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

DAWN CURRY PAGE, et al., Plaintiffs, v. CHARLIE JUDD, in his capacity as Chairman of the Virginia State Board of Elections, et al., Defendants.	)	Civil Action No. 3:13-cv-678-REP-LO-AKD

DAWN CURRY PAGE, GLORIA PERSONHUBALLAH AND JAMES FARKAS' REPLY IN SUPPORT OF BRIEF ON AVAILABLE REMEDIES

In their responses to Plaintiffs' brief on available remedies, SBE Defendants and the Cantor Intervenors largely fail to respond to Plaintiffs' argument on available remedies. Plaintiffs *agree* that, if it is possible for the General Assembly to enact a constitutional apportionment plan in time for use in the 2014 election, it should be given the first opportunity to do so. But if the task of remedial reapportionment were to fall to this Court because the General Assembly cannot or will not enact a constitutional plan in time, it cannot be seriously contended that the Court could not timely adopt a remedial map. Numerous courts from around the country have demonstrated that the current timeframe is more than sufficient for the Court to create and adopt a constitutional map. Moreover, the Court certainly has the authority to modify relevant election deadlines to ensure the implementation of a meaningful remedy rather than to require the citizens of the Commonwealth to suffer an election of their congressional representatives under a racially gerrymandered map. In short, this Court has the power and responsibility to resolve this litigation on the merits and ample time to fashion an appropriate remedy to ensure the 2014

congressional election is conducted pursuant to a constitutional apportionment free from the taint of racial gerrymandering.[1]

I. ARGUMENT

A. The Duty to Prepare a Remedial Map Will Only Fall to the Court if the General Assembly Is Unable or Unwilling to Enact a Constitutional Plan in Time for the 2014 Election

Plaintiffs agree that, if it is possible for the General Assembly to enact a constitutional map in time for its use in the 2014 election, it should be given the first opportunity to do so. *See* Pls.' Br. 3-5 (ECF No. 30). Only if the General Assembly is unwilling or unable to act in time, will the Court be required to impose a remedial map for use in the 2014 election. The Cantor Intervenors' speculative assertion that Plaintiffs have not offered a proposed remedial map because remediation in time for the 2014 election is impossible, Cantor Resp. [1] (ECF No. 33), is simply wrong.

In fact, the Cantor Intervenors' assertions about Plaintiffs' obligation to provide a "remedial map" confuses the issue, misunderstanding the claim that Plaintiffs make and conflating the liability and remedial phases of the litigation. Intervenors cite a slew of cases that considered claims that maps violated Section 2 of the VRA to support their argument that Plaintiffs are required to provide a constitutionally compliant map in briefing the issue of the proper remedy. Plaintiffs, however, do not make a Section 2 claim -- they allege that CD 3 was

[1] In their response briefs, both SBE and the Cantor Intervenors focus largely on their view of Plaintiffs' likelihood of success on the merits, arguing that the fact that the 2012 reapportionment plan was precleared by the Department of Justice and that Virginia was subject to Section 5 of the Voting Rights Act (the "VRA") at the time it was enacted insulates Defendants against a finding that CD 3 is an unconstitutional racial gerrymander. That is not the law and, in accordance with the Court's briefing schedule, Plaintiffs will address these issues in the merits briefing. As Plaintiffs will show, even if Defendants relied on Section 5 in drawing CD 3, that does not mean the district was drawn without an unconstitutional racial purpose. Indeed, Plaintiffs will demonstrate that the General Assembly increased CD 3's black voting age population by more than 3%, which Section 5 did not require.

an unconstitutional racial gerrymander. *See* Compl. ¶¶ 46-51 (ECF No. 1). And, unlike a Section 2 claim, which requires a plaintiff to demonstrate that an additional majority-minority district is possible in their case-in-chief, Plaintiffs' racial gerrymandering claim requires only that they prove that race was the predominant factor in the General Assembly's drawing of CD 3. Courts look to several categories of evidence to make this determination, namely, the district's shape and demographics, *see, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 905, 913-14 (1995); *Shaw v. Reno*, 509 U.S. 630, 646-47 (1993), direct evidence of legislative motives, *see, e.g.*, *Miller*, 515 U.S. at 917-18; *Bush v. Vera*, 517 U.S. 952, 960-61 (1996), and the nature of the apportionment data used by the legislative body, *Bush*, 517 U.S. at 962-63.

Thus, contrary to the Cantor Intervenors' suggestion, Plaintiffs are *not* required to affirmatively prove that Section 2 did not require the creation of CD 3 as drawn by the General Assembly. Rather, once Plaintiffs meet their burden of proving that race was the predominant factor in the creation of the district, the burden shifts to Defendants to satisfy strict scrutiny by demonstrating that (1) the Commonwealth had a compelling interest in using race as a predominant factor, and (2) the use of race was narrowly tailored to meet that interest. *Id.* at 976. To the extent the Cantor Intervenors contend that Plaintiffs have an obligation to provide an alternative map to disprove Defendants' anticipated Section 2 defense, they misunderstand the substantive standards governing this case and Defendants' own obligations to justify Virginia's race-based redistricting decisions.

In any event, Defendants' mistaken assertions in this regard refer to the question of liability, not -- as directed by the Court -- the remedial options for the Court assuming a finding of liability in Plaintiffs' favor. Dec. 3, 2013 Order 2 (ECF No. 27). A "remedial" map, by definition, is imposed only upon a finding of liability, and, of course, depends on the nature of

that liability. Accordingly, it would be premature for Plaintiffs to offer a remedial map at this point in this litigation. Indeed, it seems disingenuous for the Cantor Intervenors to assert, on the one hand, that the General Assembly should have the first opportunity to enact a remedial map if the Court deems the challenged district unconstitutional and, on the other hand, that Plaintiffs must submit a remedial map to the Court before any finding on liability has been made. They essentially invite Plaintiffs to prematurely usurp the very responsibility that they contend belongs to the General Assembly in the first instance. Plaintiffs, meanwhile, recognize that any remedial map will depend on the Court's determination on the merits and that, if sufficient time remains to implement a legislative remedy before the 2014 election, the General Assembly must be first given the opportunity to prepare a constitutional plan.

Plaintiffs further recognize that, due to the particular vagaries of the political process, legislative bodies cannot always act as quickly as courts in preparing and approving voting plans. For this reason, some courts facing an election that is near but not immediately imminent have given the legislature a defined period of time to attempt to redraw the map, while retaining jurisdiction with the understanding that the court would take over if the legislature is unable to complete the work in the time allotted. *See, e.g.*, *In re Apportionment of State Legislature - 1992*, 486 N.W.2d 639, 645 & n.31 (Mich. 1992) (appointing panel of retired and current judges to prepare plan if Legislature and Governor failed to enact one within five weeks); *McDaniels v. Mehfoud*, 702 F. Supp. 588, 596 (E.D. Va. 1988) (giving legislative body 75 days to submit an acceptable remedial plan to the court). Depending on when the Court reaches a decision on the merits, a similar approach could be an appropriate option here.

B. There is Time to Remedy the Current Plan's Unconstitutionality Prior to the 2014 Election

Neither SBE nor the Cantor Intervenors dispute that state and federal courts have consistently been able to prepare remedial redistricting and reapportionment plans in timeframes much more compressed than the one here. *See* Pls.' Br. at 6-7. Instead, they quibble with some of the cases cited by Plaintiffs, asserting that this litigation cannot be compared to ones in which the matter came before the court because the legislative body failed to enact a map in the first instance after a census, or that cases decided by state courts are so inherently different that they cannot serve as useful examples as this Court contemplates its available remedies.

But the point is that reapportionment can be and often is done by courts under extremely compressed timeframes. That some of those cases found their way to the court for different reasons, or were decided by state courts, is irrelevant. Indeed, the Cantor Intervenors *admit* that states (and presumably their courts) have a particular interest in reapportionment and redistricting. Cantor Resp., at 16. In each instance, those courts -- like this Court -- confronted similar cases under highly expedited schedules and, as a result, their experiences are highly instructive.

Tellingly, neither SBE nor the Cantor Intervenors cites a single case that supports their primary argument: that courts lack the authority or the ability to fashion expedited remedial relief in a litigation that either (1) challenges an enacted plan that was previously pre-approved by the Department of Justice, or (2) requires the court conduct an analysis under Section 2 of the VRA. The silence is telling but hardly surprising. Indeed, there are several examples of courts fashioning expedited remedial relief under *both* circumstances. *See, e.g.*, *Favors v. Cuomo*, Case No. 11-CV-5632 (E.D.N.Y.), Aff. of Prof. Nathaniel Persily, J.D., Ph.D. ¶¶ 4, 17-32 (ECF No.

223-1) (Mar. 12, 2012) (expert appointed by magistrate judge on February 28, 2012 providing full analysis of draft plan, including Section 2 analysis, less than two weeks later) (attached as Exhibit A); *Adamson v. Clayton Cnty. Elections & Registration Bd*., 876 F. Supp. 2d 1347, 1356-58 (N.D. Ga. 2012) (conducting Section 2 analysis on expedited schedule); *Stephenson v. Bartlett*, 582 S.E.2d 247, 251 (N.C. 2003) (same); *Henderson v. Bd. of Supervisors of Richmond Cnty*., Va., No. Civ. A. No. 87-0560-R, 1988 WL 86680, at **1-2 (E.D. Va. June 6, 1988) (considering appropriate remedy where county acknowledged that plan previously pre-cleared twice by the Department of Justice violated Section 2); *see also Miller*, 515 U.S. at 909, 918 (affirming decision that previously precleared plan included a district that was an unconstitutional racial gerrymander).

Perhaps more remarkably, the two cases upon which the Cantor Intervenors primarily rely to support their argument that *Shaw* violations in particular should be referred to the legislature for remediation -- even if that means holding an election under an illegal plan, Cantor Resp., at 4-5, 16-17 -- plainly *do not* support that proposition. *Moon v. Meadows* was decided over a year *before* the next congressional election was scheduled to take place, 952 F. Supp. 1141 (E.D. Va. 1997), and the Court explicitly *enjoined* the defendants from conducting that election under the unconstitutional plan. *Id*. at 1151. The case is instructive, but teaches a lesson quite different than the proposition for which it is offered by the Cantor Intervenors, as even a cursory review demonstrates.

Diaz v. Silver, 932 F. Supp. 462 (E.D.N.Y. 1996), is no more helpful to the Intervenors. The court in *Diaz* considered the plaintiffs' request for a preliminary injunction that was filed substantially closer in time to the general election and only *after* the qualifying deadlines had *already passed*. *Id.* at 466. Notably, even then, the court rejected the argument that the mere

proximity of the election alone would bar an injunction. *See id.* ("[W]hile the burden on election officials and candidates are certainly considerations, it would be difficult to accept them as controlling if there were in fact an effective and immediately available remedy to a constitutional violation."). The *Diaz* court's willingness to consider injunctive relief in fact *supports* Plaintiffs' position that there remains ample time to impose an appropriate remedy in this case, where the qualifying deadlines are still three months away, the primary and general elections are six and eleven months away, respectively, and the Court has indicated its probable intention to expedite its consideration of the merits.

The Cantor Intervenors also read *Cane v. Worcester County, Maryland,* 35 F.3d 921 (4th Cir. 1994), much too broadly and quote it out of context. Critically, the case had a peculiar history, and the court expressly "limited" its opinion "by the specific facts and circumstances presented." *Id*. at 928. When the matter first came before the district court, it found that the voting system that the plaintiffs challenged -- which had been used to elect members of the County Board -- violated Section 2 and ordered the County to implement a cumulative voting system within 60 days. *Id*. at 923. What makes the case particularly unusual is that, by the time the court ruled on the merits, the County was no longer using the plan that the court declared invalid. *See id*. ("[A]fter this action was filed but before the first hearing was held, the Board passed Bill 93-6, which amended the voting scheme[.]"). Thus, in the County's mind, it had already remedied the violation, and it submitted the voting system it was then using as its proposed "remedy." The district court, however, "properly rejected" Bill 93-6 as a legally acceptable remedy. *Id*. at 927.

The specific question before the Fourth Circuit was whether, under these unusual circumstances, the district court, which then adopted one of two remedial plans proposed by the

plaintiffs, had accorded the County's expressed preferred policies the appropriate amount of deference. *Id*. at 928. The Fourth Circuit ultimately concluded it had not and directed the district court to permit the County another opportunity to propose a remedy, explaining that while, normally, "[w]hen a political subdivision fails to submit a legally acceptable proposed remedy," the court has authority to fashion its own constitutional remedy, in this particular case "the district court failed to rule on the legality of the scheme set forth in Bill 93-6--*the electoral system in effect at the time the matter was pending before the court*." *Id*. at 929 (emphasis added).[2] There was no discussion of the district court's decision to give the County a limited time period in which to propose a remedy -- an approach that, as discussed *supra*, may be appropriate here, depending on when the Court reaches its decision on the merits.

Finally, the Cantor Intervenors' suggestion that the Court lacks the remedial power to ensure that Virginians are not forced to vote under a map deemed unconstitutional, because they believe that the allotted time does not sufficiently allow for Supreme Court review, Cantor Resp., at 4, 22, must be rejected out of hand. After this Court issues its decision on the merits, the Intervenors may, in accordance with the relevant rules of procedure, apply to the Supreme Court for an emergency stay. There is no legal basis, however, to urge this Court to decline to fashion a remedy in the first instance because the Intervenors have announced their intention to seek a second opinion if they do not like the final result.

C. If Necessary, Relevant Election Deadlines Can Be Modified to Allow the 2014 Election to Take Place Under a Constitutional Map

Neither SBE nor the Cantor Intervenors seriously contest that the Court has the power and authority to modify the relevant election deadlines to effectuate a meaningful remedy in time for

[2] The opinion's discussion of deference is not applicable to this case, which is governed by *Abrams v. Johnson*, 521 U.S. 74 (1997), as addressed in Section II.D, *infra*.

the 2014 election. While SBE argues that *it* is without the authority to unilaterally modify these deadlines, its response is curiously silent on *the Court's authority*, tacitly conceding the point.

The Cantor Intervenors, by contrast, argue that, even if the Court generally has the authority to modify deadlines to effectuate a remedy, "as a matter of federal law, [Virginia's candidate filing period] cannot be moved because this would not afford the [SBE] sufficient time to prepare the ballots that it must send to deployed military personnel" under the MOVE Act. Cantor Resp., at 19.

But the argument is based on a flawed understanding of the very statute upon which it relies: the MOVE Act explicitly allows states to apply for a waiver of its deadlines where the issuance of ballots are delayed due to litigation. *See* 42 U.S.C. § 1973ff-1(g)(2)(B)(ii). Nothing in the consent decree cited by the Cantor Intervenors denies SBE the right to seek such a waiver if it becomes evident that one will be necessary. *See* Cantor Resp., Ex. K. While SBE might be in violation of the MOVE Act if it were to choose not to seek a waiver once it becomes evident that a waiver may be required, that would be an injury of its own making. It's hardly a reason for this Court to refuse to fashion an effective and appropriate legal remedy.

Similarly, SBE's exaggerated litany of administrative burdens potentially resulting from Court-imposed relief in advance of the 2014 election is simply misplaced. A remedy would, unquestionably, inconvenience the election administrators involved, but that inconvenience hardly justifies a continuing constitutional injury. As the court in *Diaz* noted, "while the burden on election officials and candidates are certainly considerations, it would be difficult to accept them as controlling if there were in fact an effective and immediately available remedy to a constitutional violation." 932 F. Supp. at 466. *See also* Pls.' Br. 9-10 (discussing irreparable harm to voters if election is held under unconstitutional map).

Moreover, the argument simply proves too much. *Every state* has similar administrative mechanisms surrounding elections and yet, *somehow*, courts are routinely able to quickly craft remedial maps under which innumerable states have held orderly elections, often under much tighter timelines than the one at issue here. The unexplained suggestion that Virginia is different and somehow incapable of doing so is implausible and unsupported by experience.

SBE's ironic argument that ordering any remedy by the 2014 elections will necessarily carry too great a risk of disenfranchisement due to voter confusion should be viewed with a healthy dose of skepticism given SBE's recent representations in *Democratic Party of Virginia v. SBE,* Case No. 1:13-CV-1218-CMH-TRJ (E.D. Va. Oct. 1, 2013), that there was no meaningful risk of voter disenfranchisement when it implemented a purge of tens of thousands of Virginia voters mere weeks before a major state-wide election.[3] That voter purge program, like the administrative burdens that SBE now complains weigh against this Court fashioning remedial relief for elections still many months away, involved extensive use of the Virginia Election and Registration System ("VERIS"). *See* Ex. B at 3, 8, 16. But, there, SBE argued that the exceedingly short time frame for implementing the program did not risk voter disenfranchisement because SBE was so well versed in the use of VERIS and, in any event, sent notification to all purged voters. *See id*. at 3, 16, 24, 25-26. In fact, contrary to its argument to *this Court* that voter notification would be extremely difficult and seriously risk disenfranchisement, SBE defended its actions *before that court* in part by explaining that it routinely sends notices to large groups of voters close to elections, specifically citing its

[3] In the purge program, SBE required local boards of elections to cross check databases to determine whether over 57,000 registered Virginia voters could be removed from the voter rolls. *See* SBE Mem. Opp. Mot. for Prelim. Injunction 9, 12 (attached as Exhibit B). This process began in late August of this year and was completed shortly before the recent November election. *Id*. at 9. As a result, SBE cancelled the registrations of over 38,000 voters. *Id*. at 12.

obligation, pursuant to federal law, to mail change of address information to approximately 250,000 voters every summer. *Id*. at 4, 7. In addition to that annual distribution, SBE separately attempted to notify all 37,000 plus voters whose registration was cancelled during the months immediately before the general election. *Id*. at 11, 12, 23. If SBE could implement that extensive review and notification process so close to the general election, confident that voter disenfranchisement would not be a serious risk, it can certainly find a way to effectively implement a remedial map in this case to remedy a constitutional violation, where it is almost certain to have much more time to do so.

The practical effect of the Defendants' argument that the Court should not fashion a remedy if the General Assembly is unwilling or unable to enact a constitutional plan in time for use in the 2014 election is that a court should tolerate a continuing constitutional violation to allow the General Assembly to *belatedly* remedy the violation after another election under the racially gerrymandered district lines. But this is precisely what remedial maps are meant to avoid. Accordingly, courts have long recognized that remedial maps will often only be in place for only one cycle. *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 416 (2006) (Kennedy, J.) ("[O]ur decisions have assumed that state legislatures are free to replace court-mandated remedial plans by enacting redistricting plans of their own."). And yet, despite the concomitant added expense and administrative burdens, courts routinely order remedial relief in voting rights cases to address constitutional error. *See* Pls.' Br. 6-7 (discussing representative cases). Remedial maps are the only way to adequately protect against the irreparable harm caused when voters are forced to elect their representatives under maps judged unconstitutional. That's neither surprising nor unusual. Defendants' arguments to the contrary should be rejected.

D. If the Court Prepares a Remedial Map, *Upham* Will Not Restrict Its Map Drawing

Finally, throughout their response, the Cantor Intervenors repeatedly cite the Supreme Court's decision in *Upham v. Seamon*, 456 U.S. 37 (1982), for the proposition that the Court must hew to the General Assembly's policy decisions and "go no further than correcting the identified departure from the Constitution" in preparing a remedy. Cantor Resp., at 3. *See also id*. at 16, 21. This case, however, is controlled by *Abrams v. Johnson*, which explicitly distinguished *Upham*, finding that "[a] precleared plan is not owed *Upham* deference to the extent the plan subordinated traditional districting principles to racial considerations." 521 U.S. at 85. As the Court explained: "*Upham* called on courts to correct—not follow—constitutional defects in districting plans." *Id*. (citing *Upham*, 456 U.S. at 43). Thus, where the entity that prepared the original, unconstitutional map "adopted . . . [an] entirely race-focused approach to redistricting," using the illegal map "as the basis for a remedy would validate the very maneuvers that were a major cause of the unconstitutional districting." *Id*. at 85-86.

Moreover, although none of the Cantor Intervenors represent the gerrymandered CD 3, their very interest in this lawsuit indicates that, if that district were to be drawn free from racial gerrymandering, it could affect multiple districts in the Commonwealth. As the Court explained in *Abrams*, the deference announced in *Upham* was based in large part on the fact that only two contiguous districts out of 27 were affected by the lower court's decision. *Id*. at 86. In this case, the impact has the potential to be more wide reaching, which would justify the Court "in making substantial changes to the existing plan consistent with [the Commonwealth's] traditional districting principles, and considering race as a factor but not allowing it to predominate." *Id*.

II. CONCLUSION

Plaintiffs respectfully submit that the Court has the authority, responsibility and ability to resolve this litigation on the merits and approve an appropriate remedy to ensure that the 2014 election is held pursuant to a constitutional apportionment scheme, free of racial gerrymandering.

Dated: December 16, 2013

Respectfully submitted,

By /s/ _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December, 2013, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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EXHIBIT A

AFFIDAVIT OF PROFESSOR NATHANIEL PERSILY, J.D., PH.D.

Nathaniel Persily, first being duly sworn, deposes and says the following:

1. I am a citizen and resident of the State of New York. I am currently the Charles Keller Beekman Professor of Law and Professor of Political Science at Columbia Law School, where I teach courses on election law, voting rights, redistricting and constitutional law. I am an expert in election law generally, and reapportionment and districting matters in particular. I have served as a special master or court-appointed expert to assist in drafting redistricting plans for the states of Connecticut, Georgia, Maryland, and New York. I obtained Bachelors and Masters Degrees in Political Science from Yale University (1992), a Masters (1994) and Ph.D. (2002) in Political Science from the University of California at Berkeley, and a J.D. from Stanford Law School (1998). I have written over twenty articles on redistricting and election law, several of which have been cited by state and federal courts, including the U.S. Supreme Court. My curriculum vitae is attached at Appendix K.

BACKGROUND

2. On February 28, 2012, the Three-Judge Panel (the "Court") composed of: the Honorable Reena Raggi and the Honorable Gerard E. Lynch, United States Circuit Judges of the United States Court of Appeals for the Second Circuit, and the Honorable Dora I. Irizarry, United States District Judge for the Eastern District of New York, entered an Order referring the task of creating a new congressional redistricting plan for the State of New York to the Honorable Roanne L. Mann, United States Magistrate Judge for the Eastern District of New York (the "Magistrate Judge"). *See* Order of Referral (Feb. 28, 2012) ("2/28/12 Order" or "Order"), Electronic Case Filing Document Entry ("DE") #133.

3. The 2/28/12 Order provided that the Magistrate Judge shall submit her Report and Recommendation, along with her Recommended Plan ("Recommended Plan"), to the Court by March 12, 2012.

4. The 2/28/12 Order empowered the Magistrate Judge to retain appropriate experts as reasonably may be necessary to accomplish her task within the time constraints imposed by the Order. To that end, the Order appointed me as an expert to assist the Magistrate Judge in formulating a redistricting plan.

5. I have reviewed the 2/28/12 Order appointing me and have prepared this affidavit in accordance with the Order's instructions and the instructions I received from the Magistrate Judge.

6. The purposes of this affidavit are to inform the Court of the principles used in the preparation of the Recommended Plan, and to present a description and analysis of the Recommended Plan that may aid the Court in evaluating it.

7. The data relied upon and analyzed here are of the kind usually relied upon by experts in this field to render opinions on the nature of redistricting of congressional districts.

8. In fashioning the Recommended Plan, the Magistrate Judge and I drew upon my background and experience, as well as a review of various materials relating to the demography and geography of New York.

9. We relied upon the data and materials collected and made available by the New York Legislative Task Force on Demographic Research and Reapportionment ("LATFOR"), located at 250 Broadway, New York, New York.

10. The Recommended Plan was developed using my personal computers. The Recommended Plan was designed using Caliper Corporation's "Maptitude for Redistricting," with use of the Census Bureau's P.L. 94-171 data file as formatted by Caliper.

PRINCIPLES GOVERNING THE RECOMMENDED PLAN

11. The Recommended Plan was prepared in adherence to applicable constitutional requirements and Sections 2 and 5 of the Voting Rights Act.

12. The Recommended Plan was prepared in accordance with the 2/28/12 Order's direction that the Magistrate Judge must adhere to, and, where possible, reconcile the following guidelines:

> a. The plan will divide the state into 27 congressional districts in accordance with the 2010 federal Census and applicable law.
>
> b. Districts shall be substantially equal in population.
>
> c. Districts shall be compact, contiguous, respect political subdivisions, and preserve communities of interest.
>
> d. The plan shall comply with 42 U.S.C. § 1973(b) and with all other applicable provisions of the Voting Rights Act.

2/28/12 Order at 3.

13. In addition to the guidelines identified in the above paragraph, the 2/28/12 Order stated that the Magistrate Judge "may consider other factors and proposals submitted by the parties, which, in the magistrate judge's view, are reasonable and comport with the Constitution and applicable federal and state law." 2/18/12 Order at 3.

ELABORATION OF PRINCIPLES GOVERNING THE RECOMMENDED PLAN

Legal Requirements

The Constitutional Requirement of One Person, One Vote

14. The Supreme Court has construed Article I, § 2 of the Constitution to require a strict rule of population equality. Under this requirement, colloquially referred to as one person, one vote, congressional districts must be equal "as nearly as is practicable," *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964), which means that "the State [must] make a good-faith effort to achieve precise mathematical equality." *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969).

15. For congressional plans, the Supreme Court has rejected population deviations even well under one percent as violative of the one person, one vote rule. *See*, *e.g.*, *Karcher v. Daggett*, 462 U.S. 725, 730-31 (1983). Moreover, to the extent courts might permit some deviations from strict population equality in legislatively drawn plans based on a consistently applied state policy, *see id.* at 741 n.11, the Supreme Court has warned that court-drawn plans must be held to an even stricter standard of equality. *See Chapman v. Meier*, 420 U.S. 1, 26 (1975) ("A court-ordered plan, however, must be held to higher standards than a State's own plan.").

The Constitutional Prohibition on Racial Gerrymandering

16. The Equal Protection Clause of the Fourteenth Amendment to the Constitution (and, as applied to the federal government, the equal protection component of the Due Process Clause of the Fifth Amendment) prohibits both intentional race-based vote dilution and excessive use of race in the construction of districts. As with all forms of state action, the Equal Protection Clause prohibits the use of the redistricting process purposefully to discriminate

against a racial group by diluting its vote. *See City of Mobile v. Bolden*, 446 U.S. 55 (1980). Beyond that, the Supreme Court has read into the Equal Protection Clause an "analytically distinct claim" with respect to redistricting. *See Shaw v. Reno*, 509 U.S. 630, 652 (1993). Specifically, any district for which racial considerations serve as the predominant factor in its construction is subject to strict scrutiny under the Equal Protection Clause. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

Section 2 of the Voting Rights Act

17. Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (2006) (the "VRA"), protects against even unintentional race-based vote dilution, including in the redistricting process. Such dilution can occur either through overconcentration ("packing") or excessive dispersion ("cracking") of racial or language minority groups within or across voting districts.

18. Section 2 of the VRA provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973.

19. The Supreme Court has clarified the criteria for proving illegal vote dilution under Section 2. In particular, it has required, as a threshold matter, that plaintiffs demonstrate the so-called *Gingles* prongs. *See Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). *Gingles* and its progeny limit Section 2 lawsuits to situations in which (1) the minority group is "sufficiently large and geographically compact to constitute a majority" in a single-member district; (2) the minority group is politically cohesive; and (3) the majority votes "sufficiently as a bloc to enable it—in the absence of special circumstances . . . —usually to defeat the minority's preferred candidate." *Id.* at 50-51; *see Bartlett v. Strickland*, 556 U.S. 1, 20 (2009) (confirming that only communities that can form over 50% of a district's relevant population have viable Section 2 claims).

20. If the three *Gingles* factors are satisfied, the court must then determine whether, based on the "totality of the circumstances," the racial minority has "less opportunity . . . to elect representatives of their choice." *Gingles*, 478 U.S. at 36 (quoting 42 U.S.C. § 1973(b)).[1]

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[1] Such an analysis can consider:

> the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; the extent to which voting in the elections of the state or political subdivision is racially polarized; the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; if there is a candidate slating process, whether the members of the minority group have been denied access to that process; the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; whether political campaigns have been characterized by overt or subtle racial appeals; the extent to which members of the minority group have been elected to public office in the jurisdiction. Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are: whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members

21. One factor in the totality of the circumstances analysis that undercuts a finding of vote dilution is "proportionality." The Supreme Court has defined proportionality as a situation in which "minority groups constitute effective voting majorities in a number of . . . districts substantially proportional to their share in the population." *Johnson v. De Grandy*, 512 U.S. 997, 1024 (1994). Such proportionality is neither a requirement nor a safe harbor, however. A jurisdiction is not required to draw a proportional number of such districts nor is it immune from Section 2 liability simply by doing so. In particular, Section 2 may still be violated if, in ostensible pursuit of proportionality, a plan creates a district or districts with effective voting majorities of a particular minority group in a way that causes another minority group to lose its own effective voting majorities.

22. Section 2 does not require creating the maximum possible number of majority-minority districts. *See De Grandy*, 512 U.S. at 1017 (stating that "[f]ailure to maximize" majority-minority districts "cannot be the measure of § 2"). Moreover, the Supreme Court has recently interpreted the "compactness" requirement of the first *Gingles* prong to be limited to situations in which the minority community is not only geographically compact, but also culturally similar. In *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 435 (2006) ("*LULAC*"), the Court found that the "disparate needs and interests of [two distinct Texas Hispanic] populations," in addition to the "enormous geographical distance" separating them, meant that Section 2 did not require them to be grouped together in a single district. Thus, just as proportionality is not a fixed requirement, the construction of districts between geographically

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> of the minority group; whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Gingles, 478 U.S. at 36-38 (citing S. Rep. No. 97-417 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07) (internal quotation marks and numbering omitted).

distant and culturally distinct minorities is also not mandatory. Moreover, creating such districts cannot be used to compensate for the failure to draw districts for communities with viable Section 2 claims.

23. The concept of "cultural compactness" overlaps somewhat with the requirement of minority political cohesion. It, too, turns on whether the minority group generally supports the same candidates at the polls. If minority voters do not tend to vote for the same candidates, then no candidate of choice exists for the minority community, and therefore a new redistricting plan cannot be deemed to dilute their vote.

24. Because only communities that could comprise a majority of a potential district have viable Section 2 claims, how one measures the size of a racial group can affect which communities may raise successful claims of vote dilution.

25. The 2010 Census, like its predecessors, allowed respondents to check off more than one race on the census form. As a result, the Census has released redistricting data according to 63 different racial combinations for every level of geography.

26. For any given racial group, the estimates of its size will vary from a minimum of only those respondents choosing the single race category and nothing else, to a maximum of all respondents choosing that race category and one or more other race categories.

27. The Census does not consider Hispanic to be a racial group, but it does permit respondents to identify as Hispanic in addition to race. As a result, every racial group combination has two variations—Hispanic and non-Hispanic. Thus, the total number of racial and ethnic combinations recognized by the Census is 126.

28. The Office of Management and Budget has issued guidance on how to reaggregate the Census's racial combinations into a workable format for civil rights enforcement:

> Federal agencies will use the following rules to allocate multiple race responses for use in civil rights monitoring and enforcement:
>
> - Responses in the five single race categories are not allocated.
> - Responses that combine one minority race and white are allocated to the minority race.
> - Responses that include two or more minority races are allocated as follows:
>
> - If the enforcement action is in response to a complaint, allocate to the race that the complainant alleges the discrimination was based on.
> - If the enforcement action requires assessing disparate impact or discriminatory patterns, analyze the patterns based on alternative allocations to each of the minority groups.

Office of Mgmt. & Budget, Exec. Office of the President, OMB Bull. No. 00-02, Guidance on Aggregation and Allocation of Data on Race for Use in Civil Rights Monitoring and Enforcement (Mar. 9, 2000), *available at* http://www.whitehouse.gov/omb/bulletins_b00-02.

29. In its one consideration of this issue, the Supreme Court expressed apparent agreement with this approach, saying that in a "case [that] involves an examination of only one minority group's effective exercise of the electoral franchise . . . it is proper to look at *all* individuals who identify themselves as black." *Georgia v. Ashcroft*, 539 U.S. 461, 473 n.1 (2003) (emphasis in original).

30. The Department of Justice has followed the OMB guidance in its enforcement of Section 5 of the Voting Rights Act. *See* Department of Justice, Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, 66 Fed. Reg. 5412-5414 (Jan. 18, 2001). It has also clarified that "[i]f there are significant numbers of responses which report Hispanics and one or more minority races (for example, Hispanics who list their race as Black/African-American), those responses will be

allocated alternatively to the Hispanic category and the minority race category." *Id*. at 5412-01. Thus, for Voting Rights Act purposes, all racial data must be considered, but the relevant categorization of individual responses may depend on the particular nature of a potential claim to be raised against a plan.

31. For purposes of the discussion, tables, and appendices that follow, racial categories are designated with the following labels. "NH White" refers to Non-Hispanics who check off White but no other race on the census form. "NH DOJ Black" refers to Non-Hispanic Blacks who check off Black alone or Black in combination with White. "NH DOJ Asian" refers to Non-Hispanic Asians who check off Asian alone or Asian in combination with White. Black refers to any respondent who checks off Black, alone or in combination with another race. Asian refers to any respondent who checks off Asian, alone or in combination with another race.

32. These categorizations are used so as to maintain consistency between this affidavit and the submissions of the parties. The inclusion of "DOJ" in the label tracks the categorization scheme used by the redistricting data providers to indicate data expressed according to Department of Justice guidelines.

Section 5 of the Voting Rights Act

33. Section 5 of the VRA provides that certain jurisdictions (including three counties in New York—the Bronx, New York County, and Kings County) must preclear their redistricting plans with either the Department of Justice or the United States District Court for the District of Columbia. Court-drawn redistricting plans are not subject to the Section 5 preclearance requirement. *See Connor v. Johnson*, 402 U.S. 690, 691 (1971) ("A decree of the United States District Court is not within the reach of Section 5 of the Voting Rights Act."). The Supreme Court has instructed, however, that when drawing new congressional plans, district

courts "should follow the appropriate Section 5 standards, including the body of administrative and judicial precedents developed in Section 5 cases." *Abrams v. Johnson*, 521 U.S. 74, 96 (1997) (internal quotation marks and citation omitted).

34. Section 5 requires that redistricting plans neither have "the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or [membership in a linguistic minority]." 42 U.S.C. § 1973c(a). The "purpose" standard targets voting changes motivated by "any discriminatory purpose." *Id.* § 1973c(c). The "effect" standard covers changes "that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976).

35. When Congress reauthorized Section 5 of the VRA in 2006, it added a new subsection clarifying Section 5's substantive standard to include:

> Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of *diminishing the ability of any citizens of the United States* on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, *to elect their preferred candidates of choice* denies or abridges the right to vote within the meaning of subsection (a) of this section.

42 U.S.C. § 1973c(b) (2007) (emphasis added). "Retrogression" under Section 5 is established by comparing a proposed plan with the existing, or "benchmark," plan. *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 478 (1997). Whether a plan is retrogressive "depends on an examination of all the relevant circumstances," and "'[n]o single statistic provides courts with a shortcut to determine whether' a voting change retrogresses from the benchmark." *Georgia*, 539 U.S. at 479-80 (quoting *De Grandy*, 512 U.S. at 1020-21). *See also* Department of Justice, Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470,

7471 (Feb. 9, 2011) ("Although comparison of the census population of districts in the benchmark and proposed plans is the important starting point of any Section 5 analysis, additional demographic and election data in the submission is often helpful in making the requisite Section 5 determination."). However, substantial drops in a racial group's share of the voting age population in a district, if avoidable, can often signal likely retrogression.

Districting Principles Mandated by the Court's Order

Compactness

36. The 2/28/12 Order directed that the districts drawn by the Recommended Plan "shall be compact." 2/28/12 Order at 3.

37. Compactness is an important and commonly employed redistricting principle. It is not, however, an independent requirement of federal law. Rather, the Supreme Court has referenced compactness in two contexts. The first concerns the "smoking out" of impermissible motive in a racial gerrymandering case. Non-compact districts with shapes unexplainable on grounds other than race may violate the Equal Protection Clause of the Fourteenth Amendment. *See, e.g.*, *Bush v. Vera*, 517 U.S. 952, 958-65 (1996); *Miller*, 515 U.S. at 917; *Shaw*, 509 U.S. at 642. Second, as discussed above, compactness of a minority community is a prerequisite for a Section 2 VRA claim. Only compact minority communities that could constitute a majority in a single member district have a potential entitlement to a district under Section 2. *See LULAC*, 548 U.S. at 443-44; *Gingles*, 478 U.S. at 50. Other than those two contexts, compactness is primarily relevant only in those states that have explicit compactness requirements in state law. *See* National Conference of State Legislatures, Redistricting Law 2010, at 106-12 (2009) (identifying states with legal requirements of compactness, including New York for state legislative districts).

38. Neither the courts nor political scientists have accepted any single measure of compactness. Rather, compactness is an aesthetic as well as a geometric quality of districts. Thus, although there are objective measures of compactness, it is also the case that compactness, like beauty, can lie in the eye of the beholder. *See* Kurtis A. Kemper, *Application of Constitutional "Compactness Requirement" to Redistricting*, 114 ALR 5th 311 (2003) (comparing different courts' treatment of state law compactness requirements).

39. Maptitude for Redistricting, the redistricting software used to formulate the Recommended Plan, provides reports for eight different measures of compactness: the Reock, Schwartzberg, Perimeter, Polsby-Popper, Length-Width, Population Polygon, Population Circle, and Ehrenburg tests. *See* Caliper Corporation, Maptitude for Redistricting: Supplemental User's Guide, 117-19 (2010). The software user's guide describes these tests as follows:

> *Reock Test*: The Reock test is an area-based measure that compares each district to a circle, which is considered to be the most compact shape possible. For each district, the Reock test computes the ratio of the area of the district to the area of the minimum enclosing circle for the district. The measure is always between 0 and 1, with 1 being the most compact. The Reock test computes one number for each district and the minimum, maximum, mean and standard deviation for the plan.[2]
>
> *Schwartzberg Test*: The Schwartzberg test is a perimeter-based measure that compares a simplified version of each district to a circle, which is considered to be the most compact shape possible. This test requires the base layer that was used to create the districts. The base layer is used to simplify the district to exclude complicated coastlines.
>
> For each district, the Schwartzberg test computes the ratio of the perimeter of the simplified version of the district to the perimeter of a circle with the same area as the original district. The district is simplified by only keeping those shape points where three or more areas in the base layer come together. Water features and a

[2] E.C. Reock, Jr., *Measuring Compactness as a Requirement of Legislative Apportionment*, 5 Midwest J. of Pol. Sci. 70 (1961).

neighboring state also count as base layer areas. This measure is usually greater than or equal to 1, with 1 being the most compact. Unfortunately, the simplification procedure can result in a polygon that is substantially smaller than the original district, which can yield a ratio less than 1 (e.g., an island has a 0 ratio). The Schwartzberg test computes one number for each district and the minimum, maximum, mean and standard deviation for the plan.[3]

Perimeter Test: The perimeter test computes the sum of the perimeters of all the districts. The perimeter test computes one number for the whole plan. If you are comparing several plans, the plan with the smallest total perimeter is the most compact.[4]

Polsby-Popper Test: The Polsby-Popper test computes the ratio of the district area to the area of a circle with the same perimeter: 4(pi)Area/(Perimeter squared). The measure is always between 0 and 1, with 1 being the most compact. The Polsby-Popper test computes one number for each district and the minimum, maximum, mean and standard deviation for the plan.[5]

Length-Width Test: The length-width test computes the absolute difference between the width (east-west) and the height (north-south) of each district. The bounding box of a district is computed in longitude-latitude space, and the height and width of the box through the center point are compared. The total is divided by the number of districts to create the average length-width compactness. A lower number indicates better length-width compactness. This measure of compactness is designed for contiguous districts, since the bounding box encloses the entire district.[6]

Population Polygon Test: The population polygon test computes the ratio of the district population to the approximate population of the convex hull of the district (minimum convex polygon which completely contains the district). The population of the convex hull is approximated by overlaying it with a base layer, such as Census Blocks. [Census Blocks are the smallest geographic units for which the Census distributes population data.] The measure is always between 0 and 1, with 1 being the most compact. The population polygon test computes one

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[3] J.E. Schwartzberg, *Reapportionment, Gerrymanders, and the Notion of Compactness*, 50 Minn. L. Rev. 443 (1966).

[4] H.P. Young, *Measuring the Compactness of Legislative Districts*, 13 Leg. Stud. Q. 105 (1988).

[5] Daniel D. Polsby & R.D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L. & Pol'y Rev. 301 (1991).

[6] *See* Iowa State Leg. Website, http://www.legis.state.ia.us/redist/june2001report.htm.

number for each district and the minimum, maximum, mean and standard deviation for the plan.[7]

Population Circle Test: The population circle test computes the ratio of the district population to the approximate population of the minimum enclosing circle of the district. The population of the circle is approximated by overlaying it with a base layer, such as Census Blocks. The measure is always between 0 and 1, with 1 being the most compact. The Population Circle test computes one number for each district and the minimum, maximum, mean and standard deviation for the plan.[8]

Ehrenburg Test: The Ehrenburg test computes the ratio of the largest inscribed circle divided by the area of the district. The measure is always between 0 and 1, with 1 being the most compact. The Ehrenburg test computes one number for each district and the minimum, maximum, mean and standard deviation for the plan.[9]

40. The compactness criterion is often in tension with the requirements of federal law, such as the VRA, or the constitutional requirement of one person, one vote.

41. Given the strange shape of some of New York's municipalities and counties, as well as the presence of natural boundaries like coastline, districts that respect such boundaries will be somewhat noncompact both in appearance and by traditional measures.

Contiguity

42. The 2/28/12 Order directed that the districts drawn by the Recommended Plan "shall be . . . contiguous." 2/28/12 Order at 3.

43. In general, a contiguous district may be defined as one in which it is possible to travel from any one part of the district to any other part of the district without leaving

[7] Thomas Hofeller & Bernard Grofman, *Comparing the Compactness of California Congressional Districts Under Three Different Plans: 1980, 1982, and 1984*, in Toward Fair and Effective Representation 281 (Bernard Grofman ed., 1990).

[8] *Id.*

[9] Y.S. Frolov, *Measuring the Shape of Geographic Phenomena: A History of the Issue*, 16 Soviet Geography 676 (1995).

the district. Contiguity is an important and commonly employed criterion in redistricting. *See, e.g.*, *Shaw*, 509 U.S. at 647.

44. Some of New York's districts include islands or bodies of water that prevent all parts of the district from being connected by land. The Supreme Court and the New York courts have held that districts that are contiguous only by water can satisfy the contiguity criterion. *See, e.g.*, *Lawyer v. Department of Justice*, 521 U.S. 567, 581 n.9 (1997) ("The Supreme Court of Florida has held that the presence in a district of a body of water, even without a connecting bridge and even if such districting necessitates land travel outside the district to reach other parts of the district, 'does not violate this Court's standard for determining contiguity under the Florida Constitution.'" (quoting *In re Constitutionality of Senate Joint Resolution 2G*, 597 So.2d 276, 280 (Fla. 1992)); *Matter of Schneider v. Rockefeller*, 31 N.Y.2d 420, 430 (1972) ("[T]he requirement of contiguity is not necessarily violated because a part of a district is divided by water.").

Respect for Political Subdivisions

45. The 2/28/12 Order directed that the districts drawn by the Recommended Plan "shall . . . respect political subdivisions." 2/28/12 Order at 3.

46. Political subdivision boundaries include those of counties, cities, towns, and villages. The Supreme Court and this Court have treated respect for such subdivision boundaries as a traditional principle of districting. *See, e.g.*, *Miller*, 515 U.S. at 908; *Puerto Rican Legal Def. & Educ. Fund, Inc. v. Gantt*, 796 F. Supp. 681, 687 (E.D.N.Y. 1992) ("*PRLDEF*").

47. The Census designates and provides data broken down according to the boundaries of certain political subdivisions, including counties, Minor Civil Divisions, and

Census Designated Places (which may or may not coincide with a political subdivision boundary).

48. The Census defines Minor Civil Divisions ("MCDs") as "the primary governmental or administrative divisions of a county in many states . . . . MCDs in the United States, Puerto Rico, and the Island Areas represent many different kinds of legal entities with a wide variety of governmental and/or administrative functions. MCDs include areas variously designated as barrios, barrios-pueblo, boroughs, charter townships, commissioner districts, election districts, election precincts, gores, grants, locations, magisterial districts, parish governing authority districts, plantations, purchases, reservations, supervisor's districts, towns, and townships. . . . The MCDs in 12 states [including New York] also serve as general-purpose local governments that can perform the same governmental functions as incorporated places." *See* Census Geographic Terms and Concepts ("Census Terms"), *available at* http://www.census.gov/geo/www/2010census/GTC_10.pdf.

49. The boroughs of New York City have an unusual status and interrelationship that require them to be treated somewhat distinctively from counties elsewhere in the state when it comes to redistricting. First, New York City boroughs are counties contained within a city, rather than cities contained within one or more counties. Second, the boroughs are political entities each with its own government, while still being part of a larger political entity (i.e., New York City) that is not the state as a whole. Third, the boroughs share many historical links with one another. Fourth, subway lines tightly link the boroughs, serving as arteries of movement that have shaped the patterns of population settlement that help define New York City's communities and that often cut across borough lines.

Preservation of Communities of Interest

50. The 2/28/12 Order directed that the districts drawn by the Recommended Plan "shall . . . preserve communities of interest." 2/28/11 Order at 3.

51. The Supreme Court and this Court have treated the preservation of communities of interest as a traditional principle of districting. *See, e.g.*, *Miller*, 515 U.S. at 916; *PRLDEF*, 796 F. Supp. at 687.

52. Respecting communities of interest is both an essential and slippery consideration in redistricting processes. In one respect, redistricting is *about* representation of communities. Communities that are split between districts often view their voice as diminished.

53. In another respect, arguments based on asserted communities of interest can often be pretexts for incumbency or partisan-related considerations. Moreover, community boundaries are inherently amorphous, contested, shifting and conflicting. By respecting one community's boundaries or some advocates' conception of their community, a redistricting plan might conflict with other advocates' conception of their community or with another community's boundaries.

54. In addition to testimony presented in redistricting-related hearings, including through submissions by parties and the public to the court, information regarding communities of interest can be garnered through certain governmental and non-governmental sources.

55. For example, the Census provides data for "Census Designated Places." "Census Designated Places (CDPs) . . . are delineated to provide data for settled concentrations of population that are identifiable by name but are not legally incorporated under the laws of the state in which they are located. The boundaries usually are defined in cooperation with local or

tribal officials and generally updated prior to each decennial census. These boundaries, which usually coincide with visible features or the boundary of an adjacent incorporated place or another legal entity boundary, have no legal status, nor do these places have officials elected to serve traditional municipal functions. CDP boundaries may change from one decennial census to the next with changes in the settlement pattern; a CDP with the same name as in an earlier census does not necessarily have the same boundary." *See* Census Terms.

56. In addition, New York City is divided into 59 "community districts." As the New York City Department of City Planning website explains: "New York City's 59 community districts, established by local law in 1975, illustrate the remarkable diversity of the city's land uses and population. They range in size from less than 900 acres to almost 15,000 acres, and in population from fewer than 35,000 residents to more than 200,000." *See* Community District Profiles, *available at* http://www.nyc.gov/html/dcp/html/lucds/cdstart.shtml. Given that community districts have their own boards and some political power, they could also be considered as political subdivisions. Those community districts are further divided into "projection areas," which are very rough estimates of neighborhoods with a minimum population of 15,000 people. However, these projection areas are used principally for purposes of projecting population change, by neighborhood, over the next twenty years. *See* New York City Projection Areas, *available at* http://www.nyc.gov/html/dcp/html/bytes/meta_pa.shtml. Presented in Appendix F are maps of the New York City community districts and projection areas.

Additional Considerations Not Mandated by the Court's Order

57. The 2/28/12 Order also provided that the Magistrate Judge "may consider other factors and proposals submitted by the parties, which, in the magistrate judge's view, are reasonable and comport with the Constitution and applicable federal and state law." 2/28/12 Order at 2.

58. An additional principle that guides the Recommended Plan is a desire that the process and decision-making be nonpartisan, even if the effect of a new redistricting plan will have inevitable and substantial effects for political parties and incumbents. Toward that end, at the Magistrate Judge's direction, the Recommended Plan deliberately ignores political data, such as voter registration or election return data, as well as incumbent residence. Although avoiding incumbent pairings may be a redistricting principle traditionally followed by the Legislature when it draws lines, the Recommended Plan seeks to avoid picking favorites in its construction of districts. Therefore, the location of incumbent residences was not even added to the redistricting data considered in the construction of either the Recommended Plan or its predecessor, the Proposed Plan circulated by the Magistrate Judge on March 5. Moreover, congressional candidates, unlike candidates for the state legislature, are not legally required to live in a district in order to run from it. Thus, drawing districts around incumbent residences is less important in the congressional context than in other redistricting contexts.

59. To the extent doing so does not conflict with the other criteria identified in the 2/28/12 Order, the Recommended Plan respects the population cores of prior districts. Following this criterion can be quite challenging for many of the bizarrely shaped districts in the state. A gallery of the most bizarrely shaped districts in the existing plan ("Existing Plan") is provided in Appendix G. Moreover, given that the state is losing two districts and that every

district is currently underpopulated, significant shifts among districts are inevitable in order to comply with the requirement of one person, one vote.

CONSIDERATION OF REDISTRICTING MATERIAL SUBMITTED BY THE PARTIES AND MEMBERS OF THE PUBLIC

60. The Magistrate Judge directed parties to submit any proposals, plans, and comments by February 29, 2012; responses thereto, and submissions by non-parties, were due by March 2, 2012. A public hearing was held on March 5, 2012, at the United States Courthouse at 225 Cadman Plaza, Brooklyn, New York. The redistricting materials and testimony presented by interested parties in advance of, at, and after the hearing were reviewed and evaluated by me and by the Magistrate Judge.

61. The parties submitted to the Magistrate Judge a total of four statewide redistricting plans and three partial plans. The Magistrate Judge and I considered those plans and other submissions made to the Magistrate Judge by non-parties, as well as testimony presented at the hearing. For the reasons set out below, the Recommended Plan does not adopt any of the submitted plans in their entirety.

62. The four statewide plans submitted by parties are the plans of (1) Defendants Dean G. Skelos (as Majority Leader and President Pro Tempore of the Senate of the State of New York), Michael F. Nozzolio (as member of LATFOR), and Welquis R. Lopez (as member of LATFOR) (hereinafter the "Senate Majority Plan"); (2) Defendants Sheldon Silver (as Speaker of the Assembly of the State of New York), John McEneny (as member of LATFOR), Roman Hedges (as member of LATFOR) (hereinafter the "Assembly Majority Plan"); (3) Defendant Brian M. Kolb (as Minority Leader of the Assembly of the State of New York)

(hereinafter the "Assembly Minority Plan"); and (4) Plaintiff-Intervenors Linda Rose, et al. (hereinafter the "Rose Plan").

63. After carefully reviewing the Senate Majority, Assembly Majority, Assembly Minority, and Rose Plans, as well as the parties' and others' responses to those plans, the Magistrate Judge and I decided to reject those plans and draft our own. Each of those plans could fairly be characterized (and was characterized by the other parties) as attempting to gain partisan advantage through the redistricting process. Adopting any such plan would violate the principle of nonpartisanship that undergirds the Recommended Plan.

64. The three partial plans submitted by parties are the plans of (1) Plaintiff-Intervenors Linda Lee, et al. (hereinafter the "Lee-AALDEF Plan"); (2) Plaintiff-Intervenors Juan Ramos, et al. (hereinafter the "Ramos Plan"); (3) Plaintiff-Intervenors Donna Kaye Drayton, et al. (hereinafter the "Drayton-Unity plan").

65. Partial and individual district plans cannot be adopted wholesale while fulfilling the requirement that we create a plan of 27 districts. Furthermore, especially with respect to proposed individual districts, a proposal cannot be inserted into a plan while ignoring the population "needs" of surrounding districts. Moreover, adopting an individual district proposal risks ignoring the necessary tradeoffs between districts, and can raise VRA problems if one district's configuration leads to race-based dilution or retrogression in another district. Nevertheless, careful consideration was given to each proposal submitted by the parties.

66. Non-party members of the public submitted a total of thirteen statewide redistricting plans: the Common Cause, Connor Allen, David Harrison, Michael Danish, Andrew C. White, Vincent Flynn, Elijah Reichlin-Melnick, Robert Silverstein, Philip Smith, David Gaskell, Jesse Laymon, Michael Fortner and Adama D. Brown plans. After careful

review of those plans, it was determined that they all violated the constitutional requirement of one person, one vote, and that many risked violating the VRA.

67. Non-party members of the public submitted a total of six partial plans. They are from the Citizens Alliance for Progress, Concerned Citizens of Fort Greene and Clinton Hill, Keith L.T. Wright, Yvette D. Clarke, the Orthodox Alliance for Liberty, and Ruben Diaz. For the same reasons the partial plans of the parties were rejected but given consideration, these plans were accorded the same treatment.

DESCRIPTION OF DISTRICTS IN THE RECOMMENDED PLAN

68. Districts in the Recommended Plan, and any plan for New York State, can be divided into three regions: Long Island, New York City, and Upstate. *See* Appendix A (Maps of Regions and Individual Districts in Recommended Plan); Appendix B (Existing Congressional Districts).

Long Island

69. Under the Existing Plan, Long Island has approximately 4.2 districts. To adjust for the loss of two districts and population shifts, it can only sustain 3.95 districts.

70. District 1, as it exists in a corner, is one of the least changed districts in the Recommended Plan. Its northwestern border is adjusted to achieve population equality.

71. Existing Districts 2, 3, and 5, however, are consolidated (mostly into the Recommended Plan's Proposed Districts 2 and 3) to address the population shortfall on Long Island. They are consolidated in an east-west direction, such that Proposed District 2 extends along Southern Long Island and Proposed District 3 extends along Northern Long Island.

72. Existing District 4 is kept largely intact in Proposed District 4, but extends southeast so as to compensate for the loss of population on its western boundary to Proposed District 5.

New York City

73. New York City currently has approximately 12.2 districts (eleven full districts and parts of two others). Due to population shortfalls, it should have 11.66 districts.

74. Almost all of the Proposed Districts for New York City retain a majority of the population of a prior district. *See* Appendix E (Core Constituency Report). The exceptions are Proposed District 6 and Proposed District 16.

Staten Island

75. Beginning in another corner, Staten Island, Proposed District 11 largely mirrors Existing District 13, but its Brooklyn component is adjusted in order to achieve population equality (both for Proposed District 11 and the adjacent districts).

Brooklyn

76. The Proposed Brooklyn Districts (7, 8, 9, 10 and 12) are largely based on their current configurations (but with new numbers), with a few notable exceptions.

77. Existing District 9 is taken out of Brooklyn and becomes a Queens-based district (Proposed District 6). Its Brooklyn areas (as well as the Queens neighborhoods of Ozone Park and Howard Beach) are largely transferred to Existing District 10 to form Proposed District 8 (which also picks up the Coney Island area from Existing District 8).

78. The borders of Existing Districts 10, 11, and 12 are rearranged in order to achieve population equality for Proposed Districts 7, 8, and 9.

79. Existing District 14 (Proposed District 12) now includes a portion of Brooklyn (namely Greenpoint and East Williamsburg, currently in Existing District 12) in order to bring that district up to population equality and to maintain compactness.

Queens

80. In Queens, Proposed District 5 largely retains the borders of Existing District 6, but it extends both southwest through the Rockaways (into Existing District 9) and east into the Long Island-based Existing District 4.

81. Above Proposed District 5 is Proposed District 6, which contains much of the Central Queens portion of Existing District 9, but extends north and east to pick up neighborhoods in Existing Districts 5 and 7.

82. The remaining area between Proposed District 6 and the Queens-Nassau County border is in Proposed District 3, most of which territory was in the Nassau-Queens district—Existing District 5—in the Existing Plan.

83. Proposed District 14 is modeled on Existing District 7. The Bronx-based territory and population it cedes to Proposed District 15 are made up by extending Proposed District 14 somewhat farther south into Queens.

84. Proposed District 12, as previously noted, is a Manhattan, Queens, and now Brooklyn district (with 77% of its population coming from Existing District 14). To compensate for the Queens-based population it loses to Proposed District 14, it extends south into Brooklyn (as previously described) to pick up Greenpoint and East Williamsburg.

Manhattan

85. Like their counterparts in the Existing Plan (i.e., Existing Districts 8, 12, 14 and 15), Proposed Districts 7, 10, 12, and 13 straddle Manhattan and other boroughs.

86. Proposed District 12 (Existing District 14) extends both south and west into territory held by Existing Districts 8 and 12 (although the "hook" at the bottom of Existing District 14 in Manhattan is largely eliminated in population trades between Proposed District 12 and Proposed District 7).

87. Proposed District 10, which contains a substantial Brooklyn section, as described above, moves north into Morningside Heights to pick up the requisite population from Existing District 15. The east and west sides of Manhattan remain (for the most part) in different districts, as under the Existing Plan.

88. Proposed District 13 (largely based on the Harlem-based Existing District 15) loses its small Queens-based section (which included Rikers Island) and moves into the North Bronx section connected to the Marble Hill-Inwood neighborhood, which is part of New York County but is adjoined to the Bronx. That area of the Bronx is currently shared between Existing Districts 16 and 17.

Bronx

89. Proposed District 13's incursion into the Bronx pushes Existing District 16 farther southeast, into Existing District 7, which is why Proposed District 14 must extend farther into Queens than Existing District 7.

90. With the exception of the territory now taken from it by Proposed District 13, Existing District 17's Bronx portion remains largely intact.

Upstate

91. The area of Upstate New York (loosely defined to include every county north of the Bronx) currently contains approximately 12.5 districts. Because of population shortfalls, it "deserves" 11.66 districts, according to the 2010 Census. Moreover, due to the

bizarre shape and location of many of the districts in Upstate New York, many of which do not have population cores (or have multiple cores), the Recommended Plan faced a challenge in reconciling the Existing Districts with the Court's order that "districts shall be compact, contiguous, respect political subdivisions, and preserve communities of interest." 2/28/12 Order at 3.

92. Such is the case with Existing District 17, which connects the northwestern Bronx and southeastern Westchester to a substantial share of Rockland County through a narrow corridor in western Westchester. That District is reconfigured into Proposed District 16, which includes the Bronx section of the Existing District and the geographically proximate towns in Westchester. As a result, Existing District 18 is reconfigured (as Proposed District 17) to include all of Rockland County and additional towns in northern Westchester.

93. Existing District 19 remains largely intact in Proposed District 18. It unifies Orange County by extending northwest, and captures almost all of Poughkeepsie in Dutchess County.

94. Proposed District 19 represents a combination of the cores of Existing Districts 20 and 22 in the Hudson Valley. Existing District 22 extended from Northern Orange County west through portions of Delaware, Broome, and Tioga Counties, with a "finger" capturing Ithaca in Tompkins County. Existing District 20 ran up the Hudson River into the North Country, but also west into Greene, Delaware and Otsego Counties. Proposed District 19 is a compact district that extends from the southern portion of Dutchess County not contained in Proposed District 18, north to Rensselaer and northwest to Schoharie, Otsego and Delaware Counties (with a small intrusion into Broome County in order to bring it to population equality).

95. With the exception of Schoharie County, which it loses to Proposed District 19, Proposed District 20 remains largely the same as Existing District 21. To compensate for the loss of Schoharie County, Proposed District 20 goes into Saratoga County to pick up Saratoga Springs. (It also loses about half of Montgomery County.) It remains, however, a Capitol Cities District, centered around Albany, Schenectady, Troy and Rensselaer.

96. Proposed District 21 retains the North Country core of Existing District 23. However, it gains the portions of Existing Districts 20 and 24 that intruded into the North Country and loses the portions of Madison, Oneida and Oswego Counties that it previously held, which are transferred to Proposed District 22.

97. Besides those additions, Proposed District 22 extends south to gain Chenango and Cortland Counties, almost all of Broome County, and a small part of southern Tioga County.

98. Proposed District 23 is the "Southern Tier" District, mostly resembling Existing District 29. But it is somewhat more southern-oriented than the Existing District, and it extends west to include Chautauqua and east to include Tompkins, Seneca and most of Tioga Counties. It also loses its northern extension into Monroe County.

99. Proposed District 24 is modeled on Existing District 25. It also extends south to Cayuga County and north into part of Oswego County to acquire the necessary population.

100. The Western New York districts (Proposed Districts 25, 26 and 27) presented a particular challenge in reconciling Existing District configurations with the Court's order concerning compactness and respect for political subdivision lines. Moreover, Existing District 28 is not only narrow and "dual-cored" (or perhaps "coreless," stretching from portions

of Buffalo to portions of Rochester through a long and narrow land bridge across northwestern New York), but it also has the largest population shortfall (105,869) of any Existing District in the state. Furthermore, Existing District 27 is the second most underpopulated in the state, needing to pick up 88,436 people.

101. As is clear from the district configurations, Proposed Districts 25 and 26 are adopted from the plan submitted by Common Cause. Those configurations represent compact districts that encompass the Rochester metropolitan area (Proposed District 25) and the Buffalo/Niagara Falls area (Proposed District 26), respectively.

102. Proposed District 27, as a consequence, retains (but unifies) most of the counties in Existing District 26, while going east to pick up about half of Ontario County.

LEGAL EVALUATION OF THE RECOMMENDED PLAN

Constitutional Requirements

One Person, One Vote

103. The 2010 Census determined the population of New York to be 19,378,102. Following the 2010 Census, the number of congressional districts allotted to New York was reduced from 29 to 27. Therefore, the ideal population per congressional district is 717,707.48. A "zero deviation" congressional plan for New York would consist of 14 districts with a population of 717,707 and 13 districts with a population of 717,708.

104. The Magistrate Judge and I reviewed census data on the population demography of New York for both 2000 and 2010, broken down into various units including counties and present congressional lines. This analysis demonstrated that relative to the ideal population for each of the 27 districts, each of the existing 29 congressional districts was

underpopulated. After the 2000 Census, one person, one vote required 654,360 people per congressional district. No district grew enough over the past ten years so as to reach the required 717,707 people that one person, one vote requires for redistricting after the 2010 Census.

105. The extent of the population deviations varied considerably between districts, from a population shortfall of 105,869 in Existing District 28 to a shortfall of just 4,195 in Existing District 8. Table I presents the deviations for all Existing Districts.

Table I. Population Deviations in Existing New York Congressional Districts

District	Population	Deviation	% Deviation
1	705559	-12148	-1.69
2	679893	-37814	-5.27
3	645508	-72199	-10.06
4	663407	-54300	-7.57
5	670130	-47577	-6.63
6	651764	-65943	-9.19
7	667632	-50075	-6.98
8	713512	-4195	-0.58
9	660306	-57401	-8.00
10	677721	-39986	-5.57
11	632408	-85299	-11.88
12	672358	-45349	-6.32
13	686525	-31182	-4.34
14	652681	-65026	-9.06
15	639873	-77834	-10.84
16	693819	-23888	-3.33
17	678558	-39149	-5.45
18	674825	-42882	-5.97
19	699959	-17748	-2.47
20	683198	-34509	-4.81
21	679193	-38514	-5.37
22	679297	-38410	-5.35
23	664245	-53462	-7.45
24	657222	-60485	-8.43
25	668869	-48838	-6.80
26	674804	-42903	-5.98
27	629271	-88436	-12.32
28	611838	-105869	-14.75
29	663727	-53980	-7.52

106. The Recommended Plan achieves "zero deviation." Fourteen districts have a population of 717,707 and 13 districts have a population of 717,708. *See* Appendix C (detailing the demographic composition of districts in the Recommended Plan).

Racial Gerrymandering

107. The Recommended Plan does not intentionally dilute the vote of citizens on account of race, nor is any district in the Recommended Plan drawn with race as its predominant factor.

Voting Rights Act Requirements

108. The Recommended Plan was prepared with strict adherence to the requirements of Section 2 and Section 5 of the Voting Rights Act, and neither retrogresses nor dilutes the votes of any citizens on account of race. Moreover, the Recommended Plan achieves compliance with the VRA without making race the predominant factor in the construction of any districts.

109. To ensure compliance with the applicable provisions of the VRA, the Magistrate Judge and I reviewed the racial and other characteristics of the 29 Existing Districts, based on data from the 2010 Census. I have also reviewed racial and other characteristics of the 27 districts contained in the Recommended Plan, and of the plans submitted by the parties and non-parties to the Magistrate Judge. Based on my experience as part of the team that drew the 2002 Special Master's Plan for New York, I was also intimately familiar with the racial demographics of earlier New York districting plans.

110. Although federal courts need not submit plans that they draw for preclearance, the Recommended Plan aspires to comply and indeed, does comply with the

nonretrogression requirement of Section 5 of the VRA. Specifically, the Recommended Plan does not diminish the ability of citizens on account of race, color, or linguistic minority to elect candidates of their choice.

111. The Recommended Plan also complies with the requirement of Section 2 of the VRA that proscribes dilution of votes on account of race or language minority status. The Recommended Plan maintains the majority-minority districts in the Existing Plan, even where (as a result of relative population decline and the need to add adjacent residents to achieve population equality) some alteration in the demographic composition of the districts was unavoidable. Because of the loss of two districts, the need to reach population equality in every district, and the different rates of growth of different racial groups, some change in district demographic statistics was unavoidable.

112. Any district that touches one of the three covered New York counties (Bronx, Manhattan, Kings) would be subject to a retrogression analysis under Section 5, were a plan submitted for preclearance. In the covered counties, the plan may not diminish the ability of citizens, on account of race, to elect their preferred candidates.

113. The racial and ethnic data for all districts in the Existing and Recommended Plan are provided in Appendix C.

114. Of course, the ability and opportunity of groups to elect their preferred candidates are affected by more than the simple racial breakdown of their existing and new districts. Still, racial data provide the starting point for any retrogression and dilution analysis. Significant decreases in a group's racial percentage in a district, for example, could raise concerns about retrogression.

115. In districts touching the counties covered by Section 5, therefore, the Recommended Plan keeps the demographic composition of the districts largely the same, to the extent possible given disparate rates of population growth. Of course, shifts among the protected districts, and between them and districts in uncovered counties, are inevitable given the need to comply with one person, one vote and to achieve compactness and contiguity.

Bronx County

116. The racial and ethnic composition of the Existing and Proposed Districts in Bronx County, according to both total population and voting age population, is presented in Table II below. For ease of explanation, the description of VRA compliance is focused on voting age population ("VAP"), but all population statistics were considered (as were the various ways one can categorize racial groups).

117. Under both the Existing Plan and the Recommended Plan, the Bronx encompasses all or part of four districts. All four have substantial minority populations.

118. The only notable change from the Existing Plan concerns Harlem-based Existing District 15 and its analog in the Recommended Plan, Proposed District 13. Both the Black and Hispanic shares of the population in that district increase as a result of moving part of that Harlem-based district into the northern Bronx. The Hispanic VAP share increases from 43.8% to 52.7%, and the Black VAP share increases from 34.1% to 35.7%. (The NH DOJ Black VAP share increases from 26.9% to 27.4%.) The Recommended Plan therefore adds one more majority-Hispanic VAP congressional district in the state. Otherwise, the Recommended Plan's Proposed Districts in the Bronx remain roughly the same in terms of their demographic composition as the Existing Districts in that borough.

Table II. Demographic Breakdown of Existing and Proposed Districts for the Bronx

A. Population

Existing Plan							
District	% NH White	% Black	% NH DOJ Black	% Asian	% NH DOJ Asian	% Hispanic Origin	% Minority Population
07	20.7%	21.5%	16.6%	17.4%	16.5%	44.4%	79.3%
15	20.9%	34.6%	26.9%	5.3%	4.6%	46.1%	79.1%
16	2.4%	39.0%	28.1%	2.3%	1.6%	66.5%	97.6%
17	37.2%	34.6%	30.4%	5.6%	5.0%	25.6%	62.8%

Recommended Plan							
District	% NH White	% Black	% NH DOJ Black	% Asian	% NH DOJ Asian	% Hispanic Origin	% Minority Population
13	12.2%	35.9%	27.0%	4.9%	4.2%	55.1%	87.8%
14	24.9%	13.0%	9.6%	17.1%	16.2%	47.5%	75.1%
15	2.3%	40.0%	29.2%	2.5%	1.8%	65.3%	97.7%
16	39.3%	34.5%	30.8%	5.5%	4.9%	23.3%	60.7%

B. Voting Age Population

Existing Plan							
District	% NH White VAP	% Black VAP	% NH DOJ Black VAP	% Asian VAP	% NH DOJ Asian VAP	% Hispanic Origin VAP	% Minority VAP
07	22.9%	21.0%	16.6%	17.5%	16.7%	42.1%	77.1%
15	23.0%	34.1%	26.9%	5.6%	5.0%	43.8%	77.0%
16	2.8%	38.8%	28.5%	2.5%	1.8%	65.5%	97.2%
17	38.0%	34.5%	30.7%	5.8%	5.2%	24.2%	62.0%

Recommended Plan							
District	% NH White VAP	% Black VAP	% NH DOJ Black VAP	% Asian VAP	% NH DOJ Asian VAP	% Hispanic Origin VAP	% Minority VAP
13	14.1%	35.7%	27.4%	5.1%	4.4%	52.7%	85.9%
14	27.4%	12.9%	9.9%	17.0%	16.1%	45.0%	72.6%
15	2.7%	39.8%	29.6%	2.6%	1.9%	64.3%	97.3%
16	41.6%	33.8%	30.6%	5.3%	4.8%	21.4%	58.4%

New York County

119. As shown in Table III below, New York County currently includes two districts with substantial minority populations: Existing Districts 12 and 15. Their analogs in the Recommended Plan are Proposed Districts 7 and 13.

120. The nonretrogression (and lack of dilution) in Harlem-based Proposed District 13 is discussed above, as this district crosses from New York County into the Bronx.

121. Proposed District 7, like Existing District 12, extends from Manhattan through Brooklyn and Queens. It is a plurality Hispanic district with a substantial Asian population as well. It increases from 70.2% minority to 71.6% minority VAP. Its Hispanic, Asian and Black VAP shares stay almost exactly the same (41.5%, 20.6% and 12.3%, respectively).

Table III. Demographic Breakdown of Existing and Proposed Districts for New York County

A. Population

Existing Plan							
District	% NH White	% Black	% NH DOJ Black	% Asian	% NH DOJ Asian	% Hispanic Origin	% Minority Population
08	66.5%	5.9%	4.8%	16.3%	15.9%	11.8%	33.5%
12	26.8%	12.4%	8.4%	19.4%	18.6%	44.6%	73.2%
14	65.7%	6.0%	4.8%	14.9%	14.3%	13.7%	34.3%
15	20.9%	34.6%	26.9%	5.3%	4.6%	46.1%	79.1%

Proposed Plan							
District	% NH White	% Black	% NH DOJ Black	% Asian	% NH DOJ Asian	% Hispanic Origin	% Minority Population
07	27.8%	12.7%	8.6%	19.6%	18.8%	43.1%	72.2%
10	65.3%	5.2%	4.0%	17.9%	17.4%	12.2%	34.7%
12	67.0%	6.2%	4.9%	13.9%	13.4%	13.3%	33.0%
13	12.2%	35.9%	27.0%	4.9%	4.2%	55.1%	87.8%

B. Voting Age Population

Existing Plan							
District	% NH White VAP	% Black VAP	% NH DOJ Black VAP	% Asian VAP	% NH DOJ Asian VAP	% Hispanic Origin VAP	% Minority VAP
08	67.2%	5.7%	4.7%	16.3%	15.9%	11.3%	32.8%
12	29.8%	11.6%	8.1%	19.8%	19.1%	41.4%	70.2%
14	67.5%	5.6%	4.6%	14.5%	14.0%	12.7%	32.5%
15	23.0%	34.1%	26.9%	5.6%	5.0%	43.8%	77.0%

Proposed Plan							
District	% NH White VAP	% Black VAP	% NH DOJ Black VAP	% Asian VAP	% NH DOJ Asian VAP	% Hispanic Origin VAP	% Minority VAP
07	28.4%	12.3%	8.6%	20.6%	19.8%	41.5%	71.6%
10	65.4%	5.4%	4.2%	17.9%	17.4%	11.9%	34.6%
12	68.6%	5.8%	4.7%	13.7%	13.2%	12.3%	31.4%
13	14.1%	35.7%	27.4%	5.1%	4.4%	52.7%	85.9%

Brooklyn (Kings County)

122. Because of the relatively large population shortfalls in the majority-minority (particularly majority-Black) districts in Brooklyn, significant decline in the minority population shares in such districts is inevitable. This is demonstrated by the fact that all submitted multidistrict plans (including the "Unity" Plan submitted by a civil rights coalition) propose districts with substantial drops in Black population shares in the relevant areas.

123. The nonretrogression in Proposed District 7 relative to Existing District 12 was discussed above.

124. Because Existing Districts 10 and 11 needed to add roughly 40,000 and 85,000 people respectively, and because no district can be drawn that maintains the Black population shares in those districts, they naturally experience a decline in such shares. Moreover, the requirement that all districts in Brooklyn gain population necessarily leads to alterations in the configurations of those districts relative to one another.

125. The core of Existing District 11 is now Proposed District 9. As shown in the Table IV, the District drops from 57.5% Black VAP to 55.0% Black VAP. Similarly, the 64.8% Black VAP share in Existing District 10 decreases to 56.0% in Proposed District 8.

126. However, Proposed Districts 8 and 9 both remain majority-Black (and significantly majority-minority) districts. Therefore, neither District results in dilution according to Section 2, and any diminution in Blacks' ability to elect their preferred candidates is simply the result of differential rates of population growth. (To reiterate, all proposals received in this litigation reflect comparable drops in their racial minority population.)

Table IV. Demographic Breakdown of Existing and Proposed Districts for Kings County

A. Population

Existing Plan							
District	% NH White	% Black	% NH DOJ Black	% Asian	% NH DOJ Asian	% Hispanic Origin	% Minority Population
08	66.5%	5.9%	4.8%	16.3%	15.9%	11.8%	33.5%
09	57.0%	6.1%	4.6%	20.2%	19.3%	17.2%	43.0%
10	18.3%	64.0%	58.7%	4.4%	3.9%	17.2%	81.7%
11	25.6%	58.0%	53.5%	6.5%	5.9%	13.2%	74.4%
12	26.8%	12.4%	8.4%	19.4%	18.6%	44.6%	73.2%
13	62.3%	8.6%	7.1%	14.0%	13.6%	16.1%	37.7%

Recommended Plan							
District	% NH White	% Black	% NH DOJ Black	% Asian	% NH DOJ Asian	% Hispanic Origin	% Minority Population
07	27.8%	12.7%	8.6%	19.6%	18.8%	43.1%	72.2%
08	22.4%	57.9%	52.9%	5.4%	4.8%	18.0%	77.6%
09	29.7%	55.3%	51.2%	6.7%	6.2%	11.3%	70.3%
10	65.3%	5.2%	4.0%	17.9%	17.4%	12.2%	34.7%
11	64.2%	8.7%	7.2%	12.4%	11.9%	15.7%	35.8%
12	67.0%	6.2%	4.9%	13.9%	13.4%	13.3%	33.0%

B. Voting Age Population

Existing Plan							
District	% NH White VAP	% Black VAP	% NH DOJ Black VAP	% Asian VAP	% NH DOJ Asian VAP	% Hispanic Origin VAP	% Minority VAP
08	67.2%	5.7%	4.7%	16.3%	15.9%	11.3%	32.8%
09	58.8%	5.8%	4.4%	19.8%	19.1%	16.0%	41.2%
10	17.5%	64.8%	59.8%	4.6%	4.1%	16.6%	82.5%
11	26.7%	57.5%	53.2%	6.4%	5.9%	12.5%	73.3%
12	29.8%	11.6%	8.1%	19.8%	19.1%	41.4%	70.2%
13	65.1%	7.6%	6.4%	13.8%	13.4%	14.2%	34.9%

Recommended Plan							
District	% NH White VAP	% Black VAP	% NH DOJ Black VAP	% Asian VAP	% NH DOJ Asian VAP	% Hispanic Origin VAP	% Minority VAP
07	28.4%	12.3%	8.6%	20.6%	19.8%	41.5%	71.6%
08	25.2%	56.0%	51.6%	5.3%	4.8%	16.6%	74.8%
09	30.4%	55.0%	51.1%	6.6%	6.1%	10.7%	69.6%
10	65.4%	5.4%	4.2%	17.9%	17.4%	11.9%	34.6%
11	66.9%	7.7%	6.5%	12.2%	11.8%	13.9%	33.1%
12	68.6%	5.8%	4.7%	13.7%	13.2%	12.3%	31.4%

Queens

127. Although Queens is not a covered county under Section 5, it does contain a significant minority population. Thus, some discussion of Section 2 VRA issues is warranted with respect to the Queens districts not already discussed. Data for Proposed Districts 7, 12, and 14 are presented above because they cross over into covered counties.

128. Existing District 6 is a majority-Black VAP district with a Black VAP share of 54.6% (NH DOJ Black VAP of 49.9%), which is maintained in Proposed District 5.

129. Proposed District 6, a central Queens District with a core that formerly was the top of the Existing "T-shaped" District 9, (a district that was 58.8% Non-Hispanic White VAP), is now a compact district in the center of Queens. It is majority-minority (60.1% minority VAP) and plurality-Asian (38.8% VAP).

Additional Requirements of the 2/28/12 Court Order

Compactness

130. The Recommended Plan contains compact districts. In fact, by all but one compactness score (the length-width score), the average compactness scores of the Recommended Plan are superior to the proposals submitted by the parties and to the Existing Plan. *See* Appendix D.

131. Recognizing that, as mentioned above, compactness is also an aesthetic concept, it is worth noting that the districts in the Recommended Plan generally do not appear irregular to the naked eye. The one exception may be Proposed Districts 10 and 7, which are irregularly shaped in their current forms, and in most of the submitted plans.

Contiguity

132. All of the districts in the Recommended Plan are contiguous.

Respect for Political Subdivision Lines

133. The Recommended Plan respects the boundaries of New York's political subdivisions. It splits fewer counties and towns than the Existing Districts.

134. The Recommended Plan keeps 42 of the state's 62 counties whole. A list of the counties by district is provided at Appendix I. The Existing Plan, in contrast, keeps only 36 counties whole – six fewer than the Recommended Plan.

135. The Recommended Plan also keeps 895 of the state's 970 towns (or MCDs) together. The Recommended Plan splits five fewer towns than the Existing Plan. A list of towns assigned by district is provided at Appendix J.

Communities of Interest

136. The Recommended Plan attempts to respect communities of interest. Of course, given the extreme time limitations, a court-drawn plan is inevitably hindered in its ability to weigh the validity, salience, and relative importance of different community-based arguments. Moreover, districts of over 717,000 people inevitably include more than one community of interest, and must sometimes group together quite different or conflicting communities in order to achieve population equality.

137. Nevertheless, certain widely recognized, geographically-defined communities are respected in the Recommended Plan.

138. In Upstate New York, the Plan creates coherent North Country and Southern Tier districts. It creates three compact districts surrounding the large metropolitan areas—Buffalo, Rochester and the Capitol Cities area. It also creates a lower Hudson Valley district.

139. In New York City, the Recommended Plan maintains the separation of the East and West sides of Manhattan. Unlike several proposals, it also keeps Harlem whole, even while joining Harlem with parts of the Bronx in order to achieve population equality. The South Bronx, however, is kept almost completely contained within a single district. Proposed District 6 is contained wholly within Queens and unites many of Queens' Asian communities in a compact district. Proposed District 8, in response to suggestions concerning the initial draft Proposed Plan, attempts to unite Fort Greene and Clinton Hill with similar communities of interest in Brooklyn.

140. Finally, Proposed Districts 2 and 3 respect the communities of interest in Southern and Northern Long Island, respectively.

Respecting the Cores of Existing Districts

141. Although the constitutional, statutory, and court-ordered criteria required considerable departures from the Existing Plan, the Recommended Plan respects the cores of most Existing Districts. A "Core Constituency Report," detailing which districts have which cores, is provided at Appendix E.

142. Overall, one of the Recommended Plan's districts is comprised of 90% of a prior district, five districts are comprised of between 80% and 90% of a prior district, seven districts are comprised of between 70% and 80% of a prior district, three districts are comprised of between 60% and 70% of a prior district, four districts are comprised of between 50% and 60% of a prior district, and seven districts are comprised of less than 50% of a prior district.

CONSIDERATION OF OBJECTIONS TO THE PROPOSED PLAN

143. Following the March 5, 2012 hearing, the Magistrate Judge's Proposed Plan was released for comment. The Magistrate Judge directed the parties and interested members of the public to show cause, by the morning of March 7, 2012, why the Proposed Plan should not be presented to the Court as the recommendation of the Magistrate Judge. Among the parties, the Senate Majority defendants, the Rose and the Drayton Plaintiff-Intervenors, and the Ramos Plaintiff-Intervenors, each submitted responses to the Magistrate Judge's Order to Show Cause.

144. The objections of the Senate Majority Defendants include the following:

a. They argue that the Proposed Plan's Long Island districts (which are retained in the Recommended Plan) fail to respect the cores of current districts and the communities of interest that have formed around them.

Specifically, they contend that Long Island districts have traditionally run north-south, and that the Proposed Plan needlessly flips Districts 2 and 3 to run east-west along Long Island's northern and southern shores. They further object to dividing the town of Smithtown between the Proposed Plan's Districts 1 and 3, suggesting that it be kept entirely within District 1.

b. They argue that the Proposed Plan's District 5 fails to preserve the core of the prior district and creates a conflict between incumbents by pairing Representatives Meeks and Turner, and by creating an unnecessary open seat in the Proposed Plan's District 6. They further contend that the Proposed Plan fails to respect communities of interest by dividing among four different districts (the Proposed Plan's Districts 5, 8, 9, and 10) traditional Russian and Jewish neighborhoods in Brooklyn and traditional communities of interest in Far Rockaway Peninsula, Howard Beach, and Ozone Park. Finally, they argue that the Proposed Plan's District 5 is not compact and fails to respect political subdivisions by crossing into Nassau County.

c. They argue that Marlboro Housing Development and Coney Island are communities of interest and have traditionally been in the same district. Thus, they object to placing the former in the Proposed Plan's District 11 and the latter in its District 8. As a remedy, they argue that Marlboro should be placed in District 8 and, in exchange, all of Midwood should be placed in District 11.

d. They argue that the Proposed Plan's District 19 fails to respect the traditional core of that District and the communities of interest that have formed around it. Specifically, they argue that it should include communities in the Hudson Valley that were traditionally part of this District, including Warren, Washington, and Saratoga Counties.

e. They argue that the Proposed Plan's Districts 23 and 27 fail to respect political subdivisions by splitting several towns in Wyoming and Livingston Counties. They contend that Wyoming and Livingston Counties should be located entirely within District 27, and that part of Erie County should then be included within District 23.

145. The objections of the Rose Plaintiff-Intervenors include the following:

a. They argue that Representative Israel, who is the incumbent in Proposed District 3, has long represented the communities of Wyandanch, Babylon, and Brentwood in central Long Island, and thus that the Proposed Plan errs by including those communities in its District 2, where Representative King is the incumbent. They further argue that the growing African-American populations in these communities have strong ties to the sizable African-American population in Huntington Station, and that the growing Hispanic population in these areas has a well-established working relationship with Representative Israel. Thus, they argue that these communities should be transferred from the Proposed Plan's District 2 to Proposed District 3. Populations could then be equalized, they argue, by

transferring communities historically represented by Representative King, like Old Bethpage, from the Proposed Plan's District 3 to District 2.

b. Although the proposal submitted by the Rose Plaintiff-Intervenors to the Magistrate Judge reflected a similar division, they object that the Proposed Plan's Districts 4 and 5 divide Nassau County. Specifically, they argue that Nassau County border cities should be kept with their Nassau County neighbors, with whom they share local government services like schools and public safety systems. Thus, they suggest that the Proposed Plan's District 5 should be wholly contained in Queens County, while District 4 should extend westward to the Nassau County line.

c. They object that the Proposed Plan's Districts 16 and 17 radically redraw Existing Districts 17 and 18 in ways that fail to respect the cores of the Existing Districts. They argue that the areas of Rockland County presently represented by Representative Engel should be placed in the Proposed Plan's District 16 and that areas in Westchester County presently represented by Representative Lowey should be placed in Proposed Plan's District 17. They further object to the fact that the latter district divides six towns, and argue that several of those towns could be made whole by preserving more of Existing District 18.

d. They argue that the Proposed Plan's District 21 makes unnecessary changes to Existing District 23 without respecting other districting principles. They object to the removal of Madison, Oswego, and much of Oneida Counties from this District, and to the inclusion of Saratoga,

Warren, and Washington Counties, which, they contend, have nothing in common with the North Country counties in the District. They urge that Madison, Oswego, and preferably also Oneida Counties be returned to the Proposed Plan's District 21 from District 22, and that Saratoga, Warren, and Washington Counties be returned to the Proposed Plan's District 19, where they have been historically located.

e. They argue that the Proposed Plan's Districts 26 and 27 involve unnecessarily large changes that pair incumbent Representatives Kathy Hochul and Brian Higgins, and that the Proposed Plan's District 27 should be returned to a shape more similar to Existing District 26 and should be drawn to include Representative Hochul's residence.

146. The objections of Drayton Plaintiff-Intervenors include the following:

a. They contend that Ozone Park and Howard Beach are communities of interest and should be included in the Proposed Plan's District 5 and removed from Proposed District 8, and that they should not be joined with the East New York area of Brooklyn.

b. They argue that the Proposed Plan's District 8 is a "traditional VRA district . . . that was created for Black voters," and that the areas of Fort Greene, Clinton Hill, downtown Brooklyn, Brooklyn Heights, and Williamsburg should all be included within this District.

c. They contend that the Proposed Plan's District 9 covers "the original VRA district . . . that was created for Black voters in Brooklyn," and that it should "honor the east-west orientation of North Brooklyn and the

Southeast orientation of the Black communities in Central Brooklyn below Atlantic Avenue." Specifically, they urge that the Brownsville and Flatlands areas should be moved into the Proposed Plan's District 9, while the Cobble Hill and Fort Greene areas should be moved to Proposed District 8.

d. With respect to the Plan's Proposed District 16, they argue that Rye, Scarsdale, and Eastchester should be removed and that the Mount Pleasant areas should be added.

147. The Ramos Plaintiff-Intervenors filed a response objecting to the Proposed Plan's District 7 on the ground that Greenpoint and Central/Eastern Williamsburg are a single community of interest and should be included in their entirety within this District. They further suggest that this addition be offset by removing from this District a section of South Williamsburg.

148. Almost 400 non-party members of the public responded to the Magistrate Judge's Order to Show Cause. Those responses were reviewed and have been made part of the public record. The following is a summary of a representative sample of those responses.

149. A non-party coalition called Voting Rights for All submitted a series of responses, arguing that certain features of the Proposed Plan's treatment of Proposed Districts 12, 13, 14, and 15 do not adequately respect communities of interest, including the African-American, Hispanic and Dominican-American communities. Among those responses was a submission by Congresswoman Yvette Clarke, objecting to the Proposed Plan's District 9 on the ground that it does not preserve the core of the prior district, does not maintain communities of interest, does not achieve compactness, and violates the Constitution and the VRA. She

proposes that the District be reconfigured to unite the Canarsie, Flatlands, Remsen-Village-Rugby, East Flatbush, Erasmus, Brownsville, Ocean Hill, and Crown Heights communities. Another submission, from Carl E. Heastie, contends that African-American communities in the Proposed Plan's District 15 should be joined with African-American communities in Proposed District 14, and that the change should be offset by reconfiguring the Proposed Plan's District 13 "to reflect the commonalities within the communities of Harlem, Spanish Harlem, and the Bronx."

150. Non-parties Hakeem Jeffries and Karim Camara submitted separate responses, arguing that the Proposed Plan's District 8 wrongly excludes the traditionally African-American communities of Fort Greene and Clinton Hill and wrongly includes heavily white neighborhoods such as Gerritson Beach, Gravesend and Georgetown in Brooklyn, and Ozone Park, Howard Beach, and Woodhaven in Queens. A similar response was received from a non-party coalition called Concerned Citizens of Fort Greene-Clinton Hill, arguing that the communities of Fort Greene, Clinton Hill, Bedford-Stuyvesant, Brownsville, East New York, and Canarsie are communities of interest that should be maintained within the same district. A group of 365 concerned citizens affiliated with the Brown Memorial Baptist Church submitted a petition and a series of letters voicing the same concerns.

151. Non-party Lincoln Restler submitted a response arguing that all of the communities of the north side of Williamsburg and Greenpoint are communities of interest that should be included within the Proposed Plan's District 7.

152. Non-party David M. Pollock submitted a response on behalf of the Jewish Community Relations Council of New York, raising concerns that the traditional Russian and Jewish communities of southern Brooklyn are divided among the Proposed Plan's Districts 8, 9, 10, and 11.

153. Non-party David Nir submitted a response arguing that certain aspects of the Proposed Plan do not adequately respect political subdivisions.

CHANGES MADE IN RESPONSE TO COMMENTS ON THE PROPOSED PLAN

154. Determining which, if any, of the parties' and the public's suggested changes to the Proposed Plan should be implemented and incorporated into the Recommended Plan presented a considerable challenge. Given our goal that the Recommended Plan be, and appear to be, nonpartisan and incumbent-blind, the formulation of neutral principles to evaluate which suggestions to accept proved quite difficult.

155. Ultimately, the Magistrate Judge and I decided to make (and did make) only those changes that furthered the requirements of the Court's 2/28/12 Order. *See* Appendix H (Changes Made to Proposed Plan). However, to ensure that any such alterations did not degrade the underlying features of the plan or cause cascading population changes likely to trigger a new round of objections, we made such changes only when doing so was possible by means of obvious population swaps between two adjoining districts.

156. It should also be recognized that, perhaps given time constraints, no submission provided complete and precise remedies for the problems it claimed to identify in the Proposed Plan. Therefore, if implemented by itself, each change would result in a violation of the constitutional requirement of population equality. The accommodation of any change thus required the exercise of discretion as to how to offset the suggested change in a manner least likely to be found objectionable to other parties or members of the public. Accommodating any change required the addition and subtraction of individual census blocks between districts in order to maintain precise population equality. This can be quite difficult, especially in densely populated areas, where census blocks often contain hundreds or even more than a thousand

people. Therefore, even some small suggested changes could not be accommodated without major reconfigurations of districts.

157. All the accepted changes can be justified on the basis of reducing violations of county boundaries or respecting communities of interest. However, community-of-interest arguments that were tied to incumbent-related goals—such as preserving the relationship between a community and an incumbent – were not credited, given the Recommended Plan's aim of remaining incumbent-blind. We also did not make changes that were based merely on respecting the cores of prior districts or reducing town splits, as we could not distinguish those from pretextual arguments for protecting incumbents.

158. Based on the above-described criteria, the following changes were made to the Proposed Plan:

a. The borders of Proposed Districts 8 and 9 were adjusted in order to place Fort Greene and Clinton Hill in Proposed District 8 for community-of-interest reasons. The southern end of Proposed District 9 was expanded to compensate for the loss of population and adjustments were made along the border with Proposed District 8.

b. The borders of Proposed Districts 23 and 27 were adjusted to unite Livingston and Wyoming Counties in Proposed District 27. The split of Ontario County was reoriented to compensate for the population loss.

c. Genesee County was united by placing the errant zero-population block assigned to Proposed District 25 in Proposed District 27.

159. All other suggested changes could not be justified according to criteria in the Court's 2/28/12 Order, would likely entail violations of the Constitution or VRA, appeared

motivated by partisan or incumbency-related interests, or required altering multiple districts in the Proposed Plan.

CONCLUSION

160. In my professional opinion:

The Recommended Plan achieves a zero population deviation, adheres to all constitutional and statutory requirements, and complies with the terms of the 2/28/12 Order. The Recommended Plan is superior overall to any other plan made available to the Magistrate Judge by the public for her review. It satisfies the need for population equality across districts, respects the compactness and contiguity of districts, respects political subdivisions, and preserves communities of interest.

Further affiant sayeth not.

Nathaniel Persily

Nathaniel Persily

Sworn to and subscribed before me this

12th day of March, 2012.

Linda F. Beller

LINDA F. BELLER
Notary Public, State of New York
No. 02BE6095109
Qualified in New York County
Commission Expires July 7, 2015

EXHIBIT B

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

THE DEMOCRATIC PARTY OF VIRGINIA, Plaintiffs, v. VIRGINIA STATE BOARD OF ELECTIONS, et al., Defendants.	)	Civil Action No.: 1:13-cv-01218-CMH-TRJ

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MEMORANDUM IN OPPOSITION TO
MOTION FOR PRELIMINARY INJUNCTION

Defendants Virginia State Board of Elections, Charles Judd, Kimberly Bowers and Donald Palmer in their capacities with the Virginia State Board of Elections, Robert F. McDonnell in his capacity as Governor of Virginia and Kenneth T. Cuccinelli, II, in his capacity as Attorney General of Virginia (collectively "Defendants") respectfully submit this brief and accompanying declarations in opposition to plaintiff's motion for preliminary injunction.[1]

INTRODUCTION

Plaintiff seeks a mandatory preliminary injunction restoring over 38,000 ineligible voters to Virginia's voter rolls. This action and motion are based on a false premise - that the State Board Elections ("SBE" or "State Board') directed a "purge" of voters and that there are "errors" in the lists provided by SBE to the local election officials. As can be seen in the declarations submitted by Defendants, the voter registration list maintenance activities at issue herein are

[1] The injunction is sought against all of the defendants and therefore this opposition is filed on behalf of all defendants. However, it should be noted that the claims against the State Board of Elections as an entity, Governor McDonnell and Attorney General Cuccinelli are barred by sovereign immunity. Moreover, plaintiff has not made one allegation of fact demonstrating the need for an injunction against the Governor or Attorney General.

lawful and routine and are being applied fairly to all voters. The lists in question were reviewed and prepared carefully by SBE and were sent to the registrars for review and possible cancellation. The so called "errors" were simply voters that should not be cancelled and - with one lone exception that has already been corrected - have not been cancelled.

In a bizarre twist, the plaintiff also complains that the Secretary of the State Board told the general registrars to use their "best judgment" in doing their statutory duty to review lists of individuals who registered in another state for possible cancellation. This was not a standard-less or arbitrary direction: under Virginia law, the general registrars are responsible for voter registration list maintenance activities and reviewing lists like those at issue herein is one of their core functions. The standard was clear: if a citizen registered to vote in another state after Virginia, that is a request to cancel their Virginia registration under the law. Over 38,000 individuals did just this and were properly cancelled. Over 18,000 Virginia citizens were reviewed and left on Virginia registration rolls. In short, the system worked and there is no basis to restore 38,000 out of state voters to Virginia's voter registration lists.

Because the plaintiff cannot satisfy the elevated standard that applies to a mandatory preliminary injunction, the extraordinary relief of a preliminary injunction should be denied.

STATEMENT OF FACTS

1. SBE's Core Function Includes Voter Registration List Maintenance

One of the key responsibilities of SBE is to ensure the integrity of elections in the Commonwealth. Palmer Dec. ¶ 4; Judd Dec. ¶ 3; Davis Dec. ¶ 2. A core function to meet that responsibility is maintaining and improving Virginia's voter registration system. To improve Virginia's voter rolls, SBE has sought to both increase voter registrations among eligible citizens and cancel the registrations of those ineligible to vote. Palmer Dec. ¶ 4.

The database used for Virginia voter registration is called the Virginia Election and Registration Information System ("VERIS"). Davis Dec. ¶ 2. VERIS is used by all 133 electoral jurisdictions in the Commonwealth to maintain the voter registration list for all registered voters in Virginia. *Id.* at ¶ 3. VERIS contains the voter registration information of over 5.2 million registered voters in Virginia and has been in use since February 2007. *Id.* Access to VERIS is controlled by SBE and the infrastructure and software development and maintenance services for VERIS are provided and/or coordinated by SBE. *Id.* In accordance to the Code of Virginia, each registered voter provides personally identifying information to their respective general registrar on a form provided by SBE. *Id.* at ¶ 4. That information is then transcribed into VERIS by the general registrar or by members of their staff. *Id.*

Voter registration list maintenance is an ongoing and important function of SBE . Judd Dec. ¶ 3. For example, SBE obtains a monthly list of felons from the Virginia State Police. Davis Dec. ¶ 5. The felon data is pulled into VERIS and compared to the voters who are currently registered. *Id.* When a potential match is identified, SBE alerts the impacted general registrar of the potential match and the general registrar makes the final determination on whether or not the felon record belongs to the identified registered voter. *Id.* If there is a match, the general registrar's duty is to cancel the voter's registration record and send the cancelled individual a letter informing him of the action. *Id.*

SBE performs similar processes on a monthly basis with data obtained from the Social Security Administration, federal and state courts, the Virginia Department of Health Bureau of Vital Statistics and the Department of Motor Vehicles. Davis Dec. ¶ 6. In each of these cases, SBE identifies potential voter registration records that have an issue for the general registrars, such as death of the voter or incompetency. *Id.* The general registrars' statutory duty is to

review the evidence provided to them and make registration decisions in accordance with the Code of Virginia. *Id.*

Likewise, SBE annually compares the entire voter registration list with the United States Postal Service's Change of Address database. Davis Dec. ¶ 7. On average, this process results in SBE mailing out 250,000 notices to voters requesting that they confirm their registration address. *Id.* Voters who do not respond to this mailing are moved to an inactive registration status. *Id.* Voters who do respond or who have moved within their current registered locality have their voter registration records updated by their respective general registrar. *Id.*

2. The Elimination of Duplicate Registrations In Multiple States Is Necessary To Maintain Accurate Voter Registration Records

Focusing specifically on dual registrations -- where a citizen is registered in more than one state -- the necessity for eliminating such duplicate voter registrations is well documented. Palmer Dec. ¶¶ 5-10. There were two major bi-partisan or non-partisan studies that demonstrate the need for eliminating duplicate registrations for voters that have moved to another state. *Id.* Virginia has taken great strides to enhance voter registration, including mailings to unregistered eligible citizens and the implementation of online registration as discussed below. *Id. at* ¶ 11.

In 2007, bipartisan legislation sponsored by Virginia House of Delegates member Bob Brink (D-Arlington) passed the General Assembly unanimously and included a provision authorizing SBE to share data with other state voting officials for the purpose of list maintenance. Chapter 318 Acts of Assembly (2007). Palmer Dec. ¶ 12. Additional legislation passed in 2011 and 2013 expanded SBE's mandate to share this registration data with other states and specifically to take steps to prevent the duplication of registrations in more than one state or jurisdiction. *See* Va. Code §§ 24.2-404(A)(10) and 24.2-404.4; *Id.*

Virginia's legislatively mandated process for providing for cancellation of a Virginia registration following official communication of registration in another state, coupled with subsequent legislation improving official communication between states, are all vital to protecting voters, candidates and the integrity of elections and increasing voter confidence in the registration and electoral process. Palmer Dec. ¶ 13.

As a result of the bipartisan changes to the Code of Virginia, SBE began implementing data-sharing with other states. To that end, SBE has joined two different consortiums of states for the purposes of sharing voter registration data to improve the accuracy of our voter registration list. Palmer Dec. ¶ 15.

The first project to yield any results for SBE was the Electronic Registration Information Center ("ERIC"). The ERIC project is discussed in detail in the Palmer Dec. at ¶ 16. In summary, the ERIC project consists of seven states including Virginia and uses both the Virginia Department of Motor Vehicle ("DMV") data as well as SBE voter registration data to identify possible dual registrations as well as to identify individuals who are not registered to vote but who are likely Virginia residents. *Id.* Through the data developed by the ERIC project, SBE mailed 867,852 postcards to unregistered Virginia residents' mailing addresses on September 27, 2012. *Id.*

Other efforts to enhance voter registration include an online voter registration portal that allows voters to register and update their registration online with an appropriate DMV customer identification number. Palmer Dec. ¶ 17. This was just launched in July 2013 based upon legislation drafted and supported by SBE. *Id.* To further enhance voter registration, SBE has submitted a budget request for the next state budget that includes a cash investment to provide improved technology for voter registration and updates at the DMV office locations, allowing

for registration applications submitted at DMV to be sent electronically to SBE and the localities. *Id.* This reform will eliminate the current paper registration that inevitably leads to applications lost in the mail and errors by voters and local election staff in inputting data into the registration database. *Id.*

3. Virginia Carefully Implements the Interstate Crosscheck Program

The second data-sharing project to get off the ground for SBE was the program that is at issue herein -- the Interstate Crosscheck Program ("Crosscheck"). Despite plaintiff's assertion that this is a Republican initiative, the Crosscheck process started in 2005 through a bipartisan effort by a number of Secretaries of State, including then-Kansas Secretary of State Ron Thornburg (R) and Secretary of State Robin Carnahan (D) from Missouri. Palmer Dec. ¶ 18. In each election, the number of states participating in the program has increased. *Id.* By 2013, a total of 22 states participated in the program sharing over 84 million voter registration records. *Id.* Twenty-six states are members today. *Id.*

In January 2013, each participating state submitted their entire list of registered voters, including the voter's date of birth, last four digits of their Social Security Number (where allowed by law), current registration address, whether or not they had voted in the November 2012 General Election, and applicable dates of registration activity by the voter. Palmer Dec. ¶ 19.

In February and early March of 2013, SBE received the results from the Crosscheck match. Palmer Dec. ¶ 20. The preliminary results received from the Crosscheck data revealed the likelihood that as many as 308,000 individuals were registered in Virginia and another state as follows: 2 voters were found to be registered in 7 different states; 10 voters were found to be registered in 6 different states; 113 voters were found to be registered in 5 different states; 1,123

voters were found to be registered in 4 different states; 16,361 voters were found to be registered in 3 different states; and 253,786 voters were registered in Virginia and one other state. Palmer Dec. ¶ 20; Davis Dec. ¶ 8. The Crosscheck data also identified 296 voters who appear to have voted in Virginia and another state in the November 2012 General Election.[2] Davis Dec. ¶ 9.

After further review of the data in April 2013, SBE staff presented to the State Board[3] an initial review of the Crosscheck findings. Palmer Dec. ¶ 21; Davis Dec ¶ 10; Judd Dec. ¶ 5. At this Board meeting, additional information was provided to the Board indicating potential double-voting in Virginia and another state during the November 2012 General Election. *Id.* At that meeting, the State Board voted unanimously to ask the Office of the Attorney General to investigate the possibility of voter fraud and double voting as a result of the Crosscheck. *Id.* and Exhibit 2 thereto; *See* Va. Code § 24.2-104. Following the Board meeting, SBE sent an email to all of Virginia's general registrars and electoral board members explaining to them the Crosscheck and ERIC programs with a note to expect information on upcoming list maintenance efforts as a result of the Crosscheck and ERIC data. Palmer Dec. ¶ 21 and Exhibit 3 thereto.

In July 2013, as required by the Code of Virginia, SBE conducted Annual Training for all general registrars and electoral board members and kicked off its annual federally required National Change of Address mailing to approximately 250,000 voters. Palmer Dec. ¶ 22. SBE

[2] These cases are in various stages of investigation and/or prosecution. Davis Dec. ¶ 11. Nationally, the Crosscheck identified some 5 million records that were questionable in those 22 states and identified thousands who appear to have voted in multiple states. The ERIC project made up of mostly additional states, including Virginia, identified hundreds of thousands of other registrations that needed updating.

[3] The State Board of Elections is both the supervisory board and the agency that handles the day-to-day administration of the work of SB. *See* Va. Code §§ 24.2.-102 and 103.

provided guidance to registrars on the Crosscheck and other list maintenance activities at the training, during weekly calls with leadership of the local election officials and other venues. *Id.*

The Crosscheck process is part of an overall mechanism to provide out of state registration information to registrars (which is similar to what happens with deceased voters or felons as described above). Palmer Dec. ¶ 24. Thus, SBE regularly provides general registrars with official reports of registration in other states under Va. Code § 24.2-427(B)(iv). Since 2007, Va. Code § 24.2-427(B)(iv) has required general registrars to cancel voter registration based on official reports of registration in another state; the official report of registration in another state is treated as equivalent to a voluntary request for cancellation protecting the voter from duplicate registration, a felony under Va. Code § 24.2-1004. *Id.*

To implement the Crosscheck program, SBE staff worked on verifying data and eventually worked the larger list of over 308,000 potential matches down to approximately 57,000 Virginia registered voters registered in other states. Palmer Dec. ¶ 25. The Secretary of SBE stressed to both the Board and staff that Virginia's first attempt to work with the data be based upon full data matches, thus eliminating from consideration states with large potential matching populations like Florida, that do not use the Social Security Number for voter registration. Palmer Dec. ¶ 25; Davis Dec. ¶ 9.

Thus, all voters identified in the Crosscheck lists were matched based on a 100% exact match of first name, last name, date of birth and last four digits of their Social Security Number. Palmer Dec. ¶ 26. All of these fields had to be the same in their Virginia data and in the other state's data to be included on the list. *Id.* Additional data elements available to the local registrar while conducting their independent review that are in VERIS include each voter's full Virginia registration as well as their voting and correspondence history. *Id.*

With the narrowed down list of over 57,000 duplicate[4] registrations, implementation at the local level of the Crosscheck began on August 23, 2013, when each general registrar in Virginia was provided with an Excel spreadsheet listing the voters in their localities who were registered in another state. Davis Dec. ¶ 14 and Exhibit 1 thereto. The spreadsheet given to registrars included the Virginia voter identification number, the voter's name, date of birth, last 4 digits of their Social Security Number, the other state and jurisdiction where they were registered, their current Virginia registration status and the dates of registration in both Virginia and the other state. *Id.* The general registrars were asked to review the records for possible cancellation. *Id.* They were not instructed to cancel every voter on the list. SBE made clear that the records were to be handled in the same manner as other out of state cancellation notices that the general registrars may receive, in accordance with state laws and regulations. *Id.* General registrars were instructed to accomplish a final round of quality checks at the local level before any official action was to be taken to cancel a registration record. *Id.*

4. The Crosscheck Lists Were Accurate

These lists were extremely accurate and are not "riddled with errors." Plaintiffs Br. at 7. Any so called "errors" were to be expected. Davis Dec. ¶ 16. First, SBE does not cancel voters' registrations based upon the Crosscheck list or similar lists. Palmer Dec. ¶ 28; Davis Dec. ¶ 16. Instead, these lists are sent to the general registrars whose duty it is to review all of the available data within VERIS regarding each voter registration record. *Id.* For example, the general registrar would have checked the vote history for each voter to see if they have actively participated in elections since registering in the other state and they would have checked the

[4] For ease of discussion, Defendants refer to the multiple registrations as "duplicate." However, as set forth in the Davis Dec. at ¶ 16 and above, the original list of over 308,000 multiple registrations showed voters registered in as many as 7 different states and over 16,000 voters registered in 3.

correspondence records to see if the voter had responded to a letter requesting information since registering in the other state. *Id.*

There appear to be two primary reasons why there are so called "errors" in the Crosscheck list. Davis Dec. ¶ 17. First, a voter can move out of state, register in that state, then move back to Virginia and submit an application here. *Id.* If his registration in Virginia was never cancelled, registrars treated the new application as a voter registration update. *Id.* This type of voter would still show up on the Crosscheck list as having a voter registration date that pre-dates the out of state registration. *Id.* The registrar would quickly identify this during his review and not cancel such a voter. *Id.*

Second, the Crosscheck list is based on data at a specific point in time. Davis Dec. ¶ 18. In other words, the Crosscheck list accurately reflects the data as of January 2013. *Id.* This is when all of the data was provided to the coordinator of the Crosscheck. *Id.* The final Crosscheck list was not provided to the election community until August 2013. *Id.* During this intervening time, a voter could have registered in Virginia or voted in a primary. *Id.* Thus, the voter would show on the Crosscheck list as a possible cancellation but in fact would not be eligible for cancellation, and the registrar would be able to quickly determine that with the information provided. *Id.*

Based on feedback received from general registrars, on August 28, SBE updated the Excel spreadsheets provided to the localities to include new columns of data. Davis Dec. ¶ 15 and Exhibit 2 thereto. SBE added the voter's address in the other state and added a column that showed the date of the last registration application received in Virginia. *Id.* SBE also made clear that the general registrars should not cancel any voter who had a more recent Virginia activity date than the date of registration in the other state. *Id.*

All potential duplicate registrations identified in the Crosscheck are acted on only at the local level. Palmer Dec. ¶ 27. Each of these voters information was sent to the general registrar for independent evaluation of the voter record, which is a duty of the general registrar under Va. Code §§ 24.2-114(12) and 24.2-404(A)(4). *Id.* Each voter's record examined by the registrar would include voting history subsequent to the reported registration in another state as well as subsequent registration in Virginia. *Id.* at ¶ 28. If a registrar's independent review of a voter record raises any question or concern, the correct practice would be for the registrar to make an inquiry of the voter. *Id.* at ¶ 29.

The registrar's careful independent review could result in several alternative dispositions short of cancellation, including no action at all, sending the voter a letter asking if he still wants to be registered in Virginia, and if that mailing is returned undeliverable, noting the voter's records for inclusion in the annual address confirmation process set forth in Va. Code §§ 24.2-428 through 24.2-428.2. Palmer Dec. ¶ 30.

Any voter whose registration the registrar determines to cancel after careful independent review of the voter's record is individually mailed a notice of cancellation inviting him to reapply if eligible. Palmer Dec. ¶ 31 and Exhibit 5 thereto. The cancellation notice is mailed often to both the last known Virginia registration address of record and to the new state registration address reported to Virginia. *Id.* at ¶ 32. Sending the cancellation notice to the out of state address is done to provide actual notice to voters who have already failed to respond to an official request to confirm their Virginia residence address under Virginia's separate annual address confirmation procedure set forth in Va. Code §§ 24.2-428 through 24.2-428.2. *Id.*

Some voters reported as registered in other states may have returned to reside in Virginia at a new address without informing the registrar as required by Va. Code § 24.2-424. Palmer

Dec. ¶ 33. To assure these voters an opportunity to update address information before books close for the November election, SBE guidance recommended completing action on the Crosscheck lists by October 1, 2013, to allow any affected individual the opportunity to respond to notice of cancellation before the October 15, 2013 registration deadline and for registrars to make necessary preparations for the November General Election. *Id.*

To be sure that implementation of the Crosscheck was being done legally and uniformly throughout the Commonwealth, Secretary Palmer sent a September 3 guidance email and also had SBE prepare and send to the entire election community a Frequently Asked Questions ("FAQ") document on September 24. Palmer Dec. ¶ 34 and Exhibit 6 thereto. Both the guidance email and the FAQ document summarized and formalized much of the advice that staff have been providing to registrars on an individual basis in between the August emails and late September. *Id.* In addition to their statutory responsibilities, the FAQ document guided the registrars in how to process the Crosscheck reports and also importantly how to handle affected voters who might appear to vote to assure that no eligible voter was disenfranchised on account of error. *Id.*

5. The Results of the Crosscheck Demonstrate Its Accuracy and There Are Important Safeguards to Remedy Any Error

A summary of the results of the Crosscheck demonstrate both its effectiveness and the accuracy in which it was implemented. Palmer Dec. ¶ 36. After narrowing down the Crosscheck list from over 308,000 to 80,000 and then to 57,923 (the actual number sent to the field), the following is the current status of those 57,923 individuals: (1) 38,870 were cancelled based upon registration in another state after Virginia; (2) 11,138 were left on the Virginia rolls and are still active voters; and (3) 7,285 were left on the Virginia rolls although they remain inactive. *Id.* This is a statewide cancellation rate of 78 percent. *Id.*

In the event that someone was removed from the voter rolls in error, there are important procedures that will protect that voter's rights. Palmer Dec. ¶ 37. Virginia's provisional ballot procedures provide a further safeguard protecting against official error in the Crosscheck review process. *Id.* and *see* Exhibit 6 thereto, question 10. In the unlikely event that a qualified voter was removed from the voter registration list, they would vote by provisional ballot. *Id.* That provisional ballot should be counted at the canvass the day after Election Day once the electoral board determines that the voter is eligible to vote for that election. *Id.* Moreover, SBE guidance expressly directs that even after the close of books, to correct official error, a registration cancelled in error may be reinstated. *Id.* In other words, if a voter should not have been cancelled, they do not have to vote by provisional ballot (which is a fail-safe), but can contact their registrar and will be reinstated.

Another important safeguard in the Code of Virginia is a voter's right to an administrative appeal before the registrar. Va. Code § 24.2-429. Palmer Dec. ¶ 38. If unsatisfied with the result before the registrar, the voter can further appeal the registrar's ruling to Circuit Court. Va. Code § 24.2-430. *Id.* Despite the cancellation of over 38,000 voter registrations, SBE is unaware of any case in which a disputed report of registration in another state required a hearing before a registrar or judicial correction. *Id.*

These same safeguards - provisional voting and appeals - often protect voters' rights when cancelled through error based upon things other than out of state registration. Palmer Dec. ¶ 39. As stated above, SBE produces a list of deceased voters based upon data provided by the Social Security Administration. *Id.* Sometimes, a voter is wrongfully cancelled as deceased. *Id.* When that voter shows up to vote, his vote is counted and his registration is restored. *Id.* Based upon those fairly rare errors, however, SBE is not going to halt processing

of death records --and should not be ordered to halt the processing of the cancellations at issue in this case. *Id.*

Voters typically call SBE to seek guidance and to complain when they deem necessary about actions by the election community. Palmer Dec. ¶ 40. SBE staff was asked to notify the Secretary of SBE of any complaints concerning implementation of the Crosscheck. *Id.* SBE is not aware of one phone call from a voter who claimed to have been inaccurately cancelled by the Crosscheck. *Id.*

6. A Geographically Diverse Group of Registrars Completely Support The Crosscheck and Were Able To Implement It Without Any Issues

Plaintiff provides virtually no evidence to support its motion. It presents affidavits from employees of the plaintiff purportedly repeating what registrars said, but the vast majority of those statements do not conflict with SBE's view of the case. Those declarations from plaintiff's employees show that the Crosscheck lists did in fact have some names on them that should not have been cancelled, and in fact were not cancelled after the registrars completed their work with the lists.

Plaintiff proffers the affidavit of one general registrar, Larry Haake, III. Mr. Haake points out that half of his Crosscheck list voters were inactive voters as if that were somehow problematic, but that would be expected with a list of voters that should be reviewed for cancellation (inactive voters have already not responded to at least one mailing after notice from postal service authorities of a move and sometimes two mailings, or one undeliverable piece of election mail and subsequent confirmation mailing). Palmer Dec. ¶ 43. Mr. Haake then in effect states that because he believed that 17% of his list should have remained on the rolls, that he decided unilaterally to keep 83% on the rolls that clearly should be cancelled. *Id.* This is in violation of his duties under the Code that require him to complete his action no later than 30

days after receipt of the Crosscheck (or other) list from SBE. Va. Code § 24.2-404(4). *Id.* He is the only registrar in the Commonwealth that refused to perform his duty of carefully checking the individuals on the lists. As Secretary Palmer has made clear, he expected Mr. Haake and all of the registrars to review their lists and only cancel those registrations that should have been cancelled. *Id.*

With regard to the other statements attributed to various registrars, SBE never told the Chesapeake Registrar to strike the names on the Crosscheck list. Contrast the Declaration of Matthew Weinstein (par. 11) and Nicholas Brana (par. 2) with the Declaration of the Chesapeake Deputy Registrar Mary-Lynn Pinkerman. Ms. Pinkerman specifically states that:

> Contrary to what is stated in the Weinstein and Brana Declarations, the State Board of Elections did not say the list of voters given to Chesapeake as part of the Interstate Voter Crosscheck "should be stricken" from the voter registration lists. Instead, as stated by Mr. Spradlin, I understood that the data on the list was to be carefully checked prior to the cancellation of any voters' registration. Pinkerman Dec. ¶ 2.

Other statements in the plaintiffs' declarations show the registrars are doing their duty -- checking the names against voter records and other available data. With regard to the few registrars that reportedly stated they had cancelled all the voters on their lists, SBE has followed up with those registrars and we are satisfied that correct procedures were followed. Palmer Dec. ¶ 44.

Contrast the plaintiff's lone declaration from a registrar and the statements by their employees with the declarations submitted herewith. SBE has proffered the declarations of:

- Richard J. (Jake) Washburne, General Registrar of Albemarle County;
- William A. Spradlin, General Registrar of Chesapeake City;
- Mary-Lynn Pinkerman, Deputy Registrar of Chesapeake City;
- Teresa F. Smithson, General Registrar of Hanover County;

- Alexander Ables, General Registrar of Fauquier County;
- Tom Parkins, General Registrar of the City of Alexandra;
- Cameron P. Quinn, General Registrar of Fairfax County;
- Greg S. Riddlemoser, General Registrar of Stafford County; and
- J. Kirk Showalter, General Registrar of the City of Richmond.

Consistent through most, if not all, of the declarations by these election officials are statements that:

1. The Crosscheck is a welcome tool that has long been requested;
2. They regularly handle out of state cancellation notices and are well versed in the law and guidelines in how to handle such notifications;
3. SBE instructions were clear that it was the registrars responsibility to determine if a registration should be cancelled based upon a careful review;
4. They were able to complete their review in a timely fashion and understood the correct way to review a registration record;
5. Notice was sent to all individuals that were cancelled;
6. Any actions in error or questioned by voters were promptly addressed and corrected if warranted.

These declarations from election officials demonstrate that the Crosscheck is being carried out correctly and fairly. There is no evidence that the Crosscheck list is based upon any discriminatory factor or targets any type of voter. *See* Judd Dec. ¶ 6. The over 38,000 individuals - who despite plaintiff's assertion to the contrary are no longer citizens of the Commonwealth - moved out of state and registered where they now live. They have been correctly removed from the voter rolls. The remaining individuals on the lists - who are in fact

citizens of Virginia and should remain on the rolls - are still where they belong, on the rolls of the Commonwealth's voters. The few errors identified by plaintiff and the recalcitrance of one general registrar who is in fact out of compliance with the law, provides no basis to provide a Virginia voter registration to over 38,000 clearly ineligible individuals. Accordingly, the motion for a preliminary injunction should be denied.

ARGUMENT

I. The Standard For Mandatory Preliminary Injunctive Relief

Preliminary injunctive relief, "an extraordinary remedy never available as of right," may be had only when the plaintiff makes a "clear showing" "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20, 22, 24 (2008) *accord Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2756, 2761 (2010) (reversing an award of injunctive relief as an abuse of discretion); *Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011). All four factors must be shown. *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346 (4th Cir. 2009), *vacated by* 130 S. Ct. 2371 (2010), *reinstated in pertinent part by* 607 F.3d 355 (4th Cir. 2010); *see Monsanto*, 130 S. Ct. at 2757 ("An injunction should issue only if the traditional four-factor test is satisfied.")

In the instant case, the first part of this test is even harder to meet than the traditional likelihood of success. That is because here plaintiff seeks to not only preserve the status quo, but also seeks to require the SBE to restore the voting eligibility of over 38,000 individuals who

have been removed from the rolls by the general registrars.[5] Plaintiff's Br. at 2, 4. Plaintiff's request for "[m]andatory preliminary injunctive relief" is "disfavored," and the "exacting standard of review [for preliminary injunctive relief is] even more searching." *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 525-26 (4th Cir. 2003) ("[A] mandatory preliminary injunction must be necessary both to protect against irreparable harm in a deteriorating circumstance created by the defendant and to preserve the court's ability to enter ultimate relief on the merits of the same kind."); *accord Perry v. Judd*, 840 F. Supp. 2d 945 (E.D. Va. 2012) (applying this heightened standard of review to a request for preliminary mandatory injunctive relief against the Virginia residency requirement for petition circulators). To carry its burden of persuasion, the plaintiff thus must establish that "the legal rights at issue are 'indisputably clear.'" *See In re Microsoft*, 333 F.3d at 525 (citing *Communist Party of Ind. v. Whitcomb*, 409 U.S. 1235 (1972) (Rehnquist, J. in chambers) for the proposition that "the applicants' right to relief must be indisputably clear" to obtain preliminary mandatory injunctive relief). On the factual record presented herein, the plaintiff cannot carry this heavy burden.

II. The Request For Preliminary Injunction Fails To Meet The Necessary Requirements

a. Plaintiff's Right To Relief Is Not Indisputably Clear

1. The Plaintiff Cannot Show A Violation Of The Equal Protection Clause

When reviewing the validity of a State's election regulation under the Equal Protection Clause, the Fourth Circuit has recognized a meaningful distinction between those regulations which establish voter qualifications, and those which simply place a burden on voters' ability to cast a vote. *Greidinger v. Davis*, 988 F.2d 1344, 1349-50 (4th Cir. 1993). Laws which deny

[5] It should be noted that SBE is not the appropriate party that would reinstate voters to the rolls. SBE did not remove those voters, and has no authority in this instance to add individual voters to the registration records.

voter registration on a discriminatory basis are subject to strict scrutiny review, and to maintain such laws a State must demonstrate that a compelling state interest necessitates the regulation. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). However, "the Court has distinguished between provisions that result in 'an absolute denial of the franchise' and provisions that made 'casting the ballot easier for some.'" *Greidinger*, 988 F.2d at 1350. As a result, where individuals are not absolutely denied the franchise, such as cases involving the denial of absentee ballots to certain classes of voters, regulations are not subjected to strict scrutiny. *See e.g. McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802 (1969), *Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004).

More specifically, in the context of Equal Protection challenges to voter list maintenance laws, courts have recognized a state's right to perform regular maintenance of lists of registered voters, especially in light of the interest in preventing voter fraud:

> It is well established that purge statutes are a legitimate means by which the State can attempt to prevent voter fraud. More importantly registered voters are purged -0without regard to race, color, creed, gender, sexual orientation, political belief, or socioeconomic status –because they do not vote, and do not take the opportunity of voting in the next election or requesting reinstatement.

Ortiz v. City of Philadelphia Office of the City Comm'rs Voter Registration Division, 28 F.3d 306, 314 (3d Cir. 1994) (citing *Hoffman v. Maryland*, 928 F.2d 646, 649 (4th Cir. 1991); *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1973); *Barilla v. Ervin*, 886 F.2d 1514, 1523-24 (9th Cir. 1989). The *Ortiz* court continued to find that "the procedures for re-registering to vote are identical to those for registering in the first place; therefore, they are not more complicated, burdensome, or discriminatory than the requirement of initial registration." *Ortiz*, 28 F.3d at 314 (citing *Williams v. Osser*, 350 F. Supp. 646, 653 (E.D. Pa. 1972)). In light of this discussion of the overall permissibility of voter list maintenance as a legitimate, and valuable, state interest in

preventing voter fraud, it is clear that Virginia's implementation of the Crosscheck does not impermissibly impinge on voters' rights. This is especially true as the Commonwealth provides multiple options for individuals on the list who wish to avoid removal.

In *Hoffman v. Maryland*, the Fourth Circuit emphasized that failure to remove inactive voters could lead to fraudulent voting by imposters, such that "keeping accurate, reliable and up-to-date voter registration lists is an important state interest." *Hoffman*, 928 F.2d at 649. The court also acknowledged that while re-registration could be burdensome to voters, but found that this burden was outweighed by the importance of the state interest at stake here, and concluded that "it is a small price to pay for the prevention of vote fraud." *Id.* (citing *Rosario*, 410 U.S. at 761). In *Hoffman*, as in the present case, while voters may be required to take action to prevent their removal from the voter lists, the state interest in protecting the integrity of elections justifies the imposition of this burden.

The Supreme Court of the United States has found that voters who fail to act to preserve their franchise right, and subsequently find themselves ineligible to vote, cannot constitute an aggrieved class for the purpose of bringing allegations of discriminatory election legislation. *Rosario* 410 U.S. 752. In this case, the Court stated that the failure to take a step which will preserve a voter's right to vote in a particular election does not constitute discriminatory action on the part of the state. *Id.* at 758 ("[i]f their plight can be characterized as disenfranchisement, it was not caused by § 186, but by their own failure to take timely steps to effect their enrollment.") In *Rosario*, the challenged law "did not constitute a ban on their freedom of association, but merely a time limitation on which they had to act in order to participate in their chosen party's next primary." *Id.* Accordingly, this statute "did not absolutely disenfranchise the class to which the petitioners belong." *Id.* at 757 (describing this class as "newly registered voters who were

eligible to enroll in a party before the previous general election."). Instead, the Court found the contrary to be true—namely that this law was a reasonable means by which the state government chose to preserve the integrity of its primary system. *Id.* at 761. ("[i]t is clear that the preservation of the integrity of the electoral process is a legitimate and valid state goal," and that "New York does not prohibit the petitioners from voting in the 1972 primary election or from associating with the political party of their choice. It merely imposed a legitimate time limitation on their enrollment, which they chose to disregard.") Where a regulation, such as this New York statute, represents a reasonable State approach that addresses a legitimate concern, and where a voter can preserve his right to vote by following the delineated procedure, any failure to do so does not give rise to a challenge against the regulation on the basis of any alleged discriminatory impact.

On the facts presented herein, there is not even a hint of an equal protection violation, let alone a showing of an indisputably clear violation as necessary for the mandatory injunction sought herein. First, an individual does not have a right to vote where he does not reside. The over 38,000 individuals removed from the Virginia voter rolls have registered in another state. They were thus correctly cancelled under the law. This is quite different from what was presented in *Bush v. Gore* where there were arbitrary and differing standards being applied to whether to count a particular vote. Second, the few errors where a voter was removed from the rolls and should have remained on the rolls have already been corrected. As the case law above demonstrates, making those voters respond to a cancellation notice does not create an equal protection violation. Third, the fact that one registrar has refused to do his statutory duty does not create an equal protection violation. All of the individuals are being treated equally under the law. The fact that one registrar is wrongly applying the law -- leaving on the rolls ineligible

voters -- does not change this result. His failure to act does not give other individuals who are plainly ineligible the right to vote where they do not reside. Lastly and perhaps most importantly, the evidence (most of which is hearsay) submitted by plaintiff holds virtually no weight against the detailed and substantial first-hand accounts submitted in opposition to this motion. SBE has demonstrated that not only is it not part of some "scheme" to eliminate eligible voters from the rolls, but instead is in fact working hard to expand the franchise to eligible voters through mailings and electronic voter registration. While hearsay may be *permissible* in a motion for a preliminary injunction, the Court can certainly take into account the weight it should be given, particularly when contrasted against the defendants' declarations.[6]

Plaintiff makes much of the fact that the Secretary of SBE asked the registrars to use their "best judgment." However, Secretary Palmer has made clear that when he asked the registrars to use "their best judgment," that was not meant to imply (nor does he think any registrar understood it that way) that registrars should not apply well accepted standards to possible cancellations. In fact, the declarations of the local registrars before this Court demonstrate that they clearly understood how to perform the Crosscheck. The standards by which they reviewed the Crosscheck lists are set forth in the Code and in the guidance given over many years by SBE on how to treat cancelations based upon relocation to another state. Secretary Palmer stated that he has confidence in the registrars that they would use their best judgment to review each voter and cancel only those registrations that should be cancelled.

This is not the standard-less "intent of voter" test that the Court in *Bush v. Gore* struck down. This is in fact very straightforward. If an individual registered in Virginia after the other

[6] The Court should place particular emphasis on the directly conflicting statements of Mathew Weinstein and Nicholas Brana stating as hearsay what Ms. Pinkerman of Chesapeake City allegedly said. Ms. Pinkerman has put a declaration before this Court that directly refutes that hearsay. The additional hearsay submitted by plaintiff should be discounted because of these misstatements.

state, they are not to be cancelled. If they registered in another state after Virginia, they are cancelled. If there is any doubt regarding this based upon their voter history, they are to be further investigated before a registrar takes action. And by referring to the results of the Crosscheck, it is plain that this is in effect what has occurred. Accordingly, the plaintiff has not met the heavy burden of showing an indisputably clear equal protection violation and the motion for a preliminary injunction should be denied.

2. The Plaintiff Cannot Show A Violation Of The Due Process Clause

Plaintiff's argument related to Due Process is that because voters are subjected to disparate treatment, plaintiff's members and supporters are being denied the right to vote in violation of due process. Plaintiff's Br. at 17. On the facts presented herein, this argument makes no sense. Not one eligible voter is before this Court saying he was denied the franchise or is in danger of losing his right to vote. This preliminary injunction seeks the restoration to the voting rolls of over 38,000 individuals that moved out of state. Every one of these individuals was required by law to receive a notice of cancellation. As set forth in the Palmer Dec., each of these individuals had multiple opportunities to object and obtain a hearing before a registrar and then before a Circuit Court. Even if all else fails, if they are able to show they were cancelled in error - in other words, they still live in the Commonwealth and are a qualified voter - their vote will count. The remaining over 18,000 qualified voters that are still on the rolls from the Crosscheck have not suffered at all. This is the opposite of a due process violation. The cases cited herein make clear that voter registration list maintenance activities do not constitute a violation of due process. Accordingly, the plaintiff has not shown an indisputably clear violation of the due process clause.

b. Plaintiff has not established that it will suffer irreparable harm if the requested relief is denied

Plaintiff alleges that its members will suffer irreparable harm absent injunctive relief based on "ample evidence" that lawfully registered are being denied their constitutional right to vote. Plaintiff's Br. at 18. Contrary to this claim, Plaintiff has not provided evidence of even one qualified voter who has been deprived of the right to vote. The Crosscheck should not disenfranchise a single Virginia voter and there has been no harm caused by the Crosscheck. As set forth herein, the Crosscheck has served an important governmental purpose in cleaning up the Virginia registration rolls by eliminating from the rolls over 38,000 individuals who clearly registered in another state after registering in Virginia.

There are more than adequate remedies available to the plaintiff and the individuals it purports to represent. First, any voter that was wrongfully removed has already been restored to the rolls to the best of SBE's knowledge. Even if a voter shows up on election day and had been removed, they will be permitted to cast a provisional ballot, and that ballot will count if they are qualified to vote.

Plaintiff denigrates provisional balloting as a process, but provisional ballots are legitimate means of voting and in no way diminishes a citizen's right to vote. Thus, the Supreme Court has recognized that the casting of a provisional ballot is an adequate remedy for problems involving voter identification. Recently upholding Indiana's photo-identification requirement, the Court held:

> A photo identification requirement imposes some burdens on voters that other methods of identification do not share. For example, a voter may lose his photo identification, may have his wallet stolen on the way to the polls, or may not resemble the photo in the identification because he recently grew a beard. Burdens of that sort arising from life's vagaries, however, are neither so serious nor so frequent as to raise any question about the constitutionality of SEA 483; the *availability of the right to cast a provisional ballot provides an adequate remedy for problems of that character*.

Crawford v. Marion County Election Bd., 553 U.S. 181, 197-198 (2008) (emphasis added).

The plaintiff further contends that being stripped of a constitutional right is a per-se irreparable injury. Not only does this claim ignore the fact that no constitutional right has been, or will be, denied in this case, it is an inaccurate application of the cited authority, all of which deal with the loss of First Amendment rights. *See Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978) ("Violations of first amendment rights constitute per se irreparable injury.") (citing *Elrod v. Burns*, 427 U.S. 347, 373(1976)); *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) ("[L]oss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (Internal citation omitted); *Déjà vu of Nashville, Inc. v. Metro Gov't of Nashville & Davidson Cnty., Tenn.*, 274 F.3d 377,400 (6th Cir. 2001) ("This is because the Supreme Court has recognized that even minimal infringement upon First Amendment values constitutes irreparable injury.")(Internal citation omitted).

c. Defendants Will Suffer Significant Harm If The Injunction Is Granted.

The balancing of the equities also weighs against an injunction. As discussed herein, the Commonwealth has a compelling governmental interest in maintaining its voter registration rolls. If an injunction issues, over 38,000 unqualified voters will be returned to the rolls and allowed to cast a vote in Virginia, while at the same time they are registered to vote in another state. This is far from maintaining the status quo and does harm to Virginia citizens. Requiring over 38,000 individuals to be restored to the voting rolls when they are clearly ineligible to vote because they have registered in another state would be disruptive of the upcoming election and will unnecessarily burden the election community. Palmer Dec. ¶ 48. The Crosscheck should not disenfranchise a single Virginia voter and thus there has been no harm caused by the Crosscheck. The very few voters cancelled by mistake have contacted registrars and been restored. Should

any show up on election day who were wrongfully cancelled, they will be permitted to vote provisionally and their vote should be counted. Palmer Dec. ¶ 37.

d. Defendants' Continued Maintenance Of The Accuracy Of Its Voter Registration Rolls Serves The Public Interest.

"A State indisputably has a compelling interest in preserving the integrity of its election process." *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 (1989). In this case, the state has a compelling interest in maintaining the voter registration rolls and ensuring that individuals who are registered to vote in Virginia are not also registered to vote in another state. "Countering the State's compelling interest in preventing voter fraud is the strong interest in all qualified voters exercising the 'fundamental political right' to vote." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (Citing *Dunn* v. *Blumstein*, 405 U.S. 330, 336 (1972) (internal quotation marks omitted).

"[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Purcell*, 549 U.S. at 4, (citing *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964). Thus, protecting the right of qualified citizens to vote necessarily requires preventing non-citizens from voting. Requiring the Commonwealth to return over 38,000 clearly unqualified voters to the voter registration rolls is antithetical to the public interest.

CONCLUSION

Because plaintiff's claim of likelihood of success cannot withstand the more searching and exacting standard of review applicable to motions for preliminary mandatory injunctive relief, its motion should be denied. The State Board of Elections has demonstrated with credible and first-hand evidence that its participation and implementation of the Crosscheck was proper and has not harmed any eligible voters. Instead, the Crosscheck process removed from the voter

rolls over 38,000 individuals who have moved outside the Commonwealth. Plaintiff has not provided any facts nor law that would warrant placing those individuals back on the rolls of the Commonwealth. Accordingly, plaintiff's motion to enjoin defendants' ongoing maintenance of its voter registration rolls should be denied.

Respectfully submitted,

Date: October 15, 2013

/s/Joshua N. Lief

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of October, 2013, I electronically filed the foregoing and accompanying declarations with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to all counsel of record.

/s/Joshua N. Lief
Joshua N. Lief