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**

REPLY IN SUPPORT OF INTERVENOR-DEFENDANTS' MOTION TO SUSPEND FURTHER PROCEEDINGS AND TO MODIFY INJUNCTION PENDING SUPREME COURT REVIEW

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The oppositions filed by Plaintiffs (DE 283) and Defendants (DE 284) resoundingly confirm that the Court should decline to enter a remedial plan and should modify its injunction pending Supreme Court review of the Court's liability decision. Even now, Plaintiffs and Defendants fail to identify *any* case in which a three-judge court entered a remedy "where, as here, the Supreme Court is actively considering liability." Mem. 15 (DE 271). In fact, Plaintiffs and Defendants offer no basis for this Court to become the first federal court in history to enter a remedial redistricting plan while the Supreme Court's plenary review of liability remains pending. Quite to the contrary: Plaintiffs and Defendants do not dispute *any* of the premises that, as Intervenor-Defendants have shown, foreclose entering a remedial plan and warrant modification of the injunction, even if this Court had jurisdiction to adopt a plan now.[1]

In particular, Plaintiffs and Defendants do not dispute that a reversal of this Court's liability judgment by the Supreme Court would invalidate any judicial remedial plan and "return" the Commonwealth "to the Legislature's 2012 districting lines in the Enacted Plan." Mem. 1. It is also undisputed that any reversal by the Supreme Court would occur in the middle of the 2016 election cycle and "throw[] Virginia's electoral apparatus into chaos, requir[e] wasteful administrative efforts, and needless[ly] creat[e] voter confusion" by requiring a redo of signature collection, candidate qualification, and perhaps even primary elections. *Id.* 10.

This risk of electoral havoc is particularly acute if the Court adopts either of the special master's proposed remedies. Each of those proposals ***moves more than one million people*** out of their current Enacted Districts and into new districts. A reversal by the Supreme Court,

[1] As explained below, the Court lacks jurisdiction to enter a remedial plan because the filing of a notice of direct appeal "clearly divest[s]" a three-judge court of jurisdiction, *Donovan v. Richland County Ass'n*, 454 U.S. 389, 390 n.2 (1982), and transfers "*the entire case*" to the Supreme Court, *United States v. Locke*, 471 U.S. 84, 92 (1985) (emphasis added); *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988).

however, would automatically return *all* of those people to the Enacted Districts. Moreover, one of the avowed "highest priorit[ies]" of the special master's proposals is to transform District 4 into a "minority opportunity" (and overwhelmingly Democratic) district. Final Report 4, 8-11, 20, 29, 65 (DE 272) ("Rep."). Thus, entering either of the special master's proposals now would invite a black candidate of choice to mount a historic campaign to become Virginia's second black congressional representative, only to have that effort dashed mid-stream by any reversal by the Supreme Court that restores more than one million people to their current Enacted Districts. Such a scenario would understandably engender voter confusion and mistrust, and undermine public confidence in the election. "[T]he interest[s] of all," including "the interest of the public, the interest of judicial efficiency, and the interest in the orderly administration of justice," "make it appropriate that the Court" decline to adopt a remedial plan now and to modify the injunction. 2/23/15 Mem. Op. 5; *see* Mem. 1-18.

It is clear that there is *some* risk of a Supreme Court reversal because, by ordering full briefing and oral argument on the merits, the Supreme Court has concluded that the Court's liability judgment raises "substantial questions" warranting the Supreme Court's "plenary review." *Sanks v. Georgia*, 401 U.S. 144, 145 (1971). Yet Plaintiffs and Defendants offer no reason why the Court should deliberately create the chaos that will indisputably ensue if that risk does eventuate. Instead, Plaintiffs and Defendants attempt to change the subject by citing inapposite case law and peddling revisionist history. Plaintiffs and Defendants point to cases in which federal courts declined "to stay implementation of court-adopted remedial redistricting plans" pending appeal to the Supreme Court, Pl. Opp. 10; Def. Opp. 2, but *none* of those cases involved a three-judge court *entering* a remedy while the Supreme Court was "actively considering liability," Mem. 15. In all but two of those cases, liability either had already been

finally determined by a *prior* appeal to the Supreme Court or was not contested; in another, the Supreme Court summarily affirmed liability without ever exercising plenary review; and in the final case, there never even was an appeal to the Supreme Court.

In fact, even Defendants recognize that in the one procedurally analogous case they cite, the Supreme Court "granted a stay pending appeal" of liability, even though that stay meant that elections were held under an enacted plan that a three-judge court had invalidated. Def. Mem. 3 n.10 (discussing *Karcher v. Daggett*, 455 U.S. 1303 (1982)). The Supreme Court entered that stay because "[w]ith respect to the balance of equities, this Court has repeatedly emphasized that legislative apportionment plans created by the legislature are to be preferred to judicially constructed plans" when liability remains unsettled. *Karcher*, 455 U.S. at 1306-07 (Brennan, J).

Plaintiffs contend that the Court nonetheless should take the unprecedented action of entering a remedial plan now because they "have already been subjected to two elections" under the Enacted Plan. Pl. Opp. 1. But the Court already has held that *Plaintiffs* are responsible for that fact. Indeed, Plaintiffs did not even file this lawsuit until October 2013—some 21 months after the Legislature adopted the Enacted Plan and *eleven months after the 2012 election*. *See* Compl. (DE 1). The Court decided not to enter a remedy for the 2014 election because Plaintiffs were "largely responsible for the proximity of our decision to the November 2014 elections." 10/7/14 Mem. Op. 46 (DE 109). And any further delay reflects the Supreme Court's vacatur and remand of the Court's first liability decision in light of its *Alabama* decision. Thus, the *only* question here is whether the Court should become the first federal court in history to depart from the preference for "legislative apportionment plans created by the legislature" over "judicially constructed plans," *Karcher*, 455 U.S. at 1306-07 (Brennan. J.), and enter a remedial plan while the Supreme Court is conducting plenary review of liability, where any reversal by the Supreme

Court would come in the middle of the imminent election cycle and create electoral chaos for as many as one million Virginians, candidates in five districts, and a black candidate of choice mounting a historic campaign in a remedial District 4. The Court should grant the Motion.

ARGUMENT

I. THE COURT LACKS JURISDICTION TO ENTER A REMEDIAL PLAN

A notice of direct appeal to the Supreme Court "clearly divest[s]" a three-judge court of jurisdiction to expand any prior injunction or to enter any new remedies. *Donovan v. Richland County Ass'n*, 454 U.S. 389, 390 n.2 (1982). Indeed, such a filing "brings before th[e] [Supreme] Court not merely the constitutional question decided below, *but the entire case*." *United States v. Locke*, 471 U.S. 84, 92 (1985) (emphasis added); *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988); Supreme Court Practice § 7.III.5 (10th ed.) ("[A]n appeal brings the entire case before the [Supreme] Court."). Therefore, the notice of appeal transferred "the entire case" away from this Court and to the Supreme Court, and this Court may not enter the additional remedy of a remedial plan now. *Locke*, 471 U.S. at 92; *Wells Fargo*, 485 U.S. at 354. No case has departed from this rule because, as shown below in Part II, no three-judge court has entered a remedial districting plan after the Supreme Court has granted plenary review.

Neither Plaintiffs nor Defendants cite any cases involving a direct appeal to the Supreme Court, *see* Pl. Opp. 5-6; Def. Opp. 6-7—but even their cases involving appeals to federal courts of appeals vividly illustrate that the Court may not enter a remedial plan and should modify its injunction to permit Virginia to conduct the 2016 elections under the Enacted Plan. Plaintiffs' and Defendants' cases hold that while a district court may "enforce" an injunction on appeal such as through contempt or ongoing supervision, it may not "enlarge the scope" of the injunction or grant additional remedies. *NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987) (collecting cases) (cited at Def. Opp. 7 nn.34-35 & Pl. Opp. 5); *Roberts v. Colorado*

State Bd. of Agric., 998 F.2d 824, 827 (10th Cir. 1993) (cited at Pl. Opp. 5). This prohibition applies even if the additional remedies were contemplated by, or relate to, the original injunction. Thus, for example, after a notice of appeal had been filed as to an order holding the appellants in civil contempt and setting a sanction of $500 per day for noncompliance, the district court lacked jurisdiction to rule on a motion to determine the total period of contempt and order execution of the amount due, even though such a follow-on order was contemplated by the original contempt order. *See Shuffler v. Heritage Bank*, 720 F.2d 1141, 1145 & n.1 (9th Cir. 1983).

The Fifth Circuit's decision in *Zimmer v. McKeithen*, 467 F.2d 1381 (5th Cir. 1973), *rev'd on other grounds on rehearing en banc*, 485 F.2d 1297 (1973), is also instructive. That case presented a constitutional challenge to a redistricting plan for county commission and school board elections. *See id.* at 1382. After finding a constitutional violation, the district court entered a remedy requiring at-large elections. *See id.* After the defendant filed a notice of appeal, the district court adopted a different remedial plan at the plaintiffs' request. *See id.*

The Fifth Circuit vacated—and refused even to consider—the second remedial order. *See id.* The court explained that "once an appeal is taken, jurisdiction passes to the appellate court," so the district court "was without jurisdiction to enter" its second order. *Id.* The en banc Fifth Circuit reversed the panel on the merits of the first order, 485 F.2d 1297 (5th Cir. 1973), and was affirmed by the Supreme Court, which also examined only the district court's first order and noted without criticism the panel's refusal to consider the second order, *see East Carroll Parrish School Bd. v. Marshall*, 424 U.S. 636, 638 n.4 (1976). Significantly, the second order might have resolved the questions presented by the first order, but neither the en banc court nor the Supreme Court considered it. *See id.*; *Lewis v. Tobacco Workers' Int'l Union*, 577 F.2d 1135, 1139 (4th Cir. 1978) (recounting procedural history of *East Carroll*).

Here, any order implementing a remedial plan would impose additional remedies and greatly "enlarge" the Court's prior injunction, not merely "enforce" it. *Cincinnati Bronze*, 829 F.2d at 588; *see also Zimmer*, 467 F.2d at 1382. The Court's existing injunction only prohibits Virginia from "conducting any elections" until a new plan is adopted, but does not specify a plan that Virginia is *required* to use for those elections. 6/5/16 Order 1 (DE 171). Therefore, any order imposing a remedial plan would "expand[] significantly the scope" of the Court's injunction and may not be entered now. *City of Cookeville v. Upper Cumberland Elec. Mem. Corp.*, 484 F.3d 380, 394 (6th Cir. 2007). Moreover, to approve a remedial plan, the Court would be required to decide "legal issues" and factual questions "that it had not decided previously," *id.*, such as the issues of alleged "packing" in District 3 and "fragmentation" in District 4 the special master unilaterally raised, Rep. 65, and whether the remedial plan addresses the scope and "nature of the violation" the Court found, *Milliken v. Bradley*, 418 U.S. 717, 738 (1974) (*Milliken I*); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

Plaintiffs' and Defendants' case law thus make clear that the Court faces only one viable option. If the Court "enforced" its injunction prohibiting use of the Enacted Plan in 2016, *Cincinnati Bronze*, 829 F.2d at 588, Virginia could not conduct elections in 2016 because it would have *no redistricting plan in place*. Thus, no one suggests that the Court should *enforce* its injunction; all agree that the injunction would need to be replaced with a new injunction prescribing new districts. But since the Court does not have jurisdiction to order a new plan (and would risk electoral chaos if it entered one), the only viable option is to *decline* to "enforce" its injunction, *id.*, for the 2016 elections so Virginia would have a plan in place for those elections.

Plaintiffs and Defendants offer three arguments in an attempt to avoid this outcome, all of which fail. *First*, Defendants seek to artificially limit *Donovan*, and suggest that it prevents the

Court only from reconsidering the "merits," but not entering "remedial measures," during the appeal. Def. Opp. 7. But the reason that the Supreme Court in *Donovan* pointed out that the notice of appeal divested the lower court of jurisdiction "to decide the merits" is that *only* the merits were at issue in that case. *Donovan*, 454 U.S. at 390 n.2. *Donovan* therefore is completely consistent with the Supreme Court's instruction that the filing of a notice of appeal brings "the entire case" before it. *Locke*, 471 U.S. at 92; *Wells Fargo Bank*, 485 U.S. at 354.

Second, Plaintiffs warn that the Court should "enforce" its prior "permanent injunction" by entering a remedial plan because otherwise "a party could refuse to comply with a district court's injunction through the simple expedient of filing a notice of appeal." Pl. Opp. 5. This overblown argument only exposes the fatal flaw in Plaintiffs' position: a court can always "enforce" its injunction against non-compliant parties without entering a *second* injunction. *Id.* That is especially true here: as explained, any injunction decreeing a remedial plan would create *different* obligations than the existing injunction, so there is no danger that any party will "refuse to comply" with the Court's *existing* injunction if it does not enter a *new* remedial plan. *Id.*

Finally, Plaintiffs suggest that Rule 62(c) confers jurisdiction to enter a remedial plan, *id.* at 6, but precisely the *opposite* is true. Rule 62(c) authorizes district courts to enter an "injunction pending appeal" only "on terms for bond or other terms that secure the opposing party's rights" pending the appeal. Fed. R. Civ. P. 62(c); *see Lewis*, 577 F.2d at 1139. It therefore does not give the Court carte blanche to enter a remedial plan while "the entire case" is pending before the Supreme Court. *Locke*, 471 U.S. at 92; *Wells Fargo Bank*, 485 U.S. at 354.

II. THE COURT SHOULD MODIFY ITS INJUNCTION PENDING SUPREME COURT REVIEW OF LIABILITY

Even if the Court had jurisdiction to enter a remedial plan, it still should decline to do so. This Court previously exercised its inherent authority "to modify the injunction" during

Intervenor-Defendants' first appeal. 2/23/15 Mem. Op. 5; *see also* Mem. 7-9. That decision comported with the myriad cases from the Supreme Court and other federal courts that have stayed an injunction prohibiting use of a legislatively enacted plan pending the Supreme Court's plenary review of liability. *See, e.g.*, *White v. Weiser*, 412 U.S. 783, 789 (1973); *Kirkpatrick v. Preisler*, 390 U.S. 939 (1968) (Mem.); *Whitcomb v. Chavis*, 396 U.S. 1064 (1970) (Mem.). Indeed, even now, no party has identified any case in which a three-judge court entered a remedial plan "where, as here, the Supreme Court is actively considering liability." Mem. 15.

This Court should not take this opportunity to become the first federal court to do so. Plaintiffs and Defendants do not dispute that the Supreme Court has concluded that the liability judgment raises "substantial questions" warranting "plenary review," *Sanks*, 401 U.S. at 145, or that any reversal by the Supreme Court would occur right in the middle of the 2016 election cycle, *see* Mem. 10-14. And Plaintiffs and Defendants do not seriously dispute that "entering a remedy *before* liability is established runs the serious risk of throwing Virginia's electoral apparatus into chaos, requiring wasteful administrative efforts, and needlessly creating voter confusion." *Id.* 10. Nor could they: Plaintiffs and Defendants have repeatedly advised the Court that it is "necessary" for any judicial remedy to be in place by January 1, 2016, in order to be smoothly implemented for the 2016 elections. *See* 9/2/15 Tr.; Def. Reply Br. Re. *Alabama* 10-11 (DE 153). Consequently, all agree that if a new remedial plan is rendered inoperative by a Supreme Court reversal many months after January 1, elections cannot be effectively conducted.

This risk of electoral chaos becomes especially staggering if the Court adopts either of the special master's proposed plans. The special master's Current Congressional Plan Modification 16 moves ***853,675*** voting-age people and ***1,111,088*** total people out of their current Enacted Districts and into new districts. *See* Current Congressional Plan Modification 16 Core

Constituency Rep. The special master's NAACP Plan Modification 6 is even more disruptive: it moves ***1,031,320*** voting-age people and ***1,332,440*** total people out of their current Enacted Districts and into new districts. *See* NAACP Plan Modification 6 Core Constituency Rep. ***Every one of these more than one million people*** would automatically be moved back into their Enacted Districts in the middle of the election cycle if the Supreme Court reverses the Court's liability decision. *See* Mem. 10-14. Needless to say, chaos would reign from such a massive dislocation and mid-calendar relocation of voters: administrative expense and burden would be wasted; candidate qualifications and even primary elections could be undone; and voters could become confused by a restarting of the election cycle, double shifting between districts, and a changing slate of candidates vying for election in their changing districts. *See id.* 11-14.

Moreover, the special master's proposals advance his "highest priority" of race by transforming District 4—currently a majority-Republican district represented by Intervenor-Defendant Forbes—into a "minority opportunity" (and overwhelmingly Democratic) district. Rep. 4, 8-11, 20, 29. Thus, entering either proposal would invite a black candidate of choice to mount a historic campaign to become Virginia's second black congressional representative, only to have that effort dashed mid-stream by any reversal by the Supreme Court that restores more than one million people to the Enacted Districts. Such a scenario would understandably engender voter confusion and mistrust, and "cast[] a cloud upon . . . the legitimacy of [the] election." *Bush v. Gore*, 531 U.S. 1046, 1047 (2000) (Scalia, J., concurring).

Plaintiffs suggest in passing—and without explanation or a single citation to authority—that even if the Supreme Court reverses the Court's liability judgment mid-calendar, the 2016 election could somehow be "run[] . . . under the . . . remedial map the Court ultimately adopts, and then redrawing the districts" *after* the election. Pl. Opp. 16. The reason Plaintiffs do not

provide any support for this incredible suggestion is that no statement could be more legally indefensible. It is a bedrock limitation that federal courts may not "remedy" government action that "does not violate the Constitution" or law. *Milliken v. Bradley*, 433 U.S. 267, 282 (1977) (*Milliken II*). Thus, if the Supreme Court reverses liability and finds that *no* violation exists, there is no basis for a judicial remedial plan, and any such plan is automatically nullified and cannot be used for the 2016 elections. *See id.*

Although Plaintiffs and Defendants cannot deny that a Supreme Court liability reversal would create electoral chaos in the middle of the 2016 election cycle, they nonetheless contend that other courts have taken such reckless action in analogous circumstances. That is plainly untrue. Plaintiffs and Defendants cite cases where federal courts "den[ied] motions to stay implementation of court-adopted remedial redistricting plans" during a direct appeal to the Supreme Court. Pl. Opp. 10; Def. Opp. 2. But *none* of these decisions involved a three-judge court *entering* any remedy when, as now, "the Supreme Court [was] actively considering liability" on plenary review. Mem. 15. In fact, in all but two of those decisions, liability either already had been finally established by a *prior* appeal to the Supreme Court or was not contested. Thus, these cases present the inapposite question of whether a court should stay a remedy for a proven violation pending a successive appeal of the *remedy*. *See, e.g.*, *Abrams v. Johnson*, 521 U.S. 74, 77 (1997) (liability established in *Miller v. Johnson*, 515 U.S. 900 (1995)) (cited at Def. Opp. 3); *Travia v. Lomenzo*, 381 U.S. 431, 432 (1965) (liability established in *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964)) (cited at Pl. Opp. 10); *Branch v. Smith*, 538 U.S. 254, 258 (2003) (impasse case where equal-population violation not contested) (referred to in *Giles v. Ashcroft*, 193 F. Supp. 2d 258, 261 (D.D.C. 2002) (cited at Pl. Opp. 10 n.3)); *Daggett v. Kimmelman*, 580 F. Supp. 1259, 1260 (D.N.J. 1984) (liability established in *Karcher v. Daggett*, 462 U.S. 725

(1983)) (cited at Def. Opp. 3).[2]

In one of the other cases, there never even was a direct appeal to the Supreme Court. *Johnson v. Mortham*, 926 F. Supp. 1540, 1542 (N.D. Fla. 1996) (cited at Pl. Opp. 10 n.3 and Def. Opp. 4-5). And in Plaintiffs' remaining case, the Supreme Court summarily affirmed the liability judgment without ever conducting plenary review. *Larios v. Cox*, 305 F. Supp. 2d 1335 (N.D. Ga. 2004), *summ. aff'd*, 542 U.S. 947 (2004) (cited at Pl. Opp. 10, 15-16).

In fact, as Defendants all but concede, the one procedurally analogous case they identify actually *demonstrates* that the Court should withhold any remedial plan. Defendants *admit* that the Supreme Court "granted a stay pending appeal" of the *liability* judgment in *Daggett*, even though that stay meant that elections were held under a plan that a three-judge court had invalidated. Def. Opp. 3 n.10; *see Karcher*, 455 U.S. at 1307. The Supreme Court took this action even though it later *affirmed* the liability judgment, *see* 462 U.S. 725, and thereafter denied a stay pending successive appeal of the *remedy*, *see* 466 U.S. 910. This stay pending plenary review of liability was proper because "[w]ith respect to the balance of equities, this Court has repeatedly emphasized that legislative apportionment plans created by the legislature are to be preferred to judicially constructed plans" when liability based upon the enacted plan remains unsettled. *Karcher*, 455 U.S. at 1306-07 (Brennan, J).

Plaintiffs nonetheless argue that the Court should take the unprecedented action of entering a remedial plan now because they "have already been subjected to two elections" under

[2] Moreover, the Supreme Court never found "substantial questions" but instead summarily affirmed the judicial remedies in two of these appeals, *see, e.g.*, *Travia*, 381 U.S. 431, *summ. aff'd*, *WMCA, Inc. v. Lomenzo*, 382 U.S. 4 (1965); *Daggett*, 580 F. Supp. at 1260, *summ. aff'd*, 467 U.S. 1222 (1984), and did not complete its review of the two other remedial appeals until *after* the election, *see Abrams*, 521 U.S. at 74; *Branch*, 538 U.S. at 258. Thus, these cases have no application here, where the Supreme Court has found substantial questions on liability and its review will be completed mid-cycle.

the Enacted Plan. Pl. Opp. 1. But, because of Plaintiffs' inexcusable delay, this is the *first* election where a timely remedy is even possible. Plaintiffs did not even file this lawsuit until October 2013—some 21 months after the Legislature adopted the Enacted Plan and *eleven months after the 2012 election*. *See* Compl. (DE 1). This belated filing of Plaintiffs' lawsuit made them "largely responsible for the proximity of [the Court's] decision to the November 2014 elections" and the Court's inability to enter a remedy in 2014. 10/7/14 Mem. Op. 46.

Any further "delay" of which Plaintiffs complain stems from the Supreme Court's holding of the first appeal and vacatur and remand of the Court's first liability decision. Plaintiffs nowhere suggest that Intervenor-Defendants have not been diligent in pursuing appellate review. Nor could they: Intervenor-Defendants filed their first jurisdictional statement 96 days before the deadline and their second jurisdictional statement 103 days before the deadline. Thus, Intervenor-Defendants *accelerated* their two appeals by a total of 199 days over the past 14 months. For their part, Plaintiffs did not file any of their briefs in the Supreme Court before the deadline, so they can hardly complain if the Supreme Court's plenary review of liability takes longer than they prefer. The Court should decline to enter a remedial plan and modify its injunction to allow the 2016 elections to be conducted under the Enacted Plan.

III. IN THE ALTERNATIVE, THE COURT SHOULD ENTER A STAY

Even if the Court lacked inherent authority to modify its injunction, it still should grant the Motion because each factor weighs heavily in favor of a stay. *See* Mem. 15-17; *supra* Part II. As a threshold matter, *all* agree that the Court cannot enforce, and therefore must *stay*, its existing injunction *precluding* elections under the Enacted Plan during 2016. The only question is whether that stay of the injunction should be accompanied by an order entering a remedial plan immediately (as Plaintiffs and Defendants argue) or by one saying that the remedial proceedings will be conducted if and when the Supreme Court affirms liability (as Intervenor-Defendants

argue). As this reflects, the standards for *staying* an injunction do not govern here; the only disputed question is whether the Court should now *enter* a *new* remedial injunction for the 2016 elections. Anyway, the stay standards are amply satisfied here.

Irreparable Harm. Enormous and irreparable harm is likely to "result from denial of the stay" and entry of a new remedial redistricting plan. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). The Commonwealth, its voters, and its candidates will be seriously harmed if the Court proceeds with a judicial remedy that is invalidated by the Supreme Court mid-calendar. *See supra* Part II. Indeed, if the Court adopts either of the special master's proposals, *more than one million Virginians* will be moved into new districts for the first portion of the election cycle, only to be moved back into their current Enacted Districts mid-calendar if the Supreme Court reverses the liability finding. *See id.* And a mid-calendar reversal could negate a historic campaign to become Virginia's second black congressional representative in the special master's proposed versions of District 4. *See id.*

Plaintiffs and Defendants do not even *mention*, much less refute, this enormous risk of electoral chaos if the Supreme Court reverses liability in the middle of the election calendar. *See* Pl. Opp. 11-15; Def. Opp. 15-20. Instead, Plaintiffs and Defendants contend that Intervenor-Defendants have not shown "irreparable harm" to *themselves*, but even this myopic contention is faulty. Intervenor-Defendants *do* face irreparable harm from a remedial plan because they would find themselves seeking to qualify or standing for primary elections in substantially altered districts, particularly if the Court adopts either of the special master's proposals. Intervenor-Defendants Rob Wittman, Scott Rigell, Randy Forbes, and David Brat represent four of the five districts across which the special master proposes to move more than one million people. Thus, these Intervenor-Defendants would lose significant portions of their base electorate in exchange

for a substantial number of unfamiliar and potentially unfavorable voters. These Intervenor-Defendants would have to expend substantial time, money, and resources gathering signatures, seeking to qualify, and perhaps even participating in primary elections in overhauled districts—and all such time, money, and resources will be irretrievably lost if the Supreme Court invalidates the liability judgment and reinstates the Enacted Plan. *See* Mem. 15-17.

Moreover, because of the substantial overhaul of their districts, any of these Intervenor-Defendants might lose a primary election under the remedial plan and, therefore, a congressional seat. And even a victory in a primary election would be nullified if the Supreme Court reverses and a second primary election is required. *See id.*

As Defendants agree, Intervenor-Defendant Forbes stands to suffer the greatest harm because he "would see a material increase in Democratic voters" from 48% in Enacted District 4 to between 60.1% and 62.2% in the special master's proposals. Def. Opp. 17. It simply strains credulity for Defendants to suggest that this sea change "in Democratic performance" would not "cause his ouster." *Id.* In the first place, the special master completely redraws District 4: his proposals move 658,330 people and 696,104 people in and out of Enacted District 4, respectively, and thus place Congressman Forbes in a district where *nearly half* of the residents are new. *See* NAACP Plan Modification 6 Core Constituency Report; Current Congressional Plan Modification 16 Core Constituency Report. It is at best unclear what kind of "incumbency advantage" he would wield in such a district, if any. Def. Opp. 17.

Moreover, the *entire point* of the special master's proposed changes to District 4 is to convert it into a "minority opportunity" (and overwhelmingly Democratic) district, Rep. 29—and there is no credible argument that any Republican could prevail in such a district. Even a 60.1% Democratic district is only 39.9% Republican—a Democratic advantage of *20.2%*—and there is

no Republican serving in Congress from a district with a Democratic advantage of more than 5%. *See* The Cook Political Report, The Ten Republicans In The Least Republican Districts, *available at* http://cookpolitical.com/story/5604. Thus, that Congressman Forbes won 60% of the vote in a majority-Republican Enacted District 4 in 2014, *see* Def. Opp. 17, says precisely nothing about how he would fare in a "minority opportunity" and 60% Democratic district where nearly half of the voters are new, Rep. 29. And even if the 2014 election results could be extrapolated to a remedial District 4, Congressman Forbes *would lose*: even the minimum 12% pro-Democratic partisan swing that the special master proposes would decrease his vote share to 48.1% and increase his Democratic opponent's vote share to 49.5%. *See* Def. Opp. 17. At an absolute minimum, Congressman Forbes's reelection prospects are *greatly impaired* under the new district. This is obviously "harm" and is "reparable" only by returning to the Enacted Plan in late spring or summer, with all the attendant chaos.[3]

Balance Of Equities. As explained, the "equities" and weighing of the "relative harms" alone warrant suspending further proceedings and modifying the injunction. *Hollingsworth*, 558 U.S. at 190; *see supra* Part II. Plaintiffs' and Defendants' responses on this point are irremediably distorted by their failure even to *acknowledge* the massive risk of electoral havoc that would result from entering a remedial plan now and courting a reversal mid-cycle. *See* Pl. Opp. 11-15; Def. Opp. 15-20. Unsurprisingly, their arguments on the equities utterly fail.

At the threshold, Plaintiffs and Defendants suggest that Plaintiffs and other voters will

[3] Plaintiffs and Defendants also mischaracterize the Court's order denying the General Assembly's prior motion to stay. *See* Pl. Opp. 4; Def. Opp. 5-6. There, the Court held that the "Interested Parties failed to show that . . . *they* will suffer irreparable injury or prejudice by adhering to the Court's September 1, 2015 [deadline] for adopting a new redistricting plan," Order 1 (DE 201) (emphasis added), not, as Plaintiffs and Defendants suggest, *see* Pl. Opp. 4; Def. Opp. 5-6, that *Intervenor-Defendants* face no irreparable harm from a remedial plan entered while the Supreme Court's plenary review of liability is pending.

suffer "irreparable harm" if they vote in Enacted District 3 in 2016. Pl. Opp. 15; Def. Opp. 18. But Plaintiffs obviously did not believe that voting in Enacted District 3 harmed them in 2012 because they waited until *eleven months thereafter* to file their lawsuit. And while the Court noted in its 2014 liability opinion that a remedy should be entered "as soon as possible," 10/7/14 Mem. Op. 49 (cited at Def. Opp. 19), it concluded that no voter would be irreparably harmed by voting in Enacted District 3 in the 2014 elections, which it allowed to occur due to Plaintiffs' dilatoriness in filing suit, *id.* 46. Plaintiffs' and Defendants' appeal to the importance of the right to vote, *see* Pl. Opp. 15-16; Def. Opp. 18, is therefore misplaced: that right was equally at stake in the 2012 and 2014 elections, but did not establish irreparable harm then.

Plaintiffs and Defendants offer no explanation as to why the outcome should be different now. In fact, as explained, the only conceivable prejudice is that voters and candidates would participate in elections in Enacted District 3 that this Court has held is flawed in a non-final judgment now under the Supreme Court's plenary review. *See* Mem. 14. But other candidates and voters have faced the identical prejudice in prior cases—and the Supreme Court has made clear that such prejudice does not override "the balance of equities" and preference for "legislative apportionment plans created by the legislature" over "judicially constructed plans" that it has "repeatedly emphasized" when its plenary review of liability remains pending. *Karcher*, 455 U.S. at 1306-07 (Brennan, J); *see also Whitcomb*, 396 U.S. 1064.

Defendants thus alternatively contend that failing to enter a remedial plan now would pose a risk "of disrupting the electoral process if the Supreme Court affirms" on liability "or dismisses the appeal." Def. Opp. 19. But Defendants' argument on this point actually confirms that the Court should decline to enter a remedial plan. Defendants argue that because any decision from the Supreme Court "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." *Id.* Of course, this eleventh-hour suggestion that a remedial plan could be entered as late as summer 2016 directly contradicts Defendants' repeated statements to the Court that it is "necessary" for any judicial remedy to be in place by January 1. *See* 9/2/15 Tr.; Def. Reply Br. Re. *Alabama* 10-11.

Moreover, if Defendants are correct that a remedial plan could be entered in June 2016 or later, then there is no need to make history by rushing to enter a remedial plan now, because the Court could simply await the outcome of the appeal. Defendants attempt to back away from this course by asserting that the Commonwealth "has a compelling interest in avoiding [the] disruption" that would result from such a belated remedy. *Id.* But this simply proves Intervenor-Defendants' point. *All* agree that the Commonwealth has a "compelling interest" in "avoiding the disruption" inherently caused by entering a remedial plan in June that differs from the plan in place before June. Thus, all agree there is a compelling need to avoid the scenario that would occur if the Supreme Court reverses liability in late May or June: a last-minute switch to the Enacted Plan from the now-invalid remedial plan. So the equities compellingly weigh against entering a remedial plan during the pendency of liability review. *See* Mem. 10-15.

As Intervenor-Defendants have explained, no judicial remedy could be timely entered for the 2016 elections after the Supreme Court's decision on liability. *See id.* 13-14. The latest date upon which a primary can be held under the federal MOVE Act is around August 23, 2016—and the MOVE Act date to commence preparing ballots for an August 23 primary would be around June 9, 2016. *See id.* & n.2. Of course, that date is before the end of the Supreme Court's term, so it may come and go before the Supreme Court's decision on liability. Moreover, all candidate signature collection and qualification would have to be completed *before* June 9, so there is no

realistic prospect that the Court could enter a remedial plan for the 2016 election after the Supreme Court's decision on liability. *See id.* Indeed, all of the cases Defendants cite where "[f]ederal courts have entered remedial redistricting plans later in the election cycle," Def. Opp. 19, predate the 2009 enactment of the federal MOVE Act with its 45-day mailing requirement, *see* P.L. 111-84 §§ 577-579 (2009). Accordingly, because no remedial plan can be properly entered for the 2016 elections in any event, the Court should decline to take the unprecedented action of entering a remedial plan now. *See* Mem. 13-14.

Likelihood Of Success On The Merits. Finally, there is "a fair prospect that a majority of the Court will vote to reverse the judgment," *Hollingsworth*, 558 U.S. at 190; *Karcher*, 455 U.S. at 1306 (Brennan, J); and even a "likel[ihood]" of Intervenor-Defendants' success on the merits, *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (vacating lower court's denial of a stay). The Supreme Court's exercise of plenary review rather than summary affirmance or dismissal of the appeal confirms that the Court's split decision raises "substantial questions," *Sanks*, 401 U.S. at 145, and at a minimum a "fair prospect" of reversal, *Hollingsworth*, 558 U.S. at 190. Moreover, the split decision in this case runs counter to Supreme Court precedent in *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015), and *Easley v. Cromartie*, 532 U.S. 234 (2001). *See* Juris. Stat., No. 14-1504 (S. Ct.) (available at DE 182-1); Mem. 16-17.

As the Jurisdictional Statement establishes at length, the majority's basic legal error on liability (accepting all of its factual findings as correct) was finding a *Shaw* violation without identifying any conflict between the Legislature's purported racial goal and the race-neutral factors that concededly motivated the Enacted Plan, at least in part. Absent such conflict, there cannot be the requisite "subordination." And there can be no conflict because preserving District 3 treated that district the *same* as the majority-white districts, all of which were preserved

because of the neutral core-preservation, political, and incumbency-protection factors.

Plaintiffs and Defendants return to the Court's order denying the General Assembly's motion to postpone, *see* Pl. Opp. 4, 7-8; Def. Opp. 5-6, but the Court's conclusion that "*the Interested Parties* have failed to show that . . . the Intervenor-Defendants are likely to succeed in the appeal," Order 1 (DE 201), predated the Supreme Court's acceptance of "plenary review" of the "substantial questions" presented in the Court's liability judgment, *Sanks*, 401 U.S. at 145; Mem. 17. The Court thus did not consider the "changed and somewhat unusual circumstances," 2/23/15 Mem. Op. 4, or the showing of "a fair prospect of reversal," *Hollingsworth*, 558 U.S. at 190; *Karcher*, 455 U.S. at 1306 (Brennan, J), that are present here, Mem. 17.

Plaintiffs' and Defendants' other arguments fare no better. Defendants offer a lengthy rehashing of the facts that this Court found sufficient to establish a *Shaw* violation. *See* Def. Opp. 8-15. But the question is not whether the lower court stands by its judgment because stays would *never* be granted under that standard. Instead, the question is whether there is a "fair prospect" of reversal by the Supreme Court. *Hollingsworth*, 558 U.S. at 190; *Karcher*, 455 U.S. at 1306 (Brennan, J). That standard is satisfied even in cases where the Supreme Court ultimately does *not* reverse the judgment below, *see, e.g.*, *Karcher*, 455 U.S. at 1306 (Brennan, J), and is easily met with respect to the split decision here, where the Court has already recognized "substantial questions" as to its correctness, *Sanks*, 401 U.S. at 145; *see* Mem. 15-17.

Plaintiffs fall back on their challenge to Intervenor-Defendants' standing to appeal, *see* Pl. Opp. 7-11, but that challenge does not empower the Court to enter a remedial plan now. In the first place, the Supreme Court's postponement of standing to plenary review, *see id.*, is of no moment: the Supreme Court *routinely* takes this action, including in the very case Plaintiffs cite in which it *granted a stay*, *see Hollingsworth*, 558 U.S. at 190 (granting defendant-intervenors'

application for a stay) (cited at Pl. Opp. 9); *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (addressing defendant-intervenors' standing to appeal). Moreover, Plaintiffs do not dispute that the Supreme Court's acceptance of plenary review signals that the Court's liability decision presents substantial questions on the merits. *See* Pl. Opp. 9. Indeed, if the Supreme Court did not think so, it could have summarily affirmed or dismissed the appeal.

On substance, this Court obviously has no authority to prejudge the question the Supreme Court is now reviewing—Intervenor-Defendants' standing to appeal *to the Supreme Court*. In any event, Plaintiffs' standing challenge is so meritless that even Defendants have rejected it. *See* Def. Opp. 17-18; Reply Of Va. State Board Of Elections Appellees To Supplemental Briefing On Standing (Ex. A). As Defendants have agreed, Intervenor-Defendants have standing to appeal for the simple reason that the Court's "judgment" causes them "direct, specific, and concrete injury" by requiring alterations to their districts that place at least one Intervenor-Defendant in a majority-Democratic district and, thus, harm his chances for reelection and interests as a Republican voter. *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 623-24 (1989) (holding that intervenor-defendants had standing to appeal even in the absence of an appeal by the State defendants); Appellants' Br. Re. Standing 9-10 (Ex. B); Appellants' Reply Br. Re. Standing 4-5 (Ex. C). In all events, Intervenor-Defendants at a minimum have a "fair prospect" of prevailing on this and other issues on appeal, *Karcher*, 455 U.S. at 1306 (Brennan, J), so the Court should decline the invitation to become the first federal court in history to enter a remedial redistricting plan while the Supreme Court's plenary review of liability is pending.

CONCLUSION

The Court should decline to enter a remedial plan and modify its injunction to allow Virginia to conduct the 2016 congressional elections under the Enacted Plan.

Dated: December 7, 2015

Respectfully submitted,

/s/ Mark R. Lentz

Michael A. Carvin (*pro hac vice*)
John M. Gore (*pro hac vice*)
Mark R. Lentz (VSB #77755)
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
Tel: (202) 879-3939
Fax: (202) 626-1700
Email: macarvin@jonesday.com
Email: jmgore@jonesday.com
Email: mrlentz@jonesday.com

Counsel for Intervenor-Defendants

CERTIFICATE OF SERVICE

I certify that on December 7, 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:

John K. Roche, Esq.
Mark Erik Elias, Esq.
John Devaney, Esq.
PERKINS COIE, LLP
700 13th Street, N.W., Suite 600
Washington, D.C. 20005-3960
Tel. (202) 434-1627
Fax (202) 654-9106
JRoche@perkinscoie.com
MElias@perkinscoie.com
JDevaney@perkinscoie.com

Kevin J. Hamilton, Esq.
PERKINS COIE, LLP
1201 Third Avenue, Ste. 4800
Seattle, WA 98101-3099
Tel. (202) 359-8000
Fax (202) 359-9000
KHamilton@perkinscoie.com

Counsel for Plaintiffs

Stuart A. Raphael
Trevor S. Cox
Mike F. Melis
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
Telephone: (804) 786-2071
Fax: (804) 371-2087
sraphael@oag.state.va.us
tcox@oag.state.va.us
mmelis@oag.state.va.us

Counsel for Defendants

/s/ Mark R. Lentz
Mark R. Lentz

Counsel for Intervenor-Defendants