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.	)	

GOVERNOR OF VIRGINIA'S MEMORANDUM IN RESPONSE TO OTHER PARTIES' REMEDIAL CONGRESSIONAL DISTRICTING PLANS

Any Congressional districting plan adopted by this Court must *remedy* the actual violations found in this Court's order of June 5, 2015. The Governor of Virginia has proposed a comprehensive remedial plan that fully cures the constitutional violations that this Court has again found in Virginia's Third Congressional District ("CD-3") and that addresses the underlying problem with CD-3 that has persisted since it was created as a majority-minority district in 1991. The plans submitted by Republican partisans, including the plans submitted by the Defendant-Intervenors ("Republican Congressmen"), fundamentally fail to remedy the violations found by this Court. Their solution to the racial gerrymander of CD-3 is to rely on a slightly lower racial quota for CD-3, again without justification; they ignore and misconstrue the relevant case law instructive on this case; and they pursue a purely partisan objective to maintain an unrepresentative Congressional map for Virginia. These proposals should be rejected.

In addition, the plan submitted by the Governor of Virginia (the "Governor's Plan") should receive special deference from this Court because it is the only plan submitted by a state official who can actually speak for the Commonwealth and who has so powerful a role in the

legislative process that would have enacted a remedial plan. His plan was based in large part on the plan nearly adopted by the General Assembly in 2011, the Locke plan; was developed by current legislators with expertise on the diverse communities of interest across Virginia; and there is no other competing plan that has been endorsed by either the House of Delegates or the Senate of Virginia. Thus, in keeping with the Court's deference to the policy judgments of the Commonwealth, it should give special deference to the Governor's Plan in how it balances the task of remedying the violations identified by this Court.

ARGUMENT

I. The Remedial Plan Adopted by the Court Must *Remedy* the Constitutional Violations the Court has Found.

As a general response to the remedial plans submitted by the other parties, it is important to point out the core function here, which is not to maintain a Republican partisan advantage in Virginia's Congressional districting map: it is to remedy the racial gerrymander of CD-3. First principles dictate, under well-established precedent for remedying unconstitutional uses of race, that any remedy adopted by this Court is "to be determined by the nature and scope of the constitutional violation" and that the remedy 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." *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) (citations omitted).

The nature and scope of the constitutional violation in this case is that racial considerations predominated in the drawing of CD-3 in the General Assembly's 2012 redistricting ("2012 Plan"), triggering strict scrutiny. Because the General Assembly had no valid reason under the Voting Rights Act to maintain so high a BVAP in CD-3, the 2012 Plan failed strict scrutiny review. Thus, based on the constitutional violations found by this Court, there are only two paths available to the Court for a viable remedy: (1) either draw CD-3 in a

fashion in which racial considerations do not predominate, or (2) narrowly-tailor the BVAP in CD-3 to meet strict scrutiny. The history of CD-3 as a majority-minority district, which has been ruled an unconstitutional racial gerrymander each time that it has been reviewed by this Court, once in 1997 and again in this case, must inform this Court's remedial approach.

To draw CD-3 in a manner in which racial considerations do not predominate, the Court should look to the enacted plans adopted prior to the 1991 redistricting, in which much more traditional districting principles drove Virginia's districting plan. These plans, rather than artificially uniting black population centers in Richmond and Hampton Roads, separated these regions into different districts. Any plan adopted by the Court should similarly treat these regions separately and not attempt to artificially unite them in order to maintain a majority-minority district in CD-3. If, alternatively, the Court attempts to narrowly-tailor CD-3 in order to satisfy strict scrutiny, then this approach would also require major changes to CD-3. The expert analysis submitted in support of the Governor's Plan by Dr. Lisa Handley, along with the Plaintiffs' expert, shows that a BVAP in the low-thirties percent is all that is actually required in CD-3. *See* Dkt. 231 ("Governor's Br.") at 11–12; Governor's Br. Ex. C (the "Handley Report"). Since the General Assembly erroneously believed the required minimum BVAP was over 55%, any movement to narrowly-tailor the district's BVAP number would require dramatic changes to CD-3, and thus the other districts.

The sum total of either remedial path is that Virginia's Congressional district map must be substantially altered to remedy the constitutional violations in CD-3 while maintaining constitutionally-required population equality. There is absolutely no case law holding that constitutional violations may be maintained because remedying them would require departures from legislatively-enacted policies. Indeed, it is decidedly the law that constitutional violations

must be remedied, and racial gerrymanders such as CD-3 often require dramatically different districting maps in order to achieve this result. *See Abrams v. Johnson*, 521 U.S. 74, 79 (1997). The Governor's Plan is just such a remedy, and the Court should adopt it.

II. Many of the Other Parties' Proposals Fail to Provide an Adequate Remedy and Should Be Rejected.

The Governor has reviewed the plans submitted by the other parties in this remedial phase, and sets out below specific responses to some of the plans.[1]

A. The Plans Submitted by the Republican Congressmen Should Be Rejected.

The Republican Congressmen submitted two plans (the "Republican Plans") designed primarily to protect their electoral chances, not to remedy the constitutional violations this Court found in CD-3. Their plans simply water down the racial gerrymander of CD-3 and ignore or misconstrue relevant case law. This Court should reject them.

1. The Republican Plans Fail to Remedy the Constitutional Violations in CD-3.

The Republican Plans fail entirely to remedy the violations found by this Court. First, they argue that this Court has endorsed the maintenance of a majority-minority district in CD-3, *see* Dkt. 232 (the "Republican Congressmen's Br.") at 7; however, this Court has *never* done so, and it has always expressed skepticism that a majority-minority district could be legally justified at all in Virginia. *See Moon v. Meadows*, 952 F. Supp. 1141, 1149 (E.D. Va. 1997); *Page v. Va. State Bd. of Elections*, 3:13-cv-678, slip op. at 42–43 (E.D. Va. June 5, 2015) ("Mem. Op."). Indeed, the Republican Congressmen attempt to maintain the core of CD-3 by putting words in this Court's mouth, implying that the *Moon* Court endorsed the redraw of CD-3 in 1998. *See* Republican Congressmen's Br. at 14 (quoting *Moon* Court as stating that revised CD-3

[1] The Governor reserves comment on plans submitted by Jacob Rapoport, Donald Garrett, the Richmond First Club, and State Senator Chap Petersen.

"conform[ed] to all requirements of law"). The fact is that CD-3 was declared by the *Moon* Court to be an unconstitutional gerrymander in 1997; the General Assembly then reduced the BVAP but maintained a majority-minority district in 1998. The *Moon* Court, however, never reviewed or endorsed this redistricting plan. CD-3 has remained a majority-minority district since that time and has been found, in this case, to remain an unconstitutional racial gerrymander.

Second, the expert analysis of Dr. Lisa Handley, as confirmed by the Plaintiffs' expert, makes it clear that constructing CD-3 as a majority-minority district in CD-3 cannot be constitutional. *See* Handley Report at 11 and 13; Trial Tr. 196:14–197:25 (both showing minimum BVAP required in CD-3 to prevent retrogression in low-thirties). Dr. Handley's analysis confirms substantial white crossover voting throughout CD-3, which indicates both that Section 2 of the Voting Rights Act would not require a majority-minority district under the *Thornburg v. Gingles* test, and that no Section 5 claim of retrogression would be viable so long as CD-3's BVAP remained above the low-thirties. *See also Moon*, 952 F. Supp. at 1149 (rejecting Voting Rights Act justification for racially gerrymandered CD-3 because of crossover white voting and the geographic inefficacy of creating a majority-minority Congressional district).

For these reasons, the Republican Plans are no remedy at all. They assume that a majority-minority district must be maintained in CD-3. Again acting without any analysis to show the need for a majority-minority district (and against the undisputed evidence from Dr. Handley and Plaintiffs' expert Dr. McDonald), the Republican Plans substitute a 50% BVAP floor for the 55% BVAP floor which infected the 2012 Plan's design for CD-3. To do so is to

engage in much the same constitutional violation as this Court set out to remedy, and so this approach fails entirely to remedy the constitutional violations in CD-3.[2]

2. The Republican Plans Ignore or Misconstrue the Relevant Case Law.

The Republican Plans make no secret of the fact that they are designed to protect the Republicans' 8-3 hold over Virginia's Congressional seats—indeed, the Republican Congressmen argue that the Court is required to protect them because it may not depart substantially from the 2012 Plan. Republican Congressmen's Br. at 2. This approach stands the remedial process on its head and either ignores or misconstrues the relevant case law. This Court is required to remedy the constitutional violations in CD-3, and it need not defer to the 2012 Plan because it was fundamentally premised on the racial gerrymander of CD-3.

The Republican Congressmen conceded that "the nature of the violation determines the scope of the remedy"; however, they move quickly past this point in order to focus the Court on maintaining the Republican partisan advantage that flowed from CD-3's racial gerrymandering. *See* Republican Congressmen's Br. at 4 (quoting *Milliken*, 418 U.S. at 738). In CD-3, this Court has found an unconstitutional racial gerrymander in what was the very foundation of the entire redistricting plan adopted by the General Assembly in 2012. Mem. Op. at 1–2. The nature of the violation is that race predominated CD-3's design, so the scope of the remedy must be, as stated above, either to redraw CD-3 without racially predominant considerations *or* to narrowly-tailor CD-3 to meet strict scrutiny.

[2] The plans submitted by Bull Elephant Media LLC suffer from the same fatal flaw. In pursuit of a Republican partisan advantage, they adopt a BVAP floor around the prior Congressional districting plan, assuming this would be somehow necessary but without any factual justification or explanation other than that it was done in the past. *See* Dkt. 222 at 2. For this reason, these plans fail entirely to remedy the constitutional violation in CD-3 and should be rejected.

In tracing the law on redistricting remedies, the Republican Congressmen notably say very little about the most relevant case on point, *Abrams v. Johnson*, in which the Supreme Court specifically addressed the validity of a district court remedy to racial gerrymandering in Georgia's Congressional districts. There, the Supreme Court affirmed the remedial plan, which based its design on decades-old Congressional maps that were adopted prior to the DOJ's focus on majority-minority districts for preclearance, because remedying a racial gerrymander, particularly ones that spanned so many population centers in the state, justified a departure from the legislatively-enacted plans. *Abrams*, 521 U.S. at 86.

The Republican Congressmen point to *Upham v. Seamon* as guidance for this Court's remedial process, arguing that the Supreme Court requires deference to legislatively-enacted plans. *See* Republican Congressmen's Br. at 4–5. They neglect to point out, however, that the Supreme Court has made perfectly clear that "*Upham* deference" "is not owed" "to the extent [a] plan subordinated traditional districting principles to racial considerations." *Abrams*, 521 U.S. at 85. The Republican Congressmen's reliance on *Upham* is therefore totally off-base, as they argue deference to the 2012 Plan is required when the Supreme Court has explicitly held the opposite when, as in this case, the enacted plan is premised on a racial gerrymander.

Similarly misplaced is the Republican Congressmen's reliance on *White v. Weiser*, which they argue signals some requirement that the Court maintain the Republican's 8-3 incumbency advantage in any remedial plan. *See* Republican Congressmen's Br. at 5–6. That case involved a choice between two remedial plans to fix districts that violated the constitutional equal population requirement. *White v. Weiser*, 412 U.S. 783, 793–94 (1973). But that case is easily distinguishable from the present situation before this Court.

First, in *White*, the district court was deciding between two remedial plans that actually remedied the underlying constitutional violation, which was a statistical violation of the one person, one vote requirement. *Id.* *White* therefore stands for the common sense proposition that all remedies being equal, one that adheres more closely to what the legislature has enacted should be preferred over one that substitutes the district court's own policy preferences. *See also Perry v. Perez*, 132 S. Ct. 934, 941 (2012) (invalidating remedy where district court disregarded without justification the policy preferences enacted in the prior districting plan).

What *White* does *not* hold, as the Republican Congressmen suggest, is that a court's remedial plan must maintain the "political impact" of any given enacted plan. The constitutional violation in *White* was of a distinct nature, that of a statistical violation of the one person, one vote principle. The nature of this violation would not ordinarily require a major redraw of the districting map, as it is purely a statistical violation. The case of a racial gerrymander, however, is quite distinct. In *Abrams*, which post-dates *White*, the Supreme Court affirmed a dramatic departure from the legislatively-enacted plans, along with departures from those plans' political impacts, because that was necessitated by the nature of the constitutional violations. 521 U.S. at 85.

For the reasons set forth in the Governor's Brief, a broad remedial scope is required in this case. *See* Governor's Br. at 8–13. The Republican Congressmen ignore and misconstrue the relevant case law to protect their seats. But the Court, in comparing the Republican Plans to the Governor's Plan, is not comparing remedies that adhere closely to the 2012 Plan with a remedy that departs from the 2012 Plan—it is comparing non-remedies to a remedy. In such a situation, the Governor's Plan must be preferred because it is an actual *remedy*. *Id.*

B. The Plaintiffs' Plan Does Not Go Far Enough in Unpacking CD-3.

While the Plaintiffs have proposed a remedial plan that adheres far more to traditional districting principles and results in a more representative map that the Governor would favor, the Plaintiffs concede that their plan maintains a majority-minority district in CD-3 in order to "avoid making radical alterations to the enacted plan." Dkt. 229 ("Pls. Br.") at 4. The Plaintiffs' plan, therefore, incorrectly assumes that a majority-minority district must be maintained in CD-3. *Id.* Should the Court conclude, however, that CD-3 should be maintained as a majority-minority district, the Plaintiffs' plan comes closest to a remedy that uses the criteria adopted by the General Assembly to guide redistricting and achieves a map far more representative of Virginia, and should be preferred over the Republican Plans.

C. The Plan Submitted by the NAACP Remedies the Constitutional Violations in CD-3.

The NAACP has taken a similar remedial approach as the Governor, recognizing that the unnatural unification of the heavily-black populations in the Richmond and Hampton Roads areas in CD-3 is precisely what constitutes the constitutional violation in this case. It appears that the NAACP also based its remedy on the 2011 Locke plan, and the Governor believes the NAACP's plan would remedy the constitutional violations in CD-3.

III. The Governor's Plan Should Receive Special Deference from the Court.

Only one litigant or interested party who has submitted a remedial plan could properly be identified as "the State" in this remedial phase, and that is the Governor. As the Republican Congressmen make clear, courts must defer to the policy judgments and preferences of the elected political branches of the states which enact redistricting plans. *See* Republican Congressmen's Br. at 1–2 (citing *Perry*, 132 S. Ct. at 940; *White*, 412 at 794–95; and *Miller v. Johnson*, 515 U.S. 900 (1995)). Here, however, that does not mean deference to the Republican

Congressmen, none of whom actually represent CD-3 nor have any power to enact redistricting legislation in Virginia, but is meant to refer to the Governor and the General Assembly. Since neither the House of Delegates nor the Senate of Virginia have submitted any remedial plan, the Governor's Plan stands as the closest thing to a legislative remedy that *would have* been enacted as a result of this Court's June 5, 2015 opinion, and so it should receive special deference.

Indeed, the Governor's Plan was based on a plan passed by the Senate of Virginia in the 2011 General Assembly session, but was rejected by the House of Delegates because the legislators erroneously believed that the plan did not have a high enough BVAP to avoid retrogression. *See* Governor's Br. at 13. It now being clear that the Governor's Plan would not result in retrogression, *see id.* at 16–17, the Court should consider this plan as being as close to a legislative remedy as any plan submitted for review. As the only remedy before the Court proposed by an officeholder elected to represent the entire Commonwealth, the Governor's Plan should receive special deference.

CONCLUSION

CD-3 was drawn as a majority-minority district in 1991 by artificially linking communities that had not previously been combined in one district, snarling along the James River and Chesapeake Bay to unify heavily-African American portions of the state. Each time that this Court has reviewed CD-3 as a majority-minority district, it has found that it is an unconstitutional racial gerrymander. Now that the Court has the power to remedy the underlying violations, it must do so fully and completely. The plans submitted by the other parties largely fail to remedy the actual constitutional violation, offering versions of watered-down racial gerrymanders that fundamentally keep CD-3 as a majority-minority district, despite strong and uncontradicted evidence that this is not required under the Voting Rights Act. The Governor's

Plan offers this Court a full and fair remedy endorsed by the only officeholder representing the will of the Commonwealth in this case. It should be adopted by the Court.

October 7, 2015

Respectfully submitted,
GOVERNOR OF VIRGINIA

By: /s/

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of October, 2015, I filed 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 electronic mail a copy of the foregoing to non-parties not registered on the Court's CM/ECF system.

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