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

GLORIA PERSONHUBALLAH, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
JAMES B. ALCORN, et al.,	)	**Civil Action No.: 3:13-cv-678**
	)	
Defendants.	)	
	)	
	)	

INTERVENOR-DEFENDANTS' STATEMENT OF POSITION
REGARDING USE OF DATA SUBMITTED BY DR. LISA HANDLEY

The special master should disregard the data and racial bloc voting analysis submitted by Dr. Lisa Handley (DE 231-3) because they are not at all relevant to the proper remedy to be entered. Dr. Handley's analysis merely replicates the analysis conducted by Plaintiffs' expert, Dr. Michael McDonald—and, unsurprisingly, reaches the same conclusions that Dr. McDonald reached. The Court, however, did not consider Dr. McDonald's analysis relevant to its finding of a *Shaw* violation because it did not even *mention* that analysis in its liability decision. Thus, Dr. Handley's identical analysis likewise cannot have any bearing on the remedy for that violation.

Dr. Handley's redundant data and analysis are irrelevant to any *Shaw* violation and remedy in this case for other reasons as well. In the first place, adopting either the 30% black voting age population (BVAP) floor that Dr. Handley's analysis supports or the 41.9% BVAP floor she advocates would *exacerbate*, rather than alleviate, the *Shaw* violation the Court found in District 3. In the first place, any version of District 3 drawn to either of those floors would not

be a majority-black district as in the Enacted Plan or in Plaintiffs' Alternative Plan that the Court endorsed as the constitutional standard. More fundamentally, as the Governor's Plan demonstrates, any version of District 3 drawn to either of Dr. Handley's BVAP floors would interject *more* race-consciousness into the plan than exists in the Enacted Plan or in Intervenor-Defendants' proposed remedial plans. The reason is simple: targeting either of those floors not only would make compliance with the Voting Rights Act "non-negotiable," the "primary focus," and the "paramount concern" in any plan, 6/5/15 Mem. Op. 23-26 (DE 170) ("Op."), but also would conflict with, and require wholesale subordination of, the Legislature's political, incumbency-protection, and core-preservation priorities and other traditional principles.

Finally, Dr. Handley's data and analysis shed no light on whether a remedial plan drawn to either of her BVAP floors would comply with the Voting Rights Act. As even Dr. Handley acknowledges, the elections she analyzes are not probative of the controlling question under Section 2 of the Voting Rights Act: whether black voters in District 3 would have "an opportunity to elect a candidate of choice even if that candidate is not a widely recognized, popular incumbent who garners a majority of the white vote as well as the black vote." Handley Rep. 3. Even more obviously, her analysis says nothing about compliance with Section 5, because it does not even attempt to analyze the relevant question under that provision; *i.e.*, whether the "ability to elect" has been "*diminish[ed]*" relative to the benchmark BVAP. 52 U.S.C. § 10304 (emphasis added). The special master should disregard Dr. Handley's irrelevant and unprobative data and analysis.

I. DR. HANDLEY'S DATA AND ANALYSIS ARE IRRELEVANT TO ANY *SHAW* VIOLATION AND REMEDY IN THIS CASE

The special master should disregard Dr. Handley's data and analysis because they have no bearing on the *Shaw* violation that the Court found in Enacted District 3 or the remedy for that

violation. Dr. Handley's racial bloc voting analysis reaches the same conclusion as the racial bloc voting analysis conducted by Plaintiffs' sole witness at trial, Dr. McDonald: that black voters have "an opportunity to elect their preferred candidates" in any version of District 3 "that is as low as 30% black in voting age population." Handley Rep. 1; *see* Pl. Trial Ex. 30 at 4-6; Trial Tr. 190-98. The Court, however, did not even *cite* Dr. McDonald's racial bloc voting analysis in its opinion, much less indicate that it was probative evidence of the *Shaw* violation. *See* Op. If Dr. McDonald's racial bloc voting analysis was not probative of the liability question, then Dr. Handley's identical analysis cannot be probative of the remedy for that violation. *See Upham v. Seamon*, 456 U.S. 37, 43 (1982) (redistricting remedy must be no broader than "necessary to cure" the violation); *White v. Weiser*, 412 U.S. 783, 795 (1973).

Instead, the benchmark that this Court endorsed as constitutional and compliant with *Shaw* was the Alternative Plan that Plaintiffs introduced at trial, which "maintains a majority-minority district" with 50.1% BVAP in District 3. Op. 32. Thus, the Court did not hold that *Shaw* required the Legislature to reduce District 3's BVAP to the lowest non-retrogressive level. In fact, such a precisely calibrated reduction in District 3's BVAP would place the map drawer in a racial straitjacket and exacerbate, rather than redress, the *Shaw* violation the Court identified.

In the first place, the Court rested its finding of a *Shaw* violation on the fact that Delegate Janis rank-ordered compliance with the federal Voting Rights Act above "permissive" state-law traditional districting principles. Op. 1-2, 18-21, 23-26. But a requirement to reduce District 3's BVAP to the lowest non-retrogressive level would likewise rank-order Voting Rights Act compliance above permissive state-law traditional districting principles. Indeed, such a requirement would become "non-negotiable," the "primary focus," and the "paramount concern" in any drawing of District 3. *Id.* 23-26.

Moreover, drawing a district to meet a 30% BVAP floor or quota would subordinate the Legislature's race-neutral districting principles far *more* than the Enacted Plan. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995). The 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, Op. 35—and it is *undisputed* that core preservation was the *most* important neutral state districting criterion, *see* Pl. Trial Ex. 5; Pl. Mot. To Dismiss Or Affirm 22, *Wittman v. Personhuballah*, No. 14-1504 (S. Ct.). Reducing District 3's BVAP to the lowest non-retrogressive point, however, would dramatically subordinate those traditional principles.

For example, reducing District 3's BVAP from 56.3% in the Enacted Plan to 30% would require moving a net of *147,556* black voters—equivalent to 26% of District 3's voting age population—out of District 3, and an equal number of white voters into District 3 from surrounding districts (for a total of 295,112 people moved). *See* Pl. Trial Ex. 16. Yet the Court found that the Legislature's decision to move approximately 180,000 people in and out of Benchmark District 3 was insufficient core preservation (and, of course, any new remedial changes to District 3 will be on top of the 2012 changes already made to Benchmark District 3). Op. 33. Needless to say, the drastic changes caused by lowering District 3's BVAP to 30% would substantially redraw District 3 and depart from the Legislature's core-preservation priority. At the same time, by shifting black and predominantly Democratic voters into, and white and predominantly Republican voters out of, the surrounding Republican districts, these changes would directly harm incumbents. *See, e.g.*, Int-Def. Br. In Support Of Their Proposed Remedial Plans 3, 10-15 (DE 232); Int.-Def. Br. Regarding Proposed Remedial Plans 3, 7-23 (DE 251).

Dr. Handley apparently agrees that neither *Shaw* nor the Voting Rights Act requires reducing District 3's BVAP to the lowest non-retrogressive point because she endorses the Governor's Plan, which reduces District 3's BVAP to only 41.9%. Handley Rep. 1. Dr. Handley recognizes that this 41.9% level "exceeds 30% by a considerable amount" and is "well over the 30 to 34% [BVAP] needed to create an opportunity for black voters to elect their candidates of choice." *Id.* 1, 16. Of course, the same is true of the 56.3% BVAP level in Enacted District 3 and the 50.1% BVAP level in Intervenor-Defendants' proposed remedial plans. *See* Int-Def. Br. In Support Of Their Proposed Remedial Plans 8. Thus, Dr. Handley's data and analysis at best establish that *multiple* proposed remedial plans contain a BVAP well above the lowest non-retrogressive point. *See* Handley Rep. 1-16.

Indeed, Dr. Handley never explains why a 41.9% BVAP level is preferable under *Shaw* or the Voting Rights Act to the 56.3% Enacted Plan or Intervenor-Defendants' 50.1% proposed remedial plans. *See* Handley Rep. 1-16. Nor could Dr. Handley have done so, had she tried. There is no reason to prefer a 41.9% BVAP floor to a 50% (or 56%) floor. Both make the racial percentages "paramount" to "permissive" districting principles and both are well above the (alleged) non-retrogression BVAP percentage of 30%. Moreover, if there were something wrong with BVAP percentages substantially above 41.9%, that problem still exists in the Governor's plan because District 4 in that plan has a 48% BVAP. *See* Gov. Plan Ex. E (DE 231-5).

In all events, a 41.9% BVAP District 3, like a 30% BVAP District 3, would entail *greater* subordination of traditional principles than that in either the Enacted Plan or Intervenor-Defendants' proposed remedial plans. For example, the 41.9% BVAP Governor's Plan, in pursuit of its racial objectives, subordinates the Legislature's political, incumbency-protection, and core-preservation priorities, as well as other traditional principles. Int.-Def. Br. Regarding

Proposed Remedial Plans 12-18. In particular, the Governor's Plan requires moving at least 161,724 people in and out of District 3 alone, redraws every district in the Commonwealth, replaces the 8-3 pro-Republican split with a 6-5 Democratic split, harms Republican incumbents while protecting all Democratic incumbents, and preserves less of the cores of districts—and even splits more localities—than the Enacted Plan and Intervenor-Defendants' proposed remedial plans. *See id.*; Pl. Trial Ex. 16. That result is unsurprising: as Intervenor-Defendants repeatedly have explained without refutation, the Enacted Plan with 56.3% BVAP in District 3 performs *better* on the Legislature's political, incumbency-protection, and core-preservation priorities than *any* alternative proposed at the time or in litigation—and Intervenor-Defendants' proposed remedial plans perform better on those factors than the Alternative Plan or any other proposed remedial plan. *See* Int-Def. Br. In Support Of Their Proposed Remedial Plans 3, 10-15; Int.-Def. Br. Regarding Proposed Remedial Plans 3, 7-23. Moreover, the Governor's avowed racial purpose of creating *two* electable black districts is *more* race-conscious than the Legislature's effort to preserve, as Section 5 required, the one district in Virginia where black voters could elect their preferred candidate. *See* Int.-Def. Br. Regarding Proposed Remedial Plans 12-18.

In short, the mere fact that a 30% or 41.9% BVAP level is *lower* than a 56.3% or 50.1% BVAP level does not mean that a plan drawn to either of Dr. Handley's BVAP floors in District 3 is entails less racial subordination than a plan with a higher BVAP in District 3. To the contrary, on this record, the *opposite* is true. Dr. Handley's analysis therefore reveals nothing about the *Shaw* violation that the Court found in this case or the remedy for that violation. The special master therefore should disregard Dr. Handley's analysis.

II. DR. HANDLEY'S DATA AND ANALYSIS ALSO HAVE NO BEARING ON WHETHER ANY REMEDY COMPLIES WITH THE VOTING RIGHTS ACT

Dr. Handley's analysis not only has no relevance to the *Shaw* violation or the scope of any remedy in this case, but also sheds no light on whether any remedy would comply with the Voting Rights Act. It cannot be argued that the 41.9% BVAP District 3 is needed to comply with Section 2 because that section only requires the creation of a district where blacks constitute a "compact" *majority. Bartlett v. Strickland*, 556 U.S. 1, 12-20 (2009) (plurality op.). Thus, District 3 (as well as the 48% District 4) in the Governor's Plan could not be justified as mandated by Section 2, and thus are gratuitously race-conscious.

Moreover, Dr. Handley's analysis does not address whether reducing District 3's BVAP to the 41.9% minority level would comply with Section 5's non-retrogression mandate. The amended 2006 version of Section 5 prohibited any change that resulted in any "effect of *diminishing*" minority voters' "ability . . . to elect their preferred candidates of choice." 52 U.S.C. § 10304(b) (emphasis added). This plain textual command thus prohibits changing the lines of majority-black districts in a way that diminishes minority voters' ability to elect their candidates of choice, including by making safe majority-black districts less safe. *See id.* This is particularly obvious because the avowed purpose of the 2006 amendment was to overturn *Georgia v. Ashcroft*, 539 U.S. 461 (2003), which had purportedly "misconstrued and narrowed the protections offered by Section 5," 52 U.S.C. § 10304 note, Findings (b)(6), by authorizing reducing the BVAP in majority-minority districts to below 50%, 539 U.S. at 470; *see also Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 56 (D.D.C. 2002).

Dr. Handley does not even mention, much less address, Section 5's anti-diminution prohibition—and her own report demonstrates that reducing District 3's BVAP to 30% or even 41.9% would violate that prohibition. Dr. Handley points out that Enacted District 3 is an

overwhelmingly safe district that always elects black voters' candidate of choice, Representative Scott, who routinely runs unopposed. *See* Handley Rep. 2-3. But District 3 becomes less likely to elect black voters' candidates of choice at either the minimum "30 to 34%" or the 41.9% BVAP levels Dr. Handley identifies. *Id.* 16. Even if a "30 to 34%" BVAP District 3 provides black voters "an *opportunity* . . . to elect their candidates of choice," *id.* 16 (emphasis added), it does not provide them the virtual guarantee that they enjoyed in Benchmark District 3 and Enacted District 3. In particular, at a 30% BVAP level, black voters' candidate of choice would barely clear a majority of votes in District 3, and could potentially be threatened by a well-funded white opponent in a primary or general election. *See id.* 9-11. Moreover, while black voters' candidate of choice would fare better at a 41.9% BVAP level than at a 30% BVAP level, s*ee id.*; Gov. Plan Ex. E (DE 231-5), the chances of electing such a candidate is quite "diminished" compared to the 56.3% BVAP Enacted District 3 or the 53.2% Benchmark District 3, *see* Handley Rep. 2-3. Thus, reducing District 3's BVAP to 30% or even 41.9% would have the proscribed "effect of diminishing" black voters' "ability to elect" their candidates of choice. 52 U.S.C. § 10304.

In all events, even if Dr. Handley's analysis could survive the governing legal standards, it still would provide no insight into whether any particular remedy complies with the Voting Rights Act. Dr. Handley focuses on three sets of election data which, by her own admission, are not probative of the governing question under the Voting Rights Act: whether black voters would have "an opportunity to elect a candidate of choice even if that candidate is not a widely recognized, popular incumbent who garners a majority of the white vote as well as the black vote." Handley Rep. 3. *First*, Dr. Handley points to the elections of Representative Scott dating back to 1992—but she recognizes that "these results are not sufficient, in and of themselves, to

conclude that the Third District could have a significantly lower black VAP" than in the Enacted Plan "and still elect other minority-preferred candidates." *Id.* That is because Representative Scott "is a popular, long-time incumbent" who enjoys broad white cross-over support and "has faced Republican challengers only twice in the past decade." *Id.* 3 & n.3.

Second, Dr. Handley turns to exogenous races involving a black candidate and a white candidate—but the only such general elections she identifies are the historic 2008 and 2012 presidential elections involving President Obama. *See id.* 4; *see also, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 80-82 (1986) (relying exclusively on interracial legislative races to determine whether a redistricting plan diluted the black vote); *Magnolia Bar Ass'n v. Lee*, 994 F.2d 1143, 1149 (5th Cir. 1993) ("[T]he most probative elections are generally those in which a minority candidate runs against a white candidate."). But the two Obama elections reveal precisely nothing about the level of BVAP required to provide an unknown black candidate an equal opportunity to be elected in District 3, much less to avoid retrogression. Indeed, President Obama twice carried Virginia—a state with *19.7%* BVAP—and District 11, a district with *12.3%* BVAP. Pl. Trial Ex. 16; Nov. 6, 2012 General Election Official Results, *available at* https://voterinfo.sbe.virginia.gov/election/DATA/2012/68C30477-AAF2-46DD-994E-5D3BE8A89C9B/Official/1_D_1323Cea4-0C91-4Ba4-Bec1-Ecf0b10f499f_S.Shtml. But no one would suggest that districts with 19.7% or 12.3% BVAP are electable (or non-retrogressive) for black candidates, because everyone recognizes that the extraordinary white cross-over vote received by President Obama in his historic, wholly atypical elections (*e.g.*, 50.8% in the 2012 general election and 60.1% in the 2008 primary election, Handley Rep. 8-12) says nothing about what a typical black candidate will receive in a normal congressional election in the face of white bloc voting. Thus, the Obama election results indisputably and dramatically overstate the ability

to elect back voters' preferred candidate, and are thus an inherently unreliable guide for the BVAP needed in the real world to elect such a candidate.

Third, Dr. Handley invokes a 2013 Democratic primary election for Attorney General. *See* Handley Rep. 11-13. As Dr. Handley elsewhere recognizes, however, these election results are not probative because "congressional elections do not occur at the same time" as Virginia's off-year state elections and "are higher up on the ticket than" state elections. *Id.* 6 n.6; *see also Bethune-Hill v. Va. State Bd. of Elecs.*, No. 3:14-cv-852, Slip Op. 124 n.37 (Oct. 22, 2015) (DE 108) (Payne, J.) ("The Court does not credit the racial polarization analysis conducted by Dr. Ansolabhere" because "[h]is analysis drew from on-year statewide elections data (rather than off-year House of Delegates election data.)").

Finally, Dr. Handley's unreliable and unprobative analysis only underscores that the Legislature cannot be faulted for its decision not to conduct a costly and debatable racial bloc voting analysis in 2012. Any such analysis inherently could not have provided any reliable estimates for the BVAP needed to avoid retrogression (or to provide even an equal opportunity) and would have misleadingly suggested, as both Dr. McDonald's and Professor Handley's analyses do, that dramatically reducing District 3's BVAP to 30% would be non-retrogressive. But this would not have been accepted by the Justice Department as *proving* non-retrogression, particularly since the analyses would primarily rest on the Obama election results, which are so clearly statistical outliers. Thus, the Legislature had "good reason[] to believe" that such an analysis could produce only "controverted claims" resting on "unclear" evidence. *Ala. Leg. Black Caucus v. Ala.*, 135 S. Ct. 1257, 1274 (2015). The Legislature thus had a very good reason to not attempt a reckless reduction to 30% BVAP, particularly since such a massive revision of District 3 would have necessarily endangered the adjacent Republican incumbents.

CONCLUSION

The special master should disregard Dr. Handley's data and analysis, and the Court should enter one of Intervenor-Defendants' proposed remedial plans if a judicial remedy becomes necessary in this case.

Dated: November 9, 2015

Respectfully submitted,

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

Counsel for Intervenor-Defendants

CERTIFICATE OF SERVICE

I certify that on November 9, 2015, a copy of the foregoing was filed electronically with the Clerk of Court using the ECF system, which will send notification to the following ECF participants:

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

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

Counsel for Plaintiffs

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

Counsel for Defendants

/s/ Mark R. Lentz
Mark R. Lentz

Counsel for Intervenor-Defendants