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.,** **Defendants.**	**Civil Action No.: 3:13-cv-678**

MEMORANDUM IN SUPPORT OF INTERVENOR-DEFENDANTS' MOTION TO SUSPEND FURTHER PROCEEDINGS AND TO MODIFY INJUNCTION PENDING SUPREME COURT REVIEW

Intervenor-Defendants respectfully move to suspend any further proceedings and to modify the injunction in this case pending Supreme Court review of the Court's liability decision. On November 13, 2015, the Supreme Court noted probable jurisdiction in Intervenor-Defendants' appeal, concluding that the Court's liability judgment raises "substantial questions" warranting the Supreme Court's "plenary review." *Sanks v. Georgia*, 401 U.S. 144, 145 (1971); *see* 11/13/15 S. Ct. Order in *Wittman v. Personhuballah*, No. 14-1504 (Mot. Ex. A).

Consequently, no remedy can plausibly be entered by this Court in time to affect the 2016 elections. The only *timely* remedy would have to be entered *before* the Supreme Court has resolved liability. If the Court were to take this wholly unprecedented step, it would create the clear potential for massive voter confusion and extraordinary burdens for the Commonwealth and candidates, by requiring voters, candidates and election officials to *return to* the Legislature's 2012 districting lines in the Enacted Plan (if liability is reversed) after proceeding

far down the electoral path under the new remedial lines. Conversely, pursuing the sensible course of awaiting the Supreme Court's liability decision will preclude entering a remedy for the 2016 elections. Thus, even if the Supreme Court affirms liability, any remedy will necessarily be put in place only for the 2018 elections.

That being so, the only sensible and prudent course is to suspend any remedial efforts pending the Supreme Court's decision. For similar reasons, the Supreme Court has routinely granted stays precluding any three-judge court remedies during the pendency of Supreme Court appellate review and, indeed, so far as we can discern, no three-judge court has ever entered a remedy during the pendency of such review. In fact, the Supreme Court has even stayed a three-judge court's remedial plan entered *before* the Supreme Court noted probable jurisdiction, even though that stay meant that the election would be held under the enacted plan that the three-judge court had invalidated. *See Whitcomb v. Chavis*, 396 U.S. 1064 (1970) (Mem.).

As this Court previously concluded, it would be "wasteful of the resources of the parties and the Court" to proceed any further in this case "before the parties and [the Court] know the views and instructions of the Supreme Court." 2/23/15 Mem. Op. 4 (DE 137). Indeed, a reversal of the liability judgment by the Supreme Court would invalidate any remedial plan adopted by this Court and reinstate the Legislature's Enacted Plan. Thus, it simply makes no sense to force the taxpayers of Virginia to continue paying the special master—and to require the Court to expend its limited judicial resources and the parties to incur the expense of further litigation—to create a judicial remedy now. Instead, "the interest[s] of all," including "the interest of the public, the interest of judicial efficiency, and the interest in the orderly administration of justice," "make it appropriate that the Court respond to this uncertainty" by suspending proceedings and modifying the injunction pending Supreme Court review. *Id.* 5. But even if this Court decides to

complete its review of the special master's plan and endorse a remedy, that remedy should not be *entered* for the 2016 elections.

This is because the timing of the Supreme Court's decision to exercise plenary review has made it impossible to enter any judicial remedy in time for the 2016 elections. Plaintiffs and Defendants have repeatedly advised the Court that it is "necessary" to have a remedial plan in place by January 1, 2016, in order to implement it for the 2016 elections. But even if no party obtains an extension, briefing in the Supreme Court alone will not be completed until February 26, 2016 at the earliest—and oral argument and a decision by the Supreme Court will take place even later. Thus, "the views and instructions of the Supreme Court" will not be available in time to inform a remedy for the 2016 elections, *id.* 4, and the Court should suspend proceedings and modify its injunction for this reason alone.

Moreover, entering a remedy while the Supreme Court's review of liability remains pending would create a substantial and unnecessary risk of electoral chaos, mass confusion, and enormous expense for the Commonwealth, its voters, and its candidates. Given the timeline of the Supreme Court's review, any reversal of the Court's liability judgment, and the resulting reinstatement of the Enacted Plan, would occur many months after the January 1 commencement of the 2016 election calendar and almost certainly after the April 30 deadline for mailing out absentee ballots for the June 14 primary elections. Needless to say, such a mid-calendar reversion to the Enacted Plan would impose massive administrative complexity and expense on the Commonwealth and its taxpayers, which would be required to manage and fund new rounds of candidate signature collection and qualification—and possibly even a *second* round of congressional primary elections.

Voters, moreover, would invariably be confused by the changing composition of their districts and the changing slate of candidates vying for their votes. Such changes might well occur *after* primary elections in the remedial districts and therefore require voters to vote in a *second* congressional primary election in a different Enacted District with different candidates. Any of this avoidable confusion and havoc would lead to decreased participation in voting and in constitutionally protected political activities, as well as diminished confidence in the legitimacy of the election.

Finally, candidates at a minimum would have collected signatures—and likely qualified for the ballot or even prevailed in primary elections—in one district under a remedial plan, only to find themselves moved, in the middle of the election calendar, into a different district with different voters under the restored Enacted Plan. Any such candidates will presumably have to collect new signatures, requalify for the ballot, or run in a second primary election—if they can comply with Virginia's candidate qualification requirements in their new districts at all.

Thus, the only fair and equitable course is for the Court to suspend further proceedings in this case pending Supreme Court review or, at a minimum, modify its injunction to allow the 2016 elections to proceed under the Enacted Plan.[1]

BACKGROUND

This Court issued its first split decision on the liability phase in this case on October 7, 2014 and set an April 1, 2015 deadline for the General Assembly to adopt a remedial

[1] In fact, it is at best unclear whether this Court has jurisdiction to enter a remedy now that the Supreme Court has exercised plenary appellate jurisdiction in this case. *See, e.g.*, *Donovan v. Richland County Ass'n*, 454 U.S. 389, 390 n.2 (1982) ("The filing of the notice of appeal" to the Supreme Court in a direct appeal case "clearly divested the Court of Appeals of any jurisdiction that it otherwise had to decide the merits of this case."). The Court need not reach this issue because suspension of proceedings and modification of the injunction are warranted in all events.

redistricting plan. Intervenor-Defendants filed a notice of direct appeal to the Supreme Court on October 30, 2014, *see* Notice Of Appeal (DE 115), 37 days before the deadline for filing such a notice, *see* 28 U.S.C. § 2101(b). Intervenor-Defendants filed their jurisdictional statement in the Supreme Court the next day, only 24 days after the majority's decision and 96 days before the deadline for filing that statement. *See id.*; Sup. Ct. R. 18(3). Intervenor-Defendants asked the Supreme Court to "resol[ve] this case during this Term." Juris. Statement 39, *Cantor v. Personhuballah*, No. 14-518 (U.S. filed Oct. 31, 2014).

During the pendency of that appeal, it became clear that the Supreme Court was holding this case pending its decision in another redistricting case raising a *Shaw* claim, *Alabama Black Caucus v. Alabama*. *See* 2/23/15 Mem. Op. 3. The Court therefore postponed the deadline for the General Assembly to adopt a legislative remedy to September 1, 2015. *See id.* 3-6.

On March 30, 2015, the Supreme Court vacated this Court's first liability decision and remanded the case for further consideration in light of *Alabama*. After a round of briefing, the Court issued its second split decision on liability on June 5, 2015, but maintained the September 1, 2015 deadline for remedial action by the General Assembly. *See* 6/5/15 Mem. Op. (DE 170). The Court further enjoined the Commonwealth "from conducting any elections for the office of United States Representative until a new redistricting plan is adopted." 6/5/15 Order (DE 171).

Intervenor-Defendants filed a notice of appeal on June 18, 2015, only 13 days later and 47 days before the deadline for filing such a notice. *See* 28 U.S.C. § 2101(b). Intervenor-Defendants filed their jurisdictional statement in the Supreme Court 4 days later, 103 days before the deadline for filing that statement. *See id.*; Sup. Ct. R. 18(3). Plaintiffs and Defendants filed their responsive briefs on July 22, 2015, and Intervenor-Defendants filed their reply on August 4, 2015. *See* Docket, *Wittman v. Personhuballah*, No. 14-1504 (S. Ct.), *available at* http://www.

supremecourt.gov/search.aspx?filename=/docketfiles/14-1504.htm. Supplemental briefing on Intervenor-Defendants' standing to appeal was completed on October 20, 2015. *See id.*

On July 16, 2015, Governor Terry McAuliffe called the General Assembly into a special session to commence on August 17, 2015, in order to consider a legislative remedy for the Republican-authored Enacted District 3 invalidated by this Court. The General Assembly's special session lasted a matter of hours before the Senate Democrats, joined by a single Republican senator, adjourned sine die. *See* "In Surprise Move, Senate Democrats Adjourn Special Session," Richmond Times-Dispatch (Aug. 17, 2015), *available at* http://www.richmond.com/news/virginia/government-politics/article_7b98d105-4949-502d-ba7a-435380baee58.html.

The Court thereafter appointed Dr. Bernard Grofman as special master to assist in drawing any judicial remedial plan. *See* 9/25/15 Order (DE 241). Dr. Grofman's final report is due on November 16, the parties' briefs regarding that report are due on November 24 and December 1, and a hearing on Dr. Grofman's final report is currently scheduled for December 14. *See* 10/22/15 Order (DE 263). Dr. Grofman's fees and expenses, as well as the fees for any assistants he might reasonably employ, are to be paid by the Commonwealth of Virginia. *See id.*

Plaintiffs and Defendants thereafter advised the Court that it was "highly unlikely" that the Supreme Court would note probable jurisdiction in this case. *See* 9/2/15 Tr. (DE 208). Nonetheless, the Supreme Court did so on November 13, 2015. *See* S. Ct. Order. Absent an extension, Intervenor-Defendants' opening brief on the merits is due in the Supreme Court on December 28, 2015. *See* S. Ct. R. 25.1. Response briefs on the merits are due on January 27, 2016, *see* S. Ct. R. 25.2, and Intervenor-Defendants' reply brief is due on February 26, 2016, *see* S. Ct. R. 25.3. The Supreme Court would not hold oral argument until at least 7 days after filing

the reply brief, *see id.*, or no earlier than late February or early March, *see* Supreme Court Calendar, *available at* http://www.supremecourt.gov/oral_arguments/2015TermCourtCalendar.pdf. In fact, given that the Supreme Court already has scheduled some oral arguments for this Term, oral argument for this case most likely would occur in late February or early March 2016. *See id.* A decision from the Supreme Court would follow the oral argument and would be expected to issue no earlier than April 2016.

Plaintiffs and Defendants have correctly noted that it is "necessary" for any judicial remedy in this case to be in place by January 1, 2016, in order to be implemented for the 2016 elections. *See* 9/2/15 Tr.; Defs.' Reply Br. Regarding *Alabama* 10-11 (DE 153). Virginia's candidate signature collection period for the congressional primary elections opens on January 2, 2016. *See* Va. Code Ann. § 24.2-521. The statutory candidate qualifying period for the primary elections runs from March 14, 2016 to March 31, 2016. *See id.* § 24.2-522. The federal Military and Overseas Voter Empowerment ("MOVE") Act requires Virginia election officials to mail absentee ballots to deployed military personnel and other overseas voters no later than April 30—and additional lead time is needed to allow for legal challenges, ballot printing, and other election administration tasks. 42 U.S.C. § 1973ff. Virginia's congressional primary elections are set by statute for Tuesday, June 14, 2016. *See* Va. Stat. § 24.2-515.

ARGUMENT

I. THE COURT SHOULD SUSPEND PROCEEDINGS AND MODIFY ITS INJUNCTION PENDING SUPREME COURT REVIEW

A. The Court Previously Exercised Its Inherent Power To Modify Its Injunction Pending Supreme Court Review

This Court possesses "inherent power" to "control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Stone v. INS*, 514 U.S. 386, 411 (1995). This Court also wields broad "inherent power" to "modify or vacate

[its] decrees 'as events may shape the need.'" *Hudson v. Pittsylvania Cnty.*, No. 13-2160, slip op. at 6 (4th Cir. Dec. 16, 2014) (Duncan, J.) (quoting *Holiday Inns, Inc. v. Holiday Inn*, 645 F.2d 239, 244 (4th Cir. 1981)); *see also United States v. Swift & Co.*, 286 U.S. 106, 114 (1932). Federal courts routinely have exercised this authority to avoid adopting a judicial remedy or ordering a legislative remedy in a redistricting case during the pendency of a direct appeal to the Supreme Court. *See, e.g.*, *White v. Weiser*, 412 U.S. 783, 789 (1973); *Kirkpatrick v. Preisler*, 390 U.S. 939 (1968) (Mem.); *Whitcomb*, 396 U.S. 1064. In fact, the Supreme Court has routinely entered stays requiring holding elections under the plan invalidated by the three-judge court where that invalidation remained subject to appellate review. *See, e.g.*, *White*, 412 U.S. at 789 (granting stay pending appeal that resulted in state conducting election under a plan found unconstitutional); *Kirkpatrick*, 390 U.S. 939 (Mem.) (same); *Whitcomb*, 396 U.S. 1064 (Mem.) (same); *see also Upham v. Seamon*, 456 U.S. 37 (1982); *Kilgarin v. Hill*, 386 U.S. 120 (1967).

The Supreme Court's decision in *Whitcomb v. Chavis* is instructive. The three-judge court in that case invalidated an Indiana apportionment statute and gave the State until October 1, 1969 to enact a legislative remedy. *See* 396 U.S. at 1064 (Black, J., dissenting). The State did not adopt a legislative remedy by that date, and the three-judge court entered a judicial remedy on December 15, 1969. *See id.* The Supreme Court thereafter noted probable jurisdiction and granted a stay of the three-judge court's remedial order, even though the stay "forced" the plaintiffs "to go through" the 1970 election cycle under the enacted plan that had been "held unconstitutional by the District Court." *Id.* at 1064-65. The Supreme Court deemed that outcome preferable to conducting the 1970 election "under the reapportionment plan of the District Court" where the Supreme Court's review of liability remained pending. *Id.* at 1064. The Supreme Court even denied the plaintiffs' later motion to modify or vacate the stay to

require the 1970 election to be conducted under the judicial remedy. *See id.*

This Court previously exercised its inherent authority "to modify the injunction" and to extend the deadline for the General Assembly to adopt a legislative remedy to "September 1, 2015." 2/23/15 Mem. Op. 5. At that time, the Supreme Court had not noted probable jurisdiction in the case, but instead was merely holding the case pending its disposition of *Alabama*. *See id.* 2-3. Nonetheless, this Court concluded that under the "changed and somewhat unusual circumstances," it would be "wasteful for the General Assembly to devise a redistricting plan without the views and instructions of the Supreme Court." *Id.* 4. The Court also recognized that it might be called upon to review a legislative remedy or to craft a judicial remedy—and that either possibility warranted modifying the injunction. *See id.* "To proceed with review before the parties and we know the views and instructions of the Supreme Court would be wasteful of the resources of the parties and the Court." *Id.*

Thus, while the Court "agree[d] that the public interest is best served by a prompt resolution, we think that the interest of all is served by allowing the parties and the Court to proceed with the benefit of the views and instructions of the Supreme Court." *Id.* 5. The Court determined that "the interest of the parties, the interest of the public, the interest of judicial efficiency, and the interest in the orderly administration of justice make it appropriate that the Court respond to this uncertainty of circumstance by granting the motion to modify the injunction." *Id.*

B. The Court Should Avoid The Enormous Risk Of Electoral Chaos By Again Exercising Its Inherent Authority To Suspend Proceedings And To Modify The Injunction

This Court should again exercise its inherent authority, suspend any further proceedings, and modify its injunction for at least four reasons.

First, by noting probable jurisdiction, the Supreme Court concluded that the Court's liability judgment raises "substantial questions" warranting "plenary review." *Sanks*, 401 U.S. at 145. But even assuming a Supreme Court affirmance is still likely or plausible, the dispositive point is that there is no final determination of liability in this case and, therefore, no basis for the Court to enter a judicial remedy. *See, e.g.*, *White*, 412 U.S. at 789; *Kirkpatrick*, 390 U.S. 939 (Mem.); *Whitcomb*, 396 U.S. 1064 (Mem.).

Second, suspending further proceedings and modifying the injunction will provide the Court, the parties, and the Special Master with the benefit of "the views and instructions of the Supreme Court." 2/23/15 Mem. Op. 4. Any decision from the Supreme Court on the merits will elucidate whether a *Shaw* violation occurred in this case, whether a remedy should even be entered, and the scope of any remedy. It is simply "wasteful of the resources of the parties and the Court" to proceed with a remedy without these forthcoming "views and instructions." *Id.*

Third, entering a remedy *before* liability is established runs the serious risk of throwing Virginia's electoral apparatus into chaos, requiring wasteful administrative efforts, and needlessly creating voter confusion. If a remedy begins to be implemented, all administrative efforts to do so will be wasted, Virginia taxpayers' dollars will be unduly expended on the special master, and voters will be needlessly confused, if the remedial plan never takes effect because this Court's liability determination is reversed. This harm is particularly exacerbated here because this *mid-decade* alteration of lines will place some voters in different districts than they have resided in for two elections already. *See, e.g.*, *LULAC v. Perry*, 548 U.S. 399, 448 (2006) (Stevens, J., joined by Breyer, J., concurring in part and dissenting in part) ("interests in orderly campaigning and voting, as well as in maintaining communication between representatives and their constituents" weigh heavily against mid-decade redistricting); *see also*

10/7/14 Maj. Op. 44–48 (declining to require remedial plan before 2014 election because "[d]elaying the elections or attempting to configure an interim districting plan would unduly disturb Virginia's election process" and "cause significant and undue confusion").

This risk is even more acute now than it was when the Court first modified its injunction in February of this year. *See* 2/23/15 Mem. Op. At that time, it remained conceivable that the Supreme Court could resolve the merits of the first appeal of the Court's liability judgment in time for the 2016 elections. *See id.* 1-5. As described more fully below, that possibility is nonexistent now. Even assuming that no party receives an extension, briefing alone will not be completed until February 26, 2016 and oral argument and a decision from the Supreme Court most likely will extend into at least the spring of 2016. *See supra* pp. 6-7.

Implementing a judicial remedy now would invite havoc in the 2016 elections if the remedy is subsequently invalidated in the middle of the election calendar. By invalidating any judicial remedy and reinstating the Enacted Plan, a reversal of the liability judgment would shift at least some voters and candidates out of the remedial districts and back into different Enacted Districts. This shift would interject massive administrative burden and expense, widespread confusion, and uncertainty—and it could even invalidate candidate qualifications or primary elections conducted under the remedial plan.

For example, the Supreme Court's decision necessarily will come after the January 2, 2016 commencement of the candidate signature collection period. *See* Va. Stat. § 24.2-521. But if a remedy is implemented and later invalidated, voters and candidates may find themselves in new districts. Candidates thus may discover that some or all of the signatures they have collected are invalid because the signing voters now live in different districts than the one in which the candidate seeks election. *See id.* Candidates therefore would need to collect

replacement signatures to comply with statutory requirements—or might find themselves disqualified from the primary elections entirely. *See id.*

Also, the Supreme Court's decision will certainly come after the March 31 candidate qualifying deadline, *see id.* § 24.2-522, when an invalidation of a judicial remedy would have even more far-reaching consequences. Candidates who qualified to seek election in a remedial district might find themselves unqualified to seek election in the Enacted District. Voters might become confused if candidates they have supported no longer are seeking election in their districts or satisfy the qualifications to do so. And chaos would reign if *no* candidates who qualified to seek election in the remedial district turned out to be qualified to seek election in the Enacted District.

At the very earliest, the Supreme Court could issue its decision shortly before or on April 30, which is the deadline for Virginia election officials to mail absentee ballots to deployed military personnel and other overseas voters. 42 U.S.C. § 1973ff. If that decision reverses liability, Virginia will have incurred the substantial expense of preparing, printing, and vetting its absentee ballots for the now-moot remedial districts, and will not have time to re-send the correct absentee ballots for the now-restored 2012 districts. Virginia thus would be forced to face federal litigation, dispose of its absentee ballots, and prepare, print, and vet entirely new absentee ballots.

Even worse, any decision reversing liability in the late April-early May (or later) time-frame will create massive voter confusion and enormous burdens on candidates and election officials preparing for the June 14, 2016 primaries. *See* Va. Stat. § 24.2-515. Virginia would be required to incur the enormous expense of redoing new signature collection and candidate qualifying periods, absentee ballots, and election administration to reflect the Enacted Plan's

districts. Candidates would be required to collect signatures and qualify for election in different districts with different voters. And voters undoubtedly would be confused about being shifted to different districts and different candidates.

Needless to say, all this confusion and extra expense would be greatly exacerbated if the June 14th primary were postponed. This is particularly true since the latest a primary can be held under the federal MOVE Act is around August 23, 2016, a date that will inexorably depress voter turnout, since many Virginians are out-of-state or on summer vacation during the period.[2] Even more obviously, any effort to have a *second* congressional primary after the June 14th election is a prescription for disaster, as it would greatly exacerbate the confusion and expense described above, as well as spur litigation in all congressional districts over the propriety and (potentially divergent) results of a second primary.

For all these reasons, entering a remedy *prior* to knowing the Supreme Court's liability decision is plainly inappropriate and not feasible. For these same reasons, entering a remedy *after* the Supreme Court *affirms* liability could not be done in time to alter the districts for the 2016 elections. Even if entered immediately after the Supreme Court affirms liability in late April or (far more likely) late May, there simply will be no time to *switch* to the new districts; with the attendant requirements for signature gathering, candidate qualifying, and election administration described above. That is why Plaintiffs and Defendants have repeatedly

[2] The MOVE Act requires Virginia election officials to mail absentee ballots to deployed military personnel and other overseas voters no later than 45 days before the November 8, 2016 election, or September 24, 2016. 42 U.S.C. § 1973ff Because additional lead time is needed to allow for legal challenges, ballot printing, and other election administration tasks, courts in MOVE Act cases ordinarily order jurisdictions to hold their primary elections 30 days or more before the MOVE Act deadline. *See, e.g.*, Mem. Decision & Order at 8, *U.S. v. State of New York*, No. 1:10-cv-1214 (Jan. 27, 2012) (ordering State of New York to hold primary elections no later than "35 days prior to" MOVE Act deadline). August 23, 2016 is 32 days before the MOVE ACT deadline and falls on a Tuesday, Virginia's preferred weekday for congressional primary elections. *See* Va. Stat. § 24.2-515.

acknowledged that it is "necessary" for a judicial remedy to be in place by January 1, 2016, in order to be implemented for the 2016 elections. *See* 9/2/15 Tr.; Defs. Reply Br. Regarding *Alabama* 10-11.

Since no post-liability decision remedy can be entered until the 2018 elections anyway, and since there is more than ample time to enter such a 2018 remedy after the Supreme Court's liability decision, it is pointless, counter-productive and an inherent waste of resources to rush to a remedy now, rather than entering a remedy (if necessary) after the Supreme Court's opinion. At an absolute minimum, the Court should suspend any remedies unless and until it has determined if and precisely how it can accomplish the seemingly impossible task of entering a 2016 remedy that does not seriously burden election officials, candidates and voters.

Finally, against all this, suspending further proceedings and modifying the injunction would not unduly prejudice any party. The only conceivable prejudice is that voters and candidates would participate in elections in the Enacted District 3 that this Court has held is flawed in a non-final judgment now under the Supreme Court's plenary review. But as *Whitcomb* confirms, *see* 396 U.S. 1064, any such prejudice is outweighed by the enormous prejudice and waste of resources that would result if the Court proceeds to a remedy now in "these changed and somewhat unusual circumstances," 2/23/15 Mem. Op. 4. Indeed, while the public interest may normally be "best served by a prompt resolution[,] the interest of all"—including "the interest of the parties, the interest of the public, the interest of judicial efficiency, and the interest in the orderly administration of justice"—is "served by allowing the parties and the Court to proceed with the benefit of the views and instruction of the Supreme Court." *Id.* 5. The Court should suspend further proceedings pending Supreme Court review and modify the injunction to allow the 2016 elections to proceed under the Enacted Plan.

II. IN THE ALTERNATIVE, THE COURT SHOULD STAY FURTHER PROCEEDINGS AND ITS INJUNCTION

Even if the Court lacked inherent authority to manage its docket and to modify its injunction, it still should grant the Motion. To obtain a stay pending Supreme Court review, an applicant must show "a fair prospect that a majority of the Court will vote to reverse the judgment below"; "a likelihood that irreparable harm will result from denial of the stay"; and that the "equities" and "weigh[ing] [of] the relative harms" favor a stay. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Each of these factors weighs heavily in favor of a stay.

At the threshold, it is certain that a stay is warranted in these circumstances because the Supreme Court has routinely and uniformly granted stays to preserve elections under a plan invalidated by a three-judge court during the pendency of Supreme Court appellate review. *See supra* Part I. Indeed, it appears that no judicial remedy has *ever* been entered where, as here, the Supreme Court is actively considering liability. In fact, as explained, *Whitcomb* demonstrates that any judicial remedy should be stayed pending the Supreme Court's review of liability, even if such a stay results in conducting an election under an enacted plan that a three-judge court has invalidated. *See Whitcomb*, 396 U.S. at 1064-65 (Black, J., dissenting).

An independent examination of the individual factors further confirms the need for a stay here. *First*, as explained, the "equities" and weighing of the "relative harms" alone warrants suspending further proceedings and modifying the injunction. *Hollingsworth*, 558 U.S. at 190; *see supra* Part I.

Second, enormous and irreparable harm is likely to "result from denial of the stay." *Hollingsworth*, 558 U.S. at 190. As established above, any judicial remedy informed by the "views and instructions of the Supreme Court," 2/23/15 Mem. Op. 4, is impossible for the 2016 elections. Moreover, the Commonwealth, its voters, and its candidates will be seriously harmed

if the Court proceeds with a judicial remedy that is invalidated by the Supreme Court in the middle of the election calendar. *See supra* Part I. For their part, Intervenor-Defendants may find themselves seeking to qualify or to stand for primary elections in new or substantially altered districts—and any time and expense devoted to such efforts will be irretrievably lost if the Supreme Court invalidates the remedial plan. In addition, any victory by an Intervenor-Defendant in a primary election held under the remedial plan would be lost if the Supreme Court subsequently reversed the liability judgment, while any loss in a primary election under the remedial plan could result in a loss of a congressional seat.

At an absolute minimum, switching from a remedial plan back to the Enacted Plan in the middle of the 2016 election calendar would "cast[] a cloud upon . . . the legitimacy of [the] election," to the irreparable detriment of the Commonwealth, its voters, and its candidates. *Bush v. Gore*, 531 U.S. 1046, 1047 (2000) (Scalia, J., concurring) (concurring in grant of stay pending Supreme Court review). Indeed, implementing a remedial plan to conduct part of an election cycle only to start all over again under the Enacted Plan upheld on the Supreme Court's plenary review "is not a recipe for producing election results that have the public acceptance democratic stability requires." *Id.*

Third, there is "a fair prospect that a majority of the Court will vote to reverse the judgment below," *Hollingsworth*, 558 U.S. at 190, and there is even a "likel[ihood]" of Intervenor-Defendants' success on the merits, *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (vacating lower court's denial of a motion to stay). The Supreme Court's note of probable jurisdiction confirms that the Court's split decision raises "substantial questions" warranting plenary appellate review. *Sanks*, 401 U.S. at 145. Indeed, the Supreme Court could have summarily affirmed the Court's judgment if it were so inclined—so its decision not to do so at a

minimum establishes a "prospect" of reversal. *Hollingsworth*, 558 U.S. at 190. Moreover, as Intervenor-Defendants already have explained, the split decision in this case runs counter to Supreme Court precedent because the Court failed to apply *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015) and *Easley v. Cromartie*, 532 U.S. 234 (2001); found a *Shaw* violation without requiring Plaintiffs to show that race rather than politics predominated in the changes to Enacted District 3; and misapplied the narrow tailoring requirement. *See* Juris. Stat., *Wittman v. Personhuballah*, No. 14-1504 (S. Ct.) (available at DE 182-1).

The Court's earlier split denial of a stay sought by the General Assembly to allow postponement of any special session until after the November 2015 elections, *see* 8/5/15 Order (DE 201), does not affect, much less alter, this result. At that time, the Supreme Court had not yet noted probable jurisdiction or signaled that the Court's liability judgment raises "substantial questions" warranting plenary appellate review. *Sanks*, 401 U.S. at 145. Thus, the General Assembly's motion did not present the "changed and somewhat unusual circumstances" of the exercise of the Supreme Court's jurisdiction, 2/23/15 Mem. Op. 4, or the showing of "a fair prospect" of reversal, *Hollingsworth*, 558 U.S. at 190, that are present here. Moreover, at the time of the Court's denial, Governor McAuliffe already had called the General Assembly into special session starting on August 17, 2015. The General Assembly therefore was obligated to convene the special session *regardless* of the Court's liability judgment and, thus, faced no "irreparable injury" *from* that judgment. 8/5/15 Order. Finally, as explained, the formal standard for a stay is not even applicable here, where "the interest of all is served by allowing the parties and the Court to proceed with the benefit of the views and instruction of the Supreme Court" forthcoming in Intervenor-Defendants' appeal. 2/23/15 Mem. Op. 4.

CONCLUSION

The Court should suspend further proceedings in this case pending Supreme Court review and modify its injunction to allow Virginia to conduct the 2016 congressional elections under the Enacted Plan.

Dated: November 16, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 16, 2015, a copy of the foregoing 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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