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 IN OPPOSITION TO DEFENDANTS' EMERGENCY MOTION TO MAKE PROPOSED REMEDIAL PLANS AND SUPPORTING MATERIALS ACCESSIBLE ON DLS WEBSITE

I. INTRODUCTION

Plaintiffs respectfully submit this memorandum in opposition to Defendants' Emergency Motion to Make Proposed Remedial Plans and Supporting Materials Accessible on DLS Website ("Defendants' Motion") (Dkt. Entry No. 225).

Defendants seek an order from this Court "authorizing" Virginia's Division of Legislative Services ("DLS") to post on its redistricting website the remedial redistricting plans and supporting materials submitted by the parties in connection with the litigation pending before this Court. The motion should be denied. The issue before this Court is the appropriate remedial map to adopt in light of the evidence presented during the trial of this matter. The parties have each submitted remedial plans and, with the Court's authorization, numerous non-parties have also provided input to the Court on proposed remedial plans. Posting the submitted remedial plans on a website created and maintained to encourage public input to the legislative branch during the decennial redistricting process, and specifically for encouraging similar wide-ranging public input to this Court, is ill-advised and inappropriate. The Court, aided by the parties and those members of the public who have taken the time to submit proposed plans to the Court, is best positioned to make an appropriate remedial decision. Unlike "deadlock" cases where a court embraces the unwelcome task of reapportionment by default, the Court here is faced with a quintessential *judicial* task of fashioning a remedy appropriate to the constitutional violation it has found. All of the data, remedial plans, and other materials that have been filed with this Court are already a matter of public record. Plaintiffs respectfully submit that issuing an order requiring, or "authorizing," the posting of such material by a political branch of the Virginia government sends an inappropriate message to the public. Defendants' motion should be denied.

II. BACKGROUND

Following a bench trial, on October 7, 2014, the Court found in Plaintiffs' favor on the merits of their claim that Virginia's current congressional districting plan violates the Fourteenth Amendment of the United States Constitution. Dkt. Entry Nos. 109, 110. Accordingly, the Court ordered that the "Commonwealth of Virginia is hereby enjoined from conducting any elections subsequent to 2014 for the office of United States Representative until a new redistricting plan is adopted" and that the Virginia General Assembly must act to "remedy the constitutional violations found in this case." Dkt. Entry No. 110. The Intervenor-Defendants appealed to the Supreme Court on October 31, 2014. Dkt. Entry No. 123.

On March 30, 2015, the United States Supreme Court vacated the judgment and remanded the case to this Court for further consideration in light of *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015) ("*Alabama*"). Dkt. Entry No. 150. On remand, the Court again found that "race predominated when the legislature devised Virginia's Third Congressional District in 2012." Dkt. Entry No. 170 ("Memorandum Opinion"), at p. 41. The Court further found that the General Assembly's use of race was not narrowly tailored to a compelling interest in complying with the Voting Rights Act. Among other things, the Court noted that the General Assembly had increased the BVAP of a "safe" majority-minority district from 53.1% to 56.3% without adequate justification. *Id.* at 45-47. Accordingly, the Court ordered "that new districts be drawn forthwith to remedy the unconstitutional districts." *Id.* at 49.

After the General Assembly failed to adopt a new districting plan by the September 1, 2015, deadline set by the Court (instead adjourning a special session called by the Governor after a single day), the Court ordered the parties—as well as any 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 (the "September 3 Order" or the

"Order"). Plaintiffs have submitted a remedial plan (Dkt. Entry No. 229), as have Intervenor-Defendants. (Dkt. Entry No. 232). In addition, eight non-parties have submitted proposals (through filings with the Clerk's office, letters, and faxed documents), including:

1. OneVirginia2021 (Dkt. Entry No. 214);
2. Richmond First Club (Dkt. Entry No. 218);
3. Virginia Senate Bill 5001—J. Chapman Peterson (Dkt. Entry No. 219);
4. Bull Elephant Media LLC (Dkt. Entry No. 222);
5. Virginia State Conference of NAACP Branches (Dkt. Entry No. 227);
6. Jacob Rapoport (Dkt. Entry No. 228);
7. Governor Terry McAuliffe (Dkt. Entry No. 231);
8. Donald Garrett (via facsimile to Clerk's Office).

The September 3 Order also contemplated an opportunity for those submitting proposed remedial plans to respond to the *other* remedial plans submitted. The Order provides that "On October 2, 2015, the parties and any non-parties desiring to do so, shall submit their briefs in response to the remedial plans, maps, and briefs submitted on September 18, 2015." Dkt. Entry No. 207, ¶ 4. The purpose of the provision was to allow responsive briefing by the parties to this litigation (and any members of the public who took advantage of the opportunity provided by the Court in Paragraph 3 of the Order to submit their own proposed remedial plans).

Defendants take the position that Paragraph 4 of the Order was a standing invitation to members of the public to submits comments and briefing on any of the proposed remedial plans, whether or not those individuals or groups had themselves proposed a remedial plan. In other words, rather than merely providing the parties (and participating non-parties) an opportunity to respond to the other proposed remedial plans, Defendants interpret the Court's order as authorizing open-ended public commentary. Further, to assist such non-participating members of the public in fashioning such commentary, Defendants propose that

this Court issue an order "authorizing" the Virginia Division of Legislative Services to post all of the proposed remedial plans and related data on its public access website, apparently to encourage public input and participation.

III. ARGUMENT

Defendants' motion should be denied for several reasons.

First, the Court's Order of September 3 is plain on its face and, while it authorizes non-parties to submit proposed remedial maps and to defend those maps in responsive briefing, it was not proposed to include (and cannot be fairly read to include) an invitation for further public commentary from individuals or organizations who did not themselves submit proposed remedial maps.

Second, the Court is not writing on a clean slate. This is not a "deadlock" case in which the Court is fashioning a map from scratch but, rather, the Court is fashioning a remedy for a constitutional violation found in the record before the Court. Inviting broad public commentary is no more appropriate here than it would be in hearings before this Court on the proposed remedy. The Court might well entertain argument from those who had submitted proposed remedial maps. It's difficult to imagine, and certainly would be inappropriate, to invite members of the public to address the Court at a hearing on the remedial plans before the Court.

Third, the proposed remedial plans are already a matter of public record. Interested members of the public can already access materials filed with this Court through the Clerk's office. Further orders "authorizing" the posting of such materials on state websites is unnecessary and inappropriate at this stage of these proceedings.

For each of these reasons, the motion should denied.

A. The Court's September 3 Order Does Not Authorize Additional Non-Party Submissions From Non-Participating Non-Parties

At the outset, the September 3 Order is plain on its face. The Order, in Paragraph 3, authorizes not only parties, but also non-parties, to submit by September 18, 2015, proposed "remedial plans and maps with supporting data and briefs explaining their respective proposals." The Order then provides the parties (and participating non-parties) an opportunity for filing responsive briefs addressing the other timely-filed remedial plans:

> On October 2, 2015, the parties, and any non-parties desiring to do so, shall submit their briefs in response to the remedial plans, maps, and briefs submitted on September 18, 2015.

Dkt. Entry No. 207, ¶ 4.

It seems apparent from the structure of the Order that the opportunity to respond was designed to be afforded to *the parties and any non-parties who had submitted proposed remedial plans.* Had the Court wished to provide a public comment period, it would hardly have provided for the filing of "briefs" or limited their subject to "the remedial plans, maps, and briefs submitted on September 18, 2015." Rather, such an invitation would more naturally have taken the form of an invitation for comments from the public (or any "non-parties") on appropriate factors to consider in fashioning relief or drawing remedial districts. The Order, however, does no such thing but instead carefully describes what can only be understood as responsive briefing limited to the subject of previously-filed "remedial plans, maps and briefs."

Posting the filed remedial maps and related material on the DLS website would inappropriately suggest a broader invitation to submit public commentary to the Court. The Court, of course, remains free to do so, but such an action would be inconsistent with the September 3 Order and, Plaintiffs submit, would be inappropriate.

B. The Task Before the Court is Fashioning a Remedial Plan Based on the Record

The motion should be denied for a second reason as well.

This not a "deadlock" case; that is, an instance where the political branches fail to implement a new plan after a decennial Census, and the Court must draw a new map from scratch. In that circumstance, it may well be appropriate for the public to have a significant opportunity to participate in the process of drawing the new map. *See, e.g., Hippert v. Ritchie*, 813 N.W.2d 374, 380 (Minn. 2012) (three-judge panel hearing "deadlock" case held eight public hearings across Minnesota and invited and received written comments and maps from members of the public via United States Mail and e-mail).

Rather, this is a case where the Court—based on the specific evidence it heard at the trial—struck down as unconstitutional the map adopted after the 2010 Census. While the Court need and should not *defer* to that unconstitutional map, the goal of the remedial phase is to make the changes to the existing map needed to fully unwind the unconstitutional gerrymander. *See Abrams v. Johnson*, 521 U.S. 74, 85 (1997) (the task of courts adopting a remedy after striking down enacted districting plans it to "*correct* . . . . constitutional defects in districting plans") (emphasis added). Necessarily, the public role in that process (as in any inherently judicial process) is limited. The public at large did not sit through the trial, did not hear the evidence presented, and is unfamiliar with the scope and nature of the constitutional violation found by the Court.

Inviting uninformed input from non-parties who are not only unfamiliar with the record, but did not even bother to make the effort to submit their own remedial plan, would be unhelpful. Posting the remedial briefing and proposed remedial maps on the DLS website—but *not* the remainder of the evidence found in the record before this Court demonstrating the unconstitutional racial gerrymander—only welcomes uninformed public commentary. The Court should decline the invitation to do so.

C. An Order From This Court "Authorizing" The Posting of Proposed Remedial Plans Would be Inappropriate

Finally, but perhaps most importantly, an Order from this Court "authorizing" the posting of this material on the DLS website would be a decidedly odd step. The remedial plans submitted before this Court and the related briefing are all matters of public record. They have been transmitted to the Clerk's Office via overnight delivery and will be available in the Clerk's office for review on Monday, September 21, 2015. The parties have already served all of those non-parties who have submitted proposed remedial plans with the detailed shapefiles and block assignment files (by email with a file sharing link for those with email addresses and by overnight delivery of a CD-ROM for those who did not identify an email account). But it strains credulity to imagine that members of the public who (a) have not submitted their own proposed remedial plans, and (b) wish to comment, would nonetheless (c) find these large data files (which can be opened and utilized only using specialized software) useful in doing so.

DLS, moreover, hardly needs this Court's authorization to post whatever it wishes to post. Whether to do so is a decision for DLS, not this Court. Asking this Court to issue orders "authorizing" the posting of some of the papers and evidence filed in this case but not all of it suggests some inappropriate emphasis on some, but not all, of the record before the Court.

IV. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court deny Defendants' Motion in its entirety.

Dated: September 20, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September, 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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