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

GLORIA PERSONHUBALLAH, et al.,	
Plaintiffs,	
v.	
JAMES B. ALCORN, et al.,	**Civil Action No.: 3:13-cv-678**
Defendants.	

INTERVENOR-DEFENDANTS' BRIEF IN SUPPORT
OF THEIR PROPOSED REMEDIAL PLANS

Intervenor-Defendants respectfully submit this brief in support of the two proposed remedial plans, Intervenor-Defendants' Proposed Remedial Plan 1 and Intervenor-Defendants' Proposed Remedial Plan 2, that they have filed for the Court's consideration in any remedial phase in this case. *See* Order (DE 207). Because "[r]edistricting is 'primarily the duty and responsibility of the State,'" *Perry v. Perez*, 132 S. Ct. 934, 940 (2012) (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)), and "primarily a matter for legislative consideration and determination," *White v. Weiser*, 412 U.S. 783, 794-95 (1973), judicial redistricting by federal courts is an "unwelcome obligation," *Connor v. Finch*, 431 U.S. 407, 415 (1977), that threatens "a serious intrusion on the most vital of local functions," *Miller v. Johnson*, 515 U.S. 900, 915 (1995).

Accordingly, remedial redistricting by federal courts is strictly confined by two rules ensuring that the federal judiciary does "not pre-empt the legislative task nor intrude on state policy any more than necessary." *White*, 412 U.S. at 795; *Upham v. Seamon*, 456 U.S. 37, 41

(1982). *First*, any judicial redistricting plan must be no broader than "necessary to cure" the constitutional defect in the legislature's duly enacted plan. *Upham*, 456 U.S. at 43; *White*, 412 U.S. at 794-95. *Second*, when "'faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying' a state plan—even one that was itself unenforceable—'to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act.'" *Perez*, 132 S. Ct. at 941 (quoting *Abrams v. Johnson*, 521 U.S. 74, 79 (1997)).

Intervenor-Defendants' proposed remedial plans directly implement both of these bedrock rules—and certainly do so to a far greater degree than the Alternative Plan that Plaintiffs introduced at trial and that this Court endorsed as constitutional. In the first place, Intervenor-Defendants' remedial plans are narrowly drawn to fix the defect in Enacted District 3 identified by the Court and to give effect, to the greatest extent practicable, to the Legislature's overarching priorities of incumbency protection and preservation of cores to maintain the 8-3 partisan division established in the 2010 election. The Court endorsed Plaintiffs' Alternative Plan because it decreases District 3's black voting-age population ("BVAP") to 50.1%, makes District 3 more compact than it was in the Enacted Plan, and uses fewer locality splits than the Enacted Plan. *See* 6/5/15 Mem. Op. 21-23, 27-33, 45-48 (DE 170) ("Op."). Intervenor-Defendants' remedial plans achieve these same results: they change only District 3 and surrounding districts, mirror the BVAP level in Plaintiffs' Alternative District 3, and perform comparably or *better* than Alternative District 3 on compactness and locality splits. In fact, Intervenor-Defendants' Proposed Remedial Plan 1 outperforms the Alternative Plan on locality splits because it reunites the City of Richmond in a single congressional district for the first time in decades.

At the same time, both of Intervenor-Defendants' proposed remedial plans dramatically

outperform Plaintiffs' Alternative Plan on the Legislature's principles that "inarguably" "played a role in drawing" Enacted District 3; namely, "protect[ing] incumbents" and preserving cores to maintain the 8 Republican to 3 Democrat ratio established in 2010. *Id.* 35. Indeed, there is no dispute that maintaining the 8-3 partisan division, by protecting all incumbents of both parties and preserving all district cores, was the Legislature's top discretionary priority. Plaintiffs' sole witness at trial, expert Michael McDonald, admitted that the Alternative Plan undermines these inter-related goals, because it transforms District 2, an evenly divided district politically that is currently represented by Republican Congressman Scott Rigell, into a "heavily Democratic" district. Tr. 119, 152-53, 184. Similarly, Dr. McDonald conceded that the Alternative Plan performs "significant[ly]" *worse* than the Enacted Plan on the Legislature's race-neutral incumbency-protection and core-preservation priorities. *Id.* 422-23. Thus, the Alternative Plan is plainly contrary to the Legislature's goals and, in any event, cannot be entered as a *judicial* remedy since it is so starkly and deliberately designed to achieve partisan advantage.

Intervenor-Defendants' Proposed Remedial Plan 1 and Proposed Remedial Plan 2, by contrast, faithfully adhere to the Legislature's political, incumbency-protection, and core-preservation priorities to the greatest extent practicable. Both plans better protect incumbents of both parties and better preserve the cores of districts, including District 3, than the Alternative Plan. The Court should enter one of Intervenor-Defendants' proposed remedial plans if a judicial remedy becomes necessary in this case.

ARGUMENT

I. ANY JUDICIAL REDISTRICTING PLAN MUST BE NARROWLY DRAWN TO CORRECT THE VIOLATION AND MUST DEFER TO THE LEGISLATURE'S REDISTRICTING CHOICES TO THE GREATEST EXTENT PRACTICABLE

Redistricting "is primarily a matter for legislative consideration and determination." *White*, 412 U.S. at 794–95; *Upham*, 456 U.S. at 41. Judicial redistricting by federal courts is an

"unwelcome obligation," *Connor*, 431 U.S. at 415, that threatens "a serious intrusion on the most vital of local functions," *Miller*, 515 U.S. at 915. The Supreme Court therefore has formulated two rules that strictly confine judicial redistricting in order to guarantee that federal courts do "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.

First, any judicial redistricting plan must be no broader than "necessary to cure" the constitutional defect identified in the legislature's duly enacted plan. *Upham*, 456 U.S. at 43; *White*, 412 U.S. at 794–95. This rule reflects the fundamental limit on the remedial powers of federal courts: "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." *Milliken v. Bradley*, 418 U.S. 717, 738 (1974); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

The Supreme Court's decision in *Upham v. Seamon* is instructive. The plaintiffs in *Upham* brought a challenge against a congressional redistricting plan in Texas. *See* 456 U.S. at 38. The Attorney General had objected to the legislature's duly enacted plan because, in his view, two districts in south Texas were improperly retrogressive under Section 5 of the Voting Rights Act. *See id.* The three-judge court, however, entered a remedial plan that redrew the districts in Dallas County in north Texas, without holding that the Dallas County districts were "unconstitutional," "inconsistent with § 5," or otherwise in violation of law. *Id.* at 39-40.

The Supreme Court reversed. *See id.* at 40-44. The Supreme Court explained that a constitutional or statutory violation in one "part of a state plan" does not "grant[] a district court the authority to disregard" other parts of the legislatively enacted plan that have not been held to violate the Constitution or law, *id.* at 43. Rather, because judicial redistricting presents "the

problem of reconciling the requirements of the Constitution with the goals of state political policy," "the district court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect." *Id.* Thus, because the three-judge court had not identified any violation in the Dallas County districts, it erred when it redrew those districts. *See id.*

Second, when "'faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying' a state plan—even one that was itself unenforceable—'to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act.'" *Perez*, 132 S. Ct. at 941 (quoting *Abrams*, 521 U.S. at 79). This rules makes perfect sense: in drawing a redistricting plan, a legislature obviously must "balanc[e] competing interests," *Easley v. Cromartie*, 532 U.S. 234, 242 (2001), "the sort of policy judgments for which courts are, at best, ill suited," *Perez*, 132 S. Ct. at 941.

This rule of deference to legislative redistricting prerogatives is so robust that it applies even when the state plan is "itself unenforceable" because of a constitutional or statutory defect. *Id.* Thus, for example, the Supreme Court has directed that judicial deference is required even where the state plan "had been held to violate the one-person, one-vote principle" or had been "denied § 5 preclearance." *Id.* Even in such a case, a federal court must "follow the policies and preferences of the State" in entering the remedy designed to cure the legal violation. *White*, 412 U.S. at 795.

The Supreme Court's decision in *White v. Weiser* dramatically illustrates this rule. The Texas legislature drew the congressional redistricting plan at issue there to "promote 'constituency-representative relations,' a policy frankly aimed at maintaining existing relationships between incumbent congressmen and their constituents and preserving the seniority the members of the State's delegation have achieved in the United States House of

Representatives." 412 U.S. at 791. The Supreme Court recognized the validity of these core-preservation, incumbency-protection, and political objectives. *See id.* at 791, 797.

The plan, however, violated the constitutional equal population requirement. *See id.* at 791-92. The three-judge court was presented with two remedial plans: Plan B, which "adhered to the basic district configurations found in" the invalidated plan and Plan C, which "made no attempt to adhere" to those districts. *Id.* at 793-94. Therefore, "Plan B, to a greater extent than did Plan C, adhered to the desires of the state legislature." *Id.* at 795. The three-judge court nonetheless opted to implement Plan C as the remedy. *See id.*

The Supreme Court reversed. *See id.* at 795-97. The Supreme Court emphasized that "a federal district court" drawing a redistricting plan "should follow the policies and preferences of the State . . . whenever adherence to state policy does not detract from the requirements of the Federal Constitution." *Id.* at 795. The Supreme Court further explained that redistricting "inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task." *Id.* at 795-96. "Here those decisions were made by the legislature in pursuit of what were deemed important state interests." *Id.* at 796. Such legislative "decisions should not be unnecessarily put aside in the course of fashioning relief appropriate to remedy what were held to be impermissible population variations between congressional districts." *Id.*

Thus, "[g]iven the alternatives," the three-judge court "should not have imposed Plan C, with its very different political impact, on the State." *Id.* Rather, "[i]t should have implemented Plan B, which most clearly approximated the reapportionment plan of the state legislature, while satisfying constitutional requirements." *Id.* In short, the district court fundamentally erred because it entered a remedy that did not adhere to the Legislature's incumbency-protection policies and therefore had a different "political impact" than the enacted plan. *Id.*

II. INTERVENOR-DEFENDANTS' PROPOSED REMEDIAL PLANS ARE NARROWLY DRAWN TO CORRECT THE VIOLATION AND DEFER TO THE LEGISLATURE'S REDISTRICTING CHOICES TO THE GREATEST EXTENT PRACTICABLE

The Court should adopt one of Intervenor-Defendants' proposed remedial plans if a judicial remedy becomes necessary in this case because both plans are no broader than "necessary to cure" the constitutional defect the Court found in Enacted District 3, *Upham*, 456 U.S. at 43; *White*, 412 U.S. at 794–95, and "follow the policies and preferences of the State" to the greatest extent practicable, *White*, 412 U.S. at 795.

Plaintiffs sought to prove their *Shaw* claim at trial at least in part through presentation of their Alternative Plan, and this Court endorsed the Alternative Plan as a constitutional remedy for District 3. *See* Op. 32-34. In particular, the Court reasoned that Alternative District 3 is constitutional because, in reducing District 3's BVAP from 56.3% in the Enacted Plan to 50.1%, it "maintains a majority-minority district and achieves the population increase needed for parity, while simultaneously minimizing locality splits and the number of people affected by such splits." *Id.* at 32. The Court also found it significant that Alternative District 3 "results in . . . one less locality split" than the Enacted Plan. *Id.* And the Court pointed to the fact that "the three primary statistical procedures used to measure the degree of compactness of a district"—the Reock, Polsby-Popper, and Schwartzberg measures—"all indicate that the Third Congressional District is the least compact congressional district in Virginia," *id.* at 28, even though Enacted District 3 was the least compact district "by the slimmest of margins" and Dr. McDonald conceded that these margins "do[] not hold comparative significance under any professional standard," *id.* 88 (Payne, J., dissenting).

Intervenor-Defendants' Proposed Remedial Plan 1 and Proposed Remedial Plan 2 mirror the Alternative Plan on these factors and, thus, are no broader than "necessary to cure" the

constitutional defect the Court found in Enacted District 3. *Upham*, 456 U.S. at 43; *White*, 412 U.S. at 794–95. At the same time, Intervenor-Defendants proposed remedial plans "follow the policies and preferences of the State," *White*, 412 U.S. at 795, far *better* than the Alternative Plan on the non-mandatory criteria that the Legislature indisputably deemed most important: incumbency protection and preserving cores to maintain the 2010 partisan ratio.

A. Intervenor-Defendants' Proposed Remedial Plans Maintain Majority-Black District 3, Minimize Locality Splits, And Improve District 3's Compactness

Intervenor-Defendants' proposed remedial plans correct the violation the Court found in District 3 by "maintain[ing] a majority-minority district[,] achiev[ing] the population increase needed for parity, while simultaneously minimizing locality splits" and improving District 3's compactness. Op. 28, 32.

First, Plaintiffs' Alternative Plan reduced District 3's BVAP from 56.3% to 50.1%. *See id.* 32. Intervenor-Defendants' Proposed Remedial Plan 2 likewise reduces District 3's BVAP to 50.1%, *see* Proposed Rem. Plan 2 BVAP Chart (Ex. M), while Intervenor-Defendants' Proposed Remedial Plan 1 reduces District 3's BVAP to 50.2%, *see* Proposed Rem. Plan 1 BVAP Chart (Ex. C).

Second, both plans make changes only to District 3 and surrounding districts, "achieve[] the population increases needed for parity," and comply with the constitutional equal population requirement. *See* Proposed Rem. Plan 1 Population Chart (Ex. D); Proposed Rem. Plan 2 Population Chart (Ex. N).

Third, both plans "minimiz[e] locality splits." Op. 32. In fact, Intervenor-Defendants' Proposed Remedial Plan 1 *outperforms* the Alternative Plan on this factor. The Alternative Plan has 13 locality splits affecting population, "only one less locality split" than the Enacted Plan. *Id.*; *see also* Int.-Def. Trial Ex. 25. Intervenor-Defendants' Proposed Remedial Plan 1 reunites

the City of Richmond into a single congressional district, District 3, for the first time in decades, and also unites Prince George County in a single district. *See* Proposed Rem. Plan 1 Maps (Ex. A, B). It therefore has only 12 locality splits affecting population, *see* Proposed Rem. Plan 1 Splits (Ex. E), "one less locality split" than the Alternative Plan, Op. 32.

Moreover, Proposed Remedial Plan 1 not only has "one less locality split" overall than the Alternative Plan, it also has one less split in District 3 itself. *Id.* Alternative District 3 has 5 locality splits, *see* Int.-Def. Trial Ex. 25, while Proposed Remedial Plan 1 has only 4 locality splits in District 3, *see* Proposed Rem. Plan 1 Splits (Ex. E). And because Proposed Remedial Plan 1 unites both Richmond and Prince George County in District 3, its splits between Districts 3 and 7 do not affect the 204,214 people residing in Richmond, and its splits between Districts 3 and 4 do not affect the 35,725 people residing in Prince George. *See id.*; *cf.* Op. 32 (noting that the Alternative Plan "reduces the number of people affected by the locality splits between the Third Congressional District and the Second Congressional District by 240,080").

Intervenor-Defendants' Proposed Remedial Plan 2 has the same number of locality splits as the Alternative Plan, with 13 locality splits affecting population across the plan and 5 such locality splits in District 3. *See* Proposed Rem. Plan 2 Splits (Ex. O); Proposed Rem. Plan 2 Maps (Ex. K, L).

Finally, District 3 in Intervenor-Defendants' proposed remedial plans is not "the least compact congressional district in Virginia" according to the Reock, Polsby-Popper, and Schwartzberg measures. *Id.* at 28. Proposed Remedial Plan 1 improves District 3's Reock score to 0.20 compared to 0.19 in the Enacted Plan, making District 3 as compact as District 9 on this measure. *See* Proposed Rem. Plan 1 Reock (Ex. F). Proposed Remedial Plan 1 also improves District 3's Polsby-Popper score to 0.09 from 0.08 in the Enacted Plan, making District 3 as

compact as District 11 on this measure. *See* Proposed Rem. Plan 1 Polsby-Popper (Ex. G). And Proposed Remedial Plan 1 improves District 3's Schwartzberg score to 3.01 from 3.07 in the Enacted Plan, making District 3 more compact than District 11 on this measure. *See* Proposed Rem. Plan 1 Schwartzberg (Ex. H).

District 3 is even more compact in Proposed Remedial Plan 2. Proposed Remedial Plan 2 raises District 3's Reock score to 0.25, making District 3 more compact than District 9 and District 11 on this measure. *See* Proposed Rem. Plan 2 Reock (Ex. P). Proposed Remedial Plan 2 raises District 3's Polsby-Popper score to 0.10, making District 3 more compact than District 11 on this measure. *See* Proposed Rem. Plan 2 Polsby-Popper (Ex. Q). Proposed Remedial Plan 2 also improves District 3's Schwartzberg score to 2.82 and makes District 3 more compact than District 11 on this measure. *See* Proposed Rem. Plan 2 Schwartzberg (Ex. R).

B. Intervenor-Defendants' Proposed Remedial Plans Adhere To The Legislature's Political, Incumbency-Protection, And Core-Preservation Priorities To The Greatest Extent Practicable

Intervenor-Defendants' proposed remedial plans also "follow the policies and preferences of the State," *White*, 412 U.S. at 795, to the greatest practicable extent—and far *better* than the Alternative Plan—on the three criteria that the Legislature deemed most important: incumbency protection and preserving the cores of districts to maintain the 8-3 partisan split. The Enacted Plan thus "has sharp political impact," and these "inevitably political decisions must be made by those charged with the task." *Id.* at 795-96. "Here those decisions were made by the legislature in pursuit of what were deemed important state interests." *Id.* at 796. This Court may not "brush[] aside" these quintessential legislative decisions, let alone substitute its political judgment for the Legislature's or act *contrary* to legislative policy. *Id.*

This Court acknowledged that the Legislature's preferred principles of "partisan politics" and "a desire to protect incumbents" "inarguably" "played a role in drawing" Enacted District 3.

Op. 35. The undisputed record evidence more than amply supports that acknowledgment. Dr. McDonald *conceded* that it would have made "perfect sense" for the Legislature to adopt Enacted District 3 for the political reason of maintaining the 8-3 pro-Republican partisan division in Virginia's congressional delegation even if every affected voter "was *white*." Tr. 128 (emphasis added). That is because, according to Dr. McDonald, the Republican-authored Enacted Plan's trades involving District 3 had a "clear political effect" of benefitting "the Republican incumbents" in surrounding districts from which "[y]ou could infer" a "political purpose." *Id.* 122, 128. These concessions comported with *all* contemporaneous statements—including Dr. McDonald's pre-litigation law review article—universally describing the Enacted Plan *not* as a racial gerrymander, but as a "political gerrymander" that created "a 8-3 partisan division" in favor of Republicans and "protected all incumbents." Int.-Def. Trial Ex. 55 at 816.

The undisputed electoral data confirms that the Enacted Plan had this "clear political effect" across the Commonwealth and in District 3 and surrounding districts. Tr. 122, 128; *see also* Int.-Def. Trial Exs. 14-15, 20-23. The Enacted Plan made all Republican districts in the Commonwealth more Republican, and all Democratic districts more Democratic, thereby solidifying the 8-3 partisan split and protecting incumbents of both parties. *See, e.g.*, Int.-Def. Trial Exs. 14-15, 20-23. Moreover, the Enacted Plan's relatively minor changes to District 3 were all "politically beneficial" to the Republican incumbents in adjacent districts because they moved Democrats out of, and Republicans into, those districts. Tr. 122, 128.

For example, prior to the Enacted Plan, District 2 represented by Republican Congressman Rigell was a closely divided district where Barak Obama and John McCain each captured 49.5% of the vote in 2008. Int.-Def. Trial Ex. 20. The Enacted Plan increased District 2's Republican vote share by 0.3%. *See id.* The same pattern adhered in other Republican

districts surrounding District 3: District 1 became 1% more Republican; District 4 became 1.5% more Republican; and District 7 became 2.4% more Republican. *See id.*

The fact that the Enacted Plan achieves these political and incumbency-protection effects is unsurprising because Delegate Bill Janis, sponsor of the bill that became the Enacted Plan, *expressly said so*, in a display of candor rarely seen among legislators engaged in redistricting. Delegate Janis said that his overriding objective was "to respect to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 election," when Virginia voters elected 8 Republicans and 3 Democrats to Congress (as opposed to the 5-6 split resulting in 2008). Pl. Trial Ex. 43 at 4. Indeed, any minimal changes to the districts were not politically harmful to incumbents because Delegate Janis *adhered* to "the input of the existing congressional delegation, both Republican and Democrat," including Congressman Scott in District 3, in how their districts should be drawn. Int.-Def. Trial Ex. 9 at 14; *see also id.* 8-10. Indeed, each incumbent told Delegate Janis that the lines for the incumbent's district conform to "the recommendations that they provided[,] and that they support the lines for how their district is drawn" in the Enacted Plan. *Id.* 9-10.

The Alternative Plan would require this Court to "brush[] aside" these "inevitably political decisions" that were "charged" to and "made by" the Legislature "in pursuit of what were deemed important state interests." *White*, 412 U.S. at 795-96. Indeed, the Alternative Plan's "sharp political impact," *id.*, is irreconcilable with the Legislature's "inargubal[e]" political and incumbency-protection goals, Op. 35. As Dr. McDonald admitted, the Alternative Plan undermines the Legislature's "political goals" of "an 8/3 incumbency protection plan," Tr. 172-73, 180, and performs "significant[ly]" worse on its race-neutral incumbency-protection objective, *id.* 422-23. In particular, Dr. McDonald conceded that the Alternative Plan transforms

District 2, an evenly divided "49.5% Democratic" district represented by Republican Scott Rigell, into a 54.9% "heavily Democratic" district, creating a 7-4 partisan division. *Id.* 153; Int.-Def. Trial Ex. 22. The Alternative Plan thus decreases District 3's BVAP by 6% not to eliminate District 3's racial identifiability, but to increase District 2's Democratic vote share by 5.4% and turn District 2 into a Democratic district. Int.-Def. Trial Ex. 22.[1]

Intervenor-Defendants' proposed remedial plans both more faithfully adhere to the Legislature's undisputed—and "inarguabl[e]," Op. 35—"political goals" of implementing "an 8/3 incumbency protection plan," Tr. 172-73, 180, than the Alternative Plan. As part of remedying the defect the Court found in District 3, Proposed Remedial Plan 1 and Proposed Remedial Plan 2 slightly reduce District 2's Republican vote share, as measured by the 2008 presidential election results, to 48.9%, a reduction of only 0.6%. *See* Proposed Rem. Plan 1 Election Data (Ex. I); Proposed Rem. Plan 2 Election Data (Ex. S). Intervenor-Defendants' plans therefore do not turn District 2 into a "heavily Democratic" district as in the Alternative Plan, Tr. 119, 152-53, 184, and preserve District 2 as an evenly divided district politically.

Intervenor-Defendants' proposed remedial plans also perform significantly better than the Alternative Plan on the Legislature's race-neutral incumbency-protection objective. Intervenor-Defendants' plans better preserve the Republican vote share in Republican Congressman Rigell's District 2, and they also preserve the majority-Republican vote share in the 7 other districts

[1] That the Alternative Plan has this pro-Democratic effect is unsurprising. The Alternative Plan was drafted by a "liberal" advocacy organization—and Plaintiffs' litigation is being financed by the National Democratic Redistricting Trust. *See* Tr. 272. Plaintiffs' lead counsel, Marc Elias, is currently general counsel to Hillary Clinton's presidential campaign and also represents the Democratic National Committee, Democratic Senatorial Campaign Committee, Democratic Congressional Campaign Committee, and the Democratic Governors Association. *See* Marc E. Elias, *available at* https://www.perkinscoie.com/en/professionals/marc-e-elias.html (last visited Sept. 15, 2015). The nominal Plaintiffs, Ms. Personhuballah and Mr. Farkas, testified that they did not see the complaint in this case before it was filed. *See* Personhuballah Dep. 52-54 (Ex. V); Farkas Dep. 46-47 (Ex. W).

currently represented by Republicans—including the districts surrounding District 3—and the majority-Democratic vote share in the three districts currently represented by Democrats. *See, e.g.*, Proposed Rem. Plan 1 Election Data (Ex. I); Proposed Rem. Plan 2 Election Data (Ex. R).

Finally, it is undisputed that the Legislature rank-ordered core preservation *first* among discretionary state policies. *See, e.g.*, Pl. Trial Ex. 5. Delegate Janis explained that preserving "the core of the existing" districts directly advanced the Legislature's political and incumbency-protection objectives. Pl. Trial Ex. 43 at 4. Preserving District 3's core also made unusually good sense for the independent reasons that District 3 "conform[ed] to all requirements of law" when it was adopted as a *Shaw remedy* in 1998, *Moon v. Meadows*, 952 F. Supp. 1141, 1151 (E.D. Va. 1997) (three-judge court), and had not been challenged under *Shaw* in 2001, *see Wilkins v. West*, 264 Va. 447 (2002).

The Enacted Plan preserves between 71.2% and 96.2% of the cores of all districts, and 83.1% of District 3's core. *See* Int.-Def. Trial Ex. 27. It therefore treats majority-black District 3 the same on core preservation as the other, majority-white districts across the Commonwealth. *See id.* The Alternative Plan, by contrast, preserves only 69.2% of District 3's core, the lowest core-preservation percentage of any district in the Alternative or Enacted Plans. *See id.* Thus, the Alternative Plan moves twice as many people out of District 3 as the Enacted Plan and, in fact, treats District 3 differently and *worse* than its majority-white counterparts on this criterion. *See* Pl. Trial Ex. 29 at 8-9. As Dr. McDonald conceded, the Alternative Plan performs "significant[ly]" worse than the Enacted Plan with respect to core preservation. Tr. 422-23.

Intervenor-Defendants' proposed remedial plans again dramatically outperform the Alternative Plan on this factor. Intervenor-Defendants' Proposed Remedial Plan 1 preserves between 71.2% and 93.9% of the cores of all districts, and 77.2% of District 3's core. *See*

Proposed Rem. Plan 1 Core Preservation (Ex. J). Intervenor-Defendants' Proposed Remedial Plan 2 is even better: it preserves between 71.2% and 93.9% of the cores of all districts, and 81.2% of District 3's core. *See* Proposed Rem. Plan 1 Core Preservation (Ex. T).[2] Therefore, unlike the Alternative Plan, both of Intervenor-Defendants' proposed remedial plans do not single out District 3 for the least favorable treatment. To the contrary, they treat that district the same as the majority-white districts with regard to this most important "policy and preference of the State." *White*, 412 U.S. at 795.

CONCLUSION

The Court should enter one of Intervenor-Defendants' proposed remedial plans if a judicial remedy becomes necessary in this case.

[2] The Court also noted that the Enacted Plan "moved over 180,000 people in and out of . . . the Third Congressional District to achieve an overall population increase of only 63,976 people," if the population needs of District 3 are viewed in isolation. Op. 33. The Alternative Plan moves far more people—384,498—between District 3 and surrounding districts to achieve the same population increase of 63,976 people. *See* Int.-Def. Trial Ex. 23. Once again, Intervenor-Defendants' proposed remedial plans significantly outperform the Alternative Plan, moving 267,919 people and 209,491 people, respectively, between District 3 and surrounding districts. *See* Population Affected By Trades (Ex. U).

Dated: September 18, 2015

Respectfully submitted,

/s/ Mark R. Lentz

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CERTIFICATE OF SERVICE

I certify that on September 18, 2015, a copy of the INTERVENOR-DEFENDANTS' BRIEF IN SUPPORT OF THEIR PROPOSED REMEDIAL PLANS was filed electronically with the Clerk of Court using the ECF system, which will send notification to the following ECF participants:

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