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

GLORIA PERSONHUBALLAH, et al,	)	
Plaintiffs,	)	
v.	)	
JAMES B. ALCORN, et al.,	)	Civil Action No. 3:13-cv-678-REP-LO-AKD
Defendants,	)	

PLAINTIFFS' OPPOSITION TO INTERVENOR-DEFENDANTS' MOTION TO SUSPEND FURTHER PROCEEDINGS AND TO MODIFY INJUNCTION PENDING SUPREME COURT REVIEW

TABLE OF CONTENTS

Page

I. INTRODUCTION

> [O]nce a State's . . . apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan.

Reynolds v. Sims, 377 U.S. 533, 585 (1964).

This is not an unusual case. Intervenors' Motion to Suspend Further Proceedings and to Modify Injunction Pending Supreme Court Review is but the latest in a series of efforts to delay implementation of a remedy for the constitutional violation this Court first found more than a year ago. In two thorough and, indeed, exhaustive opinions, this Court has affirmed and reaffirmed its holding that Congressional District 3 ("CD 3") is an unconstitutional racial gerrymander. The Special Master appointed by the Court has since issued a Final Report that further illustrates the utter lack of justification for the General Assembly's decision to draw CD 3 to comply with a 55% BVAP threshold.

> As described in *Page*, one justification offered by some individual Virginia legislators for the way in which the present CD3 was configured, was that such a configuration was required because only a district with a 55% black voting age majority could provide African-American voters with a realistic opportunity to elect candidates of choice. That assertion is unsupported by <u>any</u> empirical evidence. Moreover, in my view as a political scientist specialist on redistricting, not only does talismanic reliance on a figure of 55% black voting age population impose a "bright line" test rejected by the Supreme Court in *Alabama Legislative Black Caucus et al. v. Alabama*, 135 S. Ct. at 1270, but analyses specific to the eastern part of Virginia demonstrate that the claim that a 55% minority voting age population is needed in a district to assure African-American voters a realistic opportunity to elect candidates of choice in CD3 is, factually, flatly wrong.

Dkt. #272 at 61-62.

Rather than accept the Court's ruling, Intervenors have fought it tooth and nail. In the meantime, Plaintiffs—and every voter in the Commonwealth—have already been subjected to two elections under the patently unconstitutional enacted plan. Intervenors now ask the

Court to stay—rather than complete the nearly done—remedial phase of this lawsuit and delay implementation of a remedy until after the 2016 congressional elections. Stripped to its essence, then, Intervenors ask the Court to delay remedying the unconstitutional racial gerrymander for *four years* after its first Order striking down the enacted plan, *five years* after Plaintiffs filed suit, and to allow *two* congressional elections to go forward under an unconstitutional map during the pendency of this case. And they ask the Court to do so even though Intervenors do not even have standing to pursue their pending appeal and even though the Court has *already rejected* a previous motion to modify its injunction pending appeal because, among other things, it found that Intervenors do not have a likelihood of success on the merits.

The Court should reject Intervenors' motion in no uncertain terms and instead preserve the status quo pending appeal—finalization and adoption of a remedial plan for the 2016 elections.

II. BACKGROUND

Intervenors' motion is simply the latest in a series of efforts to delay this Court's correction of the unconstitutional racial gerrymander of CD 3.

On October 7, 2014, the Court held that the enacted plan was unconstitutional and enjoined the Commonwealth from conducting elections subsequent to 2014 until a new, constitutional plan was adopted. Dkt. #110 at 1. Thus, for more than a year, the status quo has been that the enacted plan is unconstitutional and cannot be used for elections after 2014.

In its October 7, 2014, Order, the Court gave the General Assembly until April 1, 2015, to adopt a new redistricting plan. *Id.* at 1-2. Intervenors appealed to the Supreme Court. Thereafter, on Intervenors' motion, and over Plaintiffs' objection, the Court continued that April 1, 2015 deadline to September 1, 2015. *See* Dkt. #138.

The Supreme Court remanded this case for further consideration in light of *Alabama Legislative Black Caucus et al. v. Alabama*, 135 S. Ct. 1257 (2015). On June 5, 2015, the

Court reaffirmed its holding that CD 3 is an unconstitutional racial gerrymander, "enjoined [the Commonwealth] from conducting any elections for the office of United States Representative until a new redistricting plan is adopted," and gave the Virginia General Assembly until September 1, 2015, to draw a new redistricting plan. Dkt. #171. The Court expressly "recognize[d] that individuals in the Third Congressional District whose constitutional rights have been injured by improper racial gerrymandering have suffered significant harm" and were "'entitled to vote as soon as possible for their representatives under a constitutional apportionment plan.'" *Id.* at 49 (quoting *Cosner v. Dalton*, 522 F. Supp. 350, 364 (E.D. Va. 1981)).

On June 18, 2015, Intervenors filed a Notice of Appeal. Dkt. #172. Intervenors did not file a motion to stay pending appeal in conjunction with their Notice of Appeal. The State Defendants did not join Intervenors' appeal. Indeed, the State opposes the appeal. *See Wittman v. Personhubbalah*, No. 14-1504, Motion to Affirm by Appellees Virginia State Bd. of Elections (S. Ct. July 22, 2015).

A month later, on July 15, 2015, the Virginia Senate and Virginia House filed a motion to continue the Court's September 1, 2015, remedial deadline to November 16, 2015. Dkt. #193 at 2. The core justification advanced by the General Assembly for the requested continuance was that failure to grant it would either "moot the Intervener-Defendants' direct appeal to the Supreme Court" or require a remedial plan to be drafted "without the benefit of the Supreme Court's guidance and, worse, [s]ubject to vacatur or reversal in the Supreme Court." *Id.* at 8-9 (internal quotation marks and citation omitted, alteration in original).

Plaintiffs opposed the motion. *See* Dkt. #197. In their opposition to the motion, Plaintiffs noted that if the Court granted the requested continuance, and the Supreme Court thereafter set Intervenors' appeal for full briefing, the Court could expect a motion to stay the implementation of a remedial plan until after the 2016 elections:

> [I]f the Supreme Court . . . sets the appeal for a full hearing . . . [a] motion will be filed to stay this Court's remedy

> until after the Supreme Court decides the appeal (as late as June 2016), at which point Intervenors and the General Assembly will argue that it is too late to draw new districts before the 2016 primary election.

Id. at 7.

On August 5, 2015, the Court denied the General Assembly's motion on grounds fatal to the instant motion:

> The Court concludes that the Interested Parties have failed to show that (1) the Intervenor-Defendants are likely to succeed in the appeal pending before the Supreme Court, or (2) they will suffer irreparable injury or prejudice by adhering to the Court's September 1, 2015 [deadline] for adopting a new redistricting plan.

See Dkt. #201 at 1. Intervenors responded to this Order by doing precisely nothing. Intervenors did not seek reconsideration of the Court's August 5 Order, and did not seek a stay pending appeal from either this Court or the Supreme Court.

Three more months came and went. The General Assembly failed to adopt a remedial plan to implement the Court's injunction by the September 1, 2015, deadline, and so the Court took up the task of enforcing its order by developing a remedial plan. During this period, pursuant to a Supreme Court order dated September 28, 2015 in response to Plaintiffs' motion to dismiss Intervenors' appeal due to lack of standing, the parties submitted supplemental briefing to the Supreme Court on whether Intervenors even have standing to pursue their pending appeal, given that none reside in or represent CD 3. On November 13, 2015, the Supreme Court issued an order postponing further consideration of the standing question until full briefing and argument on the merits of Intervenors' appeal, and directing the parties "to brief and argue the following question: Whether Appellants lack standing because none reside in or represent the only congressional district whose constitutionality is at issue in this case." *See* Dkt. #271 ("Mot. to Suspend"), Ex. A. Thus, while the Supreme Court may reach the merits of Intervenors' appeal, there is at the very least a serious possibility that the Supreme Court will instead reject the appeal outright because Intervenors lack standing.

On November 16, 2015, Intervenors filed the present motion to stay pending appeal—more than a year after the Court's original order striking down CD 3 and more than six months after the Court reaffirmed that decision. This motion will not be fully briefed until December 7—a mere week before the Court completes the final step in the remedial process (a final hearing) before adopting a remedial plan. *See* Dkt. ##263, 274.

III. ARGUMENT

A. The Court Has Jurisdiction to Enforce the Entered Injunction

As an initial matter, the Court should reject Intervenors' half-hearted suggestion (advanced in a footnote) that it is "unclear" whether the Court "has jurisdiction to enter a remedy." Mot. to Suspend at 4 n.1. It *is* clear why Intervenors lacked the courage of their convictions to advance this contention in the body of their motion. The Court has issued an injunction compelling the Commonwealth to implement a remedial redistricting plan by a certain deadline, and the Commonwealth did not do so. The Court obviously has jurisdiction to enforce its permanent injunction by finalizing, adopting, and ordering implemented a remedial map. If the rule were to the contrary, a party could refuse to comply with a district court's injunction through the simple expedient of filing a notice of appeal.

That is not the law and never has been. To the contrary, it is well-established that a district court "does retain jurisdiction to enforce the judgment" pending appeal. *NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588–89 (6th Cir. 1987) (as cited in *Greater Potater Harborplace, Inc. v. Jenkins*, 935 F.2d 267 (4th Cir. 1991) (unpublished)). Thus, where the district court is supervising a "continuing course of conduct . . . [a]bsent a stay 'an appeal from the supervisory order does not divest the district court of jurisdiction to continue its supervision.'" *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 827 (10th Cir. 1993) (quoting *Hoffman v. Beer Drivers & Salesmen Local Union No. 888*, 536 F.2d 1268, 1276 (9th Cir. 1976)); *see also United States v. Hanover Ins. Co.*, 869 F. Supp. 950, 952 (1994) ("[A]bsent a stay pending appeal, a court retains jurisdiction to supervise its judgments and

enforce its orders."), *aff'd*, 82 F.3d 1052 (Fed. Cir. 1996). This is black letter law. *See* 11 Fed. Prac. & Proc. Civ. § 2904 (3d ed.) ("There is no automatic stay in actions for injunctions; in those actions a judgment, whether interlocutory or final, may be stayed only by court order. If no stay has been obtained, an injunction that the district court has granted remains in effect.").

Indeed, Federal Rule of Civil Procedure 62(c) *expressly* authorizes district courts to issue or modify injunctions during the pendency of the appeal. *See also* 11 Fed. Prac. & Proc. Civ. § 2904 (3d ed.) ("[E]ven after notice of the appeal has been filed, the trial court still has jurisdiction to make an order under Rule 62(c).") (collecting cases). Intervenors' conduct during the remedial phase of this case would be hard to explain if they truly believed the Court lacked jurisdiction to enforce its injunction pending appeal. Among other things, Intervenors have participated throughout the months-long remedial process and directed the present motion to the Court's attention rather than to the Supreme Court.

In short, the Court unquestionably has jurisdiction to enforce the injunctions it entered in October 2014 and June 2015. Absent a stay, the Commonwealth has no right to simply ignore these injunctions and hold an election in 2016 under the map the Court has twice held unconstitutional.

B. Intervenors Fail to Meet Their Burden of Establishing the Court Should Stay Implementation of the Remedy

1. Intervenors Face a Significant Burden to Establish Their Entitlement to the "Extraordinary Relief" They Seek

A stay is an exercise of judicial discretion. *See Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 125 (4th Cir. 1983) ("[F]ederal district courts possess the ability to, under their discretion, stay proceedings before them when the interests of equity so require."). The granting of a stay pending appeal is "extraordinary relief," and the party requesting a stay bears a "heavy burden." *Winston–Salem/Forsyth County Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971) (Burger, Circuit Justice); *see also Flame S.A. v. Indus. Carriers, Inc.*, No.

2:13-CV-658, 2014 WL 5410622, at *3 (E.D. Va. Oct. 23, 2014) (moving party has the burden of demonstrating that the circumstances warrant issuance of a stay) (citing *Nken v. Holder*, 556 U.S. 418, 433-34 (2009)). In determining whether to grant a stay pending appeal, the Court considers four 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." *Nken*, 556 U.S. at 434; *see also Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970).

A party seeking a stay pending appeal "will have greater difficulty demonstrating a likelihood of success on the merits" than one seeking a preliminary injunction because there is "a reduced probability of error" in a decision of the district court based upon complete factual findings and legal research. *See Mich. Coal. of Radioactive Material Users, Inc. v. Greipentrog*, 945 F.2d 150, 153 (6th Cir. 1991).[1] The first two factors of the test outlined above "are the most critical." *Nken*, 556 U.S. at 534. And the moving party must show it is *likely* to prevail on the merits and *likely* to suffer irreparable injury in the absence of a stay—more than speculation and the hope of success is required. The moving party is thus required to show something more than "a mere possibility" of success on the merits. *Nken*, 556 U.S. at 534; *see also Mich. Coal.*, 945 F.2d at 153. By the same token, "simply showing some 'possibility of irreparable injury,' . . . fails to satisfy the second factor." *Nken*, 556 U.S. at 534 (quoting *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998)).

1. Intervenors Cannot Establish a Likelihood of Success on the Merits

Under these well-established standards, Intervenors cannot meet their burden of showing a stay is appropriate. Indeed, the Court *has already held that they cannot*. In denying the General Assembly's motion to delay the remedial deadline (Dkt. #201), the

[1] Of course, the "probability of error" is all the more "reduced" where, as here, the district court has reconsidered and reaffirmed its decision upon order of the Supreme Court.

Court held that there had been no showing that "1) the Intervenor-Defendants are likely to succeed in the appeal pending before the Supreme Court." *See* Dkt. #201 at 1. Thus, it is now the law of the case that Intervenors are not likely to succeed on the merits of their appeal. *See United States v. Aramony*, 166 F.3d 655, 661 (4th Cir. 1999) (explaining law of case doctrine).

In any event, Intervenors cannot begin to demonstrate a likelihood of success on the merits. Intervenors offer no substantive argument to the contrary. Intervenors argue briefly that they are likely to prevail because the Court supposedly "failed to apply *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015) and *Easley v. Cromartie*, 532 U.S. 234 (2001); found a *Shaw* violation without requiring Plaintiffs to show that race rather than politics predominated in the changes to Enacted District 3; and misapplied the narrow tailoring requirement." Mot. to Suspend at 17. None of these arguments have merit. To the contrary, the Court's exhaustive opinion expressly (1) applied *Alabama*, *see, e.g.*, Dkt. #170 at 4-5, 13-15, 41-42, 44-45; (2) fully considered *Easley* and rejected Intervenors' reliance on it, *see id.* at 36-39; (3) not only required Plaintiffs to show that race predominated but actually *included a section of its opinion* devoted to explaining its finding of the "[p]redominance of [r]ace over [p]olitics," *id.* at 34; and (4) applied well-established precedent in finding that the General Assembly's use of race to draw CD 3 was not narrowly tailored, *id.* at 43-49. Repetition has not made Intervenors' arguments any more persuasive. A party seeking a stay pending appeal has the burden of establishing a likelihood of success on the merits, which it cannot meet where it simply reargues the same points without new analysis, as Intervenors do here.[2]

[2] *See, e.g.*, *Spirit Airlines, Inc. v. Ass'n of Flight Attendants*, No. 14-CV-10715, 2015 WL 4757106, at *2 (E.D. Mich. Aug. 12, 2015) ("no likelihood of success on appeal where proponent of stay 're-argu[es] . . . the issues without any new analysis or case citation'") (quoting *Smith v. Jones*, No. 05–CV–72971, 2007 WL 3408552, at *2 (E.D. Mich. Nov. 15, 2007)); *Stewart Park & Reserve Coal. Inc. (SPARC) v. Slater*, 374 F. Supp. 2d 243, 263 (N.D.N.Y. 2005) (same, where moving party simply attempted to "to relitigate or reargue" the court's earlier rulings); *Anderson v. Gov't of Virgin Islands*, 947 F. Supp. 894, 898 (D.V.I. 1996) ("Defendants attempt to recharacterize the factual findings in this case fails to show a likelihood of success on the merits of the appeal.").

But Intervenors' main thrust is that the mere fact that the Supreme Court will entertain argument on Intervenors' appeal establishes that Intervenors are likely to prevail. Mot. to Suspend at 16-17. This is flatly wrong. To the contrary, to establish a likelihood of success on the merits of a Supreme Court appeal, a party must show: (1) a "reasonable probability that four Justices will consider the issue sufficiently meritorious to . . . note probable jurisdiction" *and* (2) that a majority of the Court will reverse on the merits. *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). In other words, as common sense suggests, and Supreme Court precedent holds, the mere fact that the Supreme Court notes probable jurisdiction does not establish automatically—as Intervenors suggest—that the Supreme Court is likely to reverse the judgment of a lower court.

Moreover, the Supreme Court *has not* noted probable jurisdiction, as Intervenors suggest. Mot. to Suspend at 10 ("By noting probable jurisdiction, the Supreme Court concluded that the Court's liability judgment raises substantial questions warranting plenary review.") (internal quotation marks and citation omitted). To the contrary, the Supreme Court "postponed" the question of jurisdiction and specifically instructed the parties to brief and argue "[w]hether appellants lack standing because none reside in or represent the only congressional district whose constitutionality is at issue in this case." Mot. to Suspend, Ex. A. The distinction between the Supreme Court noting "probable" jurisdiction and "postponing" jurisdiction is significant. It means that the Supreme Court doubts whether Intervenors even have standing on appeal. Stephen M. Shapiro et al., Supreme Court Practice 369 (10th ed. 2013) ("If the Court itself has any doubts as to its jurisdiction over the appeal . . . its order will provide that further consideration of question of jurisdiction is postponed to the hearing of the case on the merits.") (internal quotation marks omitted). Thus, not only have Intervenors failed to establish any "reasonable probability" that the Supreme Court will *reverse* on the merits, it is unclear whether the Supreme Court will even *reach* the merits.

Nor is there, as Intervenors suggest, some kind of "per se" rule that redistricting cases are subject to an automatic stay pending appeal to the United States Supreme Court. *See, e.g.*, *Travia v. Lomenzo*, 381 U.S. 431, 431 (1965) (denying motion to stay district court order requiring New York to use court-approved remedial redistricting plan). To the contrary, district courts routinely deny motions to stay implementation of court-adopted remedial redistricting plans. *Compare Larios v. Cox*, 305 F. Supp. 2d 1335 (N.D. Ga. 2004) (order of three-judge panel denying motion to stay during pendency of Supreme Court review and ordering implementation of remedial plan for 2004 elections) *with* Mot. to Suspend at 2 ("[S]o far as we can discern, no three-judge court has ever entered a remedy during the pendency of [Supreme Court] review" of a redistricting case). *Larios* is highly instructive. There, as here, a defendant argued that stays are granted as a matter of course in redistricting cases where a court has struck down an apportionment plan. The *Larios* court rejected that claim, holding that "stays are not commonly granted in redistricting, or any other type of litigation" and noting a dearth of "authority to suggest that this type of relief is any less extraordinary or the burden any less exacting in the redistricting context." 305 F. Supp. 2d at 1336 (collecting cases wherein district courts denied stays in redistricting cases).[3]

None of the cases Intervenors cite establish any rule relaxing standards for granting the "extraordinary relief" of a stay in the redistricting context. The mere fact that the Supreme Court has on other occasions, in other states, on other factual records, stayed implementation of remedial redistricting plans is of no moment here.[4] Intervenors do not

[3] *See also Giles v. Ashcroft*, 193 F. Supp. 2d 258, 261 (D.D.C. 2002) (noting, with respect to related litigation, that a party had "sought to stay the federal court'ss ruling [ordering adoption of a redistricting plan] until the United States Supreme Court could hear an appeal, but that request was denied on March 1, 2002, and the appeal remains pending before the Supreme Court at this time"); *Johnson v. Mortham*, 926 F. Supp. 1540, 1542 (N.D. Fla. 1996) (three-judge court) (denying a stay pending appeal of an order striking down Florida's Third Congressional District).

[4] *See White v. Weiser*, 412 U.S. 783, 788-89 (1973) (noting, without explanation, that Court had stayed an order issued on January 22, on January 27, regarding upcoming 1972 elections); *Whitcomb v. Chavis*, 396 U.S. 1064 (1970) (same, as to December 15, 1969, order, stayed by Supreme Court on February 2, 1970); *Kirkpatrick v. Preisler*, 390 U.S. 939 (1968) (same, as to an order issued on December 29, 1967, on March 4, 1968, regarding upcoming 1968 elections).

present a single case where a court has granted a stay on remotely comparable facts; i.e., where an intervenor (whose standing to pursue an appeal is questionable) asks the court to stay implementation of a remedy for a racial gerrymander for four years while the intervenor pursues multiple appeals *over* the objections of the defendants themselves.

2. Intervenors Will Not Suffer Any Injury—Let Alone Irreparable Injury—in the Absence of a Stay

Even if Intervenors could establish any likelihood of success on the merits, which they cannot, a stay is inappropriate because Intervenors will not suffer any injury in the absence of a stay. Indeed, the Court should deny Intervenors' motion at the outset because Intervenors seek a stay during the pendency of an appeal that they lack standing to pursue.

The Court's injunction is directed entirely at the Commonwealth. None of the Appellants have special legal authority for redistricting or the conduct of Virginian elections—those jobs belong to the General Assembly (which did not intervene in this litigation and whose motion to delay implementation of a remedy the Court has already denied) and the Board of Elections (which moved the Supreme Court to affirm the decision of this Court). Accordingly, much of Intervenors' argument as to "injury" does not address their own injury, but rather, offers speculative musings about potential administrative burdens on the Commonwealth—which opposes Intervenors' pending appeal—and potential voter confusion if (a) the Court orders implementation of a remedial plan and (b) the Supreme Court eventually reverses. But Intervenors' arguments about the potential "injury" *others* will suffer if a stay is granted do not establish that *they* will suffer injury. Moreover, as discussed in the next section, any administrative inconvenience the Commonwealth *may* face pales in comparison to the harm Plaintiffs and the public *will* suffer if the 2016 election goes forward under an unconstitutional plan.

Intervenors' attempt to stand in the shoes of the Commonwealth for purposes of arguing irreparable injury makes sense, as their attempts to articulate the injury *they* would suffer are strained at best. In fact, it is clear that most Intervenors face no threat of injury

even by Intervenors' own analysis, and any injury to the others rests entirely on unsupported conjecture and theories of injury no court has ever accepted. Indeed, Intervenors do not even have independent Article III standing, for the reasons Plaintiffs have set out more fully in their briefing to the Supreme Court. *See Wittman v. Personhubbalah*, No. 14-1504, Supplemental Brief for Appellees on Standing (S. Ct. Oct. 13, 2015); Appellees Reply Brief on Standing (S. Ct. Oct. 20, 2015).[5] It would be strange indeed if Intervenors could obtain a stay in the pursuit of an appeal they lack standing to pursue.

Intervenors will suffer no injury in the absence of a stay (and thus have no standing to pursue their pending appeal) because the Court's injunction does not order Intervenors to do—or refrain from doing—anything. *Hollingsworth*, 133 S. Ct. at 2662-64 (a court order did not cause a party any "direct injury," if it "ha[s] not ordered [Appellants] to do or refrain from doing anything."). Moreover, long-standing precedent establishes that, in a racial gerrymandering case, standing requires a "district specific" and "personal" injury—meaning that voters do not have standing unless they reside in the district being challenged. *Alabama*, 135 S. Ct. at 1265; *see also United States v. Hays*, 515 U.S. 737, 739 (1995) (voters who "do not live in the district that is the primary focus" in a racial gerrymandering case lack standing). None of the Intervenors reside in or represent CD 3. There is no defensible basis for a rule that provides that, while voters challenging a racial gerrymander must live in the district being challenged, voters or office holders defending a racial gerrymander may live anywhere in the Commonwealth. *See Johnson*, 915 F. Supp. at 1537-38 (holding that, of three congressional representatives who sought to intervene in a racial gerrymandering lawsuit, only the representative of the district challenged by the lawsuit had standing to do so, even if a remedial plan might necessitate redrawing the other representatives' districts).

Former congressmen Eric Cantor and Frank Wolf plainly will suffer no injury in the absence of a stay—they do not reside in CD 3 and do not represent any district in the

[5] Whether Intervenors had Article III standing in this Court was immaterial, given that Defendants plainly do. *Hollingsworth*, 133 S. Ct. at 2662.

Commonwealth. Moreover, if the Court adopts either of the remedial plans proposed by the Special Master, there will be no changes to the boundaries of CD 5 (Robert Hurt), CD 6 (Bob Goodlatte), CD 9 (Morgan Griffith), or CD 10 (Barbara Comstock). These Intervenors, too, do not face even a theoretical risk of injury.

Nor can the current representatives of CD 1 (Robert Wittman), CD 2 (Scott Rigell), CD 4 (Randy Forbes), and CD 7 (David Brat), which would be altered slightly under the Special Master's proposal, show they will suffer an injury in the absence of a stay. They scarcely try. Intervenors posit three "injuries," with no citation to any authority suggesting that these are legally cognizable injuries.

First, Intervenors complain that they "may find themselves seeking to qualify or to stand for primary elections in new or substantially altered districts—and any time and expense devoted to such efforts will be irretrievably lost if the Supreme Court invalidates the remedial plan." Mot. to Suspend at 16. Intervenors do not attempt to explain this statement. Intervenors will incur the same expense and need to undertake the same steps under the Commonwealth's election process if they stand for reelection regardless of the contours of the districts—and the Court will almost certainly adopt a remedial plan in which incumbents will run in the same numbered districts in the same general areas as under the current plan. Any nominal expense to Intervenors in securing, if necessary, a handful of additional voter signatures, *id.* at 4, is simply not a colorable injury that warrants the extraordinary relief of a stay and certainly is outweighed by the threat of the continuing constitutional injury suffered by Plaintiffs and, indeed, by all of the citizens of the Commonwealth.[6]

Second, Intervenors contend that "any victory by an Intervenor-Defendant in a primary election held under the remedial plan would be lost if the Supreme Court

[6] To qualify for the ballot, a congressional candidate must obtain 1,000 voter signatures in support of his or petition to appear on the ballot. Va. Code Ann. § 24.2-521. In the highly unlikely scenario that an incumbent representative will struggle to muster that many signatures, the obvious solution would be to secure the signatures of the requisite number of voters who reside in areas that are encompassed within the intervenor's district under both the enacted plan and the remedial plan the Court ultimately adopts.

subsequently reversed the liability judgment." *Id.* Again, Intervenors do not explain this claim, which appears to rest on the supposition that (1) they will prevail in the next election, held under a remedial plan; (2) the Supreme Court will reverse; (3) the Supreme Court (or this Court) will thereafter order a special election held in advance of 2018; and (4) they will lose in that special election, which would presumably be run under the enacted plan. Intervenors provide the Court with no authority suggesting that this speculative chain of potential events (culminating somehow in a *loss* for Intervenors under the very enacted plan they fight so hard to defend) constitutes irreparable injury.

Third and finally, Intervenors posit that "any loss in a primary election under the remedial plan could result in a loss of a congressional seat." Again, this argument rests on speculation—that Intervenors (1) will choose to run for reelection; (2) will lose their reelection bid; (3) and will be able to prove that their defeat was causally linked to the remedial plan the Court ultimately adopts rather than the host of reasons for which politicians lose elections (a primary challenge, such as that which felled Intervenor Cantor, a disgruntled electorate, fundraising issues, unpopular positions, etc.). But the more fundamental problem with Appellants' argument is that it would effectively confer upon members of Congress, former members of Congress, and voters in general a legally cognizable interest in maintaining the precise partisan composition of the voters in the districts that they represent or live in. That is, Intervenors' claimed "injury" flowing from the implementation of the remedial plan is that one or more Intervenors may end up with too many of the "wrong" kind of voters in their district—i.e., those less likely to vote for the Intervenors. Not surprisingly, Appellants fail to cite any cases suggesting that a politician's fear that voters of a certain presumed political bent may be moved into his or her district is a legally cognizable injury entitling him or her to a stay pending appeal.

No incumbent is entitled to remain in an office to which he or she was elected under an invalid election plan.[7] The status quo pending appeal is that CD 3 is an unconstitutional racial gerrymander. Requiring incumbents to stand for election in racially fair elections can hardly constitute a cognizable injury.

3. Granting a Stay Will Cause Irreparable Injury to Plaintiffs and Is Contrary to the Public Interest

Whereas Intervenors will not suffer any injury at all in the absence of a stay, there is no doubt that granting stay would cause irreparable injury to Plaintiffs and the public. As the Court has recognized, "individuals in the Third Congressional District whose constitutional rights have been injured by improper racial gerrymandering have suffered significant harm" and are "'entitled to vote as soon as possible for their representatives under a constitutional apportionment plan.'" Dkt. #171 at 49 (quoting *Cosner*, 522 F. Supp. at 364).

Intervenors think otherwise, professing themselves unable to glean any injury that would occur if the Court permits the 2016 elections to go forward under a plan it has twice held is unconstitutional. *See* Mot. to Suspend at 14 ("The only conceivable prejudice is that voters and candidates would participate in elections in the Enacted District 3 that this Court has held is flawed in a non-final judgment now under the Supreme Court's plenary review."). Intervenors cite no authority in support of that bald claim, and for good reason. The right to vote is one of the most fundamental rights in our democratic system of government and is afforded special protection. *See Reynolds*, 377 U.S. at 554-55, 562; *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined."). Accordingly, any illegal impediment on the right to vote is an irreparable injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). Thus, it is simply beyond any dispute that Plaintiffs and other voters will suffer irreparable injury if they are forced to participate in a *third* election under an unconstitutional redistricting plan. *See Larios*, 305 F. Supp. 2d at

[7] *See, e.g.*, *Keller v. Gilliam*, 454 F.2d 55, 57-58 (5th Cir. 1972) (approving the shortening of terms of office as a remedy for a voting rights violation).

1344 ("If the court permits a stay, thereby allowing the 2004 elections also to proceed pursuant to unconstitutional plans, the plaintiffs and many other citizens in Georgia will have been denied their constitutional rights in two of the five elections to be conducted under the 2000 census figures. . . . Accordingly, we find that the plaintiffs will be injured if a stay is granted because they will be subject to one more election cycle under unconstitutional plans.").[8]

Intervenors invoke the taxpayer expense of engaging the special master as a reason to halt the remedial process. *See* Mot. to Suspend at 2. But even if this factor could outweigh the injury of an unconstitutional election, those costs have already been incurred. The special master has issued his Final Report proposing a remedy. Dkt. #272. Indeed, the only action left to be taken on adopting a remedial map lies with the Court, not the special master. Intervenors' fears of "massive voter confusion," Mot. to Suspend at 1, 12, are equally baseless. The status quo is—and has been for over a year—that enacted CD 3 is unconstitutional and cannot be used for any further elections. Voters would be justifiably confused to learn that they will be subject, once again, to elections under a map twice deemed unconstitutional by this Court.

At worst, the only "injury" to the public that will result from denying the stay would be running the 2016 election under the constitutional remedial map the Court ultimately adopts, and then redrawing the districts. Any administrative inconvenience to the Commonwealth—which does not support this appeal—would pale in comparison to the harm to the public in granting the stay if the Court's decision is affirmed.

[8] *See also Dye v. McKeithen*, 856 F. Supp. 303, 306 (W.D. La. 1994) (in redistricting case, holding that "potential injury of an election in which citizens are deprived of their right to vote negates any damage that may be sustained by Vernon Parish in the potential delay of elections"); *Cardona v. Oakland Unified Sch. Dist.*, 785 F. Supp. 837, 840 (N.D. Cal. 1992) ("Abridgement or dilution of a right so fundamental as the right to vote constitutes irreparable injury.").

C. Intervenors Do Not Establish "Changed Circumstances" Warranting Modification of the Injunction

Finally, even if the Court did construe the pending motion as one to "modify" the entered injunction (as Intervenors suggest it is) instead of what it is—a motion to stay pending appeal—Intervenors cannot meet their burden and the motion should be rejected.[9]

This Court has previously recognized, and it is of course undisputed, that "[c]ourts have the power 'to modify an injunction in adaptation to changed circumstances.'" Dkt. #137 at 2 (quoting *United States v. Swift & Co.*, 28 6 U.S. 106, 114 (1932)). That is, a court may grant a request to modify an injunction it has issued "where warranted by a change in the law or the circumstances." *United States v. Snepp*, 897 F.2d 138, 141 (4th Cir. 1990) (citing *Swift*, 286 U.S. 106). But "[a] court is, nevertheless, 'not at liberty to reverse under the guise of readjusting.'" *Id.* (quoting *Swift*, 286 U.S. at 119). Thus, a party who does not cite to "a change in the law or the circumstances which existed at the time" the injunction was entered cannot meet its burden of showing an injunction should be altered. *Id.*

In *RoadTechs, Inc. v. MJ Highway Tech., Ltd.*, 83 F. Supp. 2d 677 (E.D. Va. 2000), this Court quoted with favor an opinion of the Eighth Circuit putting these standards into plain language terms:

> "Placed in other words, this means for us that modification is only cautiously to be granted; that some change is not enough; that the dangers which the decree was meant to foreclose must almost have disappeared; that hardship and oppression, extreme and unexpected, are significant; and that the movants' task is to provide close to an unanswerable case."

Id. at 687 (quoting *Humble Oil & Refining Co. v. American Oil Co.*, 405 F.2d 803, 813 (8th Cir. 1969)).

These standards are not met here. The only thing that has changed since the last time the Court rejected a request that it defer implementation of a remedial plan is that the Supreme Court has requested further briefing and argument on whether Intervenors have

[9] In rejecting the General Assembly's earlier motion, Dkt. #193, which was also advanced as a motion to modify the Court's injunction, the Court effectively applied the standards governing motions for a stay pending appeal. *See* Dkt. #201.

standing on appeal and regarding the merits of Intervenors' appeal. As explained above, the mere fact that the Supreme Court will consider Intervenors' appeal further does not demonstrate Intervenors are likely to prevail on their appeal, and certainly does not constitute changed circumstances warranting "modification" of the Court's injunction. To the contrary, Intervenors' appeal was pending the last time the Court rejected an effort to stay the remedial proceedings, and as Plaintiffs called out in their opposition to the General Assembly's earlier motion, it was obvious that Intervenors would move for a stay if the Supreme Court set their appeal for hearing. *See* Dkt. #197 at 7.

The Court should not "modify" its injunction by indefinitely delaying its implementation because circumstances have not changed since the Court entered that injunction—including Intervenors' unwavering efforts to "run out the clock" on judicial proceedings in the hopes that they will secure the benefits of having the 2016 elections held under the patently unconstitutional enacted plan.

IV. CONCLUSION

For the reasons stated above, the Court should deny Intervenors' motion and complete the remedial process so that the Commonwealth's voters can, at long last, have the opportunity to vote under a constitutional congressional map.

Dated: November 30, 2015

Respectfully submitted,

By /s/ John K. Roche
John K. Roche (VSB# 68594)
Marc Erik Elias (admitted *pro hac vice*)
John Devaney (admitted *pro hac vice*)
Perkins Coie LLP
700 13th St. N.W., Suite 600
Washington, D.C. 20005-3960
Phone: (202) 434-1627
Fax: (202) 654-9106
Email: JRoche@perkinscoie.com
Email: MElias@perkinscoie.com
Email: JDevaney@perkinscoie.com

Kevin J. Hamilton (admitted *pro hac vice*)
Perkins Coie LLP
1201 Third Avenue, Ste. 4900
Seattle, WA 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000
Email: KHamilton@perkinscoie.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of November, 2015, I filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to the counsel of record in this case.

Respectfully submitted,

By /s/ John K. Roche
John K. Roche (VSB# 68594)
Perkins Coie LLP
700 13th St. N.W., Suite 600
Washington, D.C. 20005-3960
Phone: (202) 434-1627
Fax: (202) 654-9106
Email: JRoche@perkinscoie.com

Attorneys for Plaintiffs