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

PERSONHUBULLAH, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 3:13cv678
ALCORN, et al.,	)	
Defendants.	)	

BRIEF IN RESPONSE TO THE SPECIAL MASTER'S PROPOSED CONGRESSIONAL REDISTRICTING PLANS

Pursuant to the Court's order on October 22, 2015 (Dkt. No. 263), the Virginia State Conference of NAACP Branches (hereinafter, "Virginia NAACP") respectfully submits this brief responding to Defendant-Intervenors' Statement of Position Regarding the Special Master's Final Report, filed on November 24, 2015 (Dkt. No. 279).

Defendant-Intervenors criticize the remedial plans proffered by Dr. Grofman for failing to adequately defer to the Legislature's core-preservation priorities. Dkt. No. 279 at 16. Defendant-Intervenors argue that the legislature's goal of preserving district cores "helps to freeze in place the 8-3 partisan split that the Legislature favored." *Id*. These criticisms are legally unavailing, though. The United States Supreme Court has squarely addressed this issue, and held that where a district has been found to be an unconstitutional racial gerrymander, a court drawing a remedial plan does not need to, and in fact should not, defer to the legislature's enacted, unconstitutional districts in crafting the remedial plan. *Abrams v. Johnson*, 521 U.S. 74, 90 (1997).

The Supreme Court first considered challenges to Georgia's 1991 congressional redistricting plan in *Miller v. Johnson*, 515 U.S. 900 (1995). There the Court held that the 11th Congressional District was unconstitutional as drawn, because race predominated in the drawing of the district lines without a compelling governmental interest. *Id*. at 920-21. On remand, the district court found that a second district, the 2nd Congressional District, was also an unconstitutional racial gerrymander. *Abrams*, 521 U.S. at 82. The district court deferred to the legislature to draw a new, constitutional plan, but the legislature could not come to agreement, so the district court was tasked with drawing a remedial plan. *Id*. at 78. The parties submitted proposed remedial plans, many of which included versions of the 11th Congressional District that resembled the version of the district invalidated in *Miller*. *Id*. at 83-84. The court-drawn remedial plan contained only one majority black district, compared to the three in the plan considered by the Supreme Court in *Miller*. *Id*. at 78.

Noting that the "max-black" plan pushed by the United States Department of Justice and implemented by the state subverted the entire redistricting process, the district court decided to place Georgia's new congressional district (the 11th) in a high-growth area near Atlanta. *Id*. at 84. This was not where the legislature had placed the 11th District in the 1991 plan, as that version stretched from Atlanta to Savannah. *Id*. at 80. On appeal, the Supreme Court upheld the district court's remedial plan. *Id*. at 101.

Just like here, appellants in *Abrams* alleged that the district court "erred in disregarding the State's legislative policy choices and in making more changes than necessary to cure constitutional defects in the previous plans." *Id*. at 79. While the Court observed that "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 "to the extent those policies do not lead

to violations of the Constitution or the Voting Rights Act," *id*. at 79, it went on to hold that the district court properly declined to defer to an enacted and pre-cleared plan that used race as a predominant factor. *See also Perry v. Perez*, 132 S. Ct. 934, 941 (2012) ("A district court making such use of a State's plan must, of course, take care not to incorporate into the interim plan any legal defects in the state plan.")

Like the challengers in *Abrams*, Defendant-Intervenors here rely heavily on *Upham v. Seamon*, 456 U.S. 37 (1973), for the proposition that a court-drawn plan must defer to legislative priorities in redistricting. The Supreme Court's response to that argument in *Abrams* is perfectly on point here, as well: the enacted plan "is not owed *Upham* deference to the extent the plan subordinated traditional districting principles to racial considerations. *Upham* called on courts to correct—not follow—constitutional defects in districting plans." *Abrams*, 521 U.S. at 85. The Supreme Court also approved of the wide-scale nature of the changes in the remedial plan because "the constitutional violation here affects a large geographic area of the State; any remedy of necessity must affect almost every district." *Id*. at 86. Finally, Supreme Court further affirmed the District Court's decision to reject an alternative "least-change plan" submitted by a party because its version of the 11th Congressional District had "an iguana-like shape betraying the same invidious purpose" condemned in *Miller*. *Id*. at 89.

The Court concluded that the "unconstitutional predominance of race" in the drawing of districts ruled to be racial gerrymanders rendered them "to be improper departure points" for the crafting of a remedial plan. *Id*. at 90. Indeed, the Court stated that to use the enacted plan "as the basis for a remedy would validate the very maneuvers that were a major cause of the unconstitutional districting." *Id*. at 86.

In light of *Abrams*, Defendant-Intervenors' position on the Special Master's remedial plans has no merit. The Special Master made only the changes necessary to correct the unconstitutional racial gerrymandering in Virginia's 3rd Congressional District, but remedying that flaw required more than superficial changes. Such corrections have been endorsed by the Supreme Court, and this Court would be on sound legal ground to order implementation of either of the Special Master's plans.

For the reasons stated in the Virginia NAACP's November 24, 2015, Statement of Position Regarding the Special Master's Report, however, the Virginia NAACP urges this Court to adopt the NAACP Plan Modification 6 version of a remedial plan.

Respectfully submitted this 1st day of December, 2015.

/s/ David O. Prince

David O. Prince, Esquire
VSB # 17044
411 East Franklin Street
Richmond, VA 23219
804-788-4861
princelaw@aol.com

Anita S. Earls (NC State Bar # 15597)
*admitted *pro hac vice*
Allison J. Riggs (NC State Bar # 40028)
*admitted *pro hac vice*
George Eppsteiner (NC State Bar # 42812)
*admitted *pro hac vice*
Southern Coalition for Social Justice
1415 W. Highway 54, Suite 101
Durham, NC 27707
Telephone: 919-323-3380 ext. 117
Facsimile: 919-323-3942
E-mail: allison@southerncoalition.org

Attorneys for the Virginia State Conference
of NAACP Branches

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of December, 2015, a true and correct copy of the foregoing Brief was delivered to Plaintiffs, Defendants and Defendant-Intervenors via the United States District Court, Eastern District of Virginia, Richmond Division, CM/ECF system.

/s/ David O. Prince
David O. Prince, Esquire
VSB # 17044
411 East Franklin Street
Richmond, VA 23219
804-788-4861
princelaw@aol.com

Attorney for the Virginia State Conference of NAACP Branches