

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.	)	

**DEFENDANTS’ RESPONSE TO PROPOSED REMEDIAL PLANS**

As the Court fashions a remedial plan, it should steer clear of two mistaken suggestions in the proposals it received. First, the Court should avoid insisting that CD3 contain a Black Voting-Age Population (BVAP) exceeding 50%, which is significantly higher than what is needed to protect black voters’ ability to elect a candidate of their choice. The functional analysis performed by Dr. Lisa Handley (ECF 231-3) shows—consistent with the trial record—that a BVAP of 30-34% is sufficient to protect minority voting rights. Insisting on a BVAP significantly higher than that risks perpetuating the constitutional violation that the Court is trying to correct. Second, the Court should reject the Intervenor-Defendants’ argument that the remedial plan must entrench an 8-3 partisan split. Having rejected that 8-3-split theory at trial, the Court should not credit it now in remedying the constitutional violation.

**ARGUMENT**

**A. An artificially high BVAP in CD3 is not required to protect the voting rights of minority voters.**

The Supreme Court held in *Alabama Legislative Black Caucus v. Alabama*<sup>1</sup> that insisting

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<sup>1</sup> 135 S. Ct. 1257 (2015).

on a fixed racial floor, unsupported by a functional analysis, in drawing a redistricting plan makes race the predominant factor in the redistricting and triggers strict scrutiny. The Court rejected Alabama's "mechanical" use of a 70% BVAP floor because no functional analysis had shown that that level was needed to protect black voters' ability to elect their candidate of choice. Applying *Alabama* on remand, this Court concluded (for a second time) that CD3 was an unconstitutional racial gerrymander. It found that the General Assembly had not performed any functional analysis to determine the BVAP level necessary to avoid retrogression and instead had impermissibly used "a 55% BVAP floor" in redrawing CD3.<sup>2</sup>

Although those rulings made clear that a functional analysis is needed to determine the requisite BVAP level to avoid retrogression in CD3, only the Governor's proposed remedial plan was accompanied by any such analysis.<sup>3</sup> The report by Dr. Lisa Handley, a well-recognized expert in the field,<sup>4</sup> concluded that a BVAP of 30-34% will avoid retrogression in CD3.<sup>5</sup> That figure is consistent with the trial testimony of Plaintiffs' expert, Michael McDonald, whose analysis showed that a BVAP "substantially lower" than 50%,<sup>6</sup> approaching 30%,<sup>7</sup> would protect

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<sup>2</sup> *Page v. Va. State Bd. of Elections*, Case No. 3:13-cv-00678, 2015 WL 3604029, at \*9 (E.D. Va. June 5, 2015). *See also id.* at \*8 (finding that the "legislative record here is replete with statements indicating that race was the legislature's paramount concern in enacting the 2012 Plan").

<sup>3</sup> *See* Dr. Lisa Handley, "Providing Black Voters with an Opportunity to Elect Candidates of Choice: A District-Specific Functional Analysis of the Third Congressional District in Virginia" (Sept. 17, 2015) ("Handley Report"), ECF No. 231-3.

<sup>4</sup> *Id.* at 1-2 & App. A.

<sup>5</sup> *Id.* at 16.

<sup>6</sup> Trial Tr. 197:16-21.

<sup>7</sup> Trial Tr. 196:14-17.

African-American voters in CD3. Dr. Handley’s report is significantly more comprehensive than McDonald’s,<sup>8</sup> but reaches the same conclusion.

Accordingly, the Court should not insist on an artificially high BVAP in CD3.

Two of the proposed remedial plans are more consistent with the requisite functional analysis than the others. Relying on Dr. Handley’s analysis, the Governor’s plan proposes a redrawn CD3 with a BVAP level of 41.9%.<sup>9</sup> The Virginia State Conference of NAACP Branches likewise concludes that a BVAP level of 43.0% “will still allow black voters to elect their candidate of choice.”<sup>10</sup> The other proposed plans, however, all suggest redrawn CD3s with BVAP levels between 50% and 52.5%, but offer no analysis that those levels are needed to avoid retrogression.

To the extent those BVAP levels reflect arbitrary targets or floors, they run directly counter to *Alabama*. Bull Elephant Media, LLC, for instance, expressly states that one of the “standards” it used in creating its two proposed plans was preserving the BVAP as “close to the BVAP of [CD3] for the 2002 plan (53.1%).”<sup>11</sup> But that reflexive perpetuation of the BVAP level from the previous plan commits the same error that the Supreme Court corrected in *Alabama*. The Supreme Court explained that Alabama had asked the wrong question—“How can we maintain present minority percentages in majority-minority districts?”—and instead should have

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<sup>8</sup> Compare Handley Report at 2-16, with Pls.’ Trial Ex. 30 (reply report of Dr. Michael P. McDonald) at 4-6.

<sup>9</sup> See Mem. in Supp. of Remedial Congressional Districting Plan Submitted by the Governor of Virginia at 17 (Sept. 18, 2015), ECF No. 231; Handley Report at 14.

<sup>10</sup> See Br. in Supp. of the Proposed Congressional Redistricting Plan Submitted by the Virginia State Conference of NAACP Branches at 9 (Sept. 18, 2015), ECF No. 227.

<sup>11</sup> Br. in Supp. of Remedial Plan on Behalf of Bull Elephant Media LLC at PageID#s 5134-35 (Sept. 17, 2015), ECF No. 222.

asked: ““To what extent must we preserve existing minority percentages in order to maintain the minority’s present ability to elect the candidate of its choice?””<sup>12</sup>

Asking the right question here yields the right answer—that a redrawn CD3 may permissibly have a BVAP level substantially below 50%.

**B. It would be inconsistent with the Court’s findings in the liability phase to uphold an 8-3 Republican-Democrat split.**

As they did at trial, Intervenor-Defendants insist that the remedial plan here must “maintain the 8-3 partisan division established in the 2010 election”<sup>13</sup>—that is, that the Court must draw Virginia’s eleven congressional districts so that eight Republicans and three Democrats entrench their hold on office. Intervenor-Defendants argue that “there is no dispute that maintaining the 8-3 partisan division . . . was the Legislature’s top discretionary priority”<sup>14</sup> in enacting the 2012 plan.

But they forget that the Court specifically rejected their 8-3-split argument as “not supported by the record.”<sup>15</sup> The Court instead credited the statements of Delegate Janis, the redistricting plan’s sole author, who said unequivocally that he had *not* “looked at the partisan performance. It was not one of the factors that I considered in the drawing of the district.”<sup>16</sup> As

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<sup>12</sup> *Alabama*, 135 S. Ct. at 1274.

<sup>13</sup> Intervenor-Defs.’ Br. in Supp. of Their Proposed Remedial Plans at 2 (Sept. 18, 2015), ECF No. 232.

<sup>14</sup> *Id.* at 3.

<sup>15</sup> *Page*, 2015 WL 3604029, at \*7 n.12.

<sup>16</sup> *Id.* at \*14 (quoting Intervenor-Defs.’ Trial Ex. 9, at 14).



