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

DAWN CURRY PAGE, et al, Plaintiffs, v. VIRGINIA STATE BOARD OF ELECTIONS, et al., Defendants.	)	Civil Action No. 3:13-cv-678-REP-LO-AKD

PLAINTIFFS' OPPOSITION TO INTERVENOR-DEFENDANTS' MOTION TO POSTPONE REMEDIAL DEADLINE

Intervenors' Motion to Postpone asks this Court to act in the face of inaction—inaction on behalf of the Supreme Court, the General Assembly, and even Intervenors' themselves. According to Intervenors, because the Supreme Court has *not* acted on their appeal in this case, this Court should instruct the General Assembly to take no steps toward a remedy until that appeal is resolved, all without any effort from Intervenors to actually move for a stay under the relevant legal standard. Intervenors' proposal to halt the remedial process, however, will only delay and derail the full and fair remedy to which Plaintiffs are entitled.

Intervenors presume that the Supreme Court's silence in this case will likely lead to a victory on the merits of their appeal, and warn this Court that its Memorandum Opinion is merely a preliminary finding, a legal nullity until the Supreme Court says otherwise. *See* Dkt. No. 127 ("Int. Br.") at 6. But Intervenors forget that, absent a motion to stay the case, the considered opinion of a district court granting an injunction takes effect immediately.

Intervenors' preference for postponing a remedy, based on little more than mere speculation, cannot substitute for a motion to stay the case under the well-established standard.

Intervenors' assertion, moreover, that a postponement of the remedy "makes perfect sense from everyone's perspective," Int. Br. at 9, ignores Intervenors' own arguments to the contrary. In 2014, Intervenors argued that the Supreme Court's decision in *Alabama Democratic Conference v. Alabama* has no bearing on this case, that the public interest demands a swift resolution, and that any remedial plan must be in place well before the next election. Now, in 2015, Intervenors reverse themselves, arguing that the *Alabama* case will be outcome determinative of their appeal, that the public interest will be served by further delay, and that a postponed remedial deadline will provide ample time before the next election. Intervenors' abrupt change of heart reveals the baselessness of their Motion to Postpone. The Court should deny Intervenors' effort to stave off an efficient and effective remedy in this case.

I. ARGUMENT

A. Intervenors Have Not Moved for a Stay and Can Identify No Grounds for a Stay

Intervenors' Motion to Postpone seems to assume that this Court's Memorandum Opinion finding CD3 an unconstitutional racial gerrymander is unenforceable absent the Supreme Court's blessing. *See, e.g.*, Int. Br. at 2 ("[A]ll remedial action will be put on hold unless and until liability is established (by the Supreme Court or this Court on remand)."). But Intervenors' decision to appeal to the Supreme Court does not automatically freeze the legal force and effect of this Court's Order. On the contrary, absent a motion for stay based on a well-established legal standard—and an order granting such motion—this Court's injunction remains in effect. Intervenors congratulate themselves for filing their Notice of

Appeal "37 days before the deadline" and their jurisdictional statement "only 24 days after the majority's decision and 96 days before the deadline for filing that statement." *Id*. at 3-4. But over *four months* have elapsed since this Court issued its October 7, 2014 Memorandum Opinion, and not once in that time have Intervenors sought a stay of this Court's order in any forum. The alacrity with which Intervenors sought to overturn this Court's decision cannot excuse their reluctance to actually seek a stay of that ruling pending appeal. In fact, Intervenors' present Motion to Postpone seeks to sidestep both the procedural requirements and the legal standard for imposing a stay.

The Federal Rules of Civil Procedure set forth specific instructions for staying a district court injunction. Rule 62 provides the default rule that "an interlocutory or final judgment in an action for an injunction" is "*not* stayed after being entered, even if an appeal is taken." Fed. R. Civ. P. 62(a)(1) (emphasis added). While a Court may suspend an injunction upon a motion while an appeal is pending, "[i]f the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either: (1) by that court sitting in open session; or (2) by the assent of all its judges, as evidenced by their signatures." Fed. R. Civ. P. 62(c).

Nor is procuring stay a mere procedural formality. Rather, issuance of a stay is governed by a well-established legal standard. The Supreme Court has defined the relevant factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Not only

have Intervenors failed to request a stay under this standard, they could not satisfy these elements even if they had chosen to follow the proper procedure.[1]

1. Intervenors Have Demonstrated No Likelihood of Success on the Merits

Intervenors have made no showing whatsoever—let alone a "strong showing"—that they are likely to succeed on the merits of their appeal. Nor could they, as the panel's controlling opinion is well grounded in undisputed evidence and a long line of Supreme Court authority. This Court relied on a host of both direct and circumstantial evidence that race was the predominant factor in drawing CD3, including Intervenors' own statement to that effect and their recognition that the General Assembly applied a racial threshold. *See* Dkt. No. 109 ("Mem. Op.") at 18-19; *see also* Dkt. No. 85 at 26 (arguing "the General Assembly had a 'strong basis in evidence' to believe . . . that 55% BVAP was a reasonable level for preserving the ability to elect" and it "acted accordingly when it adopted the Enacted Plan with 56.3% BVAP in [CD3]"). Indeed, the sole mapdrawer stated on the record that the racial composition of CD3 was his "primary focus" and that he considered this factor "nonnegotiable." *See* Mem. Op. at 21. Intervenors can hardly contend, moreover, that the district was narrowly tailored where the General Assembly engaged in no analysis

[1] Intervenors' repeated citation to Supreme Court authority granting stays pending appeal only further highlights their failure to move for a stay in that Court as well. *See, e.g.*, *White v. Weiser*, 412 U.S. 783, 789 (1973) ("This Court, *on application of appellant*, granted a stay of the order of the District Court.") (emphasis added). Intervenors' contention, moreover, that the Supreme Court has imposed such stays "to avoid compelling a state legislature to adopt a remedial plan during the pendency of a direct appeal," Int. Br. at 5, is belied by a closer look at the cases themselves. *See Whitcomb v. Chavis*, 396 U.S. 1064 (1970) (noting that stay was granted only after legislature had failed to act and district court had adopted remedial plan). To be sure, the Supreme Court has its own procedural requirements and legal standard governing stays, neither of which Intervenors have pursued. *See* Supreme Court Rule 23 (providing, *inter alia*, that "[e]xcept in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below"); *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (stay is granted "only in those extraordinary cases where the applicant is able to rebut the presumption that the decision[] below—both on the merits and on the proper interim disposition of the case—[is] correct").

whatsoever of racial voting patterns and instead applied a blanket threshold that went beyond what was necessary to avoid retrogression. *See id.* at 40, 44. As applied to the facts in this case, the law as it stands is clear. *See generally id.* (citing *Easley v. Cromartie*, 532 U.S. 234 (2001); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993)). Based on that precedent, Intervenors' argument on the merits simply fails.

Indeed, Intervenors do not argue otherwise. Instead they contend that the Supreme Court's *inaction* on Intervenors' appeal portends the ultimate reversal of this Court's ruling based on a separate case the Court has not yet decided. According to Intervenors, "the Supreme Court *appears* to be holding this case pending its decision in *Alabama Democratic Conference v. Alabama*." Dkt. No. 125 at 1 (emphasis added). This argument fails for at least two reasons. First and foremost, it is based entirely on pure speculation. Intervenors extrapolate from nothing more than the Supreme Court's silence that it "appears unlikely" the Court will take action in this case until it issues its *Alabama* opinion, as that decision "may provide" guidance on the racial gerrymandering standard. *Id.* at 2; *see also id.* (any remedy "may be rendered nugatory" by the Supreme Court); Int. Br. at 1 (the Supreme Court is "almost certainly" holding the appeal, "probably" pending its decision in the *Alabama* case); *id.* at 2 ("summary affirmance is also a possibility"); *id.* at 8 (the Supreme Court "appears to believe" its decision in *Alabama* will control here); *id.* at 9 ("adhering to th[e] deadline *may* deprive" the General Assembly of "whatever guidance the Supreme Court *may* provide" in the *Alabama* case, which "*might*" control determination of this case) (emphasis added). Instead of relying upon evidence and argument, Intervenors' brief relies upon conjecture, reading the tea leaves based on scraps of information. Intervenors'

prognostication, while interesting, hardly amounts to a "strong showing" that they are likely to succeed in their appeal.

Second, Intervenors' assumption that the *Alabama* case is not only relevant to, but determinative of, their appeal in this case at once ignores key differences between the two cases and directly contradicts the position Intervenors previously advanced before this Court. The Court specifically invited the parties to address the Supreme Court's decision to hear the *Alabama* case in their post-trial briefs. Intervenors' discussion consisted of a single paragraph entitled: "The Supreme Court's Eventual Decision In The Alabama Case Is Unlikely to Affect This Case." Dkt. No. 106 ("Int. Post-Tr. Br.") at 37. At that time, Intervenors agreed with Plaintiffs on the limited relevance of the *Alabama* case, arguing that there is "good reason to doubt the Supreme Court's decision . . . would have any effect on this case," and that the "Supreme Court is unlikely to announce a decisional rule that would materially modify existing law." *Id.* (internal quotation marks omitted). The Supreme Court has done nothing since then that would suggest otherwise; it has issued no opinion in the *Alabama* case and has taken no action on Intervenors' appeal. The only intervening event has been this Court's ruling against Intervenors' position. Yet Intervenors have done a complete about-face, remarkably asserting that "it makes perfect sense . . . to await the Supreme Court's decision in *Alabama*," Int. Br. at 9, just a few months after urging the Court to "resolve this case without awaiting the Supreme Court's decision in the Alabama case," Int. Post-Tr. Br. at 37. Intervenors' suggestion that this case now *hinges* on the *Alabama* case is not only disingenuous, it is barred by the doctrine of judicial estoppel. *See New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (purpose of doctrine is to "'prohibit[] parties

from deliberately changing positions according to the exigencies of the moment'") (quoting *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993)).

2. Intervenors Allege No Injury

Intervenors do not and cannot allege any injury absent a stay. Intervenors are eight Republican politicians who, at the time of their intervention, were members of Virginia's congressional delegation. Two of the Intervenors, Eric Cantor and Frank Wolf, are no longer in office. None of the Intervenors reside in or represent CD3. *See Johnson v. Mortham*, 915 F. Supp. 1529, 1538 (N.D. Fla. 1995) (refusing intervention to congressional representatives who did not represent the challenged district because they "have no more than a generalized interest in [the] litigation, since . . . the possibility of a remedy that would impair their interests in their congressional seats is no more than speculative"). Nor do Intervenors have legal authority for redistricting or the conduct of elections in Virginia—those jobs belong to the state's General Assembly and Board of Elections, respectively. In short, the Court's ruling "ha[s] not ordered [Intervenors] to do or refrain from doing anything." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013).

The only injury Intervenors can point to is asserted on behalf of the General Assembly, the State, and this Court, *see* Int. Br. at 3 (arguing that postponing the remedial deadline "would avoid the potentially unnecessary and wasteful exercise of diverting scare legislative, administrative, and judicial resources to crafting a remedial plan"), none of whom Intervenors represent. In fact, not only has the State not appealed this Court's ruling, it affirmatively opposes Intervenors' Motion to Postpone here. *See* Dkt. No. 133.[2] Whatever

[2] The State's brief requests a modification of the remedial deadline to April 15, 2015, to allow the Commonwealth to address a remedial plan during the current Regular Session. Plaintiffs have no objection to this slight modification.

interest Intervenors once had warranting intervention in this case does not translate into injury as a result of the Court's injunction.[3]

3. Plaintiffs Will Be Prejudiced by the Proposed Delay

Intervenors assert that postponing the remedial deadline five months "would not prejudice any party," as the 2016 election is still far off. Int. Br. at 9. Intervenors' argument that there will be "more than ample time to craft a judicial remedy" with the extended deadline, *id.*, is dubious at best, especially given the strident objection Plaintiffs faced when they sought relief in time for the 2014 election. In their December 13, 2013 brief on potential remedies, the State Defendants argued, "it is already too late to redraw a map prior to the November 2014 election without significant disruption and expense," Dkt. No. 32 at 7, and provided over five pages of dates and deadlines that would be compromised by imposition of a new congressional plan, *id.* at 7-13. At that point, Intervenors wholeheartedly agreed that "it would be extraordinarily impractical and unfair to enter *any* remedy" in time for the 2014 election. Dkt. No. 33 at 1. If the December prior to an election is "already too late," it can hardly be the case that a September deadline provides "more than ample time," Int. Br. at 9. Intervenors cannot have it both ways, leaving a window so narrow as to potentially squeeze Plaintiffs out of an effective remedy for another election cycle.

Intervenors' "no harm no foul" approach, moreover, ignores the potential length and complexity of the remedial process. If the Court were to allow the General Assembly until September 1 to draw a remedial plan, it would have to determine whether that plan in fact cures the constitutional violation. This process would likely entail additional briefing, expert

[3] In fact, Plaintiffs have filed a Motion to Dismiss Intervenors' appeal in the Supreme Court arguing that Intervenors lack standing to bring the appeal where the State has chosen not to appeal. The Supreme Court could just as likely decide Intervenors' appeal on standing grounds as it could on the merits of the underlying case.

analysis, and oral argument. If the General Assembly's plan is deemed inadequate, or if the General Assembly fails to enact a remedial plan, the Court will have to craft a judicial remedy, which may be as simple as adopting a plan proposed by one of the parties or as complicated as enlisting a special master or technical expert to draw district lines, *see* Dkt. No. 30 at 6 (listing several approaches for judicial remedy), either of which would then trigger additional briefing by the parties and analysis by the Court. The Court must allow sufficient time to finalize a full and fair remedy for the violation of Plaintiffs' constitutional rights. Plaintiffs would be severely prejudiced if Intervenors' proposed "postponement" were granted, as it would risk yet another election under an unlawful map.

4. The Public Interest Demands a Swift Resolution

The public interest most certainly favors an efficient remedy for a constitutional violation that has endured far too long. *See Desena v. Maine*, 793 F. Supp. 2d 456, 462 (D. Me. 2011) ("Constitutional violations, once apparent, should not be permitted to fester; they should be cured at the earliest practicable date."). Indeed, just a few months ago, Intervenors themselves argued that "the public interest militates in favor of resolving any ambiguity surrounding the Enacted Plan," and urged the Court to "resolve this case without awaiting the Supreme Court's decision in the Alabama case." Int. Post-Tr. Br. at 37. Intervenors' new-found enthusiasm for prolonging the road to a decisive resolution is based solely on their own interests, not the public interest.

This Court's Memorandum Opinion carefully considered the issue of a proper remedy, and while it determined that more harm than good would result from disrupting the 2014 election, it found that Plaintiffs are entitled to a swift remedy:

> [W]e recognize that individuals in the Third Congressional District whose constitutional rights have been injured by improper racial gerrymandering

> have suffered significant harm. Those citizens "are entitled to vote as soon as possible for their representatives under a constitutional apportionment plan." *Cosner v. Dalton*, 522 F. Supp. 350, 364 (E.D. Va. 1981). Therefore, we will require that new districts be drawn during Virginia's next legislative session to remedy the unconstitutional districts.

Mem. Op. at 47. The public interest in a speedy remedy—marked by the April deadline for the General Assembly to enact a remedial plan—is no less pressing today than it was at the time the Court issued its Memorandum Opinion.

B. The General Assembly Is Invited, Not Required, to Enact a Remedial Plan

Intervenors take issue with the Court's "requir[ing] the General Assembly to adopt a remedial plan" by the April 1 deadline, arguing that there is "no basis for a federal court to compel the General Assembly to devote its limited time and resources to adopting a remedial plan based on *contingent* liability." Int. Br. at 2, 6. Intervenors' defense of the General Assembly's purported interests, is misplaced. The General Assembly is not *required* to enact a remedial plan if it prefers otherwise. Rather, consistent with well-established precedent, the General Assembly has been given "the first opportunity to create a constitutional redistricting plan." Mem. Op. at 47; *see also McDaniels v. Mehfoud*, 702 F. Supp. 588, 596 (E.D. Va. 1988) ("[T]he court should give the appropriate legislative body the first opportunity to provide a plan that remedies the violation."). But the General Assembly's time frame to remedy the violation is not unlimited. *See Rodriguez v. Bexar Cnty., Tex.*, 385 F.3d 853, 870 (5th Cir. 2004) (courts should afford local governments a "*reasonable* opportunity to propose a constitutionally permissible plan") (emphasis added). The only requirement imposed by the Court is that, if the General Assembly chooses to take advantage of the opportunity to correct the constitutional violation, it must do so by the April deadline. The General Assembly has every reason to take seriously the considered opinion of this

Court and act accordingly. Plaintiffs must not be deprived of an effective and efficient remedy simply because the General Assembly may choose to sit on its hands in the hopes of a more favorable ruling from the Supreme Court. Intervenors' attempt to either encourage or justify legislative inaction provides no basis for postponing the relief to which Plaintiffs—and the voters of Virginia—are entitled.

II. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court deny Intervenor-Defendants' Motion to Postpone Remedial Deadline Until September 1, 2015.

Dated: February 9, 2015

Respectfully submitted,

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I hereby certify that on this 9th day of February, 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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