IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

GLORIA PERSONHUBALLAH, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No.: 3:13-cv-678
	)	
JAMES B. ALCORN, et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' BRIEF IN OPPOSITION TO INTERVENORS' MOTION TO SUSPEND FURTHER PROCEEDINGS AND TO MODIFY INJUNCTION PENDING SUPREME COURT REVIEW

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GLOSSARY

BVAP	Black Voting Age Population
CD#	Virginia Congressional District No.
DOJ	The U.S. Department of Justice
DX	Defendants' Trial Exhibit No.
IX	Intervenor-Defendants' Trial Exhibit No.
PX	Plaintiffs' Trial Exhibit No.
Tr.	Trial Transcript Page No.
VTD	Voting Tabulation District

INTRODUCTION AND SUMMARY

The Court should deny the motion to stay remedial proceedings pending the appeal in *Wittman v. Personhuballah*. The Congressmen are mistaken that a stay is the normal or routine course in such cases. They overlook a number of cases in which the Supreme Court declined to stay remedial proceedings notwithstanding its consideration of an appeal from the merits of a three-judge court's ruling. Moreover, they are wrong that their appeal triggers an automatic stay of remedial measures by somehow ousting this Court of jurisdiction. To the contrary, a stay is not lightly granted. To warrant one, the Congressmen bear the heavy burden of showing that the traditional four factors weigh in favor of a stay.

They cannot carry that burden here. Most importantly, they cannot demonstrate a likelihood that five Justices will find clear error in this Court's determination that race predominated in the redistricting. Nor is any Justice, let alone five, likely to hold that the government's use of an explicit, 55%-BVAP quota does *not* trigger strict scrutiny and was narrowly tailored to prevent retrogression in CD3. The Congressmen have also failed to show that they will suffer irreparable harm if this Court completes its work on the remedial plan. Indeed, they have failed to show irreparable harm if either of the Special Master's remedial plans is actually implemented. Neither of those plans would oust any incumbent. The changes have no effect on four of the Congressmen's districts and strengthen the Republican base in two of them. While the Special Master's remedial measures will make the election in CD4 a more closely contested race for Representative Forbes, that marginal effect on his reelection opportunity does not outweigh the irreparable harm to Virginia voters from the continued denial of their fundamental constitutional rights.

Thus, the balance of hardship plainly warrants denying the stay pending appeal. If the Supreme Court thinks otherwise, it can act promptly on any application by the Congressmen to stay remedial action pending appeal.

ARGUMENT

A. Federal courts apply the traditional four-factor test in determining whether to stay remedial proceedings pending appeal.

1. The Supreme Court does not reflexively stay remedial proceedings in election cases or other direct-appeal cases.

Intervenor-Defendants are mistaken that the Supreme Court routinely stays remedial proceedings pending an appeal of the judgment, and it is untrue that "no three-judge court has ever entered a remedy during the pendency of such review."[1] Their conclusions do not follow from the few cases they cite—all more than forty years old—in which remedial proceedings were stayed pending direct review in the Supreme Court: *White v. Weiser*,[2] *Whitcomb v. Chavis*,[3] and *Kirkpatrick v. Preisler*.[4] While none of the cryptic orders from those cases illuminates why the Court granted a stay, each reached the Supreme Court *later* in the election cycle than what has happened here.[5]

In more recent cases, the Supreme Court has declined to stay remedial proceedings on appeal from three-judge courts *despite* the pendency of a direct appeal. Thus, in *Johnson v.*

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[1] Int.-Defs.' Mem. at 2 (ECF No. 271).

[2] 412 U.S. 783 (1973).

[3] 396 U.S. 1064 (1970).

[4] 390 U.S. 939 (1967).

[5] *See Weiser*, 412 U.S. at 789 (noting that the Court, 404 U.S. 1065 (Jan. 27, 1972), stayed the district court's remedial order and permitted the 1972 congressional elections to proceed under the previous plan); *Whitcomb*, 396 U.S. at 1064 (stay entered February 2, 1970 of remedial order for State reapportionment); *Kirkpatrick*, 390 U.S. at 939 (stay entered March 4, 1968 authorizing Missouri to conduct 1968 congressional elections under previous redistricting plan).

Miller ("*Miller*"), the three-judge court, on December 13, 1995, invalidated Georgia's Eleventh Congressional District as a racial gerrymander and devised a remedial redistricting plan.[6] After the Supreme Court noted probable jurisdiction on May 20, 1996,[7] the Supreme Court denied the appellants' motion to stay on June 7, 1996[8] and allowed the November 1996 general elections to proceed under the court-ordered plan.[9] Similarly, in *Daggett v. Kimmelman*, the three-judge court invalidated New Jersey's congressional districts and ruled that it would implement its own remedial plan for the November 1984 elections if the legislature failed to meet a February 3 deadline to correct the deficiencies.[10] When the legislature failed to meet that deadline, the court ordered a remedial plan on February 17, 1984.[11] New Jersey State officials appealed but the Supreme Court denied their motion to stay on March 30, 1984, permitting the November 1984 election to proceed under the court-ordered plan.[12]

One of the seminal cases to address stays pending appeal, *Whalen v. Roe*, made clear forty years ago that such stays are *not* routinely granted.[13] In *Whalen*, Justice Marshall declined

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[6] 922 F. Supp. 1556 (S.D. Ga. 1995), *probable jurisdiction noted sub nom. Abrams v. Johnson*, 517 U.S. 1207, *stay denied*, 517 U.S. 1241 (1996), *aff'd*, 521 U.S. 74 (1997) .

[7] 517 U.S. at 1207.

[8] 517 U.S. at 1241.

[9] *See Abrams v. Johnson*, 521 U.S. 74, 78 (1997) ("we declined to stay the order; and the 1996 general elections were held under" the court-ordered plan).

[10] 580 F. Supp. 1259, 1260 (D.N.J.), *stay denied sub nom. Karcher v. Daggett*, 466 U.S. 910, *aff'd mem.*, 467 U.S. 1222 (1984). During an earlier phase of the case, the Supreme Court had granted a stay pending appeal, but that stay was vacated and the injunction reinstated because the Court affirmed the district court's conclusion that New Jersey's redistricting plan was unconstitutional. *See id.*; *see also Karcher v. Daggett*, 455 U.S. 1303, 1307 (1982).

[11] *Id.* at 1265.

[12] 466 U.S. at 910.

[13] 423 U.S. 1313 (1975).

to stay the judgment of a three-judge court enjoining enforcement of a New York law regulating the disclosure of certain patient information. He explained that the party seeking a stay must demonstrate not only a reasonable probability that "four members" of the Court will note probable jurisdiction, but that "five Justices are likely to conclude that the case was erroneously decided below."[14] The other traditional factors must also be satisfied. For instance, where the movant fails to demonstrate "irreparable harm," the Court need not predict whether the appellant "will be able to convince five Justices to reverse the three-judge court."[15]

2. The traditional four-factor test determines whether to stay the remedial order pending appeal.

The traditional four-factor test applies—both in this Court and in the Supreme Court—in determining whether to stay further remedial proceedings pending appeal. Thus, in *Johnson v. Mortham* ("*Mortham*"),[16] the three-judge court invalidated Florida's Third Congressional District on April 17, 1996 and ordered a remedial redistricting plan for the November 1996 election, granting the legislature until May 22, 1996 to devise its own remedy.[17] The court denied Florida officials' motion to stay that order pending appeal to the Supreme Court.[18] The court explained that "[a] stay is extraordinary relief for which the moving party bears a 'heavy

[14] *Id.* at 1316-17 (citation omitted).

[15] *Id.* at 1317-18.

[16] 926 F. Supp. 1460 (N.D. Fla.), *stay denied*, 926 F. Supp. 1540 (N.D. Fla. 1996).

[17] *Id.* at 1494-95.

[18] 926 F. Supp. at 1542.

burden' to demonstrate" his entitlement.[19] The court went on to find that a stay was not warranted under the four-factor test discussed by the Supreme Court in *Hilton v. Braunskill*.[20]

Hilton explained that those four factors are the same as "the general standards for staying a civil judgment."[21] They are:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.[22]

More recently, the Supreme Court reaffirmed in *Nken v. Holder* that the four-factor test is part of an appellate court's "'traditional equipment for the administration of justice.'"[23] The Court added that "'[a] stay is not a matter of right, even if irreparable injury might otherwise result.'"[24] "It is instead 'an exercise of judicial discretion,' and '[t]he propriety of its issue is dependent upon the circumstances of the particular case.'"[25]

This Court itself applied the four-factor test in denying the motion by the Virginia Senate and House of Delegates to postpone the legislature's remedial deadline from September 1 until mid-November 2015.[26] The Court ruled that the movants had "failed to show that (1) the Intervenor-Defendants are likely to succeed in the appeal pending before the Supreme Court, or

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[19] *Id.* (quoting *Winston-Salem/Forsyth Cty. Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971) (Burger, C.J., in chambers)).

[20] *Id.* (discussing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

[21] 481 U.S. at 775.

[22] *Id.* at 776.

[23] 556 U.S. 418, 421 (2009) (quoting *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9-10 (1942)).

[24] *Id.* at 433 (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)).

[25] *Id.* (quoting *Virginian Ry. Co.*, 272 U.S. at 672-73).

[26] Order (ECF No. 201).

(2) they will suffer irreparable injury or prejudice by adhering to the Court's September 1, 2015 for adopting a new redistricting plan."[27] There is no reason for a different conclusion this time.

3. The appeal does not divest the court of jurisdiction over the remedial phase of this case.

It follows ineluctably from what has already been said that this Court does not lose jurisdiction over remedial proceedings simply because the Supreme Court is considering the Intervenor-Defendants' appeal of the underlying judgment. There is no merit to their footnoted suggestion that their appeal, or the Supreme Court's decision to hear it, somehow operates as an automatic stay.[28] The notion of an automatic stay contradicts *Nken*'s reminder that a stay is not a matter of right (even in the face of irreparable harm). It contradicts Rule 8 of the Federal Rules of Appellate Procedure, which requires a party to move for a stay pending appeal if it wants to suspend an injunction.[29] And it is disproved by the examples discussed above in which the party seeking a stay had to satisfy the demanding four-factor test to justify one. As Justice Stevens said in *Williams v. Zbaraz*: "Whether or not the plaintiffs prevail in this Court, the fact is that they did in the District Court. The burden is on the defendants-applicants to establish that the order of the District Court should not be enforced."[30]

Intervenor-Defendants' sole citation, *Donovan v. Richland County Association*,[31] does not hold otherwise. In *Donovan*, the Supreme Court held that once it had decided to grant review, the court of appeals could not pull the rug out (jurisdictionally speaking) by recalling and

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[27] *Id.*

[28] Int.-Defs.' Mem. at 4 n.1 (ECF No. 271).

[29] Fed. R. App. P. 8(a)(1).

[30] 442 U.S. 1309, 1315 (1979) (Stevens, J., in chambers).

[31] 454 U.S. 389, 390 n.2 (1982).

reversing the ruling under review: "[t]he filing of the notice of appeal clearly divested the Court of Appeals of any jurisdiction that it otherwise had to *decide the merits* of this case."[32] *Donovan* is an unremarkable example of the general rule that the filing of a notice of appeal divests a district court of jurisdiction *only* "over those aspects of the case involved in the appeal."[33]

But the *merits* of the case on appeal are different from the *remedial* measures required in the district court as a result of the judgment from which the appeal is taken. "'[T]he mere pendency of an appeal does not, in itself, disturb the finality of a judgment.'"[34] Accordingly, "[t]he district court has jurisdiction to act to enforce its judgment so long as the judgment has not been stayed or superseded."[35] That retained jurisdiction includes the power "to act . . . on remedial matters unrelated to the merits of the appeal."[36]

In short, "[u]nless the judgment is stayed, the district court may act to enforce it despite the pendency of an appeal."[37] That is why the appeals in *Miller*, *Daggett*, *Whalen*, and *Mortham* did not oust those three-judge courts of their power to implement the remedy they had ordered. The appeal here likewise does not oust this Court of jurisdiction to implement the remedial plan that it has ordered.

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[32] *Id.* (emphasis added).

[33] *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982).

[34] *NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987) (quoting *Wedbush, Noble, Cooke, Inc. v. SEC*, 714 F.2d 923, 924 (9th Cir. 1983)).

[35] *Id.* (quoting *Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 298, 299 n.2 (5th Cir. 1984)).

[36] *Fort Gratiot Sanitary Landfill v. Mich. Dep't of Nat. Res.*, 71 F.3d 1197, 1203 (6th Cir. 1995).

[37] 16 Charles Alan Wright, Arthur R. Miller et al., *Federal Practice & Procedure: Jurisdiction* § 3949.1 (4th ed. 2015); *see also Cincinnati Bronze*, 829 F.2d at 588 ("[A]lthough a district court may not expand upon an order after the notice of appeal has been filed, it may take action to enforce its order in the absence of a stay pending appeal.").

B. The Congressmen's motion for a stay fails the four-factor test.

The Intervenor-Defendants have not carried their "heavy burden"[38] to show that the four-factor test warrants staying this Court's efforts to finalize the remedial plan pending appeal. In evaluating those factors, the Court should bear in mind that "[b]alancing the equities is always a difficult task, and few cases are ever free from doubt."[39] But "[w]here there is doubt, it should inure to the benefit of those who oppose grant of the extraordinary relief which a stay represents."[40]

1. The Congressmen have not shown that five Justices will likely hold that using a 55%-BVAP quota is not subject to strict scrutiny and is narrowly tailored to prevent retrogression in CD3.

To conclude that this Court erred, five Justices would have to be persuaded that the General Assembly did not impose a 55%-BVAP floor in redrawing CD3, or that the use of such a mechanical racial quota does not trigger strict scrutiny. The Congressmen cannot succeed on either argument.

Easley v. Cromartie makes clear that this Court's factual determination that race predominated can be reviewed "only for 'clear error.'"[41] It is not enough for the Supreme Court to find that it "'would have decided the case differently.'"[42] The question is simply "whether 'on

[38] *Nken*, 556 U.S. at 439 (Kennedy, J., concurring) (quoting *Zbaraz*, 442 U.S. at 1311 (Stevens, J., in chambers) (quoting *Whalen*, 423 U.S. at 1316 (Marshall, J., in chambers))).

[39] *Zbaraz*, 442 U.S. at 1315.

[40] *Id.* at 1315-16.

[41] 532 U.S. 234, 242 (2001).

[42] *Id*. (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)).

the entire evidence,' [the Supreme Court] is 'left with the definite and firm conviction that a mistake has been committed.'"[43]

Although the facts at trial were disputed, there was ample evidence to support this Court's finding that race predominated in the redistricting. Delegate Janis, the plan's sole author, insisted in the floor debates that nonretrogression in CD3 was the "primary focus"[44] indeed, the "paramount,"[45] "nonnegotiable"[46] concern. Janis also insisted that he had not conducted a partisan analysis of the results of his redistricting plan,[47] evidence that supports the majority's decision to reject the Congressmen's argument that the legislature intended to entrench an 8-3 partisan split in Virginia's congressional delegation.[48] Although Judge Payne, in dissent, identified some statements by Janis that suggested that race was one of several factors,[49] quoting prepared remarks twice given by Janis,[50] the majority did not commit clear error in relying on Janis's unscripted comments showing that race was the predominant factor.

There was also sufficient evidence to support the Court's finding that the General Assembly applied a 55%-BVAP floor when it added black voters to CD3. That point was advanced by the defense expert, John Morgan, who had served as the Republican consultant for

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[43] *Id*. (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

[44] PX 43 at 25:14.

[45] *Id.* at 25:8.

[46] *Id.* at 25:10.

[47] IX 9 at 14:7-13.

[48] Mem. Op. at 18 n.12 (finding "assumption that the legislature's political objective was to create an 8-3 incumbency protection plan" was "not supported by the record") (ECF No. 170).

[49] *Id.* at 61-65.

[50] *Compare* PX 43 at 2-6 (statement of Del. Bill Janis on floor of House of Delegates), *with* IX 9 at 4-9 (statement of Del. Bill Janis to Senate Committee on Privileges and Elections).

the House of Delegates' 2011 redistricting plan. Morgan said under oath[51] that the legislature used a 55%-BVAP floor in revising CD3.[52] Moreover, Virginia's § 5 submission advocated the 56.3% BVAP of Enacted CD3 as being "over 55 percent,"[53] comparing it to other alternative plans that would have resulted in BVAP "below 55 percent."[54] Plaintiffs also introduced floor debates in which Delegate Morrissey asked Janis: "[I]s there any empirical evidence whatsoever that 55 percent African-American voting population is different than 51 percent or 50? Or is it just a number that has been pulled out of the air?"[55] Janis responded that his plan (exceeding 55% BVAP) made getting § 5 preclearance a "certainty," whereas the 40% BVAP in Senator Locke's competing plan jeopardized preclearance.[56] Plaintiffs also introduced the floor debates on the redistricting plan for the Virginia House of Delegates, which contained statements referencing the need for a 55%-BVAP floor in order to obtain DOJ preclearance.[57]

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[51] IX 13 at 28.

[52] *Id.* at 26-27 (emphasis added); Tr. 351:20-352:25.

[53] PX 6 at 2.

[54] *Id.* at 3, 4.

[55] PX 45 at 7:9-12.

[56] *Id.* at 7:13-8:20.

[57] *E.g.*, IX 30 at 13:23-25 (statement of Del. Dance that population shifts were required between three districts to get "at least 55 percent performing" in majority-minority districts); IX 32 at 18:11-16 (statement of Del. Vogel that "when it came to Section 5—I just want to be very clear about this—that we believed that that was not really a question that was subject to any debate. The lowest amount of African Americans in any district that has ever been precleared by the Department of Justice is 55.0"); *id.* at 20:8-11 ("We were just simply following what, I believe, is not subject to any question; that is, as of today, the lowest percentage that the Department of Justice has ever approved is 55.0."); *id.* at 22:6-12 ("But it has been the position of the Department of Justice, and I will speak to this very confidently, that 55.0 is the percentage that they believe is what is qualified, and that has been, at least in the past to date, their position regarding what it would take to be able to elect a candidate of your choice, whomever that might be.").

Because substantial evidence supported this Court's finding that race predominated, the Court did not err in applying strict scrutiny under *Alabama Legislative Black Caucus v. Alabama*.[58] In *Alabama*, the State legislature acted under the mistaken view that, under the nonretrogression mandate of § 5 of the Voting Rights Act, the legislature was "required to maintain roughly the same black population percentage in existing majority-minority districts."[59] That led the legislature to pack black voters into at least one district in order to maintain the baseline percentage.[60] Nonetheless, the three-judge court determined (2-1) that the evidence was insufficient to show that race predominated because the legislature's concern about maintaining a racial floor was secondary to its compliance with the equal-population requirement. The Supreme Court held that was error. The equal-population requirement is "not one factor among others to be weighed against the use of race to determine whether race 'predominates.' Rather, it is part of the redistricting background, taken as a given, when determining whether race, or other factors, predominate in a legislator's determination as to *how* equal population objectives will be met."[61] Setting the equal-population consideration aside, "there [was] strong, perhaps overwhelming, evidence that race did predominate as a factor when the legislature drew the boundaries."[62] Similar to this case, the evidence in *Alabama* included statements from legislative leaders "that a primary redistricting goal was to maintain existing racial percentages

[58] 135 S. Ct. 1257 (2015).

[59] *Id.* at 1263.

[60] *Id.*

[61] *Id.* at 1270.

[62] *Id.* at 1271.

in each majority-minority district, insofar as feasible."[63] Accordingly, the Court remanded the case to the district court to apply the correct analysis.

This case squarely fits *Alabama*'s description of what constitutes making race the predominant factor in redrawing electoral districts: the legislature here "'placed' race 'above traditional districting considerations in determining *which* persons were placed in appropriately apportioned districts.'"[64] In this case, the majority resolved the conflicting evidence by finding, as a factual matter, that the General Assembly imposed a 55%-BVAP floor in drawing CD3 to meet the "primary," "paramount," and "nonnegotiable" goal of avoiding retrogression, and that it did so "by increasing the BVAP of a safe majority-minority district and using a BVAP threshold."[65]

In order to find that strict scrutiny does not apply in this case, five Justices would have to conclude that the General Assembly's use of a mechanical racial quota excites no heightened judicial concern whatsoever. But such a holding would be unprecedented. The principal dissent in *Alabama*—authored by Justice Scalia and joined by Chief Justice Roberts and Justices Thomas and Alito—did not defend Alabama's use of mechanical racial floors. To the contrary, the dissenters *agreed* that "[r]acial gerrymandering strikes at the heart of our democratic process."[66] But the dissenting Justices thought that the plaintiffs had waived their district-by-district challenge and that the majority had improperly awarded them a "mulligan" by allowing them to pursue that theory on remand in the district court.[67] Justice Thomas wrote separately to

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[63] *Id.*

[64] *Id.* (second emphasis omitted) (citation omitted).

[65] Mem. Op. at 45 (ECF No. 170).

[66] 135 S. Ct. at 1275 (Scalia, J., dissenting, joined by Roberts, C.J., Thomas and Alito, JJ.).

[67] *Id.*

denounce what he called the "consciously segregated districting system currently being constructed in the name of the Voting Rights Act," in which "the only disagreement is about what *percentage* of blacks should be placed in those optimized districts."[68] He said that was "nothing more than a fight over the 'best' racial quota."[69]

Thus, there is no reason to suppose that any current member of the Supreme Court would think that strict scrutiny does not apply here. To the contrary, Justice Kennedy, who joined the 5-4 majority in *Alabama*, wrote separately in *Bush v. Vera* that strict scrutiny applies whenever a fixed racial percentage is required in an electoral district: "In my view, we would no doubt apply strict scrutiny if a State decreed that certain districts had to be at least 50 percent white, and our analysis should be no different if the State so favors minority races."[70] Justice Thomas (joined by Justice Scalia) agreed that that was "never a close question."[71] Chief Justice Roberts has similarly written that "'*all* racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny.'"[72] He famously lamented, "It is a sordid business,

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[68] *Id.* at 1281 (Thomas, J., dissenting).

[69] *Id*.

[70] *Bush v. Vera*, 517 U.S. 952, 996 (1996) (Kennedy, J., concurring); *see also Fisher v. Univ. of Tex*., 133 S. Ct. 2411, 2421 (2013) (majority opinion by Kennedy, J.) ("'[A]ll racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'") (quoting *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003)); *Miller v. Johnson*, 515 U.S. 900, 914-15 (1995) (majority opinion by Kennedy, J.) ("Nor can the argument that districting cases are excepted from standard equal protection precepts be resuscitated by *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977), where the Court addressed a claim that New York violated the Constitution by splitting a Hasidic Jewish community in order to include additional majority-minority districts . . . . To the extent any of the opinions in that 'highly fractured decision' can be interpreted as suggesting that a State's assignment of voters on the basis of race would be subject to *anything but our strictest scrutiny*, those views ought not be deemed controlling.") (citation omitted) (emphasis added).

[71] *Bush*, 517 U.S. at 999 (Thomas, J., concurring, joined by Scalia, J.).

[72] *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 741 (2007) (plurality opinion by Roberts, C.J.) (citation omitted).

this divvying us up by race."[73] And Justice Scalia has criticized racial quotas for years, writing in *Richmond v. J. A. Croson Co.* that "[a] racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice."[74] It would be astonishing if *any* Justice, let alone five, were to find strict scrutiny *inapplicable* when a State imposes a 55% fixed racial quota as the "primary," "paramount," and "nonnegotiable" consideration in a redistricting plan.

Having correctly found that strict scrutiny applied, this Court also did not err in holding that the use of a 55%-BVAP floor was not narrowly tailored to meet the compelling interest of avoiding retrogression in CD3. Morgan, the only witness for the defense, testified that he had *no opinion* on the narrow-tailoring question.[75] Accordingly, it is unlikely that five Justices would find the General Assembly had any basis—let alone a "strong basis in evidence"[76]—to conclude that increasing the BVAP above a 55% floor was needed to prevent retrogression in CD3, particularly when, as this Court found, CD3 had been "a safe majority-minority district for 20 years."[77]

As the Court emphasized in *Alabama*, the question under § 5 of the Voting Rights Act is not "'How can we maintain present minority percentages in majority-minority districts?'"[78] The correct question is "'To what extent must we preserve existing minority percentages in order to

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[73] *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, dissenting in part).

[74] 488 U.S. 469, 527 (1989) (Scalia, J., concurring in the judgment) (quoting Alexander M. Bickel, *The Morality of Consent* 133 (1977)).

[75] Tr. 349:16-23.

[76] *Alabama*, 135 S. Ct. at 1274.

[77] Mem. Op. at 45 (ECF No. 170).

[78] 135 S. Ct. at 1274.

maintain the minority's present ability to elect the candidate of its choice?'"[79] The testimony in this case showed that a BVAP percentage in the thirty-percent range would have sufficed in CD3.[80] Accordingly, the Congressmen will be unable to identify a "strong basis in evidence" to support the 55%-BVAP floor that was used instead.[81]

2. The Congressmen have not demonstrated irreparable harm.

The second *Hilton* factor does not ask whether someone else will suffer irreparable harm but "whether the *applicant* will be irreparably injured absent a stay."[82] The Congressmen have not shown that *they* will suffer the required irreparable harm to warrant a stay of proceedings.

In evaluating their assertion of harm, the Court should distinguish between two separate aspects of the remedial proceedings at issue here: completing work on the remedial plan, and ordering the Commonwealth to implement that remedial plan. The Congressmen do not identify any irreparable harm that they will suffer if the Court merely completes work on the remedial plan. That task will be accomplished shortly; the Court should finish its work.

Nor will the Congressmen be irreparably harmed if the Commonwealth implements the remedial plan while their appeal in *Wittman* proceeds. Assuming the Court adopts one of the "least change" plans now recommended by the Special Master, no incumbent is forced to compete against any other incumbent.[83] Moreover, the changes affect only CD3 and its

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[79] *Id.*

[80] Tr. 196:14-197:25. That conclusion was corroborated by both the Special Master and by Dr. Lisa Handley. *See* Report of the Special Master at 40-41, 63 (ECF No. 272).

[81] The Special Master likewise concluded that the claim that a 55% BVAP floor in CD3 is needed to give African-American voters a realistic opportunity to elect candidates of their choice "is unsupported by *any* empirical evidence." *Id.* at 62 (ECF No. 272).

[82] 481 U.S. at 776 (emphasis added).

[83] Report of the Special Master at 4 (ECF No. 272*)*.

immediately adjoining districts (CDs 1, 2, 4, and 7); no changes are made to six of the eleven congressional districts (CDs 5-6, 8-11).[84] Thus, Intervenor-Defendants Hurt (CD5), Goodlatte (CD6), Griffith (CD9), and Comstock (CD8) cannot claim any injury. Of the affected districts, the changes *increase* the Republican voting performance in two districts, improving the reelection chances of Intervenor-Defendants Wittman (CD1)[85] and Rigell (CD2).[86]

Although the two remaining Intervenor-Defendants, Representatives Forbes (CD4) and Brat (CD7), would see a reduction in Republican-voting performance in their districts, that too is not irreparable harm. For Brat, CD7 would remain a Republican-dominant district.[87] For

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[84] *Id.* at 19-20.

[85] *Compare* Congressional Plan: 1 - Current Congressional Districts, Spreadsheet – Excel, Election Data Worksheet, *available at* http://redistricting.dls.virginia.gov/2010/data/congressional%20plans/2012%20HB251_Bell/HB251_bell.xls (showing 45.8% Democratic vote in CD1 for President Obama in 2008), *with* Current Congressional Modification 16 data tables.pdf at 3 (showing 43.8%) *and* NAACP Modified #6 Revised data tables.pdf at 4 (showing 44.4%), *available at* http://redistricting.dls.virginia.gov/2010/court-ordered-redistricting.aspx; *see also* Analysis, Virginia Public Access Project, *available at* http://www.vpap.org/offices/us-representative-1/redistricting/?plan=13 (showing that CD1 "would become [2.1%] more Republican as a result of Congress: Special Master, Plan 1"); *id*. at http://www.vpap.org/offices/us-representative-1/redistricting/?plan=14 (showing that CD1 "would become [2.0%] more Republican as a result of Congress: Special Master, Plan 2").

[86] *Compare* Congressional Plan: 1 - Current Congressional Districts, Spreadsheet – Excel, Election Data Worksheet, *available at* http://redistricting.dls.virginia.gov/2010/data/congressional%20plans/2012%20HB251_Bell/HB251_bell.xls (showing 49.3% Democratic vote in CD2 for President Obama in 2008), *with* Current Congressional Modification 16 data tables.pdf at 3 (showing 47.9%) *and* NAACP Modified #6 Revised data tables.pdf at 4 (showing 45.4%), *available at* http://redistricting.dls.virginia.gov/2010/court-ordered-redistricting.aspx; *see also* Analysis, Virginia Public Access Project, at http://www.vpap.org/offices/us-representative-2/redistricting/?plan=13 (showing that CD 2 "would become [1.5%] more Republican as a result of Congress: Special Master, Plan 1"); *id.* at http://www.vpap.org/offices/us-representative-2/redistricting/?plan=14 (showing that CD 2 "would become [3.5%] more Republican as a result of Congress: Special Master, Plan 2").

[87] *Compare* Congressional Plan: 1 - Current Congressional Districts, Spreadsheet – Excel, Election Data Worksheet, at http://redistricting.dls.virginia.gov/2010/data/congressional%20plans/2012%20HB251_Bell/HB

Forbes, by contrast, CD4 would see a material increase in Democratic voters. President Obama lost CD4 with 48% of the vote in 2008; under the Special Master's two plans, the President would have carried CD4 with 60.1% and 62.2% of the vote respectively.[88] The Special Master also noted that the revised CD4 would become a black-opportunity district.[89] But those changes to CD4 do not mean that Forbes will be voted out of office in 2016. Given Forbes's strong incumbency advantage, the Special Master said that "this may be a somewhat closely contested election."[90] In the 2014 general election, however, Forbes defeated the Democratic challenger by a margin of *more than 22 points*: 60.1% to 37.5%.[91] Given that lopsided advantage, Representative Forbes has not claimed that the change in Democratic performance under the Special Master's recommendation would be enough to cause his ouster.

Although the Supreme Court sees it as an open question, we believe that Representative Forbes likely has standing to maintain his appeal. The revised CD4 would materially affect his reelection chances, a claim of injury that appears to qualify for Article III standing under *Meese*

251_bell.xls (showing 42.8% Democratic vote in CD7 for President Obama in 2008), *with* Current Congressional Modification 16 data tables.pdf at 3 (showing 44.9%) *and* NAACP Modified #6 Revised data tables.pdf at 4 (showing 46.2%), *available at* http://redistricting.dls.virginia.gov/2010/court-ordered-redistricting.aspx.

[88] Report of the Special Master at 52 (Table 2) (ECF No. 272).

[89] *Id.* at 55.

[90] *Id*.

[91] *See* Election Results for November 2014, Virginia Department of Elections, U.S. House District 4, *available at* http://historical.elections.virginia.gov/elections/search/year_from:2014/year_to:2014/stage:General.

v. Keene.[92] But having an articulable injury for Article III purposes is different from proving irreparable harm.

Indeed, Representative Forbes is already the beneficiary of a thumb on the scale in the Special Master's remedial plans. Had the Court permitted the districts to been drawn without regard to protecting the incumbents from being paired against one another, Forbes and Rigell, who live less than 18 miles apart, would have been placed in the same district.[93] While that form of incumbency protection for Representative Forbes is permitted[94] (and is another reason supporting the conclusion that the Special Master's proposals represent least-change plans[95]), it undercuts the equities when examining Forbes's claim of irreparable harm.

In any case, the marginal risk to Representative Forbes's reelection opportunity cannot outweigh the irreparable harm to Virginia voters if a remedial plan is not implemented.

3. The relative harms to Plaintiffs, to the Commonwealth, and to the public interest greatly outweigh any injury to the Congressmen.

Failing to implement a remedial plan for the next congressional election, after having found that black voters have been illegally packed into CD3, would constitute irreparable harm not only to Plaintiffs but to other Virginia voters. "Deprivation of a fundamental right, such as limiting the right to vote in a manner that violates the Equal Protection Clause, constitutes irreparable harm."[96] As this Court already found:

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[92] 481 U.S. 465, 474 (1987) (finding adequate Article III injury in plaintiff's claim that the statute he challenged, as applied to him, would "substantially harm his chances for reelection").

[93] Report of the Special Master at 23, 53 n.29 (ECF No. 272).

[94] *Wilkins v. West*, 264 Va. 447, 464, 571 S.E.2d 100, 109 (2002) (listing consideration of "incumbency" among other "traditional redistricting elements").

[95] Report of the Special Master at 23-24 (ECF No. 272).

[96] *Mortham*, 926 F. Supp. at 1542 (citing *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976)).

> [I]ndividuals in the Third Congressional District whose constitutional rights have been injured by improper racial gerrymandering have suffered significant harm. Those citizens "are entitled to vote *as soon as possible* for their representatives under a constitutional apportionment plan." *Cosner v. Dalton*, 522 F. Supp. 350, 364 (E.D. Va. 1981). Therefore, we will require that new districts be drawn *forthwith* to remedy the unconstitutional districts.[97]

Since the Court wrote those words, the 2014 election cycle went forward with an unconstitutional gerrymander in CD3, and the Special Master's analysis has further confirmed that black voters have been packed into CD3 far in excess of the number sufficient to protect minority voting rights. Indeed, his analysis further uncovered that the packing of black voters into CD3 also fragmented black voters in CD4, negatively affecting their ability to elect a candidate of choice. Because "[p]acking and cracking" are "two sides of the same coin," the Special Master's recommended solution to the packing problem in CD3 solves the cracking problem in CD4.[98]

In addition to frustrating the constitutional rights of Virginia voters, staying the implementation of the remedial plan would pose a larger risk of disrupting the electoral process if the Supreme Court affirms this Court's ruling on the merits or dismisses the appeal for lack of standing. Because that decision will likely be rendered before the end of the Supreme Court's term in June 2016, it may not be too late, depending on the circumstances, to implement remedial measures for the November elections. Federal courts have entered remedial redistricting plans later in the election cycle.[99] But as those cases show, doing so would require

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[97] Mem. Op. at 49 (ECF No. 170) (emphasis added).

[98] Report of the Special Master at 65 (ECF No. 272).

[99] *See Vera v. Bush*, 933 F. Supp. 1341, 1352-53 (S.D. Tex. 1996) (ordering remedial plan on August 6, 1996 for November 1996 election); *Mortham*, 926 F. Supp. at 1542 (denying motion to stay May 22, 1996 deadline for legislature to enact remedial plan for November 1996 congressional election, stating "[t]here is sufficient time to adopt a remedial plan that does not offend the Constitution, while still giving opportunities to the candidates to campaign and the

extensive court-ordered revisions to the normal deadlines for the qualification of candidates. The Commonwealth has a compelling interest in avoiding that disruption. Given the Intervenor-Defendants' failure to show that they will succeed on the merits of their appeal, the Court should minimize that risk of disruption by implementing the remedial plan while the appeal is pending, just as the courts did in *Miller* and *Daggett*.

CONCLUSION

In the words of the three-judge court in *Mortham*, which refused to stay its order to correct a racial gerrymander, "any harm that" Congressman Forbes "will suffer as the result of redistricting is insubstantial compared to the harm that others, including the Plaintiffs, will suffer if the redistricting is not promptly effected."[100] Having twice determined that the existing redistricting plan is unconstitutional, the Court should not disable itself from implementing a remedy for the November 2016 election by failing to finish work on the nearly-completed remedial plan. The Court should also deny the motion to stay the implementation of that plan pending appeal. Intervenor-Defendants have failed to meet their heavy burden of showing that the four-factor test warrants a stay. They are, of course, free to seek review of the Court's ruling on their stay request. The Supreme Court will be able to act expeditiously on such an application, likely in December 2015.

Respectfully submitted,

By: /s/

Stuart A. Raphael, VSB # 30380
Solicitor General

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public to consider those candidates"); *Busbee v. Smith*, 549 F. Supp. 494, 518-19 (D.D.C. 1982) (entering court-ordered remedial on August 24, 1982 for two congressional districts), *aff'd mem.*, 459 U.S. 1166 (1983).

[100] 926 F. Supp. at 1542.

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the counsel of record for the parties.

By: /s/
Stuart A. Raphael