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

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

INTERVENOR-DEFENDANTS' RESPONSE TO STATEMENTS OF POSITION REGARDING THE SPECIAL MASTER'S FINAL REPORT

The Statements Of Position Regarding The Special Master's Final Report filed by Plaintiffs (DE 277), the Virginia State Conference of NAACP Branches ("NAACP") (DE 278), and Governor McAuliffe (DE 280) dramatically confirm that the Court may not enter either of the special master's proposed remedial plans, NAACP Plan Modification 6 or Current Congressional Plan Modification 16, and should enter one of Intervenor-Defendants' plans if a judicial remedy becomes necessary in this case.[1] *First*, Plaintiffs, the NAACP, and the Governor all acknowledge that the special master's proposals make "major changes" to District 3 and surrounding districts that preserve far less of the cores of districts than the Enacted Plan, Plaintiffs' Alternative Plan, or Intervenor-Defendants' plans, fail to maintain the Legislature's preferred 8-3 partisan split, and fail to protect all incumbents. *See, e.g.*, Gov. Stat. 2; Pl. Stat. 5-6; NAACP Stat. 1; *see also* Final Report 20 (DE 272) (proposing "major changes in CD3" and

[1] Defendants (DE 276), Bull Elephant Media (DE 281), and Mr. Donald Garrett also filed Statements of Position. None offered any substantive defense of the special master's proposals, so no response is required.

"substantial changes in all proximate districts") ("Rep."). The NAACP contends that the special master's massive overhaul of Districts 3 and 4 was necessary because "CD3 was packed with black voters," NAACP Stat. 1, even though the *only* evidence regarding packing adduced at trial was the testimony of Plaintiffs' expert, Dr. McDonald, that *no* packing exists in the Enacted Plan or Enacted District 3, Trial Tr. 204-05. Thus, by endorsing the special master's "major changes" based upon a vote-dilution theory that Plaintiffs never pleaded or proved at trial, Gov. Stat. 2; NAACP Stat. 1, Plaintiffs, the NAACP, and the Governor have underscored that the special master's proposals sweep far more broadly than "necessary to cure" the *Shaw* violation the Court found in District 3, *Upham v. Seamon*, 456 U.S. 37, 43 (1982), fail to follow the Legislature's core-preservation, political, and incumbency-protection "policies and preferences" to the greatest extent practicable, *White v. Weiser*, 412 U.S. 783, 795 (1973), and violate *Shaw* under this Court's liability opinion, *see* Int.-Def. Stat. (DE 279).

Second, Plaintiffs, the NAACP, and the Governor all confirm that their proposed remedial plans are also overbroad and cannot be entered as judicial remedies in this case. These parties acknowledge that their proposals "make alterations outside the districts abutting CD 3," Pl. Stat. 2; *see also* Gov. Stat. 4; NAACP Stat. 2-3—so their proposals violate *Upham*, *White*, and the bedrock limitations on the federal judiciary's remedial power. *See, e.g.*, Int.-Def. Stat.; Int.-Def. Br. Regarding Proposed Remedial Plans (DE 251). The NAACP goes even further and asks the Court to implement an even *greater* subordination of the "offsetting traditional districting principle[]" of "incumbency protection" to "racial considerations" than the special master proposes. *Ala. Leg. Black Caucus v. Ala.*, 135 S. Ct. 1257, 1270 (2015). In particular, the NAACP requests that the Court pair incumbent Republican Congressmen Randy Forbes and Scott Rigell in District 2 in order to include black communities in "Brunswick and Mecklenburg

counties" in District 4. NAACP Stat. 2-3. The NAACP, however, *never* explains how moving Brunswick and Mecklenburg counties into District *4* remedies the *Shaw* violation the Court found in District *3*—and never offers any basis to conclude that the Court may remedy a *Shaw* violation in District 3 by committing a *Shaw* violation in District 4. In fact, the *only* authorities the NAACP cites are cases predating *Bartlett v. Strickland*, 556 U.S. 1 (2009), that address vote-dilution claims under Section 2 of the Voting Rights Act, *see Garza v. Los Angeles County*, 918 F.2d 763, 771 (9th Cir. 1990) (NAACP Stat. 3); *Ketchum v. Byrne*, 740 F.2d 1398, 1408-09 (7th Cir. 1984) (NAACP Stat. 3). But of course, Plaintiffs did not plead or prove any Section 2 claims in this case, let alone in District 4, and the record, including Dr. McDonald's testimony, affirmatively *forecloses* such claims or any remedy based upon them. *See* Int.-Def. Stat. 9-14.

The Governor attempts to justify his proposal's complete statewide redrawing of the Enacted Plan by mischaracterizing *Abrams v. Johnson*, 521 U.S. 74, 79 (1997). But *Abrams* does not fashion a categorical rule forbidding all judicial deference to a legislative plan found to have a *Shaw* violation in a single district. *See* Gov. Stat. 3. Rather, as the Governor quoted in an earlier brief but omits here, *Abrams* held that judicial deference is not owed to a legislative plan "*to the extent* the plan subordinated traditional districting principles to racial considerations." *Abrams*, 521 U.S. at 85 (emphasis added) (quoted at Gov. Br. 8-9 (DE 231)). *Abrams* thus expressly confirms that this Court "should be guided by the legislative policies underlying" the Enacted Plan "to the extent those policies d[id] not lead to" the "violation[]" in District 3. *Id.* at 79. Accordingly, *Abrams* exemplifies the limitations on federal judicial power recognized in *Upham* and *White* that foreclose entry of the special master's proposals and all plans other than Intervenor-Defendants' plans. *See, e.g.*, Int.-Def. Stat. 9-27; Int.-Def. Br. Regarding Proposed Remedial Plans 3-7 (DE 251).

Finally, Plaintiffs' proposed plan maintains both the Richmond-Norfolk configuration and a 52.3% majority-black BVAP in District 3. *See* Pl. Stat. 4; Pl. Decl. at 9 (DE 230). Dr. McDonald also testified at trial that Plaintiffs drew their Alternative District 3 with a 50.1% majority-black BVAP level as a "narrowly tailored" remedy to avoid vote dilution in violation of Section 2. *See* Trial Tr. 188. Plaintiffs now seek to disavow Dr. McDonald's trial testimony with their new position that "it is far from apparent that maintaining CD 3 as a majority-minority district is required under Section 2," but they implicitly acknowledge the potential Section 2 liability by continuing to advocate for their remedial District 3 with a Richmond-Norfolk configuration and a majority-black BVAP. *See* Pl. Stat. 4.

For its part, the NAACP's proposed plan creates a majority-black district in District 4. *See* NAACP Stat. 1-3. Thus, both Plaintiffs and the NAACP agree with Intervenor-Defendants that a majority-black district may be an appropriate remedy in this case and disagree with the special master's conclusion that a district with "a 50.2% and 50.1%" BVAP level is an impermissible remedy. Rep. 27. Moreover, Plaintiffs further agree that the Court may adopt a remedy that preserves the Richmond-Norfolk configuration in District 3. *See* Pl. Stat. 4. This is a necessary concession because this configuration is at the core of prior versions of District 3 that "conform[ed] to all requirements of law" when it was first 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 in 2012 without violating the core-preservation, political, and incumbency-protection priorities the Legislature applied to *all* Virginia districts.

As Intervenor-Defendants have explained, Intervenor-Defendants' Proposed Remedial Plans 1 and 2, which maintain the basic shape and majority-black demographics in District 3, 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. Regarding 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, 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* Int.-Def. Stat. 16-35.

Plaintiffs and the Governor repeat the special master's attacks on Intervenor-Defendants' proposals—and, thus, repeat the special master's mistakes. *See id.* 31-35. Plaintiffs parrot the special master's flawed assertion that Intervenor-Defendants' plans split Newport News "in ways that appear race related" and contain a "relatively large number of total city/county splits." Pl. Stat. 3 (citing Rep. 27-28 & n.18). Like the special master, Plaintiffs ignore the obvious core-preservation, political, and incumbency-protection reasons for *maintaining* the splits in Newport News (which Plaintiffs' Alternative Plan also splits), and the fact that Intervenor-Defendants' plans have as many or *fewer* "total city/county splits" than the special master's proposals. *See* Int.-Def. Stat. 31-35. Likewise, the Governor's echoing of the special master's refusal to

maintain the Legislature's preferred 8-3 partisan split, Gov. Stat. 2, contravenes the plain 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; *see also* Int.-Def. Stat. 6, 14-15, 19-20.

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.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 1, 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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