

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

GLORIA PERSONHUBALLAH)	
Plaintiff,)	
)	
v.)	Case No. 3:13-cv-678
)	
JAMES B. ALCORN, et al.)	
Defendants.)	

**MEMORANDUM IN RESPONSE TO THE REPORT OF THE SPECIAL MASTER,
PROFESSOR GROFMAN ON BEHALF OF BULL ELEPHANT MEDIA LLC**

Bull Elephant Media LLC [“TBE”] hereby submits the following Memorandum in response to the Report of the Special Master [“Grofman Report”] and the two attached remedial plans [“Grofman Plans”]. TBE submitted two plans [“TBE Plan A”] and remedial Plan B [“TBE Plan B”] [collectively the “TBE Plans”].

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I. TBE PLANS ARE WORTHY OF CONSIDERATION

The TBE Plans should have been considered by the Special Master. According to a single line in a footnote on Page 7 of the Grofman Report the TBE Plans were wholly disregarded because a shapefile was not submitted with the TBE Plans. As such, the TBE Plans have not even been scrutinized by the Special Master and warrant further consideration by the Court. The TBE Plans were prepared in response to this Court's September 3 Order. Counsel for TBE called the Court on September 17, 2015 to enquire as to the method of submission of briefs and plans for third parties. No Court order had been entered specifying the method of filing. Counsel was told that electronic data for maps needed to be submitted physically to chambers on September 18, 2015. TBE prepared its plans for submission via overnight delivery to meet the requirements of the Court. On September 17, 2015 Sen. Chap Peterson and Richmond First submitted plans. TBE submitted its Plans in accordance with instructions from chambers. After submission, TBE found that a Court Order had been entered that day (the day before submissions were due) requiring submissions in a format unavailable to TBE (shapefiles) given the method of creation of TBE's maps. TBE's submissions include GEOID numbers. These are census designated identifiers that can reference specific block data, precinct data, or county/city data. TBE submitted plans designating each precinct in Virginia as belonging to a specific Congressional District. These GEOID numbers are readily recognizable to any technologically skilled redistricting expert such as Professor Grofman. Prof. Grofman considered both the Richmond First and Peterson plans despite those parties not submitting shapefiles (the Va. Division of Legislative Services possessed shapefiles for those two plans). The TBE Plans, were the only plans submitted with contiguous districts that attempted to maintain substantial aspects of the 2012

Plan. As the TBE Plans were ignored by the Special Master, TBE asks the Court to consider these plans in a final determination.

II. THE GROFMAN REPORT PLANS ARE SUBSTANTIALLY DEFICIENT WHEN CONSIDERING PROPER REDISTRICTING CRITERIA

The Grofman Report has two plans attached that are seriously deficient in two manners. Neither plan appropriately remedies the constitutional violation, and neither plan attempts to preserve the 2012 Plan. For these reasons the two Grofman Plans are less preferred than the TBE Plans.

A. REMEDIATION OF THE CONSTITUTIONAL VIOLATION

The Court determined on June 5, 2015 that race was the predominant factor in drawing the 2012 redistricting plan. Doc. 170 p. 50. As this is a violation of the equal protection clause of the 14th Amendment to the US Constitution, the remedy should be targeted at reducing or eliminating race as a consideration under the remedial plan. The parties are faced with the twin challenge of attempting to avoid the packing or dilution of Black Voting Age Population (“BVAP”) under a remedial plan. As the constitutional infirmity of the 2012 Plan was the use of race as a predominant factor, race should not be the predominant factor in any remedial plan. *The options here are to either make race a minor factor, or eliminate it altogether as a factor.* If race is considered as an even more important factor in the drawing of a remedial plan it cuts against the clear directive of this Court.

Instead of reducing the role of race in drawing up both plans, the Grofman Report repeatedly acknowledges that race was of utmost importance in drawing the two Grofman Plans. Of the 66 pages of the Grofman Report 32 of the pages were substantially devoted to how and why race was taken into consideration as either the predominant factor, or the only factor, in

drawing the Grofman Plans. (pp. 12-15, 29-41, 47-50, 54-58, 61-66). Prof. Grofman acknowledges:

The current configurations of CD3 and CD4 reflect a combination of packing of minority voting strength in central and southeastern Virginia, in CD3, and fragmentation of minority voting strength in central and southeastern Virginia, in CD4, that can and should be remedied. Packing and cracking, i.e., fragmentation, are two sides of the same coin. Once I drew CD3 to address the constitutional violations in the present CD3 and located it in the Newport News-Hampton-Portsmouth-Norfolk area, I found that the geography and demography of the remaining portions of central and southeastern Virginia were such that the fragmentation of minority voting strength in the southeastern and central part of the state existing in the current CD4 was remedied simply by including whole in the reconfigured CD4 the cities of Richmond and Petersburg that previously had been contained in whole or in part in current CD3, and then naturally extending CD4 south and east for population purposes until it reached the border of the newly reconfigured CD3. Grofman Report pp. 65-66.

Prof. Grofman admits that part of his goal is to remedy a constitutional violation he perceives in the 4th Congressional District. The 2012 plan was struck down because race was determined to be the primary factor in redistricting. Instead of making race one of a number of factors, the Grofman plans bring race to the forefront in trying to create two districts with specific racial composition in order to obtain a specific electoral outcome based on race

B. COMPACTNESS

There are various compactness scores utilized. All of these scores have shortcomings and benefits. At the outset, *each of these scores would unnecessarily penalize any plan that attempted to preserve the 2012 Plan to some extent.* These scores often do not take into consideration natural geographic and artificial political boundaries. For example:

Under the Polsby-Popper method the score for a long skinny district that follows geographic or political boundaries will necessarily be far worse than the score for a largely solid district with a clearly gerrymandered promontory. The focus on the perimeter of a district deemphasizes otherwise solid logically shaped districts.

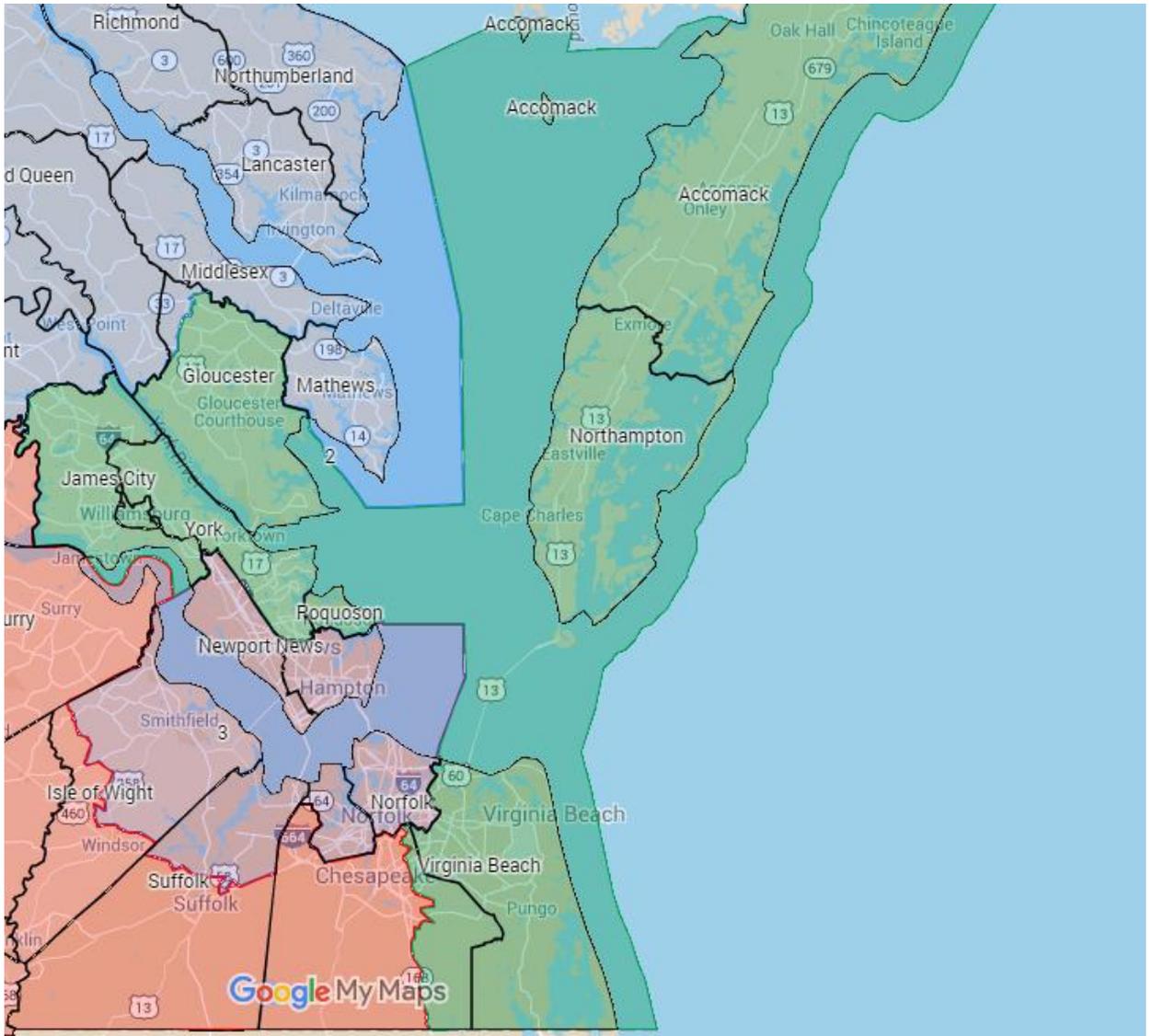
Under the Reock method a long skinny district that follows geographic or political boundaries would score far worse than a district with numerous and clearly gerrymandered, but short promontories. Further, the Reock score provides a clear preference for communities separated by water as the water is essentially subtracted from the equation as each separate community is measured and then totaled.

The Convex Hull method provides a clear preference for communities separated by water as the water is essentially subtracted from the equation as each separate community is measured and then totaled. Still, this is likely the most effective measurement to avoid gerrymandering if gerrymandering is described as the attempt to pick and choose communities for inclusion or exclusion from a district for political purposes.

By wholesale abandonment of the 3rd Congressional District as it existed under the 2012 Plan the Grofman Plans will show substantially better compactness scores. Nonetheless, the 4th and 2nd Congressional Districts are less compact than they need to be in order to remedy the violation in the 3rd Congressional District.

C. CONTIGUITY

Contiguity and equalization are generally the easiest criteria to meet. One of the Grofman Plans, the wholly new plan, contains contiguous districts. The Modified NAACP plan does not. Specifically the 2nd Congressional district is separated by the Chesapeake Bay as seen here:



There is no reason to break the contiguity of the 2nd District in this manner.

D. EQUALIZATION

The Grofman Plans provide adequate equalization.

E. UTILIZATION OF THE 2012 PLAN

The Grofman Report spends a few pages analyzing the concept of “least change,” but then abandons the concept in favor of substantial change to the 3rd Congressional District and the surrounding districts. Grofman Report pp. 19-25. Prof Grofman identifies five potential

definitions for “least change” and adheres to some and abandons others. Those that Professor Grofman adhered to: (1) Only the constitutionally infirm and surrounding districts should be affected, (2) Incumbent residences should be preserved within each respective district if possible, and (3) Spillover effects have to be remedied. What is more telling are the two definitions of least change disregarded in the Grofman Report, (1) A legislative preference for an 8/3 partisan split, and (2) Least change to the constitutionally infirm district. The first item disregarded is a straw man. Although the Defendant-Intervenors identified the 8/3 partisan split as a legislative preference, the reason behind the legislative preference is irrelevant. What is relevant is that the legislature made a preference. It is the only preference known to the Court and the 2012 Plan should not be abandoned wholesale simply because the reasoning given by one of the parties for the 2012 Plan is distasteful to the Special Master. The second criteria dismissed by the Special Master defies logic. If the goal is one of “least change” certainly the constitutionally infirm district is not to suffer extreme change. The 3rd Congressional District under the Grofman Plans both in terms of actual geographic territory as well as in concept (a district running down the James River from Richmond to Norfolk) bears very little resemblance to that of the 2012 Plan. Going back to the previous criteria of remedying the constitutional violation, this is because Prof. Grofman elevated race as the paramount consideration.

F. PRESERVATION OF POLITICAL BOUNDARIES

The Grofman Plans do an excellent job of trying to preserve political boundaries at the County and City level.

III. CONCLUSION

The Grofman Plans, in elevating race as its primary criterion disregard the 2012 Plan and artificially inflated its compactness scores. If the goal was to completely ignore prior legislative

prerogatives and elevate race to an even greater importance, then one of the Grofman plans should be adopted by the Court. If, instead, the Court wishes to remediate the constitutional violation without abandoning the political preferences of the Virginia Legislature then TBE Plan A should be the Court's preference. TBE Plan A has a focus on compactness and contiguity, preserves equalized districts, does not abandon the 2012 Plan, and addresses the Court's concerns about the unconstitutionality of the 3rd District.

Dated: November 24, 2015

Respectfully Submitted,
Bull Elephant Media LLC,
By Counsel

BY: _____/s/
Paul A. Prados
Virginia State Bar No. 71374
Attorney for Bull Elephant Media LLC
Prados Law, PLLC
1900 Campus Commons Dr., Ste. 100
Reston, VA 20191
703.766.6575
703.342.0367
pprados@pradoslaw.com

Certificate of Service

I hereby certify that on this 24th day of November 2015, I will electronically file the foregoing with the Clerk of Court using the Court's CM/ECF system, which will then send a notification of such filing (NEF) to the parties in the case, an electronic version of the submission will also be sent to the interested parties who have provided submissions or briefs:

BY: _____/s/_____
Paul A. Prados
Virginia State Bar No. 71374
Attorney for Bull Elephant Media LLC
Prados Law, PLLC
1900 Campus Commons Dr., Ste. 100
Reston, VA 20191
703.766.6575
703.342.0367
pprados@pradoslaw.com