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

Richmond Division

DAWN CURRY PAGE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No.: 3:13-cv-678
	)	
VIRGINIA STATE BOARD OF ELECTIONS, et al.,	)	
	)	
	)	
Defendants.	)	

DEFENDANTS'
BRIEF IN OPPOSITION IN PART
TO INTERVENOR-DEFENDANTS' MOTION TO
POSTPONE REMEDIAL DEADLINE UNTIL SEPTEMBER 1, 2015

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PRELIMINARY STATEMENT

The Commonwealth opposes extending the Court's deadline until September 1, 2015, for the General Assembly and Governor to reach agreement on a congressional redistricting plan that complies with the Court's October 7, 2014 ruling. This Court envisioned that a redistricting plan would be addressed by the Virginia General Assembly in its 2015 Regular Session, which is currently underway. House Joint Resolution No. 523, the General Assembly's organizing resolution, contemplates action on congressional redistricting in the current session. Accordingly, the Commonwealth does not request permission at this time to put off its work until a special session.

The Commonwealth does request, however, that the Court extend its current deadline until April 15, 2015 to enable the Commonwealth to complete its work during the current Regular Session. Because Intervenor-Defendants have not demonstrated good cause for an extension beyond April 15, 2015, their motion should otherwise be denied.

STATEMENT OF THE CASE

Following a two-day bench trial, this Court, on October 7, 2014, ruled that Virginia's 2012 redistricting plan had racially gerrymandered the third congressional district ("CD3").[1] Accordingly, the Court held that "the 2012 Plan is unconstitutional."[2] The Court permitted the 2014 congressional elections to proceed on November 4 as scheduled,[3] but it required "the Commonwealth to act within the next legislative session to draw a new congressional district plan."[4] The accompanying Order enjoined Virginia "from conducting any elections subsequent

[1] Mem. Op. 48, ECF No. 109.

[2] *Id.*

[3] *Id.* at 46.

[4] *Id.* at 48.

to 2014 for the office of United States Representative until a new redistricting plan is adopted."[5] The Court referred the matter to the General Assembly for consideration in the 2015 Session, for resolution "as expeditiously as possible, but no later than April 1, 2015, by adopting a new redistricting plan."[6]

On October 30, 2014, the eight Intervenor-Defendants—members of Congress[7]—noted a direct appeal from this Court to the United States Supreme Court, pursuant to 28 U.S.C. § 1253.[8] The Commonwealth did not appeal. Intervenor-Defendants filed their Jurisdictional Statement on October 31, 2014, *Cantor v. Personhuballah*, No. 14-518 (U.S. docketed Nov. 4, 2014); Plaintiffs-Appellees filed a motion to dismiss or affirm on December 4, 2014; and Intervenor-Defendants filed a reply on December 22, 2014.[9] The case was calendared for the Supreme Court's January 9, 2015 conference, but the Supreme Court has neither acted on the appeal nor relisted the matter for another conference.[10]

The Intervenor-Defendants assert, probably correctly, that the Supreme Court is holding their appeal pending disposition of two other direct appeals involving § 5 of the Voting Rights Act. The appellants in those cases contest Alabama's redistricting plan for its State legislative districts; Alabama used the percentage of African-American voters in the prior enacted plan as a

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[5] Order ¶ 2, ECF No. 110.

[6] *Id.* ¶ 3.

[7] Two Intervenor-Defendants are no longer sitting congressmen. Eric Cantor was succeeded by David Brat in the Seventh Congressional District, and Frank Wolf was succeeded by Barbara Comstock in the Tenth Congressional District.

[8] Notice of Appeal, ECF No. 115.

[9] The filings in the Supreme Court are available at: http://www.scotusblog.com/case-files/cases/cantor-v-personhuballah/.

[10] *See* Docket, No. 14-518, http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/14-518.htm.

fixed floor to maintain black-majority districts, ostensibly to comply with § 5 of the Voting Rights Act. Question 1 in *Alabama Democratic Conference v. Alabama*, No. 13-1138 is:

> Whether, as the dissenting Judge concluded, this effort [redrawing each majority-black district to have no less than the same percentage of black population as in the previous district] amounted to an unconstitutional racial quota and racial gerrymandering that is subject to strict scrutiny and that was not justified by the putative interest of complying with the non-retrogression aspect of Section 5 of the Voting Rights Act.[11]

Question 2 in *Alabama Legislative Black Caucus v. Alabama*, No. 13-895, is

> Whether Alabama's legislative redistricting plans unconstitutionally classify black voters by race by intentionally packing them in districts designed to maintain supermajority percentages produced when 2010 census data are applied to the 2001 majority-black districts.[12]

The Court heard oral argument in both appeals (hereinafter *Alabama*) on November 12, 2014.

The 2015 Regular Session of the Virginia General Assembly commenced on January 14, 2015. Under House Joint Resolution No. 523, the legislature is scheduled to adjourn on February 28, 2015 and to reconvene on April 15, 2015 (the "Reconvened Session"), to consider the Governor's actions on bills passed during the Regular Session.[13]

Although a redistricting bill has not yet been introduced, House Joint Resolution No. 523 provides that the normal deadlines for introducing bills do not apply to "bills and joint resolutions requested in writing by the Governor" or to "bills and joint resolutions related to the redrawing of the districts of the members of the United States House of Representatives."[14] Thus, a redrawn plan may still be acted upon by the General Assembly during the Regular

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[11] Question Presented, No. 13-1138, http://www.supremecourt.gov/qp/13-01138qp.pdf.

[12] Question Presented, No. 13-895, http://www.supremecourt.gov/qp/13-00895qp.pdf.

[13] *See* H.J. Res. 523 (Va. Jan. 14, 2015), *available at* http://lis.virginia.gov/cgi-bin/legp604.exe?151+ful+HJ523ER.

[14] H.J. Res. 523 (seventh and eight exceptions after "RESOLVED FINALLY").

Session, and as late as the April 15 Reconvened Session (provided the April 1 deadline is extended until then).

By contrast, granting the Intervenor-Defendants' request—that the Court extend the legislature's deadline from April 1 to September 1—would require a special session. Under the Virginia Constitution, the "Governor may convene a special session of the General Assembly when, in his opinion, the interest of the Commonwealth may require and shall convene a special session upon the application of two-thirds of the members elected to each house."[15]

As of this date, neither the General Assembly nor the Governor has requested that the Attorney General seek a postponement of the legislature's work on a congressional redistricting plan until a special session. The Governor does request, however, that this Court's deadline be extended until April 15, to permit a redistricting plan to be considered and acted upon within the 2015 Regular Session.

ARGUMENT: THE COURT SHOULD EXTEND THE COMMONWEALTH'S DEADLINE UNTIL APRIL 15 BUT SHOULD NOT FORCE A SPECIAL SESSION OF THE GENERAL ASSEMBLY

A. Where a third party to the injunctive relief ordered by the Court seeks to postpone the Court's ruling, the Court should be guided by the traditional four-factor test for a stay pending appeal.

The Intervenor-Defendants appear to apply the wrong law in requesting that the Court modify the current injunction. This is not a case where the injunction "has been turned through changing circumstances into an instrument of wrong,"[16] or where modification is needed because the "circumstances of law or of fact existing at the time [the] injunction . . . issued have

[15] Va. Const. art. IV, § 6.

[16] *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932).

changed . . . ."[17] The law and facts have not changed. An appeal from this Court's ruling was predictable and likely accounted for by the Court when it imposed the April 1 deadline.

Rather, the Intervenor-Defendants are effectively requesting a stay pending appeal because they suppose that the Supreme Court might reverse and render unnecessary the need to revise the 2012 redistricting plan. Moreover, they seek a stay of a deadline whose greatest effect will be on the Commonwealth, not them. While circumstances conceivably could change that might lead the Commonwealth to seek a delay of the deadline beyond the April 15 date requested here, those circumstances have not yet arisen. As noted above, House Joint Resolution No. 523 contemplates action on congressional redistricting in the 2015 Regular Session. Indeed, it is not apparent that Intervenor-Defendants have standing to request a postponement until September 1 that the Commonwealth itself does not seek.

Under these circumstances, and assuming *arguendo* that Intervenor-Defendants have standing to request a delay of the Commonwealth's deadline, the Court should be guided by the "traditional test for stays"[18] pending appeal. That is so because the requested relief is tantamount to a stay; it "has the same effect as the court's issuance of a stay" of its earlier order.[19]

The traditional four-factor test for a stay pending appeal was set forth by the Supreme Court in *Nken v. Holder* and *Hilton v. Braunskill* as follows:

> (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.[20]

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[17] *Holiday Inns, Inc. v. Holiday Inn*, 645 F.2d 239, 244 (4th Cir. 1981) (Phillips, J., dissenting).

[18] *Nken v. Holder*, 556 U.S. 418, 433 (2009).

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

[20] *Nken*, 556 U.S. at 434 (quoting *Hilton*, 481 U.S. at 776).

"A stay is not a matter of right, even if irreparable injury might otherwise result."[21] "The first two factors of the traditional standard are the most critical."[22] "Once an applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest."[23]

B. Intervenor-Defendants have failed to make a strong showing that they are likely to succeed on the merits of their appeal.

The evidence of the General Assembly's motives in redrawing CD3 was hotly contested. This Court denied summary-judgment motions because the material facts were disputed.[24] In light of the conflicting evidence, we joined with Intervenor-Defendants in defending Enacted CD3 at trial. And had the majority viewed the evidence as Judge Payne did, Enacted CD3 would not have been declared unconstitutional. But the majority did not see it that way.

Now that the case is on appeal, *Easley v. Cromartie* makes clear that this Court's factual findings are reviewed "only for 'clear error.'"[25] The Supreme Court will not reverse simply because it "would have decided the case differently."[26] Rather, under the "clearly erroneous" standard, the question is simply "whether 'on the entire evidence,' [the Supreme Court] is 'left with the definite and firm conviction that a mistake has been committed.'"[27]

In light of that highly deferential standard of review, the Intervenor-Defendants face an uphill battle to show that the majority clearly erred in finding that race predominated in drawing

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

[22] *Id.* at 434.

[23] *Id.* at 435.

[24] Order, ECF No. 50.

[25] 532 U.S. 234, 242 (2001).

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

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

CD3.[28] "The issue in this case [was] evidentiary."[29] This Court resolved the conflicting evidence against the Commonwealth, concluding that "[t]he legislative record here is replete with statements indicating that race was the legislature's paramount concern in enacting the 2012 Plan."[30]

The Intervenor-Defendants suggest that the Supreme Court will reverse in this case once it hands down *Alabama*, but events to date do not warrant their optimism. When they filed their Jurisdictional Statement last October, Intervenor-Defendants requested that the Supreme Court "note probable jurisdiction and set oral argument *as soon as practicable*," precisely because of the looming "April 1, 2015" deadline.[31] They urged the Supreme Court to act quickly because it "would prove a wasted exercise if the Court reverses the majority's flawed decision."[32] Yet the Supreme Court took no action.

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[28] The Court's finding that race predominated in drawing CD3 does not mean that race predominated when the General Assembly revised its State voting districts. A court must "scrutinize *each* challenged district to determine whether . . . race predominated over legitimate districting considerations . . . ." *Bush v. Vera*, 517 U.S. 952, 965 (1996) (plurality) (emphasis added); *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (noting that evidence must be evaluated with regard to each "particular district"). Accordingly, the Commonwealth's decision not to appeal in this case has no bearing on the pending challenge to various House-of-Delegates districts in *Bethune-Hill v. Virginia State Board of Elections*, No. 3:14-cv-00852 (E.D. Va. filed Dec. 22, 2014).

[29] *Easley*, 532 U.S. at 241.

[30] Mem. Op. 17. The direct evidence on which the majority here relied distinguishes this case from *Easley*. The strongest evidence of racial motivation in *Easley* was the redistricting leader's comment that "I think that overall [the plan] provides for a fair, geographic, *racial* and partisan balance throughout the State of North Carolina." *Id.* at 253 (emphasis added). Five justices found that remark insufficient to prove that race predominated, *id.* (Breyer, J., joined by Stevens, O'Connor, Souter, and Ginsburg, JJ.), while four Justices thought it adequate under the deferential standard of review, *id.* at 266 n.8 (Thomas, J., dissenting, joined by Roberts, C.J., and Scalia and Kennedy, JJ.).

[31] Jur. Statement 38 (emphasis added).

[32] *Id.*

In short, nothing in the Supreme Court's handling of Intervenor-Defendants' appeal suggests that the Court is likely to reverse in this case. And in light of the clear-error standard, they have not made a strong showing that they are likely to succeed on the merits.

C. Intervenor-Defendants have not claimed or shown that they will suffer irreparable harm.

The Intervenor-Defendants are incumbent or former congressmen.[33] Because they are not members of the General Assembly, they will not suffer any harm, let alone irreparable harm, if the General Assembly and the Governor work to devise new congressional districts while the appeal remains pending. Indeed, Intervenor-Defendants do not claim otherwise. Accordingly, they cannot satisfy the second consideration for a stay pending appeal.

D. Postponing the Commonwealth's deadline until September 1 will cause significant harm to others.

The Intervenor-Defendants are mistaken that "it makes perfect sense from *everyone's* perspective"[34] to stay this Court's ruling until the Supreme Court resolves their appeal. To the contrary, significant harm may befall others if the deadline is postponed until September 1.

Delay harms the Commonwealth's interests in three ways. First, the Commonwealth will incur significant expense for a special session in the form of personnel costs, per diem charges, and reasonable and necessary expenses.[35] According to 2014 estimates, each day of a special session would cost $40,999, and a one-week session would cost $141,799.[36] At a minimum

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[33] *See* note 7 *supra*.

[34] Intervenor-Defs.' Mem. Supp. 9 (emphasis added), ECF No. 127.

[35] *See generally* 2014 Va. Sp. Sess. Acts ch. 3, item 1.

[36] *See* CBS-6 News, *Special Session costs Va. taxpayers more money daily than many make annually* (Mar. 14, 2014), http://wtvr.com/2014/03/24/special-session-costs-va-taxpayers-more-money-daily-than-many-make-annually/ (follow "Play video" hyperlink; cost information at 00:55).

then, if the Court were to grant Intervenor-Defendants' request, it should require them to indemnify the Commonwealth for the cost of the special session and to post a bond in the amount of at least $140,000.

Second, granting Intervenor-Defendants' request would intrude on the Commonwealth's normal governmental operations. As noted above, House Joint Resolution No. 523 contemplates action on redistricting in the 2015 Regular Session. As of this filing, neither the Governor nor the General Assembly has requested that the Attorney General seek a modification of this Court's order to permit a special session, although the Governor does request that the deadline be extended until April 15 to allow action on a redistricting plan in the Reconvened Session, which is part of the 2015 Regular Session. Postponing the work to a special session that neither branch of State government has yet requested would be inconsistent with the "longstanding recognition of the importance in our federal system of each State's sovereign interest in implementing its [own] redistricting plan."[37]

Third, delaying the required redistricting will leave Virginia at risk if an unanticipated vacancy occurs in one of Virginia's eleven congressional seats. At present, "Virginia is . . . enjoined from conducting *any* elections subsequent to 2014 for the office of United States Representative until a new redistricting plan is adopted."[38] Thus, the Commonwealth cannot conduct a special election should a vacancy unexpectedly arise.

In addition to harming the Commonwealth's interests, needlessly postponing the deadline also would harm prospective candidates by compressing the time between the Court's approval of new congressional districts and the 2016-election cycle. At a minimum, the new districts

[37] *Bush*, 517 U.S. at 978 (plurality).

[38] Order ¶ 2 (emphasis added), ECF No. 110.

should be in place by January 1, 2016, the day after which candidates may start collecting the 1,000 signatures needed to run in a party primary[39] or to be listed on the ballot as an independent.[40] But candidates need sufficient lead time to contemplate *whether* to run, to organize their campaign, and to begin raising the necessary funds to be competitive.

In the 2014 congressional elections in Virginia, successful House candidates raised between $510,000 and $3.38 million. (*See* Ex. 1, Campaign Finance Summary—2014 Congressional House Races in Virginia.) The average was about $1.5 million. The cash-on-hand balance now remaining for Virginia's current incumbents averages nearly a half million dollars and runs as high as $1.4 million. Such war chests pose formidable obstacles to challengers, requiring long lead times to generate campaign funds.

Yet until a new congressional-district plan is approved, prospective candidates cannot know with certainty *which* congressional district they will be in, particularly if they live in precincts that were moved from one congressional district to another in the 2012 Plan. Running for office is not something undertaken lightly. It routinely requires forming an exploratory committee, developing a campaign plan, forming and staffing a campaign committee, developing a fundraising team, and spending countless hours campaigning.[41] Running a campaign is a "challenging endeavor" indeed.[42]

In addition to those considerations, any postponement of the Commonwealth's deadline must account for the possibility that the General Assembly may not be able to agree on new

[39] Va. Code Ann. § 24.2-521 (Supp. 2014).

[40] Va. Code Ann. § 24.2-506 (Supp. 2014).

[41] Although the Court could take judicial notice of such observations, *see, e.g.*, Christopher Crotty, *So you want to Run for Office*? CompleteCampaigns.com, http://www.completecampaigns.com/article.asp?articleid=13.

[42] *Id.*

congressional districts, or that the Governor may veto a proposed redistricting plan.[43] If the outcome of that process is not known until September 1, it leaves little time for the Court to receive and consider submissions from the parties and to devise a remedial plan. Even assuming that the necessary work could be completed by January 1, 2016, the delay would disproportionately burden prospective congressional candidates.

It is true that if the Supreme Court, by the end of its current term on June 30, reverses this Court's decision and vacates the injunction, the General Assembly would have engaged in an unnecessary redistricting effort. But that consideration is accounted for in the likelihood-of-success factor—Intervenor-Defendants have not made a "strong showing" they are likely to succeed. And considering that Intervenor-Defendants have shown no harm to themselves if their motion is denied, the balance-of-hardship analysis clearly weighs against postponing the deadline until September 1 in light of the cost of a special session, the intrusion into the operations of State government, the risk to Virginia's representation in Congress should a vacancy unexpectedly occur, and the burden that delay would impose on prospective congressional candidates.

E. The public-interest factor also weighs against Intervenor-Defendants' request.

The public-interest factor also warrants denying Intervenor-Defendants' request. Having determined that Enacted CD3 is unconstitutional, the Court held that Virginia citizens "'are entitled to vote as soon as possible for their representatives under a constitutional apportionment

[43] "Every bill" enacted by the General Assembly is subject to veto by the Governor, subject to being overridden by a 2/3 majority in each chamber. Va. Const. art. V, § 6. Accordingly, a redistricting bill is likewise subject to gubernatorial veto. *See also Smiley v. Holm*, 285 U.S. 355, 372-73 (1932) ("[T]here is nothing in Article I, section 4, [of the U.S. Constitution] which precludes a State from providing that legislative action in districting the State for congressional elections shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power.").

plan.'"[44] It was for that reason that the Court referred the matter to the General Assembly to exercise its authority "as expeditiously as possible, but no later than April 1, 2015, by adopting a new redistricting plan."[45] In addition, where, as here, a stay would cause injury to governmental interests, the public-interest factor "merges" with the harm-to-others factor and likewise warrants denying the stay pending appeal.[46]

CONCLUSION

The Court should extend the Commonwealth's deadline until April 15, 2015, to allow the Commonwealth's redistricting effort to be accomplished in the 2015 Regular Session of the Virginia General Assembly. The Intervenor-Defendants' motion should otherwise be denied. Alternatively, if the Court is inclined to postpone the deadline further, it should condition the extension on Intervenor-Defendants' (1) indemnifying the Commonwealth for the costs of a special session of the General Assembly, and (2) posting a bond in the amount of $140,000 towards securing that obligation.

Respectfully submitted,

By: /s/

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[44] Mem. Op. 47 (quoting *Cosner v. Dalton*, 522 F. Supp. 350, 364 (E.D. Va. 1981)).

[45] Order ¶ 3.

[46] *Nken*, 556 U.S. at 435.

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CERTIFICATE OF SERVICE

I hereby certify that on February 9, 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

Campaign Finance Summary--2014 Congressional House Races in Virginia

FEC Election Year	CD	Candidate Name	Incumbent/ Open	Party	Total Receipts	Total Disbursements	Ending Cash On Hand
2014	1	WITTMAN, ROBERT J	INCUMBENT	REP	$1,208,720	$831,606	$928,924
2014	2	RIGELL, EDWARD SCOTT	INCUMBENT	REP	$1,744,971	$1,583,266	$165,897
2014	3	SCOTT, ROBERT C.	INCUMBENT	DEM	$510,549	$457,832	$114,411
2014	4	FORBES, J. RANDY	INCUMBENT	REP	$1,425,397	$972,570	$642,689
2014	5	HURT, ROBERT	INCUMBENT	REP	$1,307,209	$1,128,424	$307,682
2014	6	GOODLATTE, ROBERT W.	INCUMBENT	REP	$2,167,491	$1,642,112	$1,039,114
2014	7	BRAT, DAVID ALAN	INCUMBENT	REP	$1,459,418	$1,367,856	$91,561
2014	8	BEYER, DONALD STERNOFF JR	OPEN	DEM	$2,875,992	$2,789,738	$86,254
2014	9	GRIFFITH, H MORGAN	INCUMBENT	REP	$921,071	$845,544	$200,335
2014	10	COMSTOCK, BARBARA J	OPEN	REP	$3,388,541	$3,374,998	$13,543
2014	11	CONNOLLY, GERALD EDWARD	INCUMBENT	DEM	$1,995,141	$1,422,105	$1,440,982
			Mean		$1,727,682	$1,492,368	$457,399
			Median		$1,459,418	$1,367,856	$200,335
			High		$3,388,541	$3,374,998	$1,440,982
			Low		$510,549	$457,832	$13,543

Source: Federal Election Commission, 2014 House and Senate Campaign Finance (through 12/31/2014)
http://www.fec.gov/disclosurehs/hsnational.do
(follow VA hyperlink; then "Choose a House Candidate")