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

INTERVENOR-DEFENDANTS' STATEMENT OF POSITION
REGARDING THE SPECIAL MASTER'S FINAL REPORT

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The Court may not enter either of the special master's proposed remedial plans, NAACP Plan Modification 6 or Current Congressional Plan Modification 16, because both plans stray far afield of any remedial mandate in this case. By his own admission, the special master does not propose limited changes to cure the *Shaw* violation the Court found in District 3. Rather, he proposes ***"major changes in CD3"*** and ***"substantial changes in all proximate districts,"*** Final Report 20 (DE 272) ("Rep."), in order to cure purported "fragmentation of minority voting strength . . . in CD4" that Plaintiffs never even *alleged* and purported "packing of minority voting strength . . . in CD3" that Plaintiffs' own expert, Dr. McDonald, conceded at trial does *not* exist, Trial Tr. 204-05. Nonetheless, the special master exercises carte blanche to pursue his "highest priority" of "avoiding either fragmentation or packing" in Districts 3 and 4 that "*might* have the effect" of "diluting" minority voting strength. Rep. 4, 8-11 (emphasis added). He therefore proposes a massive overhaul that splits District 3 in half, lowers its black voting-age population ("BVAP") well below the 50% majority level of the Enacted Plan, Plaintiffs' Alternative Plan, and Intervenor-Defendants' proposed plans, and transforms District 4 into a second "minority opportunity" district. *Id.* 29. The special master's proposals thus closely resemble—and, in fact, are derived from—a plan introduced by Senator Mamie Locke that the Legislature considered and expressly *rejected* in favor of the Enacted Plan in 2012.

The special master's complete two-district redrawing thus rests solely on his own unsupported vote-dilution findings and sweeps far more broadly than "necessary to cure" the *Shaw* violation the Court actually identified in District 3. *Upham v. Seamon*, 456 U.S. 37, 43 (1982). Unsurprisingly, the special master achieves this overhaul of the Enacted Plan only by failing to "follow the policies and preferences of the State" to the greatest extent practicable and instead improperly substituting his preferred "good government" criteria in their place. *White v.*

Weiser, 412 U.S. 783, 795 (1973). And the special master's uncompromising pursuit of his "highest priority" of race, Rep. 11, violates *Shaw* under this Court's liability opinion. The Court should reject the special master's proposals and enter one of Intervenor-Defendants' plans if a judicial remedy becomes necessary in this case.

1. The special master's proposals both sweep far beyond any remedy even remotely connected to curing the *Shaw* violation the Court identified. The special master admits that he does not make only the "minimal . . . changes in CD3" required to remedy that *Shaw* violation. Rep. 20. In fact, the special master acknowledges that he does not even limit his proposals to remedying District 3. Rather, the special master has unilaterally decided to "remedy" *two* districts, District 3 *and* District 4, because, in his view, "[t]he current configurations of CD3 and CD4 reflect a combination of packing of minority voting strength . . . in CD3, and fragmentation of minority voting strength . . . in CD4, *that can and should be remedied*." *Id.* 65 (emphasis added). Thus, the special master set out to achieve his "highest priority" of "avoiding either fragmentation or packing of geographically concentrated minority populations" that "might have the effect" of "diluting" minority voting strength by transforming Districts 3 and 4 into "minority opportunity" districts with a BVAP of less than 50%. *Id.* 4, 8-11, 29.

By the special master's own admission, his two-district proposals make ***"major changes in CD3"*** and ***"substantial changes in all proximate districts."*** *Id.* 20, 25 (emphases added). In particular, the special master's proposals split District 3 in half, reduce its BVAP below 50%, and completely transform District 4—a district with 31% BVAP and 51% Republican vote share in the Enacted Plan—into a "minority opportunity" and overwhelmingly Democratic district with more than 40% BVAP and more than 60% Democratic vote share. *See id.* 45, 52.

The special master's proposals thus sweep far more broadly than "necessary to cure" the

Shaw violation the Court identified in District 3, perhaps because he apparently did not review the "trial evidence" or the theories of liability presented at trial. *Upham*, 456 U.S. at 43; *White*, 412 U.S. at 794-95; Rep. 24 n.10; *see also id.* 7-8. Most obviously and egregiously, the special master completely redraws District 4 for the avowed purpose of providing minority voters with a "realistic opportunity . . . to elect candidates of choice," Rep. 4, in order to correct alleged "fragmentation of minority voting strength . . . in CD4" that he somehow found without any evidence, *id.* 65. But of course, there was not a single word, allegation, shred of proof, or finding at trial that even hinted at any constitutional or statutory violation in District 4, much less any "fragmentation" in that district. *Id.* Accordingly, the special master's massive overhaul of District 4 is not in any way "necessary to cure" the *Shaw* violation the Court identified in District 3. *Upham*, 456 U.S. at 43; *White*, 412 U.S. at 794.

The special master's egregious departure from basic remedial norms reflects his fundamental misunderstanding of the scope of federal remedial power to cure constitutional violations. That basic limit holds that "federal remedial power may be exercised only on the basis of a constitutional violation and . . . the nature of the violation determines the scope of the remedy." *Milliken v. Bradley*, 418 U.S. 717, 738 (1974) (*Milliken I*); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). In other words, "this inherent limitation upon federal judicial authority" requires that remedies must "directly address and relate to the constitutional violation itself." *Milliken v. Bradley*, 433 U.S. 267, 281-82 (1977) (*Milliken II*). Here, the violation the Court found was that Enacted District 3 made an excessive use of race relative to the constitutionally compliant Alternative Plan produced by Plaintiffs. *See, e.g.*, 6/5/15 Mem. Op. 21-23, 27-33, 45-48 (DE 170) ("Op."). Accordingly, the scope of the remedy must "directly address" the violation the Court found as illustrated by the Alternative Plan.

Milliken II. 433 U.S. at 281.

The Special Master's proposals plainly do not address the identified violation. Neither Plaintiffs nor the Court suggested that District 3 violated *Shaw* because it kept together the "two distinct minority population concentrations" around Richmond and Norfolk, Rep. 15, since that basic configuration "conform[ed] to all requirements of law" when it was adopted as a *Shaw remedy* in 1998, *Moon v. Meadows*, 952 F. Supp. 1141, 1151 (E.D. Va. 1997) (three-judge court), *summ. aff'd*, 521 U.S. 1113 (1997), had been used without a *Shaw* challenge for over a decade, and could not be undone without violating the core-preservation, political, and incumbency-protection priorities the Legislature applied to *all* Virginia districts. Recognizing this reality, even Plaintiffs' Alternative Plan kept the Richmond and Norfolk minority populations together in their version of District 3.

Nor was there any allegation or finding at trial that in any way supports the special master's new legal conclusion that his remedy is needed to redress "packing of minority voting strength . . . in CD3." Rep. 65. In fact, any such allegation or finding is *foreclosed* by the trial record the special master did not review: the *only* evidence related to "packing" at trial was the testimony of Plaintiffs' own expert, Dr. McDonald, that Enacted District 3 does *not* "pack" minority voters. Trial Tr. 204-05. In the face of this record, the special master nonetheless decided, based solely on his "professional judgment" as a political scientist, that the Enacted Plan "pack[s]" minority voters in District 3 and "fragment[s]" minority voters in District 4, and that the remedy for this vote dilution he found is to *separate* the two areas with "substantial minority population" in order to create *two* districts where minorities have a "realistic opportunity . . . to elect candidates of choice." Rep. 4, 42-43, 65.

But since there were never any findings of "packing" or "fragmentation," much less that

keeping the Richmond and Norfolk areas together constituted such illegal action, the special master's avowed purpose of curing such "packing" and "fragmentation," *id.* 65, by separating Richmond and Norfolk is a remedy unrelated to any *violation* found here. Indeed, such a splitting of District 3 would only be an appropriate remedy if the Court had made a liability finding under Section 2 of the Voting Rights Act that such packing and fragmentation had occurred. *See, e.g.*, Trial Tr. 204-05. But again, no such allegation ever surfaced at trial because Section 2 requires creating districts only where members of a single minority group form a "compact" *majority*. *Bartlett v. Strickland*, 556 U.S. 1, 12-20 (2009) (plurality op.). No such allegation is even possible: Dr. McDonald *and the special master* both concede that it is impossible to create any such additional majority-black district. *See* Trial Tr. 204-05; Rep. 13-14 & n.8. In fact, Dr. McDonald testified that maintaining a majority-black District 3, such as in the Alternative Plan, was a narrowly tailored remedy necessary to *avoid* any vote dilution in violation of Section 2. *See* Trial Tr. 188.

Accordingly, the special master's two-district "remedy" directly contradicts the core premises of Plaintiffs' Alternative Plan and constitutes either an effort to cure a non-existent Section 2 violation or a reflection of the special master's view of the "best" redistricting plan based on the "good government" criteria he preferred for District 3 and adjacent districts. Either way, it is far in excess of any permissible remedial mandate in this case.

2. The special master's massive reconfiguration of Districts 3 and 4 is improper not only because it *goes beyond* the scope of the violation the Court found, but also because it *violates* the principal "legislative polic[y] underlying" the Enacted Plan, *Perry v. Perez*, 132 S. Ct. 934, 940 (2012), which was to preserve the cores of all districts in order to maintain the reelection prospects of all incumbents. The Court squarely held that protecting the 8 Republican and 3

Democratic incumbents by maintaining the cores of existing districts "inarguably" "played a role" in the changes to Enacted District 3, Op. 35—and it is *undisputed* that core preservation was the *most* important neutral state districting criterion to the Legislature, *see* Pl. Trial Ex. 5; Pl. Mot. To Dismiss Or Affirm 22, *Wittman v. Personhuballah*, No. 14-1504 (S. Ct.). Yet by his own admission, the special master completely ignored these criteria. The special master nowhere even *mentions* core preservation, and with good reason: his proposed plans "remove[]" "nearly half the population" out of Enacted District 3 and even *more* people out of Enacted District 4. Rep. 22. Thus, the special master's plans perform dramatically worse on the preeminent neutral factor of core preservation than the Enacted Plan, Intervenor-Defendants' proposed remedial plans, and even Plaintiffs' Alternative Plan.

Furthermore, the special master expressly disavowed any effort to maintain the 8-3 partisan split or otherwise to consider partisan politics disconnected from race. Op. 35; Rep. 24-25. Indeed, the special master at first "deliberately" eschewed any effort to protect incumbents, and then only minimally protected them by avoiding incumbent pairings when so "instructed by the Court." Rep. 23-24. The result is a stark departure from the Legislature's priorities: the special master's proposals replace the 8-3 partisan split with a 7-4 partisan split by turning District 4 from a 48% Democratic district into a 60.1% or 62.2% overwhelmingly Democratic district. *See id.* 52.

The special master thus flagrantly violated the specific holding of *White v. Weiser* that, when faced with a choice between remedial options, a court must choose the option that preserves the "political impact" and incumbency protection the legislature favored over the option that does not. *White*, 412 U.S. at 794-97. The special master sought to justify his express disavowal of the "legislative policies underlying" the Enacted Plan because those policies here

purportedly lead to "violations of the Constitution or the Voting Rights Act." Rep. 20. But, of course, the special master's notion that preserving cores to maintain the existing 8-3 partisan split and protecting all incumbents is somehow unconstitutional or illegal not only is foreclosed by *White* and other decisions of the Supreme Court, *see, e.g.*, *Ala. Leg. Black Caucus v. Ala.*, 135 S. Ct. 1257, 1270 (2015), but also directly *contradicts* this Court's liability holding. Indeed, far from holding these policies unconstitutional, the Court held that the Legislature should have pursued these "inarguabl[e]" race-neutral priorities to a *greater* extent, rather than "subordinating" them to the "mandatory" race-conscious objective of avoiding Section 5 retrogression in District 3. Op. 35. In fact, the Court found that the Legislature did not sufficiently preserve the core of District 3 when it moved out of District 3 a fraction of the population that the special master proposes to move out of that district. *Id.* 33. Thus, again, protecting incumbents and preserving the cores of Districts 3 and 4 only violates the special master's new-found theory that the preexisting districts somehow diluted minority voting strength under Section 2. Since this theory is the invention of the special master rather than the Court (and is facially meritless under *Bartlett*), it is a wholly improper basis for a remedy here.

The special master alternatively attempts to justify his departure from the "legislative policies underlying" the Enacted Plan, *Perry*, 132 S. Ct. at 940, as warranted by the "good government" criteria of "contiguity and compactness and the avoidance of unnecessary city/county splits," Rep. 22. But, as mentioned, neither the special master nor this Court may substitute these criteria for the Legislature's "balance" of "competing" traditional principles such as core preservation, politics, and incumbency protection. *Miller v. Johnson*, 515 U.S. 900, 915 (1995); *Wilkins v. West*, 264 Va. 447, 463-64 (2002); *see also White*, 412 U.S. at 794-97. In all events, the special master badly misstates the performance of his proposals on the "good

government" criteria he favors, and wholly ignores that his proposals perform *worse* on those criteria in District 4 and across the State than the Enacted Plan and Intervenor-Defendants' proposed remedial plans.

In the first place, the special master's compactness scores are flawed and unreliable because they contradict the compactness scores Plaintiffs presented at trial. In fact, the trial evidence demonstrates that the special master's versions of District 4 are *less* compact than Enacted District 4 and Intervenor-Defendants' District 4 on the Reock measure. Moreover, the special master does not dispute that Enacted District 3 and Intervenor-Defendants' versions of District 3 are contiguous under Virginia law—or that Enacted District 4 and Intervenor-Defendants' versions of District 4 achieve contiguity in exactly the same way as the special master's versions of District 4. And one of the special master's proposals splits as many localities as the Enacted Plan, while his proposals split as many or *more* localities than Intervenor-Defendants' plans.

3. Finally, far from curing the *Shaw* violation of purportedly excessive use of race in preserving Virginia's one minority district, the special master's proposals create *two* minority districts for the avowedly racial reasons condemned by the Court's liability opinion. The Court rested its finding of a *Shaw* violation in District 3 on the fact that Delegate Janis rank-ordered compliance with the federal Voting Rights Act right below equal population and above "permissive" state-law traditional districting principles. Op. 1-2, 18-21, 23-26. But the special master *does exactly the same thing*. Indeed, he ranks "avoiding either fragmentation or packing of geographically concentrated minority populations that might have the effect or purpose of minimizing or diluting the voting strength of constitutionally protected minorities, and/or lead to retrogression" ***as his "highest priority"*** after "conformity to a standard of one person, one vote."

Rep. 8-9, 11 (emphasis added). In fact, the special master lists this *statutory* goal of complying with the Voting Rights Act above *Shaw*'s *constitutional* requirement of "avoiding use of race as a predominant criterion for redistricting." *Id.* And the special master devotes the bulk of his report to establishing that his reconfigured District 4 is a new "minority opportunity" district, further underscoring that his "highest priority" was race. *Id.* 11; *see id.* 52-59.

Moreover, the special master's plans subordinate traditional principles to race in creating the "minority opportunity" Districts 3 and 4. The special master asserts that the his proposals do not subordinate because race does not conflict with *his* "good government" criteria, Rep. 4-5, (although, as explained below, that assertion is faulty). But the special master's proposals clearly and indisputably subordinate the *Legislature's* primary goal of preserving cores. Whereas the special master's plans preserve the cores of all majority-white districts across the Commonwealth, the plans *dismantle* Districts 3 and 4 because of their racial composition. The special master's plans thus plainly violate the Legislature's neutral criteria and have the perverse result of treating Districts 3 and 4 *differently* than majority-white districts because of race. Having invalidated the Enacted Plan that *fulfills* the Legislature's race-neutral priorities because Delegate Janis recognized that the federal Voting Rights Act is more important than those state-law criteria, it clearly makes no sense to replace it with the plans that *both* affirmatively *violate* the Legislature's priorities *and* elevate the Voting Rights Act above these "permissive" state-law policies.

I. THE SPECIAL MASTER'S TWO-DISTRICT OVERHAUL IS FAR BROADER THAN NECESSARY TO CURE THE *SHAW* VIOLATION THE COURT FOUND

Because "[r]edistricting is 'primarily the duty and responsibility of the State,'" *Perry*, 132 S. Ct. at 940 (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)), and "primarily a matter for legislative consideration and determination," *White*, 412 U.S. at 794-95, judicial redistricting by

federal courts is an "unwelcome obligation," *Connor v. Finch*, 431 U.S. 407, 415 (1977), that threatens "a serious intrusion on the most vital of local functions," *Miller*, 515 U.S. at 915. Moreover, any federal judicial remedy must "directly address and relate to the constitutional violation itself." *Milliken II*, 433 U.S. at 281-82. Thus, any judicial redistricting plan must be no broader than "necessary to cure" the constitutional defect identified in the legislature's duly enacted plan. *Upham*, 456 U.S. at 43; *White*, 412 U.S. at 794–95.

The Supreme Court's decision in *Upham v. Seamon* is instructive. The plaintiffs in *Upham* brought a challenge against a congressional redistricting plan in Texas. *See* 456 U.S. at 38. The Attorney General had objected to the legislature's duly enacted plan because, in his view, two districts in south Texas were improperly retrogressive under Section 5 of the Voting Rights Act. *See id.* The three-judge court, however, entered a remedial plan that redrew the districts in Dallas County in north Texas, without holding that the Dallas County districts were "unconstitutional," "inconsistent with § 5," or otherwise in violation of law. *Id.* at 39-40.

The Supreme Court reversed. *See id.* at 40-44. The Supreme Court explained that a constitutional or statutory violation in one "part of a state plan" does not "grant[] a district court the authority to disregard" other parts of the legislatively enacted plan that have not been held to violate the Constitution or law, *id.* at 43. Rather, because judicial redistricting presents "the problem of reconciling the requirements of the Constitution with the goals of state political policy," "the district court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect." *Id.* Thus, because the three-judge court had not identified any violation in the Dallas County districts, it erred when it redrew those districts. *See id.*

Here, the special master's proposals to remedy the "fragmentation" in District 4 and "packing" in District 3 that *he* found, Rep. 65, do not "address" or "relate to," *Milliken II*, 433

U.S. at 281-82, and are not "necessary to cure," *Upham*, 456 U.S. at 43; *White*, 412 U.S. at 794-95, the *Shaw* violation that the *Court* found. The special master correctly recognized that the "least change" requirement prevented him from proposing changes to districts other than District 3 and surrounding districts. Rep. 19-20. But without citing *Upham*, *White*, or *Milliken*, he incorrectly concluded that the "least change" requirement did not constrain him to making only the "minimal . . . changes" required to remedy the *Shaw* violation. *Id.* 20.

The special master thus improperly concluded that the "least change" requirement limited only the *districts* he could change, but not the *extent* to which he could change them. *See id.* Laboring under this flawed conclusion, the special master exercised carte blanche not only to cure the *Shaw* violation that the Court found, but also to correct alleged "fragmentation of minority voting strength . . . in CD4" and "packing of minority voting strength . . . in CD3" that he found on his own, *id.* 65. Indeed, the special master's plans treat District 3 and surrounding districts as a blank slate and make "major changes in CD3" and "substantial changes in all proximate districts," *id.* 20: the special master proposes dividing District 3 in half, separating the Richmond and Norfolk minority populations, and creating two "minority opportunity" districts with less than 50% BVAP, *id.* 29. Thus, the special master's plans decrease District 3's BVAP to 42.3% and 45.3% from 56.3% in the Enacted Plan, and increase District 4's BVAP to 40.9% and 42% from 31.3% in the Enacted Plan. *See id.* 45, 52.

But the Court *never* found or even hinted that there was any "fragmentation of minority voting strength . . . in CD4" or "packing of minority voting strength . . . in CD3." *Id.* 65. In fact, the trial record actually *forecloses* any remedy on those bases. In the first place, Plaintiffs *never* alleged or sought to prove *anything* regarding District 4, much less alleged "fragmentation of minority voting strength . . . in CD4." *Id.* Nor did they suggest separating the Richmond-area

and Norfolk-area black communities that the special master claims is needed to avoid such "fragmentation." Moreover, Plaintiffs never set out to prove any "packing" in District 3. Quite to the contrary: the only evidence regarding such "packing" is Dr. McDonald's testimony that Enacted District 3 does *not* "pack" minority voters. Trial Tr. 204-05.

Plaintiffs had good reason not to pursue any "fragmentation" or "packing" theory: both "fragmentation" and "packing" are species of vote dilution under Section 2 of the Voting Rights Act. Thus, to prove a cognizable claim under either theory, Plaintiffs would have been required to show that it was possible to create an *additional* "compact" *majority-black* district. *Bartlett*, 556 U.S. at 12-20 (plurality op.); *see also Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). But both Dr. McDonald *and the special master* have conceded that it is impossible to create such an extra majority-black district. *See* Trial Tr. 204-05; Rep. 13-14 & n.8.

In fact, not only did Plaintiffs eschew any "fragmentation" or "packing" claim, but Dr. McDonald also testified that Plaintiffs drew the Alternative Plan with a majority-black District 3 as a "narrowly tailored" remedy to *avoid* any vote dilution under Section 2. *See* Trial Tr. 188. Thus, the Alternative Plan that this Court endorsed as constitutional makes *no* changes to District 4, and maintains the majority-black and urban Richmond-Norfolk configuration in District 3 that "conform[ed] to all requirements of law" when it was first adopted as a *Shaw remedy*, *Moon*, 952 F. Supp. at 1151, and was not challenged under *Shaw* in the 2001 *Wilkins* case.

It is beyond dispute that the parties would have litigated this case differently had Plaintiffs alleged and sought to prove that District 4 "fragment[s]" black voters or that District 3 "packs" such voters in violation of Section 2. Rep. 65. Because Plaintiffs' Alternative Plan made changes only to Districts 2 and 3 and made no changes to District 4, the evidence at trial focused on whether such a shifting of the boundary between Districts 2 and 3 and the resulting

maintenance of a majority-black District 3 proved and remedied a *Shaw* violation. *See, e.g.*, Post-Trial Br. Of Intervenor-Defs. And Defs. (DE 106). Thus, the case presented the question whether a *Shaw* violation in a majority-black district can be proven through a majority-black alternative district of substantially the same shape. *See id.* The parties presented little, if any, evidence regarding District 4, and presented *no* evidence whatsoever regarding alleged "fragmentation" in District 4. *See id.*

Thus, the special master's new and baseless findings of "fragmentation" in District 4 and "packing" in District 3 raise a host of issues that were not presented or litigated at trial. For example, such vote dilution findings require a finding that it was possible to create an additional "compact" majority-black district, *Bartlett*, 556 U.S. at 12-20 (plurality op.), that both Dr. McDonald and the special master have conceded is impossible, *see* Trial Tr. 204-05; Rep. 13-14 & n.8. Moreover, Dr. McDonald opined at trial that there is a strong basis in evidence to conclude that failing to maintain District 3 as a majority-black district would constitute vote dilution in violation of Section 2. *See* Trial Tr. 188. And the special master's deliberate creation of two "minority opportunity" districts with less than 50% BVAP threatens a *Shaw* violation: whereas the Legislature sought to preserve the cores of *all* districts, the special master's findings would require dismantling the cores of Districts 3 and 4 and treating those districts *differently* than every other district because of their racial composition. *See infra* pp. 27-31. Thus, implementing either of the special master's plans would require reopening liability to allow the parties to litigate these new "packing" and "fragmentation" theories that Plaintiffs did not raise or prove at trial, and that affirmatively contradict Plaintiffs' defense of the Alternative Plan.

The fact that the special master's plans sweep far beyond the scope and "nature of the violation" litigated at trial, *Milliken I*, 418 U.S. at 738; *Swann*, 402 U.S. at 16, is unsurprising

because the special master apparently did not "review[] the trial evidence," Rep. 24 n.10; *see also id.* 7-8, and did not even mention Plaintiffs' Alternative Plan in his report. But regardless of the reason for the disconnect between Plaintiffs' litigated theory of liability and the special master's proposed remedies, the Court may not adopt either of the special master's overbroad remedies that are not "necessary to cure" the defect that Plaintiffs sought to prove and the Court identified in Enacted District 3. *Upham*, 456 U.S. at 43; *White*, 412 U.S. at 794–95. The Court should reject the special master's proposals for this reason alone.

II. THE SPECIAL MASTER'S PROPOSALS IMPROPERLY DEPART FROM THE LEGISLATURE'S PREFERRED TRADITIONAL CRITERIA

The special master's proposed "major changes in CD3" and "substantial changes in all proximate districts," Rep. 25, would violate the inherent remedial limitations on federal courts for another independent reason: the proposals improperly disregard the Legislature's preferred traditional districting criteria in favor of the special master's "good government" criteria, *id.* 4. When "'faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying' a state plan—even one that was itself unenforceable—'to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act.'" *Perez*, 132 S. Ct. at 941 (quoting *Abrams v. Johnson*, 521 U.S. 74, 79 (1997)). This rules makes perfect sense: in drawing a redistricting plan, a legislature obviously must "balanc[e] competing interests," *Easley*, 532 U.S. 234, 242 (2001), and make "the sort of policy judgments for which courts are, at best, ill suited," *Perez*, 132 S. Ct. at 941; *see also Miller*, 515 U.S. at 915; *Wilkins*, 264 Va. at 463-64.

The Supreme Court's decision in *White v. Weiser* dramatically illustrates this rule. The Texas legislature drew the congressional redistricting plan at issue there to "promote 'constituency-representative relations,' a policy frankly aimed at maintaining existing

relationships between incumbent congressmen and their constituents and preserving the seniority the members of the State's delegation have achieved in the United States House of Representatives." 412 U.S. at 791. The Supreme Court recognized the validity of these core-preservation, incumbency-protection, and political objectives. *See id.* at 791, 797.

The plan, however, violated the constitutional equal population requirement. *See id.* at 791-92. The three-judge court was presented with two remedial plans: Plan B, which "adhered to" the legislature's "political decisions" to the greatest extent practicable, and Plan C, which resulted in a different "political impact," *id.* at 794-96. Therefore, "Plan B, to a greater extent than did Plan C, adhered to the desires of the state legislature." *Id.* at 795. The three-judge court nonetheless opted to implement Plan C as the remedy. *See id.*

The Supreme Court reversed. *See id.* at 795-97. It emphasized that "a federal district court" drawing a redistricting plan "should follow the policies and preferences of the State . . . whenever adherence to state policy does not detract from the requirements of the Federal Constitution." *Id.* at 795. The Supreme Court further explained that redistricting "inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task." *Id.* at 795-96. "Here those decisions were made by the legislature in pursuit of what were deemed important state interests." *Id.* at 796. Such legislative "decisions should not be unnecessarily put aside in the course of fashioning relief appropriate to remedy what were held to be impermissible population variations between congressional districts." *Id.*

Thus, "[g]iven the alternatives," the three-judge court fundamentally erred because it "should not have imposed Plan C, with its very different political impact, on the State." *Id.* Rather, "[i]t should have implemented Plan B," which preserved the legislature's preferred core-preservation, political, and incumbency-protection priorities. *Id.*

A. The Special Master Disregarded The Legislature's Core-Preservation, Political, And Incumbency-Protection Priorities

This Court squarely held that protecting the 8 Republican and 3 Democratic incumbents by maintaining the cores of existing districts "inarguably" "played a role" in the changes to Enacted District 3, Op. 35—and it is *undisputed* that core preservation was the *most* important neutral state districting criterion to the Legislature, *see* Pl. Trial Ex. 5; Pl. Mot. To Dismiss Or Affirm 22, *Wittman v. Personhuballah*, No. 14-1504 (S. Ct.). Because redistricting "inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task," neither the special master nor this Court may "unnecessarily put aside" these legislative priorities "in the course of fashioning relief appropriate to" the *Shaw* violation the Court identified. *White*, 412 U.S. at 795-96. Yet the special master's proposals do precisely that: the special master ignores the Legislature's political and incumbency-protection decisions, substitutes his own "good government" principles in their stead, and makes "major changes in CD3" and "substantial changes in all proximate districts." Rep. 25. This failure to "approximate[] the reapportionment plan of the state legislature" and adhere to the legislature's core-preservation, political, and incumbency-protection priorities, *White*, 412 U.S. at 796, as well as the accompanying effort to recalibrate the Legislature's "balance" of "competing" traditional principles, *Easley*, 532 U.S. at 242; *Perez*, 132 S. Ct. at 941; *Miller*, 515 U.S. at 915; *Wilkins*, 264 Va. at 463-64, flagrantly violates *White* and requires rejection of the special master's proposals.

Core Preservation. The Legislature had ample good reasons to elevate core preservation to preeminent status among its preferred neutral criteria. Preserving the cores of districts helps to freeze in place the 8-3 partisan split that the Legislature favored, protects all incumbents by leaving them in largely unchanged districts, and fosters constituent consistency.

Moreover, preserving District 3's core made unusually good sense for the independent reasons that District 3 "conform[ed] to all requirements of law" when it was adopted as a *Shaw remedy*, *Moon*, 952 F. Supp. at 1151, had not been challenged under *Shaw* in the 2001 *Wilkins* case, and was politically beneficial to the Republican incumbents in surrounding districts, Trial Tr. 122-28.

The special master does not even *mention* the Legislature's preeminent neutral criterion of core preservation. The reason is obvious: both of his proposed plans wholly depart from that principle. As even the special master admits, his "major changes" in both plans move "nearly half of the population" of Enacted District 3 out of that district. Rep. 22, 25. In particular, the special master's NAACP Plan Modification 6 moves 321,782 people out of Enacted District 3, and 643,546 people in and out of Enacted District 3. *See* NAACP Plan Modification 6 Core Constituency Report. The special master's Current Congressional Plan Modification 16 moves 336,752 people out of Enacted District 3, and a total of 673,504 people in and out of that district. *See* Current Congressional Plan Modification 16 Core Constituency Report. These proposals thus retain only 55.8% and 53.7%, respectively, of the core of Enacted District 3. *See* NAACP Plan Modification 6 Core Constituency Report; Current Congressional Plan Modification 16 Core Constituency Report.

The special master's versions of District 3 fare even worse in comparison to the Benchmark Plan against which the Enacted Plan, Alternative Plan, and Intervenor-Defendants' plans were drawn. The NAACP Plan Modification 6 moves 340,398 people out of, and 680,796 people in and out of, Benchmark District 3. *See* NAACP Plan Modification 6 Benchmark Core Constituency Report (Ex. A). The Current Congressional Plan Modification 16 moves 344,973 people out of, and 689,946 people in and out of, Benchmark District 3. *See* Current Congressional Plan Modification 16 Benchmark Core Constituency Report (Ex. B). These

numbers are more than three-and-a-half times *greater* than the approximately 180,000 people the Court criticized the Legislature for moving in and out of District 3 in the Enacted Plan. *See* Op. 33. The special master's proposals thus preserve only 53.2% and 52.6% of the core of Benchmark District 3, respectively, *see* NAACP Plan Modification 6 Benchmark Core Constituency Report; Current Congressional Plan Modification 16 Benchmark Core Constituency Report, far less than the 83.1% in the Enacted Plan, the 81.2% and 77.2% in Intervenor-Defendants' proposals, and even the 69.2% in the Alternative Plan, which is the lowest core-preservation percentage of any district in the Alternative or Enacted Plans, *see* Int.-Def. Trial Ex. 27; Int.-Def. Ex. J (DE 232-10, DE 232-20). In fact, even Dr. McDonald recognized that the Alternative Plan's 13.9% reduction in the preservation of Benchmark District 3's core compared to the Enacted Plan was "significant," Tr. 422-23—and the special master's proposed plans dwarf that figure with 29.9% and 30.5% reductions in the preservation of Benchmark District 3's core.

The special master's plans, moreover, preserve even *less* of the core of Enacted District 4 because they each move even *more* people out of Enacted District 4 than they move out of Enacted District 3. *See* NAACP Plan Modification 6 Core Constituency Report; Current Congressional Plan Modification 16 Core Constituency Report. The special master's NAACP Plan Modification 6 moves 329,165 people out of Enacted District 4, and a total of 658,330 people in and out of Enacted District 4. *See* NAACP Plan Modification 6 Core Constituency Report. The special master's Current Congressional Plan Modification 16 moves 348,052 people out of Enacted District 4, and a total of 696,104 people in and out of Enacted District 3. *See* Current Congressional Plan Modification 16 Core Constituency Report. The special master's proposals thus preserve only 54.7% and 52.1%, respectively, of Enacted District 4's core. *See*

NAACP Plan Modification 6 Core Constituency Report; Current Congressional Plan Modification 16 Core Constituency Report.

The special master's versions of District 4 fare only slightly better in comparison to the Benchmark Plan. The NAACP Plan Modification 6 moves 299,431 people out of, and 598,862 people in and out of, Benchmark District 4. *See* NAACP Plan Modification 6 Benchmark Core Constituency Report. The Current Congressional Plan Modification 16 moves 318,318 people out of, and 636,636 people in and out of, Benchmark District 3. *See* Current Congressional Plan Modification 16 Benchmark Core Constituency Report. Once again, these numbers are more than three times greater than the approximately 180,000 people the Court criticized the Legislature for moving in and out of District 3 in the Enacted Plan—and are in *addition to* the special master's sweeping changes to District 3. *See* Op. 33. The special master's plans thus preserve only 58.8% and 56.2% of the core of Benchmark District 4, respectively, *see* NAACP Plan Modification 6 Benchmark Core Constituency Report; Current Congressional Plan Modification 16 Benchmark Core Constituency Report—far less than the *96.2%* preserved in both Enacted District 4 and Alternative District 4 and the *93.9%* preserved in Intervenor-Defendants' proposals, *see* Int.-Def. Trial Ex. 27. These 37.4% and 40% reductions in the preservation of Benchmark District 4's core far exceed the 13.9% reduction that even Dr. McDonald viewed as "significant." Tr. 422-23.

The special master's plans therefore starkly violate *White* because they deliberately depart from the Legislature's main policy of making only "minimal" changes vis-a-vis the Benchmark Districts, to protect the existing incumbents and partisan ratio. Rep. 20. The Legislature evenhandedly pursued this "least change" core-preservation policy across the State without any regard for racial considerations, in order to freeze in place the 8-3 split and protect

all incumbents. The Enacted Plan therefore preserves between 71.2% and 96.2% of the cores of all Benchmark districts. *See* Int.-Def. Trial Ex. 27. The special master, however, selectively implements this policy on the basis of race. The special master preserves between 71.2% and 91.5% of the cores of majority-white Districts 5, 6, 8, 9, 10, and 11 compared to the Benchmark Plan. *See id.*; NAACP Plan Modification 6 Benchmark Core Constituency Report; Current Congressional Plan Modification 16 Benchmark Core Constituency Report. But as part of his avowedly "highest priority" of creating "minority opportunity" districts, Rep. 4, 29, the special master dramatically reduces the preservation of the cores of Districts 3 and 4, *see* NAACP Plan Modification 6 Benchmark Core Constituency Report; Current Congressional Plan Modification 16 Benchmark Core Constituency Report.

Thus, for purely racial reasons, the special master's plans treat Districts 3 and 4 worse than the overwhelmingly white districts on the Legislature's most important neutral criterion. The special master thus subordinates the Legislature's traditional principle of core preservation to race in the name of purportedly remedying the subordination of traditional principles to race. *See infra* pp. 29-30. Needless to say, the Fourteenth Amendment and *Shaw* cannot *require* treating certain districts worse because of their racial composition. *See Ala.*, 135 S. Ct. at 1270.

The 8-3 Partisan Split And Partisan Politics. The Court held that preserving the 8-3 partisan split and "partisan politics" "inarguably" "played a role" in the Enacted Plan. Op. 35. Indeed, as the Supreme Court recently held, "political affiliation" is one the "offsetting traditional districting principles" that must be decoupled from "racial considerations" in *Shaw* cases. *Ala. Leg. Black Caucus*, 135 S. Ct. at 1270; *see also White*, 412 U.S. at 791, 797.

But the special master expressly disavowed any effort to maintain the 8-3 partisan split. Rep. 24-25. In fact, the special master's *only* consideration of partisan politics was *coupled with*

his "highest priority" of creating "minority opportunity districts," *id.* 11, 29: "I have addressed considerations of electability or of partisan politics only in areas of the state where the issue could not be avoided because of the need to assess the potential for the creation of a district in which the minority community realistically had an equal opportunity to elect candidates of choice," *id.* 25. "Elsewhere, I have drawn districts in a fashion that was blind to partisan politics." *Id.*

The special master's selective and race-based consideration of politics thus departed from the Legislature's "inarguabl[e]" statewide race-neutral consideration of politics. Op. 35. The result is predictable: the special master's proposals replace the 8-3 partisan split with a 7-4 partisan split by turning District 4, a district with 51% Republican vote share currently represented by Republican Randy Forbes, into a 60.1% to 62.2% overwhelmingly Democratic district. Rep. 45, 52.

Incumbency Protection. The Court held that "a desire to protect incumbents" "inarguably" played a role in the Enacted Plan. Op. 35. Like partisan politics, "incumbency protection" is one of the "offsetting" traditional principles that must be disentangled from race in *Shaw* cases. *Ala. Leg. Black Caucus*, 135 S. Ct. at 1270; *see also White*, 412 U.S. at 791, 797. The special master, however, "deliberately" eschewed any effort to protect incumbents at first, and then only minimally protected them by avoiding incumbent pairings. Rep. 23-24. As a result, his proposals fail to protect Congressman Forbes in District 4. *See id.* 45, 52.

B. The Special Master Erred In Substituting His Criteria For The Legislature's Preferred Traditional Principles

The special master offers no tenable justification for his departure from the Legislature's preferred districting principles. The special master notes, without elaboration, that he was required to implement the Legislature's districting priorities only "to the extent" that they "do

not lead to violations of the Constitution or the Voting Rights Act." Rep. 20. But this truism is wholly inapposite: indeed, the special master never explains why the Constitution or the Voting Rights Act mandates his wholesale abandonment of the Legislature's "offsetting" core-preservation, political, and incumbency-protection priorities. *Ala. Leg. Black Caucus*, 135 S. Ct. at 1270; *see also* Rep. 20. Nor could he, had he tried: as explained, the Voting Rights Act does *not* require correcting any vote dilution on this record (and, according to Dr. McDonald, requires a majority-black District 3), *see supra* pp. 9-14, and the Supreme Court has repeatedly recognized that these criteria are constitutional factors which *rebut* any finding of a *Shaw* violation. *White*, 412 U.S. at 794-97; *Ala. Leg. Black Caucus*, 135 S. Ct. at 1270.

That being so, far from holding these "inarguabl[e]" criteria unconstitutional, the Court suggested that the Legislature should have pursued them to a *greater* extent, rather than "subordinating" them to the "mandatory" race-conscious objective of avoiding Section 5 retrogression in District 3. Op. 35. In fact, the Court held that the Legislature did not sufficiently pursue the race-neutral goal of preserving District 3's core when it moved far fewer people out of District 3 than the special master's proposes to move out of that district. *Id.* 33. Finally, Plaintiffs' Alternative Plan—which this Court endorsed as constitutional—demonstrates that the special master could have remedied the *Shaw* violation the Court found while adhering far more closely to the Legislature's core-preservation priority than he chose to do in either of his proposals. *See supra* pp. 16-20.

The special master thus seems to believe that his subordination of the *Legislature's* neutral criteria is somehow justified because his plans purportedly further *his* preferred "good government criteria" of "contiguity and compactness and the avoidance of unnecessary city/county splits." Rep. 4, 22. But *Shaw* is about remedying subordination of traditional

districting principles to race, not subordinating one set of traditional principles to another set. Thus, it belongs to the Legislature to "balance" "competing" traditional principles, *Easley*, 532 U.S. at 242; *Perez*, 132 S. Ct. at 941, and courts may not upset that balance in *Shaw* cases, *see Miller*, 515 U.S. at 915; *Wilkins*, 264 Va. at 463-64. Accordingly, neither the special master nor this Court may substitute some set of "good government" traditional districting principles for the Legislature's priorities. *See Miller*, 515 U.S. at 915; *Wilkins*, 264 Va. at 463-64.

This prohibition on judicial override of legislative policy judgments applies with particular force here. In the first place, the special master's two-district proposals clearly resemble the plan proposed by Senator Locke that the Legislature *rejected* in favor of the Enacted Plan in 2012. Thus, if either proposal is accepted, the Court would be directly injecting itself into the political thicket by directly overturning the Legislature's judgment and granting the minority party a political victory it could not accomplish with elected representatives. Moreover, as explained, the Legislature had ample good reasons to make core preservation its highest priority because District 3 was adopted as a *Shaw remedy* that "conform[ed] to all requirements of law" and had been used without *Shaw* challenge for over a decade. *Moon*, 952 F. Supp. at 1151. Preserving district cores also directly accomplished the Legislature's other neutral political and incumbency-protection priorities. *Ala. Leg. Black Caucus*, 135 S. Ct. at 1270; Tr. 122-28. And the alleged compactness, contiguity, and locality-split flaws that the special master complains of in the Enacted Plan all flowed from the Legislature's decision to preserve District 3 in substantially the same form as the original *Shaw* remedy. *See, e.g.*, *See* Pl. Tr. Ex. 4; Int.-Def. Ex. 13 at 16-24. Thus, the special master has decided to elevate some traditional principles over core preservation—but resolving such conflicts is the province of the Legislature. *See Miller*, 515 U.S. at 915; *Wilkins*, 264 Va. at 463-64.

In all events, the special master starkly overstates—and in at least one instance, *mis*states—the performance of his proposals on his preferred "good government" criteria.

Compactness. The special master states that his proposed versions of Districts 3 and 4 are more compact than Enacted Districts 3 and 4 on the Polsby-Popper and Reock measures. *See* Rep. 46, 53. But the special master's compactness scores are flawed and unreliable because they contradict the scores that Plaintiffs presented at trial. In particular, the special master's Reock score for Enacted District 4 is far lower than the score Dr. McDonald provided at trial—and the special master's Reock and Polsby-Popper scores for Enacted Districts that he did not change in his proposals are also different than Dr. McDonald's scores for those districts. *Compare* Rep. 46, 53 *and* NAACP Plan Modification 6 Compactness Analysis *and* Current Congressional Plan Modification 16 Compactness Analysis, *with* Pl. Tr. Ex. 27 at 7. In particular:

- The trial evidence established that Enacted District 4's Reock score is 0.32, but the special master's report states that it was 0.20.
- The trial evidence established that Enacted Districts 5, 8, 9, 10, and 11 have higher Reock scores (0.20, 0.37, 0.20, 0.29, and 0.23) than the scores the special master reports for those unchanged districts (0.22, 0.32, 0.12, 0.19, 0.20).
- The trial evidence established that Enacted District 9's Polsby-Popper score is 0.18, but the special master generates a score of 0.16.

The consequence of the special master's use of unreliable data is far-reaching. Utilizing his flawed data, the special master suggests that Enacted District 4's Reock score was ".20," while his versions of District 4 scored ".25" and ".26." Rep. 53-54. He therefore states that his transformed versions of District 4 are "more compact" than Enacted District 4. *Id.*

But the trial evidence *disproves* this claim: once Enacted District 4's Reock score is

corrected to 0.32, *Enacted District 4 is more compact than both of the special master's proposals* on the Reock measure. Moreover, Intervenor-Defendants' versions of District 4 score 0.32 and 0.31 on the Reock measure and, thus, also are more compact than the special master's proposals. *See* Int.-Def. Ex. F, P (DE 232-6; DE 232-16). And the special master admits that one of his proposals is only marginally more compact than Enacted District 4, while the other is exactly "as compact," on the Polsby-Popper test. *Id.* Thus, even if the special master or the Court could prioritize the "good government" principle of compactness above the Legislature's preferred traditional principles, such elevation could not support adopting the special master's proposed transformation of District 4.

Contiguity. The special master does not dispute that Enacted District 3 and Intervenor-Defendants' versions of District 3 are contiguous under Virginia law. Nor could he, since the Virginia Supreme Court has upheld water contiguity as permissible. *Wilkins*, 264 Va. at 461; *see also* Rep. 17. The special master also points to no authority to support his apparent belief that contiguity by water over a "bridge or tunnel" such as in his proposed versions of District 3 is superior to contiguity over water without a bridge or tunnel. Rep. 17, 46. Thus, any effort by the Enacted Plan to use water contiguity, even if attributable to race, cannot *subordinate* a neutral districting principle, since such water continguity is an *accepted* districting principle, no different than the special master's new-found "bridge or tunnel" contiguity policy.

The special master notes that his versions of District 4 are "contiguous in that you can move from one land portion of the district to all other land portions of the district without the need to rely on contiguity via water." *Id.* 53, 54. Of course, the same is true of Enacted District 4 and both of Intervenor-Defendants' versions of District 4. *See, e.g.*, Int.-Def. Ex. A (DE 232-1); Int.-Def. Ex. K (DE 232-11).

Locality Splits. Although not insignificant, respecting localities has not been an important principle in Virginia for decades. The Virginia Constitution was amended in 1970 to *eliminate* respect for "political subdivisions" as a traditional principle. Int.-Def. Trial Ex. 55 at 782. In 2000, the Legislature codified by statute certain important traditional principles; respecting localities was not included. Va. Code Ann. § 242.2-305. The Virginia Supreme Court, in a *Shaw* case, listed "preservation of existing districts" and "incumbency," but not respecting political boundaries, as traditional principles. *Wilkins*, 264 Va. at 464.

The special master nonetheless touts the fact that his proposed versions of District 3 split fewer localities than Enacted District 3. Rep. 46-47. But he recognizes that his NAACP Plan Modification 6 "splits one more city or county" in District 4 than the Enacted Plan, while his Current Congressional Plan Modification 16 "splits the same number of cities or counties as the current CD4." *Id.* 53-54. Thus, his proposals perform equally or *worse* than the Enacted Plan with regard to split localities in District 4. *See id.* Moreover, on a statewide basis, the Current Congressional Plan Modification 16 splits the same number of localities—14—as the Enacted Plan. *See* Current Congressional Plan Modification 16 Split Localities.

The special master's proposals perform even worse in comparison to Intervenor-Defendants' proposals. Intervenor-Defendants' proposals each contain only *one* locality split in District 4 affecting population. (The special master counts three locality splits in Intervenor-Defendants' plans, but fails to note that two of the three affect no population). *See* Rep. 52; Int.-Def. Ex. E (DE 232-5); Int.-Def. Ex. O (DE 232-15). Anyway, even if Intervenor-Defendants' plans had three locality splits in District 4, they are still superior to the special master's alternatives: the Current Congressional Modification 16 contains four such splits and NAACP Plan Modification 6 contains five such splits. *See* Rep. 52. Intervenor-Defendants' proposals

also perform as well or better than the special master's proposals with respect to split localities statewide: whereas Intervenor-Defendants' proposals split 12 or 13 localities, respectively, *see* Int.-Def. Ex. E (DE 232-5); Int.-Def. Ex. O (DE 232-15), the special master's proposals split 13 and 14 localities, respectively, *see* NAACP Plan Modification 6 Split Localities; Current Congressional Plan Modification 16 Split Localities.

Thus, as with compactness and contiguity, the special master's "good government" criteria of avoiding locality splits does not support entry of either of his proposals as a judicial remedy in this case.

III. THE SPECIAL MASTER'S PROPOSALS SUBORDINATE TRADITIONAL DISTRICTING PRINCIPLES TO RACE

The Court also may not enter either of the special master's two-district proposals as a *Shaw* remedy because they both *violate Shaw* under this Court's liability opinion: the special master rank-ordered racial considerations above traditional districting principles in order to intentionally create two minority opportunity districts; subordinated the traditional principles of core preservation, politics, and incumbency protection to race; and has not attempted to show that his use of race was narrowly tailored.

Rank Ordering And Creation Of Two "Minority Opportunity" Districts With Less Than 50% BVAP. This Court principally rested its finding of a *Shaw* violation in Enacted District 3 on the fact that Delegate Janis rank-ordered compliance with the federal Voting Rights Act above "permissive" state-law traditional districting principles. Op. 1-2, 18-21, 23-26. The special master, however, *does exactly the same thing*. Indeed, the special master ranks "avoiding either fragmentation or packing of geographically concentrated minority populations that might have the effect or purpose of minimizing or diluting the voting strength of constitutionally protected minorities, and/or lead to retrogression" as his predominant consideration after

"conformity to a standard of one person, one vote." Rep. 8-9, 11. In fact, the special master lists this *statutory* goal of complying with the Voting Rights Act above the *constitutional* requirement of "avoiding use of race as a predominant criterion for redistricting." *Id.* And he explicitly confirms that these three federal criteria were ***"of highest priority"*** in drawing his proposals. *Id.* 11 (emphasis added).

The special master pursues this highest priority of race by creating two "minority opportunity" districts with less than 50% BVAP in Districts 3 and 4. *Id.* 29. Indeed, the special master's stated goal is to "fix the constitutional infirmities in the current CD3" as well as unproven "packing of minority voting strength . . . in CD3" and "fragmentation of minority voting strength . . . in CD4." *Id.* 65. He thus strays far beyond the Court's *Shaw* finding and draws proposals "that provide[] minority voters in CD3 a realistic opportunity to elect candidates of choice" and "also neither fragment[] nor pack[] minority population concentrations elsewhere in central or southeastern Virginia." *Id.* 14. The special master therefore "configur[es] CD3 with a black voting age population slightly above 40% as a 'minority opportunity to elect' district" in order to facilitate "the creation of a reconfigured CD4 [as] a second 'minority opportunity to elect' district." *Id.* 38 n.22. Accordingly, in the special master's view, his race-based division of District 3 serves the purpose "of creating a second 'minority opportunity to elect' district in CD4 that remedies previous fragmentation of the black population in eastern central Virginia." *Id.* 43.

This creation of *two* "minority opportunity" districts with BVAPs calibrated in the 40% range, *see id.* 38 n.22, is clearly more race-conscious than preserving one majority-black district originally created as a *Shaw* remedy. The special master thus attempts to suggest that race did not predominate in drawing his versions of District 4, which he describes as a "residual" district

that "arises virtually automatically" from his decision to divide District 3's Richmond and Norfolk urban centers. *Id.* 16. But the fact that the special master's version of District 4 "arises virtually automatically" from his race-based changes to District 3 is the entire point: that fact underscores that the transformation of District 4 advanced the special master's "highest priority" of "avoiding either fragmentation or packing" that he has now concluded infects the Enacted Plan's District 3. *Id.* 8-9, 11.

Moreover, the special master devotes eight pages of his report to demonstrating that his versions of District 4 are performing "minority opportunity" districts. *Id.* 51-59. And the special master readily admits that "there are alternative ways to reconfigure current CD3 that fully address the constitutional violations in that district," *id.* 16—but the proposals he chose alternatives that "reconfigure[] CD4" into a "second 'minority opportunity to elect' district" that "remedies the previous fragmentation of the black population in eastern central Virginia," *id.* 38 n.22, 43. This predominant pursuit of racial priorities violates *Shaw* under the Court's own reasoning. *See* Op. 1-2, 18-21, 23-26.

Subordination Of Traditional Principles To Race. The special master also subordinates the Legislature's preferred "offsetting" traditional districting principles to race. *Ala. Leg. Black Caucus*, 135 S. Ct. at 1270. As explained, the special master's proposals completely sacrifice the Legislature's preeminent neutral priority of core preservation to the goal of creating two "minority opportunity" districts. *See supra* pp. 16-20. While the Legislature consistently implemented this priority across the state, the special master pursues it only in majority-white districts and abandons it in Districts 3 and 4 because of their racial composition. *See id.* Thus, the special master's proposals subordinate this traditional districting principle to race—and treat minority voters and representatives *worse* than their white counterparts—in the name of

remedying an alleged subordination of other traditional principles to race.

The special master also subordinated the Legislature's desire to maintain the 8-3 partisan split and to protect incumbents of both parties by proposing overwhelmingly Democratic versions of District 4 that result in a 7-4 partisan split that harms Republican incumbent Representative Forbes. *See supra* pp. 20-21. But the Legislature's political and incumbency-protection objectives are legitimate traditional principles that "offset" racial considerations, *Ala. Leg. Black Caucus*, 135 S. Ct. at 1270; *White*, 412 U.S. at 791, 797, so *Shaw* cannot require the judiciary to subordinate them to race.

Narrow Tailoring. The special master uses the term "narrowly tailored," but not to address the strict-scrutiny burden applicable to his intentional use of race. Rep. 2. Rather, the special master uses that term as a synonym for his definition of "least change," or, in other words, as a prohibition on "modifying congressional districts that did not need to be changed to deal with the constitutional problems in CD3." *Id.*; *see also id.* 4, 14 n.6, 21, 26, 27, 37, 58, 61, 64, 66. Even under that inartful use, the special master's proposals are not "narrowly tailored" because they sweep beyond the "constitutional problems" the Court found in District 3, *id.* 2, to address unproven "packing" in District 3 and "fragmentation" in District 4, *id.* 65.

In all events, the special master has not even attempted to satisfy his burden to show that his use of race satisfies strict scrutiny. Nor could he have satisfied that burden, had he tried, for the simple reason that he gratuitously seeks to correct unproven "fragmentation" in District 4 and "packing" in District 3. *Id.* Moreover, the use of race cannot be remotely justified as narrowly tailored to satisfy the Voting Rights Act. As noted, Section 2 of the Voting Rights Act requires preservation of a district where blacks constitute a "compact" *majority*, so the special master's creation of *plurality*-black districts is wholly gratuitous, not responsive to any legitimate Voting

Rights Act concern. *Bartlett*, 556 U.S. at 12-20 (plurality op.). Indeed, as Dr. McDonald testified, Section 2 might be *violated* by reducing District 3's BVAP below a majority level. *See id.*; Trial Tr. 188.

Further, the special master states that he set out to "avoid retrogression" in minority voting strength. Rep. 9. He fails to explain, however, how making the very safe majority-black District 3 far less safe does not violate this objective. *See id.* Moreover, the special master admits that he did not "seek to determine the absolute minimum percentage of African-American voting age population needed to create an 'opportunity to elect district' for minority voters," but concedes that the BVAP levels in his proposals exceed that level. *Id.* 37 (emphasis in original). In fact, like the analyses of Dr. McDonald and Dr. Handley, the special master's analysis indicates that black voters would have the ability to elect representative of their choice in a district with a BVAP in the low 30% range. *See id.* 35-41. Thus, under his own analysis, he chose BVAP levels far above the "minority opportunity" range, and therefore commits the same "narrow tailoring" problem the Court criticized in the Enacted Plan. *See id.*; Op. 43-49. And the special master admits that "there are alternative ways to reconfigure CD3 that fully address the constitutional violations in that district" without making any effort to explain why his proposals are superior or more narrowly tailored than any others. *Id.* 16. The Court cannot remedy an alleged *Shaw* violation that it found fails strict scrutiny with another *Shaw* violation that does not even attempt to satisfy such scrutiny.

IV. THE SPECIAL MASTER'S CRITICISMS OF INTERVENOR-DEFENDANTS' PLANS ARE MERITLESS

As Intervenor-Defendants have explained, Intervenor-Defendants' Proposed Remedial Plans 1 and 2 are the only legally defensible remedies in the record. *See* Int.-Def. Br. In Support Of Their Proposed Plans 1-15 (DE 232); Int.-Def. Br. Re. Proposed Remedial Plans (DE 251).

Intervenor-Defendants' plans remedy the *Shaw* violation the Court identified because they "maintain[] a majority-minority district" in District 3 and "achieve[] the population increase needed for parity, while simultaneously minimizing locality splits" and improving District 3's compactness. Op. 28, 32; *see also* Int.-Def. Br. In Support Of Their Proposed Plans 8-10. Moreover, Intervenor-Defendants' proposals—unlike *all* other proposals, including the special master's proposals—are no broader than "necessary to cure" the constitutional defect the Court found in Enacted District 3, *Upham*, 456 U.S. at 43; *White*, 412 U.S. at 794-95, and "follow the policies and preferences of the State" with regard to the Legislature's paramount neutral criteria to the greatest extent practicable, *White*, 412 U.S. at 795; *see also* Int.-Def. Br. In Support Of Their Proposed Plans 1-15. In fact, as explained above, Intervenor-Defendants' proposed plans outperform the special master's proposals on core preservation, politics, incumbency protection, compactness in District 4, and locality splits in District 4 and statewide. *See supra* pp. 16-27.

The special master agrees that Intervenor-Defendants' plans "make only minimal changes in the present configuration of CD3." Rep. 27. The special master, however, contends that Intervenor-Defendants' plans do not sufficiently cure the *Shaw* violation and, thus, may not be adopted as a judicial remedy. *See id.* But the special master rests this conclusion on his view of how Intervenor-Defendants' plans perform on certain of his preferred "good government" criteria. *See id.* 27-28. He therefore *never* compares Intervenor-Defendants' plans to Plaintiffs' Alternative Plan that this Court endorsed as constitutional. *See id.* This failure is fatal: because the Court endorsed the Alternative Plan as constitutional, it necessarily serves as the remedial benchmark for what plans are constitutional remedies for the *Shaw* violation the Court found. *See, e.g.*, Int.-Def. Br. In Support Of Their Proposed Plans 1-15. Here, Intervenor-Defendants'

plans equal or exceed the Alternative Plan in all respects, and thus are necessarily adequate to cure the constitutional violation the Court found. *See id.*

The special master's criticisms of Intervenor-Defendants' plans therefore falter under even the most minimal scrutiny. *First*, the special master criticizes Intervenor-Defendants' plans because they do not cure the unpleaded and unproven "fragment[ation]" of "some minority population concentrations" in Enacted District 4. Rep. 28 n.13. But, of course, this fact weighs *in favor of* Intervenor-Defendants' plans because it underscores that those plans are focused on the *Shaw* violation the Court found and do not rest on the special master's newly invented and baseless vote-dilution findings that doom his proposals. *See supra* pp 9-14.

Second, the special master criticizes Intervenor-Defendants' plans for preserving a majority-black District 3 and not lowering District 3's BVAP below 50%. *See* Rep. 27. Of course, this Court endorsed Plaintiffs' Alternative Plan that also maintained a majority-black District 3 (and made *no* changes to District 4), so the Court's liability decision does not in any way justify reducing District 3's BVAP below 50%. *See* Int.-Def. Br. In Support Of Their Proposed Plans 1-15. Moreover, as explained, the special master eschewed any effort to reduce District 3's BVAP to the "minimum" "opportunity to elect" level, and provides no explanation as to why the non-minimum BVAP level he chose is superior to the allegedly non-minimum BVAP level Plaintiffs chose in their Alternative Plan and Intervenor-Defendants replicated in their plans. Rep. 37 (emphasis original).

Third, the special master attacks Intervenor-Defendants' plans because they maintain the same basic shape and "form" as Enacted District 3 and are not as "compact" as his proposals in District 3. Rep. 27-28 & n.13. But both facts also are true of Plaintiffs' Alternative Plan, and are inevitable in *any* district that seeks to preserve District 3's core. Thus, this criticism again boils

down to the special master's untenable assertion that the Court should favor his "good government" principles over the Legislature's "inarguabl[e]" priorities. Op. 35.

Finally, the special master takes aim at Intervenor-Defendants' plans purportedly "relatively large number of total city/county splits" and the split of Newport News between Districts 2 and 3. Rep. 27-28 & n.13. Of course, as with shape and compactness, any criticisms of the number of locality splits in Intervenor-Defendants' plans flows from the preservation of District 3's basic shape and demographics as in the Enacted Plan and Plaintiffs' Alternative Plan. Moreover, the special master's criticism of the total number of locality splits in Intervenor-Defendants' plans is puzzling: the special master ignores that Intervenor-Defendants' plans perform far *better* than his proposals with regard to locality splits in District 4, and as well or better than his proposals on locality splits statewide. *See supra* pp. 26-27.

The special master's unsupported allegation that the split of Newport News in Intervenor-Defendants' plans "*appear[s]* to be race related," Rep. 27 (emphasis added), again ignores the evidence. In the first place, as the trial evidence the special master did not review demonstrates, Intervenor-Defendants' split of Newport News between Districts 2 and 3 simply maintains a split that already existed in the Benchmark Plan and the post-*Moon* plan adopted as a *Shaw* remedy. *See, e.g.*, Int.-Def. Trial Exs. 3, 6, and 7. In fact, even Plaintiffs' Alternative Plan splits Newport News (between Districts 1 and 3). *See* Int.-Def. Trial Ex. 25. Moreover, the special master's myopic focus on racial demographics and disregard of political and incumbency-protection considerations, Rep. 27 & n.12, ignores that the portions of Newport News included in District 3 in Intervenor-Defendants' plans not only encompass the home of District 3 incumbent Representative Bobby Scott, but also are far more heavily Democratic than the portions of Newport News left in District 2, *see* Int.-Def. Br. In Support Of Their Proposed Plans 1-15.

Thus, far from being "race-related," Rep. 27, Intervenor-Defendants' plans' treatment of Newport News is more than amply justified by the Legislature's preeminent race-neutral core-preservation, political, and incumbency-protection priorities.

CONCLUSION

The Court should reject the special master's proposed plans and enter one of Intervenor-Defendants' proposed plans if a judicial remedy becomes necessary in this case.

Dated: November 24, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 24, 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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