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

GLORIA PERSONHUBALLAH, et al, Plaintiffs, v. JAMES B. ALCORN, et al., Defendants & Intervenor-Defendants	Civil Action No. 3:13cv00678

PLAINTIFFS' MEMORANDUM REGARDING PROPOSED REMEDIAL PLANS OF INTERVENORS AND NON-PARTIES

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I. INTRODUCTION

Plaintiffs respectfully submit this memorandum to address the proposed remedial plans submitted by Intervenor-Defendants ("Intervenors") and non-parties pursuant to the Court's Order dated September 3, 2015 (Dkt. Entry No. 207).[1] For the reasons stated below, the Court should adopt Plaintiffs' proposed remedial plan and reject the proposals of Intervenors and non-parties.

Intervenors' two proposals are fatally flawed. In its Memorandum Opinion (Dkt. Entry No. 170 and hereinafter "Memorandum Opinion"), the Court expressly considered and rejected Intervenors' contention that the primary objective of Delegate Janis—the architect of the enacted plan—was to draw an "8-3" map benefitting Republicans. Undeterred, Intervenors advance two plans expressly intended to result in an "8-3" map benefitting Republicans. Even if Intervenors' proposals were not premised on a central conceit the Court has already rejected, neither of Intervenors' proposals should be adopted. Given their Cyclopean focus on pursuit of their political goals, Intervenors largely ignore both the Court's findings as set out in the Memorandum Opinion and traditional redistricting principles. Intervenors' proposals reflect the same creative use of water contiguity and disregard for political subdivisions that the Court strongly criticized in its Memorandum Opinion. By contrast, Plaintiffs' proposed remedial map outperforms both of Intervenors' proposals with respect to respect for political subdivisions and compactness. The Court should, Plaintiffs submit, reject Intervenors' proposals in favor of Plaintiffs' remedial plan.

The Court should also favor Plaintiffs' proposal over the proposals submitted by non-parties. The non-parties who took the time to submit proposed districting plans to the Court should be commended. But many of their proposals reflect (1) their lack of familiarity with the factual record in this matter and (2) the fact that a non-party is only likely to take the time to generate and submit a redistricting plan that serves its own interests and policy goals,

[1] Defendants have not submitted a proposed remedial plan.

rather than a plan designed to carry out the remedial task before the Court. Plaintiffs address the specific deficiencies of the other plans in greater detail below, but the alternatives before the Court share at least one of the following five deficiencies and shortcomings:

- The data files for the plan were not timely served on Plaintiffs or, presumably, the other parties, as required by the Court;
- The plan does not comply with basic, background principles of remedial redistricting—including one-person, one-vote compliance and use of single-member districts;
- The plan was drafted, in whole or part, in 2011 in conjunction with the decennial redistricting process and thus was *not* prepared in light of (and in response to) the specific constitutional violation as set out in the Memorandum Opinion;
- The plan misapprehends the task before the Court by advancing independent policy goals rather than focusing on correcting the racial gerrymander of CD 3 and making related adjustments to other districts to achieve population equality and better adhere to traditional redistricting criteria; and
- The plan does not perform as well on objective measures—such as political subdivision splits and compactness—as Plaintiffs' remedial plan.

Of all the plans before the Court, Plaintiffs' proposed remedial plan best accomplishes the remedial task before the Court. Plaintiffs' proposal cures the unconstitutional racial gerrymander of CD 3 and rebalances the population of Virginia's congressional districts while respecting traditional redistricting criteria. Plaintiffs' remedial plan splits far fewer political subdivisions and is more compact than the enacted plan and the other proposals before the Court. For all the reasons stated below, and in their opening memorandum, Plaintiffs respectfully ask the Court to adopt their proposed remedial plan.

II. BACKGROUND

The Court ordered the parties and interested non-parties to submit proposed remedial plans by no later than September 18, 2015, with accompanying data and supporting memoranda. *See* Dkt. Entry No. 207. Defendants elected not to submit a proposed remedial plan. *See* Dkt. Entry No. 223. Plaintiffs submitted a remedial plan. Dkt. Entry No. 229.

Intervenors submitted two proposed plans. *See* Dkt. Entry No. 232. In addition, seven non-parties submitted proposed remedial plans, including:

1. Richmond First Club (Dkt. Entry No. 218);
2. Virginia Senate Bill 5001—J. Chapman Peterson (Dkt. Entry No. 219);
3. Bull Elephant Media LLC ("Bull Elephant") (Dkt. Entry No. 222);
4. Virginia State Conference of NAACP Branches (the "NAACP") (Dkt. Entry No. 227);
5. Jacob Rapoport (Dkt. Entry No. 228);
6. Governor Terry McAuliffe (Dkt. Entry No. 231);
7. Donald Garrett (Dkt. Entry No. 238).[2]

The Court's Order provided an opportunity for those submitting proposed remedial plans to respond to the other remedial plans submitted. Dkt. Entry No. 207, ¶ 4; Dkt. Entry No. 239, ¶ 3. Plaintiffs provide this response to the other proposed remedial plans submitted to the Court.

III. ARGUMENT

Plaintiffs first address the two proposed remedial plans submitted by Intervenors. Plaintiffs then address the various plans submitted by non-parties.

A. The Court Should Reject Intervenors' Proposed Plans

Intervenors begrudgingly acknowledge the "violation the Court found in District 3"; that is, that enacted CD 3 is an unconstitutional racial gerrymander. Dkt. Entry No. 232, at 8. Accordingly, Intervenors' proposals reduce (as they must) the BVAP in CD 3—to 50.2% and 50.1% in their Plan 1 and Plan 2, respectively. Dkt. Entry No. 232-3, 232-13. But Intervenors candidly admit that their proposed remedial plans are drawn to advance a central and overriding purpose—their "political goal[] of implementing an 8/3 incumbency

[2] Non-party OneVirginia2021 submitted proposed criteria it urges this Court to adopt to govern redistricting, Dkt. Entry No. 214, but did not submit a proposed remedial plan.

protection plan." Dkt. Entry No. 232, at 12 (internal quotation marks and citations omitted). The Court should reject Intervenors' proposed remedial plans because it has already held that the General Assembly—though not entirely blind to political considerations—*did not* adopt the enacted plan as an "8-3 incumbency protection plan." Moreover, Intervenors' proposed plans would embroil the Court inappropriately in partisan gerrymandering, and those proposals maintain the same features in CD 3 (creative water contiguity and rampant political subdivision splits) that the Court criticized in the Memorandum Opinion.

1. The Court Has Already Rejected Intervenors' Claim That Delegate Janis's Overriding Purpose in Drawing the Enacted Plan Was to Create an "8/3" Partisan Map

Intervenors devote much of their briefing to a repackaging of their now-familiar and increasingly stale argument that the sole mapdrawer, Delegate Janis, drew the enacted plan to advance one very specific political goal—an "8-3" map. *See generally* Dkt. Entry No. 232, at 10-15. From that (false) premise, Intervenors contend that this Court must likewise set out to draw an 8-3 partisan map, and offer two such maps for the Court's consideration. Intervenors' "politics" argument has not become any stronger, more persuasive, or more tethered to the record evidence since last Intervenors made it, Plaintiffs thoroughly addressed it, and the Court rejected it. *See, e.g.*, Dkt. Entry No. 154 (Plaintiffs' Reply Brief Regarding *Alabama Legislative Black Caucus v. Alabama*), at 10-12; Dkt. Entry No. 170 (Memorandum Opinion), at 34-41.

As the Court has already found, Intervenors' political arguments are spun almost entirely out of whole cloth. Intervenors are self-described "strangers to the redistricting process." Dkt. Entry No. 152-2, at 24 n.1. Thus, while Intervenors "offered *post-hoc political justifications* for the 2012 Plan in their briefs, neither the legislative history as a whole, nor the circumstantial evidence in the record, supports" Intervenors' claim that political considerations determined the specific contours of districts in the enacted plan. *See* Memorandum Opinion, at 37 (emphasis added). That is, the Court rejected Intervenors'

characterization of the enacted plan as a bald "incumbency protection plan." *Id.* at 24. And for good reason.

The plan's architect, Del. Janis *expressly disavowed* any consideration of partisan performance when drawing the enacted plan. As the Court noted, when asked whether he had "any knowledge as to how this plan improves the partisan performance of those incumbents in their own district[s]," Del. Janis answered unequivocally: "'I haven't looked at the partisan performance. It was not one of the factors that I considered in the drawing of the district[s].'" *Id.* at 38 (quoting Int. Ex. 9 at 14). This is consistent with Delegate Janis's description of his redistricting criteria, which never once mention partisan performance. *See* Pl. Ex. 43, at 3-7, 18-20. By contrast, there is no contemporaneous statement (nor other circumstantial evidence) in the record supporting Intervenors' post-hoc claim that Del. Janis set out to draw an "8-3" map favoring Republicans. This Court found no reason to accept Intervenors' implicit argument that Del. Janis was being duplicitous, and instead found it "appropriate to accept the explanation of the legislation's author as to its purpose." *Id.* at 26. There is no basis (much less reason) to revisit that conclusion now.

Likewise, the Court has already flatly rejected Intervenors' claim that Del. Janis's "overriding objective was to respect to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 election, when voters elected 8 Republicans and 3 Democrats (as opposed to the 5-6 split resulting in 2008)." Dkt. Entry No. 232, at 12 (internal quotation marks omitted). The term "overriding objective" is Intervenors' own creation and is not found in the legislative record. The Court found the actual statements that do appear in the record to be "rather ambiguous"—not evidence that Del. Janis sought to maintain an 8-3 partisan split. Memorandum Opinion, at 38. Indeed, Del. Janis spelled out precisely how he applied the "will of the Virginia electorate": "[W]hat that meant was we based the territory of each of these districts on the core of the existing congressional districts" in an attempt to make a "minimal amount of change or disruption to

the current boundary lines." Pl. Ex. 43 at 4, 19. Indeed, because the "current boundary lines" were the same in 2008 and 2010, when they generated different partisan divides, Intervenors' claim that Del. Janis sought to achieve a certain partisan balance that this Court is duty-bound to maintain is, to put it delicately, in some considerable tension with the record before the Court. That is, presumably, why the Court rejected it in the first place.

2. The Court Should Reject Intervenors' Request That the Court Adopt a Remedial Plan Designed With the Overriding Purpose of Advancing Partisan Goals

Plaintiffs also submit that it would be inappropriate for the Court to (as Intervenors request) put partisan advantage at the forefront and draw a remedial map designed with the overriding objective of achieving defined partisan ends.

The redistricting process is inherently political when carried out by the political branches of government. But the Court is not a political branch of government. Indeed, many courts facing the unwelcome task of adopting a new redistricting plan have stated in no uncertain terms that partisan considerations will not drive their decision-making. *See, e.g.*, *Wyche v. Madison Parish Police Jury*, 769 F.2d 265, 268 (5th Cir. 1985) ("A court-ordered plan is subject to a more stringent standard than is a legislative plan. Many factors, such as the protection of incumbents, that are appropriate in the legislative development of an apportionment plan have no place in a plan formulated by the courts.") (internal citation omitted); *Larios v. Cox*, 306 F. Supp. 2d 1214, 1218 (N.D. Ga. 2004) ("[I]n the process of adopting reapportionment plans, the courts are 'forbidden to take into account the purely political considerations that might be appropriate for legislative bodies.'") (quoting *Wyche v. Madison Parish Police Jury*, 635 F.2d 1151, 1160 (5th Cir. 1981)); *Balderas v. Texas*, No. 6:01CV158, 2001 WL 36403750, at *4 (E.D. Tex. Nov. 14, 2001) ("[P]olitical

gerrymandering, a purely partisan exercise, is inappropriate for a federal court drawing a congressional redistricting map.").[3]

The Court should remedy the constitutional violation by reference to neutral redistricting criteria—not Intervenors' post hoc claims about the General Assembly's supposed political goals. If the resulting, neutrally-drawn map inures in relatively more or less advantage for Republicans or Democrats, so be it. That outcome would be a mere—and appropriate—function of Virginia's geographic and partisan distribution. This Court should decline Intervenors' invitation to embroil itself in partisan political machinations.

3. Both of Intervenors' Proposed Remedial Plans Fail to Fully Address the Court's Order and Are Objectively Inferior to Plaintiffs' Proposed Remedial Plan

Intervenors recognize that it is important that a remedial plan "[m]inimize [l]ocality [s]plits, [a]nd [i]mprove District 3's [c]ompactness." Dkt. Entry No. 232, at 8. But Intervenors' proposals fail that very standard and pale by comparison to Plaintiffs' proposed remedial plan when measured by traditional redistricting principles. That is, of course, hardly a surprise given the overriding political considerations admittedly undergirding Intervenors' proposals.

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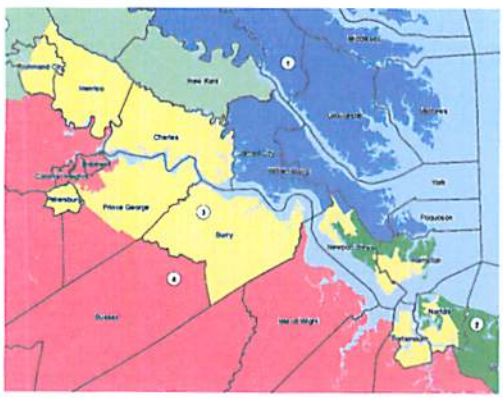
[3] *See also Maestas v. Hall*, 274 P.3d 66, 76 (N.M. 2012) ("To avoid the appearance of partisan politics, a judge should not select a plan that seeks partisan advantage."); *Peterson v. Borst*, 789 N.E.2d 460, 463 (Ind. 2003) ("A court . . . must . . . determine whether adoption of one of the plans would improperly introduce political considerations into the judicial process."); *Smith v. Clark*, 189 F. Supp. 2d 529, 537 (S.D. Miss. 2002) ("[P]olitical considerations are inappropriate for a federal court to consider when drafting a congressional redistricting plan."); *Corbett v. Sullivan*, 202 F. Supp. 2d 972, 973-74 (E.D. Mo. 2002) (noting that plan adopted by the court "does not consider the political consequences because that is not the proper role for a Court."); *Below v. Gardner*, 963 A.2d 785, 793 (N.H. 2002) ("[P]olitical considerations may be permissible in legislatively-implemented redistricting plans, [but] they have no place in a court-ordered remedial plan."); *Prosser v. Elections Bd.*, 793 F. Supp. 859, 867 (W.D. Wis. 1992) ("Judges should not select a plan that seeks partisan advantage—that seeks to change the ground rules so that one party can do better than it would do under a plan drawn up by persons having no political agenda—even if they would not be entitled to invalidate an enacted plan that did so.").

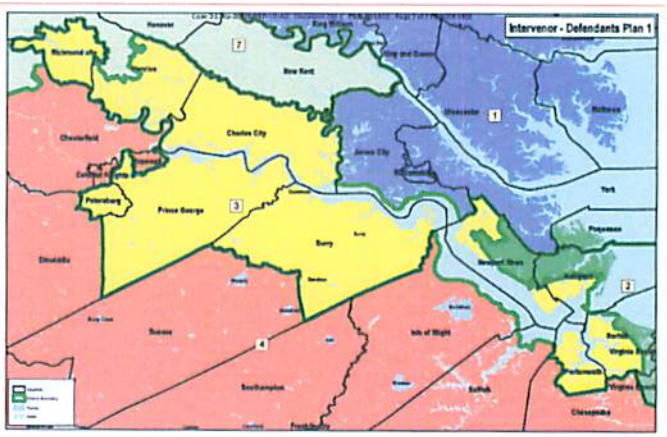
a. Intervenors' Proposals Contain the Same Problematic Use of Water Contiguity as in the Enacted Plan

Most notably, Intervenors' proposals both manifest the same creative use of water contiguity the Court criticized as evidence of the racial purposes underlying the enacted CD 3. Under Intervenors' proposal, the district would jump the James River between Surrey and Newport News, disappear in Newport News (as CD 1 is drawn down to the riverbank), and then reappear further down the river. Intervenors' proposals are "contiguous" only in the technical sense. This is, of course, familiar. Intervenors employ the same cartographical sleights of hand that led the Court to note that the General Assembly was using "water contiguity as a means to bypass white communities and connect predominantly African-American populations." Memorandum Opinion, at 29. Using water contiguity in this way is no more appropriate when done by Intervenors. The following comparisons of enacted CD 3 and Intervenors' two iterations of a proposed CD 3 illustrate the point:[4]

Enacted CD 3

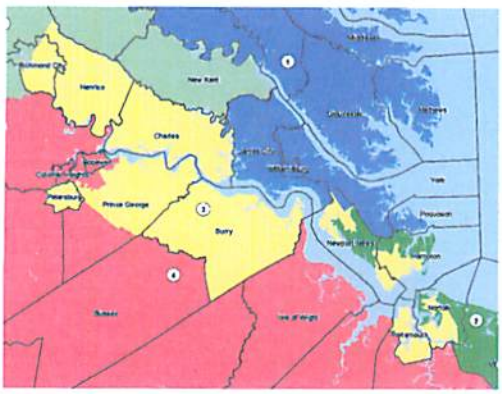


Intervenors' Plan 1

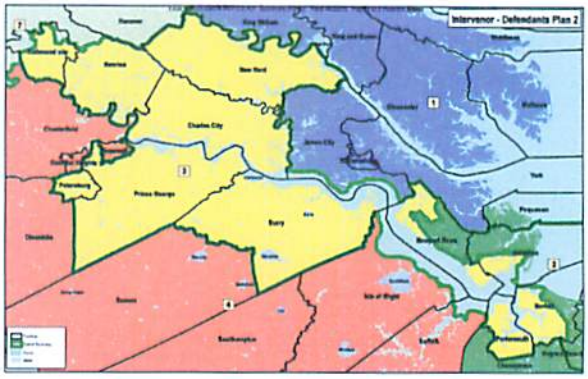


[4] For purposes of the illustrations in this memorandum, Plaintiffs modified the maps of Intervenors' proposed CD 3 for their Plan 1 (Dkt. Entry No. 232-2) and Plan 2 (Dkt. Entry No. 232-12) by altering their coloration to better show the similarities and contrasts with the map of enacted CD 3.

Enacted CD 3



Intervenors' Plan 2



As these maps illustrate, Intervenors may have reduced the BVAP of CD 3, but they did not address or remediate the fundamental deficiencies in the district that led to the Court's conclusion that race predominated. Intervenors simply repeat the same flaw identified and specifically discussed by the Court. Memorandum Opinion, at 29. This is, at the risk of stating the obvious, an inappropriate approach to "remedying" the constitutional error at hand.

b. Intervenors' Proposals Split Far More Political Subdivisions Than Plaintiffs' Proposed Plan

Intervenors' proposals are significantly flawed (and inferior to Plaintiffs' map) in a second way: They split markedly more political subdivisions. This is true both with respect to CD 3 and the map as a whole. Intervenors' approach here, like their approach to water contiguity, simply *ignores* the Court's decision and *repeats* the same problematic approach to splitting political subdivisions. This is no remedy; it is repetition.

The difference between Plaintiffs' proposed remedial plan and Intervenors' proposed CD 3 is particularly notable. Plaintiffs' remedial CD 3 consists of all of Portsmith, Hampton, Newport News, Surry, Prince George, Petersburg, Hopewell, Charles, and Henrico. *See* Dkt. Entry No. 230, Ex. E. Plaintiffs' remedial CD 3 only contains two splits that affect population—in Richmond and Henrico, which are necessary to achieve population equality given that Plaintiffs preserved CD 3 in the same, basic configuration. *Id.*

Intervenors, by contrast, continue to stitch together a Frankenstein's monster from dismembered counties. As in the Enacted Plan, under both of Intervenors' proposals, "[t]he Third Congressional District splits more local political boundaries than any other district in Virginia." Memorandum Opinion, at 30. Intervenors' Plan 1 splits CD 3 four times in a way that affects population (eight overall), including splits of Hampton, Henrico, Newport News, and Norfolk.[5] *See* Declaration of Kevin J. Hamilton in Support of Plaintiffs' Memorandum Regarding Proposed Remedial Plans of Intervenors and Non-Parties ("Hamilton Decl."), Ex. A. Intervenors' Plan 2 splits CD 3 five times in a way that affects population (nine overall), including splits of Hampton, Henrico, Newport News, Norfolk, and Richmond. *Id.*, Ex. B. These are essentially the same splits that the Court criticized in the Memorandum Opinion, and fly in the face of the "strong public sentiment, as expressed during 2010 redistricting forums, against splitting localities, and in favor of keeping the integrity of cities like Hampton and Norfolk intact." Memorandum Opinion, at 32-33.

Plaintiffs' remedial plan splits fewer cities and counties than either of Intervenors' alternatives:

Table 1[6]

	Plaintiffs	**Intervenors Plan 1**	**Intervenors Plan 2**
# of Political Subdivisions Split (Overall)	12	16	17
# of Political Subdivisions Split (Affecting Population)	9	12	13

Plaintiffs' remedial plan also compares favorably to both of Intervenors' proposals on a district-by-district basis with respect to the *overall* number of times that cities and counties

[5] All discussion of the metrics of Intervenors' and non-parties' proposed remedial plans is based on the memoranda filed with the Court and Plaintiffs' analysis of the data files served on Plaintiffs by Intervenors and non-parties. To the extent that Intervenors and non-parties did not provide accompanying reports setting out relevant metrics for their proposed plans, Plaintiffs generated such reports using the data files they received.

[6] *Compare* Dkt. Entry No. 230, Ex. E *with* Hamilton Decl., Exs. A-B.

are split. Plaintiffs' remedial plan only splits cities and counties a total of **20** times (in a way affecting population). By contrast, Intervenor Plan 1 and Plan 2 split cities and counties a total of **26** and **28** times (in a way affecting population), respectively:

Table 2[7]				
Number of Locality Splits by District Affecting Population				
District	**Plaintiffs**	**Enacted**	**Intervenor Plan 1**	**Intervenor Plan 2**
1	2	4	3	3
2	1	3	3	3
3	2	6	4	5
4	3	4	1	1
5	2	3	3	3
6	2	2	2	2
7	2	4	3	4
8	1	1	1	1
9	1	2	2	2
10	2	2	2	2
11	2	2	2	2
Total	**20**	**33**	**26**	**28**

Again, the objective inferiority of Intervenors' proposal is no surprise. Plaintiffs cured the unconstitutional gerrymander of CD 3 by focusing on objective and neutral redistricting principles. Intervenors, by their own admission, did not.

c. Intervenors' Proposed Plans Are Not as Compact as Plaintiffs' Plan

Finally, Intervenors' proposed plans are less compact than Plaintiffs' remedial plan. As the Court has recognized, "reapportionment is one area in which appearances do matter." Memorandum Opinion, at 27 (internal quotation marks and citation omitted). Indeed, "compactness is one of two redistricting criteria required by the Virginia Constitution." *Id.*

[7] *Compare* Dkt. Entry No. 230, Ex. E *with* Hamilton Decl., Exs. A-B.

(citing Va. Const. art. II, § 6). Thus, while Virginia may not impose bright line rules regarding compactness, compact districts are to be preferred over less compact districts.

Overall, Plaintiffs' remedial plan is more compact than both of Intervenors' proposals. In the table below, the measurement in bold reflects the most compact plan:

Table 3[8]

Measures of Compactness—Planwide Mean[9]

Plan	Reock	Polsby-Popper	Schwartzberg
Plaintiffs	**0.32**	**0.22**	**2.08**
Intervenors Plan 1	0.28	0.16	2.33
Intervenors Plan 2	0.29	0.17	2.28

Plaintiffs' proposed CD 3 itself is more compact that Intervenors' proposed CD 3. In the table below, the measurement in bold reflects, as to each district, which of the iterations of the district is more compact. Plaintiffs' CD 3 is more compact than either iteration of Intervenors' CD 3 on every relevant measure of compactness (with one nominal exception):

Table 4[10]

Measures of Compactness—CD 3

Plan	Reock	Polsby-Popper	Schwartzberg
Plaintiffs	0.24	**0.12**	**2.51**
Intervenors Plan 1	0.20	0.09	3.01
Intervenors Plan 2	**0.25**	0.10	2.82

[8] *Compare* Dkt. Entry No. 230, Ex. D *with* Dkt. Entry No. 232-6 to 232-8, 232-16 to 232-18.

[9] Under the Reock and Polsby-Popper measures, the *higher* number indicates a more compact district. Under the Schwartzberg measure, a *lower* number indicates a more compact district.

[10] *Compare* Dkt. Entry No. 230, Ex. D *with* Dkt. Entry No. 232-6 to 232-8, 232-16 to 232-18.

Plaintiffs' proposed remedial plan is superior to Intervenors' plans in every material respect in accomplishing the specific remedial task set by the Court. Plaintiffs reduced the excessive BVAP of CD 3, eliminated the most egregious uses of water contiguity and political subdivision splits in the enacted plan, and improved the compactness of the overall congressional map, all while respecting the basic contours of the existing districts. Intervenors, meanwhile, submit maps drawn to advance a political objective that Delegate Janis—the enacted plan's architect—expressly disavowed. This renders Intervenors' proposed plans unfit for adoption by the Court.

A. The Court Should Choose Plaintiffs' Proposal Over the Plans Submitted by Non-Parties

1. The Court Should Reject Plans That Were Not Timely Served Pursuant to the Court's September 3, 2015 Order

As an initial matter, the Court should reject and give no consideration to proposed remedial plans that were not timely served on the parties as required by the Court.

In its Order Regarding Submission of Proposed Remedial Plans (Dkt. Entry No. 221), the Court provided the parties—and non-parties who wished to submit proposed remedial plans—with specific instruction for effecting service on the other parties. The Order reads, in relevant part, as follows:

> All Shapefiles and Block Equivalency Files for each proposed remedial plan must be served electronically and in native format on all counsel of record for all parties on September 18, 2015, and all non-parties who submit proposed remedial plans no later than September 21, 2015.

Id. ¶ 4.

As of the date Plaintiffs file this memorandum, they have not been served with shapefiles or block equivalency files associated with the plans presented by non-parties Richmond First Club (Dkt. Entry No. 218) and Sen. J. Chapman Petersen (Dkt. Entry No.

219). *See* Hamilton Decl. ¶ 3.[11] The Court's Order was crafted carefully to provide a uniform set of rules for the submission of plans that would put all parties on the same even playing field and provide adequate opportunity to assess and respond to all plans before the Court. Accordingly, given these non-parties' failure to comply with the terms of the Order, the Court should give no consideration to the plans submitted by Richmond First Club and Senator Petersen.

2. The Court Should Reject Plans That Do Not Meet Basic Redistricting Requirements

The Court should also reject plans submitted by non-parties Bull Elephant and Donald Garrett due to threshold deficiencies that disqualify these plans for any consideration by the Court.

a. Bull Elephant

The two plans submitted by non-party Bull Elephant do not comply with the baseline constitutional principle of one-person, one-vote. In adopting criteria to guide congressional redistricting, the General Assembly provided that "[t]he population of each district shall be as nearly equal to the population of every other district as practicable." Pl. Ex. 5. This recognized that with regard to congressional redistricting, the Fourteenth Amendment requires states to—absent unusual circumstances—"achieve *precise mathematical equality*" between districts. *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969) (emphasis added). Any deviation from absolute population equality—no matter how small—must be justified. *See Karcher v. Daggett*, 462 U.S. 725, 730-31 (1983).

The plans submitted by Bull Elephant fall well short of meeting this standard. As stated in its brief, Bull Elephant did not attempt to achieve precise mathematical equality. Rather, it drew districts with substantial population variation. *See* Dkt. Entry No. 222, at 2-3.

[11] Plaintiffs were not timely served on September 18, 2015 (as required by the Order) with the data files for the plans submitted by Bull Elephant Media LLC and Jacob Rapoport. *See* Hamilton Decl. ¶ 2. Plaintiffs were not served with data related to these two plans until September 21, 2015. *Id.*

The data files provided to Plaintiffs by Bull Elephant reveal that its "Plan B" has a 1,430 person discrepancy between the least and most heavily populated districts.[12] Bull Elephant Plan A is even worse—there is a 2,707 person discrepancy between the least and most heavily populated districts.[13] Bull Elephant provides no substantive justification for this significant departure from precise mathematical equality.[14] Even if the proposed remedial plans were otherwise acceptable, substituting one constitutional violation for another is hardly appropriate. Accordingly, Bull Elephant's two proposals should be rejected out of hand.

b. Donald Garrett

The Court should also reject Donald Garrett's proposal. Mr. Garrett asks the Court to throw out Virginia's congressional map in its entirety and instead order the use of at-large elections for all 11 of Virginia's congressional seats pending the 2020 decennial Census. *See* Dkt. Entry No. 238. Not only would this radical departure from the status quo be unwarranted, it would violate federal law. Pursuant to 2 U.S.C. § 2c, for states with more than one congressional representative, "there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, *no district to elect more than one Representative*." (emphasis added). This mandated use of single member districts (and general prohibition on use of at-large districts) applies to courts tasked with drawing a redistricting plan. *See Branch v. Smith*, 538 U.S. 254, 273 (2003) (determining that barring unusual circumstances, "Congress mandated that States are to provide for the election of their

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[12] Under Bull Elephant Plan B, the most heavily populated district is District 8, with 728,153, and the least heavily populated district is District 6, with 726,723 residents. *See* Hamilton Decl., Ex. D.

[13] Under Bull Elephant Plan A, the most heavily populated district is District 8, with 729,516, and the least heavily populated district is District 6, with 726,809 residents. *See* Hamilton Decl., Ex. C.

[14] It appears that Bull Elephant's failure to submit constitutional proposals for the Court's consideration relates to deficiencies in the software used by Bull Elephant to generate its two plans. *See* Dkt. Entry No. 222, at 2 n.3.

Representatives from single-member districts, and that this mandate applies equally to courts remedying a state legislature's failure to redistrict constitutionally").

3. The Other Plans Submitted By Non-Parties Are Not Responsive to the Court's Order and Are Inferior to Plaintiffs' Proposal

The Court should also choose Plaintiffs' plan over those that were not drafted in response to the factual record developed in this matter and the Court's Memorandum Opinion. This includes the map presented by the Richmond First Club (drafted by law students in 2011), the map submitted by the NAACP, which is a slightly modified version of a map first introduced by Senator Mamie Locke in 2011 as Senate Bill 5004, and Jacob Rapoport's proposed plan.

The task before the Court is to "correct" the "constitutional defects" in the enacted plan. *Abrams v. Johnson*, 521 U.S. 74, 85-86 (1997). Plans that were drafted in whole or in part in 2011 necessarily cannot respond effectively to the Court's 2015 Memorandum Opinion to correct the specific constitutional defects the Court identified in the enacted plan. And all these plans were drafted with other objectives in mind and, in any event, are objectively inferior to Plaintiffs' plan.

a. Richmond First Club

The Richmond First Club explains that its proposed map was generated by law students in 2011 as part of a competition designed to further the Richmond First Club's interest in creation of "fair election districts on the state level to create better, more competitive legislative elections, in the interest of good government, instead of partisan gridlock." Dkt. Entry No. 218. While the Richmond First Club's aims are laudable, it misapprehends the purpose of the remedial phase of this litigation. We are not drawing on a blank slate. The Richmond First Club does not claim (because it cannot) that its proposed map is designed to respond to and correct the unconstitutional racial gerrymander of CD 3.

b. NAACP

The NAACP's plan is "based on the congressional map introduced by Senator Locke in 2011," with certain unidentified "adjustments" to Senator Locke's proposal made based on "the input of the Virginia NAACP's membership." Dkt. Entry No. 227, at 4. In fact, the NAACP's proposed CD 3 appears to be *exactly* the same as the version proposed by Senator Locke in 2011.[15] Though Plaintiffs share the NAACP's deep concern about the historic underrepresentation of African-Americans in the Commonwealth, the NAACP's plan was not crafted in response to the record evidence and the Court's findings. Like the NAACP, Plaintiffs question whether maintaining CD 3 as a majority-minority district is legally required under Section 2 of the Voting Rights Act, given that CD 3 is a "safe" majority-minority district in large measure because of substantial white cross-over voting. See Pl. Ex. 30, at 4-6. Nonetheless, Plaintiffs submit that retaining CD 3 as a majority-BVAP district is appropriate in the remedial phase of this lawsuit to avoid making radical alterations to the enacted plan.

Finally, and in any event, Plaintiffs' proposed remedial plan is superior to the NAACP's with reference to traditional redistricting criteria. Plaintiffs' plan splits fewer political subdivisions:

Table 5[16]

	Plaintiffs	**NAACP**
# of Political Subdivisions Split (Overall)	12	14
# of Political Subdivisions Split (Affecting Population)	9	14

Plaintiffs' remedial plan also splits far fewer cities and counties *overall* are compared to the NAACP proposal. Plaintiffs' remedial plan only splits cities and counties a total of **20**

[15] Data for and the map of Senate Bill 5004 are available at http://redistricting.dls.virginia.gov/2010/RedistrictingPlans.aspx#29.

[16] *Compare* Dkt. Entry No. 230, Ex. D *with* Hamilton Decl., Ex. E.

times (in a way affecting population), whereas the NAACP's proposal splits cities and counties a total of **31** times (in a way affecting population).[17]

Finally, Plaintiffs' plan contains districts that are more compact than in the NAACP proposal. Again, the bolded text reflects the most compact plan:

Table 6[18]			
Measures of Compactness—Planwide Mean			
Plan	**Reock**	**Polsby-Popper**	**Schwartzberg**
Plaintiffs	**0.32**	**0.22**	**2.08**
NAACP	0.31	0.17	2.28

The Court should reject the NAACP's plan in favor of Plaintiffs' proposal.

c. Jacob Rapoport

Finally, the Court should reject the plan offered by Jacob Rapoport, which performs radical surgery on CD 3 and the surrounding districts to accomplish goals beyond the scope of the Memorandum Opinion. Mr. Rapoport excises Richmond from CD 3 and places it in CD 4, along with many of the other counties and cities that currently comprise the western portion of enacted CD 3. *See* Dkt. Entry No. 228, at 1. He then proposes pushing CD 3 further south, to the border of North Carolina. *See* Dkt. Entry No. 228-1. Significant swaps of population are required to accomplish these alterations, including swapping over 300,000 persons between CD 3 and CD 4, and shifting tens of thousands of voters between CD 2, 4, and 7. *See* Dkt. Entry No. 228, at 2.

Mr. Rapoport explains that the rationale behind his proposed plan is to recreate CD 4 as a district in which "black voters . . . hav[e] an equal opportunity to elect the candidate of their choice under the Voting Rights Act." *Id.* at 1. Without supporting citation or legal argument, Mr. Rapoport asserts that the "demands of Voting Rights Act jurisprudence"

[17] *Compare* Dkt. Entry No. 230, Ex. D *with* Hamilton Decl., Ex. E.
[18] *Compare* Dkt. Entry No. 230, Ex. E *with* Hamilton Decl., Ex. F.

require adoption of a remedial congressional map that "reconfigure[s] the 3rd and 4th CDs sufficiently for the purposes of adequate minority representation." *Id.* at 3.

As stated above with respect to the NAACP's proposed plan above, Plaintiffs share Mr. Rapoport's concerns and support the policy goal of ensuring that African Americans in CD 4 have an equal opportunity to elect their candidate of choice. And it is certainly true that "unpacking" the excessive BVAP in CD 3 means that the districts surrounding CD 3 will necessarily have a BVAP higher than under the enacted plan. That said, the Court did not determine that the "demands of Voting Rights Act jurisprudence" require elevating the BVAP of CD 4 to some preordained level, as Mr. Rapoport suggests. It would be inappropriate to drastically alter the enacted plan to draw CD 4 with a particular racial composition in the absence of specific findings from the Court. Plaintiffs submit that the better approach is to—as Plaintiffs have done—reduce the excess BVAP of CD 3 and reachieve population equality by drawing more compact districts that better follow political subdivisions while maintaining existing districts in essentially their present form.

Moreover, Mr. Rapoport's focus on greatly raising the BVAP of CD 4 (from 32.4% in the enacted CD 4 to 42.4% in Mr. Rapoport's proposal) also requires more splits of political subdivisions than under Plaintiffs' proposal:

Table 7[19]		
	Plaintiffs	**Rapoport**
# of Political Subdivisions Split (Overall)	12	13
# of Political Subdivisions Split (Affecting Population)	9	13

Plaintiffs' remedial plan also splits far fewer cities and counties *overall* are compared to the Rapoport proposal. Plaintiffs' remedial plan only splits cities and counties a total of **20**

[19] *Compare* Dkt. Entry No. 230, Ex. D *with* Hamilton Decl., Ex. G.

times (in a way affecting population), whereas Mr. Rapoport's proposal splits cities and counties a total of **29** times (in a way affecting population).[20]

IV. CONCLUSION

For the reasons stated above, and in their opening memorandum, Plaintiffs respectfully request that the Court adopt Plaintiffs' proposed remedial districting plan and reject the proposals submitted by Intervenors and non-parties. Of all the proposals before the Court, Plaintiffs' remedial plan best fixes the specific unconstitutional racial gerrymander identified by the Court while improving the objective characteristics of the overall map in the course of tweaking districts to achieve population equality. Plaintiffs accordingly submit that the Court should adopt Plaintiffs' proposed remedial plan.

Dated: October 7, 2015

Respectfully submitted,

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[20] *Compare* Dkt. Entry No. 230, Ex. D *with* Hamilton Decl., Ex. G.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of October, 2015, I caused the foregoing to be electronically filed with the Clerk of this Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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