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 SUPPORT OF THEIR PROPOSED REMEDIAL PLAN

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I. INTRODUCTION

Plaintiffs respectfully submit this supporting memorandum in support of their proposed remedial plan pursuant to the Court's Order dated September 2, 2015 (Dkt. Entry No. 207). The plan is attached to the accompanying Declaration of Kevin J. Hamilton.[1] Plaintiffs' proposed remedial plan 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 is more compact than the existing plan and splits far fewer political subdivisions. The ease with which CD 3 and surrounding districts can be redrawn in more sensible configurations illustrates the unnecessary lengths the General Assembly went to force Black voters into CD 3 in the first place. For all the reasons stated below, Plaintiffs respectfully ask the Court to adopt their proposed remedial plan.

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

[1] Pursuant to the Court's instruction, Plaintiffs have separately filed with the Court a hard copy of Plaintiffs' proposed remedial map with accompanying data files.

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 pp. 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 to submit proposed remedial plans by no later than September 18, 2015, with accompanying data and supporting memoranda. *See* Dkt. Entry No. 207.

III. ARGUMENT

Accompanying this memorandum, Plaintiffs provide the Court with their proposed remedial plan, maps of Plaintiffs' remedial plan as a whole and of CD 3 and surrounding environs, and reports of the basic demographic details of Plaintiffs' proposal.

As explained below, Plaintiffs' plan cures the fundamental constitutional deficiency in the existing plan (the "enacted plan")—the artificially inflated BVAP in CD 3. Plaintiffs' remedial plan preserves the structure of the enacted plan, but is superior to the enacted plan with respect to every objective metric. The remedial plan's districts are more compact and split fewer political subdivisions than the enacted plan. Plaintiffs' remedial plan thus accomplishes the remedial task before the Court in a neutral and objective fashion, as is appropriate for a map to be adopted by a court overseeing the redistricting process.

A. Plaintiffs' Proposed Remedial Plan Fixes the General Assembly's Racial Gerrymander of CD 3

Plaintiffs' proposed remedial plan achieves the primary objective of the remedial phase of this litigation—curing the unconstitutional racial gerrymander of CD 3 identified by the Court.

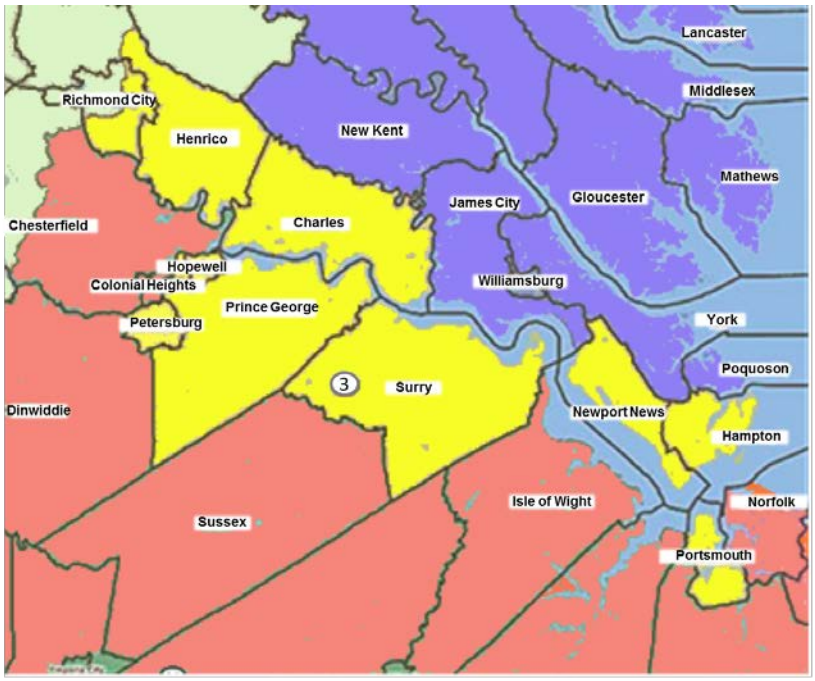
As set out in detail in the Memorandum Opinion, the enacted version of CD 3 was drawn to unite far-flung African-American communities, which explains the unusual shape of CD 3, why it relies heavily on "water contiguity as a means to bypass white communities and connect predominantly African-American populations," Memorandum Opinion, at p. 29, and why the current CD 3 splits more local political boundaries than any other district, and contributes to the majority of splits in surrounding districts. *Id.* at p. 30.

To address these issues in the configuration of CD 3, then, three related changes must be made to the enacted plan. First, the BVAP in CD 3 must be reduced. Second, the departures from traditional redistricting principles driven by the General Assembly's unnecessary use of race (chiefly, split political subdivisions) should be reversed, meaning that alterations to the districts surrounding CD 3 are also required. Third, final adjustments to district boundaries must be made, as it is, of course, impossible to alter the boundaries of CD 3 and fix race-motivated splits of political subdivisions without recalibrating districts to achieve population equality. This is particularly true because existing CD 3 is centrally located and abuts four surrounding districts.

Plaintiffs' remedial plan achieves these goals. Plaintiffs reduced the artificially-inflated BVAP of CD 3. The enacted plan raised the BVAP of CD 3 from 53.1% to 56.3%, even though it had been a safe majority-minority district for twenty years. *See* Memorandum Opinion, at pp. 45-46. Plaintiffs reduced the BVAP of CD 3 to roughly the same percentage as under the 2001 version of the district—to 51.5% (or 52.3% if the "any part black" metric is used). *See* Hamilton Decl., Ex. C (Population Summary). As further explained below (and reflected in Table 1 below), Plaintiffs accomplished the "unpacking" of CD 3 by uniting

political subdivisions that were split in the enacted plan, rather than simply reversing the General Assembly's approach (i.e., mechanically *removing* high-BVAPs from CD 3 without regard to political subdivisions).

Table 1: Plaintiffs' Proposed CD 3



Although Plaintiffs reduced the BVAP of CD 3, they did not drop the district's BVAP below 50%. 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 part because of substantial White cross-over voting. *See* Pl. Ex. 30, at 4-6. Nonetheless, Plaintiffs retained CD 3 as a majority-BVAP district to avoid making radical alterations to the enacted plan.

Finally, Plaintiffs note that they do not propose that the Court adopt as a remedy the alternative plan Plaintiffs presented during the liability phase of this litigation. At trial, Defendants expressed dissatisfaction with the substance of Plaintiffs' demonstrative alternative plan and advanced various objections to it. *See*, *e.g.*, Dkt. Entry No. 85 (Defendants' and Intervenors' Joint Trial Brief), at 18-22. The Court rejected these critiques,

relying on the improvements it made to CD 3 as proof that race predominated in the enacted version of CD 3. Memorandum Opinion, at pp. 32-33. Nonetheless, to address the objections raised by Defendants to Plaintiffs' prior alternative plan, Plaintiffs propose a clean and objectively superior remedial plan for adoption by the Court.

B. The Court Need Not—and Should Not—Defer to Proposed Remedial Plans Presented by Either Defendants or Intervenors

In taking up the task of creating a constitutional congressional districting plan, it is important to note that the Court has no constitutional plan before it that has been duly adopted by the political branches in Virginia. In response to the Court's Memorandum Opinion, the General Assembly did not adopt a remedial plan, instead electing to adjourn a special session called for that purpose after a single day. Had the General Assembly chosen to exercise its prerogative and adopt a remedial plan itself, the task before the Court would be quite different. In that instance, the Court would likely have deferred to the map duly adopted under Virginia law. But the General Assembly chose not to adopt a new map manifesting its judgment on the configuration of Virginia's congressional districts in the absence of an unconstitutional racial gerrymander of CD 3.

The Court therefore has no plan before it that is entitled to the Court's deference. The enacted plan is, as the Court has found, unconstitutional. The Court need not and should not "defer" to that unconstitutional plan—it must remedy it. *See Abrams v. Johnson*, 521 U.S. 74, 85-86 (1997) (adopted redistricting plan "is not owed . . . deference to the extent the plan subordinated traditional districting principles to racial considerations" because "courts [are] to correct—not follow—constitutional defects in districting plans"); *see also Favors v. Cuomo*, No. 11-CV-5632 RR GEL, 2012 WL 928223, at *6 (E.D.N.Y. Mar. 19, 2012) ("[T]he court owes no . . . deference to the outdated policy judgments of a now unconstitutional plan.").

Nonetheless, while Plaintiffs submit that no deference is owed to the enacted plan—an unconstitutional nullity tainted by the General Assembly's impermissible racial motives—in drafting their remedial plan, they have still sought to minimize the impact of redistricting on the existing districts. Plaintiffs have therefore focused alterations to the enacted plan to CD 3 and surrounding districts to the extent possible. They have done so even though it would be possible to further improve the objective characteristics of further-flung districts by eliminating unnecessary splits of political subdivisions and enhancing compactness.

C. Plaintiffs' Proposed Remedial Plan Achieves Population Equality

The ideal population for each Virginia congressional district following the 2010 census is 727,366 persons. Plaintiffs' proposed districts are of equal population, with no more than +1 or -1 variance between districts. *See* Hamilton Decl., Ex. C.

D. Plaintiffs' Proposed Remedial Plan Better Adheres To Traditional Redistricting Criteria As Compared to the Enacted Plan

1. Plaintiffs' Remedial Plan Substantially Improves the Contiguity of CD 3

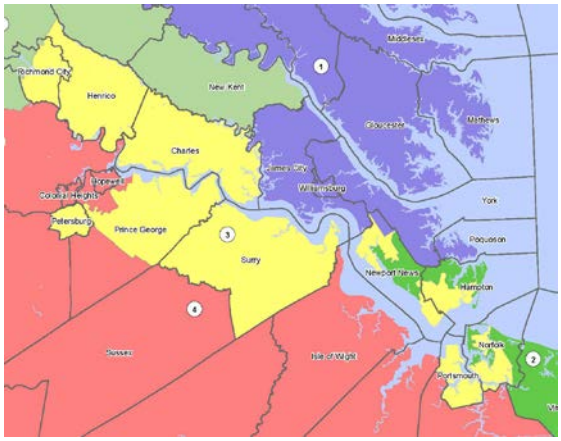
One of the more notable peculiarities of the enacted CD 3 is the way in which the district is only nominally contiguous, using the James River to connect otherwise disconnected pockets of Black voters. As the Court has found, although the enacted CD 3 is technically contiguous because Virginia allows water contiguity, the General Assembly's enthusiastic and creative use of water contiguity to scoop up pockets of Black voters provided strong evidence of the racial motives behind the district. Memorandum Opinion, at p. 29.

Plaintiffs' remedial plan does better. Without redrawing CD 3 entirely, Plaintiffs could not avoid all use of the James River to achieve contiguity in CD 3. Plaintiffs have however, substantially improved CD 3 in this regard.

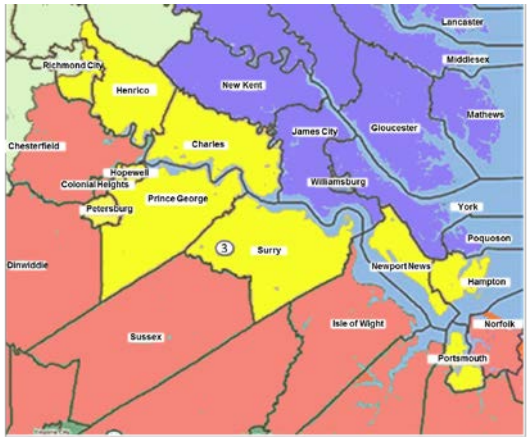
In stark contrast to the enacted CD 3, which splits more counties than any other district, Plaintiffs used whole counties to draw CD 3 (with the exception of one split of

Richmond City).[2] This allowed Plaintiffs to draw a new version of CD 3 that echoes the existing district while traveling more naturally along the banks of the James River. As the side-by-side comparison below confirms, nowhere does Plaintiffs proposed CD 3 resort to the creative cartography manifested by the enacted CD 3, which, as the Court found, went to great lengths to avoid White communities along the shores of the James River:

Enacted CD 3



Plaintiffs' Proposed CD 3



2. Plaintiffs' Remedial Plan Creates More Compact Districts

Plaintiffs' proposed remedial plan structures districts into compact districts. Plaintiffs have markedly improved the compactness of CD 3, and their remedial plan either matches or improves the compactness of every other district in the map, with the sole exception of CD 2, which became slightly less compact as Plaintiffs cured the deficiencies in CD 3. *See* Hamilton Decl., Ex. D (Measure of Compactness).

Plaintiffs provide a comparison of the compactness of their proposed remedial plan and the enacted plan using three common measures of compactness. The Reock test compares each district to an ideal circle (considering the circle to best the most compact shape possible) and computes the ratio of the area of the district to the minimum area of a circle sufficiently large to encompass the district. The Polsby-Popper test similarly compares

[2] As discussed below, Plaintiffs CD 3 contains two other technical splits that do not affect any population.

the ratio of a district's area with the area of a circle sharing the same perimeter. Under these two measures, a larger number means the district is more compact. The Schwarzberg measure compares the ratio of the perimeter of the district to the perimeter of a circle of an equal area to that of the district. Under this measure, a smaller number means the district is more compact.

Taken as a whole, the districts in Plaintiffs' proposed remedial plan are more compact than the enacted plan under each of the three measures.

Plan	Mean Reock	Mean Polsby-Popper	Mean Schwarzberg
Plaintiffs	0.32	0.22	2.08
Enacted	0.28	0.16	2.33

The superior compactness of Plaintiffs' remedial plan manifests as well on a district-by-district comparison. The measurement in bold reflects, as to each district, which of the two iterations of the district is more compact:

District No.	Reock Enacted	Reock Plaintiffs	Polsby-Popper Enacted	Polsby-Popper Plaintiffs	Schwartzberg Enacted	Schwartzberg Plaintiffs
1	0.28	**0.29**	0.18	**0.21**	2.09	**1.93**
2	**0.27**	0.26	0.20	**0.33**	2.09	**1.64**
3	0.19	**0.24**	0.08	**0.12**	3.07	**2.51**
4	0.32	**0.36**	0.20	0.20	**2.04**	2.09
5	0.30	**0.49**	0.15	**0.32**	2.30	**1.62**
6	0.26	**0.32**	0.16	**0.20**	2.17	**2.00**
7	0.30	**0.48**	0.13	**0.29**	2.34	**1.71**
8	0.37	0.37	0.26	0.26	1.76	1.76
9	0.20	**0.23**	0.18	**0.22**	2.13	**1.96**
10	0.29	0.29	0.12	0.12	2.60	2.60
11	0.23	0.23	0.09	0.09	3.06	3.06

In sum, in the course of curing the constitutional deficiencies of CD 3 and making necessary adjustments to re-achieve population equality, Plaintiffs were able to improve the compactness of CD 3 and the congressional map as a whole. Had Plaintiffs departed more freely from the contours of the existing districts, they could have improved the compactness of the districts even further.

3. Plaintiffs' Remedial Plan Reflects Greater Respect for Political Subdivisions than the Enacted Plan

Plaintiffs' proposed remedial plan also substantially reduces the number of split political subdivisions in both CD 3 and the map as a whole.

As the Court noted in the Memorandum Opinion, enacted CD 3 "splits nine counties or cities, the highest number of any congressional district in the 2012 Plan." Memorandum Opinion, at p. 30. By comparison, Plaintiffs' proposed plan contains only splits nine political subdivision *in total* (it contains three additional technical splits that affect no population). *See* Hamilton Decl., Ex. E (Split Political Subdivisions Report). Plaintiffs' proposed plan is a substantial improvement over the Enacted Plan, which splits **17** counties and cities.[3]

The improvement in CD 3 is dramatic. Plaintiffs' remedial CD 3 consists of all of Portsmith, Hampton, Newport News, Surry, Prince George, Petersburg, Hopewell, Charles, and Henrico. Plaintiffs' remedial CD 3 only contains one split that affects population—in Richmond, where a split is necessary to achieve population equality. *See id.* By contrast, the enacted CD 3 split Henrico, Hampton, Newport News, Norfolk, and Richmond, and also split Suffolk, James, and Isle of Wight, although these latter splits did not affect any population.

Plaintiffs' remedial plan also compares favorably to the Enacted Plan on a district-by-district basis with respect to the *overall* number of times that cities and counties are split. Whereas the enacted plan splits cities and counties a total of **33** times (in a way affecting population), Plaintiffs' remedial plan only splits cities and counties a total of **22** times:

[3] Three of the political subdivision splits in the enacted plan do not affect any population.

Number of Locality Splits by District Affecting Population		
District	**Enacted**	**Plaintiffs**
1	4	2
2	3	1
3	6	2
4	4	5
5	3	2
6	2	2
7	4	2
8	1	1
9	2	1
10	2	2
11	2	2
Total	**33**	**22**

By any measure, Plaintiffs' remedial plan manifests a greater respect for political subdivisions than the enacted plan. This is not surprising. Because the General Assembly used race as the predominant consideration in drawing CD 3, it paid little heed to county and city boundaries when drawing the district. Ignoring political subdivisions was one of the primary ways the General Assembly was able to markedly increase the BVAP of CD 3. In "unwinding" this racial gerrymander fully, it was easy for Plaintiffs to draw districts that more closely followed Virginia's geographic and political contours, even without making radical changes to the existing districts.

IV. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court adopt the Plaintiff's proposed remedial districting plan. Plaintiffs' remedial plan clearly and cleanly fixes the unconstitutional racial gerrymander of CD 3. Moreover, though Plaintiffs did not perform radical surgery on other districts, they were still able to improve the objective characteristics of the map in the course of tweaking districts to achieve population equality.

Plaintiffs therefore submit that their proposed remedial plan is precisely the kind of clean, objectively-drawn plan that the Court should enter.

Dated: September 18, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th 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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