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

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

INTERVENOR-DEFENDANTS' MOTION
TO POSTPONE REMEDIAL DEADLINE UNTIL SEPTEMBER 1, 2015

Intervenor-Defendants Eric Cantor, Robert J. Wittman, Bob Goodlatte, Frank Wolf, Randy J. Forbes, Morgan Griffith, Scott Rigell, and Robert Hurt respectfully move to postpone for five months—until September 1, 2015—the April 1, 2015 deadline for the General Assembly to adopt a new congressional redistricting plan set in the two-judge majority's remedial order. Intervenor-Defendants have taken a direct appeal to the Supreme Court of this Court's decision invalidating the Enacted Plan under *Shaw v. Reno* and its progeny, expedited the filing of their jurisdictional statement in the Supreme Court, and asked the Supreme Court to note probable jurisdiction and to resolve the case during its current Term. The Supreme Court listed the case for its January 9, 2015 conference, but has not yet taken any action in the case and has not affirmed this Court's decision. Instead, the Supreme Court appears to be holding this case pending its decision in *Alabama Democratic Conference v. Alabama*, No. 13-1138, another case involving a *Shaw* claim and the appropriate use of race in a redistricting conducted under Section 5 of the Voting Rights Act.

It therefore appears unlikely that the Supreme Court will take *any* action in this case until it issues its opinion in the Alabama case, which may occur as late as June 30, 2015, the end of its current Term and nearly 3 months *after* the Court's current remedial deadline of April 1, 2015. As courts routinely have recognized in redistricting cases, it simply makes no sense—and implicates serious federalism concerns—to require the General Assembly to adopt a remedial plan before liability has been affirmed by the Supreme Court on direct appeal. This is especially true here, where the Alabama decision may provide the General Assembly, this Court, and the parties with additional guidance on the requirements of *Shaw* and the proper use of race in redistricting. Moreover, enforcing the Court's current deadline also risks wasting the resources of this Court and the parties on crafting a judicial remedy that may be rendered nugatory by a subsequent decision of the Supreme Court.

No party faces any prejudice from postponing the Court's remedial deadline to September 1, 2015. That date is more than two months after the end of the current Supreme Court Term, meaning that the General Assembly, the Court, and the parties will have the benefit of the Supreme Court's guidance in the Alabama case and any order in this case when they draw any remedial plan. Moreover, that date is still more than 14 months before the 2016 election, which leaves more than ample time for the Court to craft a judicial remedy if one becomes necessary due to any failure of the General Assembly to adopt a legislative remedy.

Counsel for Intervenor-Defendants has conferred with counsel for Plaintiffs and Defendants. Plaintiffs and Defendants oppose the relief requested.

WHEREFORE, as explained more fully in the accompanying Memorandum Of Law, the Court should postpone until September 1, 2015 its deadline for the General Assembly to adopt a remedial congressional redistricting plan.

Dated: January 27, 2015

Respectfully submitted,

/s/ Jonathan A. Berry

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CERTIFICATE OF SERVICE

I certify that on January 27, 2015, a copy of the INTERVENOR-DEFENDANTS' CONSENT MOTION TO POSTPONE REMEDIAL DEADLINE UNTIL SEPTEMBER 1, 2015 was filed electronically with the Clerk of Court using the ECF system, which will send notification to the following ECF participants:

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MEMORANDUM IN SUPPORT OF INTERVENOR-DEFENDANTS' MOTION TO POSTPONE REMEDIAL DEADLINE UNTIL SEPTEMBER 1, 2015

Intervenor-Defendants Eric Cantor, Robert J. Wittman, Bob Goodlatte, Frank Wolf, Randy J. Forbes, Morgan Griffith, Scott Rigell, and Robert Hurt respectfully move to postpone for five months—until September 1, 2015—the April 1, 2015 deadline for the General Assembly to adopt a new congressional redistricting plan set in the two-judge majority's remedial order. It appears virtually certain that the Supreme Court will neither affirm this Court's liability determination nor set it for plenary Supreme Court review before April 1 (or sufficiently in advance of that date to provide the General Assembly a realistic opportunity to enact a remedy). Specifically, after expedited briefing by Intervenor-Defendants and a timely response by Plaintiffs, the Supreme Court listed this appeal for its January 9, 2015 conference. But it took no action then and, more importantly, has not even relisted the appeal for a subsequent conference (or taken other action).

This failure to take any action on the appeal or even relist it for conference almost certainly means the Court is "holding" this appeal for a subsequent event, probably the pending

decision in *Alabama Democratic Conference v. Alabama*, No. 13-1138, another case involving a claim under *Shaw v. Reno* and implicating the appropriate use of race in a redistricting conducted under Section 5 of the Voting Rights Act. Since that case was argued on November 12, 2014, it is quite likely that the *Alabama* opinion will be issued in March or April at the earliest (and theoretically might not be released until June 30, the last day of the Term). At that point, the Court will either set this appeal for full argument (in the Fall of 2015) or, more likely, vacate and remand for this Court to reassess liability in light of the *Alabama* decision. In either event, all remedial action will be put on hold unless and until liability is established (by the Supreme Court or this Court on remand). It thus makes no sense to have the General Assembly begin or conclude its remedial action when the Supreme Court will shortly take action that will require reconsideration of liability (by this Court or the Supreme Court).

While summary *affirmance* is also a possibility, it is quite unlikely because, if the Supreme Court were so inclined, it would have taken such action at the January 9 conference or shortly thereafter, since summary affirmance briefing was fully complete on that date. In any event, the Court can, if it wishes, deal with the possibility of summary affirmance by extending the deadline until 60 days after such affirmance, or September 1, whichever is earliest. In the unlikely event of a summary affirmance in the near future, this will only slightly delay the Legislature's deadline.

What the Court should not do, however, is require remedial action by the General Assembly so long as liability is not certain. As other federal courts have routinely recognized, it would raise serious federalism concerns and undermine judicial efficiency to require the General Assembly to adopt a remedial plan before the Supreme Court has affirmed liability on direct appeal, especially where, as here, the Supreme Court is currently deciding another case raising

similar issues. Conversely, postponing the remedial deadline until September 1, 2015 would avoid the potentially unnecessary and wasteful exercise of diverting scarce legislative, administrative, and judicial resources to crafting a remedial plan based on a decision that remains subject to appellate vacatur or reversal. This is particularly obvious here since the Supreme Court will undoubtedly provide specific guidance well before September 1 (albeit after April 1). Thus, postponement would at a minimum allow the General Assembly, the Court, and the parties to act in accordance with any additional guidance the Supreme Court offers in *Alabama* or any order in this case. And such a postponement would not prejudice any party, as September 1, 2015 is still more than 14 months before the 2016 election and thus leaves ample time for the Court to craft a judicial remedy if one becomes necessary. The Court should grant the Motion and postpone the remedial deadline to September 1, 2015 (or, at a minimum, until 60 days after a summary affirmance in this case).

BACKGROUND

This Court issued a split decision in this case on October 7, 2014. The two-judge majority concluded that the Enacted Plan violates *Shaw v. Reno* and its progeny because, in its view, District 3—the only majority-black congressional district in Virginia—is a racial gerrymander. As part of its remedy, the majority ordered that "[t]he Virginia General Assembly should exercise [its] jurisdiction as expeditiously as possible, but no later than April 1, 2015, by adopting a new redistricting plan." Order ¶ 3 (Oct. 7, 2014).

Intervenor-Defendants filed a notice of direct appeal to the Supreme Court on October 30, 2014, *see* Notice Of Appeal (DE 115), 37 days before the deadline for filing such a notice, *see* 28 U.S.C. § 2101(b). Intervenor-Defendants filed their jurisdictional statement in the Supreme Court the next day, only 24 days after the majority's decision and 96 days before the

deadline for filing that statement. *See id.*; Sup. Ct. R. 18(3). In light of this Court's April 1, 2015 remedial deadline, Intervenor-Defendants asked the Supreme Court to "resol[ve] this case during this Term." Juris. Statement 39, *Cantor v. Personhuballah*, No. 14-518 (U.S. filed Oct. 31, 2014). Intervenor-Defendants also noted that the Supreme Court had heard argument in another redistricting case involving a *Shaw* claim in a Section 5 jurisdiction, and that resolving the two cases "simultaneously . . . may promote judicial efficiency." *Id.* 38–39 (discussing *Ala. Dem. Conf. v. Ala.*, No. 13-1138 (U.S. argued Nov. 12, 2014)).

Plaintiffs filed a motion to dismiss or to affirm on December 4, 2014, and Intervenor-Defendants filed an opposition on December 22, 2014. The Supreme Court distributed the case for the conference of January 9, 2015. *See* Docket, *Cantor v. Personhuballah*, No. 14-518, *available at* http://www.supremecourt.gov/search.aspx?filename=/docketfiles/14-518.htm (last visited Jan. 26, 2015) ("Appeal Docket"). The Supreme Court, however, took no action on the case in its January 12, 2015 order from the January 9, 2015 conference. *See* Jan. 12, 2015 Order, *available at* http://www.supremecourt.gov/orders/courtorders/011215zor_3e47.pdf (last visited Jan. 26, 2015). The Supreme Court did not relist this case for its January 16, 2015 conference, *see* Appeal Docket, and took no action on its in its January 16, 2015 or January 20, 2015 orders from the January 16, 2015 conference, *see* Jan. 16, 2015 Order, *available at* http://www.supremecourt.gov/orders/courtorders/011615zr_f2q3.pdf (last visited Jan. 26, 2015); Jan. 20, 2015 Order, *available at* http://www.supremecourt.gov/orders/courtorders/012015 zor_bq7d.pdf (last visited Jan. 26, 2015). The Supreme Court also did not relist this case for its January 23, 2015 conference, *see* Appeal Docket, and took no action on its in its January 23, 2015 or January 26, 2015 orders from the January 23, 2015 conference, *see* Jan. 23. 2015 Order, *available at* http://www.supremecourt.gov/orders/courtorders/012315zr_6jgm.pdf (last visited

Jan. 26, 2015); Jan. 26, 2015 Order, *available at* http://www.supremecourt.gov/orders/courtorders/012615zor_3ebh.pdf (last visited Jan. 26, 2015). The Supreme Court's next conference does not take place until February 20, 2015. *See* Oct. Term 2014 Calendar, *available at* http://www.supremecourt.gov/oral_arguments/2014TermCourtCalendar.pdf (last visited Jan. 26, 2015).

At least one other redistricting appeal implicating the appropriate use of race in a Section 5 jurisdiction also was listed for the Supreme Court's January 9, 2015 conference, has not been relisted, and has not been resolved by the Supreme Court. *See* Docket, *Harris v. Az. Redist. Comm'n*, No. 14-232, *available at* http://www.supremecourt.gov/search.aspx?filename=/docketfiles/14-232.htm (last visited Jan. 26, 2015). By contrast, the Supreme Court has accepted jurisdiction over a handful of cases that were initially listed for the January 9, 2015 conference and relisted for the January 16, 2015 conference. *See, e.g.*, *Obergefell v. Hodges*, No. 14-556.

ARGUMENT

I. THE COURT SHOULD POSTPONE THE REMEDIAL DEADLINE UNTIL SEPTEMBER 1, 2015

This Court possesses broad "inherent power" to "modify or vacate [its] decrees 'as events may shape the need.'" *Hudson v. Pittsylvania Cnty.*, No. 13-2160, slip op. at 6 (4th Cir. Dec. 16, 2014) (Duncan, J.) (quoting *Holiday Inns, Inc. v. Holiday Inn*, 645 F.2d 239, 244 (4th Cir. 1981)); *see also United States v. Swift & Co.*, 286 U.S. 106, 114 (1932). Federal courts routinely have exercised this authority to avoid compelling a state legislature to adopt a remedial redistricting plan during the pendency of a direct appeal to the Supreme Court. *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.). These courts have recognized that such avoidance reflects the substantial federalism concerns and need for judicial efficiency implicated

in federal redistricting litigation. *See, e.g.*, *White*, 412 U.S. at 789. In fact, federal judicial deference to state legislative prerogatives has been so overwhelming that federal courts have even allowed elections to proceed under a judicially-invalidated redistricting plan where that invalidation remained subject to appellate review. *See, e.g.*, *id.* (granting stay pending appeal that resulted in state conducting election under a plan found unconstitutional); *Kirkpatrick*, 390 U.S. 939 (Mem.) (same); *Whitcomb*, 396 U.S. 1064 (Mem.) (same); *see also* Maj. Op. 45–46 (citing *Upham v. Seamon*, 456 U.S. 37 (1982) and *Kilgarin v. Hill*, 386 U.S. 120 (1967)) (DE 109); *Miller v. Johnson*, 515 U.S. 900, 915 (1995) ("Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions.").

This Court should exercise its inherent authority and postpone the majority's remedial deadline to September 1, 2015 for at least three reasons.

First, the Supreme Court has *not* affirmed the majority's decision invalidating the Enacted Plan. In fact, if the Supreme Court were inclined to summarily affirm that decision as Plaintiffs requested, it could have done so already in a one-line order and undoubtedly would have done so if so inclined, because summary affirmance briefing was completed well in advance of the January 9th conference. But regardless of whether summary affirmance is a realistic possibility at this late date, the dispositive point is that there is no final determination of liability in this case and, therefore, no basis for a federal court to compel the General Assembly to devote its limited time and resources to adopting a remedial plan based on *contingent* liability. *See, e.g.*, *White*, 412 U.S. at 789; *Kirkpatrick*, 390 U.S. 939 (Mem.); *Whitcomb*, 396 U.S. 1064 (Mem.).

Yet the current remedial deadline forces the General Assembly to just such an unappealing choice: the General Assembly must either abandon its duly-adopted Enacted Plan

and enact a remedial plan based on a decision that remains subject to vacatur or reversal in the Supreme Court, or run the risk that this Court will adopt a judicial remedy that pretermits the legislative process and could become nugatory under a later Supreme Court decision. There is no basis to compel the General Assembly to make this choice, much less to do so by April 1, 2015, more than 19 months *before* the 2016 election. Moreover, if the General Assembly elects not to adopt a remedial plan, any effort by the Court and the parties to craft a judicial remedy would be wasted if the Supreme Court ultimately vacates or reverses the majority's decision.

Moreover, wholly apart from the General Assembly's sovereign interests, entering a remedy before liability is established runs the serious risk of requiring wasteful administrative efforts and needlessly creating voter confusion. If a remedy begins to be implemented, all administrative efforts to do so will be wasted, and voters will be needlessly confused, if the remedial plan never takes effect and voters continue to vote in their current districts. This harm is particularly exacerbated here because this *mid-decade* alteration of lines will place some voters in different districts than they have resided in for two elections already. *See, e.g.*, *LULAC v. Perry*, 548 U.S. 399, 448 (2006) (Stevens, J., joined by Breyer, J., concurring in part and dissenting in part) ("interests in orderly campaigning and voting, as well as in maintaining communication between representatives and their constituents" weigh heavily against mid-decade redistricting); *see also* Maj. Op. 44–48 (declining to require remedial plan before 2014 election because "[d]elaying the elections or attempting to configure an interim districting plan would unduly disturb Virginia's election process" and "cause significant and undue confusion").

Second, postponing the remedial deadline to September 1, 2015 will provide the General Assembly, the Court, and the parties with the benefit of any additional guidance regarding *Shaw* claims, Section 5, and redistricting remedies that the Supreme Court may provide during this

Term. Given the Supreme Court's inaction in this case, it appears likely that the Supreme Court is holding this case (and the Arizona redistricting case) pending its decision in *Alabama Democratic Conference v. Alabama*, No. 13-1138. The Supreme Court frequently "holds" a case "until some event takes place that will aid or control the determination of the matter," such as "a decision . . . by the Court in a pending case raising identical or similar issues." Supreme Court Practice § 5.I.9 (10th ed.). The procedure for so "holding" a case is precisely what has occurred here: the relevant "papers are held by the Court" pending the subsequent development. *Id.* When it "holds" a case, the Supreme Court takes no action in it, neither grants nor declines jurisdiction, and only relists the case when it is prepared to take action. *See id.* Thus, at least the Supreme Court appears to believe that its decision in *Alabama* may "aid or control the determination of" this case. *Id.*; *see also, e.g.*, *Siegelman v. United States*, 130 S. Ct. 3542 (2010); *Balderas v. United States*, 553 U.S. 1091 (2008); *Hoevenaar v. Lazaroff*, 545 U.S. 1101 (2005); *Board of Trustees of the Univ. of Ill. v. Doe*, 526 U.S. 1142 (1999).

Indeed, if the Supreme Court is holding this case pending its decision in *Alabama*, three outcomes are possible—and each would provide crucial guidance and benefits to the General Assembly, the Court, and the parties that warrant postponing the remedial deadline. First, the Supreme Court could affirm this Court's decision and finally determine liability in Plaintiffs' favor. In that scenario, the Court can require the General Assembly to adopt a remedial plan within 60 days of the summary affirmance or by September 1. Second, the Supreme Court could vacate the majority's decision and remand the case for reconsideration in light of *Alabama*. *See* Supreme Court Practice §§ 4.I.5; 5.I.12.(B). In that scenario, the Court would address the threshold liability questions with the benefit of new guidance from the Supreme Court (which, of course, would have to go *before* any remedial order). Finally, the Supreme Court could grant

plenary review of this Court's liability determination, which should foreclose any remedial efforts while the Supreme Court is still resolving liability.

Thus, it makes perfect sense from everyone's perspective to await the Supreme Court's decision in *Alabama* and any action in this case before requiring the General Assembly to begin crafting a remedial plan. As noted, however, the Supreme Court may well not decide *Alabama* until after the current April 1 remedial deadline. Accordingly, adhering to that deadline may deprive the General Assembly (and ultimately the Court and the parties) of whatever guidance the Supreme Court may provide in *Alabama* and this case—but postponing the deadline to September 1, 2015 will all but guarantee the availability of such guidance that might "aid or control the determination of" this case. Supreme Court Practice § 5.1.9.

Third, postponing the deadline to September 1, 2015, would not prejudice any party. That date is still more than 14 months before the 2016 election—or, in other words, nearly 5 months longer than the barely more than 9 months between the January 25, 2012 adoption of the Enacted Plan and the 2012 elections in which it was first used. Moreover, unlike in 2012, any remedial plan need not receive preclearance under Section 5, further shortening the lead time required to implement such a plan for the 2016 elections. *See, e.g.*, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). Thus, the Court and the parties will have more than ample time to craft any judicial remedy if the General Assembly fails to adopt a remedial plan by the new September 1, 2015 deadline.

CONCLUSION

The Court should postpone until September 1, 2015 its deadline for the General Assembly to adopt a remedial congressional redistricting plan.

Dated: January 27, 2015

Respectfully submitted,

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I certify that on January 27, 2015, a copy of the MEMORANDUM IN SUPPORT OF INTERVENOR-DEFENDANTS' CONSENT MOTION TO POSTPONE REMEDIAL DEADLINE UNTIL SEPTEMBER 1, 2015 was filed electronically with the Clerk of Court using the ECF system, which will send notification to the following ECF participants:

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