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' RESPONSE IN SUPPORT
OF THE RECOMMENDATIONS OF THE SPECIAL MASTER

Mark R. Herring
Attorney General of Virginia

Trevor S. Cox, VSB # 78396
Deputy Solicitor General
tcox@oag.state.va.us

Matthew R. McGuire, VSB # 84194
Assistant Attorney General
mmcguire@oag.state.va.us

Stuart A. Raphael, VSB # 30380
Solicitor General
sraphael@oag.state.va.us

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-7240 – Telephone
(804) 371-0200 – Facsimile

Counsel for Defendants

December 1, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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.
Report	Report of the Special Master (ECF No. 272)
Tr.	Trial Transcript Page No.

INTRODUCTION AND SUMMARY

The principal challenge to the Special Master's report comes from Intervenor-Defendants, but they have seriously mischaracterized his findings and recommendations. He did not make race the predominant criterion in redrawing the lines. To the contrary, he correctly applied traditional redistricting criteria—the same ones embraced by the General Assembly—in locating a remedial CD3 in Tidewater, altering CD4 in the process. Doing so resulted in a remedial CD3 that has a much lower BVAP score that complies with § 5 of the Voting Rights Act by not impairing the ability of African-American voters to elect a candidate of choice. The Special Master did not set out to create a black-opportunity district in CD4. Rather, his non-race-based changes to CD3 caused the BVAP to increase in CD4 for the simple reason that packing and cracking are opposite sides of the same coin. Correcting the packing of black voters in CD3 reciprocally corrected the fragmenting of black voters in CD4.

The Special Master's report makes clear that he followed a least-change methodology that is both necessary and sufficient to correct the racial gerrymander in CD3. Contrary to Intervenor-Defendants' claims, his recommended plans comfortably comport with Supreme Court precedent governing the scope of a federal court's remedial powers. His plans also do not result in unacceptably low core-preservation values in CDs 3 and 4; lower core-preservation in those two districts is the by-product of curing the constitutional violation. All of his proposed remedial districts are also more compact than under the Enacted Plan and result in materially fewer locality splits, while preserving the basic geographic location and shape of the districts.

The Special Master was also correct to reject the Intervenor-Defendants' proposed remedial plans. Their filings to date make clear that they improperly used a 50.1%-BVAP floor for their remedial plans. Doing that simply swaps one BVAP quota for another. Strict scrutiny applies to that intentional use of a racial floor. And because no analysis supports a 50.1%-BVAP

floor—the evidence shows that that figure is much higher than necessary to protect minority voting rights—their plans cannot survive strict scrutiny.

The correct approach was the one used by the Special Master: use traditional restricting considerations, not race, to redraw CD3; check to confirm that the revised district does not retrogress; and minimize the reciprocal changes needed to the adjoining districts while respecting the legislature's traditional redistricting considerations. Both of the Special Master's least-change remedial plans pass muster and the Court should adopt one of them.

ARGUMENT

I. Intervenor-Defendants have mischaracterized the Special Master's report.

Intervenor-Defendants have repeatedly mischaracterized and distorted the Special Master's report and recommendations. The most egregious misstatements are corrected below.

A. The Special Master did not make race the predominant criterion in drawing the remedial lines.

Intervenor-Defendants erroneously claim that the Special Master engaged in an "uncompromising pursuit of his 'highest priority' of race."[1] They later accuse him of acting with "avowedly racial reasons"[2] and with the "'highest priority' of creating 'minority opportunity districts.'"[3]

Those are inexcusable misquotes that reflect the opposite of what the Special Master actually said. He identified three criteria as his top priorities: "The first three of the criteria listed in Section 2. above, 2.(a), 2.(b), and 2.(c), I treated as of highest priority."[4] Criterion 2(a) was

[1] Int.-Defs.' Statement of Position Regarding the Special Master's Final Report at 2, ECF No. 279; *see also id.* at 8-9.

[2] *Id.* at 8.

[3] *Id.* at 21.

[4] Report of the Special Master at 10-11, ECF No. 272 [hereinafter Report].

conforming to the one-person-one-vote requirement.[5] Criterion 2(c)—which Intervenor-Defendants hardly mention—was "*avoiding* use of race as a predominant criterion for redistricting."[6] They focus instead on criterion 2(b), which was "avoiding either fragmentation or packing of geographically concentrated minority populations" that would have "the effect or purpose of minimizing or diluting the voting strength of constitutionally protected minorities, and/or lead to retrogression in the ability of minority communities to realistically have an 'equal opportunity to elect candidates of choice."[7]

But *avoiding* the use of race as the predominant factor in redrawing the lines, under criterion 2(c), is consistent with ensuring non-retrogression, under criterion 2(b), by determining whether the revised district avoids retrogression. Indeed, by *not* using race to redraw the districts, the Special Master achieved both objectives.

The Special Master explained how he drew the maps based on non-racial, traditional redistricting criteria:

> Each illustrative map . . . has been drawn according to good government criteria, such as limiting splits of existing cities and counties between two or more districts, achieves an average higher level of compactness than the current plan, and follows the legal guidance provided to me by the Court.[8]

He added that his maps "do not use race as a predominant criterion."[9] Indeed, the Special Master made clear that, because this Court found that the current CD3 had been drawn with a "predominant racial motive," in redrawing it he was "especially attentive to issues of contiguity,

---

[5] *Id.* at 8.

[6] *Id.* at 9 (emphasis added).

[7] *Id.* at 8-9.

[8] *Id.* at 3; *see also id.* at 66.

[9] *Id.* at 4.

compactness and maintenance of existing political subunit boundaries within the district in drawing illustrative remedial configurations of CD3."[10] Because the Tidewater area that includes the cities of Newport News, Hampton, and Portsmouth already contained "90% of ideal congressional district population," it created the basis for both of his proposed plans.[11] Although the resulting CD3 is "a heavily minority district," his selection of neighboring localities as the basis for the district did "*not* reflect in any way a predominant concern for race.[12] "Rather, these maps naturally reflect the underlying demography of the state . . . ."[13]

Of course, once the district was redrawn according to non-racial criteria, he needed to confirm that his remedial plans for CD3 would not retrogress in violation of § 5 of the Voting Rights Act. The resulting plans had BVAP scores that were "eleven to fourteen percentage points lower than the black voting age population percentage in the present CD3,"[14] with BVAP scores of 42.3% and 45.3% respectively.[15] Because those scores are higher than needed to preserve the ability of African-American voters to elect a candidate of choice, his recommended plans do not retrogress.[16]

B. Intervenor-Defendants exaggerate the Special Master's changes to CD3 and CD4.

Intervenor-Defendants take the Special Master's comments out of context when they say

---

[10] *Id.* at 11.

[11] *Id.* at 12-13.

[12] *Id.* at 15 (emphasis added).

[13] *Id.*

[14] *Id.* at 37.

[15] *Id.* at 45 (Table 1).

[16] *Id.* at 63.

that he "proposes 'major changes in CD3.'"[17] In context, the Special Master explained: "This is certainly a major change from the *current* configuration, but it is a change needed to craft a *narrowly tailored* remedy for the constitutional violation identified in the majority opinion in *Page*."[18]

They more seriously distort the Special Master's words in claiming that he admitted that he went further than necessary in changing CD3 to cure the racial gerrymandering problem. They say "[t]he special master admits that *he does not make only the* 'minimal . . . changes in CD3' *required to remedy that Shaw violation*."[19] But that is not what he wrote. He wrote that he rejected as "inappropriate" the notion of making a "least change" to CD3 without regard to what was necessary to cure the constitutional infirmity. He explained that something *more* than a "least change" to CD3 was necessary to correct the racial gerrymander.[20]

Intervenor-Defendants also erroneously claim that the Special Master "gratuitously"[21] altered CD4 "for the avowed purpose"[22] of fixing a black-voter-fragmentation problem there. In fact, the Special Master made clear that fixing the fragmentation problem in CD4 was simply the by-product of revising CD3 using traditional redistricting principles:

> *In the process of rectifying* the constitutional violations found in current CD3, and *without using race as a predominant factor*, but *simply taking into account the demography and geography and present political subunits* of the State in terms of standard good government districting criteria, the two illustrative

[17] Int.-Defs.' Statement of Position Regarding the Special Master's Final Report at 1-2.

[18] Report at 21 (emphasis added).

[19] Int.-Defs.' Statement of Position Regarding the Special Master's Final Report at 2 (quoting Report at 20) (emphasis added).

[20] Report at 20.

[21] Int.-Defs.' Statement of Position Regarding the Special Master's Final Report at 30.

[22] *Id.* at 3.

> remedial maps create a second district (CD4) in which African-American voters now possess a realistic opportunity to elect candidates of choice.[23]

Rather than setting out to create a black-opportunity district in CD4 in the first instance, correcting the constitutional violation in CD3 had the effect of increasing the black-voting population in CD4 "virtually automatically."[24] That should come as no surprise, since packing black voters in one district often means fragmenting them in an adjoining district: packing and cracking are "two sides of the same coin."[25] The Special Master thus makes clear that the fact that revising the lines for CD3 increased the BVAP in CD4 does not mean that either was drawn according to race; rather, by correcting "the tortuous way CD3 is presently configured," the resulting change to CD4 "in no way reflects race as a predominant motive."[26] Indeed, the Special Master's decision to move the City of Petersburg from CD3 to CD4 in both of his remedial plans[27] echoes the same solution that followed *Moon v. Meadows*, when Petersburg was moved from CD3 to CD4 to correct the earlier racial gerrymander.[28]

C. The Special Master did not replace the General Assembly's traditional redistricting considerations with his own.

Intervenor-Defendants unfairly criticize the Special Master for supposedly departing "from the 'legislative policies underlying' the Enacted Plan as warranted by the 'good government' criteria of 'contiguity and compactness and the avoidance of unnecessary

---

[23] Report at 4 (emphasis added).

[24] *Id.* at 15-16, 42.

[25] *Id.* at 65-66.

[26] *Id.* at 16.

[27] *Id*.

[28] 952 F. Supp. 1141, 1144 (E.D. Va.), *aff'd mem.*, 521 U.S. 1113 (1997); *see also* Tr. 48:13-22; PX 21 at 13 (Section 5 submission to DOJ).

city/county splits.'"[29] They go so far as to accuse him of using "*his* preferred 'good government criteria,'" rather than the General Assembly's.[30] At one point, they even claim that "respecting localities has *not* been an important principle in Virginia for decades."[31]

But those assertions are directly contradicted by the record. "Contiguity and Compactness" were ranked third in order of consideration by the Senate Committee on Privileges and Elections.[32] And the author of the Enacted Plan, Delegate Janis, told the House of Delegates that, in preparing the Enacted Plan, "[w]herever possible, we also attempt to keep together jurisdictions and localities, counties, cities, and towns. We try to either keep them intact or, in some cases, reunite counties, cities, or towns that were splintered in previous redistricting plans."[33] Indeed, Janis touted the *reduction* in total jurisdictional splits as a positive feature of the plan.[34]

So those plainly were appropriate considerations for the Special Master to use in preparing his remedial plan. His Plan 1 (Congressional Modified) saves a net *four* locality splits compared to the Enacted Plan; his Plan 2 (NAACP Modified) saves a net *six* locality splits.[35] Indeed, the Intervenor-Defendants fail to mention that net-positive aspect of the Special Master's remedial plans. They simply cherry pick the occasional instance in which the Enacted Plan or

---

[29] Int.-Defs.' Statement of Position Regarding the Special Master's Final Report at 7 (citation omitted).

[30] *Id.* at 22 (citation omitted).

[31] *Id.* at 26 (emphasis added).

[32] PX 5 at 1.

[33] PX 43 at 4:21-25; *see also* Mem. Op. at 33 (June 6, 2015), ECF No. 170.

[34] PX 43 at 5:1-7.

[35] Report at 60 (Table 4); *see also* Ex. 1, Summ. Comparison of Plans, Decl. of Trevor S. Cox (filed Dec. 1, 2015).

their plan compares more favorably.[36] But the Special Master's plans are plainly superior on this measure.

D. The Special Master did not improperly decline to entrench an 8-3 partisan split.

Intervenor-Defendants' claim that this Court "squarely held that protecting the 8 Republican and 3 Democratic incumbents by maintaining the cores of existing districts 'inarguably' 'played a role' in the changes to Enacted District 3."[37] Then they criticize the Special Master for recommending plans that might lead to a 7-4 split because he failed to "freeze in place the 8-3 split" that the Legislature supposedly intended.[38]

But Intervenor-Defendants have inappropriately added the "8-3 split" phrase to this Court's much more modest statement that "partisan political considerations, as well as a desire to protect incumbents, played a role in drawing district lines."[39] The Court actually *rejected* their argument that perpetuating an 8-3 split was ever intended, finding that claim "not supported by the record."[40] The 8-3 entrenchment claim could not be squared with Delegate Janis's claim that he had not "looked at the partisan performance" in the Enacted Plan.[41]

The more modest form of incumbency protection that Janis actually mentioned was "not cutting out currently elected congressmen from their current districts nor drawing current

---

[36] Int.-Defs.' Statement of Position Regarding the Special Master's Final Report at 26-27.

[37] *Id.* at 5-6, & 16 (quoting Mem. Op. at 35).

[38] *Id.* at 19; *see also id*. at 6, 16, 21 (repeating argument). The Bull Elephant joins in that criticism. *See* Mem. in Response to the Report of the Special Master, Professor Grofman on Behalf of Bull Elephant Media LLC at 6, ECF No. 281.

[39] Mem. Op. at 35.

[40] *Id.* at 18 n.12.

[41] IX9 at 14:11-12.

congressmen into districts together."[42] But the Special Master's recommended plans, as instructed by this Court, are faithful to that consideration by not pairing together any two incumbents in the same district.[43]

Intervenor-Defendants have never come to grips with the Court's rejection of their 8-3-split theory. But the Special Master was correct that he could not second-guess this Court's ruling on that point. That is why he said he had not "reviewed the trial evidence bearing on the question of legislative intent."[44] He was right that the "characterization of the motivation of the legislature in creating the current map has already been argued and litigated and decided in *Page*."[45] It follows that the Special Master was also right that his role in advising on remedial matters did not require that he form his own "opinion" on the 8-3-split issue.[46]

Intervenor-Defendants are also mistaken in claiming that the Special Master's plan will necessarily lead to a 7-4 split.[47] The Special Master said Congressman Forbes's race in CD4 "may be a somewhat closely contested general election."[48] Indeed, in the 2014 election, Forbes defeated the Democratic challenger by a margin of *more than 22 points*: 60.1% to 37.5%.[49] It is therefore uncertain whether the more modest 12-14% increase in Democratic performance in

---

[42] PX 43 at 4:16-18.

[43] Report at 23-24.

[44] *Id.* at 24 n.10.

[45] *Id*.

[46] *Id.*

[47] Int.-Defs.' Statement of Position Regarding the Special Master's Final Report at 21.

[48] Report at 55.

[49] *See* Election Results for Nov. 2014, Va. Dep't of Elections, U.S. House Dist. 4, *available at* http://historical.elections.virginia.gov/elections/search/year_from:2014/year_to:2014/stage:General.

CD4 (based on the 2008 Presidential election) will actually lead to Forbes's ouster.[50]

Finally, even assuming for argument's sake that the Special Master's plan would lead to a 7-4 split in Virginia's congressional delegation, it is hypocritical for Intervenor-Defendants to complain that the Special Master's plan is *worse* than their own on that measure. Intervenor-Defendants have represented to the Supreme Court that they have standing because even their *own* remedial plans would jeopardize Representative Rigell's reelection chances by moving the Democratic voting share in CD2 "from 49.3% to 50.2%."[51] In light of Forbes's superior performance as an incumbent in CD4, there is no reason to think that he is worse off under the Special Master's proposals than Rigell would be under the Intervenor-Defendants' proposals.

E. Intervenor-Defendants mischaracterize the function of the Alternative Plan offered by Plaintiffs at trial.

Intervenor-Defendants repeatedly yet mistakenly claim that this Court somehow adopted the Alternative Plan discussed by Plaintiffs' trial expert as some sort of target or benchmark plan against which other remedial plans must be judged.[52] Their claim has no support in the record. Plaintiffs offered the Alternative Plan at trial simply as circumstantial evidence that race predominated in creating the Enacted Plan.[53] They did not ask for their Alternative Plan to serve as the remedy. This Court treated the Alternative Plan for the same limited purpose it had been

---

[50] Report at 52 (Table 2) (2008 Democratic President vote share).

[51] Appellants' Br. Regarding Standing at 6, *Wittman v. Personhuballah*, No. 14-1504 (U.S. Oct. 13, 2015), *available at* http://www.scotusblog.com/wp-content/uploads/2015/11/Appellants-Brief-Regarding-Standing_14-1504.pdf; *see also id.* at 10 (calling current CD2 a "toss-up District").

[52] Int.-Defs.' Statement of Position Regarding the Special Master's Final Report at 3-4, 12, 22, 32, 33.

[53] *See* Pls.' Post-Trial Reply Br. at 11 ("Plaintiffs . . . submitted the alternative plan to show that, had the legislature been truly interested in traditional redistricting criteria rather than race, they could have drawn CD3 with greater respect for traditional criteria and with much less racial disparity."), ECF No. 107.

offered: to show that the legislature could have "maintain[ed] a majority-minority district and achieve[d] the population increase needed for parity, while simultaneously minimizing locality splits and the number of people affected by such splits," while "keep[ing] the cities of Newport News, Hampton, and Norfolk intact."[54] This Court never said the Alternative Plan should serve as the benchmark or target for the remedy here.

F. Intervenor-Defendants understate the evidence of "packing" in CD3.

Intervenor-Defendants are wrong to criticize the Special Master for his conclusion that Enacted CD3 reflects the "packing" of black voters. They argue that "the only evidence related to 'packing' at trial was the testimony of Plaintiffs' own expert, Dr. McDonald, that Enacted District 3 does not 'pack' minority voters."[55] Not so.

As an initial matter, Intervenor-Defendants mischaracterize McDonald's testimony. McDonald testified unequivocally that there were more black voters than necessary in CD3 to "elect a candidate of choice."[56] McDonald understood the term "packing," however, in a much narrower way than used by the Special Master. To McDonald, "packing" meant placing *so many* black voters in a single district as to deny them the ability to have a *second* black-majority district; in *that* sense, he said CD3 was not "packed."[57] But that notion of packing is materially different from how the parties and the Special Master have been using the term: intentionally moving more black voters into a district than necessary to protect minority voting rights. In that sense, the evidence sufficed to show that CD3 had been packed.

---

[54] Mem. Op. at 32.

[55] Int.-Defs.' Statement of Position Regarding the Special Master's Final Report at 4 (quoting Tr. 204-05).

[56] Tr. 204:23-24.

[57] Tr. 205:9-22.

Intervenor-Defendants are also wrong to claim that the "only" evidence of packing came from McDonald. The evidence at trial showed that Senator Locke protested on the Senate floor that CD3 "has been packed" with African-Americans, protecting incumbents in the surrounding districts but leaving African-Americans there "essentially disenfranchised."[58] Senator McEachin agreed that the plan was "packing the 3rd Congressional District and deliberately denying minority voters the opportunity to influence congressional districts elsewhere."[59] He also said that Janis's plan violated the Voting Rights Act because the black-voter concentration in CD3 was "not necessary . . . to afford minorities the opportunity to choose a candidate of their choice."[60]

The Special Master's analysis confirmed they were right: a BVAP score in CD3 of "somewhat above a 40%" would protect minority voting rights,[61] and the supposed need for a 55%-BVAP floor is "unsupported by *any* empirical evidence."[62] So he was justified in writing that the current configuration reflects "the packing of minority voting strength."[63]

II. The Special Master's remedial recommendations do not exceed the scope of the constitutional violation.

Intervenor-Defendants are wrong in claiming that the Special Master's remedial plans go further than needed to correct the constitutional infirmity in CD3.

---

[58] PX 47 at 16:2-6.

[59] *Id.* at 23:15-18.

[60] *Id.* at 22:13-16.

[61] Report at 37.

[62] *Id.* at 62.

[63] *Id.* at 65.

A. Remedying CD3 necessarily requires changing the adjoining boundaries, but the Special Master followed a least-change methodology.

For starters, Intervenor-Defendants unfairly criticize the Special Master because he "does not even limit his proposals to remedying District 3."[64] But it is obviously impossible to remedy CD3 *without* affecting one or more of the adjoining districts. Intervenor-Defendants know that. They claim standing to appeal precisely because of the ineluctable changes to the adjoining districts that the remedy will require. They told the Supreme Court that "the three-judge court's finding of a *Shaw* violation *requires* a remedy that swaps black (and largely Democratic) voters from District 3 with nonblack (far less Democratic) voters from one or more of the four adjacent districts, all of which are represented by a Republican Appellant."[65]

Although fixing CD3 necessarily requires altering adjoining boundaries, the Special Master made clear that one of his criteria was "*avoiding* changes in existing district boundaries that are not required to create a constitutional map."[66] Thus, he rejected the proposed plans submitted by the Plaintiffs, Rapoport, the NAACP, Senator Petersen, First Richmond, and the Governor precisely because they made changes beyond CD3 and its immediately adjoining districts.[67] By contrast, his recommended plans alter only CD3 and the immediately adjoining districts as needed to effect the changes to CD3.[68] And further showing his least-change

---

[64] Int.-Defs.' Statement of Position Regarding the Special Master's Final Report at 2.

[65] Appellants' Reply Br. Regarding Standing at 2, *Wittman v. Personhuballah*, No. 14-1504 (U.S. Oct. 20, 2015), *available at* http://www.scotusblog.com/wp-content/uploads/2015/11/Appellants-Reply-Re-Standing.pdf (emphasis added); *id.* at 5 ("[A]ny remedial alteration of the population in District 3 will be precisely equal to the (cumulative) population alteration of the adjacent district(s).").

[66] Report at 10 (emphasis added).

[67] *Id.* at 13-14, 26, 61.

[68] *Id.* at 4, 42.

approach, the adjoining districts in his recommended plans "generally reflect the present shape of the equivalent districts in the current map."[69]

B. Any resemblance to the Locke Plan does not impeach the Special Master's recommended plans.

Intervenor-Defendants unfairly condemn the Special Master's proposals on the ground that they "closely resemble—and, in fact, are derived from—a plan introduced by Senator Mamie Locke that the Legislature considered and expressly rejected in favor of the Enacted Plan in 2012."[70] That criticism is without merit for two reasons.

First, the Special Master explained that his proposals stem from the obvious, common-sense recognition that a compact version of CD3 could be drawn based on the existing political units in the Tidewater portion of CD3: "Given the demography and geography of the State of Virginia . . . the *obvious way* to remedy the constitutional violation in CD3 is to redraw CD3 as a Newport News-Hampton-Portsmouth-Norfolk based district that is contiguous, highly compact, and has few city splits."[71] Occam's razor teaches that the simplest solution is usually right. That Senator Locke may have noticed the same *obvious way* of drawing CD3 hardly discredits the Special Master's solution.

Second, the Locke plan not only won the support of the Virginia Senate by a vote of 22-15,[72] but the *only* reason given in the House for opposing it was Janis's constitutionally erroneous claim that the BVAP score in CD3 was too low.[73] Thus, the resemblance of the

---

[69] *Id.* at 4.

[70] Int.-Defs.' Statement of Position Regarding the Special Master's Final Report at 1.

[71] Report at 21; *id.* at 15 ("the most obvious way").

[72] PX 8 at 8.

[73] PX 45 at 7:13-8:20.

remedial plan to what was the runner-up to the Enacted Plan is a *plus* factor for its consideration, not a detriment. It more closely "restore[s] the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."[74]

C. The Special Master's proposed plans do not violate *Upham*, *Milliken I*, *Milliken II*, or *Weiser*.

The Intervenor-Defendants unfairly accuse the Special Master of not citing or even being aware of the limitations on a court's remedial authority set forth in cases like *Upham v. Seamon*.[75] Contrary to their claim that he was unaware of *Upham*,[76] the Special Master cited *Upham* at page 19, footnote 9 of his report. He also quoted from Intervenor-Defendants' own brief, repeating their case citations for the principle that "'a court, as a general rule, should be guided by the legislative policies underlying' a state plan—even one that was itself unenforceable—'to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act.'"[77]

The Special Master's recommendations in no way run afoul of *Upham*. The problem in *Upham* was that the district court unilaterally redrew districts in Dallas county, in *north* Texas (District 5 and adjoining districts), when the only two districts with Voting-Rights-Act infirmities were in *south* Texas (Districts 15 and 27).[78] The Supreme Court held that the lower court should not have changed the district lines in noncontiguous districts, in a different part of

---

[74] *Milliken v. Bradley*, 418 U.S. 717, 746 (1974) ("*Milliken I*").

[75] 456 U.S. 37 (1982).

[76] Int.-Defs.' Statement of Position Regarding the Special Master's Final Report at 11 ("without citing *Upham*").

[77] Report at 20 (quoting Int.-Defs.' Br. in Supp. of their Proposed Remedial Plans at 2, ECF No. 232) (citing *Perry v. Perez*, 132 S. Ct. 934, 941 (2012) (quoting *Abrams v. Johnson*, 521 U.S. 74, 79 (1997))).

[78] 456 U.S. at 38-39.

the State, "in the absence of any finding of a constitutional or statutory violation with respect to those districts."[79] In this case, by contrast, the Special Master's changes were strictly confined to CD3 and to its immediately adjacent districts. So his proposed plans fully comply with *Upham*.

Nor does *Milliken I* advance Intervenor-Defendants' position. *Milliken I* held that a federal court that had found *de jure* segregation in the Detroit school system could not remedy it by ordering cross-district busing with 53 separate, outlying school divisions, absent a finding of *de jure* segregation in those other school divisions.[80] The Court reasoned that Michigan law vested "a large measure of local control" in the individual school divisions and that the district court's remedy would have consolidated "54 independent school districts historically administered as separate units into a vast new super school district."[81] In addition to creating huge logistical problems for local administration of those separately-governed school divisions,[82] such a remedy was improper without first finding "that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation."[83] But the outlying school districts had not even been permitted to adduce evidence that they had not

[79] *Id.* at 40.

[80] 418 U.S. at 744-45.

[81] *Id.* at 742-43.

[82] *Id.* at 743.

[83] *Id*. at 745.

engaged in *de jure* segregation. The district court's order therefore improperly imposed a remedy "on the outlying districts, not shown to have committed any constitutional violation."[84]

Milliken I is obviously distinguishable. Unlike the different local governments at issue there, this case involves a *single* governmental entity charged with drawing *all* of the relevant lines, and "dr[awing] the district lines in a discriminatory fashion."[85] And unlike in *Milliken I*, the constitutional violation in this case necessarily affected the adjacent districts. *Milliken I* made clear that remedial relief in that situation would be appropriate.[86]

Milliken II also supports the Special Master's recommendations. The Court there upheld the district court's order that required various compensatory educational programs that went beyond simply changing the pupil-assignment rules that had been found to constitute *de jure* segregation in *Milliken I*. The Court made clear that "[o]nce invoked, 'the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.'"[87] Because the compensatory remedial programs were aimed at correcting the effects of past segregation, they were within the district court's remedial powers: "where, as here, a constitutional violation has been found, the remedy does not 'exceed' the violation if the remedy is tailored to cure the '*condition* that offends the Constitution.'"[88] Thus,

---

[84] *Id.*; *see also Milliken v. Bradley*, 433 U.S. 267, 270 (1977) ("*Milliken II*") (stating that outlying school districts "uninvolved with and unaffected by any constitutional violations").

[85] *Milliken I*, 418 U.S. at 746.

[86] *See id.* at 745 ("[A]n interdistrict remedy might be in order where . . . district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation.").

[87] 433 U.S. at 281 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971)).

[88] *Id.* at 282 (quoting *Milliken I*, 418 U.S. at 738).

"matters other than pupil assignment must on occasion be addressed by federal courts to eliminate the effects of prior segregation."[89] As in *Milliken II*, adopting the Special Master's least-change proposals here for CD3 and the immediately adjoining districts would be well within this Court's "broad and flexible equity powers," and plainly warranted by equity's "practical flexibility in shaping its remedies."[90]

The Intervenor-Defendants' hyperbole may reach one of several crescendos when they insist that the Special Master "flagrantly violated the specific holding of *White v. Weiser*."[91] The Court in *Weiser* held that the district court erred in selecting remedial "Plan C" when correcting population-equality problems in Texas's congressional districting, rather than "Plan B." Both plans met the one-person-one-vote requirement.[92] But "Plan C, unlike Plan B, substantially disregarded the configuration of the districts" as approved by the Texas legislature.[93] Plan B, by contrast, "'merely took the plan of the legislature and adjusted that plan to achieve greater equality to present to the court, in a graphic manner, what the legislature could have done if it had been disposed to make an attempt at population equality.'"[94] Because both plans solved the constitutional defect, the Court held that the district court "should have implemented Plan B, which most clearly approximated the reapportionment plan of the state legislature, while

---

[89] *Id.* at 283.

[90] *Id.* at 288 (citation omitted).

[91] Int.-Defs.' Statement of Position Regarding the Special Master's Final Report at 6 (discussing *White v. Weiser*, 412 U.S. 783 (1973)).

[92] 412 U.S. at 796.

[93] *Id.* at 787; *see also id.* at 793-94 ("Plan C . . . was based entirely upon population considerations and made no attempt to adhere to the district configurations found in S. B. 1").

[94] *Id.* at 793 n.14 (quoting Br. of Appellees at 25).

satisfying constitutional requirements."[95] *Weiser* made clear, however, that a district court should not pull its remedial punches: "[t]he District Court should not, in the name of state policy, refrain from providing remedies fully adequate to redress constitutional violations which have been adjudicated and must be rectified."[96]

The Special Master's plans are comparable to Plan B in *Weiser*, not Plan C, because he did not "substantially disregard[] the configuration of the districts."[97] He did what *Weiser* teaches ought to be done: devise a plan that cures the constitutional defect while respecting to the extent practical the redistricting policies expressed by the legislature. In this case, the Special Master followed a least-change methodology that corrected the deficiencies in CD3 while respecting the legislature's policies of improving contiguity and compactness, and reducing locality splits, and he did so while preserving the basic appearance and orientation of the adjacent districts that were necessarily altered. He did not violate *Weiser*, let alone "flagrantly."

III. Core preservation is not too low in the remedial districts.

It was not "*undisputed* that core preservation was the *most* important neutral state districting criterion to the Legislature."[98] The exhibit that Intervenor-Defendants cite for that embellishment—the Senate committee's redistricting priorities—does not say that; it does not even mention core preservation, although that factor would obviously be included among the "varied factors that can create or contribute to communities of interest."[99] But those

[95] *Id*. at 797.

[96] *Id.* at 796.

[97] *Id.* at 787.

[98] Int.-Defs.' Statement of Position Regarding the Special Master's Final Report at 16.

[99] PX 5.

miscellaneous factors were rank-ordered, in Part V of the Senate's criteria, *lower* than "Contiguity and Compactness," in Part II.[100]

Intervenor-Defendants are also wrong in claiming that this Court found "that the Legislature did not sufficiently preserve the core of District 3."[101] The Court never said that. Rather, in rejecting the dissent's claim that CD3 could be explained by non-racial, core-preservation considerations, the majority wrote that the 2012 Plan moved 180,000 people in and out of CD3 and that the shifts reflected a "predominantly" racial effect of increasing the percentage of African-American voters.[102]

Intervenor-Defendants' complaint that the core-preservation scores are too low in CDs 3 and 4 is simply another way of complaining that the constitutional violation in CD3 has been corrected. A chef must crack a few eggs to craft an omelet. When CD3 is redrawn to correct the constitutional defect while promoting "both contiguity and compactness and the avoidance of unnecessary city/county splits, there are obvious limits to how similar the remaining four changed districts can be to their present exact geographic configurations."[103] A reduction in BVAP from 56% in the Enacted Plan to 42.3 to 45.3% in the Special Master's plans necessarily translates to lower core preservation. And because CD4 was the principal adjoining district affected, CD4 has a lower core preservation too. In other words, the least-change plan needed here necessarily results in lower core-percentage values for both CD3 and CD4. Yet those districts are *better* performers on compactness, as well as in reducing locality splits.[104]

---

[100] *Id.*

[101] Int.-Defs.' Statement of Position Regarding the Special Master's Final Report at 7.

[102] Mem. Op. at 33-34.

[103] Report at 22.

[104] *Id.* at 18-19.

With regard to the other districts adjoining CD3, the core preservation figures in the Master's Plan 1 (Congressional Modification) are not too low: CD1 has a *higher* core preservation than in the Enacted Plan—81.5% compared to 76.5% in Enacted CD1; CD2 is comparable—83.1% compared to 85% in Enacted CD2; and CD7 is 76.8% compared to 88.1% in Enacted CD7.[105] That last figure, 76.8%, is still greater than the core-preservation value in Enacted CD11, 71.2%.[106] So that figure fits easily within the range the Virginia legislature found acceptable.

To be sure, the Special Master's proposed Plan 2 (NAACP Modified) has lower core-preservation scores for CDs 1, 2, and 7 than under Plan 1.[107] While that may be a reason to prefer Plan 1, as the Governor does,[108] the lower core-preservation scores are not disqualifying.

As the Special Master made clear, when there are so many criteria to apply in a case like this one, it can be "impossible to satisfy all criteria fully."[109] Any detriment from lower core-preservation values in the affected congressional districts is amply offset by the creation of a constitutional plan that does not illegally pack black voters into CD3 and that actually improves compactness and reduces locality splits. The Special Master's solution was elegant. All in all, the reduction in core preservation in his plans is *de minimis* and an acceptable price to pay.

---

[105] *See* Ex. 1, Summ. Comparison of Plans, Decl. of Trevor S. Cox.

[106] IX 27.

[107] *See* Ex. 1, Summ. Comparison of Plans, Decl. of Trevor S. Cox.

[108] Governor of Va.'s Position Statement Regarding R. & R. of the Special Master at 5, ECF No. 280.

[109] Report at 10.

IV. Intervenor-Defendants cannot seriously maintain that the Special Master's remedial plans for CD3 are less compact than the current district.

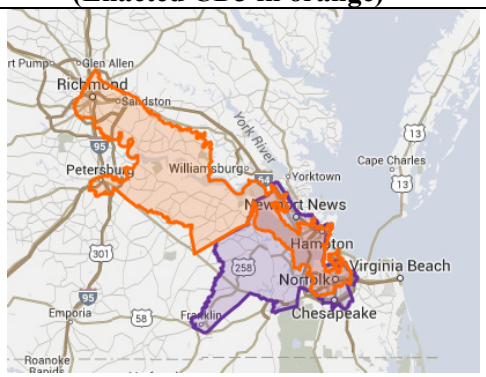
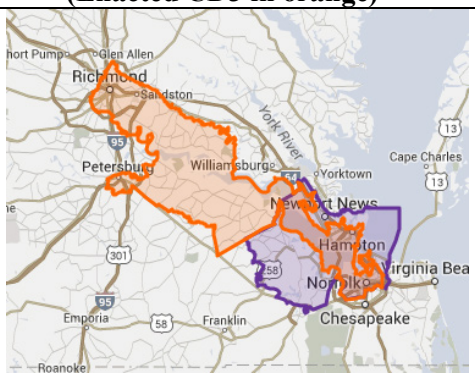
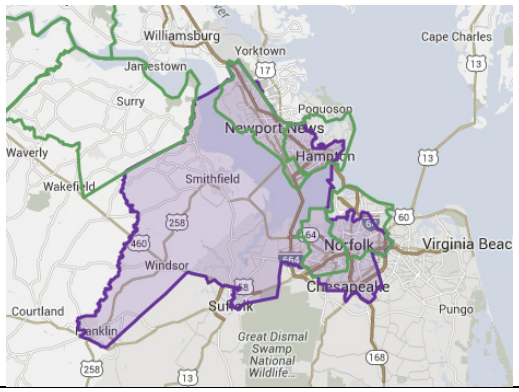
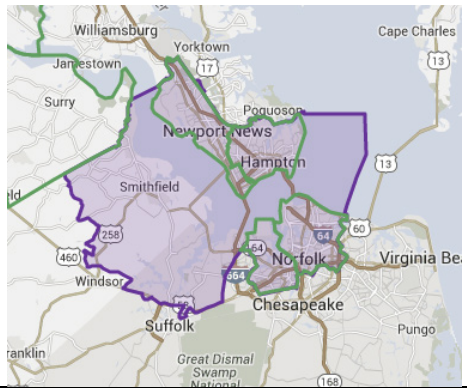
The Special Master's report uses two measures of compactness to compare the five changed districts, Reock and Polsby-Popper.[110] The Intervenor-Defendants complain that the Reock scores in his report for Enacted CD3 differ from the scores reported by Plaintiffs' expert, Michael McDonald, in his expert report (PX 27 at 7).

This is a tempest in a teapot. In comparing the districts in the Enacted Plan against the Special Master's recommended plans, the question of compactness is a *relative* one: how do the compactness scores compare between the plans. Notably, the Polspy-Popper scores reported by the Special Master are the same as in McDonald's report, something the Intervenor-Defendants do not mention. And while the Reock scores as reported by McDonald and the Special Master differ for the Enacted Plan, only the Special Master has reported Reock scores using the same methodology for the Enacted Plan as well as for his remedial plans. And for each of his remedial plans, "both the Polsby-Popper and the Reock" scores "are between *twice as large and over four times* as large as the corresponding compactness scores of the current CD3."[111]

Simply looking at the maps shows that no one could fairly argue that the Special Master's remedial plans for CD3 would result in a *less* compact district than Enacted CD3:

[110] *Id.* at 3, 18-19, 60 (Table 3).

[111] *Id.* at 3 (emphasis added); *see also id*. at 60 (Table 3).

Special Master Plan 1 (CD3) (in blue) (Enacted CD3 in orange)[112]	Special Master Plan 2 (CD3) (in blue) (Enacted CD3 in orange)[113]
	
Special Master Plan 1 (CD3)	**Special Master Plan 2 (CD3)**
	

It would be absurd to claim otherwise.

For CD4, the compactness scores are comparable to or more compact than in the Enacted Plan.[114] CDs 1, 2, and 7 are also more compact under the Special Master's proposals than under the Enacted Plan.[115]

[112] *See* Va. Pub. Access Project, Elections, Redistricting, Special Master Plan 1, http://www.vpap.org/offices/us-representative-3/redistricting/?plan=13.

[113] *See* Va. Pub. Access Project, Elections, Redistricting, Special Master Plan 2, http://www.vpap.org/offices/us-representative-3/redistricting/?plan=14.

[114] Report at 60 (Table 3).

[115] *Id.*

V. The Special Master correctly determined that Intervenor-Defendants' plans do not correct the violation and would themselves be subject to constitutional challenge.

The Intervenor-Defendants' recommended plans fail to correct the racial gerrymander of CD3. As the Special Master explained, their plans "continue to split Newport News, involving a three way split of the city in ways that appear race related."[116] Their plans also leave CD3 in a "still tortuous form," failing to satisfactorily show that it has ceased being a racial gerrymander.[117] Indeed, Table 1 of the Special Master's report shows that the Intervenor-Defendants' plans lead to hardly any improvement in compactness or in reducing locality splits in CD3.[118] The Special Master also observed that the Intervenor-Defendants had not provided adequate documentation or explanation for the choices made in drawing their plans,[119] something Intervenor-Defendants do not satisfactorily rebut.

Perhaps most significantly, the Special Master correctly found that the Intervenor-Defendants' selection of a BVAP target of 50.1% and 50.2% was not "narrowly tailored" to correct the racial gerrymander;[120] indeed, their filings disclose facts that would likely render both of their proposed plans unconstitutional.

Intervenor-Defendants admit that they "*replicated* in their plans" the "BVAP level Plaintiffs chose in their Alternative Plan."[121] The Alternative Plan at trial had a BVAP score of

---

[116] *Id.* at 27.

[117] *Id*.

[118] *Id.* at 45.

[119] *Id.* at 27, 61.

[120] *Id.*

[121] Int.-Defs.' Statement of Position Regarding the Special Master's Final Report at 33 (emphasis added).

50.2%.[122] The BVAP in Intervenor-Defendants' two plans clock in at 50.1% and 50.2%, respectively.[123] A bullseye, indeed. Although we did not immediately notice it, Intervenor-Defendants admitted when they first submitted their proposal that they changed CD3 and surrounding districts in order to "*mirror* the BVAP level in Plaintiffs' Alternative District 3."[124] In their most recent filing, they criticized the Plaintiffs' remedial plan because it did "*not match* Alternative District 3's *50.1% BVAP*, but instead reduces District 3's BVAP to only 51.5%. The plan therefore does not even satisfy *the constitutional benchmark the Court has set in this case*."[125] They likewise criticized the Governor's plan for having a 41.9% BVAP score in CD3, "more than 8 percentage points lower than Alternative District 3's 50.1% BVAP level."[126] And they criticized the other non-party plans as well for failing to maintain the 50.1% -BVAP target that they say this Court supposedly endorsed.[127] In short, the Intervenor-Defendants have plainly viewed 50.1% BVAP as the racial target that must be hit in any remedial plan.

---

[122] Tr. 292:20-293:1.

[123] *See* Report at 45 (Table 1); Int.-Defs.' Br. in Supp. of their Remedial Plans at 8.

[124] Int.-Defs.' Br. in Supp. of their Remedial Plans at 2 (emphasis added).

[125] Int.-Defs.' Br. Regarding Proposed Remedial Plans Submitted by Pls. and Non-Parties at 2 (emphasis added), ECF No. 251; *id*. at 7 ("Plaintiffs' new plan does not comport with the constitutional benchmark the Court established: by Plaintiffs' own admission, their new plan reduces District 3's BVAP *only* to 51.5%, or 1.4% higher than the 50.1% BVAP in Alternative District 3.") (emphasis added).

[126] *Id.* at 13.

[127] *Id.* at 18 ("The NAACP plan drops District 3's BVAP to 42.1%, NAACP Plan VAP (Ex. E), 8 whole percentage points below the 50.1% "majority-minority" level in Alternative District 3 that this Court endorsed.") (citation omitted); *id.* at 20 ("The Petersen plan sets District 3's BVAP to 50.4%, above the Court's constitutional benchmark of 50.1%."); *id.* at 22 ("The Rapoport plan sets District 3's BVAP to 50.9%, above the Court's constitutional benchmark of 50.1%.").

But that commits the same fundamental error that triggers strict scrutiny under *Alabama Legislative Black Caucus v. Alabama*.[128] Intervenor-Defendants have simply substituted one mechanical BVAP quota (55%) with another one (50.1%). Their plans are subject to strict scrutiny because they have intentionally made hitting their racial target the predominant consideration in the redistricting. And given the functional analysis showing that the BVAP needed to maintain African-American voters' ability to elect in CD3 is in the thirty-percent range, according to Plaintiffs' expert[129] and Dr. Handley,[130] or, as the Special Master found, that ability to elect would be protected by a BVAP "somewhat above a 40%"[131] the Intervenor-Defendants' avowedly race-based method for reducing BVAP is not narrowly tailored. They not only have failed to correct the racial gerrymander; their plans would invite yet another round of litigation over the unconstitutionality of CD3.

VI. The Special Master's recommended plans are constitutionally valid and the Court should adopt one of them.

The better approach is the one the Special Master used: revise CD *without using race* as the predominant factor, using the functional analysis simply to check at the end that the BVAP score for CD3 is, in fact, high enough to avoid retrogression. Because the Special Master did not make race the predominant consideration in revising CD3, strict scrutiny does not apply to his plans. And because the BVAP score in CD3 is above the threshold needed to protect the ability

[128] 135 S. Ct. 1257 (2015).

[129] Tr. 196:14-197:25.

[130] *See* Dr. Lisa Handley, *Providing Black Voters with an Opportunity to Elect Candidates of Choice: A District-Specific Functional Analysis of the Third Congressional District in Virginia* at 16 (Sept. 17, 2015) ("even a district that is as low as 30 to 34% black in voting age population can provide black voters with an opportunity to elect their preferred candidates to represent the Third Congressional District"), ECF No. 231-3.

[131] Report at 37.

of African-American voters to elect a candidate of choice—as demonstrated by the functional analysis performed by McDonald, Handley, and the Special Master himself—CD3 does not violate § 5 of the Voting Rights Act.

Intervenor-Defendants misapprehend the role of the functional analysis. The point is not to target and remove black voters from CD3 to a level just above the threshold needed to preserve ability to elect. If it were, a remedial CD3 might need an even lower BVAP than what the Special Master is recommending. The point instead is that, once CD3 is drawn for reasons *other than* race, as the Special Master did, the district must then be evaluated under § 5 to determine if it retrogresses. And the Special Master has confirmed that neither of his plans would retrogress.

CONCLUSION

The Court should adopt one of the two remedial plans recommended by the Special Master. Because the Intervenor-Defendants' plans use a racial quota targeting a 50.1%-BVAP floor, neither can survive strict scrutiny and the Court should reject them.

Respectfully submitted,

By: /s/

Stuart A. Raphael, VSB # 30380
Solicitor General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-7240 – Telephone
(804) 371-0200 – Facsimile
sraphael@oag.state.va.us

Mark R. Herring
Attorney General of Virginia

Trevor S. Cox, VSB # 78396
Deputy Solicitor General
tcox@oag.state.va.us

Matthew R. McGuire, VSB # 84194
Assistant Attorney General
mmcguire@oag.state.va.us

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 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