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

Richmond Division

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

MEMORANDUM IN SUPPORT OF REMEDIAL CONGRESSIONAL DISTRICTING PLAN SUBMITTED BY THE GOVERNOR OF VIRGINIA

September 18, 2015

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INTRODUCTION

On June 5, 2015, this Court held for the second time that the Virginia General Assembly unconstitutionally drew the Third Congressional District as a racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment. Because the General Assembly failed to pass any remedial Congressional districting plan of its own within the court-ordered deadline, the Court has taken upon itself the task of remedying the constitutional violations and invited non-parties to submit plans for the Court's consideration. The Governor of Virginia is a non-party to this case; however, he is uniquely qualified to represent the interests of all Virginians in achieving a constitutional Congressional district map as soon as possible, and so hereby submits his plan for the Court's consideration.

The Governor of Virginia proposes a remedial plan (the "Governor's Plan") that fully cures the constitutional violations found by this Court, while creating a map that fairly represents all Virginians. It is compact and contiguous, respects core communities of interest, and fully protects minority voting rights—the same priorities adopted by the General Assembly in enacting the current Congressional districting plan (the "2012 Plan"). The 2012 Plan, however, cannot and should not stand as a baseline for any acceptable remedy: the deep-seated constitutional violations found by this Court require a more comprehensive redraw of the map. Indeed, since the Third Congressional District was originally redrawn in 1991 to be a majority-minority district, this Court has ruled it unconstitutional *each time* that this Court has considered it, once in 1997 and then again in this case. *See Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va. 1997). Therefore, a more fundamental remedial approach is required. The plan submitted by the Governor of Virginia is just such a plan, and he respectfully submits it for the Court's consideration.

BACKGROUND

While a detailed background of the current proceedings is unnecessary, a brief note on the historical background of Virginia's Congressional districting plan in general and the Third Congressional District ("CD-3") in particular is necessary for understanding the merits of the Governor's Plan.

Under the 2012 Plan, the Virginia General Assembly drew CD-3 so as to maintain the basic shape and function that CD-3 has held since it was created in 1991 as a majority-minority district. CD-3 is a majority African American district created by joining two distinct urban areas of the state, combining heavily-African American portions of Richmond and Henrico County with heavily-African American communities in Hampton Roads including Newport News, Portsmouth, Hampton, and Norfolk. The shape of CD-3 has variously been described as a "monstrosity" which uses the land underlying the James River and Chesapeake Bay in order to "pack[] pretty much every black community up and down the James River into one" district. *See* Plaintiffs' Trial Exhibit ("Pls. Ex.") 12 at 49.

Historical Background of Virginia's Congressional District Map

Prior to the 1991 round of redistricting, Virginia had ten Congressional districts, which were regionally apportioned based on more traditional redistricting principles. From 1973-1982, CD-3 was essentially a Richmond-centered district, with northern Hampton Roads in CD-1 (along with the northern coastal regions of Virginia and the Eastern Shore), Norfolk and Virginia Beach in CD-2, and the remaining portions of the Tidewater Region contained in CD-4. *See* Ex. A (Map of U.S. Congressional Districts in Virginia: 1973-1982, *Digital Boundary Definitions of United States Congressional Districts, 1789 – 2012* [Online] http://cdmaps.polisci.ucla.edu). From 1983-1992, the districts remained closely aligned; however, portions of CD-4 were adjusted as the coastal portion of Virginia was brought into CD-2 to join Norfolk and Virginia

Beach. *See* Ex. B (Map of U.S. Congressional Districts in Virginia: 1983 - 1992, *Digital Boundary Definitions of United States Congressional Districts, 1789 – 2012* [Online] http://cdmaps.polisci.ucla.edu).

Under these Congressional maps, Virginia's Congressional districts were largely competitive as between the two parties. The Republican Party was generally ascendant in federal elections, with Virginia voting for the Republican Presidential candidate in every election. In the partisan control of Virginia's Congressional delegation, from 1973-1993, Republicans reached a high-water mark after the 1980 elections, holding nine of ten. The Democrats reached their high-water mark of six of ten seats after the 1990 midterm elections. During this period, there was only *one* Congressional district that remained in one party's control over the twenty-year period.[1]

Since the 1991 redistricting, however, the story has changed dramatically. Because of population growth, Virginia was given one more Congressional seat after the 1990 census, bringing its total to eleven. After the 1992 elections, Democrats reached their high-water mark with control of seven of the eleven seats. Republicans have held eight of eleven Congressional seats for much of the period from 2000 to present, with a brief realignment after the 2008 elections, in which Virginia voted for a Democratic Presidential candidate for the first time since 1964. Most tellingly, however, is that since 1991, *six* of eleven seats have *never* changed from one party to another.[2]

[1] A helpful summary of Congressional representation in Virginia can be found here: https://en.wikipedia.org/wiki/United_States_congressional_delegations_from_Virginia#1953_.E2.80.93_1993:_10_seats.

[2] *Id.*

History of Current CD-3

Current CD-3 maintains the basic shape it has had since 1991—a serpentine design to collect black population centers to create a majority-minority district. In 1991 as in 2011, Virginia was subject to preclearance requirements under Section 5 of the Voting Rights Act. It is well-documented that the Department of Justice ("DOJ"), in the 1990s redistricting rounds, issued guidance to many covered jurisdictions that pushed for them to create majority-minority districts where they could. In Virginia, DOJ did not *require* creation of a majority-minority district; however, the General Assembly went to great lengths to make CD-3 a "safe" black district, with a Black Voting Age Population ("BVAP") of over 60%. *See Moon*, 952 F. Supp. at 1144–45. Many of these majority-minority districts were challenged in the 1990s as being racial gerrymanders, and the Supreme Court held, under the *Shaw* line of cases, that many of these districts violated the Fourteenth Amendment because race predominated the districting considerations. *See Shaw v. Reno*, 509 U.S. 630 (1993); *Miller v. Johnson*, 515 U.S. 900 (1995).

A similar challenge was raised against CD-3, and, in 1997, this Court struck down CD-3 as an unconstitutional racial gerrymander. *Moon*, 952 F. Supp. At 1148–49. That case was strikingly similar to this case. The evidence was overwhelming that *race* predominated in drawing CD-3, and the General Assembly had engaged in no analysis to show in any way that such racial considerations were necessary under the Voting Rights Act. *Id.* at 1149–50. In declaring CD-3 to be unconstitutional, this Court made no remedial plan of its own, and the General Assembly enacted a new plan in 1998, which made some shifts and brought down the BVAP of CD-3 from over 60% to just over 50%. *See* Virginia's 1998 §5 Submission. This Court was never asked to review the General Assembly's 1998 plan.

In 2001, Virginia redistricted as a result of the 2000 census, making some adjustments to CD-3 that increased its BVAP from 50.47% under the 1998 plan to 53.1%, among other changes. The 2001 plan shifted some black populations from CD-4 to CD-3 and CD-5. *See* Virginia's 2001 §5 Submission. The 2001 plan was never challenged, so no court has again considered, until this case, whether CD-3 violated the Equal Protection Clause.

Remedial Background

After the June 5, 2015 ruling from this Court, the Governor convened a Special Session of the Virginia General Assembly for the purpose of enacting a remedial Congressional districting plan. Two plans were introduced into legislation, SB 5001 by State Senator Peterson and SB 5002 by State Senator Mamie Locke. No other plans were introduced in the General Assembly session. The General Assembly convened on August 17, 2015, but the Senate of Virginia quickly adjourned. The September 1, 2015 deadline set by this Court passed, and the Court has taken jurisdiction back from the General Assembly to fashion a remedy in this case.

LEGAL STANDARD

District Courts are afforded broad discretion in fashioning equitable remedies to constitutional violations. *See Brown v. Plata*, 131 S.Ct. 1910, 1944 (2011) ("[o]nce invoked, 'the scope of a district court's equitable powers . . . is broad"') (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971)). In remedying unconstitutional racial discrimination by the State, Courts are guided by three principles: (1) that the "remedy is to be determined by the nature and scope of the constitutional violation"; (2) the decree must be "*remedial* in nature, that is, it must be designed as nearly as possible to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct"; and, (3) the court must take into account the interests of state and local officials to

conduct their own affairs, "consistent with the Constitution." *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) (citations omitted).

In the specific context of redistricting litigation, the Supreme Court has held that the broad discretion given to the District Courts to fashion equitable remedies should be moored to the State's legislatively enacted plans insofar as they "do not lead to violations of the Constitution or the Voting Rights Act," so as to avoid "otherwise standardless decisions" by the District Courts. *Perry v. Perez*, 132 S.Ct. 934, 941 (2012) (quoting *Abrams v. Johnson*, 521 U.S. 74, 79 (1997)). However, while District Courts should defer to legislative policy judgments, they need not defer to plans that have used race as a predominant factor in the drawing of district lines. *See Abrams*, 521 U.S. at 79 (District Court properly declined to defer to a pre-cleared plan because it used race as a predominant factor).

ARGUMENT

I. The Court Should Not Defer to the 2012 Plan and Should Embrace a More Comprehensive Redrawing of Virginia's Congressional District Map.

This Court has ruled CD-3, as it has existed as a majority-minority district since 1991, to be an unconstitutional racial gerrymander *each time* that it has had the chance to review CD-3. The basic shape and purpose of CD-3 has remained the same, to create a majority-minority district in Virginia because the General Assembly believed the creation and maintenance of such a district was *required*, either under Section 2 or Section 5 of the Voting Rights Act. *See Moon*, 952 F. Supp. at 1149 (explaining Section 2 defense of CD-3 in 1990s round of redistricting); *Page v. Va. State Bd. of Elections*, 3:13-cv-678, slip op. at 42–43 (E.D. Va. June 5, 2015) ("Mem. Op.") (addressing Section 5 defense for predominant use of race in drawing current CD-3). On both occasions, this justification for the bizarre, slithering shape of CD-3 has been

rejected by this Court, and this Court expressed skepticism that either Section 2 or Section 5 would require a majority-minority district. *Id.*

There are three reasons that this Court should not defer to the 2012 Plan in crafting a remedy and should take a more comprehensive approach to redrawing Virginia's Congressional districts: (1) the fundamental infirmity with CD-3 has never been remedied; (2) the nature of the racial gerrymander in CD-3 requires a more comprehensive remedial approach; and (3) the General Assembly has expressed a desire to move away from CD-3's current design.

A. CD-3's Infirmity Has Never Been Remedied.

CD-3, since it was drawn in 1991, has been ruled unconstitutional as a racial gerrymander each time that it has been judicially reviewed. CD-3 was a racial gerrymander in 1997, under the *Moon* case, and it remains a racial gerrymander today. The history of Virginia's Congressional district map indicates that in previous maps the General Assembly sought to group Virginia's Congressional districts in a more regionally compact way that identified with distinct communities of interest. In 1991, the General Assembly attempted to draw a majority-minority district by creating a new version of CD-3, which, instead of being a Richmond-area district, became a highly irregular shape described at the time as a "grasping claw" or a "squashed salamander" that attempted to unite black populations into one Congressional district. *Moon*, 952 F. Supp. at 1147 (citation omitted). While adjustments have been made to CD-3 at various times since it was ruled unconstitutional by this Court in 1997, it has remained a contorted district for the purpose of maintaining a majority-minority district.

Thus, using the 2012 Plan or even the 2001 plan as a baseline for redrawing CD-3 operates on a fundamentally shaky foundation, which is that CD-3 can constitutionally be constructed anyway close to its present form. Indeed, the *Moon* Court expressed skepticism that Section 2 would ever require a majority-minority district under the *Thornberg v. Gingles* test, in

balancing both the prevalence of white crossover voters and the geographic efficacy of a majority-minority district. *Moon*, 952 F. Supp. at 1149. The racial bloc voting analysis conducted by Dr. Lisa Handley in support of this remedial plan also confirms that CD-3 *does not* need a majority African American district in order to ensure the opportunity for minority voters to elect candidates of their choice. *See infra*, Section II.B.2.

Now that the Court is in the position of remedying the racial gerrymander of CD-3, it should complete what the *Moon* court began to remedy decades ago by rejecting the fundamental infirmity of CD-3's design, unpacking CD-3's artificially-high African American population, and using traditional redistricting principles to reapportion Virginia's Congressional districts.

B. The Racial Gerrymander of CD-3 Requires a More Comprehensive Redrawing of Districts to Remedy the Underlying Violation.

As a point of first principles, remedies to constitutional violations must "directly address and relate to the constitutional violation itself." *Milliken*, 433 U.S. at 282. In the case of CD-3, the violation is not necessarily found in the result of it, but in the very process used to construct the district: there is a lingering taint of unconstitutional consideration of race. Thus, for a court to properly remedy a racial gerrymander, the Court may either "re-draw" the district in a way that does not make race the predominant factor *or* it can maintain a focus on race as a predominant factor, but narrowly tailor the district to meet strict scrutiny.

1. District Courts Owe No Deference to Enacted Plans with Racial Gerrymanders.

Recognizing this, the Supreme Court holds racial gerrymanders as a different kind of violation, in which a District Court is justified in departing from a legislatively-enacted plan. In *Abrams*, the Court clarified *Upham v. Seamon*, 456 U.S. 37, 38 (1982), which direct courts to defer to the political judgments made by legislatures in redistricting, stating plainly that "*Upham* deference" "is *not owed*" "to the extent [a] plan subordinated traditional districting principles to

racial considerations." *Abrams*, 521 U.S. at 85 (emphasis added); *see also Perez*, 132 S.Ct. at 941 (citing *Abrams* with approval as an exception to court-deference to legislative redistricting plans).

This Court has found that the General Assembly used race as the predominant factor in drawing CD-3, the design of which drove the entire 2012 Plan. Mem. Op. at 1–2. Thus, this Court is not bound to defer in any way to the 2012 Plan or any other previous plan which it finds subordinates traditional districting principles to racial considerations. Since CD-3 has fundamentally been a district that subordinated traditional districting principles to racial considerations since 1991, this Court may even look to plans from before 1991 as a guide.

2. CD-3's Broad Geographic Impact in High-Population Centers Requires a Comprehensive Redraw.

In *Abrams*, the Court cited the broad geographic impact of the unconstitutional districts as another reason for affirming the District Court's departure from any legislative plan. *Abrams*, 521 U.S. at 86. There, two of the eleven districts in Georgia were found unconstitutional, and together they encompassed "[a]lmost every major population center in Georgia," which were split along racial lines. *Id.* Because of the geographic reach of the unconstitutional districts, the District Court was justified in departing from the enacted plans. The same is true here.

As this Court noted in describing CD-3's physical shape insofar as it demonstrates racial predominance, the Court found that it "splits more local political boundaries than any other district in Virginia" and that it "contribute[s] to the majority of splits in its neighboring districts." Mem. Op. at 30. Indeed, the number of locality splits between CD-3 and CD-2 affected 241,096 people alone, shifting from one to the other. *Id.* at 32. Moreover, CD-3 traverses the James River and Chesapeake Bay to link African American communities in two of Virginia's three most heavily-populated regions, very similar to the districts in *Abrams*. *Id.* at

28. Thus, CD-3, even though it is around 95 miles long, is contorted such that it abuts *four* Congressional districts.[3] With the Constitutional requirement of equal population in Congressional districts, it is hard to imagine any acceptable remedy to CD-3 that will not have a domino effect throughout the other districts. Thus a departure from the 2012 Plan is justified.

3. The Primary Rationale for the 2012 Plan was the Racial Gerrymander of CD-3.

As this Court's opinion makes very clear, the evidence is overwhelming that the primary, non-negotiable, and driving purpose *for the entire* 2012 Plan was the racial gerrymandering of CD-3. Mem. Op. at 1–2 ("[T]he primary focus of how the lines in [the redistricting legislation] were drawn was to ensure that there be no retrogression in the [Third] Congressional District.") (quoting Del. Janis). The reason for this, of course, is that the General Assembly erroneously believed that it needed to pack over 55% of CD-3 with black voters—the basis of this Court's finding of an unconstitutional racial gerrymander.

Thus, the 2012 Plan should not receive deference because the General Assembly premised the entire plan on CD-3 having to be 55%. Without this foundation, the entire plan collapses. Had CD-3's design been an ancillary reason for the 2012 Plan, then perhaps a more minimalist approach could be justified; however, it was admittedly the foundational premise upon which other decisions were based, at least in part. Moreover, as the *Abrams* Court found persuasive, the erroneous belief that the General Assembly was required to draw CD-3 the way it did gives little reason for the Court to "defer" to that judgment. In *Abrams*, the District Court had declined to use legislative plans drawn under pressure from the DOJ because it likely did not reflect a true desire on the legislature's part and otherwise explained the use of race in the

[3] Only the 2012 Plan's CD-5 beats this with six abutting districts; however, it traverses over *200 miles*, going from Virginia's southern border to almost its very northernmost extremity.

redistricting process, which the Supreme Court affirmed. 521 U.S. at 87–88. While the DOJ was not itself responsible for telling the General Assembly to adopt an arbitrary BVAP for its redistricting, the evidence is clear that the General Assembly *believed* that it needed this number, so, by the same logic as in *Abrams*, the 2012 Plan's determinations should be afforded little deference.

4. A Narrow-Tailoring Remedy Would Require Substantial Reform of CD-3.

Alternatively, the Court may want to maintain the General Assembly's stated focus on protecting against retrogression under Section 5 of the Voting Rights Act; however, maintaining race as the predominant factor in drawing CD-3 *and* narrowly tailoring the district to prevent retrogression would point to a radically different shape for CD-3.

The General Assembly believed that a minimum 55% BVAP was required. Mem. Op. at 22–24. Of course, the General Assembly conducted no analysis whatsoever to determine what BVAP might be required in CD-3. *Id.* at 48. The Governor's Office has engaged an expert, Dr. Lisa Handley, to conduct just this kind of analysis. Her analysis is attached hereto as Exhibit C (the "Handley Report"), and Dr. Handley has concluded that a BVAP from between 30 and 34% is what is required to prevent retrogression in CD-3. *See* Handley Report at 11 and 13. Dr. Handley's analysis demonstrates that Virginia *does not* need a majority-minority district in order to comply with the Voting Rights Act, but need only maintain about one-third of CD-3 as African American to comply with the Voting Rights Act. This analysis is confirmed by the Plaintiffs' expert, who estimated around a 30% BVAP required in CD-3 to avoid retrogression. *See* Trial Tr. 196:14–197:25.

Thus, to have narrowly-tailored CD-3, the General Assembly would have to have constructed a district that was far less populated with voting-aged African Americans than it did.

For example, reducing CD-3's BVAP from 56% to around 35% would require shifting approximately 150,000 voting-aged African Americans out of CD-3 and into the surrounding Congressional districts, while absorbing another, non-African American group of 150,000 voters from the surrounding districts. This large of a population shift would necessarily change the shape of the surrounding districts to such an extent that the ripple effect would leave little untouched throughout the Commonwealth.

In short, because the General Assembly was *so far* off the mark in packing CD-3 with African American voters because of unwarranted fears about retrogression, only radical change to the Congressional map that unpacks CD-3 can achieve a map in which racial concerns still predominate but that is constitutional.

* * *

To properly remedy the Constitutional violations in CD-3, this Court must either depart from the basic design of CD-3 and redistrict according to traditional principles *or* it must narrowly tailor CD-3 to achieve non-retrogression. Under either scenario, it is clear that any remedial plan *requires* a substantial and comprehensive redrawing of Virginia's Congressional districts.

C. The General Assembly Preferred an Approach Different from the 2012 Plan.

Though the 2012 Plan advantaged Republicans over Democrats, the debate on the passage of a Congressional redistricting plan demonstrates that the General Assembly actually preferred not to have CD-3 drawn as it is. Thus, the Court need not defer to the 2012 Plan since the General Assembly, had it correctly believed that a 55% BVAP was not necessary to prevent retrogression in CD-3, would have gone a different route.

As noted above, the General Assembly operated under the erroneous belief that it had to maintain a minimum 55% BVAP in CD-3 in order to receive preclearance from the DOJ. This

was the primary motivation and purpose for the entire plan. *See* Mem. Op. at 1–2. But during consideration of alternative plans, the General Assembly expressed support for a very different approach to drawing CD-3. For instance, State Senator Stephen Martin, a Republican legislator, said that he "would agree" that CD-3 was a "monstrosity" and that he "did not care for the 3rd, the way the 3rd was done." Pl. Ex. 12 at 50.

The General Assembly also gave favorable consideration to another plan proposed by State Senator Mamie Locke. That plan, introduced in the 2011 session, splits the Richmond region and the Hampton Roads regions of current CD-3, and it passed the Virginia Senate. In the House of Delegates' consideration of that plan, Delegate Janis cited only one concern: that it would not receive preclearance because it dropped the BVAP from the 2012 Plan's 56% to closer to 40%. *See* Pls. Ex. 45 at 7–8. The belief, erroneously held by the General Assembly, was that the Locke plan was illegal under the Voting Rights Act because it dropped the BVAP below 55%. Had the General Assembly correctly understood the required BVAP in CD-3 to prevent retrogression, it may well have enacted Senator Locke's approach, or something similar. It was only because of its belief that it *had* to maintain CD-3 as a strong majority-minority district that it did so.

Thus, the Court should depart from the 2012 Plan because it is not likely that the 2012 Plan even reflects the true desires of the General Assembly.

II. The Court Should Adopt the Governor's Plan.

For all the reasons articulated above, the Court should not maintain an artificial adherence to the 2012 Plan, but should embrace a comprehensive redrawing of Virginia's Congressional districts. The Governor's Plan creates a fair, representative map for Virginia's

Congressional districts, and it strongly conforms to the criteria adopted by the General Assembly to govern its redistricting process.[4]

A. The Governor's Plan Creates a Fair, Representative Map for Virginia's Congressional Districts.

The 2012 Plan is a racial gerrymander that, without justification, packs African American voters into CD-3, and the electoral results from the 2012 Plan show it to be far from representing the voting preferences of most Virginians. Out of Virginia's eleven Congressional districts, it creates eight reliably Republican districts, which is completely unrepresentative.

Far from being a state in which Republicans dominate with almost three-fourths of the vote, Virginia has become a "purple" state. Virginia voted for President Obama in 2008 and 2012, with 2008 being the first time Virginia had awarded its electoral votes to a Democrat since 1964. Virginia elected Democratic United States Senators in 2006, 2008, 2012, and 2014. Only in 2009, in which Republican statewide candidates did exceedingly well, have the Democrats lost a statewide race since 2008. In 2013, the state elected a Democratic Governor, Lieutenant Governor, and, for the first time since 1989, a Democratic Attorney General.

The Governor's Plan takes the Virginia Senate-approved Locke plan as a general guide. It was developed through the hard work of four Democratic legislators in the run-up to the General Assembly special session, and it was the only plan introduced as legislation (as SB 5002 (Locke) in the 2015 Special Session) that was actually drawn by legislators with deep knowledge

[4] A color map showing the geographical design of the Governor's Plan is attached hereto as Exhibit D.

and insight about the various communities across Virginia.[5] No Republican-sponsored remedial plan was developed or introduced as legislation.

The Governor's Plan makes critical changes to Virginia's Congressional map that accurately reflects the political face of Virginia. Instead of having one super-majority black district, the Governor's Plan focuses on communities of interests in the Richmond area and the Hampton Roads area, which actually results in *two* districts in which African Americans will have an opportunity to elect candidates of their choice. In making a map that reflects the true political preferences of Virginians, the Governor's Plan is a far fairer and more representative plan than the 2012 Plan.[6]

B. The Governor's Plan Conforms to the Criteria Adopted by the General Assembly to Govern Redistricting.

In its resolution setting criteria for the 2012 Plan, the General Assembly embraced five core criteria: (1) population equality; (2) compliance with the Voting Rights Act; (3) contiguity and compactness; (4) single-member districts; and (5) communities of interests. *See* Committee Resolution No. 2 on Congressional District Criteria, Va. Senate Cmte. on Privileges and Elections (Adopted Mar. 25, 2011). The Governor's Plan meets all of these criteria, and so it should be considered as very much in-line with the legislative policies adopted by the General Assembly.

[5] State Senator Peterson also introduced a remedial proposal in the 2015 Special Session, SB 5001 (Peterson), though it was not developed by legislators themselves but through an academic competition on redistricting.

[6] Statistical analysis on this plan, as run by Virginia's Division of Legislative Services, is attached hereto as Exhibit E.

1. The Governor's Plan Maintains Population Equality and Single-Member Districts.

Out of constitutional necessity, the General Assembly maintains a strict rule of population equality as between the eleven Congressional districts. The Governor's Plan makes the same commitments and shows no deviation from the ideal population of 727,366. In addition, each of the districts in the Governor's Plan is a single-member district. Thus, the plan meets these two criteria.

2. The Governor's Plan Complies with the Constitution and the Voting Rights Act.

The Governor's Plan fully complies with the Constitution and the Voting Rights Act. First, the Governor's Plan was not drawn with race as a predominant factor. The districts use as a general guide the plan supported by the Virginia Senate in 2011, past configurations of Congressional districts prior to 1991, and makes other decisions based on traditional redistricting criteria.

For the purposes of this redistricting, it should be assumed that, whether or not required, the General Assembly would want to ensure no retrogression under Section 5 of the Voting Rights Act. In order to demonstrate compliance with the Voting Rights Act, the Governor's Office engaged Dr. Lisa Handley to perform a racial bloc voting analysis of CD-3, something that the General Assembly failed to do in its prior redistricting efforts.

A racial bloc voting analysis is important because, by conducting a functional analysis of past election results, African American voter preferences, white crossover voting, and other factors, Dr. Handley was able to give the critical insight necessary for confirming compliance with the Voting Rights Act. Dr. Handley has confirmed that the Governor's Plan for CD-3 maintains an effective minority district in which African Americans continue to have the opportunity to elect candidates of their choice. According to Dr. Handley's analysis, CD-3 has

racial bloc voting; however, white voters support the same candidates as African American voters to a substantial degree. Handley Report at 8–9. This brings the required BVAP to give African American voters an opportunity to elect the candidate of their choice far below 55%.

Dr. Handley has concluded that, in general elections, the BVAP required to avoid retrogression in CD-3 is between 30 and 34%; in primary elections, the BVAP required is 33%. *See* Handley Report at 11 and 13. Under the Governor's Plan, CD-3 results in a BVAP that is 41.9%--above the minimum threshold to avoid retrogression and comply with Section 5 of the Voting Rights Act. Dr. Handley has also looked specifically at the Governor's Plan and concludes that it results in no retrogression. *Id.* at 13–15.

In addition to not retrogressing in CD-3, the Governor's Plan has the effect of creating *two* districts, not just one, in which African American voters are able to elect a candidate of their choice, in both CD-3 and CD-4. Thus, the Governor's Plan, by using more traditional redistricting principles and not artificially enlarging CD-3's BVAP, *increases* African American voting power plan-wide. Because of this strong protection for minority voters and Dr. Handley's report, the Governor's Plan is even stronger on this criterion than the 2012 Plan.

3. The Governor's Plan Achieves Compact and Contiguous Districts.

The Governor's Plan also meets the Virginia Constitution's requirement for compact and contiguous districts. First, all the districts are contiguous as defined under Virginia law. Second, the districts in the Governor's Plan are more compact than those in the 2012 Plan. Using two different statistical measures of district compactness, the Roeck and Polsby-Popper scales, the Governor's Plan scores a 0.23 on the Roeck and a 0.15 on the Polsby-Popper. The 2012 Plan receives a 0.21 and 0.15, respectively. *See* 2012 §5 Submission at 10.[7] In terms of jurisdictional

[7] Under these measures, scores approaching 1.0 indicate more compact districts.

and precinct splits, the Governor's Plan splits 18 jurisdictions, one more than the 2012 Plan; however, one jurisdictional split was necessary to keep incumbents in their current districts and another was because of an airport where no one lives. In terms of precinct splits, the 2012 Plan contains 23 splits, while the Governor's Plan splits 17. In all of these measures, the Governor's Plan meets or exceeds the criteria for contiguity and compactness adopted by the General Assembly.

4. The Governor's Plan Respects and Aligns Important Communities of Interest.

The Governor's Plan also takes a more traditional approach to communities of interest that mirrors, to the extent population changes have allowed it, the prior approaches to the various communities in Virginia taken by the pre-1991 Congressional maps. Because the 2012 Plan focused so much on artificially unifying the African American communities in the Richmond and Hampton Roads regions, the spillover effect resulted in gross combinations that affect the communities of interest across the state. For instance, CD-5, which traverses over 200 miles, links the North Carolina border with the exurbs of Northern Virginia. CD-10 travels from densely-populated areas inside the Washington beltway all the way to the West Virginia border on the other side of the state. These nonsensical groupings are not driven by unifying communities of interest, but are outgrowths of the racial gerrymander of CD-3. The Governor's Plan respects and unites key communities of interest, aligning much more closely to the Congressional district plans enacted before CD-3 was redrawn a majority-minority district.

Redraw of CD-3

The Governor's Plan starts remedying the CD-3 gerrymander by making CD-3 centered on the core cities of Hampton Roads: Hampton, Newport News, Norfolk, and Portsmouth. These cities share much in common, far more-so than they do with Richmond. The Governor's Plan

then adds additional population reaching out from the core cities, while attempting to maintain Virginia Beach as a separate community of interest. The remaining portion of CD-3, in the Richmond area, is put into CD-4, while excising portions of CD-4 that are wholly west of Interstate 95. CD-4 maintains many of the lower-population centers, but unites them with the Richmond area, along with Petersburg.

Treatment of Northern Virginia

The Governor's Plan also makes changes to the Northern Virginia Congressional districts. The 2010 population in the Northern Virginia planning district, as organized under §15.2-4203 of the Code of Virginia,[8] was more than enough to maintain *three* Congressional districts; however, the 2012 Plan has only two districts within the Northern Virginia planning district. The Governor's Plan creates these three districts, following the prior divisions of Northern Virginia as between communities aligned along Interstate 66 and communities aligned along Interstate 95 and 395. *See* Exs. A and B (showing Northern Virginia Congressional districts generally along this divide). The Governor's Plan takes this basic split in communities of interest and puts CD-11 in between, as largely a Fairfax County district. By observing these communities of interest, the Governor's Plan also empowers emerging minority populations in Northern Virginia to exercise influence over these districts. For instance, African Americans and Hispanic Americans would each make up approximately 21% of CD-8; Asian Americans would make up about 21% of CD-11.

[8] The Northern Virginia Regional Commission is comprised of the counties of Arlington, Fairfax, Loudoun, and Prince William; the cities of Alexandria, Fairfax, Falls Church, Manassas, and Manassas Park; and the towns of Dumfries, Herndon, Leesburg, Purcellville, and Vienna. Membership has remained fairly stable since NVRC was established in 1969, with only Dumfries and Purcellville being added since 1972. *See* Member Governments, NVRC Website [available at] http://novaregion.org/index.aspx?NID=66 (viewed Sept. 17, 2015).

Other Changes

The Governor's Plan also makes substantial changes to CD-5, to return it from being a 200-mile long sliver of Virginia to a district that includes much of the Route 29 and 360/460 corridors, as CD-5 previously did in past redistricting plans. Thus, under the Governor's Plan, CD-5 includes the cities of Charlottesville, Lynchburg, Danville, and Martinsville, while dropping points far north of Charlottesville from the district. CD-1 is taken south from the Northern Virginia region and spans from the Northern Neck westward. CD-2 remains a Virginia Beach-centered district that includes the Eastern Shore. CD-6 remains a Shenandoah Valley-based district, with additions in the northern part of the state to take in needed population. CD-7 becomes more compact as a rural Central Virginia district, and CD-9 remains a Southwest Virginia district, as the Fighting Ninth. Altogether, these changes reflect Virginia's core communities of interest.

* * *

For these reasons, the Governor's Plan should be embraced by the Court as a fair and representative plan that is consistent with the criteria developed by the General Assembly for drawing Virginia's Congressional district map.

CONCLUSION

The Governor of Virginia respectfully requests that the Court provide an adequate remedy to fully cure Virginia's Congressional district map of the predominant consideration of race. Doing this requires a comprehensive approach, one that departs substantially from the 2012 Plan, and which splits CD-3 from its constitutionally-suspect design that has persisted since 1991. The Governor's Plan accomplishes the remedial task while also providing a fair and representative map for all Virginians. The Governor of Virginia respectfully requests that the Court adopt it.

Respectfully submitted,
GOVERNOR OF VIRGINIA

By: /s/

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of September, 2015, 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 counsel of record in this case.

I also hereby certify that on the same date, I will send via overnight delivery service a CD-ROM disc containing the Shapefile and Block Equivalency File for the Governor's Plan to the Clerk of Court, for filing with the Court.

I also hereby certify that on the same date, I will send the same Shapefile and Block Equivalency File data to the parties' counsel of record via electronic mail. I also hereby certify that, by the 21st day of September, 2015, I will send copies of the foregoing document, supporting exhibits, and filed data with all non-parties who submit remedial plans via electronic mail.

By: /s/

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