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 VIRGINIA REPRESENTATIVES'
RESPONSE TO PLAINTIFFS' BRIEF ON AVAILABLE REMEDIES

INTRODUCTION

Plaintiffs' Brief On Available Remedies (DE 30) vividly confirms that it is simply not possible to intelligently resolve their liability claim and enter a remedy prior to next year's primary elections in Virginia. While it would be extraordinarily impractical and unfair to enter *any* remedy in the roughly three months that are still available, Plaintiffs have rendered this effort wholly impossible by failing to specifically identify, or even describe, the changes to the existing congressional map ("the Enacted Plan") they will seek, even though the Court directly ordered them to disclose the "remedial measures sought by Plaintiffs if they were to prevail in this action." Order at 2 (DE 27).

1. The reason for Plaintiffs' calculated decision to leave Defendants and the Court in the dark as to the remedy they seek is quite understandable—a description of any meaningful remedy here reveals that there is not nearly enough time to enter it. Specifically, the liability and remedial proceedings needed to adjudicate Plaintiffs' case would require extensive discovery and

additional expert testimony on, *inter alia*, the complex issues of 1) racial bloc voting, 2) whether a proposed remedial district would preserve black voters' opportunity to elect their preferred candidate, and 3) whether that district conforms with traditional redistricting criteria. Plaintiffs, quite understandably, are not asking the Court to simply dismantle the only congressional district in the history of Virginia that has provided black voters an opportunity to elect their preferred candidate and replace it with a square, "compact" district where black voters have no such opportunity because of the low black voting-age population ("BVAP"). And, of course, the Court would not blithely take such a momentous step based on the slapdash one-day hearing in February contemplated by Plaintiffs, and could not do so because it is obliged under Section 2 of the Voting Rights Act to provide black voters with a district where they can elect their preferred candidate, if it is feasible to do so. *See Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986); *see also Abrams v. Johnson*, 521 U.S. 74, 90 (1997) ("courts should comply with . . . section [2] when exercising their equitable powers to redistrict."); *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 633 (D.S.C. 2002) (three-judge court) (same).

Plaintiffs recognize this reality, since their Complaint alleges that "Section 2" does not "justify" the challenged District 3 because "African American voters in this district are able to elect candidates of choice without constituting 56.3% of the districts voting age population," Compl. ¶ 44 (DE 1), and Plaintiffs' counsel confirmed during a scheduling conference call that Plaintiffs' remedy would continue to afford African American voters this ability to elect. Yet, although Plaintiffs contend that 56.3% BVAP is unnecessary to elect a minority-preferred candidate, and that District 3 is "pack[ed]," *id.* ¶ 4, they give no inkling of what BVAP is required to do so, or what percentage constitutes "packing," and whether a district conforming to Plaintiffs' (undisclosed) racial percentages is feasible without violating traditional districting

principles. Nor have Plaintiffs offered *any* expert analysis even relating to the complex question of what BVAP is needed, or even provided any hint as to what such a district would even look like or how many adjacent districts would need to be altered to accommodate this new district.

Yet resolving such questions about Plaintiffs' alternative district is essential not only to determine the appropriate remedy, but also to assess liability. Needless to say, the Court cannot reasonably adjudicate Plaintiffs' claim that the Legislature excessively and unconstitutionally used race in a manner not required by Section 2 unless Plaintiffs inform the Court (and Defendants) what a district would look like if the Legislature had followed their conception of the Constitution and Section 2. *See, e.g.*, *Hall v. Virginia*, 385 F.3d 421, 428 (4th Cir. 2004) ("Any claim that the voting strength of a minority group has been 'diluted' must be measured against some reasonable benchmark of 'undiluted' minority voting strength."). At a minimum, any such claim would require expert testimony on the compliance of Plaintiffs' proposed "remedial" or "benchmark" district with Section 2 and traditional districting principles. As noted, Plaintiffs have not even offered an expert report on these complex questions and Defendants, of course, have no such rebuttal expert. Such expert testimony, standing alone, would require extensive discovery into prior voting patterns involving minority candidates in the relevant areas, as well as consideration of the substitute district's compliance with neutral districting principles.

That being so, it is quite obviously impossible to adjudicate liability and enter a remedy in the next three months, as Plaintiffs request. That is particularly true since any remedy can go no further than correcting the identified departure from the Constitution, so it is essential to know what constitutes a constitutionally adequate district and how District 3 departed from this norm. *See, e.g.*, *Upham v. Seamon*, 456 U.S. 37, 43 (1982); *White v. Weiser*, 412 U.S. 783, 794–95

(1973). Moreover, as explained below, this Court is required to accord the General Assembly ample time and opportunity to adopt a legislative remedy before it can enter a judicial remedy. *See Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (cited at Pls.' Br. at 3); *McDaniels v. Mehfoud*, 702 F. Supp. 588, 596 (E.D. Va. 1988) (cited at Pls.' Br. at 3). Yet the General Assembly cannot intelligently formulate, much less enact, the narrowest remedy "necessary to cure [the] constitutional . . . defect" unless it has before it an alternative district illustrating that defect and a possible remedy. *Upham*, 456 U.S. at 43; *White*, 412 U.S. at 794–95.

2. There is another fundamental reason why this Court cannot enter a remedy at the breakneck pace Plaintiffs advocate: Plaintiffs have left no time for direct review by the Supreme Court of any liability judgment in their favor. As detailed below, Plaintiffs' claim rests on a novel theory of discriminatory purpose which arose only last June; *i.e.*, that the Supreme Court's decision in *Shelby County v. Holder*, which relieved Virginia of its Section 5 preclearance obligations for *future* changes to its election laws, somehow rendered the *previously* constitutional District 3 unconstitutional. *See* Compl. ¶¶ 1–6. While this theory is meritless (as Defendants' forthcoming motions for summary judgment will show), at a minimum it is so obviously novel and controversial that Supreme Court review is needed *before* abolishing the only district in Virginia where black voters have the ability to elect their candidate of choice. For this reason, even in far less compelling circumstances than those present here, the consistent practice of courts in *Shaw* cases has been to delay ordering a remedy into effect prior to offering an opportunity for Supreme Court review or time for the legislature to adopt a remedy. *See, e.g.*, *Diaz v. Silver*, 932 F. Supp. 462, 467–68 (E.D.N.Y. 1996) (three-judge court) (in July of election year, granting legislature time to correct *Shaw* violation in congressional plan and collecting cases); *Moon v. Meadows*, 952 F. Supp. 1141, 1144 (E.D. Va. 1997) (three-judge court)

(granting General Assembly opportunity to enact a remedy for a *Shaw* remedy in District 3), *summ. aff'd*, 521 U.S. 1113 (1997) (quoted at Pls.' Br. at 4–5).

Thus, the only sensible course is for the Court to hear arguments on Defendants' forthcoming motions for summary judgment, decide whether discovery and a trial are even needed, and, if so, then schedule a trial in advance of the 2016 election cycle. Otherwise, the parties will be conducting discovery while potentially dispositive summary judgment motions are pending—and that discovery will be wasteful and pointless because, due to Plaintiffs' failure to disclose their benchmark alternative district, Defendants do not know what alleged violation and proposed remedy they are defending against. This approach hardly works any unfairness to Plaintiffs: Plaintiffs waited more than three months after the decision in *Shelby County* before filing suit, *see* Compl. (filed Oct. 2, 2013), and now want discovery, summary judgment, trial, and remedy to be finally resolved in less time than they took to draft their Complaint. The Court should reject Plaintiffs' invitation to rush to judgment and remedy in this case.

BACKGROUND

District 3 is the only congressional district in Virginia where black voters have the opportunity to elect a candidate of their choice. It is currently represented by Congressman Bobby Scott. *See* Virginia Members Of Congress, https://www.govtrack.us/congress/members/VA (last visited Dec. 10, 2013) ("Virginia Members"). It is "surrounded by Congressional Districts 1, 2, 4, and 7," Compl. ¶ 32, which are represented by Intervenor-Defendants Robert J. Wittman, Scott Rigell, Randy J. Forbes, and Eric Cantor, *see* Virginia Members.

District 3 was created as a majority-black district in 1991. *See Moon*, 952 F. Supp. at 1144. At that time, District 3's black voting-age population ("BVAP") was 61.17%. *See id.* In

1997, a three-judge court invalidated District 3 as an unconstitutional racial gerrymander and accorded the General Assembly the opportunity to enact a remedial District 3. *See id.* at 1151.

The General Assembly responded by adopting a new plan in 1998. *See* Va. Stat. § 24-302 (1998 Version) (Ex. A). The 1998 version of District 3 received section 5 preclearance and was not challenged under section 2 or as a racial gerrymander. *See* 42 U.S.C. § 1973c.

Following the 2000 census, the General Assembly adopted a new districting plan. *See* Va. Stat. § 24-302.1 (Ex. B) (2001 Version). That plan preserved District 3 in "similar" form to the 1998 version, *see* Compl. ¶ 29; *compare* 1998 District 3 Map (Ex. C), with 2001 District 3 Map (Ex. D), received preclearance from the Justice Department, and was not challenged under section 2 or as a racial gerrymander, *see* 42 U.S.C. § 1973c.

The General Assembly enacted the Enacted Plan in 2012 to reflect population shifts shown in the 2010 census. The Enacted Plan's District 3 "contains only slight variations from Congressional District 3" drawn in 1998 and 2001. Compl. ¶ 30; *compare* 1998 District 3 Map *and* 2001 District 3 Map, *with* 2012 District 3 Map (Ex. E). The General Assembly was required to add population to District 3 in the Enacted Plan in order to comply with the constitutional one-person, one-vote requirement. *See* Va. Stat. 24.02-302.2 (2012 Version) (Ex. F). The Enacted Plan increased the BVAP of District 3 from 53.1% to 56.3%. *Compare* 2001 Plan Demographics (Ex. G), *with* Enacted Plan Demographics (Ex. H). The Justice Department granted preclearance of the Enacted Plan, meaning that Virginia carried its burden to prove that the Plan was enacted without "any discriminatory purpose." 42 U.S.C. § 1973c(c).

The 2012 Elections were conducted under the Enacted Plan. Virginia's 2014 congressional primary is set by statute for June 10. *See* Va. Stat. § 24.2-515. The statutory candidate filing period begins on March 10, less than three months from now, and ends on March

27, 75 days before the primary. *See id.* § 24.2-522. The federal Military and Overseas Voter Empowerment ("MOVE") Act requires Virginia election officials to mail absentee ballots to deployed military personnel and other overseas voters at least 45 days before congressional primary elections—or no later than April 26—and additional lead time is need to allow for legal challenges, ballot printing, and other election administration tasks. *See* 42 U.S.C. § 1973ff.

Plaintiffs acknowledge that "[a]s of the date of the enactment of the [Enacted Plan], Virginia was considered a covered jurisdiction under Section 5 of the Voting Rights Act." Compl. ¶ 35. Plaintiffs therefore concede that the General Assembly acted constitutionally when it adopted the Enacted Plan and preserved District 3 as a majority-black district as section 5 required. *See id.*; *see also* Pls.' Br. at 2. Plaintiffs also mount no challenge to the 2012 congressional elections, which were conducted under the Enacted Plan.

Plaintiffs claim, however, that the General Assembly's constitutional purpose has been tainted—and the previously constitutional Enacted Plan and District 3 have been rendered unconstitutional—by the Supreme Court's intervening decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (June 25, 2013), which relieved Virginia of its obligation to obtain section 5 preclearance of future changes in its voting practices and procedures. *See* Compl. ¶¶ 4, 39; Pls.' Br. at 2. In particular, Plaintiffs claim that "[r]ace was the predominant consideration in the creation of Congressional District 3," Compl. ¶ 41, that this alleged "racial[] gerrymander" and "packing" of black voters "diminish[es] their influence in surrounding districts," *id.* ¶ 3, and that "Virginia can no longer seek refuge in Section 5" for its pre-*Shelby County* decision to preserve District 3 as section 5 then required, *id.* ¶ 5; *see also* Pls.' Br. at 2 (citing *Shaw v. Reno*, 509 U.S. 630 (1993)).

Plaintiffs waited more than three months after the decision in *Shelby County* to file this suit. *See* Compl. (filed Oct. 2, 2013). Plaintiffs nonetheless ask "that the Court hold an expedited trial on the merits and, assuming a finding in Plaintiffs' favor on liability, that the Court approve a remedial map" prior to the opening of Virginia's candidate filing period on March 10, less than three months from now. Pls.' Br. at 1. Plaintiffs, however, have not identified, much less described in any detail, the mid-decade "remedial map" that they ask Defendants to defend against and the Court to adopt on their accelerated time table. *Id.*

ARGUMENT

I. THE COURT CANNOT RESOLVE THE COMPLEX LIABILITY AND REMEDIAL ISSUES ON PLAINTIFFS' COMPRESSED TIMELINE

Since no serious interest of either the Plaintiffs or the public is furthered by rushing adjudication prior to the 2014 elections, and since any such rush to judgment is completely impracticable, severely prejudices Defendants' ability to fully defend the Plan in this Court and the Supreme Court, and usurps the General Assembly's sovereign prerogatives, it is clear that the Court cannot fairly resolve liability and remedial issues in the time-frame advocated by the Plaintiffs.

A. Plaintiffs Have Not Identified Any Irreparable Harm That Requires An Immediate, Pre-2014 Election Remedy

While Plaintiffs' invoke the incendiary phrase "racial gerrymander," Compl. ¶ 3, it is clear that the idiosyncratic sort of "racial discrimination" they allege will not visit any real-world injury, much less the sort of serious injury needed to even consider adopting the shortened liability and remedial procedures they advocate. To the contrary, for a variety of reasons, it is clear that allowing the 2014 election in the current District 3 would not subject Virginia citizens to the sort of purposeful racial discrimination which arguably needs to be prevented through emergency measures.

First, Plaintiffs concede that the General Assembly acted constitutionally in 2012, when it adopted the Enacted Plan and preserved District 3 as a majority-black district as Section 5 of the Voting Rights Act required. Plaintiffs therefore also do not allege that the 2012 elections, which were conducted under the Enacted Plan, were invalid. Instead, Plaintiffs make the novel and meritless argument that the Supreme Court's intervening decision in *Shelby County*, which relieved Virginia of its section 5 preclearance obligations for *future* changes to its election laws, somehow *retroactively* transformed the General Assembly's constitutional purpose in preserving District 3 into an unconstitutional purpose. *See id.* ¶¶ 1–6. Thus, even under Plaintiffs' theory, District 3's boundaries do not reflect any unconstitutionally discriminatory purpose and are not the product of an unconstitutional racial classification.

Second, the Justice Department precleared the Enacted Plan and current District 3 under Section 5, declaring them free of "*any* discriminatory purpose." 42 U.S.C. § 1973c(c) (emphasis added). *Third*, Plaintiffs acknowledge that the current District 3 contains "only slight variations" from the version of District 3 "drawn in . . . 2001" and in which black voters elected the candidate of their choice for a decade. Compl. ¶ 32. Thus, Plaintiffs' claims of irreparable injury requiring immediate relief is that District 3 will continue to be used for a *seventh* election cycle. *Fourth*, the 2001 version of District 3 had "only slight variations" from the version of District 3 that the General Assembly adopted in 1998 as a *remedy* for a *Shaw* violation—further confirming that District 3's shape poses no serious constitutional concern. *See id.*; *see also Moon*, 952 F. Supp. at 1144. *Fifth*, as a practical matter, the only "harm" to the allegedly victimized black voters in District 3 is that they will continue to reside in a district where they can elect their preferred candidate rather than having some of them transferred to districts where

their ability to do so is either nonexistent or more doubtful—hardly an "injury" of any cognizable magnitude.

In short, the "irreparable harm" that allegedly requires the Court's immediate remedial action is that some black voters will be permitted to vote in District 3 again in 2014, even though District 3 was preserved without any discriminatory purpose, was used for the (unchallenged) 2012 elections, has been virtually unchanged since the General Assembly's 1998 *Shaw* remedy, and is the only Virginia district where black voters have the opportunity to elect the congressional representative of their choice. *See* Pls.' Br. at 9–11. This hardly justifies rushing to judgment and remedy in three months.

B. Plaintiffs' Failure To Identify A Benchmark Alternative Plan Prevents A Finding Of Liability Or Entry Of A Remedy, Let Alone In Less Than Three Months

Moreover, Plaintiffs' liability and remedy cannot be adjudicated in the next three months because adjudication can neither be intelligently or finally resolved absent examination of what Plaintiffs contend is a constitutionally compliant alternative—yet resolution of that question requires far more discovery and trial time than is available, particularly since Plaintiffs have not even begun the preliminary steps for identifying and justifying this constitutional alternative. Specifically, Plaintiffs failed to identify for the Court and Defendants a benchmark alternative district that comports with their view of constitutional and statutory requirements and traditional redistricting principles, and to provide expert testimony in support of it. Without this alternative district, the Court cannot find liability or enter a remedy—and Defendants cannot even *defend* this case because they do not know what Plaintiffs claim *should* have been done.

"Any claim that the voting strength of a minority group has been 'diluted' must be measured against some reasonable benchmark of 'undiluted' minority voting strength." *Hall*, 385 F.3d at 428 ("As Justice Frankfurter once observed, 'talk of 'debasement' or 'dilution' is

circular talk. One cannot speak of 'debasement' or 'dilution' of the value of a vote until there is first defined a standard of reference as to what a vote should be worth.'" (quoting *Baker v. Carr*, 369 U.S. 186, 300 (Frankfurter, J., dissenting)). Indeed, "the very concept of vote dilution implies—and, indeed, necessitates—the existence of an 'undiluted' practice against which the fact of dilution may be measured." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997) (*Bossier I*). Thus, a redistricting plaintiff cannot even *plead*, much less *prove*, liability or a remedy for racial discrimination unless the plaintiff offers a nondiscriminatory benchmark alternative plan that comports with constitutional norms and traditional districting principles. *See, e.g.*, *Hall*, 385 F.3d at 428–32 (upholding dismissal of section 2 claim for failure to identify an alternative); *see also Bossier I*, 520 U.S. at 480 (a vote-dilution plaintiff must "postulate a reasonable alternative voting practice to serve as the benchmark 'undiluted' voting practice"); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000) (*Bossier II*) ("[T]he comparison must be with a hypothetical alternative . . . ."); *Holder v. Hall*, 512 U.S. 874, 880 (1994) (Kennedy, J.) ("[A] court must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice."); *Thornburg v. Gingles*, 478 U.S. 30, 88 (1986) (O'Connor, J.)

This rule makes perfect sense: a federal court cannot determine whether a redistricting plan is *unconstitutional* unless it knows what a *constitutional* plan would look like. *See, e.g.*, *Bossier I*, 520 U.S. at 480; *Holder*, 512 U.S. at 880 (Kennedy, J.); *Gingles*, 478 U.S. at 88 (O'Connor, J.). And a defendant cannot take meaningful discovery or otherwise defend against a claim of unconstitutional legislative purpose without knowing how a legislature with a constitutional purpose allegedly would have acted. *See, e.g.*, *Bossier I*, 520 U.S. at 480; *Holder*, 512 U.S. at 880 (Kennedy, J.); *Gingles*, 478 U.S. at 88 (O'Connor, J.).

This is true for claims of racial discrimination under Section 2 of the Voting Rights Act, which require proving a discriminatory "result," and even *more* true for constitutional claims, which also require showing a discriminatory "purpose." *Washington v. Davis*, 426 U.S. 229, 240 (1976) (to establish Equal Protection violation, discriminatory effect "must ultimately be traced to a racially discriminatory purpose"). If a court cannot determine whether a challenged plan works a discriminatory *result* proscribed by Section 2 without a benchmark alternative plan, *see Gingles*, 478 U.S. at 50–51, it surely cannot determine whether the Legislature enacted the plan "because of" that adverse racial result, *see Bossier I*, 520 U.S. at 481–82; *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980); *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265 (1977). Courts therefore have recognized the requirement of a benchmark alternative plan in cases alleging unconstitutional racial discrimination against minority voters. *See, e.g.*, *Bossier II*, 528 U.S. at 334 (noting that claims of racial discrimination against minority voters under the Fifteenth Amendment require "comparison . . .with a hypothetical alternative"); *Johnson*, 204 F.3d at 1346 (requiring benchmark alternative for Fourteenth Amendment discrimination claim); *Lopez v. City of Houston*, No. 09-420, 2009 WL 1456487, *18–19 (S.D. Tex. May 22, 2009) (same).

The need for an alternative plan in constitutional racial discrimination claims is particularly acute because, as the Court has specifically warned with respect to *Shaw* claims, federal courts must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Because "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions," federal courts must presume that state legislatures act in "good faith" and that their redistricting statutes are constitutional. *Id.* at 915–16. Thus, before a federal court can

invalidate a duly enacted redistricting plan based on race, it must be satisfied that the plaintiff has met the "demanding" burden to show that "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." *Easley v. Cromartie*, 532 U.S. 234, 241 (2001). A court can make this finding that the legislature acted with a discriminatory purpose only if it had other, nondiscriminatory alternative plans before it. *See, e.g.*, *Bossier I*, 520 U.S. at 480; *Holder*, 512 U.S. at 880 (Kennedy, J.); *Gingles*, 478 U.S. at 88 (O'Connor, J.).

Finally, of course, the legislature—which must be given the first opportunity to correct any flaws in a districting plan, *see infra* part II—or the reviewing court must have a nondiscriminatory alternative plan in order to enter a remedy. *See, e.g.*, *Gingles*, 478 U.S. at 88 (O'Connor, J.); *see also Bossier I*, 520 U.S. at 480; *Holder*, 512 U.S. at 880 (Kennedy, J.); *see also* Pls.' Br. at 1 (seeking undescribed "remedial plan" for the alleged violation). Since the remedy for an unconstitutional district may be no broader than is "necessary to cure any constitutional or statutory defect," the Court needs a clear idea of what constitutes an alternative constitutional district to enter a sufficiently targeted remedy (or to guide the General Assembly in its remedial efforts). *Upham*, 456 U.S. at 43; *White*, 412 U.S. at 794–95.

Yet, despite this Court's order that they disclose the "remedial measures" they seek here, Order at 2, Plaintiffs have not offered an alternative remedial plan or any expert (or other) testimony to justify it. Although Plaintiffs claim that current District 3 "dilutes" minority voting power through "packing," "fail[s] to comply with traditional districting principles," and is not needed to comply with Section 2, *see* Compl. ¶¶ 3, 33–34, 41, 44, they provide no guidance on any alternative district that both complies with traditional districting principles and has enough BVAP to satisfy Section 2, but not so much that it constitutes "packing." But such information is essential for the Court to assess whether the General Assembly's use of race was unjustified

because there existed a reasonable alternative that both better complied with neutral districting principles and satisfied Section 2, and for it to enter a remedy that accomplishes both objectives. As discussed below, resolving complicated questions requires far more discovery, expert testimony and trial time than Plaintiffs contemplate, particularly since Plaintiffs have not even offered the basic evidence needed to start this inquiry—*i.e.*, a proposed alternative district supported by expert testimony on racial voting patterns and compliance with districting principles.

C. Every Conceivable Remedial Map For Plaintiffs' Alleged Violation Is Fatally Flawed, And Cannot Be Implemented Through An Expedited Trial

Plaintiffs' failure to disclose their alternative plan is unsurprising because any conceivable remedy would mire the Court in complex factual issues and a protracted trial that cannot possibly be completed by March.

As noted, Plaintiffs allege that District 3's alleged subordination of districting principles was not needed to comply with Section 2 because Virginia could have complied with those principles while still preserving black voters' Section 2 right to "elect candidates of their choice." *See supra* p. 13; Compl. ¶¶ 41, 44.[1] And, of course, the issue whether there is an available alternative district that complies with both Section 2 and neutral principles must be resolved to determine, on the merits, whether Section 2 supplied the General Assembly with a *Shaw* justification for preserving District 3, *see* Compl. ¶ 44, and, on remedies, whether the remedial district complies with Section 2, *Abrams*, 521 U.S. at 90; *Colleton County*, 201 F. Supp.

[1] As noted, Plaintiffs contend that their proposed remedy will comply with Section 2 and therefore are not advocating a district that strips black voters of their only opportunity in Virginia to elect a candidate of their choice. Moreover, Plaintiffs' counsel indicated on a scheduling conference call that Plaintiffs were not seeking to simply reduce District 3's BVAP to its 2010 level of roughly 53%, and any such minor adjustments would not cure Plaintiffs' complaints about District 3's shape or "packing."

2d at 633. Consequently, to resolve liability and remedy, the Court must resolve whether Plaintiffs' hypothetical alternative district comports with traditional districting principles, as well as resolving a searching, fact-bound inquiry into the level of BVAP required to preserve black voters' "a[bility] to elect candidates of their choice" in District 3. *See* Order Denying Motion For Preliminary Injunction at 24, *Favors v. Cuomo*, No. 11-CV-5632 (DE 367) (E.D.N.Y. May 16, 2012) (three-judge court) (case referenced at Pls.' Br. at 7) ("*Favors* Order") (Ex. I); *Charleston County*, 365 F.3d at 346–53; *Moon*, 952 F. Supp. at 1150. As one of the cases Plaintiffs invoke vividly confirms, issues related to racial bloc voting and minority voters' ability to elect their representative of choice implicated by a Section 2 inquiry "typically require substantial expert testimony and analysis" and cannot be resolved without extensive discovery, trial, and factfinding. *Favors* Order at 24; *see also United States v. Charleston County*, 365 F.3d 341, 346–53 (4th Cir. 2004) (relying on expert evidence in resolving racial voting issues); *Moon*, 952 F. Supp. at 1150 (same); *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 640–46 (D.S.C. 2002) (same) (three-judge court); *Marylanders for Fair Rep., Inc. v. Schaefer*, 849 F. Supp. 1022, 1058 (D. Md. 1994) (same) (three-judge court). The Court simply does not have time to resolve the complex evidentiary issues in proving *Shaw* compliance and the "ability to elect" BVAP-level, particularly since, even at this late date, Plaintiffs have not either suggested an alternative district or offered expert testimony to justify it.

II. THIS COURT MUST ACCORD THE GENERAL ASSEMBLY AMPLE OPPORTUNITY TO REMEDY ANY AFTER-THE-FACT VIOLATION IN THE ENACTED PLAN BEFORE ADOPTING A MID-DECADE JUDICIAL REMEDY

For the foregoing reasons, there is plainly not enough time to enter a remedy *even if* the Court did so unilaterally. It is even more implausible, however, because the Court is obliged (at least absent extraordinary emergency circumstances not present here) to provide the General Assembly with a reasonable opportunity to remedy any constitutional violation.

"Reapportionment is primarily a matter for legislative consideration and determination," and "legislatures have primary jurisdiction over legislative reapportionment." *White*, 412 U.S. at 794–95; *Upham*, 456 U.S. at 41. In other words, "it is the domain of the States, not federal courts, to conduct apportionment in the first place." *Voinovich v. Quilter*, 570 U.S. 146, 156 (1993). Federal courts therefore should "not pre-empt the legislative task nor intrude on state policy any more than necessary." *White*, 412 U.S. at 795; *Upham*, 456 U.S. at 41. In drawing a plan, a legislature obviously must "balanc[e] competing interests," *Easley*, 532 U.S. at 242, "the sort of policy judgments for which courts are, at best, ill suited," *Perry v. Perez*, 132 S. Ct. 934, 941 (2012) (per curiam).

Thus, as Plaintiffs' own cited case confirms, where a court finds a violation in a districting plan, it "should give the appropriate legislative body the first opportunity to provide a plan that remedies the violation." *McDaniels*, 702 F. Supp. at 596 (cited at Pls.' Br. at 3); *see also Wise*, 437 U.S. at 540 ("When a federal court declares an existing apportionment scheme unconstitutional, it is therefore appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan.") (cited at Pls.' Br. at 3). Indeed, "Supreme Court precedent requir[es] that federal courts give deference to state legislatures by at least giving them the initial opportunity to draft a constitutionally valid plan." *Diaz*, 932 F. Supp. at 467 (citing *Miller*, 515 U.S. at 900 and *Reynolds v. Sims*, 377 U.S. 533, 585 (1964)). Consequently, this Court cannot enter a mid-decade judicial redistricting plan until it has accorded the General Assembly "an adequate opportunity" to enact its own remedy. *Upham*, 456 U.S. at 41; *see also Cane v. Worcester County*, 35 F.3d 921, 927 (4th Cir. 1994) ("Once a violation . . . has been established, a district court should give the appropriate

legislative body the first opportunity to devise a remedial plan."); *Moon*, 952 F. Supp. at 1151 (allowing General Assembly opportunity to cure *Shaw* violation) (quoted at Pls.' Br. at 5); *Diaz*, 932 F. Supp. at 467–68 (in July of election year, allowing legislature time to correct *Shaw* violation in congressional plan).

This deference to the General Assembly is particularly appropriate in this case. Plaintiffs' theory is that the Enacted Plan was constitutional at the time it was enacted, and only became unconstitutional due subsequent events outside of the General Assembly's control. *See* Compl. ¶¶ 1–6. Thus, even under Plaintiffs' theory, the General Assembly fully *complied* with the Constitution; that constitutional act somehow became unconstitutional because of a later decision of the Supreme Court invalidating Section 5. *See id.* Since, unlike in every other redistricting case, the General Assembly committed no constitutional wrong, it has a far greater entitlement to an opportunity to alter District 3 than the legislature in any other case. Moreover, under Plaintiffs' theory, the General Assembly has *new* responsibilities in 2013 (after *Shelby County*) that it did not have in 2012 when it adopted the Enacted Plan, so this will be its *first* opportunity to exercise its sovereign redistricting prerogative in Plaintiffs' new world. Depriving the General Assembly of its *only* opportunity to enact a plan under the new framework, even though it committed no constitutional wrong in 2012, would be no different than a court depriving a legislature of the first opportunity to redistrict after the new census, before it violated the Constitution. After all, since the General Assembly's act in 2012 was concededly free of unconstitutional discriminatory purpose, depriving it of the opportunity to redraw District 3 and affected surrounding districts would, quite literally, deny it the opportunity to redistrict even though it never committed a constitutional violation. Needless to say, this would be a facially improper exercise of a federal court's remedial power. *See Milliken v.*

Bradley, 418 U.S. 717, 738 (1974) ("A federal remedial power may be exercised only on the basis of a constitutional violation and . . . the nature of the violation determines the scope of the remedy."); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (same); *see also Voinovich*, 570 U.S. at 156 ("[I]t is the domain of the States, not federal courts, to conduct apportionment in the first place.").

Plaintiffs nonetheless suggest that this Court may bypass the General Assembly and impose a mid-decade remedial map because of the imminence of Virginia's candidate filing period. *See* Pls.' Br. at 3–8. However, particularly since Plaintiffs delayed filing their suit for more than three months after the *Shelby County* decision, the emergency exception permitting courts to dispense with deference to the legislative body is inapplicable here—as their own cases confirm.

Indeed, virtually all of the cases that Plaintiffs cite arose at the *beginning* of the decade and involved the same scenario: the legislature had failed to enact a districting plan based on new census data and, thus, had left in place an outdated plan that no longer complied with the one-person, one-vote requirement and was unconstitutional in its entirety. *See, e.g.*, *Scott v. Germano*, 381 U.S. 407, 409 (1965) (cited at Pls.' Br. at 3); *LULAC v. Perry*, 548 U.S. 399, 415 (2006) (cited at Pls.' Br. at 3); *Wise*, 437 U.S. at 540 (cited at Pls.' Br. at 3); *Desena v. Maine*, 793 F. Supp. 2d 456, 462 (D. Me. 2011) (three-judge court) (cited at Pls.' Br. at 5); *Favors* Order at 9 (case referenced at Pls.' Br. at 7).[2] In that scenario, the legislature already had been accorded ample opportunity to remedy the plan-wide constitutional violation, but had failed to do

[2] *See also Adamson v. Clayton Cnty. Elections and Reg. Bd.*, 876 F. Supp. 2d 1347, 1352–53 (N.D. Ga. 2012) (cited at Pls.' Br. at 6); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 661–62 (N.D. Ill. 1991) (cited at Pls.' Br. at 6); *In re Apportionment of State Legislature-1992*, 486 N.W.2d 639, 645 n.31 (Mich. 1992) (cited at Pls.' Br. at 6); *In re Constitutionality of S.J. Res. 2G*, 601 So. 2d 543, 544–45 (Fla. 1992) (adopting judicial plan because legislature had reached a political "impasse" and was no longer in session) (cited at Pls.' Br. at 6).

so due to a political impasse. *See, e.g.*, *Scott*, 381 U.S. at 409; *LULAC*, 548 U.S. at 415; *Wise*, 437 U.S. at 540; *Desena*, 793 F. Supp. 2d at 462; *Favors* Order at 9. It therefore became "the unwelcome obligation of the federal court to devise and impose a reapportionment plan pending later legislative action." *Wise*, 537 U.S. at 540. These plan-wide, equal-population cases thus offer *no* support for Plaintiffs' position that the Court should pretermit *any* opportunity for the General Assembly to address for the first time an alleged district-specific violation that arose mid-decade through no fault of the General Assembly, and only *after* the Enacted Plan had been precleared by the Department of Justice as free of "any discriminatory purpose," 42 U.S.C. § 1973c(c), and constitutionally used in the 2012 election.[3]

III. EXTENDING THE FILING DEADLINE WOULD NOT GIVE THE COURT SUFFICIENT TIME TO RESOLVE THIS CASE BEFORE THE 2014 ELECTION

Contrary to Plaintiffs' suggestion, *see* Pls.' Br. at 8–9, moving the dates of Virginia's candidate filing period is not an option that would afford the Court sufficient time to reasonably adjudicate this case before the 2014 election. In the first place, as a matter of federal law, the deadline cannot be moved because this would not afford the Board of Elections sufficient time to prepare the ballots that it must send to deployed military personnel and other voters living abroad. The MOVE Act requires Virginia election officials to *mail* absentee ballots to military

[3] Plaintiffs' meager authority from outside the equal-population impasse context fares no better. The government defendants in *Neal v. Coleburn*, 689 F. Supp. 1426 (E.D. Va. 1988) (cited at Pls.' Br. at 4 n.1), took the position that there was "no acceptable remedy," judicial or legislative, for the violation in that case, *id.* at 1438–39, so the court adopted the only remedy presented to it, *see id.* The plaintiffs and defendants all sought a judicial remedy in *Henderson v. Bd. of Supervisors of Richmond County*, Civ. A No. 87-0560-R. 1988 WL 86680, at *9–10 (E.D. Va. June 6, 1988) (cited at Pls.' Br. at 4 n.1), so there was no point to referring the remedy to defendants in their legislative capacity. Plaintiffs' other cases involve state courts implementing state-law redistricting requirements and remedies. *See, e.g.*, *In re Legislative Redistricting of State*, 805 A.2d 292, 298 (Md. 2002) ("The Maryland Constitution requires us, in addition to reviewing the plan, to provide a remedy."); *Stephenson v. Bartlett*, 582 S.E. 2d 247, 248–49 (N.C. 2003).

and overseas voters at least 45 days before congressional primary elections, and additional lead time is need to allow for legal challenges, ballot printing, and other election administration tasks. *See* 42 U.S.C. § 1973ff. Preparing the ballots before mailing requires considerable time: in fact, the Justice Department requires primary elections to be held *80 days* before the general elections so that general election ballots can be prepared in time for the MOVE Act's 45-day mailing deadline. *See* Memorandum In Support Of United States' Motion For Supplemental And Permanent Relief at 3, *United States v. New York*, No. 1:10-cv-1214 (N.D.N.Y. Sept. 19, 2011) (Ex. J). Virginia has a special need to fully comply with its MOVE Act obligations: the United States sued Virginia for failing to comply with the MOVE Act in the 2008 election, and Virginia devoted significant resources to training and MOVE Act compliance under the consent decree entered in that case. *See* Consent Decree, *United States v. Cunningham*, No. 3:08CV709 (E.D. Va. Dec. 10, 2010) (Ex. K). Thus, even if there were grounds for the Court to move Virginia's March 27 filing deadline to later in the year, changing that state law deadline will not solve the problem because the MOVE Act also requires knowing who the June 10 primary candidates are by roughly March 27. (March 27 is 75 days before June 10.)

Overwhelming considerations of the public interest and fundamental fairness also militate against the Court shortening the election schedule or entering a last-minute remedy. In the first place, "elections are complex to administer, and the public interest would not be served by a chaotic, last-minute reordering of [congressional] districts." *Favors* Order at 25. "It is best for candidates and voters to know significantly in advance of the petition period who may run where." *Id.*; *see also Diaz*, 932 F. Supp. at 466–68. Attempting to implement a remedial plan would create all of the problems that mid-decade redistricting does, disrupting "orderly campaigning and voting, as well as . . . communication between representatives and their

constituents." *LULAC*, 548 U.S. at 448. This interest in orderly election administration is so strong that the Supreme Court has held that a pre-election remedy "may be inappropriate even when a redistricting plan has actually been found unconstitutional because of the great difficulty of unwinding and reworking a state's entire electoral process." *Favors* Order at 25 (citing *Reynolds*, 377 U.S. at 585; *Roman v. Sincock*, 377 U.S. 695, 709–10 (1964)).

Moreover, "[t]he greatest public interest must attach to adjudicating these claims fairly—and correctly." *Id.* at 25. Given the novelty of Plaintiffs' theory and the fact-intensive nature of any conceivable violation and remedy, this Court simply would not "be able to give the issues or a possible remedy the careful consideration they deserve in such an abbreviated time frame" as Plaintiffs advocate. *Id.* at 26. And if this Court were to rush to judgment and remedy, there is a substantial risk that it could grant Plaintiffs a remedy that they do not deserve, that shifts the electoral map to some voters' disadvantage, and that disturbs the General Assembly's delicate political and policy choices, in contravention of the directive that federal courts in redistricting cases "should follow the policies and preferences of the State" and "honor" those policies to the maximum extent possible. *White*, 412 U.S. at 795; *Upham*, 456 U.S. at 41–43.

In short, it is not remotely possible or desirable to accomplish the following tasks in any reasonable time-frame before the 2014 elections:

1. Plaintiffs' disclosing their benchmark alternative plan, *see supra* Part I.A;
2. The Court deciding Defendants' forthcoming motions for summary judgment after oral argument on January 21, and determining whether discovery and a trial are necessary;
3. The parties conducting and completing discovery, including expert discovery;
4. The Court holding a trial and receiving evidence from all parties, including complex extensive evidence related to racial bloc voting and black voters' ability to elect candidates of their choice, *see supra* Part I.B;
5. The Court adjudicating the question of liability;

6. The Court then allowing the General Assembly reasonable time and opportunity to remedy the violation, *see supra* Part II;

7. If the General Assembly failed to remedy the violation within a reasonable time, the Court holding further hearings and consider additional evidence regarding remedies;

8. If Plaintiffs have their way, the Court appointing a special master or other expert to assist it in drawing a remedial plan, *see* Pls.' Br. at 7–8; and

9. The Court then drawing a remedial plan.

And even if the Court and parties somehow accomplished these Sisyphean tasks in less time than Plaintiffs took to draft their Complaint, there would be no time for an appeal of Plaintiffs' novel, untested legal theory to the Supreme Court, irreparably harming Defendants' appellate rights and creating the distinct possibility that the Court's 2014 remedy will have to be *undone* for 2016, to the irreparable harm of candidates and voters. *See Ctr. for Int'l Envtl. Law v. Office of USTR*, 240 F. Supp. 2d 21, 23 (D.D.C. 2003) ("de facto deprivation of the basic right to appeal" is "irreparable harm"); *Diaz*, 932 F. Supp. at 468 (in a *Shaw* case, where "it would appear most unlikely that a proper plan can be drafted by this court in sufficient time to avoid delaying at least the . . . primary," the "harm to the public in delaying either the primary or the general election or even changing the rules as they now stand substantially outweighs the likely benefit to the plaintiffs of granting a preliminary injunction at this time" (citing cases)). Accordingly, the far more sensible, and only fair, course is to resolve this case according "to the normal litigation procedures of pretrial motions, discovery, and direct and cross-examination of witnesses, all unhampered by the severe time constraints imposed" by upcoming election deadlines. *Puerto Rican Legal Def. & Educ. Fund, Inc. v. Gantt*, 796 F. Supp. 698, 700 (E.D.N.Y. 1992).

CONCLUSION

The Court should withhold any discovery or setting of a trial date until it has resolved summary judgment, because this case cannot be resolved in time for the 2014 elections, and therefore there is no need to rush.

Dated: December 13, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 13, 2013, a copy of the INTERVENOR-DEFENDANTS VIRGINIA REPRESENTATIVES' RESPONSE TO PLAINTIFFS' BRIEF ON AVAILABLE REMEDIES 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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EXHIBIT A

Code 1950, § 24.2-302

CODE OF VIRGINIA
TITLE 24.2. ELECTIONS.
CHAPTER 3. ELECTION DISTRICTS, PRECINCTS, AND POLLING PLACES.
ARTICLE 2. CONGRESSIONAL, SENATORIAL, AND HOUSE OF DELEGATES DISTRICTS.

§ 24.2-302 Congressional districts.

A. There shall be eleven Virginia members of the United States House of Representatives elected from eleven congressional districts and each district is entitled to representation by one representative.

B. The eleven congressional districts are:

First. All of Accomack, Caroline, Essex, Gloucester, James City, King and Queen, King George, King William, Lancaster, Mathews, Middlesex, Northampton, Northumberland, Richmond, Spotsylvania, Stafford, Westmoreland, and York Counties; all of the Cities of Fredericksburg, Poquoson, and Williamsburg; and part of the Cities of Hampton and Newport News.

Second. All of the City of Virginia Beach; and part of the City of Norfolk.

Third. All of Charles City, New Kent, and Surry Counties; part of Henrico and Isle of Wight Counties; and part of the Cities of Hampton, Newport News, Norfolk, and Richmond.

Fourth. All of Amelia, Brunswick, Dinwiddie, Greensville, Nottoway, Prince George, Southampton, and Sussex Counties; all of the Cities of Chesapeake, Colonial Heights, Emporia, Franklin, Hopewell, Petersburg, Portsmouth, and Suffolk; and part of Chesterfield and Isle of Wight Counties.

Fifth. All of Appomattox, Buckingham, Campbell, Charlotte, Cumberland, Fluvanna, Franklin, Halifax, Henry, Lunenburg, Mecklenburg, Nelson, Patrick, Pittsylvania, and Prince Edward Counties; all of the Cities of Bedford, Charlottesville, Danville, Martinsville, and South Boston; and part of Albemarle and Bedford Counties.

Sixth. All of Alleghany, Amherst, Augusta, Bath, Botetourt, Highland, and Rockbridge Counties; all of the Cities of Buena Vista, Clifton Forge, Covington, Harrisonburg, Lexington, Lynchburg, Roanoke, Salem, Staunton, and Waynesboro; and part of Bedford, Roanoke, and Rockingham Counties.

Seventh. All of Culpeper, Goochland, Greene, Hanover, Louisa, Madison, Orange, and Powhatan Counties; part of Albemarle, Chesterfield, and Henrico Counties; and part of the City of Richmond.

Eighth. All of Arlington County; all of the Cities of Alexandria and Falls Church; and part of Fairfax County.

Ninth. All of Bland, Buchanan, Carroll, Craig, Dickenson, Floyd, Giles, Grayson, Lee, Montgomery, Pulaski, Russell, Scott, Smyth, Tazewell, Washington, Wise, and Wythe Counties; all of the Cities of Bristol, Galax, Norton, and Radford; and part of Roanoke County.

Tenth. All of Clarke, Fauquier, Frederick, Loudoun, Page, Rappahannock, Shenandoah, and Warren Counties; all of the Cities of Manassas, Manassas Park, and Winchester; and part of Fairfax, Prince William, and Rockingham Counties.

Eleventh. All of the City of Fairfax; and part of Fairfax and Prince William Counties.

C. All references to boundaries of counties and cities shall be interpreted to refer to those in existence on April 1, 1991, and as reported by the United States Bureau of the Census in the 1990 census reports provided pursuant to United States Public Law 94-171, notwithstanding subsequent boundary changes by law, annexation, merger,

consolidation, or the voiding of boundary changes therefore made final.

D. Parts of counties and cities listed in subsection B for the Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Congressional Districts are defined by reference to the United States 1990 Census precincts, parts of precincts, and blocks listed for each congressional district in the Statistical Report (C0830452) on file with the Clerk of the Senate of Virginia pursuant to Chapter 983 of the 1993 Acts of Assembly. Notwithstanding the Statistical Report (C0830452), that part of Timberville Precinct of Rockingham County included in the Sixth District shall be only that part of the 1990 census precinct situated within the corporate limits of the Town of Broadway as of January 1, 1992. That part of Timberville Precinct not within such 1992 corporate limits shall be included in the Tenth District.

E. Parts of counties and cities listed in subsection B for the First, Second, Third, Fourth, and Seventh Congressional Districts are defined by reference to the precincts and to the United States 1990 Census blocks listed for each congressional district in the Statistical Report (C0926750 — Dominion File) on file with the Clerk of the Senate of Virginia pursuant to this act.

(1991, 2nd Sp. Sess., c. 6, §§ 24.1-17.300 through 24.1-17.313; 1992, c. 874; 1993, cc. 641, 983; 1998, c. 1.)

NOTES, REFERENCES, AND ANNOTATIONS

Cross references. — For constitutional provisions as to apportionment of State into congressional districts, see Va. Const., Art. II, § 6.

Editor's note. — Acts 1993, c. 983, amended former § 24.1-17.313, from which this section is derived. Pursuant to § 9-77.11 and Acts 1993, c. 641, cl. 6, effect has been given in this section, as set out above. In accordance with c. 983, "(C0830452)" was substituted for "(C0786555)" in the first and second sentences of subsection D.

Acts 1998, c. 1, cl. 2 provides: "That the parts of the counties and cities listed in subsection B for the First, Second, Third, Fourth, and Seventh Congressional Districts shall be defined by reference to precincts listed in Statistical Report C0926750 — Dominion File. That report incorporates, to the extent practical, locally enacted precincts in effect November 1, 1997. Congressional district lines conform to United States 1990 Census block boundaries. If a locally enacted precinct boundary divides a United States 1990 Census block, the congressional district boundary shall follow the 1990 Census block boundary as shown in the data files and maps supporting Statistical Report C0926750.

"The counties and cities divided in the First, Second, Third, Fourth, and Seventh Congressional Districts are divided as follows:

"Albemarle County: The line dividing Albemarle County between the Fifth and Seventh Congressional Districts is not changed by the provisions of this act.

"Chesterfield County: The Beach, Branches, Dutch Gap, Enon, Ettrick, Harrowgate, Matoaca, Point of Rocks, Walthall, Wells, and Winfrees Store Precincts are in the Fourth Congressional District. The balance of Chesterfield County is in the Seventh Congressional District.

"Henrico County: The Byrd, Cardinal, Causeway, Cedarfield, Coalpit, Crestview, Derbyshire, Dumbarton, Freeman, Gayton, Glen Allen, Glenside, Godwin, Greendale, Hermitage, Hilliard, Innsbrook, Jackson Davis, Johnson, Lakeside, Lakewood, Lauderdale, Longan, Maude Trevvett, Maybeury, Monument Hills, Mooreland, Pemberton, Pinchbeck, Ridge, Ridgefield, Rollingwood, Sadler, Skipwith, Spottswood, Staples Mill, Stoney Run, Summit Court, Three Chopt, Tuckahoe, Tucker, West End, and Westwood Precincts are in the Seventh Congressional District. The balance of Henrico County is in the Third Congressional District.

"Isle of Wight County: The Camps Mill, Carrsville, Orbit, Walters, and Windsor Precincts are in the Fourth

Congressional District. The balance of Isle of Wight County is in the Third Congressional District.

"City of Hampton: The Booker, Burbank, Forrest, Fox Hill, Kecoughtan, Kraft, Langley, Northampton, Phillips, Syms, and Tucker Capps Precincts are in the First Congressional District. The balance of the City of Hampton is in the Third Congressional District.

"City of Newport News: The Beaconsdale, Bland, Boulevard, Charles, Christopher Newport, Deep Creek, Hidenwood, Hilton, Jenkins, Oyster Point, Palmer, Richneck, Riverside, Riverview, Sanford, Saunders, Sedgefield, South Morrison, Warwick, Watkins, and Yates Precincts are in the First Congressional District. The balance of the City of Newport News is in the Third Congressional District.

"City of Norfolk: The Ballentine, Bowling Park, Brambleton, Coleman Place School, Crossroads, Hunton Y, Immanuel, Lafayette Library, Lafayette Presbyterian, Lafayette-Winona, Lindenwood, Maury, Monroe, Northside, Norview Methodist, Norview Recreation Center, Ocean View School, Park Place, Rosemont, Sherwood School, Stuart, Therapeutic Center, Union Chapel, and Young Park Precincts are in the Third Congressional District. The balance of the City of Norfolk is in the Second Congressional District.

"City of Richmond: Precincts 101, 102, 103, 104, 105, 106, 111, 112, 404, 409, 410, 411, 412, and 413 are in the Seventh Congressional District. The balance of the City of Richmond is in the Third Congressional District."

Acts 1998, c. 1, cl. 3 provides: "That this act implements the General Assembly's responsibilities for decennial redistricting and is in force from its passage [February 11, 1998] pursuant to Article II, Section 6, of the Constitution of Virginia."

The 1998 amendments. — The 1998 amendment by c. 1, in subsection B, in the First Congressional District, inserted the counties of Essex, King and Queen, King William, and Spotsylvania, and deleted "part of Hanover, and Spotsylvania Counties" following "Williamsburg," and rewrote the Second, Third, Fourth, and Seventh Congressional Districts; in subsection D, in the first sentence inserted "for the Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Congressional Districts"; and added subsection E.

Law Review. — For article, "The Virginia Legislative Reapportionment Case: Reapportionment Issues Of The 1980's," see 5 Geo. Mason L. Rev. 1 (1982).

Editor's note. — The cases cited below were decided under a former law corresponding to this section.

It is the duty of the General Assembly to reapportion the congressional districts of Virginia so that each district shall be composed of contiguous and compact territory, containing as nearly as practicable an equal number of inhabitants, and, so far as can be done without impairing the essential requirement of substantial equality in the number of inhabitants among the districts, give effect to the community of interest within the districts. Wilkins v. Davis, 205 Va. 803, 139 S.E.2d 849 (1965).

Any plan of districting which is not based upon approximate equality of inhabitants will work inequality in right of suffrage and of power in elections of the representatives in Congress. Wilkins v. Davis, 205 Va. 803, 139 S.E.2d 849 (1965).

Certification of congressional candidates only for election at large from State. — Because 2 U.S.C. § 2c requires that each state establish a number of districts equal to the number of congressional representatives to which such state is entitled, and that "Representatives shall be elected only from districts so established ...," the Supreme Court cannot legally issue a peremptory writ of mandamus requiring the State Board of Elections to certify congressional candidates only for election at large from the State. Simpson v. Mahan, 212 Va. 416, 185 S.E.2d 47 (1971).

Applied in Moon v. Meadows, 952 F. Supp. 1141 (E.D. Va. 1997).
Code 1950, § 24.2-302
VA ST § 24.2-302

END OF DOCUMENT

EXHIBIT B

Va. Code Ann. § 24.2-302.1

WEST'S ANNOTATED CODE OF VIRGINIA
TITLE 24.2. ELECTIONS
CHAPTER 3. ELECTION DISTRICTS, PRECINCTS, AND POLLING PLACES
ARTICLE 2. CONGRESSIONAL, SENATORIAL, AND HOUSE OF DELEGATES DISTRICTS

§ 24. 2-302.1. Congressional districts

A. There shall be eleven Virginia members of the United States House of Representatives elected from eleven congressional districts and each district is entitled to representation by one representative.
B. All references in this section to counties and cities shall be interpreted to refer to those in existence on April 1, 2001, and as reported by the United States Bureau of the Census in the 2000 Census reports provided pursuant to United States Public Law § 94-171, notwithstanding subsequent boundary changes by law, annexation, merger, consolidation, or the voiding of boundary changes theretofore made final.
C. Parts of counties and cities listed in subsection D are defined by reference to the 2000 Census reports for the precincts, parts of precincts, and blocks listed for each congressional district in the Statistical Report on file with the Clerk of the Senate for the Act of Assembly containing the final enactment of this section.
D. The eleven congressional districts are:
First. All of Essex, Gloucester, King and Queen, King George, King William, Lancaster, Mathews, Middlesex, Northumberland, Richmond, Stafford, Westmoreland, and York Counties; all of the Cities of Fredericksburg, Poquoson, and Williamsburg; part of Caroline County comprised of the Bowling Green, Port Royal, Woodford, and Mattaponi Precincts; part of Fauquier County comprised of the Kettle Run, Catlett, Casanova, Lois, Morrisville, Remington, Opal, and Waterloo Precincts and part of the Baldwin Ridge Precinct; part of James City County comprised of the Berkeley A, Berkeley B, Jamestown A, Jamestown B, Jamestown C, Powhatan A, Powhatan B, Stonehouse A, Stonehouse B, Roberts A Part 1, and Roberts A Part 2 Precincts and part of the Roberts B Precinct; part of Prince William County comprised of the Dumfries, Potomac, Graham Park, Quantico, Washington-Reid, and Rippon Precincts; part of Spotsylvania County comprised of the Travelers Rest, Grange Hall, Plank Road, Summit, Frazers Gate, Salem, Battlefield, and Brent's Mill Precincts and part of the Maury Precinct; part of the City of Hampton comprised of the Kraft, Magruder, Northampton, and Tucker Capps Precincts and part of the Burbank Precinct; and part of the City of Newport News comprised of the Richneck, Windsor, Boulevard, Christopher Newport, Watkins, Hidenwood, Palmer, Saunders, Yates, Kiln Creek, Beaconsdale, Sedgefield, and South Morrison Precincts and parts of the Deep Creek, Hilton, Riverside, and Warwick Precincts.
Second. All of Accomack and Northampton Counties; all of the City of Virginia Beach; part of the City of Hampton comprised of the Lasalle, Phoebus, River, Syms, Wythe, Booker, Buckroe, Fox Hill, Kecoughtan, Langley, and Phillips Precincts and part of the Burbank Precinct; and part of the City of Norfolk comprised of the Northside, Titustown Center, Zion Grace, Canterbury, Crossroads, Larchmont Library, Larchmont Recreation Center, Therapeutic Center, Wesley, Azalea Gardens, Barron Black, Easton, Fairlawn, Houston, Bayview School, Bayview United, East Ocean View, Larrymore, Little Creek, Ocean View School, Oceanair, Tarrallton, Third Presbyterian, Ocean View Center Part 1, and Ocean View Center Part 2 Precincts and part of the St. Andrew's Precinct.

Third. All of Charles City, New Kent, and Surry Counties; all of the City of Portsmouth; part of Henrico County comprised of the Adams, Central Gardens, East Highland Park, Fairfield, Ratcliffe, Maplewood, Cedar Fork, Chickahominy, Donahoe, Eanes, Elko, Fairmount, Glen Echo, Highland Springs, Laburnum, Masonic, Town Hall, Montrose, Pleasants, Sandston, Seven Pines, Sullivans, Mehfoud, Whitlocks, Nine Mile, Dorey, and Antioch Precincts; part of Isle of Wight County comprised of part of the Rushmere Precinct; part of James City County comprised of part of the Roberts B Precinct; part of Prince George County comprised of the Blackwater, Brandon, Courts Bldg, and Bland Precincts and part of the Jefferson Park Precinct; part of the City of Hampton comprised of the Aberdeen, Bassette, City Hall, Cooper, East Hampton, Lee, Pembroke, Phenix, Smith, Tarrant, Forrest, Jones, Mallory, and Tyler Precincts; part of the City of Newport News comprised of the Denbigh, Epes, Jenkins, Mcintosh, Oyster Point, Reservoir, Lee Hall, Bland, Charles, Grissom, Nelson, Sanford, Riverview, Briarfield, Carver, Chestnut, Downtown, Dunbar, Huntington, Jefferson, Magruder, Marshall, New Market, Newsome Park, Reed, River, Washington, and Wilson Precincts and parts of the Deep Creek, Hilton, Riverside, and Warwick Precincts; part of the City of Norfolk comprised of the Granby, Tucker House, Ghent Square, Immanuel, Lafayette Library, Lafayette Presbyterian, Lambert's Point, Maury, Ohef Sholom, Park Place, Stuart, Suburban Park, Willard, Ballentine, Tanner's Creek, Bowling Park, Coleman Place School, Lafayette-Winona, Lindenwood, Monroe, Norview Methodist, Norview Recreation Center, Rosemont, Sherwood School, Union Chapel, Berkley, Brambleton, Campostella, Chesterfield, Coleman Place Presbyterian, Hunton Y, Ingleside, Poplar Halls, Young Park, Sherwood Rec Center Part 1, and Sherwood Rec Center Part 2 Precincts and part of the St. Andrew's Precinct; and part of the City of Richmond comprised of the 113, 114, 203, 204, 206, 207, 208, 211, 212, 213, 303, 304, 305, 306, 309, 402, 403, 501, 502, 503, 504, 505, 508, 509, 510, 602, 603, 604, 606, 607, 608, 609, 610, 701, 702, 703, 704, 705, 706, 707, 802, 806, 807, 810, 811, 812, 813, 902, 903, 906, and 911 Precincts and part of the 910 Precinct.

Fourth. All of Amelia, Dinwiddie, Greensville, Nottoway, Powhatan, Southampton, and Sussex Counties; all of the Cities of Chesapeake, Colonial Heights, Emporia, Franklin, Petersburg, Suffolk, and Hopewell; part of Brunswick County comprised of the Alberta, Danieltown, Elmore, and Seymour Precincts and part of the King's Store Precinct; part of Chesterfield County comprised of the Bellwood, South Chester, Enon, North Chester, Drewry's Bluff, Harrowgate, Wells, Ecoff, Point of Rocks, Dutch Gap, Iron Bridge, Gates, Beulah, Bird, Falling Creek, Meadowbrook, Salem Church, Five Forks, Ettrick, Deer Run, Matoaca, Winfrees Store, Beach, Winterpock, Walthall, Branches, Bailey Bridge, and Spring Run Precincts and parts of the Jacobs and Pocahontas 307/Crenshaw 308 Precincts; part of Isle of Wight County comprised of the Smithfield, Carrollton, Pons, Courthouse, Windsor, Orbit, Walters, Camps Mill, Carrsville, and Zuni Precincts and part of the Rushmere Precinct; and part of Prince George County comprised of the Richard Bland College, Templeton, Union Branch, and Rives Precincts and part of the Jefferson Park Precinct.

Fifth. All of Albemarle, Appomattox, Buckingham, Campbell, Charlotte, Cumberland, Fluvanna, Franklin, Greene, Halifax, Lunenburg, Mecklenburg, Nelson, Pittsylvania, and Prince Edward Counties; all of the Cities of Bedford, Charlottesville, Danville, and Martinsville; part of Bedford County comprised of the Stewartsville, Hardy, Chamblissburg, Staunton River, Moneta, Mountain View, Otter Hill, Walton's Store, White House, Huddleston, Shady Grove, Thaxton, Goode, Liberty High School, and Sign Rock Precincts; part of Brunswick County comprised of the Brodnax, Rock Store, Tillman, Dromgoole, Edgerton, Fitzhugh, Sturgeon, and Lawrenceville Precincts and part of the King's Store Precinct; and part of Henry County comprised of the Axton, Irisburg, Mount Olivet, Mountain Valley, Collinsville 1, Daniels Creek, Collinsville 2, Mountain View, Figsboro, Stanleytown, Oak Level, Dyers Store, and Ridgeway Precincts and part of the Fontaine Precinct.

Sixth. All of Amherst, Augusta, Bath, Botetourt, Highland, Rockbridge, Rockingham, and Shenandoah Counties; all of the Cities of Buena Vista, Harrisonburg, Lexington, Lynchburg, Roanoke, Salem, Staunton, and Waynesboro; part of Alleghany County comprised of the Humpback Bridge, Dolly Ann, Callaghan, and Griffith

Precincts; part of Bedford County comprised of the New London, Forest, Jefferson, Cove, Big Island, Sedalia, Kelso, Boonsboro, and Montvale Precincts; and part of Roanoke County comprised of the Green Hill, Plantation, Burlington, Mountain View, Bonsack, Hollins, Poages Mill, Windsor Hills, Garst Mill, Oak Grove 304/Castle Rock 305, North Vinton, South Vinton, Lindenwood, Mount Pleasant, Cotton Hill, Penn Forest, Cave Spring, Ogden, Clearbrook, Mount Vernon, and Hunting Hills Precincts and part of the Glenvar Precinct; and part of the City of Covington, comprised of the Precinct 1-1 and parts of the 2-1 and 3-1 Precincts.

Seventh. All of Culpeper, Goochland, Hanover, Louisa, Madison, Orange, Page, and Rappahannock Counties; part of Caroline County comprised of the Madison and Reedy Church Precincts; part of Chesterfield County comprised of the Belmont, Chippenham, Skinquarter, Tomahawk, Evergreen, Woolridge, Genito, Brandermill, Providence, Lyndale, Smoketree, Monacan, Reams, Manchester, Wagstaff, Davis, Harbour Pointe 401/Swift Creek 411, Huguenot, Crestwood, Midlothian, Robious, Bon Air, Greenfield, Salisbury, Cranbeck, Sycamore, Shenandoah, Beaufont, Watkins, and Belgrade 508/Black Heath 511 Precincts and parts of the Jacobs and Pocahontas 307/Crenshaw 308 Precincts; part of Henrico County comprised of the Brookland, Dumbarton, Glen Allen, Glenside, Greendale, Hermitage, Hilliard, Hunton, Johnson, Lakeside, Longan, Maude Trevvett, Moody, Staples Mill, Stratford Hall, Summit Court, Azalea, Bloomingdale, Brook Hill, Canterbury, Chamberlayne, Glen Lea, Greenwood, Highland Gardens, Hungary, Longdale, Randolph, Upham, Wilkinson, Yellow Tavern, Chipplegate, Landmark, Cardinal, Coalpit, Crestview, Freeman, Innsbrook, Jackson Davis, Lauderdale, Monument Hills, Ridge, Sadler, Cedarfield, Skipwith, Three Chopt, Tucker, Westwood, Causeway, Stoney Run, Byrd, Lakewood, Derbyshire, Gayton, Godwin, Maybeury, Mooreland, Pemberton, Pinchbeck, Ridgefield, Rollingwood, Spottswood, Tuckahoe, and West End Precincts; part of Spotsylvania County comprised of the Partlow, Blaydes Corner, Belmont, Brokenburg, Todd's Tavern, and Holbert Precincts and part of the Maury Precinct; and part of the City of Richmond comprised of the 101, 102, 103, 104, 105, 106, 111, 112, 301, 302, 307, 308, 404, 409, 410, 411, 412, 413, 908, and 909 Precincts and part of the 910 Precinct.

Eighth. All of Arlington County; all of the Cities of Alexandria and Falls Church; part of Fairfax County comprised of the Reston #1, Reston #2, Westbriar, Dogwood, Hunters Woods, Reston #3, Glade, South Lakes, Terraset, Wolftrap, Sunrise Valley, North Point, Aldrin, Pimmit, Bush Hill, Cameron, Franconia, Groveton, Mount Eagle, Pioneer, Rose Hill, Virginia Hills, Beulah, Villages, Kingstowne, Van Dorn, Hayfield 406/Woodlawn 412/Fairfield 413, Baileys, Glen Forest, Lincolnia, Parklawn, Westlawn, Weyanoke, Willston, Skyline, Whittier, Walnut Hill #1, Bren Mar, Edsall, Belle Haven, Belleview, Bucknell, Hollin Hall, Huntington, Kirkside, Marlan, Sherwood, Belvoir, Grosvenor, Fort Buffalo, Graham, Greenway, Marshall, Pine Spring, Shreve, Timber Lane, Woodburn, Magarity, Walnut Hill #2, and Tysons Precincts and parts of the Holmes and Westhampton Precincts.

Ninth. All of Bland, Buchanan, Carroll, Craig, Dickenson, Floyd, Giles, Grayson, Lee, Montgomery, Patrick, Pulaski, Russell, Scott, Smyth, Tazewell, Washington, Wise, and Wythe Counties; all of the Cities of Bristol, Clifton Forge, Galax, Norton, and Radford; part of Alleghany County comprised of the Arritt, Dameron, Low Moor, Jackson Heights Part 1, Jackson Heights Part 2, Iron Gate, and Peters Switch Precincts; part of Henry County comprised of the Bassett 2, Gunville, Scott's Tanyard, Fieldale, Horsepasture, Spencer, Bassett 1, and Hillcrest Precincts and part of the Fontaine Precinct; part of Roanoke County comprised of the Catawba, Mason Valley, Northside, Peters Creek, Bennett Springs, Botetourt Springs, Woodlands, and Bent Mountain Precincts and part of the Glenvar Precinct; part of the City of Covington comprised of the 4-1 and 5-1 Precincts and parts of the 2-1 and 3-1 Precincts; and Montgomery A.

Tenth. All of Clarke, Frederick, Loudoun, and Warren Counties; all of the Cities of Winchester, Manassas and Manassas Park; part of Fairfax County comprised of the Colvin, Fox Mill, Floris 203/Frying Pan 235, Chain Bridge, Chesterbrook, Churchill, Cooper, El Nido, Great Falls, Haycock, Kenmore, Kirby, Langley, Longfellow, Mclean, Salona, Westmoreland, Herndon #1, Herndon #2, Clearview, Forestville, Shouse, Herndon #3, Hutchis-

on, Stuart, Sugarland, Hickory, Seneca, Centre Ridge, Chantilly, Dulles, Franklin, Greenbriar East, Greenbriar West, Kinross, London Towne, Navy, Rocky Run, Virginia Run, Lees Corner, Deer Park, and Cub Run 903/Stone 917 Precincts and part of the Westhampton Precinct; part of Fauquier County comprised of the Warrenton, Marshall, Leeds, Upperville, The Plains, New Baltimore, and Broad Run Precincts and part of the Baldwin Ridge Precinct; and part of Prince William County comprised of the Buckhall, Parkside, Jackson, Evergreen, Loch Lomond, Sinclair, Stonewall, Sudley, Westgate, Catharpin, Bull Run, Plantation, and Mullen Precincts.

Eleventh. All of the City of Fairfax; part of Fairfax County comprised of the Bristow, Chapel, Fairview, Heritage, Kings Park, Olde Creek, North Springfield #1, North Springfield #2, North Springfield #3, Oak Hill, Ravensworth, Wakefield, Lake Braddock, Laurel, Sideburn, Villa, Long Branch, Robinson, Olley, Signal Hill, Bonnie Brae, Flint Hill, Vienna #1, Vienna #2, Vienna #4, Vienna #6, Crestwood, Garfield, Lynbrook, Barcroft, Belvedere, Masonville, Ravenwood, Sleepy Hollow, Saint Albans, Columbia, Hummer, Brook Hill, Camelot, Poe, Ridgelea, Fort Hunt, Stratford, Waynewood, Westgate, Whitman, Woodley, Gunston, Lorton, Newington, Delong, Pohick Run, Blake, Freedom Hill, Mantua, Mosby, Price, Walker, Pine Ridge, Stenwood, Thoreau, Merrifield, Oakton, Nottoway, Penderbrook, Oak Marr, Burke, Cardinal, Clifton, Fairfax Station, Keene Mill, Pohick, Valley, Woodyard, Orange, Cherry Run, Irving, Saratoga, Terra Centre, White Oaks, Hunt, Burke Centre, Sangster, Silverbrook, West Springfield, Popes Head, Parkway, Leehigh, Newgate, Vale, Waples Mill, Centreville, Green Trails, Willow Springs, Woodson Part 1, and Woodson Part 2 Precincts and part of the Holmes Precinct; part of Prince William County comprised of the Brentsville, Armory, Nokesville, Linton Hall, Woodbine, Park, Saunders, Enterprise, Coles, Mccoart, Springwoods, King, Lodge, Westridge, Pattie, Henderson, Montclair, Haymarket, Lake Ridge, Occoquan, Old Bridge, Rockledge, Mohican, Bethel, Chinn, Dale, Neabsco, Godwin, Civic Center, Minnieville, Bel Air, Kerrydale, Belmont, Library, Lynn, Featherstone, Potomac View, and Kilby Precincts; and Fairfax A.

Acts 2001, Sp.S. I, c. 7.

HISTORICAL AND STATUTORY NOTES

Prior to Acts 2001, Sp.S. I, c. 7, the subject matter of this section was contained in § 24. 2-302.

The repeal of § 24. 2-302 and enactment of § 24. 2-302.1 were precleared on October 16, 2001 pursuant to the Voting Rights Act of 1965, as amended and extended, but a suit challenging the redistricting plan has been filed in Petersburg Circuit Court.

CROSS REFERENCES

Apportionment of state into districts, see Const. Art. 2, § 6.

LIBRARY REFERENCES

Key Numbers

United States 11.

Westlaw Key Number Search: 393k11.

Encyclopedias

C.J.S. United States §§ 11, 13 to 15.

UNITED STATES SUPREME COURT

Congressional districts,

Equality of population,

Federal constitutional requirement of population equality for congressional districts, see Kirkpatrick V. Preisler, U.S.Mo.1969, 89 S.Ct. 1225, 394 U.S. 526, 22 L.Ed.2d 519.

Political gerrymandering,

Reapportionment, drawing district boundaries on partisan lines, threshold requirements, justiciability under equal protection clause, see Davis v. Bandemer, U.S.Ind.1986, 106 S.Ct. 2797, 478 U.S. 109, 92 L.Ed.2d 85 .

Racial gerrymandering,

Congressional redistricting plans, racial gerrymandering, see Miller v. Johnson, U.S.Ga.1995, 115 S.Ct. 2475, 515 U.S. 900, 132 L.Ed.2d 762, on remand 922 F.Supp. 1552, on remand 922 F.Supp. 1556.

Historically disadvantaged racial groups, equal protection, reapportionment, racial gerrymandering, see Shaw v. Reno, U.S.N.C.1993, 113 S.Ct. 2816, 509 U.S. 630, 125 L.Ed.2d 511 on remand 861 F.Supp. 408.

Narrowly tailored to serve compelling state interest, redistricting, racial gerrymandering, see Shaw v. Hunt, U.S.N.C.1996, 116 S.Ct. 1894, 517 U.S. 899, 135 L.Ed.2d 207.

Noncompact and bizarrely shaped majority-minority districts, compelling state interest, voting rights Act, redistricting, racial gerrymandering, see Bush v. Vera, U.S.Tex.1996, 116 S.Ct. 1941, 517 U.S. 952, 135 L.Ed.2d 248.

Traditional districting plans, percentage of minority voters compared to minority residents in the county, redistricting, racial gerrymandering, see Lawyer v. Department of Justice, U.S.Fla.1997, 117 S.Ct. 2186.

NOTES OF DECISIONS

Mandamus 3
Standing 2
Validity 1

1. Validity

Racially gerrymandered congressional district in Virginia violated equal protection, in that using race as predominate basis in drawing district lines did not serve compelling state interest, notwithstanding alleged interest in precluding exposure to liability under Voting Rights Act of 1965 (VRA), and Commonwealth failed to use narrowly tailored methods to achieve this goal; evidence did not establish that racially drawn district was necessary to avoid VRA liability, district did not meet preconditions for drawing district based on race so as to avoid such liability, and bizarre and tortured shape of district established that narrowly tailored means were not used in drawing district. U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2 et seq., as amended, 42 U.S.C.A. § 1973 et seq.; Va.Code 1950, § 24. 2-302. Moon v. Meadows, 1997, 952 F.Supp. 1141, affirmed 117 S.Ct. 2501, 521 U.S. 1113, 138 L.Ed.2d 1006. Constitutional Law k 215.3

Statute apportioning Commonwealth into congressional districts which had populations ranging in size from about 313,000 to 527,000 violated state constitutional provision requiring that districts contain as nearly as practicable an equal number of inhabitants and apportionment was invalid under Federal Constitution. Code 1950, § 24-3; Const. § 55; U.S.C.A.Const. art. 1, § 2; U.S.C.A.Const. Amend. 14. Wilkins v. Davis, 1965, 139 S.E.2d 849, 205 Va. 803. Constitutional Law k 225.3(7)

2. Standing

Residents of newly created congressional district in Virginia had standing to challenge only that district as violative of Equal Protection Clause; thus, residents' challenge to state statute setting out geographical boundaries of each of Virginia's congressional districts as unconstitutional, except for that portion dealing with residents' district, failed for lack of standing. U.S.C.A. Const.Amend. 14; Va.Code 1950, § 24. 2-302. Moon v. Meadows, 1997, 952 F.Supp. 1141, affirmed 117 S.Ct. 2501, 521 U.S. 1113, 138 L.Ed.2d 1006. Constitutional Law k 42.3(2)

3. Mandamus

Under federal Act requiring that each state establish number of districts equal to number of congressional representatives to which state is entitled and that representatives be elected only from districts so established, Supreme Court could not legally issue peremptory writ of mandamus requiring State Board of Elections to certify congressional candidates only for election at large from state. Code 1950, § 24.1-4.1; 2 U.S.C.A. § 2c. Simpson v. Mahan, 1971, 185 S.E.2d 47, 212 Va. 416. Mandamus k 74(1)

Va. Code Ann. § 24 .2 -302 .1
VA ST § 24 .2 -302 .1

END OF DOCUMENT

EXHIBIT C

3rd Congressional District
as established 1998

Caroline
Ashland
Hanover
King William
King and Queen
Essex
Richmond
Lancaster
Kilmarnock
Accomack
Irvington
White Stone
Urbanna
Middlesex
West Point
7
Richmond city
Henrico
New Kent
1
Mathews
Gloucester
Chesterfield
Charles City
James City
Williamsburg
Northampton
York
Hopewell
Colonial Heights
Petersburg
Prince George
Claremont
3
Surry
Surry
Poquoson
Dinwiddie
Newport News
Hampton
Waverly
Dendron
Wakefield
Smithfield
Stony Creek
Sussex
4
Isle of Wight
Norfolk
2
Ivor
Portsmouth
Jarratt
Windsor
Virginia Beach
Greensville
Southampton
Suffolk
Chesapeake
Capron
Courtland
Emporia
Franklin city

EXHIBIT D

Congressional District 3

7

3

1

4

2

Hanover
King William
King and Queen
Middlesex
Henrico
New Kent
Richmond city
Gloucester
Mathews
Chesterfield
Charles City
James City
Hopewell
Williamsburg
Colonial Heights
York
Petersburg
Prince George
Surry
Poquoson
Newport News
Hampton
Dinwiddie
Sussex
Isle of Wight
Norfolk
Portsmouth
Chesapeake
Southampton
Suffolk
Greensville

EXHIBIT E

HB 251 (2012)
Congressional District 3

7

1

3

2

4

King William
King and Queen
Middlesex
Mathews
Gloucester
New Kent
Henrico
Richmond city
Charles City
Chesterfield
Hopewell
James City
Williamsburg
Colonial Heights
Petersburg
Prince George
Surry
Dinwiddie
Sussex
Isle of Wight
Southampton
Greensville
Newport News
Hampton
Poquoson
York
Norfolk
Pottsmouth
Chesapeake
Suffolk

EXHIBIT F

Code of Virginia
TITLE 24.2. ELECTIONS
CHAPTER 3. Election Districts, Precincts, and Polling Places (§§ 24.2-300 through 24.2-301.1 to 24.2-313)

◂ Prev

Code of Virginia § 24.2-302.2

Next ▸

Section 24.2-302.2. Congressional districts

A. There shall be 11 Virginia members of the United States House of Representatives elected from 11 congressional districts and each district is entitled to one representative.

B. All references in this section to boundaries of counties and cities shall be interpreted to refer to those in existence on April 1, 2011, and as reported by the United States Bureau of the Census in the 2010 Census reports provided pursuant to United States Public Law 94-171, notwithstanding subsequent boundary changes by law, annexation, merger, consolidation, or the voiding of boundary changes theretofore made final.

C. Parts of counties and cities listed in subsection D are defined by reference to the 2010 Census reports for the precincts, parts of precincts, and blocks listed for each congressional district in the Statistical Report for this enrolled House bill on file with the Clerk of the House of Delegates. Precincts shall be interpreted to refer to those in existence on April 1, 2011, and as reported by the United States Bureau of the Census in the 2010 Census reports provided pursuant to United States Public Law 94-171, notwithstanding subsequent changes made by localities.

D. The 11 congressional districts are:

First. All of Caroline, Essex, Gloucester, King and Queen, King George, King William, Lancaster, Mathews, Middlesex, Northumberland, Richmond, Stafford, Westmoreland, and York Counties; all of the Cities of Fredericksburg, Poquoson, and Williamsburg; part of Fauquier County comprised of the Bealeton (303), Catlett (102), Lois (104), and Morrisville (301) Precincts and part of the Remington (302) Precinct; part of James City County comprised of the Berkeley A Part 1 (101), Berkeley A Part 2 (1012), Berkeley B Part 1 (1021), Berkeley B Part 2 (1022), Berkeley C (103), Jamestown A (201), Jamestown B (202), Powhatan A (301), Powhatan B (302), Powhatan C (303), Powhatan D (304), Roberts A Part 1 (5011), Roberts A Part 2 (5012), Roberts C Part 1 (5031), Roberts C Part 2 (5032), Stonehouse A (401), Stonehouse B (402), and Stonehouse C (403) Precincts and part of the Roberts B (502) Precinct; part of Prince William County comprised of the Ashland (309), Bennett (102), Benton (203), Brentsville (101), Bristow Run (111), Cedar Point (112), Ellis (106), Forest Park (310), Glenkirk (408), Henderson (307), Lake Ridge (501), Limestone (113), Lodge (207), Marshall (202), Marsteller (107), McCoart (204), Montclair (308), Mullen (411), Nokesville (104), Park (109), Pattie (305), Penn (210), Powell (211), Quantico (304), Sinclair (404), Stonewall (405), Sudley North (409), Victory (108), Washington-Reid (306), Westgate (407), Westridge (208), and Woodbine (209) Precincts and part of the Buckland Mills (110) Precinct; part of Spotsylvania County comprised of the Battlefield (701), Brent's Mill (702), Grange Hall (303), Hazel Run (302), Plank Road (301), and Summit (401) Precincts and part of the Lee Hill (403) Precinct; and part of the City of Newport News comprised of the Greenwood (110) Precinct.

Second. All of Accomack and Northampton Counties; all of the City of Virginia Beach; part of the City of Hampton comprised of the Asbury (205), Booker (201), Bryan (202), Burbank (203), Langley (209), Phillips (213), Sandy Bottom (216), and Syms (113) Precincts and part of the Machen (210) Precinct; part of the City of Newport News comprised of the Boulevard (202), Charles

(203), Deer Park (219), Hidenwood (208), Kiln Creek (218), Nelson (210), Oyster Point (105), Palmer (211), Richneck (107), Riverview (217), Sanford (213), Saunders (319), Sedgefield (315), Watkins (320), Wellesley (204), Windsor (109), and Yates (216) Precincts and parts of the Deep Creek (205), Hilton (209), Riverside (212), and Warwick (215) Precincts; and part of the City of Norfolk comprised of the Azalea Gardens (512), Barron Black (406), Bayview School (501), Crossroads (511), East Ocean View (503), Easton (408), Fairlawn (409), Lafayette (205), Larchmont Library (208), Larchmont Recreation Center (209), Larrymore (504), Little Creek (505), Northside (103), Ocean View Center (506), Ocean View School (102), Oceanair (508), Old Dominion (201), Suburban Park (215), Tarrallton (509), Third Presbyterian (510), Willard (218), and Zion Grace (106) Precincts.

Third. All of Charles City and Surry Counties; all of the Cities of Petersburg and Portsmouth; part of Henrico County comprised of the Adams (201), Antioch (501), Azalea (202), Cedar Fork (502), Central Gardens (206), Chickahominy (503), Donahoe (504), Dorey (505), Eanes (506), Elko (507), Fairfield (208), Glen Lea (209), Highland Gardens (211), Highland Springs (508), Laburnum (509), Maplewood (215), Masonic (510), Mehfoud (511), Montrose (512), Nine Mile (513), Pleasants (514), Ratcliffe (220), Rolfe (519), Sandston (515), Sullivans (516), Town Hall (517), Whitlocks (518), and Wilder (222) Precincts; part of Isle of Wight County comprised of parts of the Bartlett (201), Carrollton (202), and Rushmere (301) Precincts; part of James City County comprised of part of the Roberts B (502) Precinct; part of Prince George County comprised of the Blackwater (202), Bland (201), Brandon (203), and Harrison (105) Precincts and part of the Rives (104) Precinct; part of the City of Hampton comprised of the Aberdeen (101), Armstrong (106), Bassette (102), Bethel (212), City Hall (103), Cooper (104), East Hampton (105), Forrest (204), Hampton Library (111), Jones (116), Kecoughtan (117), Kraft (208), Lindsay (107), Mallory (118), Phenix (109), Phoebus (110), Smith (112), Thomas (108), Tucker Capps (214), Tyler (215), and Wythe (115) Precincts and part of the Machen (210) Precinct; part of the City of Newport News comprised of the Bland (201), Briarfield (302), Carver (303), Chestnut (304), Denbigh (101), Downtown (305), Dunbar (306), Epes (102), Huntington (307), Jefferson (308), Jenkins (103), Lee Hall (108), Magruder (309), Marshall (310), McIntosh (104), Newmarket (311), Newsome Park (312), Reed (313), Reservoir (106), River (314), South Morrison (316), Washington (317), and Wilson (318) Precincts and parts of the Deep Creek (205), Hilton (209), Riverside (212), and Warwick (215) Precincts; part of the City of Norfolk comprised of the Ballentine (301), Berkley (402), Bowling Park (303), Brambleton (403), Campostella (404), Chesterfield (405), Chrysler Museum (211), Coleman Place School (304), Ghent Square (203), Granby (101), Hunton Y (411), Immanuel (204), Ingleside (412), Lafayette-Winona (305), Lambert's Point (207), Lindenwood (306), Maury (210), Norview Methodist (308), Norview Middle School (309), Park Place (212), Poplar Halls (413), Rosemont (310), Sherwood Rec Center (311), Sherwood School (312), Stuart (214), Tanner's Creek (302), Taylor Elementary School (213), Titustown Center (104), Tucker House (105), Union Chapel (313), United Way (415), Wesley (217), and Young Park (414) Precincts; part of the City of Richmond comprised of the 113 (113), 114 (114), 203 (203), 204 (204), 206 (206), 207 (207), 208 (208), 211 (211), 212 (212), 213 (213), 301 (301), 302 (302), 303 (303), 304 (304), 305 (305), 306 (306), 307 (307), 308 (308), 402 (402), 501 (501), 503 (503), 504 (504), 505 (505), 508 (508), 509 (509), 510 (510), 602 (602), 603 (603), 604 (604), 606 (606), 607 (607), 609 (609), 610 (610), 701 (701), 702 (702), 703 (703), 705 (705), 706 (706), 707 (707), 802 (802), 806 (806), 810 (810), 811 (811), 812 (812), 814 (814), 902 (902), 903 (903), 908 (908), 909 (909), 910 (910), and 911 (911) Precincts and part of the 404 (404) Precinct; and part of the City of Suffolk comprised of parts of the Bennetts Creek (104), Ebenezer (201), and Harbour View (103) Precincts.

Fourth. All of Amelia, Dinwiddie, Greensville, Nottoway, Powhatan, Southampton, and Sussex Counties; all of the Cities of Chesapeake, Colonial Heights, Emporia, Franklin, and Hopewell; part of Chesterfield County comprised of the Bailey Bridge (315), Beach (305), Bellwood (101), Beulah (202), Bird (203), Birkdale (317), Carver (112), Chippenham (207), Cosby (307), Crenshaw (414), Deer Run (302), Drewry's Bluff (105), Dutch Gap (110), Ecoff (108), Elizabeth Scott (109), Enon (103), Ettrick (301), Falling Creek (205), Five Forks (210), Gates (201), Harrowgate (106), Iron Bridge (111), Jacobs (204), Matoaca (303), Meadowbrook (208), Nash (211), North Chester (104), S. Manchester (308), Salem Church (209), South Chester (102), Southside (213), Spring Run (316), St. Lukes (212), Wells (107), Winfrees Store (304), and Winterpock (306) Precincts; part of Isle of Wight County comprised of the Camps Mill (502), Carrsville (503), Courthouse (401), Orbit (403), Pons (302), Raynor (505), Smithfield (101), Walters (501), Windsor (402), and Zuni (504) Precincts and parts of the Bartlett (201), Carrollton (202), and Rushmere (301) Precincts; part of Prince George County comprised of the Courts Bldg (204), Jefferson Park (205), Richard Bland (101), Templeton (102), and Union Branch (103) Precincts and part of the Rives (104) Precinct; and part of the City of Suffolk comprised of the Airport (401), Chuckatuck (202), Cypress Chapel (303), Driver (102), Elephants Fork/Westhaven (603), Holland (502), Hollywood (701), Holy Neck (503), John F. Kennedy (302), Kilby's Mill (501), King's Fork (203), Lake Cohoon (504), Lakeside (601), Nansemond River (703), Olde Towne (602), Southside (403), Whaleyville (402), White Marsh (301), and

Yeates (705) Precincts and parts of the Bennetts Creek (104), Ebenezer (201), and Harbour View (103) Precincts.

Fifth. All of Albemarle, Appomattox, Brunswick, Buckingham, Campbell, Charlotte, Cumberland, Fluvanna, Franklin, Greene, Halifax, Lunenburg, Madison, Mecklenburg, Nelson, Pittsylvania, Prince Edward, and Rappahannock Counties; all of the Cities of Bedford, Charlottesville, and Danville; part of Bedford County comprised of the Bedford Christian Church (703), Bedford County PSA (302), Bethesda Methodist Church (303), Body Camp Elem School (204), Chamblissburg First Aid Bldg (103), Goode Rescue Squad (701), Goodview Elem School (101), Hardy Fire & Rescue Bldg (102), Huddleston Elem School (305), Liberty High School (702), Moneta Elem School (203), Saunders Grove Brethren Church (604), Saunders Vol Fire Dept (205), Shady Grove Baptist Church (602), Staunton River High School (202), and Thaxton Elem School (603) Precincts and part of the New London Academy (301) Precinct; part of Fauquier County comprised of the Airlie (202), Baldwin Ridge (203), Broad Run (503), Casanova (103), Courthouse (201), Kettle Run (101), Leeds (402), Marshall (401), New Baltimore (502), Opal (105), The Plains (501), Warrenton (204), and Waterloo (403) Precincts and part of the Remington (302) Precinct; and part of Henry County comprised of the Axton (302), Irisburg (303), Mountain Valley (305), Mountain View (405), and Ridgeway #1 (603) Precincts and part of the Mount Olivet (304) Precinct.

Sixth. All of Amherst, Augusta, Bath, Botetourt, Highland, Page, Rockbridge, Rockingham, Shenandoah, and Warren Counties; all of the Cities of Buena Vista, Harrisonburg, Lexington, Lynchburg, Roanoke, Staunton, and Waynesboro; part of Bedford County comprised of the Big Island Elem School (502), Boonsboro Elem School (505), Boonsboro Ruritan Club (506), Forest Elem School (401), Forest Youth Athletic Assoc. (304), Knights Of Columbus Bldg (403), Montvale Elem School (601), Odd Fellows Hall (504), Pleasant View (507), Sedalia Center (503), Suck Springs (704), and Thomas Jefferson Elem School (402) Precincts and part of the New London Academy (301) Precinct; and part of Roanoke County comprised of the Bonsack (402), Burlington (202), Castle Rock (305), Cave Spring (503), Clearbrook (505), Cotton Hill (501), Garst Mill (306), Hollins (206), Hunting Hills (507), Lindenwood (405), Mount Pleasant (406), Mount Vernon (506), Mountain View (203), North Vinton (403), Oak Grove (304), Ogden (504), Orchards (205), Penn Forest (502), Plantation (201), Poages Mill (302), South Vinton (404), and Windsor Hills (303) Precincts.

Seventh. All of Culpeper, Goochland, Hanover, Louisa, New Kent, and Orange Counties; part of Chesterfield County comprised of the Beaufont (513), Belgrade (508), Belmont (206), Black Heath (511), Bon Air (505), Brandermill (403), Cranbeck (509), Crestwood (502), Davis (515), Evergreen (312), Genito (402), Greenfield (506), Harbour Pointe (401), Huguenot (501), La Prade (405), Manchester (409), Midlothian (503), Monacan (407), Providence (404), Reams (408), Robious (504), Salisbury (507), Shenandoah (413), Skinquarter (309), Smoketree (406), Swift Creek (411), Sycamore (510), Tomahawk (310), Wagstaff (410), Watkins (514), and Woolridge (313) Precincts; part of Henrico County comprised of the Belmont (203), Brookland (204), Byrd (401), Canterbury (205), Causeway (301), Cedarfield (302), Chamberlayne (207), Coalpit (101), Crestview (303), Derbyshire (402), Dumbarton (102), Freeman (403), Gayton (404), Glen Allen (103), Glenside (104), Godwin (405), Greendale (105), Greenwood (210), Hermitage (106), Hilliard (107), Hollybrook (212), Hungary (213), Hungary Creek (116), Hunton (108), Innsbrook (304), Jackson Davis (305), Johnson (109), Lakeside (110), Lakewood (406), Lauderdale (407), Longan (111), Longdale (214), Maude Trevvett (112), Maybeury (408), Monument Hills (306), Moody (216), Mooreland (409), Mountain (217), Nuckols Farm (307), Oakview (218), Pemberton (410), Pinchbeck (411), Pocahontas (308), Randolph (219), Ridge (309), Ridgefield (412), Rivers Edge (317), Rollingwood (413), Sadler (310), Shady Grove (311), Short Pump (318), Skipwith (312), Spottswood (414), Springfield (313), Staples Mill (113), Stoney Run (314), Stratford Hall (221), Summit Court (114), Three Chopt (315), Tuckahoe (415), Tucker (316), Wellborne (417), West End (416), Westwood (115), and Yellow Tavern (223) Precincts; part of Spotsylvania County comprised of the Belmont (501), Blaydes Corner (102), Brock (505), Brokenburg (502), Chancellor (204), Courthouse (504), Elys Ford (201), Fairview (703), Frazers Gate (402), Massaponax (104), Ni River (203), Partlow (101), Piedmont (603), Salem (601), Smith Station (602), Todd's Tavern (503), Travelers Rest (103), and Wilderness (202) Precincts and part of the Lee Hill (403) Precinct; and part of the City of Richmond comprised of the 101 (101), 102 (102), 104 (104), 105 (105), 106 (106), 111 (111), 112 (112), 309 (309), 409 (409), 410 (410), 412 (412), and 413 (413) Precincts and part of the 404 (404) Precinct.

Eighth. All of Arlington County; all of the Cities of Alexandria and Falls Church; and part of Fairfax County comprised of the Alban (623), Baileys (501), Belle Haven (601), Belleview (602), Belvoir (619), Bren Mar (526), Brook Hill (521), Bucknell (604), Bush Hill (401), Cameron (402), Chesterbrook (302), Clermont (423), Crestwood (415), Edsall (527), El Nido (305), Fairfield (413), Fort Buffalo (703), Fort Hunt (605), Franconia (404), Garfield (417), Glen Forest #2 (529), Glen Forest (505), Graham (705), Greenway (706), Grosvenor (621), Groveton (405), Gunston (616), Haycock (307), Hayfield (406), Hollin Hall (606), Holmes #1 (506), Huntington (607), Huntley (424), Island Creek (427), Kingstowne (421), Kirby (310), Kirkside (608), Lane (419), Leewood (531), Lincolnia (507), Longfellow (312), Lorton (617), Lorton Center (625), Lorton Station (622), Lynbrook (418), Marlan (609), Marshall (708), Mount Eagle (408), Parklawn (510), Pimmit (315), Pine Spring (710), Pioneer (409), Poe (523), Rose Hill (410), Salona (316), Saratoga (626), Sherwood (610), Shreve (712), Skyline (520), Stratford (611), Timber Lane (713), Van Dorn (422), Villages (420), Virginia Hills (411), Walnut Hill # 1 (525), Walnut Hill # 2 (728), Waynewood (612), Westgate (613), Westhampton (317), Westlawn (515), Westmoreland (318), Weyanoke (516), Whitman (614), Whittier (524), Willston (517), Wilton (425), Woodlawn (627), and Woodley (615) Precincts and parts of the Magarity (726) and Saint Albans (513) Precincts.

Ninth. All of Alleghany, Bland, Buchanan, Carroll, Craig, Dickenson, Floyd, Giles, Grayson, Lee, Montgomery, Patrick, Pulaski, Russell, Scott, Smyth, Tazewell, Washington, Wise, and Wythe Counties; all of the Cities of Bristol, Covington, Galax, Martinsville, Norton, Radford, and Salem; part of Henry County comprised of the Bassett No. 1 (501), Bassett No. 2 (101), Collinsville Number 1 (401), Collinsville Number 2 (404), Daniel's Creek (402), Dyers Store (505), Fieldale (201), Figsboro (502), Fontaine (601), Gunville (102), Hillcrest (602), Horsepasture #1 (202), Horsepasture #2 (203), Oak Level (504), Ridgeway #2 (604), Scott's Tanyard (103), Spencer (204), and Stanleytown (503) Precincts and part of the Mount Olivet (304) Precinct; and part of Roanoke County comprised of the Bennett Springs (107), Bent Mountain (301), Botetourt Springs (204), Catawba (101), Glenvar (103), Green Hill (106), Mason Valley (102), Northside (104), Peters Creek (105), and Wildwood (108) Precincts.

Tenth. All of Clarke, Frederick, and Loudoun Counties; all of the Cities of Manassas, Manassas Park, and Winchester; part of Fairfax County comprised of the Brookfield (902), Bull Run (923), Chain Bridge (301), Churchill (303), Clearview (321), Clifton (803), Colvin (330), Cooper (304), Cub Run (903), Deer Park (921), Dulles (904), Fairfax Station (805), Forestville (322), Fountainhead (845), Fox Mill (229), Franklin (905), Great Falls (306), Greenbriar West (847), Hickory (328), Kenmore (309), Kinross (908), Langley (311), Lees Corner (920), Lees Corner West (927), McLean (314), Navy (911), Newgate North (849), Newgate South (854), Popes Head (841), Poplar Tree (928), Rocky Run (913), Sangster (838), Seneca (329), Shouse (323), Silverbrook (839), South Run (850), Spring Hill (331), Stone (917), Sugarland (327), Vale (914), Virginia Run (915), Waples Mill (916), and Woodyard (815) Precincts and part of the Old Mill (925) Precinct; and part of Prince William County comprised of the Alvey (406), Battlefield (402), Buckhall (103), Bull Run (403), Evergreen (401), Mountain View (410), Pace West (412), Parkside (105), Pr. William A (000), and Signal Hill (114) Precincts and part of the Buckland Mills (110) Precinct.

Eleventh. All of the City of Fairfax; part of Fairfax County comprised of the Aldrin (234), Barcroft (502), Belvedere (503), Blake (701), Bonnie Brae (126), Bristow (102), Burke (801), Burke Centre (127), Camelot (522), Cameron Glen (238), Cardinal (128), Centerpointe (844), Centre Ridge (901), Centreville (918), Chapel (104), Cherry Run (825), Columbia (518), Coppermine (239), Dogwood (220), Eagle View (853), Fair Oaks (848), Fairfax A (0700), Fairlakes (843), Fairview (105), Flint Hill (202), Floris (203), Freedom Hill (704), Frying Pan (235), Glade (223), Green Trails (919), Greenbriar East (846), Greenspring (426), Heritage (106), Herndon #1 (319), Herndon #2 (320), Herndon #3 (324), Holmes #2 (530), Hummer (519), Hunt (624), Hunters Woods (221), Hutchison (325), Irving (827), Keene Mill (129), Kilmer (733), Kings Park (108), Lake Braddock (118), Laurel (119), Laurel Hill (628), London Towne East (910), London Towne West (924), Long Branch (122), Mantua (707), Masonville (508), McNair (237),

Merrifield (721), Monument (852), Mosby (709), Newington (618), North Point (233), North Springfield # 1 (110), North Springfield # 2 (111), Nottoway (729), Oak Hill (113), Oak Marr (732), Oakton (727), Olde Creek (109), Olley (124), Orange (824), Parkway (842), Penderbrook (730), Pine Ridge (718), Pohick (811), Powell (926), Price (711), Ravensworth (115), Ravenwood (511), Reston #1 (208), Reston #2 (209), Reston #3 (222), Ridgelea (528), Robinson (123), Sideburn (120), Signal Hill (125), Sleepy Hollow (512), South County (629), South Lakes (224), Stenwood (719), Stuart (236), Sunrise Valley (227), Terra Centre (130), Terraset (225), Thoreau (720), Tysons (731), Valley (812), Vienna #1 (213), Vienna #2 (214), Vienna #4 (216), Vienna #6 (218), Villa (121), Wakefield (116), Walker (714), West Springfield (840), Westbriar (219), White Oaks (833), Willow Springs (851), Wolftrap (226), Woodburn (717), and Woodson (117) Precincts and parts of the Magarity (726), Old Mill (925), and Saint Albans (513) Precincts; and part of Prince William County comprised of the Bel Air (606), Belmont (701), Bethel (506), Beville (205), Chinn (507), Civic Center (604), Dale (601), Dumfries (301), Enterprise (608), Featherstone (704), Freedom (609), Godwin (603), Graham Park (303), Kerrydale (607), Kilby (707), King (206), Library (702), Lynn (703), Minnieville (605), Mohican (505), Neabsco (602), Occoquan (502), Old Bridge (503), Potomac (302), Potomac View (705), Rippon (706), River Oaks (708), Rockledge (504), Saunders (201), Springwoods (508), and Swans Creek (311) Precincts.

2012, c. 1.

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Code of Virginia § 24.2-302.2

Next ▸

EXHIBIT G

Current Congressional Districts
District Population Summary

DISTRICT	Total Population	Target	Difference	Deviation from Ideal
1	786,237	727,366	58,871	8.1%
2	646,184	727,366	-81,182	-11.2%
3	663,390	727,366	-63,976	-8.8%
4	738,639	727,366	11,273	1.5%
5	685,859	727,366	-41,507	-5.7%
6	704,056	727,366	-23,310	-3.2%
7	757,917	727,366	30,551	4.2%
8	701,010	727,366	-26,356	-3.6%
9	656,200	727,366	-71,166	-9.8%
10	869,437	727,366	142,071	19.5%
11	792,095	727,366	64,729	8.9%

Current Congressional Districts
Demographic Population Totals

DISTRICT	Total Population	White	% White	Black	% Black	AIAN	% AIAN	Asian	% Asian	HawPI	% HawPI	Other	% Other	Multi	% Multi	Hispanic	% Hispanic
1	786,237	558,404	71.0%	164,455	20.9%	6,612	0.8%	26,452	3.4%	1,105	0.1%	22,428	2.9%	6,781	0.9%	53,012	6.7%
2	646,184	427,383	66.1%	149,285	23.1%	5,459	0.8%	39,012	6.0%	1,357	0.2%	16,213	2.5%	7,475	1.2%	45,210	7.0%
3	663,390	246,414	37.1%	373,134	56.2%	5,407	0.8%	15,449	2.3%	901	0.1%	14,355	2.2%	7,730	1.2%	32,713	4.9%
4	738,639	441,259	59.7%	254,180	34.4%	5,074	0.7%	17,637	2.4%	787	0.1%	14,724	2.0%	4,978	0.7%	33,353	4.5%
5	685,859	501,303	73.1%	155,886	22.7%	3,753	0.5%	12,312	1.8%	311	0.0%	10,204	1.5%	2,090	0.3%	20,935	3.1%
6	704,056	585,107	83.1%	84,891	12.1%	4,348	0.6%	12,311	1.7%	390	0.1%	14,700	2.1%	2,309	0.3%	30,117	4.3%
7	757,917	563,423	74.3%	135,386	17.9%	4,604	0.6%	32,784	4.3%	523	0.1%	17,198	2.3%	3,999	0.5%	36,794	4.9%
8	701,010	444,616	63.4%	99,886	14.2%	5,182	0.7%	84,581	12.1%	844	0.1%	59,460	8.5%	6,441	0.9%	127,533	18.2%
9	656,200	609,813	92.9%	28,039	4.3%	3,185	0.5%	8,764	1.3%	254	0.0%	5,114	0.8%	1,031	0.2%	11,632	1.8%
10	869,437	611,159	70.3%	71,471	8.2%	5,327	0.6%	119,178	13.7%	907	0.1%	55,074	6.3%	6,321	0.7%	117,278	13.5%
11	792,095	497,971	62.9%	96,841	12.2%	5,912	0.7%	130,333	16.5%	1,200	0.2%	52,413	6.6%	7,425	0.9%	123,248	15.6%

Current Congressional Districts
Voting Age Population Totals

DISTRICT	Voting Age Pop.	VAP White	% VAP White	VAP Black	% VAP Black	VAP AIAN	% VAP AIAN	VAP Asian	% VAP Asian	VAP HawPI	% VAP HawPI	VAP Other	% VAP Other	VAP Multi	% VAP Multi	VAP Hispanic	% VAP Hispanic
1	592,940	434,385	73.3%	116,161	19.6%	4,797	0.8%	18,735	3.2%	756	0.1%	14,488	2.4%	3,618	0.6%	33,602	5.7%
2	500,240	343,037	68.6%	107,121	21.4%	4,217	0.8%	29,285	5.9%	998	0.2%	11,259	2.3%	4,323	0.9%	30,312	6.1%
3	511,559	207,441	40.6%	271,419	53.1%	4,200	0.8%	12,758	2.5%	652	0.1%	10,357	2.0%	4,732	0.9%	22,506	4.4%
4	557,742	342,184	61.4%	186,644	33.5%	3,746	0.7%	12,349	2.2%	492	0.1%	9,614	1.7%	2,713	0.5%	21,184	3.8%
5	543,596	405,436	74.6%	117,536	21.6%	2,866	0.5%	9,685	1.8%	238	0.0%	6,529	1.2%	1,306	0.2%	13,800	2.5%
6	556,067	472,240	84.9%	60,303	10.8%	3,346	0.6%	9,008	1.6%	295	0.1%	9,455	1.7%	1,420	0.3%	19,404	3.5%
7	576,326	437,613	75.9%	98,210	17.0%	3,360	0.6%	23,110	4.0%	356	0.1%	11,362	2.0%	2,315	0.4%	24,120	4.2%
8	565,094	370,959	65.6%	75,734	13.4%	3,960	0.7%	66,225	11.7%	675	0.1%	43,128	7.6%	4,413	0.8%	93,296	16.5%
9	528,131	492,562	93.3%	21,444	4.1%	2,579	0.5%	7,287	1.4%	204	0.0%	3,343	0.6%	712	0.1%	7,810	1.5%
10	629,287	453,796	72.1%	49,016	7.8%	3,641	0.6%	82,026	13.0%	644	0.1%	36,543	5.8%	3,621	0.6%	77,158	12.3%
11	586,365	379,691	64.8%	66,660	11.4%	4,074	0.7%	95,206	16.2%	822	0.1%	35,756	6.1%	4,156	0.7%	83,665	14.3%

Current Congressional Districts
Election Data

DISTRICT	Rep. Gov '09	Dem. Gov '09	Rep. Lt. Gov '09	Dem. Lt. Gov '09	Rep. Att. Gen. '09	Dem. Att. Gen. '09	Rep. Pres. '08	Dem. Pres. '08	Other Pres. '08	Rep. U.S. Sen. '08	Dem. U.S. Sen. '08	Other U.S. Sen. '08
1	65%	35%	62%	38%	63%	37%	53%	47%	1%	38%	61%	1%
2	62%	38%	56%	44%	60%	40%	50%	50%	1%	34%	64%	1%
3	34%	66%	33%	67%	35%	65%	25%	75%	1%	18%	81%	1%
4	61%	39%	59%	41%	61%	39%	50%	49%	1%	37%	61%	1%
5	61%	39%	60%	40%	62%	38%	52%	47%	1%	35%	64%	1%
6	67%	33%	66%	34%	67%	33%	58%	41%	1%	41%	58%	1%
7	66%	34%	63%	37%	65%	35%	54%	45%	1%	39%	59%	1%
8	39%	61%	37%	63%	36%	64%	32%	67%	1%	25%	73%	1%
9	67%	33%	66%	34%	66%	34%	59%	39%	1%	36%	63%	1%
10	61%	39%	58%	42%	58%	42%	48%	51%	1%	38%	61%	1%
11	55%	45%	52%	48%	52%	48%	44%	56%	1%	35%	64%	1%

EXHIBIT H

HB 251 Introduced - Delegate Bell
Population Totals

DISTRICT	Total Pop.	Target	Difference	Deviation
1	727,366	727,366	0	0.0%
2	727,366	727,366	0	0.0%
3	727,366	727,366	0	0.0%
4	727,366	727,366	0	0.0%
5	727,365	727,366	-1	0.0%
6	727,366	727,366	0	0.0%
7	727,366	727,366	0	0.0%
8	727,366	727,366	0	0.0%
9	727,366	727,366	0	0.0%
10	727,365	727,366	-1	0.0%
11	727,366	727,366	0	0.0%

HB 251 Introduced - Delegate Bell
Racial Demographics

DISTRICT	Total Population	White	% White	Black	% Black	AIAN	% AIAN	Asian	% Asian	HawPI	% HawPI	Other	% Other	Multi	% Multi	Total Hispanic	% Hispanic
1	727,366	527,650	72.5%	130,061	17.9%	6,435	0.9%	29,672	4.1%	1,035	0.1%	26,577	3.7%	5,936	0.8%	61,279	8.4%
2	727,366	483,615	66.5%	167,162	23.0%	5,983	0.8%	42,530	5.8%	1,489	0.2%	18,340	2.5%	8,247	1.1%	50,019	6.9%
3	727,366	246,712	33.9%	432,581	59.5%	5,554	0.8%	16,134	2.2%	967	0.1%	16,781	2.3%	8,637	1.2%	37,044	5.1%
4	727,366	447,441	61.5%	235,678	32.4%	5,098	0.7%	18,153	2.5%	782	0.1%	15,248	2.1%	4,966	0.7%	34,360	4.7%
5	727,365	542,589	74.6%	154,368	21.2%	4,149	0.6%	13,088	1.8%	371	0.1%	10,554	1.5%	2,246	0.3%	22,973	3.2%
6	727,366	607,889	83.6%	84,851	11.7%	4,609	0.6%	12,343	1.7%	407	0.1%	14,868	2.0%	2,399	0.3%	31,018	4.3%
7	727,366	556,598	76.5%	111,369	15.3%	4,698	0.6%	33,412	4.6%	559	0.1%	16,836	2.3%	3,894	0.5%	36,815	5.1%
8	727,366	454,669	62.5%	105,900	14.6%	5,554	0.8%	89,760	12.3%	962	0.1%	63,612	8.7%	6,909	0.9%	135,594	18.6%
9	727,366	666,198	91.6%	40,053	5.5%	3,526	0.5%	9,626	1.3%	272	0.0%	6,506	0.9%	1,185	0.2%	13,904	1.9%
10	727,365	527,743	72.6%	54,611	7.5%	4,011	0.6%	96,867	13.3%	778	0.1%	38,400	5.3%	4,955	0.7%	85,367	11.7%
11	727,366	425,748	58.5%	96,820	13.3%	5,246	0.7%	137,228	18.9%	957	0.1%	54,161	7.4%	7,206	1.0%	123,452	17.0%

HB 251 Introduced - Delegate Bell
Voting Age Population

DISTRICT	Voting Age Persons	VAP White	% VAP White	VAP Black	% VAP Black	VAP AIAN	% VAP AIAN	VAP Asian	% VAP Asian	VAP HawPI	% VAP HawPI	VAP Other	% VAP Other	VAP Multi	% VAP Multi	Voting Age Hispanic	% VAP Hispanic
1	543,139	405,154	74.6%	91,813	16.9%	4,600	0.8%	20,586	3.8%	681	0.1%	17,157	3.2%	3,148	0.6%	38,845	7.2%
2	565,464	389,929	69.0%	120,213	21.3%	4,640	0.8%	32,067	5.7%	1,102	0.2%	12,768	2.3%	4,745	0.8%	33,688	6.0%
3	560,158	208,802	37.3%	315,603	56.3%	4,358	0.8%	13,297	2.4%	687	0.1%	12,123	2.2%	5,288	0.9%	25,479	4.5%
4	547,486	346,507	63.3%	171,434	31.3%	3,750	0.7%	12,721	2.3%	493	0.1%	9,926	1.8%	2,655	0.5%	21,796	4.0%
5	574,341	436,040	75.9%	116,491	20.3%	3,156	0.5%	10,186	1.8%	283	0.0%	6,784	1.2%	1,401	0.2%	15,077	2.6%
6	572,702	488,611	85.3%	60,264	10.5%	3,520	0.6%	9,010	1.6%	305	0.1%	9,534	1.7%	1,458	0.3%	19,899	3.5%
7	549,562	428,788	78.0%	80,425	14.6%	3,398	0.6%	23,375	4.3%	373	0.1%	10,975	2.0%	2,228	0.4%	23,883	4.3%
8	580,212	375,269	64.7%	79,591	13.7%	4,213	0.7%	69,715	12.0%	738	0.1%	46,039	7.9%	4,647	0.8%	98,819	17.0%
9	584,877	538,799	92.1%	30,113	5.1%	2,853	0.5%	7,897	1.4%	219	0.0%	4,201	0.7%	795	0.1%	9,226	1.6%
10	520,811	387,308	74.4%	36,962	7.1%	2,706	0.5%	65,528	12.6%	541	0.1%	25,026	4.8%	2,740	0.5%	55,325	10.6%
11	548,595	334,137	60.9%	67,339	12.3%	3,592	0.7%	101,292	18.5%	710	0.1%	37,301	6.8%	4,224	0.8%	84,820	15.5%

HB 251 Introduced - Delegate Bell
Election Data

DISTRICT	Rep. Gov '09	Dem. Gov '09	Rep. Lt. Gov '09	Dem. Lt. Gov '09	Rep. Att. Gen. '09	Dem. Att. Gen. '09	Rep. Pres. '08	Dem. Pres. '08	Other Pres. '08	Rep. U.S. Sen. '08	Dem. U.S. Sen. '08	Other U.S. Sen. '08
1	66%	34%	63%	37%	64%	36%	53%	46%	1%	39%	60%	1%
2	62%	38%	57%	43%	60%	40%	50%	49%	1%	35%	64%	1%
3	31%	69%	29%	71%	31%	69%	22%	78%	1%	16%	83%	1%
4	63%	37%	60%	40%	62%	38%	51%	48%	1%	39%	60%	1%
5	62%	38%	61%	39%	62%	38%	52%	47%	1%	36%	63%	1%
6	67%	33%	67%	33%	68%	32%	58%	41%	1%	42%	57%	1%
7	68%	32%	65%	35%	67%	33%	56%	43%	1%	41%	58%	1%
8	40%	60%	38%	62%	38%	62%	33%	66%	1%	26%	73%	1%
9	66%	34%	66%	34%	66%	34%	59%	40%	1%	36%	63%	1%
10	63%	37%	60%	40%	60%	40%	50%	50%	1%	39%	60%	1%
11	50%	50%	47%	53%	47%	53%	38%	61%	1%	30%	68%	1%

EXHIBIT I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MARK A. FAVORS, HOWARD LEIB, LILLIE H. GALAN, EDWARD A. MULRAINE, WARREN SCHREIBER, and WEYMAN A. CAREY,

Plaintiffs,

DONNA KAYE DRAYTON, EDWIN ELLIS, AIDA FORREST, GENE A. JOHNSON, JOY WOOLLEY, SHEILA WRIGHT, MELVIN BOONE, GRISSELLE GONZALEZ, DENNIS O. JONES, REGIS THOMPSON LAWRENCE, AUBREY PHILLIPS, LINDA LEE, SHING CHOR CHUNG, JULIA YANG, JUNG HO HONG, JUAN RAMOS, NICK CHAVARRIA, GRACIELA HEYMANN, SANDRA MARTINEZ, EDWIN ROLDAN, MANOLIN TIRADO, LINDA ROSE, EVERET MILLS, ANTHONY HOFFMAN, KIM THOMPSON-WEREKOH, CARLOTTA BISHOP, CAROL RINZLER, GEORGE STAMATIADES, JOSEPHINE RODRIGUEZ, SCOTT AUSTER, and ITZCHOK ULLMAN,

Intervenor-Plaintiffs,

-against-

ANDREW M. CUOMO, as Governor of the State of New York, ROBERT J. DUFFY, as President of the Senate of the State of New York, DEAN G. SKELOS, as Majority Leader and President Pro Tempore of the Senate of the State of New York, SHELDON SILVER, as Speaker of the Assembly of the State of New York, JOHN L. SAMPSON, as Minority Leader of the Senate of the State of New York, BRIAN M. KOLB, as Minority Leader of the Assembly of the State of New York, NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT ("LATFOR"), JOHN J. McENENY, as Member of LATFOR, ROBERT

OPINION AND ORDER

DOCKET # 11-CV-5632 (RR)(GEL)(DLI)(RLM)

OAKS, as Member of LATFOR, ROMAN HEDGES, as Member of LATFOR, MICHAEL F. NOZZOLIO, as Member of LATFOR, MARTIN MALAVÉ DILAN, as Member of LATFOR, and WELQUIS R. LOPEZ, as Member of LATFOR,

Defendants.

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REENA RAGGI, United States Circuit Judge,
GERARD E. LYNCH, United States Circuit Judge,
DORA L. IRIZARRY, United States District Judge:

In this opinion and order, we address several outstanding motions following our previous orders denying defendants' motions to dismiss the original complaint, see Favors v. Cuomo, No. 11-cv-5632 (RR)(GEL)(DLI)(RLM), 2012 WL 824858 (E.D.N.Y. Mar. 8, 2012), and adopting, with slight modifications, Magistrate Judge Roanne L. Mann's report and recommendation for the enactment of a new congressional redistricting plan for New York that complies with federal and state law, see Favors v. Cuomo, No. 11-cv-5632 (RR)(GEL)(DLI)(RLM), 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012). First, we deny defendants Dean G. Skelos's, Michael F. Nozzolio's, and Welquis R. Lopez's (collectively, the "Senate Majority Defendants") motion to dismiss the amended complaints for lack of ripeness and failure to state a claim. Second, we grant the Senate Majority Defendants' and defendants Sheldon Silver's, John J. McEneny's, and Roman Hedge's (collectively, the "Assembly Majority Defendants") motions to dismiss intervening plaintiff Itzchok Ullman's complaint for failure to state a claim. Third, we deny the motions for preliminary injunctive

relief filed by Donna Kaye Drayton, Edwin Ellis, Aida Forrest, Gene A. Johnson, Joy Woolley, Sheila Wright, Melvin Boone, Grisselle Gonzalez, Dennis O. Jones, Regis Thompson Lawrence, and Aubrey Phillips ("Drayton Intervenors"); and Juan Ramos, Nick Chavarria, Graciela Heymann, Sandra Martinez, Edwin Roldan, and Manolin Tirado ("Ramos Intervenors"). Fourth, we grant defendants John L. Sampson's and Martin Malavé Dilan's (collectively, the "Senate Minority Defendants") motion for leave to amend their answer and to file a cross-claim against the Senate Majority Defendants. Fifth, we deny the motion to intervene filed by Todd Breitbart, Tobias Sheppard Bloch, Gregory Lobo-Jost, Raul Rothblatt, Mark Weisman and David Wes Williams (collectively, "Proposed Breitbart Intervenors") .

In resolving these motions, we assume familiarity with the facts and record of the underlying proceedings. Nevertheless, we begin by providing a brief background focusing on the events that transpired on and after March 15, 2012, when New York enacted redistricting plans for the State Assembly and Senate.

I. Background

On March 15, 2012, Governor Andrew M. Cuomo signed into law newly enacted state legislative districts based upon the 2010 census ("New Senate Plan," "New Assembly Plan" and, collectively, "New Plans"). Before putting the New Plans into effect, however, defendants[1] had to obtain preclearance under Section 5 of the Voting Rights Act, see 42

[1] Defendants, all sued in their official capacities, are Andrew M. Cuomo, as Governor of the State of New York; Robert J. Duffy, as President of the State Senate; Dean G. Skelos,

U.S.C. § 1973c, from either the United States Department of Justice ("DOJ") or the United States District Court for the District of Columbia ("D.C. District Court") because New York, Kings, and Bronx counties are "covered" jurisdictions, see 28 C.F.R., pt. 51, App. Defendants took both steps to obtain preclearance. The New Senate Plan was submitted to DOJ on March 16, 2012, and the New Assembly Plan was submitted to DOJ on March 28, 2012. Meanwhile, actions were filed with the D.C. District Court seeking the empaneling of a three-judge court and declaratory judgments that the New Plans comply with Section 5 of the Voting Rights Act. See Compl., New York v. United States, No. 12-cv-413 (RBW)(JWR)(RJL) (D.D.C. Mar. 16, 2012); Compl., New York v. United States, No. 12-cv-500 (RBW)(JWR)(RJL) (D.D.C. Mar. 30, 2012).

On March 15, 2012, a group of petitioners, including defendant Dilan and proposed intervenor Breitbart, brought a special proceeding in New York State Supreme Court, New York County, alleging that the New Senate Plan violates the New York State Constitution because of the inconsistent application of two mathematical formulas to add a new sixty-third State Senate district. See Cohen v. Cuomo, No. 102185/2012 (Sup. Ct. N.Y. Cnty. Mar. 15, 2012).

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as Majority Leader and President Pro Tempore of the State Senate; Sheldon Silver, as Speaker of the State Assembly; John L. Sampson, as Minority Leader of the State Senate; Brian M. Kolb, as Minority Leader of the State Assembly; the New York State Legislative Task Force on Demographic Research and Reapportionment ("LATFOR"); John J. McEneny, as a member of LATFOR; Robert Oaks, as a member of LATFOR; Roman Hedges, as a member of LATFOR; Michael F. Nozzolio, as a member of LATFOR; Martin Malavé Dilan, as a member of LATFOR; and Welquis R. Lopez, as a member of LATFOR.

Due to these intervening events since the filing of this action, this Court orally directed the plaintiffs to file any amended complaints by March 27, 2012.[2] See Minute Entry, Mar. 21, 2012. In their new pleadings, the Amending Plaintiffs requested that this Court draft state legislative redistricting plans for the 2012 elections because the New Plans cannot be implemented until they are precleared, and there was a substantial risk that preclearance would not be obtained by the beginning of the candidate petitioning period on June 5, 2012. Without this Court's intervention, they maintained, New York would be forced to hold an election using the outdated and malapportioned existing plans, which would violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution, as well as Article III, §§ 4 and 5 of the New York State Constitution.

The Drayton Intervenors, Lee Intervenors, and Ramos Intervenors alleged that, even if the New Plans obtained preclearance and survived the state court challenge, the New Senate Plan improperly dilutes the voting power of African Americans, Asian Americans and Hispanics in violation of the United States Constitution and the Voting Rights Act, and the malapportioned districts lack any legitimate justification. The Drayton and Ramos Intervenors alleged that the New Assembly Plan also violates Section 2 by failing to create new majority-minority districts in Nassau County and New York and Bronx Counties,

[2] Plaintiffs are Mark A. Favors, Howard Leib, Lillie H. Galan, Edward A. Mulraine, Warren Schreiber, and Weyman A. Carey ("Favors Plaintiffs"); Linda Lee, Shing Chor Chung, Julia Yang, and Jung Ho Hong ("Lee Intervenors"); the Drayton Intervenors; the Ramos Intervenors. We refer to these plaintiffs collectively as the "Amending Plaintiffs" in this opinion and order. In addition to the Amending Plaintiffs, Intervenor Itzchok Ullman filed an amended complaint, which we address separately, see infra Part II.B.

respectively. The Drayton and Ramos Intervenors moved for preliminary injunctive relief on their Fourteenth Amendment one person, one vote and race discrimination claims, and their Voting Rights Act claims.

The Senate Majority Defendants moved to dismiss the Favors Plaintiffs' amended complaint in its entirety, as well as the Drayton, Lee, and Ramos Intervenors' amended complaints to the extent that they sought relief from allegedly malapportioned districts on grounds of ripeness, see Fed. R. Civ. P. 12(b)(1), and for failure to state a claim upon which relief can be granted, see Fed. R. Civ. P. 12(b)(6). Amending Plaintiffs and the Senate Minority Defendants opposed the motion.

On March 27, 2012, Intervenor Plaintiff Itzchok Ullman filed an amended complaint alleging that the New Assembly Plan improperly divides the Town of Ramapo, which could be contained in a single Assembly district, in a way that dilutes the Chasidic Jewish community's political power in violation of the Fourteenth Amendment and Article III, § 5 of the New York State Constitution. The Assembly Majority Defendants together with the Senate Majority Defendants moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

At a status conference held on April 18, 2012, this Court orally denied the motions to dismiss the amended complaints with the exception of that filed by Ullman, on which we reserved decision, and indicated that this written decision would follow. See Minute Entry, Apr. 18, 2012. Two days later, on April 20, this Court heard oral argument regarding the standard of review applicable to the Drayton, Lee, and Ramos Intervenors' malapportionment

challenge to the New Senate Plan, as well as the population measurement the Court should use to assess the various challenges presented. At the conclusion of the hearing, we ordered the Drayton and Ramos Intervenors to produce the evidence on which they intended to rely to support their preliminary injunction motions. See Minute Entry, Apr. 20, 2012.

On April 27, 2012, DOJ advised the D.C. District Court that it had precleared the New Senate Plan. On May 3, 2012, following an expedited appeal directly from the trial court, the New York State Court of Appeals held that the application of two different methods to calculate the number of districts in the New Senate Plan did not violate the New York State Constitution. See Cohen v. Cuomo, 2012 WL 1537411 (N.Y. Ct. of Appeals May 3, 2012). Thus, Amending Plaintiffs' claims regarding the need for this Court to create interim State Senate maps while preclearance and the New York Court of Appeals decisions were pending are now moot. Those claims remain viable with respect to the New Assembly Plan, however, which has not yet obtained preclearance. Further, the Drayton, Lee, and Ramos Intervenors' constitutional and Voting Rights Act challenges to the New Senate Plan remain to be decided.

II. Discussion

A. Senate Majority Defendants' Motion To Dismiss the Amended Complaints

At the April 18 hearing, we stated that we would file a written decision to explain our oral denial of the Senate Majority Defendants' motion to dismiss the amended complaints to the extent they sought to have this Court create interim redistricting maps while the

preclearance process and state court litigation were pending. Although those claims are now moot with respect to the New Senate Plan, because we represented that a written decision would follow, and because the New Assembly Plan has not yet been precleared, we offer the following explanation for why the Amending Plaintiffs' claims were and are ripe for review and why their amended complaints stated claims for relief.

1. Ripeness Challenge

The Senate Majority Defendants' contention that Amending Plaintiffs' claims were not ripe as of April 18, 2012, can be understood in two parts. First, insofar as the Amending Plaintiffs complained that defendants had failed to provide the state with election districts that had secured either DOJ or court approval necessary for implementation, the Senate Majority Defendants argued that no remediable injury was shown because the New Plans had been submitted for such approval in sufficient time to secure preclearance before June 5, 2012. They dismissed as speculative Amending Plaintiffs' allegations that the New Plans would not be precleared by June 5 or would be found to violate the New York State Constitution.

Second, insofar as the Amending Plaintiffs complained that the New Plans, even if precleared, violate the Equal Protection guarantee of one person, one vote and Section 2 of the Voting Rights Act, the Senate Majority Defendants asserted that these claims were premature because the New Plans could not be implemented—and, thus, the constitutional violations could not occur—before preclearance was secured.

"A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000). "Ripeness is a jurisdictional inquiry." Murphy v. New Milford Zoning Comm'n, 402 F.3d 342, 347 (2d Cir. 2005). "Ripeness is peculiarly a question of timing. Its basic rationale is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 580 (1985) (internal quotation marks, brackets, and citation omitted).

Amending Plaintiffs' claims are ripe for reasons analogous to those discussed in this Court's denial of the initial motions to dismiss this matter. See Favors v. Cuomo, 2012 WL 824858, at *4–*7. Although the Governor signed the New Plans into law on March 15, 2012, those Plans could not be implemented for the upcoming elections until they were precleared. See Perry v. Perez, 132 S. Ct. 934, 941 (2012) ("Section 5 prevents a state plan from being implemented if it has not been precleared."). Insofar as those Plans had not been precleared at the time of our April 18 oral ruling, New York was thus without a lawful redistricting plan for an election cycle that would start within only six weeks. It is undisputed that the Court could not allow that election cycle to proceed under the existing plans because they are based upon the outdated 2000 census. See, e.g., Flateau v. Anderson, 537 F. Supp. 257, 262 (S.D.N.Y 1982) (three-judge court) ("If we waited until there no longer was time in 1982 for the reapportionment to be effected, the constitutional violation

would then have occurred, but it would be too late for any timely remedy to be structured."). Therefore, as of the date of this Court's oral order, there were no State Senate and Assembly districts that could be used in the 2012 state legislative elections. Moreover, and what the Senate Majority Defendants fail to address satisfactorily, even if the New Plans were precleared by June 5, 2012, the amended complaints also assert federal constitutional and Section 2 Voting Rights Act claims that fall outside of the preclearance process and the state constitutional challenge in Cohen. Regardless of the outcome of the preclearance process and the state constitutional challenge, this Court needs to address these claims.

Thus, as of April 18, the Amending Plaintiffs adequately alleged injury from either (1) the complete lack of a precleared redistricting plan for the 2012 elections to the state legislature, or (2) the implementation of a plan that, even if precleared under Section 5 of the Voting Rights Act, nevertheless violated the Fourteenth Amendment's guarantee of one person, one vote and Section 2 of the Voting Rights Act. In short, resolution of the pending preclearance process and the Cohen litigation would not eliminate the Amending Plaintiffs' claimed injuries, but would only clarify their scope.

Insofar as the Senate Majority Defendants' ripeness challenge argues that any remedy would be premature, we are not persuaded. Redistricting remedies cannot be created on the spot (as this Court knows all too well after drafting congressional districts in an extremely tight time frame). As the Court's appointed expert, Professor Nathaniel Persily, has advised, "a court should have as its goal the imposition of a plan no later than one month before

candidates may begin qualifying for the primary ballot," which "means that the court should begin drawing its plan about three months before the beginning of ballot qualification in order to build in time for possible hearings and adjustments to the plan." Nathaniel Persily, When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans, 73 Geo. Wash. L. Rev. 1131, 1147 (2005). Here, less than two months remained from the date of the Court's April 18, 2012 oral order until the June 5 start of the candidate petitioning period for the Court to craft a contingent redistricting plan. Under such circumstances, Amending Plaintiffs' claims were certainly ripe for consideration as to both their merits and to the possible remedy of a judicially created redistricting plan, particularly if the New Plans were not precleared by June 5, 2012. See Branch v. Smith, 538 U.S. 254, 259–61, 265–66 (2003) (affirming three-judge panel's interim plan where state plan had not yet been precleared); Fund for Accurate & Informed Representation, Inc. v. Weprin, 796 F. Supp. 662, 673 (N.D.N.Y.) (three-judge panel) (exercising jurisdiction where state plan had not been precleared "for the sake of ensuring a fair, timely election in New York State this Fall"), aff'd mem., 506 U.S. 1017 (1992); Scaringe v. Marino, No. 92-cv-0593, 1992 WL 144627, at *2 (N.D.N.Y. June 18, 1992) (three-judge panel) ("[U]nless new districts are devised in accordance with constitutional and statutory mandates, cleared through the procedural maze, and implemented in a timely fashion, plaintiff alleges that he will be deprived of his right to vote for a Senator and an Assemblyman because no valid districts will be in existence.").[3]

[3] The Senate Majority Defendants' reliance on the Supreme Court's holding in Branch that "a district court may not impose a remedial plan unless the State plan 'had not

Time did not permit the Court to run the risk of having no contingent plan ready if the New Senate Plan was not precleared, and simply to hope that the legislature could remedy any defects in the short time frame remaining, particularly when the legislature had taken more than a year to pass the New Plans following the release of the 2010 census results. See Smith v. Clark, 189 F. Supp. 2d 503, 511 n.5 (S.D. Miss. 2002) (three-judge court) ("We are simply unwilling to wait until a point in time that would not provide ample time for our thorough consideration of the reapportionment issues presented in this case."), aff'd sub nom. Branch v. Smith, 538 U.S. 254 (2003).

For similar reasons, Amending Plaintiffs' constitutional and Voting Rights Act challenges to the New Plans were ripe for review even while preclearance and Cohen were pending. Because of the short period between the amended complaints' filing and the beginning of the petitioning period, this Court needed to be prepared to resolve any preliminary injunction motions filed in response to the precleared New Plans, and, if Amending Plaintiffs sustained their burdens, to grant preliminary relief before the state election cycle commenced.[4]

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been precleared and had no prospect of being precleared in time for the . . . election,'" Senate Majority Defs.' Mem. 13, Dkt. Entry 286-1 (quoting Branch v. Smith, 538 U.S. at 265) (emphasis and alteration in memorandum of law), misses the mark. The Court here did not propose to adopt its own plan at the expense of the New Plans. Nor did it determine that there was no possibility the New Plans would be precleared in time. It merely recognized its jurisdiction to begin the process of crafting a contingent plan to be implemented if necessary.

[4] As we explain, see infra Part II.C, the Drayton and Ramos Intervenors did not carry their burdens to obtain preliminary injunctive relief in part because the Court finds that it

Additionally, the Court notes that the New Assembly Plan was submitted to DOJ on March 28, 2012. As of the date of this Opinion and Order, no action has been taken by DOJ, whose sixty-day deadline for review expires on May 27, 2012, nine days before the candidate petitioning period begins. Thus, with respect to the New Assembly Plan, the situation remains as it did on April 18, 2012, with the people of the State of New York facing the risk that the New Assembly Plan will not be precleared in time for the petitioning period. There is a continued need for the Court to exercise jurisdiction to prepare an interim Assembly map.

In sum, this case was ripe for review at the time of the Court's April 18, 2012 oral ruling and remains so today.

2. 12(b)(6) Challenge

The Senate Majority Defendants also moved to dismiss the amended complaints under Fed. R. Civ. P. 12(b)(6), contending that they failed to plead facts that would entitle the Amending Plaintiffs to the relief sought, i.e., implementation of State Senate and Assembly plans drafted by the Court. The Senate Majority Defendants argued that the Amending Plaintiffs failed to establish that any part of the New Senate Plan would be denied preclearance or that the Court has the authority to craft a remedy in the event that the 63rd district is found unconstitutional in Cohen.

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cannot resolve the complex issues raised in their favor in the short time available. This only reinforces our ripeness determination, in that the issues raised and relief sought required immediate court consideration.

To determine whether dismissal is appropriate under Fed. R. Civ. P. 12(b)(6), "a court must accept as true all [factual] allegations contained in a complaint," but it need not accept "legal conclusions." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). For this reason, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to insulate a claim against dismissal. Id. Moreover, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Id. (quoting Bell Atl. v. Twombly, 550 U.S. 544, 570 (2007)). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint . . . has not shown . . . that the pleader is entitled to relief." Id. at 679 (internal citations and quotation marks omitted).

Applying these principles, we conclude that the Senate Majority Defendants' arguments are misplaced. Accepting Amending Plaintiffs' allegations as true, as the Court must for the purpose of deciding this motion, this Court has the authority to grant the relief sought. The Senate Majority Defendants' assertion that, under Perry, the Court cannot draft an interim plan but can only implement the New Senate Plan, misreads the Supreme Court's holding. In Perry, the Supreme Court instructed that, while courts must look to a duly enacted redistricting plan for "guidance" in drafting an interim judicial plan, "[a] district court making such use of a State's plan must, of course, take care not to incorporate into the interim plan any legal defects in the state plan." 132 S. Ct. at 941. Thus, Perry describes the standards the Court must use in drafting a redistricting map, not, as the Senate Majority

Defendants suggest, the Court's ability to implement an interim plan when there is no precleared plan based upon the latest census. See id. ("[T]he state plan serves as a starting point for the district court." (emphasis added)).

Here, Amending Plaintiffs have alleged that portions of the New Senate Plan do not pass muster under federal law. For example, the Ramos Intervenors allege that the New Senate Plan violates Section 2 of the Voting Rights Act and the Fourteenth Amendment because it purposefully dilutes the Hispanic vote by underpopulating majority White districts upstate while overpopulating downstate districts with large percentages of Hispanic and other minority voters. The Drayton Intervenors allege that the New Plans divide, or "crack," compact African American and other minority communities in Nassau County to dilute their voting power in violation of Section 2 of the Voting Rights Act. Similarly, the Lee Intervenors allege that Asian American communities are divided and diluted in the New Plans. At this stage of the litigation, the Court cannot assess the ultimate merits of these allegations. But if Amending Plaintiffs were ultimately to succeed on these Section 2 and Fourteenth Amendment claims, and the Court were compelled to draft a new plan, the Court could not adopt the New Senate Plan wholesale. It would have to exclude any identified legal defects in the enacted plan. See Perry, 132 S. Ct. at 941–42.

Thus, because Amending Plaintiffs state claims upon which this Court can grant relief, the Senate Majority Defendants' motion to dismiss is denied as without merit. Further, the motion is denied as moot insofar as the New Senate Plan has been precleared and has

survived petitioners' state law challenge in Cohen, and this Court may now consider the underlying one person, one vote and Section 2 challenges to the New Senate Plan.

B. Assembly and Senate Majorities' Motions To Dismiss Ullman Intervenor's Complaint

Intervening plaintiff Itzchok Ullman faults the New Assembly Plan because it divides the Town of Ramapo into three districts, and purposefully separates into two different districts the villages of New Square and Kaser, both of which contain large Chasidic Jewish populations.[5] Ullman alleges in his amended complaint that this division of Ramapo violates the Fourteenth Amendment because it (1) is improperly based upon religious considerations; (2) diminishes Ullman's voting power without due process of law; and (3) runs afoul of the one person, one vote requirement of the Equal Protection Clause.

Ullman, however, has since disclaimed the argument that the New Assembly Plan's division of Ramapo is based upon religious considerations. When, at oral argument, the Court asked Ullman's counsel whether "there was deliberate discrimination against these Jewish communities on the basis of religion," Counsel responded, "No, your Honor. What

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[5] As one court has explained:

> A large portion of the Town of Ramapo is a state park and undeveloped land. In the occupied area, a "village movement" has resulted in the formation of eleven incorporated villages within the town borders along its perimeter. An incorporated village controls the tax base within its boundaries and has the authority to execute its own zoning laws, run schools, operate police, fire, water and sewage departments and regulate the use of the streets.

Leblanc-Sternberg v. Fletcher, 763 F. Supp. 1246, 1247 (S.D.N.Y. 1991) (footnote omitted).

we are alleging is that there is deliberate discrimination against these communities based on their voting patterns." Apr. 18, 2012 Hr'g Tr. at 41–42. Ullman now contends that the Villages of Kaser and New Square were intentionally placed into separate Assembly districts, not because of any invidious discrimination against Chasidic Jewish people, but to enhance Assemblywoman Ellen C. Jaffee's reelection prospects. These allegations are insufficient to state a claim under the Fourteenth Amendment.

As the Second Circuit has recognized, "[i]t is well settled that there is no right to community recognition in the reapportionment process. Voting is a personal right and, in the absence of invidious discrimination, voters of a city, town, or geographic or ethnic community are not entitled to be grouped together in a single election unit." Mirrione v. Anderson, 717 F.2d 743, 745 (2d Cir. 1983) (citation omitted); see also United Jewish Orgs. of Williamsburgh, Inc. v. Wilson, 510 F.2d 512, 521 (2d Cir. 1974) (rejecting argument that a "state must in a reapportionment draw lines so as to preserve ethnic community unity" because such a holding would "make reapportionment an impossible task for any legislature"), aff'd sub nom. United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977); Wells v. Rockefeller, 281 F. Supp. 821, 825 (S.D.N.Y 1968) (three-judge panel) ("The Legislature cannot be expected to satisfy, by its redistricting action, the personal political ambitions or the district preferences of all of our citizens. For everyone on the wrong side of the line, there may well be his counterpart on the right side."), rev'd on other grounds, 394 U.S. 542 (1969). Thus, in the absence of any invidious motive such as religious

discrimination (and Ullman has conceded there is none), the Chasidic Jewish community, or any other ethnic community, in Ramapo does not have an absolute constitutional right to be grouped in the same district.

Ullman asserts that the division of the Ramapo Chasidic Jewish community in the New Assembly Plan is an impermissible political gerrymander. Although the Supreme Court has held that partisan gerrymandering claims are justiciable under the Equal Protection Clause, see Davis v. Bandemer, 478 U.S. 109, 125 (1986); but see Vieth v. Jubelier, 541 U.S. 267, 305–06 (2004) (plurality opinion) (concluding that partisan gerrymandering claims are non-justiciable political questions), a question arises as to what showing a plaintiff must make to sustain such a claim, see Davis v. Bandemer, 478 U.S. at 132 (plurality opinion) (stating that, at minimum, plaintiff must show that "the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole"); but see Vieth v. Jubelier, 541 U.S. at 309–13, 317 (Kennedy, J., concurring) (concluding that partisan gerrymandering claims are justiciable, but that no judicially manageable standards exist for determining when legislature's consideration of voters' political classifications in redistricting amounts to Equal Protection violation). Assuming arguendo, as Ullman urges, that the standard set forth in Davis v. Bandemer, 478 U.S. 109, still applies, we dismiss Ullman's complaint for failure to state a claim, see Fed. R. Civ. P. 12(b)(6).

Ullman fails to explain either in his amended complaint or his arguments how the

division of Kaser and New Square is an impermissible partisan gerrymander, particularly because Ullman has not alleged that the New Assembly Plan's division of two villages degrades or dilutes the Chasidic Jewish community's influence on the political process as a whole. Rather, Ullman alleges that the community's influence is diluted in one Assembly district. Moreover, drawing a district boundary based, at least in part, on protecting an incumbent such as Assemblywoman Jaffe, does not automatically violate the Fourteenth Amendment. See White v. Weiser, 412 U.S. 783, 797 (1973) ("The fact that district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness." (internal quotation marks omitted)). The Supreme Court has recognized that "[p]olitics and political considerations are inseparable from districting and apportionment." Gaffney v. Cummings, 412 U.S. 735, 753 (1973); see also Vieth v. Jubelier, 541 U.S. at 313 (Kennedy, J., concurring) (rejecting allegation that legislature "adopted political classifications" in enacting redistricting plan as sufficient to state claim under Equal Protection Clause). Indeed, if courts were to second guess the precise placement of every single district boundary and make sure they were not drawn on the basis of any political considerations, redistricting would essentially be taken out of the hands of the New York Legislature and given to the federal courts, a result we cannot countenance.[6] See Perry v. Perez, 132 S. Ct. at 940

[6] At oral argument, Ullman's counsel suggested that Larios v. Cox, 300 F. Supp. 2d 1320 (N.D. Ga.) (three-judge court), aff'd mem., 542 U.S. 947 (2004), a case not cited in his memorandum of law, supports his contention that his political gerrymandering allegations state a viable Fourteenth Amendment claim because incumbency was not considered

("Redistricting is primarily the duty and responsibility of the State." (internal quotation marks omitted)); see also Favors v. Cuomo, 2012 WL 928223, at *17 ("[T]he power to draw [district] lines is committed in the first instance to the states, not to the federal government, and is properly exercised by the most democratic branch of state government, the legislature.").

Insofar as Ullman's amended complaint pleads a one person, one vote claim under the Equal Protection Clause, he did not discuss this claim in his memorandum of law. To be sure, the Equal Protection Clause requires the legislature to "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." Reynolds v. Sims, 377 U.S. 533, 577 (1964). But Ullman's complaint does not allege that the Ramapo Assembly districts are malapportioned. Instead, the amended complaint reflects only Ullman's dissatisfaction with how the legislature divided Ramapo into multiple Assembly districts, which is not a one person, one vote issue. Accordingly,

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consistently throughout the state in drawing Assembly districts. See Apr. 18, 2012 Hr'g Tr. at 58. Ullman's amended complaint, however, contains no allegations that incumbency protection was a factor only in redistricting Ramapo and, in any event, Larios is a one person, one vote case, not a political gerrymandering case. See League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 422–23 (2006) ("The Larios holding and its examination of the legislature's motivations were relevant only in response to an equal-population violation."); Cox v. Larios, 542 U.S. at 949–50 (Stevens, J., concurring) (distinguishing political gerrymander claims from one person, one vote claims). The Larios court discussed incumbency protection only to the extent that it found that incumbency was not a valid excuse for malapportioning Georgia's state legislative districts. Larios, 300 F. Supp. 2d at 1338 ("[T]he protection of incumbents is a permissible cause of population deviations only when it is limited to the avoidance of contests between incumbents and is applied in a consistent and nondiscriminatory manner." (emphasis in original)). The court did not discuss the extent to which incumbency protection can be considered in drawing district boundaries.

Ullman's allegations that the Chasidic Jewish community in Ramapo is divided into separate districts do not state a claim under the Equal Protection Clause and, therefore, his amended complaint is properly dismissed.

To the extent that Ullman also claims that Ramapo's division into multiple assembly districts violates Article III, § 5, of the New York State Constitution, we decline to exercise supplemental jurisdiction over the remaining state law claim. See 28 U.S.C. § 1367(c)(3) ("The district courts may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction."); Valencia ex rel. Franco v. Lee, 316 F.3d 299, 304–06 (2d Cir. 2003); Pu v. Charles H. Greenthal Mgmt. Corp., No. 08-cv-10084(RJH)(RLE), 2010 WL 774335, at *5 (S.D.N.Y. Mar. 9, 2010) ("Generally, where federal claims are dismissed at an early stage, courts decline supplemental jurisdiction and dismiss pendant state law claims without prejudice."). Accordingly, Ullman's New York State Constitution claim is dismissed without prejudice.

C. Drayton and Ramos Intervenors' Motions for a Preliminary Injunction

The Ramos and Drayton Intervenors have filed separate motions for preliminary injunctions based on their claims under the Fourteenth Amendment and Section 2 of the Voting Rights Act. They also seek expedited discovery and the appointment of a special master.[7] For the following reasons, we deny the motions.

"In order to justify a preliminary injunction, a movant must demonstrate 1) irreparable

[7] To the extent that Intervenor Ullman also moves for preliminary relief, the motion is mooted by our dismissal of his complaint.

harm absent injunctive relief; 2) either a likelihood of success on the merits, or a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in the plaintiff's favor; and 3) that the public's interest weighs in favor of granting an injunction." Metro. Taxicab Bd. of Trade v. City of New York, 615 F.3d 152, 156 (2d Cir. 2010) (internal quotation marks and citation omitted). We find the second and third factors dispositive here.

On the current record, the intervenors have not shown a likelihood of success on the merits. The movants' claims are both factually and legally complex. For example, their one person, one vote claims rest on novel, contested legal ground. The parties sharply dispute the circumstances under which a redistricting plan with population disparities closely approaching the ten percent range that has sometimes been found acceptable can be rejected. Compare Larios v. Cox, 300 F. Supp. 2d at 1337–42 (holding that plan with just-below-10% population disparity is impermissible "where population deviations are not supported by [] legitimate interests but, rather, are tainted by arbitrariness or discrimination," including inconsistent application of redistricting criteria for political gain), with Rodriguez v. Pataki, 308 F. Supp. 2d 346, 365–71 (S.D.N.Y. 2004) (three-judge court) (upholding a just-below-10% disparity plan despite evidence of political motive because plan was supported by traditional redistricting criteria and the plaintiffs did not show that "the deviations resulted solely from impermissible considerations"). Both the one person, one vote claim and the racial discrimination claim will turn on the factual inferences to be drawn from a close

evaluation of the details of the plan, and on whatever evidence of the legislature's purpose or intent may be available. See, e.g., Larios v. Cox, 300 F. Supp. 2d at 1337–38, 1347 ("Simply stated, a state legislative reapportionment plan that systematically and intentionally creates population deviations among districts in order to favor one geographic region of a state over another violates the one person, one vote principle firmly rooted in the Equal Protection Clause."); Rodriguez v. Pataki, 308 F. Supp. 2d at 363–65 (holding that "a one-person, one-vote claim will lie even with deviations below ten percent" if plaintiff "can present compelling evidence that the drafters of the plan ignored all the legitimate reasons for population disparities and created the deviations solely to benefit certain regions at the expense of others"); Bush v. Vera, 517 U.S. 952, 958–59 (1996) (plurality opinion) (holding that strict scrutiny applies to a redistricting plan if plaintiff shows that race was "the predominant factor motivating the legislature's redistricting decision" (internal quotation marks, brackets, and emphasis omitted)). But the Drayton and Ramos Intervenors have presented little evidence on this question, and the parties vigorously dispute whether discovery into the subjective motivations of the drafters of the plan is either legally relevant or permissible in light of legislative privilege.

Similarly, the movants' Section 2 vote-dilution claims require proof of the three "necessary preconditions" established by the Supreme Court in Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986). To win on the merits, they must show that a minority group is (1) "sufficiently large and geographically compact to constitute a majority in a

single-member district," (2) "politically cohesive," and (3) the majority votes "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." Id.; accord Bartlett v. Strickland, 556 U.S. 1, 11–12 (2009). But the movants have introduced virtually no evidence on these factors, which typically require substantial expert testimony and analysis. See, e.g., Rodriguez v. Pataki, 308 F. Supp. 2d at 387–404 (analyzing voluminous expert record in vote-dilution claim).

In sum, on the limited record thus far compiled by the movants, we cannot conclude that they have established that they are likely to prevail in a case that will present difficult legal and factual issues.[8]

To the extent the Drayton and Ramos Intervenors argue that they would be able to show a likelihood of success on the merits at an evidentiary hearing if they are given expedited discovery, we conclude that conducting such discovery and holding such a hearing in sufficient time to provide relief cannot be done consistent with the third prong of the preliminary injunction standard, the public interest. The intervenors argue that, if their legal

[8] It is not clear that the movants are permitted to rely on the alternative second prong of the preliminary injunction standard: a serious merits question, and the balance of hardships tipping strongly in their favor. See Oneida Nation of N.Y. v. Cuomo, 645 F.3d 154, 164 (2d Cir. 2011) ("A party seeking to enjoin 'governmental action taken in the public interest pursuant to a statutory or regulatory scheme' cannot rely on the 'fair ground for litigation' alternative even if that party seeks to vindicate a sovereign or public interest." (quoting Monserrate v. N.Y. State Senate, 599 F.3d 148, 154 (2d Cir. 2010))); see also Montano v. Suffolk Cnty. Legislature, 268 F. Supp. 2d 243, 260 (E.D.N.Y. 2003) (in VRA and constitutional challenge to county legislature districting, holding that plaintiffs must show likelihood of success, not simply serious question of law). Even if the Drayton and Ramos Intervenors could rely on this alternative second prong, however, preliminary relief still would not be consistent with the public interest.

and factual contentions are correct, they and the broader New York public face the serious and irreparable harm of an election proceeding on the basis of unconstitutionally and illegally drawn, discriminatory and unbalanced districts. At the same time, the paramount interest in fair and legal voting counsels caution rather than haste.

First, elections are complex to administer, and the public interest would not be served by a chaotic, last-minute reordering of Senate districts. It is best for candidates and voters to know significantly in advance of the petition period who may run where. See, e.g., Diaz v. Silver, 932 F. Supp. 462, 466–68 (E.D.N.Y. 1996) (three-judge court) (in redistricting challenge, holding that, even assuming that plaintiffs had shown likelihood of success on the merits, the public interest weighed against an injunction because there was insufficient time before the election to create a new plan, and citing authority). Indeed, the Supreme Court has held that an injunction may be inappropriate even when a redistricting plan has actually been found unconstitutional because of the great difficulty of unwinding and reworking a state's entire electoral process. E.g., Reynolds v. Sims, 377 U.S. at 585; Roman v. Sincock, 377 U.S. 695, 709–10 (1964).

Second, plaintiffs' claims are not just important, but legally and factually complicated. The greatest public interest must attach to adjudicating these claims fairly—and correctly. We have little confidence that a few weeks of discovery and an abbreviated trial leaves enough time for the parties to marshal all the relevant facts and make their best arguments. We cannot ignore that the primary election process begins in less than four weeks with the

opening of the period for candidates to solicit nominating petitions. In order to grant relief in time to guide (and not disrupt) that process, the Court would need to decide the complex legal issues governing discovery and the scope of the issues to be resolved at the hearing, allow the parties time to conduct whatever discovery is allowed, conduct the hearing, resolve the difficult legal and factual issues to establish whether the movants are likely to prevail, and then, if the movants succeed in establishing entitlement to relief, craft what at least some intervenors argue should be an entirely new plan for the redistricting of the state Senate, all within a few weeks. No party has even attempted to set forth a realistic schedule on which this formidable agenda can be accomplished. We are not persuaded that this Court would be able to give the issues or a possible remedy the careful consideration they deserve in such an abbreviated time frame. If, upon such full and careful consideration, plaintiffs do prevail, this Court can then decide what relief, including the vacatur of conducted elections and the ordering of new ones, may be warranted. See, e.g., Arbor Hill Concerned Citizens v. County of Albany, 357 F.3d 260, 262 (2d Cir. 2004) ("It is within the scope of [the court's] equity powers to order a governmental body to hold special elections.").

The motions for preliminary injunction and expedited discovery are therefore denied.

D. Senate Minority Defendants' Motion for Leave To Amend

On May 1, 2012, following DOJ's preclearance of the New Senate plan, the Senate Minority Defendants moved under Fed. R. Civ. P. 15 to amend their answer to the Favors Plaintiffs' amended complaint to assert a cross-claim. Their proposed cross-claim charges

that the New Senate Plan fails to reflect a good faith effort to create districts with equal populations, and underpopulates upstate districts while overpopulating downstate districts for the impermissible purpose of achieving a political gerrymander, which, they contend, violates the Equal Protection Clause. See, e.g., Larios v. Cox, 300 F. Supp. 2d at 1337–42. Only the Senate Majority Defendants oppose the amendment, which is granted for the reasons set forth below.

When, as here, a party seeks to amend a pleading before trial, "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). In the Second Circuit, a party can amend its pleadings "unless the nonmovant demonstrates prejudice or bad faith." City of New York v. Grp. Health Inc., 649 F.3d 151, 157 (2d Cir. 2011); see also R.G.N. Capital Corp. v. Yamato Transp. USA, Inc., No. 95-cv-2647 (CSH), 1997 WL 3278, at *1 (S.D.N.Y. Jan. 3, 1997) ("[I]t is well settled that delay is not enough standing alone to defeat a motion to amend. The party opposing the relief must demonstrate prejudice resulting from delay."). An amendment is prejudicial "when, among other things, it would require the opponent to expend significant additional resources to conduct discovery and prepare for trial or significantly delay the resolution of the dispute." AEP Energy Servs. Gas Holding Co. v. Bank of Am., N.A., 626 F.3d 699, 725–26 (2d Cir. 2010) (internal quotation marks omitted).

The Senate Majority Defendants have failed to demonstrate that they will be prejudiced by their legislative colleagues' proposed cross-claim. This case, at least as it relates to the New Senate Plan, is still in its early stages. The Senate Minority Defendants'

answer to the Favors Plaintiffs' amended complaint was filed only approximately one month ago. Discovery has not yet begun. The proposed cross-claim does not expand or alter the scope or posture of this case significantly, as other parties already have asserted similar one person, one vote claims based upon the alleged malapportionment of districts in the New Senate Plan. Indeed, the Senate Minority Defendants' proposed cross-claim does not come as a surprise to the Senate Majority Defendants, as they concede that the Senate Minority Defendants, despite being named as defendants, "have all along been operating as if they are plaintiffs in this action" by consistently opposing the Senate Majority Defendants and raising the same Equal Protection claims. Senate Majority Defs.' Opp. 7, Dkt. Entry 361.

The Court previously issued a scheduling order setting March 27, 2012, as the deadline for the parties to file amended complaints and April 2, 2012, as the deadline for the parties to file answers to any amended complaints. While the Senate Minority Defendants did not file their motion to amend until May 1, 2012, a court can grant leave to amend a pleading after a deadline set in a scheduling order where there is "good cause." Parker v. Columbia Pictures Indus., 204 F.3d 326, 340 (2d Cir. 2000). "Whether good cause exists turns on the diligence of the moving party." Holmes v. Grubman, 568 F.3d 329, 335 (2d Cir. 2009) (quotation marks omitted).

Here, the Senate Minority Defendants sought to amend their answer four days after DOJ precleared the New Senate Plan on April 27, 2012, which, they argue, made their proposed cross-claim ripe for the first time. The argument confronts a hurdle: this Court had

already orally rejected the Senate Majority Defendants' argument that challenges to the New Plans were not ripe in advance of preclearance. Further, in setting a schedule for all Plaintiffs to amend their complaints, the Court had suggested to the Senate Minority Defendants that they amend their answers to add cross-claims in light of their quasi-plaintiff posture in this case. See Mar. 21, 2012 Hr'g Tr. at 47. Nevertheless, it appears that the Senate Minority Defendants acted in good faith in delaying the filing of their proposed cross-claim based on their unusual status as named defendants and the pendency of the preclearance process. Further, because the Senate Minority Defendants have been a party in this case since its inception and have consistently stood in opposition to the Senate Majority Defendants, allowing the Senate Minority Defendants to bring their cross-claim does not materially alter the posture of this case.

The Senate Majority Defendants' contention that the motion to amend should be denied because the proposed cross-claim does not arise out of the same transaction as the "original action," Senate Majority Defs.' Opp. 17–18, is meritless. A party may bring a cross-claim that "arises out of the transaction or occurrence that is the subject matter of the original action." Fed. R. Civ. P. 13(g). In determining whether a cross-claim arises out of the same transaction or occurrence as the original claim, courts generally consider the "(1) identity of facts between original claim and [cross-claim]; (2) mutuality of proof; [and] (3) logical relationship between original claim and [cross-claim]." Federman v. Empire Fire & Marine Ins. Co., 597 F.2d 798, 811–12 (2d Cir. 1979); see also id. at 813 ("[T]he Rule 13(a)

test for determining a compulsory counterclaim is identical to the Rule 13(g) test for cross-claims."). "Rule 13(g) is to be construed liberally so as to 'avoid multiple suits and to encourage the determination of the entire controversy among the parties before the court with a minimum of procedural steps . . . in order to settle as many related claims as possible in a single action.'" Bank of Montreal v. Optionable, Inc., No. 09-cv-7557 (GBD), 2011 WL 4063324, at *3 (S.D.N.Y. Aug. 12, 2011) (quoting Charles Alan Wright, et al., Federal Practice and Procedure § 1431, at 229–30 (3d ed. 2011)).

This Court permitted all plaintiffs to amend their complaints once the Court had developed and issued a new congressional district map and the impasse posture of the case had changed due to the enactment of the New Senate and Assembly Plans. This was done for the sake of judicial economy and because plaintiffs still objected to the New Plans on federal constitutional and Voting Rights Act grounds. The claims asserted in the amended complaints and the proposed cross-claim are logically related. While this action has undergone several permutations since it was originally commenced in November 2011, at its core, all plaintiffs' amended complaints and the Senate Minority Defendants' proposed cross-claim relate to the decennial redistricting process for state legislative districts and the results of that process.

Accordingly, the Senate Minority Defendants' motion to amend their answer is granted.

E. Proposed Brietbart Intervenors' Motion To Intervene

Until his retirement in 2005, Todd Breitbart directed the staff work on redistricting for successive Democratic State Senate leaders. He and the other Proposed Breitbart Intervenors now seek to intervene in this action as of right, or permissively, as "six registered voters who reside in districts in and around New York City that are severely over-populated under the" New Senate Plan. Proposed Breitbart Intervenors' Proposed Compl., Dkt. Entry 345-3, ("Proposed Breitbart Compl.") ¶¶ 1, 6–11. Like the Senate Minority Defendants, Proposed Breitbart Intervenors challenge the New Senate Plan, alleging that it is not the result of a good faith effort to create equipopulous State Senate districts as required by the Fourteenth Amendment. The Senate Majority Defendants oppose the proposed intervention. We deny the Proposed Breitbart Intervenors' motion for the following reasons.

To intervene as of right, pursuant to Fed. R. Civ. P. 24(a), the putative intervenor must: "(1) file a timely motion; (2) claim an interest relating to the property or transaction that is the subject of the action; (3) be so situated that without intervention the disposition of the action may impair that interest; and (4) show that the interest is not already adequately represented by existing parties." Butler, Fitzgerald & Potter v. Sequa Corp., 250 F.3d 171, 176 (2d Cir. 2001). Proposed Breitbart Intervenors' motion is denied because they have not shown that their interests are not already adequately represented by the various intervening plaintiffs and the Senate Minority Defendants.[9]

[9] Because Proposed Breitbart Intervenors' motion fails on the adequacy of representation prong, the Court need not discuss whether they have satisfied the other three

While the burden to demonstrate inadequacy of representation typically is "minimal," the Second Circuit has "demanded a more rigorous showing of inadequacy in cases where the putative intervenor and a named party have the same ultimate objective. Where there is an identity of interest, as here, the movant to intervene must rebut the presumption of adequate representation by the party already in the action." Id. at 179–80 (internal citations omitted). Here, the Drayton, Lee, and Ramos Intervenors, all of whom are registered New York State voters, as well as the Senate Minority Defendants, seek to strike down the New Senate Plan under the Fourteenth Amendment to the United States Constitution based upon its alleged malapportionment favoring upstate New York. Proposed Breitbart Intervenors, also registered New York State voters, seek the same relief on virtually identical grounds and, therefore, the Court concludes that their interests are already adequately represented.

In urging otherwise, Proposed Breitbart Intervenors contend that they disagree with other parties' interpretations of some of the precedents relevant to this action. Even if strategic differences could demonstrate inadequate representation in some cases, they fail to do so here, where Proposed Breitbart Intervenors and the Senate Minority Defendants are represented by the same able counsel, who would presumably interpret precedent the same way whether acting on behalf of Proposed Breitbart Intervenors or the Senate Minority Defendants. Indeed, insofar as Proposed Breitbart Intervenors contend their putative claim is different because they do not allege that the malapportionment is based upon racial animus,

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criteria.

we note that, while other intervening plaintiffs appear to allege a racial motivation for the malapportionment, the Senate Minority Defendants do not. Their malapportionment theory is essentially indistinguishable from that of Proposed Breitbart Intervenors. Indeed, the Senate Minority Defendants' cross-claim is worded identically to Proposed Breitbart Intervenors' proposed complaint. Compare Senate Minority Defs.' Proposed Cross-cl., Dkt. Entry 344-3, ¶¶ 1–10 with Proposed Breitbart Compl. ¶¶ 52–61.

Proposed Breitbart Intervenors' request for permissive intervention under Fed. R. Civ. P. 24(b) is also denied. A court "may grant a motion for permissive intervention if the application is timely and if the applicant's claim or defense and the main action have a question of law or fact in common." In re Holocaust Victim Assets Litig., 225 F.3d 191, 202 (2d Cir. 2000) (internal quotation marks omitted). Courts have "considerable discretion" in deciding whether to grant permissive intervention. AT&T Corp. v. Sprint Corp., 407 F.3d 560, 562 (2d Cir. 2005). Here, as already discussed, Proposed Breitbart Intervenors have not shown how their presence as intervenors will assist the Court in resolving this case, particularly when other parties—especially parties represented by the same counsel—already are asserting the same claims and interests. To the extent Breitbart maintains that he brings an "important perspective" to this case, Breitbart Mem. at 3, Dkt. Entry 345-1, he has been able to provide that perspective to this Court as a witness for the Senate Minority Defendants, just as he did as a co-petitioner with State Senator Dilan in Cohen. In sum, he need not be

allowed to intervene to assist the Senate Minority Defendants or to have his views heard by the Court.

Finally, the Court set March 27, 2012, as the deadline for any motions to intervene, and Proposed Breitbart Intervenors missed this deadline by more than one month. They claim that their Equal Protection challenge did not become ripe until the New Senate Plan was precleared. This is belied by our April 18, 2012 order rejecting the Senate Majority Defendants' ripeness challenge to Amending Plaintiffs' claims. Further, unlike the Senate Minority Defendants, who in good faith could have thought that, as party defendants, they could not file a cross-claim challenge while preclearance was pending, Proposed Breitbart Intervenors operated under no comparable conflict and have offered no satisfactory explanation justifying their late filing. Under such circumstances, the Court exercises its discretion to deny permissive intervention.

Accordingly, Proposed Breitbart Intervenors' motion to intervene is denied.

III. Conclusion

For the reasons set forth above, the Court hereby

(1) DENIES the Senate Majority Defendants' motions to dismiss the amended complaints (Dkt. Entry 286), reiterating the oral ruling made on April 18, 2012;

(2) GRANTS the Assembly Majority and Senate Majority Defendants' motions to dismiss the Ulman Intervenor complaint (Dkt. Entries 270, 286), and directs the Clerk of Court to enter judgment in favor of defendants on this claim;

(3) DENIES the Drayton and Ramos Intervenors' motions for preliminary injunctive relief (Dkt Entries 305, 306);

(4) GRANTS the Senate Minority Defendants' motion for leave to amend their answer and file a cross-claim (Dkt. Entry 344); and

(5) DENIES the Proposed Breitbart Intervenors' motion to intervene (Dkt. Entry 345).

The matter is hereby referred to Magistrate Judge Mann to supervise discovery on such schedule, including an expedited schedule, as she may deem appropriate, and to issue all discovery-related orders, including, but not limited to, scheduling orders and orders resolving or otherwise addressing any discovery disputes that the parties are unable to resolve after good faith efforts to reach resolution thereof without court action.

SO ORDERED.

DATED: Brooklyn, New York
May 16, 2012

_____/s/_____
REENA RAGGI
United States Circuit Judge

_____/s/_____
GERARD E. LYNCH
United States Circuit Judge

_____/s/_____
DORA L. IRIZARRY
United States District Judge

EXHIBIT J

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

1:10-cv-1214 (GLS/RFT)

v.

STATE OF NEW YORK et al.,

Defendants.

APPEARANCES: **OF COUNSEL:**

FOR THE PLAINTIFF:

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United States Dept. of Justice
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RICHARD A. DELLHEIM, ESQ.
RISA A. BERKOWER, ESQ.

FOR THE DEFENDANTS:

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Albany Department of Law
The Capitol
Albany, NY 12224

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Assistant Attorney Generals

Board of Elections

New York State Bd. of Elections
Office of Special Counsel
40 Steuben Street

KIMBERLY A. GALVIN, ESQ.
PAUL M. COLLINS, ESQ.

Albany, NY 12207-1650

Gary L. Sharpe
Chief Judge

MEMORANDUM-DECISION AND ORDER

I. Introduction

Nothing is more critical to a vibrant democratic society than citizen participation in government through the act of voting. It is unconscionable to send men and women overseas to preserve our democracy while simultaneously disenfranchising them while they are gone. To some extent, that is precisely what New York has done. Having had ample opportunity to correct the problem, it has failed to find the political will to do so. While matters of comity ordinarily counsel federal courts to refrain from becoming embroiled in state election schemes, New York has left the court no choice. If federally-guaranteed voting rights are to be protected, the court must act.

The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) of 1986, 42 U.S.C. §§ 1973ff to 1973ff-7, as amended by the Military and Overseas Voter Empowerment (MOVE) Act, Pub. L. No. 111-84, subtitle H, §§ 575-589, 123 Stat. 2190, 2318-2335 (2009) protects

the federally-guaranteed voting rights of New York's military and overseas voters. Since at least 2010, New York has recognized that its voting laws are not compliant with UOCAVA's federal mandate. Accordingly, the State entered a Consent Decree on October 19, 2010. (*See* Dkt. No. 9.) Among other things, it agreed to amend its law to ensure future compliance with UOCAVA and agreed to take certain steps to correct UOCAVA violations. (*See* Consent Decree Terms, *id.*) Furthermore, the State transmitted additional absentee ballots after October 1, 2010—that were unknown to the court at the time it entered the Decree—which constituted additional UOCAVA violations that fell beyond the scope of the relief ordered in the Consent Decree. (*See id.*)

Now pending is the United States' motion seeking permanent and supplemental relief to ensure New York's primary election date complies with UOCAVA and to address the additional violations found subsequent to the Decree. (*See* Dkt. No. 16.) For the reasons that follow, the motion is granted.

II. Background

On October 12, 2010, the United States filed this action to remedy violations of UOCAVA. UOCAVA guarantees active duty members of the

uniformed services (and their spouses and dependents), and United States citizens residing overseas, the right "to vote by absentee ballot in general, special, primary, and runoff elections for Federal office." 42 U.S.C. § 1973ff-1(a)(1). New York is responsible for complying with UOCAVA and ensuring that validly-requested absentee ballots are sent to UOCAVA voters in accordance with its terms. 42 U.S.C. §§ 1973ff-1 & 1973ff-6(6).

New York's statutorily-prescribed non-presidential federal primary election date prevents it from complying with UOCAVA's ballot transmission deadline of forty-five (45) days prior to a federal general election. On August 27, 2010, the Secretary of Defense granted New York a hardship waiver for the November 2, 2010 federal general election on that basis. The waiver exempted New York from complying with UOCAVA's ballot transmission deadline of September 18, 2010. Thus, the waiver extended New York's UOCAVA ballot transmission deadline until October 1, 2010. The waiver was granted based in part upon New York's representations that all ballots would be transmitted by October 1, 2010.

However, New York failed to transmit all UOCAVA ballots by October 1, 2010, prompting the United States to contact State officials. During these communications, New York represented that at least thirteen (13)

counties transmitted UOCAVA ballots after October 1, 2010, but stated that all UOCAVA ballots had been transmitted no later than October 10, 2010.

On October 19, 2010, and based on these representations, this court entered the Decree to remedy these UOCAVA violations. (*See* Dkt. No. 9.) The Decree required New York to accept as valid all UOCAVA ballots that were properly executed and postmarked or showing a date of endorsement of receipt by another agency of the United States government by November 1, 2010, and that were received by New York's election officials by November 24, 2010 and otherwise valid. The Decree left open the issue of additional relief should New York fail to take necessary measures to ensure future UOCAVA compliance. The Decree also contemplated supplemental relief should additional UOCAVA violations be discovered.

III. Discussion

A. Primary Election Date

Determining an UOCAVA-complaint date for New York's 2012 primary election requires consideration of a multitude of positions, all of which were presented by New York. While the Election Commissioners' Association (ECA), the State Senate, which was granted amicus status,

and the State Assembly[1] expressed their views, the Governor did not take a position.

Specifically, the ECA and State Assembly urge the court to move the September Primary to the fourth Tuesday in June in order to reliably meet the mandates of UOCOVA. The ECA contends that an August primary election does not provide sufficient time to deal with the foreseeable obstacles in certifying a primary election result or the ballot. Thus, ECA claims that an August election would potentially disenfranchise military and overseas voters.

On the other hand, the State Senate seeks an August primary date because it would be the least disruptive to the current, and long-standing, September primary system. In so arguing, the Senate urges the court to consider the economic implications of the primary date, the hardship of candidates to obtain signatures in the winter months, and that June is at the end of the legislative session. More specifically, the Senate points out that a June primary would force its members to have to weigh their elected responsibilities against the need for political presence in their district.

Having considered the parties submissions, and considering their

[1] Not a party to this litigation and did not seek amicus status.

contentions with care, the court concludes that the fourth Tuesday in June for the non-presidential primary is in the best interest of the State. However, this decision by no means precludes New York from reconciling their differences and selecting a different date, so long as the new date fully complies with UOCAVA. The court fully recognizes that a permanent primary date is best left to New York, but has acted as it must to preserve federally protected voting rights.

B. Additional UOCAVA violations

Following the entry of the Decree, the court has been informed that at least thirty-six (36) of New York's sixty-two (62) counties transmitted UOCAVA ballots after October 1, 2010. Furthermore, at least thirteen (13) counties transmitted UOCAVA ballots after the October 10, 2010, transmission date stipulated in the Decree. Since there appears to be no dispute on the subsequent violations, the court grants the relief sought by the United States to determine the extent of the UOCAVA violations and the proposed remedy to rectify those violations.

IV. Conclusion

WHEREFORE, for the foregoing reasons, it is hereby

ORDERED that the United States' motion for permanent and

supplemental relief (Dkt. No. 16) is **GRANTED**; and it is further

ORDERED that:

(1) Notwithstanding any current state law or administrative procedure to the contrary, New York shall conduct its 2012 non-presidential federal primary election on a date no later than 35 days prior to the 45-day advance deadline set by the MOVE Act for transmitting ballots to the State's military and overseas voters, *i.e.*, at least 80 days before the November 6, 2012 federal general election. In 2012, that date shall be June 26, 2012.

(2) In subsequent even-numbered years, New York's non-presidential federal primary date shall be the fourth Tuesday of June, unless and until New York enacts legislation resetting the non-presidential federal primary election for a date that complies fully with all UOCAVA requirements, and is approved by this court.

(3) For the purposes of determining the date and time for performing any act prescribed by any law and/or administrative procedure applicable to New York's non-presidential federal

primary, such non-presidential federal primary election date shall be deemed to be held on the dates provided in paragraphs (1) and (2) above.

(4) The New York State Board of Elections ("NYSBOE") shall, within five (5) days of this Order, provide the court with a proposed non-presidential federal primary election calendar for all statutory and administrative election-related deadlines based upon the non-presidential federal primary election date set by the court. The United States shall have five (5) days to respond. Once approved by the court, the NYSBOE shall have ten (10) days to take all steps necessary to adopt and promulgate this non-presidential federal primary calendar.

(5) Having promulgated an approved non-presidential federal primary election calendar, the NYSBOE shall take all steps necessary to ensure that such non-presidential federal primary election calendar is implemented by and complied with by local boards of election. To this end, and to ensure future UOCAVA compliance, the parties shall confer as to an appropriate schedule for defendants to provide pre-election reporting to the

United States with respect to the State's UOCAVA compliance.

(6) Within fourteen (14) days of this Order, the parties, having conferred, shall provide the court with a list of those county boards of elections, if any, to be re-surveyed concerning UOCAVA ballots from the 2010 federal general election, along with an explanation of any differences between the parties' proposals.

(7) If necessary and appropriate, the court will determine the list of counties to be re-surveyed. Within seven (7) days of that determination, the NYSBOE shall transmit the attached questionnaire concerning ballots transmitted to voters in the 2010 federal general election pursuant to UOCAVA to each county board of elections on that list with instructions for the chief official or officials of each county board to certify the accuracy of the board's responses to the questionnaire.

(8) Defendants shall instruct each affected county board of elections that each completed questionnaire must be returned to the NYSBOE within thirty (30) days of its receipt. After consulting with counsel for the United States, the NYSBOE

shall file all completed questionnaires with this court within sixty (60) days of this Order, along with an accurate summary of the survey results, and, if necessary, an explanation as to why the survey results are incomplete. The United States may respond to this filing within ten (10) days. This court retains jurisdiction to take all appropriate steps to ensure the completeness and accuracy of the information provided by defendants and the county boards of elections.

(9) After the actions in paragraphs (7) and (8) above are complete, defendants shall ensure that local election officials in New York State take such steps as are necessary to count as validly-cast ballots in the November 2, 2010 federal general election all those ballots cast for federal offices, including Federal Write-in Absentee Ballots, requested up to and including October 10, 2010 and transmitted to overseas and military voters after that date but received by such election officials after November 24, 2010, so long as such ballots are executed and postmarked, or show a dated endorsement of receipt by another agency of the United States government (or in the case of military voters, are

signed and dated by the military voter and one witness thereto) by November 1, 2010 and are otherwise valid under New York law.

(10) Within twenty (20) days of the completion of the actions required by paragraphs (7)-(9) above, defendants shall, after consulting with the United States, present a plan to the court detailing the procedures it will employ to count such ballots and certify the votes for federal offices. Defendants shall conclude ballot counting and recertification of all affected ballots within thirty (30) days after the court approves the ballot counting and recertification plan.

(11) Defendants shall take all reasonable steps to notify all affected voters of the terms of this Order and that their votes were counted in the 2010 federal general election.

(12) Defendants shall file a report with this court, in a format to be agreed upon by the parties, no later than five (5) days following the completion of any recertification process, detailing the number of UOCAVA absentee ballots, by county, that meet the conditions of this Order and that have been counted for the

November 2, 2010 federal general election. The report will set forth the following information, by county, categorized by absent uniformed services voters with APO/FPO addresses or non-US street addresses; uniformed services voters at a street address within the US; and overseas civilian voters:

a. The number of absentee ballots requested by UOCAVA voters between October 1, 2010 and October 10, 2010;

b. The number of absentee ballots requested by UOCAVA voters between October 1, 2010 and October 10, 2010 but sent to such voters after October 10, 2010;

c. The number of absentee ballots identified in subparagraph (b) that were received from UOCAVA voters later than the close of business on November 24, 2010 and rejected solely for that reason; and

d. The number of absentee ballots that, pursuant to this Order, have been counted and included in recertified election totals.

(13) This court shall retain jurisdiction to ensure additional relief as appropriate; and it is further

ORDERED that the Clerk provide a copy of this Memorandum-Decision and Order to the parties.

IT IS SO ORDERED.

January 27, 2012
Albany, New York

Gary L. Sharpe
Chief Judge
U.S. District Court

Questionnaire

County: _____

Instructions: Each New York county board of elections must answer the following questions. The chief official of the board must sign the responses to these questions and attest to their accuracy under penalty of perjury. Responses must be submitted to the New York State Board of Elections within 30 days of receiving this survey. Please attach additional sheets of paper if necessary to respond completely to each question. All responses will be filed by the State with the U.S. District Court for the Northern District of New York in connection with United States v. New York, et al., No. 1:10-CV-1214 (GLS/RFT) (N.D.N.Y. filed Oct. 12, 2010).

Part I: UOCAVA Ballot Requests

1. Please provide the number of UOCAVA ballot requests received by your county prior to September 18, 2010: _____.

2. Please provide the number of UOCAVA ballot requests received by your county between September 18, 2010 and October 1, 2010: _____.

3. Please provide the number of UOCAVA ballot requests received by your county between October 1, 2010 and October 10, 2010:_____.

4. Please provide the number of UOCAVA ballot requests received by your county after October 10, 2010: _____.

Part II: UOCAVA Ballot Transmittals

1. Please provide the number of UOCAVA ballots that were transmitted to voters (including by electronic transmission) by October 1, 2010: _____.

2. Please provide the number of UOCAVA ballots that were transmitted to voters (including by electronic transmission) between October 1, 2010

and October 10, 2010: _____.

3. Please provide the number of UOCAVA ballots that were transmitted to voters (including by electronic transmission) after October 10, 2010: _____.

a. If ballots were transmitted after October 10, 2010, please provide the following:

i. The number of UOCAVA ballots transmitted after October 10, 2010 that were requested before October 10, 2010: _____.

ii. The number of UOCAVA ballots transmitted after October 10, 2010 that were requested after October 10, 2010: _____.

Part III: UOCAVA Ballots Returned to the County

1. Please provide the number of UOCAVA ballots received by the county prior to November 2, 2010: _____.

2. Please provide the number of UOCAVA ballots received by the county between November 2, 2010 and November 24, 2010: _____.

3. Please provide the number of UOCAVA ballots received by the county after November 24, 2010: _____.

Part IV: Rejected UOCAVA Ballots

1. Please provide: a.) the number of UOCAVA ballots that were received prior to November 2, 2010 that were rejected and not counted: _____; and b.) the reason(s) for rejection of each of those ballots: _____
_____

2. Please provide: a.) the number of UOCAVA ballots that were

received between November 2, 2010 and November 24, 2010 that were rejected and not counted: _____; and b.) the reason(s) for rejection of each of those ballots:

_____

_____

3. Please provide the number of UOCAVA ballots that were received after November 24, 2010 that were rejected and not counted: _____.

a. Were any ballots received after November 24, 2010 requested by October 10, 2010 and transmitted to the voter after that date? _____.

i. If yes, please provide the number of such ballots: _____.

ii. If yes, please provide the number of such ballots that were not counted only because they were received after November 24, 2010: _____.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Signature:

_____

Printed name:

_____

Title:

_____

Date: _____

EXHIBIT K

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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
	)	Case No. 3:08CV709
v.	)	
	)	
JEAN CUNNINGHAM, et al.,	)	
	)	
Defendants.	)	
	)	
	)	

CONSENT DECREE

Plaintiff United States of America initiated this action to enforce the requirements of the Uniformed and Overseas Citizens Absentee Voting Act of 1986 ("UOCAVA"), 42 U.S.C. §§ 1973ff to 1973ff-6. On October 15, 2009, this Court entered an order finding that the Commonwealth of Virginia and the Virginia State Board of Elections ("Defendants") violated UOCAVA by failing to mail timely-requested absentee ballots to UOCAVA voters 30 days or more before the November 4, 2008 general federal election, and ordered the Defendants to count as validly-cast all timely-requested, but late-mailed and otherwise-valid absentee ballots that were received by local electoral boards and registrars within 30 days of the close of polls on November 4, 2008.

On September 10, 2010, this Court ordered the parties to discuss "the creation of an appropriate, functional future compliance plan." Order on Perm. Rel. at 4. Accordingly, the parties hereby agree to the entry of this Consent Decree to resolve this action, and stipulate as follows:

1. Defendant Commonwealth of Virginia is obligated to comply with UOCAVA which, following the Court's Order, has been amended by the Military and Overseas Voter Empowerment Act, Pub. L. 111-84, §§ 577 to 582, 583(a), 584 to 587, 123 Stat. 2318 (2009) ("MOVE Act").

2. The adoption of certain monitoring, reporting, and training procedures for a limited period is appropriate to ensure the Defendants' ongoing compliance with UOCAVA.

3. The adoption of additional safeguards is appropriate to ensure ongoing UOCAVA compliance should absentee ballots not be sent by dates prescribed by federal law.

4. This Consent Decree is final and binding as to all issues resolved herein.

WHEREFORE, the parties having freely given their consent, and the terms of the Consent Decree being fair, reasonable, and consistent with the requirements of UOCAVA, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that:

1. Because UOCAVA enforcement depends on timely and accurate information about the extent of compliance in each of the Commonwealth's political subdivisions, Defendants shall adopt procedures designed to determine Statewide UOCAVA compliance. Accordingly, the Defendants shall:

(a) Beginning the 50th day prior to each federal election, survey each Virginia locality to determine (1) whether the localities have received their printed absentee ballots sufficiently ahead of the 45-day mailing deadline to transmit these ballots as required by UOCAVA, (2) whether the localities anticipate any difficulties or situations that would prevent them from transmitting ballots to stateside uniformed services voters and their spouses and dependents, overseas uniformed services voters and their spouses and dependents, and overseas civilian voters as required by UOCAVA, and (3) whether it would be appropriate for the

Defendants to provide additional support to any Virginia localities to ensure that they meet the appropriate deadlines under UOCAVA;

(b) obtain written or electronic certifications, in a format agreed to by the parties, of the number of absentee ballot applications received in each Virginia locality on or before the 45th day before each federal election from stateside uniformed services voters and their spouses and dependents, overseas uniformed services voters and their spouses and dependents, and overseas civilian voters, entitled to vote pursuant to UOCAVA; the date on which the printed absentee ballots were received in each general registrar's office; the date on which the general registrar began sending absentee ballots to such UOCAVA voters; and the date on which the general registrar completed the sending of absentee ballots to such UOCAVA voters;

(c) compile the data provided by the Virginia localities described in paragraph 1(b) into a spreadsheet format devised in consultation with the United States, and transmit such spreadsheet and forms, by facsimile or other electronic means, to counsel for the United States no later than 5:00 pm on the 44th day before each federal election;

(d) forward to counsel for the United States copies of the written or electronic report from the local electoral boards to the State Board of Elections required under Va. Code Ann. §24.2-612 immediately upon receipt of said report;

(e) obtain written or electronic certifications, in a format agreed to by the parties, of the number of absentee ballot applications received in each Virginia locality after the 45th day and on or before the 30th day before each federal election from stateside uniformed services voters and their spouses and dependents, overseas uniformed services voters and their spouses and dependents, and overseas civilian voters, entitled to vote pursuant to UOCAVA; the

date on which the general registrar began sending absentee ballots to such UOCAVA voters; and the date on which the general registrar completed the sending of absentee ballots to such UOCAVA voters;

(f) compile the data provided by the Virginia localities described in paragraph 1(e) into a spreadsheet format devised in consultation with the United States, and transmit such spreadsheet and forms, by facsimile or other electronic means, to counsel for the United States no later than 5:00 pm on the 29th day before each federal election;

(g) certify in writing to counsel for the United States that all of the data reported pursuant to paragraph 1 of this Decree is accurate to the best of its knowledge.

2. Prior to each federal election cycle, Defendants shall use all reasonable effort to train at least one election official from each local electoral board or general registrar's office in Virginia on the requirements of UOCAVA, as amended by the MOVE Act, and the need to send absentee ballots to UOCAVA voters in a timely manner. Such training shall include instructions on the provisions of this Consent Decree, including the monitoring and reporting requirements, and of all Virginia laws and procedures governing voting by UOCAVA voters, including those pertaining to use of the Federal write-in absentee ballot ("FWAB"). Defendants shall provide copies of such training materials to counsel for the United States prior to their use for training Virginia local election officials.

3. If, during the time period covered by this Consent Decree, it becomes apparent that any general registrar will be unable to transmit regular absentee ballots to UOCAVA voters by the 45th day before a federal election as required by the MOVE Act, the Defendants shall ensure that each UOCAVA voter entitled to an absentee ballot shall be sent a FWAB, which shall be transmitted no later than the 45th day before the federal election. The FWAB shall be

accompanied by instructions for completing and returning it, and a complete and accurate listing of relevant candidates, offices, and ballot propositions for which the voter is eligible to vote, if available, as well as instructions for acquiring such information via the internet and toll-free telephone access. The Defendants shall further ensure that regular absentee ballots are sent to affected voters as soon as practicable.

4. For all Virginia localities that transmitted absentee ballots to stateside uniformed services voters and their spouses and dependents, overseas uniformed services voters and their spouses and dependents, and overseas civilian voters later than UOCAVA's deadlines in 2008 and 2010, the Defendants shall conduct reviews of their operational procedures to determine the sources of their failures, and shall address any failures identified with appropriate training, to be developed in consultation with the Department of Justice.

5. The monitoring, reporting, and training provisions contained in Paragraphs 1 and 2 shall remain in effect through December 31, 2012, unless extended by written agreement of the parties.

6. The Defendants shall submit the changes resulting from this Consent Decree for review under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c.

7. Nothing in this Consent Decree shall be construed as waiving any of the Commonwealth of Virginia's obligations under UOCAVA or the MOVE Act.

8. The Court shall retain jurisdiction over this action to enter such further relief as may be necessary for the effectuation of the terms of this Consent Decree.

Date: December 10, 2010

Respectfully submitted,

FOR THE UNITED STATES:

THOMAS E. PEREZ
ASSISTANT ATTORNEY GENERAL

NEIL H. MACBRIDE
UNITED STATES ATTORNEY

By: _____
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Assistant United States Attorney

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ACCEPTED AND AGREED:

_____
COMMONWEALTH OF VIRGINIA
STATE BOARD OF ELECTIONS