

**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.)	

**GOVERNOR OF VIRGINIA’S POSITION STATEMENT REGARDING REPORT AND
RECOMMENDATION OF THE SPECIAL MASTER**

On November 15, 2015, the Court’s Special Master, Professor Bernard Grofman, submitted his report and recommendation (the “Special Master’s Report”) to remedy the constitutional violations found by the Court in Virginia’s Congressional districting plan. Having reviewed the Special Master’s Report and considering the needs of the Commonwealth, the Governor of Virginia states his general support for the recommendations submitted by the Special Master, though he believes his proposed plan remains a better map for Virginians.

I. The Special Master’s Report Offers a Constitutional Remedy.

Fundamentally, the Special Master’s Report recognizes that “a major change from the current configuration” of the Third Congressional District (“CD-3”) is required in order to remedy the constitutional violation found by this Court. Special Master’s Report at 21. This is exactly what the Governor argued in his plan, and the Special Master’s additional reliance on the expert report of Dr. Lisa Handley further bolsters the force of those arguments. *Id.* at 39–41. CD-3, constructed in 1991 to be a majority-minority district unifying heavily African-American communities from Richmond to Norfolk, and having been ruled an unconstitutional racial

gerrymander each time it has been reviewed by this Court, must be dramatically changed. The Special Master's Report achieves a constitutional drawing of CD-3, and, using neutral factors, winds up creating a minority-opportunity district in CD-4, an identical result to that contained in the Governor's Plan. Thus, by not forcing an arbitrary and unsupported 55% racial quota and using more traditional redistricting criteria, the Special Master's Report creates a constitutional and more representative map for Virginia.

The Special Master's Report also rightfully rejects the Intervenor-Defendants' (the "Congressional Republicans") argument that he was compelled to draw districts favoring their partisan goals. *Id.* at 20–21. Indeed, the Congressional Republicans' plan failed entirely to remedy the constitutional violations because they substituted one racial quota (55%) for another (50%), but showed absolutely no statistical justification for this racial quota. Moreover, their proposals themselves showed evidence of racial gerrymandering independently of this quota, as the Special Master pointed out. *Id.* at 27. The Congressional Republicans have asked this Court to elevate their partisan advantage over remedying the constitutional violations in CD-3, a suggestion that the Special Master rightfully rejected, *id.* at 20, and that this Court should reject. Compliance with the Constitution and the Voting Rights Act is not some balancing test to be weighed against partisan interests. It is a minimal requirement, and both the Plaintiffs' and Congressional Republicans' plans failed fundamentally to make the changes necessary to remedy CD-3. The Special Master's Report remedies the constitutional violations in CD-3 and, therefore, the Governor generally supports the plans proposed by the Special Master.

II. The Governor's Plan Remains the Best Remedial Plan.

While the Special Master's Report presents viable remedies for CD-3's design, the Governor continues to advocate adoption of his remedial plan submitted for the Court's consideration. *See* Dkts. 231 and 254. The Special Master discarded the particulars of the

Governor's Plan because it made substantial changes outside of the districts touching CD-3. *See* Special Master's Report at 26–27. This approach for a “least change” plan taken by the Special Master, however, is counter-productive in this particular case because it defers to a plan that was foundationally premised and enacted on the erroneous belief that the General Assembly was required to maintain a 55% BVAP in CD-3.

The Governor's submissions make the legal and historical case for his Plan, and this Court should give consideration to that rationale, even though the Governor's Plan results in changes outside of CD-3's geographic footprint. In a case directly on-point, the Supreme Court affirmed the court-ordered remedial plan which corrected Georgia's unconstitutional racial gerrymanders in the 1990s even though it substantially departed from the enacted plans. *See Abrams v. Johnson*, 521 U.S. 74, 79 (1997). This gives substantial guidance to this Court to enact a plan that need not defer in any way to the 2012 plan approved by the General Assembly (the “2012 Plan”). As the Supreme Court made clear, *no deference* is owed to the 2012 Plan because it “subordinated traditional districting principles to racial considerations.” *Abrams*, 521 U.S. at 85. The Special Master's approach remedies CD-3; however, it fails to recognize the extent to which the *entire* 2012 Plan was driven by the desire to maintain CD-3 at above a 55% black voting age population and thus the constitutional violation affected all of the 2012 Plan. Because of this, the Special Master's approach does not provide a fully remedial plan.

Insofar as the Court held that the racial gerrymander of CD-3 was the foundational premise of the entire 2012 Plan, a fully remedial plan must seek to redraw the map *without* those considerations. *See* Mem. Op. at 1–2 (“[T]he primary focus of how the lines in [the redistricting legislation] were drawn was to ensure that there be no retrogression in” CD-3) (quoting Del. Janis). In insisting that 6 of 11 congressional districts remain untouched, the Special Master has

maintained the spillover effects of CD-3's constitutional infirmity—and without justification, other than to maintain adherence to the legislatively-enacted plan, which itself was premised on a racial gerrymander. *Abrams* emphatically holds that no deference is required to such a plan, and the Special Master has not explained why deference should be granted in this case. 521 U.S. at 85.

The Governor's Plan generally mirrors enacted plans existing before CD-3 was drawn as a majority-minority district—an approach the Supreme Court endorsed in *Abrams*, see Dkt. 231 at 10–11; it makes commonsense adjustments throughout the Congressional map to better-align communities of interest that had been mangled under the 2012 Plan, see *id.* at 18–19; and it is based on a plan that gained substantial support in the General Assembly—including passage in the Virginia Senate—but was rejected because of concerns about achieving preclearance without a 55% BVAP in CD-3, see *id.* at 12–13. The basic point is this: CD-3's unconstitutional design as a racial gerrymander tainted the entire redistricting process, by the General Assembly's admission, and acknowledging this fact requires dramatic changes across the board.

The Governor's Plan, as confirmed by the Special Master's changes in CD-3, is a remedy to the design of CD-3. It also fully remedies the spillover effects of CD-3's design. The General Assembly, which this Court might otherwise look to for guidance on how to redistrict without the erroneous belief that a racial gerrymander of CD-3 was required, has been totally silent in this process. It has had every opportunity to weigh-in with its preferred changes, either through the legislative process it controls or through participation in the Court's remedial process. The Governor has put forward a proposal for fully remedying the effects of the racial gerrymander of CD-3. The Court should adopt his plan.

III. If the Court Prefers to Adopt One of the Special Master's Plans, It Should Adopt Congressional Modification 16.

If, however, the Court prefers to adopt one of the Special Master's plans, it should adopt the plan labeled Congressional Modification 16. Both plans achieve the limited remedial purpose of drawing CD-3 in a constitutional manner; however, this map involves fewer shifts between voters from the current plan and, therefore, is preferred.

CONCLUSION

The Special Master's Report contains remedial plans that the Governor generally supports; however, the Special Master's plans do not fully remedy the spillover effects caused by the racial taint that CD-3's gerrymander had on the entire redistricting plan. As such, the Governor's Plan should be adopted instead by the Court. If, however, the Court decides to adopt one of the Special Master's plans, it should adopt Congressional Modification 16.

November 24, 2015

Respectfully submitted,
GOVERNOR OF VIRGINIA

By: _____ /s/

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