commencing on August 17, 2015. *See* Elias Decl., Ex. A. Thus, the General Assembly *will sit* in special session to address the Court's June 5 Order long before November 2015, regardless of whether the injunction is modified or not. In effect, then, the General Assembly seeks the Court's leave to hold a *second* special session in November 2015, which would result in double the cost to taxpayers and double the inconvenience to legislators.

Second, the General Assembly cannot be heard to complain about the September 1, 2015, deadline. This deadline represents a five-month extension from the initial April 1, 2015, deadline, which was granted by the Court pursuant to Intervenors' motion over Plaintiffs' objection. If the Republican leaders of the General Assembly find that deadline inconvenient to the General Assembly's "summer travel schedule," Dkt. Entry No. 193, at 2, they have Intervenors to blame. The need to hold a special session in the summer was entirely foreseeable at the time Intervenors requested an extension to September 1.

³ The Virginia Constitution further provides that the Governor "shall convene a special session upon the application of two-thirds of the members elected to each house." *Id.* art. IV, § 6. To the best of Plaintiffs' knowledge, the General Assembly has not made such application to the Governor.

Intervenors could have, but did not, request a longer extension. The General Assembly could have, but did not, address the remedial issues prior to August. And, respectfully, the ongoing violation of Plaintiffs' constitutional rights rather dramatically outweighs any inconvenience to the General Assembly if it must modify vacation plans to remedy that violation. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976) (any illegal impediment on the right to vote is an irreparable injury).

Third, there is simply no reason to countenance further delay. The Court originally held that CD3 was an unconstitutional racial gerrymander nine months ago. Nothing has changed since then except the United States Supreme Court issuing its decision in *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015), condemning the mechanical use of a racial threshold unsupported by analysis—which, as this Court has now found, is precisely what the General Assembly did in drawing CD3. Intervenors are free to pursue their appeal of the Court's decision, but the *Alabama* decision controls, and it is absolutely fatal to that appeal.

Fourth, the General Assembly's concern that implementing the Court's Order may "moot" the Intervenors' appeal is beside the point. Dkt. Entry No. 193, at 8. Intervenors have litigated this case both skillfully and tenaciously, including filing multiple appeals to the Supreme Court. If Intervenors believed that implementation of the Court's Order would moot their appeal and they had colorable grounds to do so, they could have moved for a stay. They did not do so. Intervenors can hardly expect the Court to grant a stay they have not requested because a non-party asked it to do so. Third party concerns about *Intervenors'* appeal, in short, are interesting but irrelevant.

Fifth, it must be said that the General Assembly is plainly setting up a future argument to delay implementation of the Court's Order until *after* the 2016 elections. The General Assembly asks the Court to delay the remedial deadline until after the Supreme Court goes back into session in September 2015 so it can benefit from the Supreme Court's

“guidance” during the contemplated November 2015 special session. Dkt. Entry No. 193, at 2. With all due respect, what the General Assembly actually means is clear. There are two forms of “guidance” the Supreme Court may offer by then: (1) dismissing or summarily affirming Intervenors’ appeal or (2) setting the case for full briefing during its 2015-2016 term. If the Supreme Court dismisses or summarily affirms, nothing will have changed and there is no reason to wait. But if the Supreme Court instead sets the appeal for a full hearing, it does not take the powers of Sherlock Holmes to deduce what will happen. The General Assembly will not hold a special session to implement the June 5 Order. Rather, a motion will be filed to stay this Court’s remedy until *after* the Supreme Court decides the appeal (as late as June 2016), at which point Intervenors and the General Assembly will argue that it is too late to draw new districts before the 2016 primary election.

Any inconvenience and cost to the General Assembly simple pales in comparison to the “significant harm” that is currently being suffered by “individuals in the Third Congressional District whose constitutional rights have been injured by improper racial gerrymandering.” *Page*, 2015 WL 3604029, at *18. This Court has already stated that “new districts [should] be drawn forthwith to remedy the unconstitutional districts.” *Id.* The General Assembly provides no reason to revisit that conclusion.

III. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court reject the General Assembly’s request that it alter and extend the September 1, 2015, deadline for the General Assembly to enact a new redistricting plan.

Dated: July 29, 2015

Respectfully submitted,

By /s/ John K. Roche

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of July, 2015, I caused the foregoing to be electronically filed with the Clerk of this Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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