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

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

REPLY IN SUPPORT OF INTERVENOR-DEFENDANTS' MOTION TO SUSPEND FURTHER PROCEEDINGS AND TO MODIFY INJUNCTION PENDING SUPREME COURT REVIEW

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The oppositions filed by Plaintiffs (DE 283) and Defendants (DE 284) resoundingly confirm that the Court should decline to enter a remedial plan and should modify its injunction pending Supreme Court review of the Court's liability decision. Even now, Plaintiffs and Defendants fail to identify *any* case in which a three-judge court entered a remedy "where, as here, the Supreme Court is actively considering liability." Mem. 15 (DE 271). In fact, Plaintiffs and Defendants offer no basis for this Court to become the first federal court in history to enter a remedial redistricting plan while the Supreme Court's plenary review of liability remains pending. Quite to the contrary: Plaintiffs and Defendants do not dispute *any* of the premises that, as Intervenor-Defendants have shown, foreclose entering a remedial plan and warrant modification of the injunction, even if this Court had jurisdiction to adopt a plan now.[1]

In particular, Plaintiffs and Defendants do not dispute that a reversal of this Court's liability judgment by the Supreme Court would invalidate any judicial remedial plan and "return" the Commonwealth "to the Legislature's 2012 districting lines in the Enacted Plan." Mem. 1. It is also undisputed that any reversal by the Supreme Court would occur in the middle of the 2016 election cycle and "throw[] Virginia's electoral apparatus into chaos, requir[e] wasteful administrative efforts, and needless[ly] creat[e] voter confusion" by requiring a redo of signature collection, candidate qualification, and perhaps even primary elections. *Id.* 10.

This risk of electoral havoc is particularly acute if the Court adopts either of the special master's proposed remedies. Each of those proposals ***moves more than one million people*** out of their current Enacted Districts and into new districts. A reversal by the Supreme Court,

[1] As explained below, the Court lacks jurisdiction to enter a remedial plan because the filing of a notice of direct appeal "clearly divest[s]" a three-judge court of jurisdiction, *Donovan v. Richland County Ass'n*, 454 U.S. 389, 390 n.2 (1982), and transfers "*the entire case*" to the Supreme Court, *United States v. Locke*, 471 U.S. 84, 92 (1985) (emphasis added); *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988).

however, would automatically return *all* of those people to the Enacted Districts. Moreover, one of the avowed "highest priorit[ies]" of the special master's proposals is to transform District 4 into a "minority opportunity" (and overwhelmingly Democratic) district. Final Report 4, 8-11, 20, 29, 65 (DE 272) ("Rep."). Thus, entering either of the special master's proposals now would invite a black candidate of choice to mount a historic campaign to become Virginia's second black congressional representative, only to have that effort dashed mid-stream by any reversal by the Supreme Court that restores more than one million people to their current Enacted Districts. Such a scenario would understandably engender voter confusion and mistrust, and undermine public confidence in the election. "[T]he interest[s] of all," including "the interest of the public, the interest of judicial efficiency, and the interest in the orderly administration of justice," "make it appropriate that the Court" decline to adopt a remedial plan now and to modify the injunction. 2/23/15 Mem. Op. 5; *see* Mem. 1-18.

It is clear that there is *some* risk of a Supreme Court reversal because, by ordering full briefing and oral argument on the merits, the Supreme Court has concluded that the Court's liability judgment raises "substantial questions" warranting the Supreme Court's "plenary review." *Sanks v. Georgia*, 401 U.S. 144, 145 (1971). Yet Plaintiffs and Defendants offer no reason why the Court should deliberately create the chaos that will indisputably ensue if that risk does eventuate. Instead, Plaintiffs and Defendants attempt to change the subject by citing inapposite case law and peddling revisionist history. Plaintiffs and Defendants point to cases in which federal courts declined "to stay implementation of court-adopted remedial redistricting plans" pending appeal to the Supreme Court, Pl. Opp. 10; Def. Opp. 2, but *none* of those cases involved a three-judge court *entering* a remedy while the Supreme Court was "actively considering liability," Mem. 15. In all but two of those cases, liability either had already been

finally determined by a *prior* appeal to the Supreme Court or was not contested; in another, the Supreme Court summarily affirmed liability without ever exercising plenary review; and in the final case, there never even was an appeal to the Supreme Court.

In fact, even Defendants recognize that in the one procedurally analogous case they cite, the Supreme Court "granted a stay pending appeal" of liability, even though that stay meant that elections were held under an enacted plan that a three-judge court had invalidated. Def. Mem. 3 n.10 (discussing *Karcher v. Daggett*, 455 U.S. 1303 (1982)). The Supreme Court entered that stay because "[w]ith respect to the balance of equities, this Court has repeatedly emphasized that legislative apportionment plans created by the legislature are to be preferred to judicially constructed plans" when liability remains unsettled. *Karcher*, 455 U.S. at 1306-07 (Brennan, J).

Plaintiffs contend that the Court nonetheless should take the unprecedented action of entering a remedial plan now because they "have already been subjected to two elections" under the Enacted Plan. Pl. Opp. 1. But the Court already has held that *Plaintiffs* are responsible for that fact. Indeed, Plaintiffs did not even file this lawsuit until October 2013—some 21 months after the Legislature adopted the Enacted Plan and *eleven months after the 2012 election*. *See* Compl. (DE 1). The Court decided not to enter a remedy for the 2014 election because Plaintiffs were "largely responsible for the proximity of our decision to the November 2014 elections." 10/7/14 Mem. Op. 46 (DE 109). And any further delay reflects the Supreme Court's vacatur and remand of the Court's first liability decision in light of its *Alabama* decision. Thus, the *only* question here is whether the Court should become the first federal court in history to depart from the preference for "legislative apportionment plans created by the legislature" over "judicially constructed plans," *Karcher*, 455 U.S. at 1306-07 (Brennan. J.), and enter a remedial plan while the Supreme Court is conducting plenary review of liability, where any reversal by the Supreme

Court would come in the middle of the imminent election cycle and create electoral chaos for as many as one million Virginians, candidates in five districts, and a black candidate of choice mounting a historic campaign in a remedial District 4. The Court should grant the Motion.

ARGUMENT

I. THE COURT LACKS JURISDICTION TO ENTER A REMEDIAL PLAN

A notice of direct appeal to the Supreme Court "clearly divest[s]" a three-judge court of jurisdiction to expand any prior injunction or to enter any new remedies. *Donovan v. Richland County Ass'n*, 454 U.S. 389, 390 n.2 (1982). Indeed, such a filing "brings before th[e] [Supreme] Court not merely the constitutional question decided below, *but the entire case*." *United States v. Locke*, 471 U.S. 84, 92 (1985) (emphasis added); *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988); Supreme Court Practice § 7.III.5 (10th ed.) ("[A]n appeal brings the entire case before the [Supreme] Court."). Therefore, the notice of appeal transferred "the entire case" away from this Court and to the Supreme Court, and this Court may not enter the additional remedy of a remedial plan now. *Locke*, 471 U.S. at 92; *Wells Fargo*, 485 U.S. at 354. No case has departed from this rule because, as shown below in Part II, no three-judge court has entered a remedial districting plan after the Supreme Court has granted plenary review.

Neither Plaintiffs nor Defendants cite any cases involving a direct appeal to the Supreme Court, *see* Pl. Opp. 5-6; Def. Opp. 6-7—but even their cases involving appeals to federal courts of appeals vividly illustrate that the Court may not enter a remedial plan and should modify its injunction to permit Virginia to conduct the 2016 elections under the Enacted Plan. Plaintiffs' and Defendants' cases hold that while a district court may "enforce" an injunction on appeal such as through contempt or ongoing supervision, it may not "enlarge the scope" of the injunction or grant additional remedies. *NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987) (collecting cases) (cited at Def. Opp. 7 nn.34-35 & Pl. Opp. 5); *Roberts v. Colorado*

State Bd. of Agric., 998 F.2d 824, 827 (10th Cir. 1993) (cited at Pl. Opp. 5). This prohibition applies even if the additional remedies were contemplated by, or relate to, the original injunction. Thus, for example, after a notice of appeal had been filed as to an order holding the appellants in civil contempt and setting a sanction of $500 per day for noncompliance, the district court lacked jurisdiction to rule on a motion to determine the total period of contempt and order execution of the amount due, even though such a follow-on order was contemplated by the original contempt order. *See Shuffler v. Heritage Bank*, 720 F.2d 1141, 1145 & n.1 (9th Cir. 1983).

The Fifth Circuit's decision in *Zimmer v. McKeithen*, 467 F.2d 1381 (5th Cir. 1973), *rev'd on other grounds on rehearing en banc*, 485 F.2d 1297 (1973), is also instructive. That case presented a constitutional challenge to a redistricting plan for county commission and school board elections. *See id.* at 1382. After finding a constitutional violation, the district court entered a remedy requiring at-large elections. *See id.* After the defendant filed a notice of appeal, the district court adopted a different remedial plan at the plaintiffs' request. *See id.*

The Fifth Circuit vacated—and refused even to consider—the second remedial order. *See id.* The court explained that "once an appeal is taken, jurisdiction passes to the appellate court," so the district court "was without jurisdiction to enter" its second order. *Id.* The en banc Fifth Circuit reversed the panel on the merits of the first order, 485 F.2d 1297 (5th Cir. 1973), and was affirmed by the Supreme Court, which also examined only the district court's first order and noted without criticism the panel's refusal to consider the second order, *see East Carroll Parrish School Bd. v. Marshall*, 424 U.S. 636, 638 n.4 (1976). Significantly, the second order might have resolved the questions presented by the first order, but neither the en banc court nor the Supreme Court considered it. *See id.*; *Lewis v. Tobacco Workers' Int'l Union*, 577 F.2d 1135, 1139 (4th Cir. 1978) (recounting procedural history of *East Carroll*).

Here, any order implementing a remedial plan would impose additional remedies and greatly "enlarge" the Court's prior injunction, not merely "enforce" it. *Cincinnati Bronze*, 829 F.2d at 588; *see also Zimmer*, 467 F.2d at 1382. The Court's existing injunction only prohibits Virginia from "conducting any elections" until a new plan is adopted, but does not specify a plan that Virginia is *required* to use for those elections. 6/5/16 Order 1 (DE 171). Therefore, any order imposing a remedial plan would "expand[] significantly the scope" of the Court's injunction and may not be entered now. *City of Cookeville v. Upper Cumberland Elec. Mem. Corp.*, 484 F.3d 380, 394 (6th Cir. 2007). Moreover, to approve a remedial plan, the Court would be required to decide "legal issues" and factual questions "that it had not decided previously," *id.*, such as the issues of alleged "packing" in District 3 and "fragmentation" in District 4 the special master unilaterally raised, Rep. 65, and whether the remedial plan addresses the scope and "nature of the violation" the Court found, *Milliken v. Bradley*, 418 U.S. 717, 738 (1974) (*Milliken I*); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

Plaintiffs' and Defendants' case law thus make clear that the Court faces only one viable option. If the Court "enforced" its injunction prohibiting use of the Enacted Plan in 2016, *Cincinnati Bronze*, 829 F.2d at 588, Virginia could not conduct elections in 2016 because it would have *no redistricting plan in place*. Thus, no one suggests that the Court should *enforce* its injunction; all agree that the injunction would need to be replaced with a new injunction prescribing new districts. But since the Court does not have jurisdiction to order a new plan (and would risk electoral chaos if it entered one), the only viable option is to *decline* to "enforce" its injunction, *id.*, for the 2016 elections so Virginia would have a plan in place for those elections.

Plaintiffs and Defendants offer three arguments in an attempt to avoid this outcome, all of which fail. *First*, Defendants seek to artificially limit *Donovan*, and suggest that it prevents the

Court only from reconsidering the "merits," but not entering "remedial measures," during the appeal. Def. Opp. 7. But the reason that the Supreme Court in *Donovan* pointed out that the notice of appeal divested the lower court of jurisdiction "to decide the merits" is that *only* the merits were at issue in that case. *Donovan*, 454 U.S. at 390 n.2. *Donovan* therefore is completely consistent with the Supreme Court's instruction that the filing of a notice of appeal brings "the entire case" before it. *Locke*, 471 U.S. at 92; *Wells Fargo Bank*, 485 U.S. at 354.

Second, Plaintiffs warn that the Court should "enforce" its prior "permanent injunction" by entering a remedial plan because otherwise "a party could refuse to comply with a district court's injunction through the simple expedient of filing a notice of appeal." Pl. Opp. 5. This overblown argument only exposes the fatal flaw in Plaintiffs' position: a court can always "enforce" its injunction against non-compliant parties without entering a *second* injunction. *Id.* That is especially true here: as explained, any injunction decreeing a remedial plan would create *different* obligations than the existing injunction, so there is no danger that any party will "refuse to comply" with the Court's *existing* injunction if it does not enter a *new* remedial plan. *Id.*

Finally, Plaintiffs suggest that Rule 62(c) confers jurisdiction to enter a remedial plan, *id.* at 6, but precisely the *opposite* is true. Rule 62(c) authorizes district courts to enter an "injunction pending appeal" only "on terms for bond or other terms that secure the opposing party's rights" pending the appeal. Fed. R. Civ. P. 62(c); *see Lewis*, 577 F.2d at 1139. It therefore does not give the Court carte blanche to enter a remedial plan while "the entire case" is pending before the Supreme Court. *Locke*, 471 U.S. at 92; *Wells Fargo Bank*, 485 U.S. at 354.

II. THE COURT SHOULD MODIFY ITS INJUNCTION PENDING SUPREME COURT REVIEW OF LIABILITY

Even if the Court had jurisdiction to enter a remedial plan, it still should decline to do so. This Court previously exercised its inherent authority "to modify the injunction" during

Intervenor-Defendants' first appeal. 2/23/15 Mem. Op. 5; *see also* Mem. 7-9. That decision comported with the myriad cases from the Supreme Court and other federal courts that have stayed an injunction prohibiting use of a legislatively enacted plan pending the Supreme Court's plenary review of liability. *See, e.g.*, *White v. Weiser*, 412 U.S. 783, 789 (1973); *Kirkpatrick v. Preisler*, 390 U.S. 939 (1968) (Mem.); *Whitcomb v. Chavis*, 396 U.S. 1064 (1970) (Mem.). Indeed, even now, no party has identified any case in which a three-judge court entered a remedial plan "where, as here, the Supreme Court is actively considering liability." Mem. 15.

This Court should not take this opportunity to become the first federal court to do so. Plaintiffs and Defendants do not dispute that the Supreme Court has concluded that the liability judgment raises "substantial questions" warranting "plenary review," *Sanks*, 401 U.S. at 145, or that any reversal by the Supreme Court would occur right in the middle of the 2016 election cycle, *see* Mem. 10-14. And Plaintiffs and Defendants do not seriously dispute that "entering a remedy *before* liability is established runs the serious risk of throwing Virginia's electoral apparatus into chaos, requiring wasteful administrative efforts, and needlessly creating voter confusion." *Id.* 10. Nor could they: Plaintiffs and Defendants have repeatedly advised the Court that it is "necessary" for any judicial remedy to be in place by January 1, 2016, in order to be smoothly implemented for the 2016 elections. *See* 9/2/15 Tr.; Def. Reply Br. Re. *Alabama* 10-11 (DE 153). Consequently, all agree that if a new remedial plan is rendered inoperative by a Supreme Court reversal many months after January 1, elections cannot be effectively conducted.

This risk of electoral chaos becomes especially staggering if the Court adopts either of the special master's proposed plans. The special master's Current Congressional Plan Modification 16 moves ***853,675*** voting-age people and ***1,111,088*** total people out of their current Enacted Districts and into new districts. *See* Current Congressional Plan Modification 16 Core

Constituency Rep. The special master's NAACP Plan Modification 6 is even more disruptive: it moves ***1,031,320*** voting-age people and ***1,332,440*** total people out of their current Enacted Districts and into new districts. *See* NAACP Plan Modification 6 Core Constituency Rep. ***Every one of these more than one million people*** would automatically be moved back into their Enacted Districts in the middle of the election cycle if the Supreme Court reverses the Court's liability decision. *See* Mem. 10-14. Needless to say, chaos would reign from such a massive dislocation and mid-calendar relocation of voters: administrative expense and burden would be wasted; candidate qualifications and even primary elections could be undone; and voters could become confused by a restarting of the election cycle, double shifting between districts, and a changing slate of candidates vying for election in their changing districts. *See id.* 11-14.

Moreover, the special master's proposals advance his "highest priority" of race by transforming District 4—currently a majority-Republican district represented by Intervenor-Defendant Forbes—into a "minority opportunity" (and overwhelmingly Democratic) district. Rep. 4, 8-11, 20, 29. Thus, entering either proposal would invite a black candidate of choice to mount a historic campaign to become Virginia's second black congressional representative, only to have that effort dashed mid-stream by any reversal by the Supreme Court that restores more than one million people to the Enacted Districts. Such a scenario would understandably engender voter confusion and mistrust, and "cast[] a cloud upon . . . the legitimacy of [the] election." *Bush v. Gore*, 531 U.S. 1046, 1047 (2000) (Scalia, J., concurring).

Plaintiffs suggest in passing—and without explanation or a single citation to authority—that even if the Supreme Court reverses the Court's liability judgment mid-calendar, the 2016 election could somehow be "run[] . . . under the . . . remedial map the Court ultimately adopts, and then redrawing the districts" *after* the election. Pl. Opp. 16. The reason Plaintiffs do not

provide any support for this incredible suggestion is that no statement could be more legally indefensible. It is a bedrock limitation that federal courts may not "remedy" government action that "does not violate the Constitution" or law. *Milliken v. Bradley*, 433 U.S. 267, 282 (1977) (*Milliken II*). Thus, if the Supreme Court reverses liability and finds that *no* violation exists, there is no basis for a judicial remedial plan, and any such plan is automatically nullified and cannot be used for the 2016 elections. *See id.*

Although Plaintiffs and Defendants cannot deny that a Supreme Court liability reversal would create electoral chaos in the middle of the 2016 election cycle, they nonetheless contend that other courts have taken such reckless action in analogous circumstances. That is plainly untrue. Plaintiffs and Defendants cite cases where federal courts "den[ied] motions to stay implementation of court-adopted remedial redistricting plans" during a direct appeal to the Supreme Court. Pl. Opp. 10; Def. Opp. 2. But *none* of these decisions involved a three-judge court *entering* any remedy when, as now, "the Supreme Court [was] actively considering liability" on plenary review. Mem. 15. In fact, in all but two of those decisions, liability either already had been finally established by a *prior* appeal to the Supreme Court or was not contested. Thus, these cases present the inapposite question of whether a court should stay a remedy for a proven violation pending a successive appeal of the *remedy*. *See, e.g.*, *Abrams v. Johnson*, 521 U.S. 74, 77 (1997) (liability established in *Miller v. Johnson*, 515 U.S. 900 (1995)) (cited at Def. Opp. 3); *Travia v. Lomenzo*, 381 U.S. 431, 432 (1965) (liability established in *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964)) (cited at Pl. Opp. 10); *Branch v. Smith*, 538 U.S. 254, 258 (2003) (impasse case where equal-population violation not contested) (referred to in *Giles v. Ashcroft*, 193 F. Supp. 2d 258, 261 (D.D.C. 2002) (cited at Pl. Opp. 10 n.3)); *Daggett v. Kimmelman*, 580 F. Supp. 1259, 1260 (D.N.J. 1984) (liability established in *Karcher v. Daggett*, 462 U.S. 725

(1983)) (cited at Def. Opp. 3).[2]

In one of the other cases, there never even was a direct appeal to the Supreme Court. *Johnson v. Mortham*, 926 F. Supp. 1540, 1542 (N.D. Fla. 1996) (cited at Pl. Opp. 10 n.3 and Def. Opp. 4-5). And in Plaintiffs' remaining case, the Supreme Court summarily affirmed the liability judgment without ever conducting plenary review. *Larios v. Cox*, 305 F. Supp. 2d 1335 (N.D. Ga. 2004), *summ. aff'd*, 542 U.S. 947 (2004) (cited at Pl. Opp. 10, 15-16).

In fact, as Defendants all but concede, the one procedurally analogous case they identify actually *demonstrates* that the Court should withhold any remedial plan. Defendants *admit* that the Supreme Court "granted a stay pending appeal" of the *liability* judgment in *Daggett*, even though that stay meant that elections were held under a plan that a three-judge court had invalidated. Def. Opp. 3 n.10; *see Karcher*, 455 U.S. at 1307. The Supreme Court took this action even though it later *affirmed* the liability judgment, *see* 462 U.S. 725, and thereafter denied a stay pending successive appeal of the *remedy*, *see* 466 U.S. 910. This stay pending plenary review of liability was proper because "[w]ith respect to the balance of equities, this Court has repeatedly emphasized that legislative apportionment plans created by the legislature are to be preferred to judicially constructed plans" when liability based upon the enacted plan remains unsettled. *Karcher*, 455 U.S. at 1306-07 (Brennan, J).

Plaintiffs nonetheless argue that the Court should take the unprecedented action of entering a remedial plan now because they "have already been subjected to two elections" under

[2] Moreover, the Supreme Court never found "substantial questions" but instead summarily affirmed the judicial remedies in two of these appeals, *see, e.g.*, *Travia*, 381 U.S. 431, *summ. aff'd*, *WMCA, Inc. v. Lomenzo*, 382 U.S. 4 (1965); *Daggett*, 580 F. Supp. at 1260, *summ. aff'd*, 467 U.S. 1222 (1984), and did not complete its review of the two other remedial appeals until *after* the election, *see Abrams*, 521 U.S. at 74; *Branch*, 538 U.S. at 258. Thus, these cases have no application here, where the Supreme Court has found substantial questions on liability and its review will be completed mid-cycle.

the Enacted Plan. Pl. Opp. 1. But, because of Plaintiffs' inexcusable delay, this is the *first* election where a timely remedy is even possible. Plaintiffs did not even file this lawsuit until October 2013—some 21 months after the Legislature adopted the Enacted Plan and *eleven months after the 2012 election*. *See* Compl. (DE 1). This belated filing of Plaintiffs' lawsuit made them "largely responsible for the proximity of [the Court's] decision to the November 2014 elections" and the Court's inability to enter a remedy in 2014. 10/7/14 Mem. Op. 46.

Any further "delay" of which Plaintiffs complain stems from the Supreme Court's holding of the first appeal and vacatur and remand of the Court's first liability decision. Plaintiffs nowhere suggest that Intervenor-Defendants have not been diligent in pursuing appellate review. Nor could they: Intervenor-Defendants filed their first jurisdictional statement 96 days before the deadline and their second jurisdictional statement 103 days before the deadline. Thus, Intervenor-Defendants *accelerated* their two appeals by a total of 199 days over the past 14 months. For their part, Plaintiffs did not file any of their briefs in the Supreme Court before the deadline, so they can hardly complain if the Supreme Court's plenary review of liability takes longer than they prefer. The Court should decline to enter a remedial plan and modify its injunction to allow the 2016 elections to be conducted under the Enacted Plan.

III. IN THE ALTERNATIVE, THE COURT SHOULD ENTER A STAY

Even if the Court lacked inherent authority to modify its injunction, it still should grant the Motion because each factor weighs heavily in favor of a stay. *See* Mem. 15-17; *supra* Part II. As a threshold matter, *all* agree that the Court cannot enforce, and therefore must *stay*, its existing injunction *precluding* elections under the Enacted Plan during 2016. The only question is whether that stay of the injunction should be accompanied by an order entering a remedial plan immediately (as Plaintiffs and Defendants argue) or by one saying that the remedial proceedings will be conducted if and when the Supreme Court affirms liability (as Intervenor-Defendants

argue). As this reflects, the standards for *staying* an injunction do not govern here; the only disputed question is whether the Court should now *enter* a *new* remedial injunction for the 2016 elections. Anyway, the stay standards are amply satisfied here.

Irreparable Harm. Enormous and irreparable harm is likely to "result from denial of the stay" and entry of a new remedial redistricting plan. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). The Commonwealth, its voters, and its candidates will be seriously harmed if the Court proceeds with a judicial remedy that is invalidated by the Supreme Court mid-calendar. *See supra* Part II. Indeed, if the Court adopts either of the special master's proposals, *more than one million Virginians* will be moved into new districts for the first portion of the election cycle, only to be moved back into their current Enacted Districts mid-calendar if the Supreme Court reverses the liability finding. *See id.* And a mid-calendar reversal could negate a historic campaign to become Virginia's second black congressional representative in the special master's proposed versions of District 4. *See id.*

Plaintiffs and Defendants do not even *mention*, much less refute, this enormous risk of electoral chaos if the Supreme Court reverses liability in the middle of the election calendar. *See* Pl. Opp. 11-15; Def. Opp. 15-20. Instead, Plaintiffs and Defendants contend that Intervenor-Defendants have not shown "irreparable harm" to *themselves*, but even this myopic contention is faulty. Intervenor-Defendants *do* face irreparable harm from a remedial plan because they would find themselves seeking to qualify or standing for primary elections in substantially altered districts, particularly if the Court adopts either of the special master's proposals. Intervenor-Defendants Rob Wittman, Scott Rigell, Randy Forbes, and David Brat represent four of the five districts across which the special master proposes to move more than one million people. Thus, these Intervenor-Defendants would lose significant portions of their base electorate in exchange

for a substantial number of unfamiliar and potentially unfavorable voters. These Intervenor-Defendants would have to expend substantial time, money, and resources gathering signatures, seeking to qualify, and perhaps even participating in primary elections in overhauled districts—and all such time, money, and resources will be irretrievably lost if the Supreme Court invalidates the liability judgment and reinstates the Enacted Plan. *See* Mem. 15-17.

Moreover, because of the substantial overhaul of their districts, any of these Intervenor-Defendants might lose a primary election under the remedial plan and, therefore, a congressional seat. And even a victory in a primary election would be nullified if the Supreme Court reverses and a second primary election is required. *See id.*

As Defendants agree, Intervenor-Defendant Forbes stands to suffer the greatest harm because he "would see a material increase in Democratic voters" from 48% in Enacted District 4 to between 60.1% and 62.2% in the special master's proposals. Def. Opp. 17. It simply strains credulity for Defendants to suggest that this sea change "in Democratic performance" would not "cause his ouster." *Id.* In the first place, the special master completely redraws District 4: his proposals move 658,330 people and 696,104 people in and out of Enacted District 4, respectively, and thus place Congressman Forbes in a district where *nearly half* of the residents are new. *See* NAACP Plan Modification 6 Core Constituency Report; Current Congressional Plan Modification 16 Core Constituency Report. It is at best unclear what kind of "incumbency advantage" he would wield in such a district, if any. Def. Opp. 17.

Moreover, the *entire point* of the special master's proposed changes to District 4 is to convert it into a "minority opportunity" (and overwhelmingly Democratic) district, Rep. 29—and there is no credible argument that any Republican could prevail in such a district. Even a 60.1% Democratic district is only 39.9% Republican—a Democratic advantage of *20.2%*—and there is

no Republican serving in Congress from a district with a Democratic advantage of more than 5%. *See* The Cook Political Report, The Ten Republicans In The Least Republican Districts, *available at* http://cookpolitical.com/story/5604. Thus, that Congressman Forbes won 60% of the vote in a majority-Republican Enacted District 4 in 2014, *see* Def. Opp. 17, says precisely nothing about how he would fare in a "minority opportunity" and 60% Democratic district where nearly half of the voters are new, Rep. 29. And even if the 2014 election results could be extrapolated to a remedial District 4, Congressman Forbes *would lose*: even the minimum 12% pro-Democratic partisan swing that the special master proposes would decrease his vote share to 48.1% and increase his Democratic opponent's vote share to 49.5%. *See* Def. Opp. 17. At an absolute minimum, Congressman Forbes's reelection prospects are *greatly impaired* under the new district. This is obviously "harm" and is "reparable" only by returning to the Enacted Plan in late spring or summer, with all the attendant chaos.[3]

Balance Of Equities. As explained, the "equities" and weighing of the "relative harms" alone warrant suspending further proceedings and modifying the injunction. *Hollingsworth*, 558 U.S. at 190; *see supra* Part II. Plaintiffs' and Defendants' responses on this point are irremediably distorted by their failure even to *acknowledge* the massive risk of electoral havoc that would result from entering a remedial plan now and courting a reversal mid-cycle. *See* Pl. Opp. 11-15; Def. Opp. 15-20. Unsurprisingly, their arguments on the equities utterly fail.

At the threshold, Plaintiffs and Defendants suggest that Plaintiffs and other voters will

[3] Plaintiffs and Defendants also mischaracterize the Court's order denying the General Assembly's prior motion to stay. *See* Pl. Opp. 4; Def. Opp. 5-6. There, the Court held that the "Interested Parties failed to show that . . . *they* will suffer irreparable injury or prejudice by adhering to the Court's September 1, 2015 [deadline] for adopting a new redistricting plan," Order 1 (DE 201) (emphasis added), not, as Plaintiffs and Defendants suggest, *see* Pl. Opp. 4; Def. Opp. 5-6, that *Intervenor-Defendants* face no irreparable harm from a remedial plan entered while the Supreme Court's plenary review of liability is pending.

suffer "irreparable harm" if they vote in Enacted District 3 in 2016. Pl. Opp. 15; Def. Opp. 18. But Plaintiffs obviously did not believe that voting in Enacted District 3 harmed them in 2012 because they waited until *eleven months thereafter* to file their lawsuit. And while the Court noted in its 2014 liability opinion that a remedy should be entered "as soon as possible," 10/7/14 Mem. Op. 49 (cited at Def. Opp. 19), it concluded that no voter would be irreparably harmed by voting in Enacted District 3 in the 2014 elections, which it allowed to occur due to Plaintiffs' dilatoriness in filing suit, *id.* 46. Plaintiffs' and Defendants' appeal to the importance of the right to vote, *see* Pl. Opp. 15-16; Def. Opp. 18, is therefore misplaced: that right was equally at stake in the 2012 and 2014 elections, but did not establish irreparable harm then.

Plaintiffs and Defendants offer no explanation as to why the outcome should be different now. In fact, as explained, the only conceivable prejudice is that voters and candidates would participate in elections in Enacted District 3 that this Court has held is flawed in a non-final judgment now under the Supreme Court's plenary review. *See* Mem. 14. But other candidates and voters have faced the identical prejudice in prior cases—and the Supreme Court has made clear that such prejudice does not override "the balance of equities" and preference for "legislative apportionment plans created by the legislature" over "judicially constructed plans" that it has "repeatedly emphasized" when its plenary review of liability remains pending. *Karcher*, 455 U.S. at 1306-07 (Brennan, J); *see also Whitcomb*, 396 U.S. 1064.

Defendants thus alternatively contend that failing to enter a remedial plan now would pose a risk "of disrupting the electoral process if the Supreme Court affirms" on liability "or dismisses the appeal." Def. Opp. 19. But Defendants' argument on this point actually confirms that the Court should decline to enter a remedial plan. Defendants argue that because any decision from the Supreme Court "will likely be rendered before the end of the Supreme Court's

term in June 2016, it may not be too late, depending on the circumstances, to implement remedial measures for the November elections." *Id.* Of course, this eleventh-hour suggestion that a remedial plan could be entered as late as summer 2016 directly contradicts Defendants' repeated statements to the Court that it is "necessary" for any judicial remedy to be in place by January 1. *See* 9/2/15 Tr.; Def. Reply Br. Re. *Alabama* 10-11.

Moreover, if Defendants are correct that a remedial plan could be entered in June 2016 or later, then there is no need to make history by rushing to enter a remedial plan now, because the Court could simply await the outcome of the appeal. Defendants attempt to back away from this course by asserting that the Commonwealth "has a compelling interest in avoiding [the] disruption" that would result from such a belated remedy. *Id.* But this simply proves Intervenor-Defendants' point. *All* agree that the Commonwealth has a "compelling interest" in "avoiding the disruption" inherently caused by entering a remedial plan in June that differs from the plan in place before June. Thus, all agree there is a compelling need to avoid the scenario that would occur if the Supreme Court reverses liability in late May or June: a last-minute switch to the Enacted Plan from the now-invalid remedial plan. So the equities compellingly weigh against entering a remedial plan during the pendency of liability review. *See* Mem. 10-15.

As Intervenor-Defendants have explained, no judicial remedy could be timely entered for the 2016 elections after the Supreme Court's decision on liability. *See id.* 13-14. The latest date upon which a primary can be held under the federal MOVE Act is around August 23, 2016—and the MOVE Act date to commence preparing ballots for an August 23 primary would be around June 9, 2016. *See id.* & n.2. Of course, that date is before the end of the Supreme Court's term, so it may come and go before the Supreme Court's decision on liability. Moreover, all candidate signature collection and qualification would have to be completed *before* June 9, so there is no

realistic prospect that the Court could enter a remedial plan for the 2016 election after the Supreme Court's decision on liability. *See id.* Indeed, all of the cases Defendants cite where "[f]ederal courts have entered remedial redistricting plans later in the election cycle," Def. Opp. 19, predate the 2009 enactment of the federal MOVE Act with its 45-day mailing requirement, *see* P.L. 111-84 §§ 577-579 (2009). Accordingly, because no remedial plan can be properly entered for the 2016 elections in any event, the Court should decline to take the unprecedented action of entering a remedial plan now. *See* Mem. 13-14.

Likelihood Of Success On The Merits. Finally, there is "a fair prospect that a majority of the Court will vote to reverse the judgment," *Hollingsworth*, 558 U.S. at 190; *Karcher*, 455 U.S. at 1306 (Brennan, J); and even a "likel[ihood]" of Intervenor-Defendants' success on the merits, *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (vacating lower court's denial of a stay). The Supreme Court's exercise of plenary review rather than summary affirmance or dismissal of the appeal confirms that the Court's split decision raises "substantial questions," *Sanks*, 401 U.S. at 145, and at a minimum a "fair prospect" of reversal, *Hollingsworth*, 558 U.S. at 190. Moreover, the split decision in this case runs counter to Supreme Court precedent in *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015), and *Easley v. Cromartie*, 532 U.S. 234 (2001). *See* Juris. Stat., No. 14-1504 (S. Ct.) (available at DE 182-1); Mem. 16-17.

As the Jurisdictional Statement establishes at length, the majority's basic legal error on liability (accepting all of its factual findings as correct) was finding a *Shaw* violation without identifying any conflict between the Legislature's purported racial goal and the race-neutral factors that concededly motivated the Enacted Plan, at least in part. Absent such conflict, there cannot be the requisite "subordination." And there can be no conflict because preserving District 3 treated that district the *same* as the majority-white districts, all of which were preserved

because of the neutral core-preservation, political, and incumbency-protection factors.

Plaintiffs and Defendants return to the Court's order denying the General Assembly's motion to postpone, *see* Pl. Opp. 4, 7-8; Def. Opp. 5-6, but the Court's conclusion that "*the Interested Parties* have failed to show that . . . the Intervenor-Defendants are likely to succeed in the appeal," Order 1 (DE 201), predated the Supreme Court's acceptance of "plenary review" of the "substantial questions" presented in the Court's liability judgment, *Sanks*, 401 U.S. at 145; Mem. 17. The Court thus did not consider the "changed and somewhat unusual circumstances," 2/23/15 Mem. Op. 4, or the showing of "a fair prospect of reversal," *Hollingsworth*, 558 U.S. at 190; *Karcher*, 455 U.S. at 1306 (Brennan, J), that are present here, Mem. 17.

Plaintiffs' and Defendants' other arguments fare no better. Defendants offer a lengthy rehashing of the facts that this Court found sufficient to establish a *Shaw* violation. *See* Def. Opp. 8-15. But the question is not whether the lower court stands by its judgment because stays would *never* be granted under that standard. Instead, the question is whether there is a "fair prospect" of reversal by the Supreme Court. *Hollingsworth*, 558 U.S. at 190; *Karcher*, 455 U.S. at 1306 (Brennan, J). That standard is satisfied even in cases where the Supreme Court ultimately does *not* reverse the judgment below, *see, e.g.*, *Karcher*, 455 U.S. at 1306 (Brennan, J), and is easily met with respect to the split decision here, where the Court has already recognized "substantial questions" as to its correctness, *Sanks*, 401 U.S. at 145; *see* Mem. 15-17.

Plaintiffs fall back on their challenge to Intervenor-Defendants' standing to appeal, *see* Pl. Opp. 7-11, but that challenge does not empower the Court to enter a remedial plan now. In the first place, the Supreme Court's postponement of standing to plenary review, *see id.*, is of no moment: the Supreme Court *routinely* takes this action, including in the very case Plaintiffs cite in which it *granted a stay*, *see Hollingsworth*, 558 U.S. at 190 (granting defendant-intervenors'

application for a stay) (cited at Pl. Opp. 9); *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (addressing defendant-intervenors' standing to appeal). Moreover, Plaintiffs do not dispute that the Supreme Court's acceptance of plenary review signals that the Court's liability decision presents substantial questions on the merits. *See* Pl. Opp. 9. Indeed, if the Supreme Court did not think so, it could have summarily affirmed or dismissed the appeal.

On substance, this Court obviously has no authority to prejudge the question the Supreme Court is now reviewing—Intervenor-Defendants' standing to appeal *to the Supreme Court*. In any event, Plaintiffs' standing challenge is so meritless that even Defendants have rejected it. *See* Def. Opp. 17-18; Reply Of Va. State Board Of Elections Appellees To Supplemental Briefing On Standing (Ex. A). As Defendants have agreed, Intervenor-Defendants have standing to appeal for the simple reason that the Court's "judgment" causes them "direct, specific, and concrete injury" by requiring alterations to their districts that place at least one Intervenor-Defendant in a majority-Democratic district and, thus, harm his chances for reelection and interests as a Republican voter. *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 623-24 (1989) (holding that intervenor-defendants had standing to appeal even in the absence of an appeal by the State defendants); Appellants' Br. Re. Standing 9-10 (Ex. B); Appellants' Reply Br. Re. Standing 4-5 (Ex. C). In all events, Intervenor-Defendants at a minimum have a "fair prospect" of prevailing on this and other issues on appeal, *Karcher*, 455 U.S. at 1306 (Brennan, J), so the Court should decline the invitation to become the first federal court in history to enter a remedial redistricting plan while the Supreme Court's plenary review of liability is pending.

CONCLUSION

The Court should decline to enter a remedial plan and modify its injunction to allow Virginia to conduct the 2016 congressional elections under the Enacted Plan.

Dated: December 7, 2015

Respectfully submitted,

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EXHIBIT A

No. 14-1504

In The
Supreme Court of the United States

ROBERT J. WITTMAN, *et al.*,

Appellants,

v.

GLORIA PERSONHUBALLAH, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Virginia

REPLY OF VIRGINIA STATE BOARD OF ELECTIONS APPELLEES TO SUPPLEMENTAL BRIEFING ON STANDING

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October 20, 2015

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GLOSSARY

BVAP	Black Voting-Age Population
CD[#]	Virginia Congressional District No.
The Congressmen	Appellants Robert J. Wittman, Bob Goodlatte, J. Randy Forbes, Morgan Griffith, Scott Rigell, Robert Hurt, David Brat, Barbara Comstock, Eric Cantor, and Frank Wolf
IX	Intervenor-Defendants' Trial Exhibit No.
JS	Jurisdictional Statement
Tr.	Trial Transcript Page No.
VSBE	Virginia State Board of Elections

No. 14-1504

In The
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REPLY OF VIRGINIA STATE BOARD OF ELECTIONS APPELLEES TO SUPPLEMENTAL BRIEFING ON STANDING

INTRODUCTION

The Virginia State Board of Elections appellees said in their supplemental brief that, although one or more of the Congressmen might be able to demonstrate appellate standing, none had yet articulated an injury in fact sufficient to satisfy Article III. The question here is a close one. But having reviewed Appellants' supplemental brief, we believe that Representative Scott Rigell (R-CD2) has now sufficiently alleged an injury in fact that would be redressed by the relief sought, and, consequently, that he has appellate standing. For the reasons stated in our

previous motion, however, the Court should summarily affirm the judgment of the district court.

ARGUMENT

Representative Rigell has adequately alleged appellate standing, but the Court should summarily affirm.

We disagree with Appellants that *any* marginal change in the partisan vote share of an adjoining district, no matter how small, causes an injury in fact to the adjoining-district officeholder. No precedent supports that argument. It also conflicts with the law in *United States v. Hays* and *Sinkfield v. Kelley*, that even though an adjoining district is "necessarily influenced" by the shape of a racially gerrymandered district, that fact alone does not confer standing on voters in the adjoining district.[1] Those cases likewise bar Appellants' claim of standing based on their status as "Republican voters" in the four districts adjoining CD3.[2]

But we agree with Appellants that *Meese v. Keene*[3] supports Representative Rigell's standing here. *Meese* held that the State senator there had

[1] *Sinkfield v. Kelley*, 531 U.S. 28, 30-31 (2000) (per curiam); *United States v. Hays*, 515 U.S. 737, 746 (1995).

[2] Appellants' Suppl. Br. at 13.

[3] 481 U.S. 465 (1987).

standing to challenge a federal statute based on his claim that complying with the law, which branded the films he wished to show as "political propaganda," would "substantially harm his chances for reelection."[4] The lower court found that "if he were to exhibit the films while they bore such characterization, his personal, political, and professional reputation would suffer and *his ability to obtain re-election* and to practice his profession would be impaired."[5] The legislator based that claim on an opinion poll and on the affidavit of an expert.[6]

In their supplemental brief, the Congressmen point out that *all* of the "properly filed proposed remedial plans make at least one Republican district represented by an Appellant majority-Democratic."[7] Importantly, of all the parties and non-parties to submit remedial plans, the Congressmen had the greatest incentive to preserve the Republican-voting performance in their own districts. Yet even their own proposed remedial plans would "increase District 2's Democratic vote share from 49.3% to 50.2%."[8] The Congressmen claim (among other things) that even that plan would materially injure Representative Rigell's chances for reelection in that "closely divided

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[4] *Id.* at 474.

[5] *Id.* at 473 (quoting *Keene v. Smith*, 569 F. Supp. 1513, 1515 (E.D. Cal. 1983)) (emphasis added).

[6] *Id.* at 473-74.

[7] Appellants' Suppl. Br. at 6.

[8] *Id.*

district."[9] The Congressmen add that the other plans submitted to date "are equally bad or worse, redrawing at least one Appellant's district—and often several Appellants' districts—into majority-Democratic districts and, in some instances, pairing two or more Appellants in the same district."[10]

The evidence adduced at trial, including testimony about an alternative plan proposed by Plaintiffs, supports Representative Rigell's claim that the remedy in this case may "substantially harm his chances for reelection."[11] Although Plaintiffs have now proposed a different remedial plan, the trial testimony about their original plan is relevant because their new plan would increase the Democratic performance in CD2 nearly as much. The alternative plan they first proposed would have shifted voters from CD3 into CD2, increasing the Democratic vote share in CD2 by more than 5%, as shown in Table 1.

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[9] *Id.* at 2; *see also id.* at 10 ("Plaintiffs' Alternative Plan, which will at least be a starting point for any remedy, harms Appellant Rigell by turning toss-up District 2 into a 'heavily Democratic' district.").

[10] *Id.* at 10.

[11] *Meese*, 481 U.S. at 474.

Table 1

Democratic vote share in CD2 (based on 2008 Presidential Election)[12]	
Enacted Plan	49.5%
Plaintiffs' Alternative Plan (as offered at trial)	54.9%
Plaintiffs' Remedial Plan (currently pending)	54.8%
Congressmen's Remedial Plans	50.2%

The trial testimony established that that plan would materially and adversely affect Representative Rigell's reelection chances. Plaintiffs' own expert, Michael McDonald, testified that CD2 was a "toss-up district" that had "moved back and forth between the parties over the last decade."[13] He agreed that Plaintiffs' alternative plan could make it "more politically difficult" for Rigell to be reelected.[14] He testified that the change could "[p]otentially" have "a very negative effect" on Rigell's "future reelection prospects," though Rigell might "still win in that district because of incumbency advantages and other things."[15] Although

[12] IX 22; Tr. 303:22-305:10; Intervenor-Defs.' Br. in Supp. of Their Proposed Remedial Plans, Exs. I, S, *Personhuballah v. Alcorn*, No. 3:13-cv-678 (Sept. 18, 2015), ECF Nos. 232-9, 232-19; Appellants' Suppl. Br. at 6.

[13] Tr. 119:10-14.

[14] Tr. 152:8-11.

[15] Tr. 181:17-25.

the majority of the district court rejected the credibility of the Congressmen's expert, John Morgan,[16] Morgan agreed with McDonald's characterization of CD2 as a "toss-up district."[17] He added that a 55%-Democratic-performing district is "highly or safely Democratic," a threshold effectively met by Plaintiffs' alternative plan.[18]

Plaintiffs have now substituted a new remedial plan for the one offered at trial, but as shown in Table 1, their new plan would increase the Democratic performance in CD2 to about the same level, 54.8%, while increasing the Democratic performance in CD4 (Representative Forbes's district) to 52.2%.[19] More importantly, even the Congressmen's proposed remedial plans—plans that are presumptively the *most favorable* to their partisan interests—increase the Democratic performance in Rigell's CD2 from 49.5% to 50.2%, making it a majority-Democratic district.

The standard of substantial-harm-to-reelection chances, set forth in *Meese*, is satisfied here by: (1) the trial testimony that CD2 is a toss-up district; (2) Representative Rigell's claim that he "intend[s] to seek reelection in 2016";[20] and (3) the fact that the remedial plans that are presumptively least

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[16] JS 21a-22a n.16.

[17] Tr. 258:17.

[18] Tr. 304:5-305:7.

[19] Appellants' Suppl. Br. at 6.

[20] *Id.* at 4.

politically injurious to Appellants—the ones they themselves have submitted—nonetheless adversely affect Rigell's reelection chances.[21]

The issue here is a close one. The district court might not alter CD2 in a manner that adversely affects Representative Rigell's reelection chances. And even if the remedial plan increases the Democratic voting performance in CD2, Rigell's incumbency advantage may still enable him to be reelected.[22] But Rigell's claims, tied with the evidence at trial that CD2 is a toss-up district, suffice to show that even the most favorable remedial plan from Appellants' joint perspective nonetheless could have "a seriously adverse effect" on Rigell's chances for reelection.[23] Like the State senator in *Meese*, Rigell "is not merely an undifferentiated bystander with claims indistinguishable from those of the general public."[24] He has alleged a sufficient injury in fact, an injury that would be redressed if he succeeded in his appeal. And "because the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy

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[21] *Id.* at 2, 10.

[22] Rigell won 58.7% of the vote against a Democratic challenger in the 2014 congressional election. *See* Va. Dep't of Elections, 2014 U.S. House General Election, District 2, http://historical.elections.virginia.gov/elections/view/44424/.

[23] *Meese*, 481 U.S. at 473 n.7.

[24] *Id.* at 476.

requirement," the Court need not evaluate the standing of the other Congressmen.[25]

Nonetheless, for the reasons set forth in our previous motion, the Court should summarily affirm. The Congressmen continue to ignore the fundamental tenet of appellate review that the facts must be viewed "in the light most favorable" to Plaintiffs, who prevailed below.[26] The Congressmen insist, as they did unsuccessfully at trial, that the General Assembly intended to enshrine an "8-3 pro-Republican partisan split" when it drew the enacted plan.[27] But they forget that the district court specifically rejected that claim, finding that it was "not supported by the record."[28] Moreover, the district court's finding that CD3 was racially gerrymandered was supported by substantial evidence that the legislature used a 55%-BVAP floor

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[25] *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006). We agree with Appellants, however, that to the extent the remedial plan adopted turns one of Appellants' districts into a majority-Democratic district, or forces two Appellants to compete against one another in the same district, those adversely affected Congressmen would have appellate standing under *Meese*, even if the district court left the political composition of CD2 unaltered.

[26] *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 213 (1993).

[27] Appellants' Suppl. Br. at 6; *see also id*. at 4a ("Plaintiffs' plan seeks to override the Legislature's 'inarguabl[e]' political and incumbency-protection goal of maintaining the 8-3 pro-Republican split. . . .").

[28] JS 16a n.12; *see* Mot. to Affirm by Va. State Bd. of Elections Appellees at 30-32.

without regard to whether it was necessary to protect minority voting rights.[29] Given that finding, the court properly concluded that CD3 was unconstitutional under *Alabama Legislative Black Caucus v. Alabama*.[30]

Because the district court's factual findings were not clearly erroneous,[31] the judgment should be summarily affirmed.

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[29] *See* Mot. to Affirm by Va. State Bd. of Elections Appellees at 2-3, 23-29.

[30] 135 S. Ct. 1257 (2015); *see* JS 39a-40a.

[31] *See Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (discussing *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)); Mot. to Affirm by Va. State Bd. of Elections Appellees at 23-24.

CONCLUSION

Representative Rigell has adequately alleged appellate standing, but the Court should summarily affirm the judgment below.

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October 20, 2015

EXHIBIT B

No. 14-1504

IN THE

Supreme Court of the United States

ROBERT J. WITTMAN, BOB GOODLATTE, RANDY FORBES, MORGAN GRIFFITH, SCOTT RIGELL, ROBERT HURT, DAVID BRAT, BARBARA COMSTOCK, ERIC CANTOR & FRANK WOLF,

Appellants,

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Virginia

APPELLANTS' BRIEF REGARDING STANDING

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APPELLANTS' BRIEF REGARDING STANDING

A party has Article III standing to appeal when it has "a direct stake in the outcome of a litigation." *Diamond v. Charles*, 476 U.S. 54, 66 (1986); *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013). Such a direct stake arises when the judgment appealed causes the party "direct injury" that would be redressed by appellate reversal. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 618, 624 (1989); *see also Swann v. Adams*, 385 U.S. 440 (1967). Such an injury may be "small," *Diamond*, 476 U.S. at 66-67, or even "contingent" on future events, *Clinton v. City of New York*, 524 U.S. 417, 430 (1998). The "presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. FAIR*, 547 U.S. 47, 52 n.2 (2006).

Appellants have "a direct stake in the outcome," *Diamond*, 476 U.S. at 66, because the judgment below inflicts "direct injury" on at least one of them, *ASARCO*, 490 U.S. at 618. In particular, the majority's holding that Enacted District 3's 56.3% black voting age population (BVAP) violates *Shaw v. Reno* necessarily requires a remedy that reduces that percentage by swapping black (and overwhelmingly Democratic) voters from District 3 with white (far less Democratic) voters from one or more of the four surrounding districts, *all* of which are represented by a Republican Appellant. Indeed, the Alternative Plan that Plaintiffs introduced at trial and *every* remedial plan proposed post-judgment turns at least one Republican district adjacent to District 3 into a majority-Democratic district—and virtually all redraw *multiple* districts currently represented by

Republican Appellants. The majority's decision thus directly harms at least one Appellant's "chances for reelection," *Meese v. Keene*, 481 U.S. 465, 474 (1987), and interests as a Republican voter and candidate, *see Swann*, 385 U.S. at 443.

It should also be noted that, because the Democratic Attorney General of Virginia has abandoned the defense of the Legislature's Enacted Plan, dismissing the appeal not only would allow a judgment that directly injures Appellants to stand, but also permit state officials to impose their partisan political preferences on litigants, the Legislature, and the public at large without appellate review. Appellants have standing, and the Court should note probable jurisdiction or summarily reverse.

BACKGROUND

A. District 3 And Surrounding Districts

District 3 has existed as Virginia's only majority-black congressional district since 1991. *See Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va. 1997), *summ. aff'd*, 521 U.S. 1113 (1997); Pl. Ex. 27 at 14. In 2010, District 3 was surrounded by four districts which each elected Republicans: Appellant Robert Wittman won reelection in District 1; Appellant Scott Rigell beat a Democratic incumbent in District 2, a closely divided district politically; Appellant Randy Forbes won reelection in District 4; and Appellant Eric Cantor won reelection in District 7.

The 2010 Census revealed population shifts that required a new congressional districting plan. After Republicans gained control of the Legislature in the 2011 elections, Delegate Bill Janis sponsored the bill that became the Enacted Plan. Janis candidly stated

that his overriding objective was "to respect to the greatest degree possible the will of the electorate as it was expressed in the November 2010 election," when voters elected 8 Republicans—including 4 Republicans in the districts surrounding District 3—and 3 Democrats. J.S. App. 53a.

To accomplish this objective, Janis not only sought, but directly adhered to, "the input of the existing congressional delegation, both Republican and Democrat," Int.-Def. Ex. 9 at 14, in how their districts should be drawn. Janis repeatedly noted that "the district boundary lines were drawn in part on specific and detailed recommendations" from "each of the eleven members currently elected to [C]ongress." *Id.* 8. After the Enacted Plan was drawn, Janis "spoke[] with each" incumbent and "showed them a map of the lines." *Id.* "[E]ach member of the congressional delegation both Republican and Democrat has told me that the lines" conform to "the recommendations that they provided me, and they support the lines for how their district is drawn." *Id.* 9-10; J.S. App. 56a.

Plaintiffs' sole witness at trial, Dr. Michael McDonald, conceded that the Enacted Plan's changes to District 3 had a "clear political effect" of benefitting "the Republican incumbents" in surrounding districts. Tr. 122, 128. The undisputed electoral data also confirmed that the Enacted Plan's changes to District 3 were "politically beneficial" to the Republican incumbents in adjacent districts because they moved Democrats out of, and Republicans into, those districts. *Id.* 122-28. For example, prior to the Enacted Plan, District 2 was a closely divided district where Barak Obama and John McCain each captured 49.5% of the vote in 2008.

Int.-Def. Ex. 20. The Enacted Plan increased District 2's Republican vote share by 0.3%. *Id.* The same pattern adhered in the other districts surrounding District 3: District 1 became 1% more Republican; District 4 became 1.5% more Republican; and District 7 became 2.4% more Republican. *Id.* All eight districts represented by an Appellant are plurality- or majority-Republican under the Enacted Plan. *See id.*

The 2012 and 2014 elections proceeded under the Enacted Plan. In both elections, all four districts surrounding District 3 elected Republicans. In 2014, District 1 reelected Appellant Wittman; District 2 reelected Appellant Rigell; District 4 reelected Appellant Forbes; and District 7 elected Appellant David Brat. All eight Appellants currently serving in Congress intend to seek reelection in 2016.

B. Plaintiffs' Lawsuit

Plaintiffs initiated a *Shaw* challenge to District 3 in October 2013. *See* Compl. (DE 1). The eight Appellants then serving as members of Congress moved to intervene as intervenor-defendants. *See* J.S. App. 3a-4a. Plaintiffs did not oppose that motion, and the three-judge court granted it. *See id.*

Plaintiffs sought to prove their *Shaw* claim in part through an Alternative Plan that replicates most of the Enacted Plan, but shifts the boundary between Districts 2 and 3. Tr. 157. The Alternative Plan reduces District 3's BVAP by 6%, to 50.2%. *Id.* 172. At the same time, it increases District 2's Democratic vote share by 5.4%. Int.-Def. Ex. 22. The Alternative Plan thus turns District 2 from an evenly divided "49.5% Democratic district" into a 54.9% Democratic district that even Dr. McDonald described as "heavily

Democratic." Tr. 153; Int.-Def. Ex. 22; J.S. App. 88a.

Following trial, the three-judge court issued a 2-1 split decision holding that Enacted District 3 violates *Shaw*. Mem. Op. (DE 109). The eight original Appellants appealed to this Court, which vacated and remanded for further consideration in light of *Ala. Leg. Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015). *See Cantor v. Personhuballah*, No. 14-518.

On remand, the three-judge court granted intervention to Appellants David Brat and Barbara Comstock, who had been elected to Congress during the appeal. The majority thereafter issued a substantially similar opinion invalidating Enacted District 3 and enjoining any congressional elections in Virginia until a remedial plan is adopted. *See* J.S. App. 1a. All ten Appellants appealed to this Court. Defendants did not join the appeal.

C. Proposed Remedies

The three-judge court accorded the Legislature until September 1, 2015, to adopt a remedy. Governor McAuliffe called the Legislature into a special session to convene on August 17, 2015. That special session lasted a matter of hours before the Senate Democrats, joined by a single Republican, adjourned sine die. *See* "In Surprise Move, Senate Democrats Adjourn Special Session," Richmond Times-Dispatch (Aug. 17, 2015).

The three-judge court has opted to proceed toward a judicial remedy during the pendency of Appellants' appeal. The court directed parties and interested non-parties to submit proposed remedial plans by September 18, 2015. *See* Order (DE 207). The court has appointed Dr. Bernard Grofman as a special

master and directed him to submit a remedy to the court by October 30, 2015. *See* Order (DE 241).

All properly filed proposed remedial plans make at least one Republican district represented by an Appellant majority-Democratic. Appellants proposed two remedial plans, both of which increase District 2's Democratic vote share from 49.3% to 50.2%. *See* Int.-Def. Exs. I, S (DE 232-9, DE 232-19).

The other proposed remedial plans seek to undo the Legislature's 8-3 pro-Republican partisan split, and turn at least one Appellant's Republican district into a majority-Democratic district:

- Plaintiffs have abandoned the Alternative Plan in favor of a proposed remedial plan that creates a 6-5 partisan split by making District 2, currently represented by Appellant Rigell, 54.8% Democratic and District 4, currently represented by Appellant Forbes, 52.2% Democratic. App. 12a.
- Governor McAuliffe's proposed remedial plan redraws every congressional district in Virginia and turns Districts 4, 5, and 10—currently represented by Appellants Forbes, Hurt, and Comstock—into majority-Democratic districts with 66.7%, 52.3%, and 54.8% Democratic vote shares. App. 17a.
- The NAACP plan turns District 4 into a 68.2% super-majority Democratic district. App. 25a.
- The Petersen plan turns Districts 1, 2, and 10 into majority-Democratic districts. App. 27a. It also pairs Appellants Goodlatte, Hurt, and Griffith in District 6 and pairs Appellant Comstock and Congressman Gerry Connolly in

District 11. App. 28a.

- The Richmond First Club plan turns District 7 (which it renumbers District 5) and District 8 (which it renumbers District 1) into majority-Democratic districts. App. 29a. It also pairs Appellant Comstock and Congressman Don Beyer in District 1; Appellants Forbes and Rigell in District 4; Appellants Brat and Hurt in District 7; and Appellants Goodlatte and Griffith in District 8. App. 29a-30a.
- The Rapoport plan turns District 4 into a majority-Democratic district. App. 31a. It also pairs Appellants Rigell and Forbes in District 2. *Id.*[1]

ARGUMENT

I. APPELLANTS HAVE STANDING TO APPEAL BECAUSE THE JUDGMENT DIRECTLY INJURES THEM

This Court's precedent plainly establishes that an intervenor-defendant has standing to appeal a "judgment" that causes it "direct, specific, and concrete injury," where "the requisites of a case or controversy are also met." *ASARCO*, 490 U.S. at 623-24; *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) ("irreducible constitutional minimum" of standing requires "injury in fact" and "causal

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[1] Bull Elephant Media and Donald Garrett also submitted proposed remedial plans, but those submissions do not comply with the three-judge court's order. In any event, by their proponents' own admission, those plans change at least one district represented by an Appellant. *See* DE 222, 238.

connection" likely to be "redressed by a favorable decision"). Appellants are directly injured by the judgment below and, thus, have standing to appeal it.

1. *ASARCO* began as a state-court suit brought by taxpayers claiming that mineral leases issued by the State of Arizona violated federal law. *See* 490 U.S. at 610. Some of the lessees intervened as defendants. *Id.* After the Arizona Supreme Court upheld the plaintiffs' claims, the intervenor-defendants sought review in this Court. *Id.* The State defendants did not join the petition for this Court's review. *Id.*

This Court held that the intervenor-defendants had standing to invoke the Court's jurisdiction even in the absence of the State defendants, and even though the state-court order did not require them to do or to refrain from doing anything. *See id.* at 617-624. The Court explained that the state-court decision "poses a serious and immediate threat to the continuing validity of th[e] leases." *Id.* Thus, the decision was "an adjudication of legal rights" "adverse" to the intervenor-defendants that caused an "actual or threatened injury that is sufficiently distinct and palpable to support their standing." *Id.* The Court further recognized that this injury-in-fact was redressable on appeal because "our reversal of the decision below would remove its disabling effects upon" the intervenor-defendants. *Id.* at 618-19.

ASARCO straightforwardly demonstrates that Appellants have standing to appeal because the majority's decision invalidating Enacted District 3 is an "adverse" "adjudication of legal rights" that imposes an injury-in-fact on at least one Appellant. *Id.* at 618. In fact, Appellants' injury-in-fact caused

by the majority's decision is even *more* "direct, specific, and concrete" than the injury this Court deemed sufficient to confer standing in *ASARCO*. *Id.* at 623-24. Here, there is not merely a "serious and immediate *threat* to the continuing validity of," but in fact an "actual" *invalidation* of, Enacted District 3. *Id.* at 618 (emphasis added).[2]

Moreover, the order necessarily requires a remedy that will harm at least one Appellant. The majority concluded that the Legislature retained too many black (overwhelmingly Democratic) voters in District 3. J.S. App. 1a-3a. Any remedy must therefore move such voters *out* of District 3 and into one or more of the surrounding Republican districts, and an equal number of non-black (and largely Republican) voters into District 3. *All* of these adjacent districts are represented by Appellants. Thus, any remedy for the *Shaw* violation found below will necessarily alter at least one Republican district where an Appellant has previously voted and been elected.

This remedial outcome is no mere "threat," but a *certainty*. *ASARCO*, 490 U.S. at 618. Because Appellants' districts surround District 3, any District 3 remedy necessarily alters the composition of districts that both previously elected an Appellant and expressly "conformed" to incumbent Appellants' detailed "recommendations" on how their districts should be drawn. *See supra* pp. 2-4. Moreover, both

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[2] As in *ASARCO*, this case otherwise presents "a cognizable case or controversy" because Appellants and Plaintiffs "remain adverse," and "valuable legal rights will be directly affected" by the Court's resolution of the appeal. 490 U.S. at 619.

the Alternative Plan and *all* proposed remedies transform at least one Republican Appellant's district into a majority-Democratic district. *See supra* pp. 6-7. For example, Plaintiffs' Alternative Plan, which will at least be a starting point for any remedy, harms Appellant Rigell by turning toss-up District 2 into a "heavily Democratic" district. Tr. 119, 152-53; J.S. 3. Plaintiffs' remedial plan is even more injurious to Appellants because it not only turns District 2 into a heavily Democratic district, but also turns Appellant Forbes's District 4 into a majority-Democratic district. *See supra* p. 6. Other proposed remedial plans are equally bad or worse, redrawing at least one Appellant's district—and often several Appellants' districts—into majority-Democratic districts and, in some instances, pairing two or more Appellants in the same district. *See supra* pp. 6-7.

Such changes will obviously injure every affected Appellant because they will undo his or her recommendations for the district, replace a portion of the "base electorate" with unfavorable Democratic voters, and harm the Appellant as a Republican candidate and voter. *King v. Illinois State Bd. of Elections*, 410 F.3d 404, 409 n.3 (7th Cir. 2005); *see Keene*, 481 U.S. at 474-75 (standing based on harm to "chances for reelection"). These injuries would clearly be redressed through a successful appeal because "reversal of the decision below would remove its disabling effects upon" Appellants and restore the Enacted Plan under which they were elected and which maximizes their chances for reelection. *ASARCO*, 490 U.S. at 618-19. Appellants therefore have shown a "direct, specific, and concrete injury" sufficient to "support their standing" to invoke "this

Court['s] review" of the judgment. *Id.* at 618, 624.

Indeed, the judgment challenged here will affect Appellants far more tangibly and directly than lower-court judgments that this Court routinely finds confer standing; *i.e.*, "the judgment of an appellate court setting aside a verdict for the defendant and remanding for a new trial." *Clinton*, 524 U.S. at 430. A judgment setting aside a pro-defense verdict can only "contingent[ly]" affect the defendant—he will be harmed only if he loses on remand. *Id.* In other words, the judgment affects the defendant's interests only because it converts a *certain* victory into a *potential* victory. Here, Appellants' harm is not contingent on the outcome of future proceedings or anything else; their interests are directly and immediately affected by the adverse judgment below because it necessitates prompt alteration of their existing districts.

2. Appellants' injury is more "direct, specific, and concrete" not only than the injury in *ASARCO*, 490 U.S. at 623-24, but also than injuries this Court has repeatedly upheld as sufficient to confer standing in the electoral context. For example, this Court held that a group of voters had standing both to bring an equal-population challenge to a Florida redistricting plan and to appeal an adverse judgment to this Court even though they resided in Dade County, which they "*concede[d]* has received constitutional treatment under the legislative plan." *Swann*, 385 U.S. at 443 (emphasis added). The Court concluded that these voters had standing because the district court rejected their proposed remedial plan "which would have accorded different treatment to Dade County in some respects as compared with the legislative plan,"

and had also "seemingly treat[ed] [them] as representing other citizens in the State." *Id.*

If these voters had standing to sue and to appeal even though the challenged plan did not directly affect their county, Appellants plainly have standing to appeal the majority's judgment that indisputably affects their districts. Any remedy will *necessarily* provide "different treatment" to their districts than that provided by the Enacted Plan. *Id.*

Moreover, this Court held that standing arose where a political candidate averred that "exhibition of films that have been classified as 'political propaganda' by the Department of Justice would substantially harm his chances for reelection and would adversely affect his reputation in the community." *Keene*, 481 U.S. at 474. Similarly, *FEC v. Akins*, 524 U.S. 11, 21 (1998), held that voters had standing to challenge the FEC's decision that a group was not a "political committee," which exempted the group from certain disclosure requirements and thereby deprived the voters of information regarding the group's donors, contributions, and expenditures. And *Davis v. FEC*, 554 U.S. 724 (2008), held that a candidate had standing to challenge a campaign finance law that had a far less direct effect on his electoral opportunities than that suffered by Appellants here. Specifically, the "self-financing" plaintiff candidate had standing to challenge a federal law because it "burdened his expenditure of personal funds by allowing his opponent to receive contributions on more favorable terms" and "most candidates who had the opportunity to receive expanded contributions had done so." *Id.* at 734-735. If the "burden" of enabling one's opponent to solicit

funds under more generous contribution limits is sufficient injury, *a fortiori* the burden of running in a different district with an electorate that has a cognizably greater presence of the opposing party's voters is quite sufficient.

As this reflects, the harm to Appellants from the majority's decision is far more "substantial" than the harms identified in these cases. *Keene*, 481 U.S. at 474. As noted, the electoral injury is far more concrete than the effect of an opponent's potentially enhanced war chest or voters' potential knowledge of and distaste for a candidate's involvement in a film the Government labels "propaganda." It is also far more tangible than the informational or "contingent" injuries in *Akins* and *Clinton*. Rather, by necessarily requiring changes to the political composition of at least one Appellant's district, the judgment below harms one or more Appellants' "chances for reelection," *Keene*, 481 U.S. at 474, and voting strength as Republican voters.

Finally, Appellants' injury is just as direct and concrete as the injury that conferred standing on the plaintiffs in *United States v. Hays*, 515 U.S. 737 (1995). Just as those plaintiffs' constitutional interests were injured by residing in a district that they alleged was different than that required by a proper interpretation of *Shaw*, so too are Appellants injured because, after any remedy, some will reside in districts they allege are different than those required by a proper interpretation of *Shaw*; *i.e.*, the Enacted Plan's *Shaw*-compliant districts. Just as a plaintiff is injured by a redistricting plan if he resides in the district affected by the alleged unconstitutionality, Appellants are injured by the

majority's command to alter District 3 because their districts will necessarily be affected by that order.

3. The district court granted Appellants intervention in accordance with myriad prior cases. *Wright v. Rockefeller*, 376 U.S. 52 (1964); *King*, 410 F.3d 404; *Hall v. Virginia*, 276 F. Supp. 2d 528 (E.D. Va. 2003), *aff'd*, 385 F.3d 421 (4th Cir. 2004). Plaintiffs did not oppose intervention when Appellants' interests faced only potential injury but now oppose standing when Appellants face *certain* harm from the adverse judgment. Pl. Mot. 6-8.

Plaintiffs' had it right the first time. Plaintiffs argue that an intervenor-defendant has standing to appeal only where the order directs it "to do or to refrain from doing" some action. *Id.* 7 (citing *Hollingsworth*, 133 S. Ct. at 2662). But an intervenor-defendant obviously also has standing to appeal an order that "directly affect[s]" its interests in ways other than compelling or restricting its action. *ASARCO*, 490 U.S. at 619. For example, when the order potentially invalidates lease rights, *id.* at 618-19, or diminishes promotion or other employment opportunities, *see Firefighters Local 1784 v. Stotts*, 467 U.S. 561 (1984); *Firefighters Local 93 v. City of Cleveland*, 478 U.S. 501 (1986); *Martin v. Wilks*, 490 U.S. 755 (1989), it directly harms appellants even though it does not command them to take or refrain from some action. *Hollingsworth* in no way alters this basic rule, but instead reaffirms that an appellant must merely "possess a direct stake in the outcome of the case." 133 S. Ct. at 2662.

Moreover, as discussed, *Hays* directly supports Appellants' standing. *See supra* pp. 13-14. Plaintiffs'

lone lower-court authority, *Johnson v. Mortham*, 915 F. Supp. 1529 (N.D. Fla. 1995) (Pl. Mot. 8), involves intervention and *supports* Appellants' standing.[3]

Finally, Plaintiffs' contention that Appellants' harm is "speculative" because the Republican-controlled Legislature *could* adopt "a remedy . . . to Appellants' political advantage," Pl. Mot. 8, is entirely backwards. *Plaintiffs'* rank speculation about how future events might moot a case cannot defeat Appellants' present standing. Otherwise, there would never be standing because the challenged law or practice could always *potentially* be repealed or changed to the appellant's advantage. That is particularly true here because the speculated legislative action is extraordinarily unlikely to occur—the Senate Democrats ended the Legislature's special session to consider legislative remedies almost as quickly as it began. Anyway, any remedial plan approved by the Legislature (and *Democratic* governor) would still have to cure the *Shaw* violation the majority found in District 3. Thus, like *all* remedies, any legislative remedy would invariably alter one or more of Appellants' districts and harm every affected Appellant as a candidate and voter.

CONCLUSION

Appellants have standing, and the Court should summarily reverse or note probable jurisdiction.

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[3] *Johnson* granted intervention to a congresswoman in a district challenged under *Shaw* based on her "personal interest in her office" and in "keeping District Three intact." 915 F. Supp. at 1538. Appellants have an identical "interest" in "keeping District Three" and (consequently) their own districts "intact."

Respectfully submitted,

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October 13, 2015

APPENDIX

APPENDIX A

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

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

INTERVENOR-DEFENDANTS' BRIEF REGARDING PROPOSED REMEDIAL PLANS SUBMITTED BY PLAINTIFFS AND NON-PARTIES

* * *

All of the proposed remedial plans submitted by Plaintiffs and non-parties dramatically underscore that the Court should enter Intervenor-Defendants' Proposed Remedial Plan 1 or Proposed Remedial Plan 2 if a judicial remedy becomes necessary in this case. Intervenor-Defendants' proposed plans are the *only* plans in the record that ensure that this Court, in entering a remedy, would narrowly cure the violation it found and "not pre-empt the legislative task nor intrude on state policy any more than necessary." *White v. Weiser*, 412 U.S. 783, 795 (1973); *Upham v. Seamon*, 456 U.S. 37, 41 (1982); *see also* Int.-Def. Br. 1-15 (DE 232).

At trial, Plaintiffs sought to prove their *Shaw* claim at least in part through their Alternative Plan—and this Court treated the Alternative Plan as the constitutional minimum for District 3. *See* Int.-Def. Br. 2, 7. In particular, the Court reasoned that Alternative District 3 is constitutional because it reduces District 3's black voting-age population ("BVAP") from 56.3% to 50.1%, "maintains a majority-minority district," "results in . . . one less locality split" than the Enacted Plan, and improves District 3's compactness. 6/5/15 Mem. Op. 28-32 (DE 170) ("Op."). Indeed, the Court must have viewed the Alternative Plan as a constitutional benchmark because it would have made no sense to prove or remedy a *Shaw* violation in District 3 with an alternative plan that *violates Shaw*. Moreover, Plaintiffs were required, as part of their prima facie burden, to present a plan that "at the least" achieves the legislature's "legitimate political objectives" and preferred "traditional districting principles" while

bringing about "significantly greater racial balance" than the Enacted Plan, *Easley v. Cromartie*, 532 U.S. 234, 258 (2001)—and the Alternative Plan was the only plan Plaintiffs presented at trial.

Both of Intervenor-Defendants' proposed remedial plans are clearly superior to the Alternative Plan as a judicial remedy. *See* Int.-Def. Br. 1-15. On the one hand, Intervenor-Defendants' plans cure the defects the Court found in Enacted District 3 to the same extent as the Alternative Plan, since they mirror Alternative District 3's BVAP level and perform as well or better than the Alternative Plan on locality splits and compactness. They are a manifestly superior remedy, however, because, unlike the Alternative Plan, they go no further than what is "necessary to cure" the violation and, relatedly, better comply with "'the legislative policies underlying'" the Enacted Plan. *Upham*, 456 U.S. at 43; *White*, 412 U.S. at 794-95; *Perry v. Perez*, 132 S. Ct. 934, 941 (2012) (quoting *Abrams v. Johnson*, 521 U.S. 74, 79 (1997)). Specifically, they are far better than the Alternative Plan regarding the Legislature's priorities that this Court held "inarguably" "played a role in drawing" Enacted District 3: maintaining the 8 Republican to 3 Democrat ratio established in 2010, preserving district cores, and protecting all incumbents. Op. 35; Int-Def. Br. 10-15.

By contrast, the proposed remedial plans offered by Plaintiffs and the non-parties all violate these basic limits on judicial remedial power even more than the Alternative Plan does. Plaintiffs have explicitly abandoned the Alternative Plan and "do not propose" that the Court adopt it "as a remedy." Pl. Br. 4 (DE 229). Yet Plaintiffs' new proposed remedial plan

makes even more sweeping changes that are neither "necessary to cure" the violation in District 3, *Upham*, 456 U.S. at 43; *White*, 412 U.S. at 794-95, nor compliant with "the legislative policies underlying" the Enacted Plan, *Perez*, 132 S. Ct. at 941. Moreover, even though Plaintiffs' remedial plan makes numerous changes that go well beyond curing the identified violation, it does not achieve the basic requirement of curing the violation, because it does not match Alternative District 3's 50.1% BVAP, but instead reduces District 3's BVAP to only 51.5%. The plan therefore does not even satisfy the constitutional benchmark the Court has set in this case. *See* Op. 28-32.

The fatal flaws in Plaintiffs' new plan do not end there. Most obviously, Plaintiffs' remedial plan makes changes to Districts 5, 6, and 9—which do not even border District 3—so those changes are clearly not "necessary to cure" any violation in District 3. *Upham*, 456 U.S. at 43; *White*, 412 U.S. at 794-95. Moreover, Plaintiffs' plan seeks to override the Legislature's "inarguabl[e]" political and incumbency-protection goal of maintaining the 8-3 pro-Republican split, Op. 35: while the Alternative Plan is a Democratic partisan gerrymander that turned one Republican district into a majority-Democratic district, Plaintiffs' new plan is even worse because it turns *two* districts currently represented by Republicans, Districts 2 and 4, into majority-Democratic districts. Unsurprisingly, Plaintiffs' plan also performs far worse on core preservation—including in District 3—than the Enacted Plan or even the Alternative Plan. Plaintiffs' plan therefore performs worse than the Enacted Plan and even the

Alternative Plan on *all* of the paramount "legislative policies underlying" the Enacted Plan. *Perez*, 132 S. Ct. at 941.

All non-party proposed remedial plans likewise fail the governing rules and thus cannot be entered as a judicial remedy. Those plans either sweep far beyond the scope of any violation in District 3 by seeking to redraw the entire State, or depart from the Legislature's political, incumbency-protection, and core-preservation goals that drove the Enacted Plan.

The Court therefore faces the same choice faced by the court in *White v. Weiser*: Intervenor-Defendants' proposed plans cure the violation found by the Court and "adhere[] to the" political and incumbency-protection "desires of the state legislature" to "a greater extent than" all other proposed remedial plans. 412 U.S. at 795. Because redistricting inevitably "has a sharp political impact and inevitably political decisions should be made by those charged with the task," the Court is required to implement one of Intervenor-Defendants' proposed plans, "which most closely approximate[s] the reapportionment plan of the state legislature," and to avoid the competing remedial plans with their markedly different "political impact." *Id.* at 795-96; *see also* Int.-Def. Br. 3-15. The Court should reject all other plans and adopt Intervenor-Defendants' Proposed Remedial Plan 1 or Proposed Remedial Plan 2 if a judicial remedy becomes necessary in this case.

ARGUMENT

I. THE PROPOSED REMEDIAL PLANS SUBMITTED BY PLAINTIFFS AND NON-

PARTIES ARE OVERBROAD AND CONTRAVENE THE LEGISLATURE'S REDISTRICTING PRIORITIES

Because "[r]edistricting is 'primarily the duty and responsibility of the State,'" *Perez*, 132 S. Ct. at 940 (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)), and "primarily a matter for legislative consideration and determination," *White*, 412 U.S. at 794-95 (1973), judicial redistricting by federal courts is an "unwelcome obligation," *Connor v. Finch*, 431 U.S. 407, 415 (1977), that threatens "a serious intrusion on the most vital of local functions," *Miller v. Johnson*, 515 U.S. 900, 915 (1995). Accordingly, remedial redistricting by federal courts is strictly confined by two rules ensuring that the federal judiciary does "not pre-empt the legislative task nor intrude on state policy any more than necessary." *White*, 412 U.S. at 795; *Upham*, 456 U.S. at 41. *First*, any judicial redistricting plan must be no broader than "necessary to cure" the constitutional defect in the legislature's duly enacted plan. *Upham*, 456 U.S. at 43; *White*, 412 U.S. at 794-95. *Second*, when "'faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying' a state plan—even one that was itself unenforceable—'to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act.'" *Perez*, 132 S. Ct. at 941 (quoting *Abrams*, 521 U.S. at 79).

Plaintiffs and Governor McAuliffe attempt to avoid this bedrock requirement of federal judicial deference to state legislative prerogatives, *see* Pl. Br. 5-6; Gov. Br. 6-13 (DE 231), but their attempt to change the law is wholly without merit. Plaintiffs and the

Governor contend that the Supreme Court's decision in *Abrams v. Johnson*, 521 U.S. 74 (1997), categorically bars *any* deference by a federal court to any aspect of a redistricting plan found to contain a *Shaw* violation and, thus, that this Court may not defer to the Legislature's race-neutral redistricting priorities in drawing the Enacted Plan. *See* Pl. Br. 5-6; Gov. Br. 8-9. But *Abrams* plainly does not fashion any such rule—to the contrary, it confirms that this Court "should be guided by the legislative policies underlying" the Enacted Plan "to the extent those policies d[id] not lead to" the "violation[] of the Constitution" in District 3. *Abrams*, 521 U.S. at 79.

As the Governor's own quotation to *Abrams* confirms, *Upham* deference "is not owed" to a legislative plan only "*to the extent* the plan subordinated traditional districting principles to racial considerations." *Id.* at 85 (emphasis added) (quoted at Gov. Br. 8-9). As the Supreme Court explained, the Georgia congressional plan challenged in *Abrams* subordinated traditional districting principles to race *statewide*. *See id.* at 85-86. The Georgia Legislature drew that plan to comply with the Justice Department's "max-black policy," which required creation of the maximum number of majority-black districts as a precondition to preclearance. *Id.* at 84. The Georgia Legislature thus drew 3 of Georgia's 11 congressional districts as majority-black districts in different parts of the state. *See id.* at 77-78. The Supreme Court upheld the district court's determination that 2 of those districts violated *Shaw*. *See id.*

Turning to the remedy, the Supreme Court held that any judicial remedy could not implement the

flawed max-black policy that had led to the *Shaw* violations in the first place. *See id.* at 85-86. The Supreme Court further noted that the 2 districts held to violate *Shaw* "affect[ed] a large geographic area of the State." *Id.* at 86. In particular, those districts were located "on opposite sides of the State," contained "between them all or parts of nearly a third of Georgia's counties," split "[a]lmost every major population center . . . along racial lines," and bordered the majority of other districts. *Id.* Given the pervasiveness of the *Shaw* violations across the entire State, the Supreme Court acknowledged that "any remedy of necessity must affect almost every district." *Id.* The Supreme Court hastened to add, however, the any remedy should remain "consistent with Georgia's traditional districting principles." *Id.*

There is no such "necessity" of a statewide *remedy* here because there is no statewide *violation*. *Id.* The Legislature did not follow a max-black policy or draw a second district "on the opposite side[] of the State" that violated *Shaw*. *Id.* Instead, the Court held that the Enacted Plan commits a localized *Shaw* violation in District 3. *See* Op. 1-2. Moreover, District 3 is located in just one area of the Commonwealth, does not contain anywhere near a third of Virginia's counties, and does not border the majority of other districts. In short, this Court held that Enacted District 3 unconstitutionally subordinated districting principles to race only to the extent it departed from the Alternative Plan and those departures can obviously be cured with minor alterations to District 3 (as evidenced by the fact that the Alternative Plan affected only one other district—District 2). Thus,

the remedy here must have a limited *geographic* scope.

As to the *substantive* scope of the remedy, *Abrams* authorizes the Court to depart from the Enacted Plan *only* "*to the extent* [it] subordinated traditional districting principles to racial considerations"; otherwise, it must adhere to the Legislature's non-racial "districting principles." *Abrams*, 521 U.S. at 85-86 (emphasis added).[1] Thus, any remedial plan must adhere to the Legislature's non-racial policies of preserving district cores and the 8-3 ratio through incumbency protection. These policies are obviously not racial and, unlike *Abrams*, were not *infected* by race; to the contrary, the Court found that these non-racial motives were *overcome* by the "paramount" motive of race (*i.e.*, Section 5 compliance). *See* Op. 34-41.

Under these basic remedial principles, Intervenor-Defendants' Proposed Remedial Plan 1 and Proposed Remedial Plan 2 pass the *Upham*, *Perez*, and *Abrams* tests with flying colors: those plans cure the *Shaw* violation "to the extent" found by the Court because

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[1] Plaintiffs' citation to *Favors v. Cuomo*, No. 11-CV-5632, 2012 WL 928223, at *6 (E.D.N.Y. Mar. 19, 2012), is even more inapposite. *Favors* was an *impasse* case: the New York Legislature had failed to redistrict following the 2010 Census, so *all* of New York's congressional districts were unconstitutional under the Fourteenth Amendment's equal-population requirement. *See id.* at *1. Thus, the three-judge court's holding that it owed no deference to a decade-old redistricting plan that had become infected with constitutional error in every district, *see id.* at *6, has no bearing on whether this Court must defer to the Legislature's Enacted Plan "to the extent [its] policies [did] not lead to [the] violation[] of the Constitution" this Court found in District 3, *Abrams*, 521 U.S. at 79.

they meet or exceed the Alternative Plan's constitutional benchmarks, *Abrams*, 521 U.S. at 85, are narrowly drawn to fix the violation, and perform significantly *better* than the Alternative Plan on the Legislature's animating priorities of maintaining the 8-3 partisan split, protecting all incumbents, and preserving district cores, *see* Int.-Def. Br. 1-15. Thus, the Court may enter either plan if a judicial remedy becomes necessary in this case. *See id.*

All other proposed remedial plans, however, fail these rules because each is broader than "necessary to cure" the constitutional defect found in Enacted District 3, *Upham*, 456 U.S. at 43; *White*, 412 U.S. at 794-95, departs from the Legislature's paramount "policies," *Perez*, 132 S. Ct. at 941; *Abrams*, 521 U.S. at 79, or both. The Court therefore should reject all of these plans.

A. Plaintiffs' New Proposed Plan Is An Egregious Partisan Gerrymander That Sweeps Across The Commonwealth And Defies The Legislature's Political, Incumbency-Protection, And Core-Preservation Goals

Plaintiffs have abandoned the Alternative Plan they sponsored at trial in favor of a new and fundamentally flawed proposed remedial plan, *see* Pl. Br. 4-5, that fails all requirements for a judicial remedy and is an even more egregious partisan gerrymander than the Alternative Plan. First, Plaintiffs' new plan does not comport with the constitutional benchmark the Court established: by Plaintiffs' own admission, their new plan reduces District 3's BVAP only to 51.5%, or 1.4% *higher* than the 50.1% BVAP in Alternative District 3. *See id.* 3;

Ham. Dec. Ex. C (DE 230). There is no basis for concluding that a 51.5% BVAP level is less race-conscious or more respectful of traditional districting principles than the 53.1% BVAP in Benchmark District 3 or the 56.3% BVAP in Enacted District 3 condemned by this Court's liability opinion—and Plaintiffs do not even *attempt* to identify such a basis. *See* Pl. Br. 3-5. Thus, Plaintiffs' failure to achieve the constitutional benchmark set by the Court, *see* Op. 32-35, alone invalidates Plaintiffs' new proposed plan as a judicial remedy.

In any event, Plaintiffs' new plan is facially unacceptable because it both sweeps far broader than "necessary to cure" any constitutional defect found by this Court and, in doing so, affirmatively contravenes "the legislative policies underlying" the Enacted Plan, *Upham*, 456 U.S. at 43; *White*, 412 U.S. at 794-95, *Perez*, 132 S. Ct. at 241. In the first place—unlike Intervenor-Defendants' proposed plans and the Alternative Plan—Plaintiffs' new plan makes changes to districts that do not even border District 3. In particular, Plaintiffs' new plan makes changes to Districts 5, 6, and 9, which are represented by Republicans (and Intervenor-Defendants) Robert Hurt, Bob Goodlatte, and Morgan Griffith respectively. *See* Ham. Dec. Ex. C. These wholly gratuitous changes to non-bordering districts obviously are not limited to curing District 3's identified violation, but advance only Plaintiffs' naked partisan agenda: for example, they increase the Democratic vote share in District 6 by nearly 5% to 46.2%. *See* Pl. Plan Election Data; Int.-Def. Trial Ex. 20.

Moreover, by shifting population across districts, these changes facilitate the changes to District 3 and surrounding districts that unjustifiably depart from "the legislative policies underlying" the Enacted Plan. *Perez*, 132 S. Ct. at 941. Specifically, Plaintiffs' new remedial plan performs far *worse* on the Legislature's paramount traditional priorities of politics, incumbency protection, and core preservation than the Enacted Plan, the Alternative Plan, or either of Intervenor-Defendants' plans. In the first place, Plaintiffs' remedial plan shifts droves of Democratic voters out of District 3 and transforms the adjacent Republican Districts 2 and 4 into majority-Democratic districts. Plaintiffs' new plan thus not only violates the Legislature's political goals that "inarguably" played a role in drawing the Enacted Plan, but also improperly seeks to replace, by judicial fiat, the 8-3 pro-Republican split that the Legislature sought to maintain with a 6-5 split. *See* Op. 35.

In particular, District 2 represented by Republican Congressman Rigell is an evenly divided "49.5% Democratic" under the Enacted Plan. Tr. 153. Plaintiffs' new remedial plan, however, turns District 2 into a 54.8% Democratic district, Pl. Plan Election Data (Ex. A), which even Plaintiffs' expert, Dr. Michael McDonald, would describe as "heavily Democratic," Tr. 153. Similarly, District 4, represented by Republican Congressman Forbes, is a *48%* Democratic district under the Enacted Plan. *See* Int.-Def. Trial Ex. 20. But Plaintiffs' new plan flips it to a *52.2%* Democratic district—a pro-Democratic swing of 4.2%. *See* Pl. Plan Election Data. Plaintiffs' proposed remedial plan thus decreases District 3's BVAP by 4.8% not to eliminate District 3's racial

identifiability, but to turn two adjacent Republican districts into Democratic districts. *See id.*

For the same reason, Plaintiffs' remedial plan departs from the Legislature's incumbency-protection priority that "inarguably" played a role in drawing Enacted District 3, because it harms Congressmen Rigell and Forbes by making their districts majority-Democratic. Op. 35. Plaintiffs' new plan also harms Republican Congressman Goodlatte by making District 6—which does not even border District 3—46.2% Democratic, or 5% more Democratic than it is under the Enacted Plan. *See* Pl. Plan Election Data; Int.-Def. Trial Ex. 20.

Plaintiffs' remedial plan also performs significantly worse than the Enacted Plan, the Alternative Plan, and Intervenor-Defendants' plans on core preservation—which, it remains undisputed, the Legislature rank-ordered *first* among discretionary state policies. *See, e.g.*, Pl. Trial Ex. 5. The Enacted Plan preserves between 71.2% and 96.2% of the cores of all districts, and 83.1% of District 3's core. *See* Int.-Def. Trial Ex. 27. It therefore treats majority-black District 3 the same on core preservation as the other, majority-white districts across the Commonwealth. *See id.* Intervenor-Defendants' remedial plans likewise preserve between 71.2% and 93.9% of the cores of all districts, and 77.2% and 81.2% of District 3's core, respectively. *See* Int.-Def. Br. 14-15. The Alternative Plan, by contrast, preserves only *69.2%* of District 3's core, the lowest core-preservation percentage of any district in the Alternative or Enacted Plans. *See id.*

Plaintiffs' proposed remedial plan is even worse because it preserves only *64.7%* of District 3's core.

Pl. Plan Core Preservation (Ex. B). Plaintiffs' new plan also preserves even less of the core of District 5, 60.8%. *See id.* The poor performance of Plaintiffs' remedial plan on the core-preservation factor that the Legislature gave top priority further confirms that the Court may not adopt the plan as a judicial remedy here. *See Perez*, 132 S. Ct. at 941.

Plaintiffs' purported explanation for abandoning the Alternative Plan in favor of their new proposed remedial plan—that they sought "to address the objections raised by Defendants to Plaintiffs' prior alternative plan," Pl. Br. 5—cannot withstand even minimal scrutiny. Indeed, the objections to the Alternative Plan that Defendants raised apply *with even greater force* to Plaintiffs' new remedial plan:

- Defendants criticized the Alternative Plan for failing to "achieve the General Assembly's political objectives" because it turns the evenly divided District 2 from a 49.5% Democratic district into a 54.9% Democratic district, Def. & Int.-Def. Joint Trial Brief 17 (DE 85) (cited at Pl. Br. 4), which Dr. McDonald described at trial as "heavily Democratic," Tr. 153. Plaintiffs' remedial plan is even worse because it not only turns District 2 into a heavily Democratic district, but also transforms District 4 from a 48% Democratic district into a 52.2% majority-Democratic district, and increases the Democratic vote share in District 6, which does not border District 3, by 5% to 46.2%. Pl. Plan Election Data.
- Defendants criticized the Alternative Plan because it does not protect all incumbents but instead places Congressman Rigell in a

majority-Democratic district. Def. & Int.-Def. Joint Trial Brief 21-22 (cited at Pl. Br. 4). Plaintiffs' proposed remedial plan is even less protective of incumbents: it not only places Congressman Rigell in a majority-Democratic district, but also places Congressman Forbes in a majority-Democratic district and increases the Democratic vote share in Congressman Goodlatte's District 6 by 5%. Pl. Plan Election Data.

- Defendants criticized the Alternative Plan because it preserves only 69.2% of the core of District 3. Def. & Int.-Def. Joint Trial Brief 21 (cited at Pl. Br. 4). Plaintiffs' remedial plan preserves even less of District 3's core, only 64.7%. Pl. Plan Core Preservation.

Finally, we note that Plaintiffs' remedial plan performs worse on locality splits than Plaintiffs lead the Court to believe. While Plaintiffs' plan reduces the number of locality splits overall, it creates more splits in District 3 than Plaintiffs disclose and introduces new locality splits across the Commonwealth that are absent from the Enacted Plan, the Alternative Plan, and Intervenor-Defendants' plans—including locality splits miles away from District 3's border. Plaintiffs represent that their Remedial District 3 "contains only one split that affects population," Richmond, Pl. Br. 9—but Plaintiffs' own maps and reports in fact confirm that Remedial District 3 *also* splits Henrico in a way that affects population, *see* Ham. Dec. Exs. A, B, C. Plaintiffs' new plan, moreover, splits Nelson County between Districts 5 and 6; Chesapeake, home of District 4's incumbent Republican Congressman

Randy Forbes, between Districts 2 and 4; and Hanover between Districts 1 and 7. *Id.* Ex. C. None of these three localities is split in the Enacted Plan, the Alternative Plan, or either of Intervenor-Defendants' proposed remedial plans. *See* Int.-Def. Trial Ex. 25; Int.-Def. Proposed Plan Ex. E (DE 232-5); Int.-Def. Proposed Plan Ex. O (DE 232-15).

Thus, in sum, Plaintiffs' remedial plan is broader than "necessary to cure" the constitutional defect in Enacted District 3, *Upham*, 456 U.S. at 43; *White*, 412 U.S. at 794-95, contravenes "the legislative policies underlying" the Enacted Plan, *Perez*, 132 S. Ct. at 941, and magnifies, rather than address, "the objections raised by Defendants" to the Alternative Plan, Pl. Br. 5. The Court therefore may not adopt Plaintiffs' plan as a judicial remedy.

B. The Governor's Plan Is A Race-Based Plan That Comprehensively Redraws The Entire State To Favor Democratic Political Interests

Governor McAuliffe, a non-party, has asked the Court to enter a remedy that "embrace[s] a comprehensive redrawing of Virginia's congressional districts" and "adopt[s]" the plan proposed by Senator Mamie Locke as SB 5002 during the August 2015 special session. Gov. Br. 13-14.[2]

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[2] The Governor notes that "the Senate of Virginia quickly adjourned" the special session. Gov. Br. 5. In fact, the special session lasted only a matter of hours before the Senate Democrats, joined by a single Republican senator, adjourned sine die. *See* "In Surprise Move, Senate Democrats Adjourn Special Session," Richmond Times-Dispatch (Aug. 17, 2015), *available at* http://www.richmond.com/news/virginia/government-politics/article_7b98d105-4949-502d-ba7a-

1. At the outset, the Governor's plan does not even *purport* to be aimed at fixing what is "necessary to cure" the identified defects in District 3. Rather, the Governor's plan "comprehensive[ly]" *redraws every district in the Commonwealth*. Gov. Br. 1, 14-15. And it does so for the avowed purpose (among others) of changing the political composition of Virginia's congressional delegation to align with the Governor's pro-Democratic "political preferences," thereby dismantling the 8-3 pro-Republican split that the Republican-controlled Legislature sought to maintain. *See id.* 14-15. Thus, the Governor's plan is far broader than "necessary to cure" the constitutional defect in Enacted District 3, *Upham*, 456 U.S. at 43; *White*, 412 U.S. at 794-95, and contravenes "the legislative policies underlying" the Enacted Plan. *Perez*, 132 S. Ct. at 941.

In particular:

- The Governor's plan changes every district in the Commonwealth, including districts as far north as Arlington and as far west as the Virginia-Tennessee state line that are hundreds of miles from District 3's border. *See* Gov. Br. Ex. A.
- The Governor's plan creates a 6-5 pro-Democratic split by turning 3 districts currently represented by Republican incumbents—Districts 4, 5, and 10—into majority-Democratic districts with 66.7%, 52.3%, and 54.8% Democratic vote shares, respectively. *See* Gov. Br. Ex E at 4.
- The Governor's plan therefore fails to protect

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the Republican incumbents in Districts 4, 5, and 10—Congressman Forbes, Congressman Hurt, and Congresswoman Barbara Comstock—while protecting every Democratic incumbent. *See id.*

- Whereas the Enacted Plan preserves between 71.2% and 96.2% of the cores of all districts and 83.1% of District 3's core, *see* Int.-Def. Trial Ex. 27, the Governor's plan preserves between 50.1% and 87.8% of the cores of districts and only 53.2% of District 3's core, Gov. Plan Core Preservation (Ex. C).
- The Governor's plan has 17 locality splits affecting population, more than the 14 in the Enacted Plan, the 13 in the Alternative Plan, and the 13 and 12 in each of Intervenor-Defendants' plans. *See* Gov. Plan Locality Splits (Ex. D).
- While the Enacted Plan's locality splits between Districts 2 and 3 affect 241,096 people, the Governor's plan's splits of Chesterfield, Henrico, and Richmond between District 7 and its new race-conscious and identifiably black District 4 affect *827,385* people—or *3.4 times* as many people as the Enacted Districts 2 and 3 splits. *See id.*
- The Governor's plan splits, in a way that affects population, localities that are not split in the Enacted Plan, the Alternative Plan, or either of Intervenor-Defendants' proposed remedial plans, including Albemarle, Amherst, Arlington, Campbell, Chesapeake, James City, Lynchburg, Manassas, Salem, Suffolk, and

Warren. *See id.*

2. Even more perversely, the Governor's plan seeks to "cure" what the Court found was an excessively race-conscious effort to preserve *one* black opportunity district (in order to satisfy Section 5) by creating *two* black opportunity districts (supported by no Section 5 justification). It reduces District 3's BVAP to 41.9%, more than 8 percentage points lower than Alternative District 3's 50.1% BVAP level. *See* Gov. Br. Ex E at 3. At the same time, it increases District 4's BVAP from 31.3% in the Enacted Plan to 48%. *See id.* The Governor, however, provides no legal justification for this race-conscious effort to create "*two* districts in which African Americans will have an opportunity to elect candidates of their choice." Gov. Br. 15 (emphasis original). Nor could he: Plaintiffs did not plead, much less prove, a Section 2 claim in this case, so there is no basis for this Court to create a second identifiable black district under the guise of remedying the Legislature's alleged racial predominance in District 3. *See, e.g.*, *Bartlett v. Strickland*, 556 U.S. 1 (2009) (discussing requirements for § 2 claims).

3. The Governor presents a panoply of arguments in an attempt to support his proposed "comprehensive redrawing of Virginia's congressional districts," Gov. Br. 13, all of which are facially meritless. *First*, the Governor does not even pretend that his plan is designed to cure the District 3 problems identified in *this* case. Rather, it is an 18-year-late effort to cure the *Shaw* violation found in 1997, on the grounds that the three-judge court in that case somehow failed to correct that violation. Specifically, the Governor argues that District 3's

"infirmity has never been remedied" since this Court found a *Shaw* violation in *Moon v. Meadows* in 1997. Gov. Br. 7. Of course, the Governor never explains how intervening elections in District 3 could have been held since 1997 if District 3's *Shaw* "infirmity" had never been remedied (or how this Court would have jurisdiction to remedy that long-ago violation). *See id.*

Unsurprisingly, the Governor's cursory revisionist history omits crucial events. In *Moon*, this Court enjoined Virginia "from coordinating and/or conducting an election" in District 3 "until such time as the General Assembly enacts, and the Governor approves, a new redistricting plan for said district which conforms to all requirements of law, including the Constitution of the United States." 952 F. Supp. 1141, 1151 (E.D. Va. 1997) (three-judge court). Thus, the remedial plan adopted by the Legislature in 1998 must have been constitutional because it was used for elections in District 3 *without challenge* by any party or restraint from this Court. The 1998 plan also served as the basis for the 2001 Benchmark Plan, which Virginia again used without a single *Shaw* challenge to District 3 for an entire decade. Given this history, it was especially sensible for the Legislature to preserve District 3's shape and basic demographics in the Enacted Plan.

Thus, the Governor's contention that District 3 "has been ruled unconstitutional as a racial gerrymander each time that it has been judicially reviewed," Gov. Br. 7, ignores that District 3 has been used without challenge for most of its history. In fact, in 2001 Virginia voters brought *Shaw* challenges against several state legislative districts, but

eschewed any such challenge to District 3. *See Wilkins v. West*, 264 Va. 447 (2002).[3]

Second, the Governor peddles more revisionist history when he contends—with a straight face—that, in 2012, the Legislature somehow preferred a plan other than the Enacted Plan it adopted into law. *See* Gov. Br. 12-13. The Governor points to a single pre-enactment statement from Senator Stephen Martin expressing reservations about District 3, *see id.* 13, but any such stray statement by a single legislator is not more probative of the Legislature's preference than its actual adoption of the Enacted Plan. In all events, the Governor neglects to mention that Senator Martin actually voted *for* the Enacted Plan in 2012. *See* HB 251, 2012 Session, *available at* https://lis.virginia.gov/cgi-bin/legp604.exe?121+vot+SV0046HB0251+HB0251 (last visited Oct. 2, 2015).

The Governor's assertion that the Legislature "gave favorable consideration to another plan proposed by" Senator Locke in 2011, Gov. Br. 13, again ignores that the Legislature *rejected* Senator Locke's plan in favor of the Enacted Plan. And the Governor is simply incorrect that the Republican-controlled Legislature's "only" concern with Senator Locke's 2011 plan was that "it would not receive preclearance," *id.*: that plan also converted majority-Republican District 4 into a majority-black and

[3] Moreover, even a cursory review of the 1991 version of District 3 challenged in *Moon* and Enacted District 3 refutes the Governor's suggestion that Enacted District 3 "retains the same basic shape it has had since 1991." Gov. Br. 4; *compare* Int.-Def. Ex. 8 (1991 District 3 Map), *with* Int.-Def. Ex. 3 (Enacted District 3 Map).

super-majority 68.2% Democratic district that harmed Republican incumbent Congressman Forbes, *see* M. Locke Plan, *available at* http://redistricting.dls.virginia.gov/2010/Data/congressional%20plans/SB5004_Locke_substitute/SB5004_Locke_substitute.pdf (last visited Oct. 2, 2015).

Third, citing *Abrams*, the Governor next argues that Enacted District 3 has a "broad geographic impact in high-population centers" because "the number of locality splits between CD-3 and CD-2 affected 241,096 people alone." Gov. Br. 9. But the Governor fails to mention that—as noted above—his plan has an even *broader* "geographic impact in high-population centers" on that metric: the locality splits between District 7 and the Governor's new race-conscious and identifiably black District 4 affect *827,385* people, or *3.4 times* as many people as the splits across Enacted Districts 2 and 3. *See* Gov. Plan Locality Splits. And if that were not enough, the Governor's plan also splits Chesapeake between Districts 2 and 4 in a way that alone affects another 222,209 people. *See id.* (In any event, the Enacted Plan's effect on *adjacent* districts cannot possibly justify the Governor's *statewide* redraw.)

Finally, the Governor invokes "the racial bloc voting analysis conducted by Dr. Lisa Handley," which purportedly "confirms that CD-3 does not need a majority African American district in order to ensure the opportunity for minority voters to elect candidates of their choice." Gov. Br. 8. Dr. Handley's analysis, however, only confirms the folly of relying upon a flawed and debatable racial bloc voting analysis in drawing District 3. Dr. Handley's analysis concluded that "a BVAP from between 30%

and 34% is what is required to prevent retrogression in CD-3." *Id.* 11. However, as Intervenor-Defendants previously have explained without dispute, such a massive reduction in District 3's BVAP to that level would almost certainly have been denied Justice Department preclearance in 2012. *See* Int.-Def. Resp. Br. Re *Alabama* 16 (DE 151).

Thus, Dr. Handley's racial bloc voting analysis, like the analysis Dr. McDonald presented at trial, was at best "controverted" and "unclear" evidence that would not have supplied the Legislature with "good reason[] to believe" that reliance on racial bloc voting analyses, and the massive reductions in BVAP they require, was a straightforward, or even feasible, means of obtaining Section 5 preclearance. *Ala. Leg. Black Caucus v. Ala.*, 135 S. Ct. 1257, 1273-74 (2015). A racial bloc voting analysis therefore cannot condemn the Enacted Plan or justify any particular remedial plan. *See* Int.-Def. Resp. Br. Re *Alabama* 13-17. Indeed, the Governor's plan *violates* Dr. Handley's analysis, because it increases District 4's BVAP from 31.3%, which is well within Dr. Handley's electable range of "30% [to] 34%" BVAP, Gov. Br. 11, to *48%* BVAP, thus gratuitously "packing" District 4 by 14-18% BVAP. And it provides District 3 with a BVAP of 41.9%, which is also well above the 30%-34% level purportedly "required to prevent retrogression in CD-3." Gov. Br. 11.

Moreover, even the Governor recognizes that "reducing CD-3's BVAP from 56% to around 35% would require" a racially motivated "shifting [of] approximately 150,000 voting-aged African Americans out of CD-3 and into the surrounding Congressional districts, while absorbing another,

non-African American group of 150,000 voters from surrounding districts." *Id.* 12. Thus, any attempt to lower District 3's BVAP to Dr. Handley's level would inject even *more* race-consciousness into the plan. And, of course, it would do direct violence to Virginia's traditional districting principle of preserving district cores. *See Wilkins*, 264 Va. at 474, 476.

Thus, in sum, the Court should reject the Governor's plan and his invitation to "embrace a comprehensive redrawing of Virginia's congressional districts," in order to *reverse* the choices made by the democratically elected Legislature in 2012. Gov. Br. 13.

C. The NAACP Plan Is A Racially Motivated Plan That Contravenes The Legislature's Redistricting Priorities

The NAACP plan is a racially motivated plan that suffers many of the same infirmities as the Governor's plan. This is unsurprising: the NAACP plan is based on the 2011 Locke plan that the Legislature rejected when it adopted the Enacted Plan in 2012. *See* NAACP Br. 4 (DE 227). The NAACP concedes that the purpose of its plan is to "redraw the state's third and fourth congressional districts" along racial lines in order to create 2 districts where "African-American voters have the opportunity to elect their candidates of choice." *Id.* 3. The NAACP plan drops District 3's BVAP to 42.1%, NAACP Plan VAP (Ex. E), 8 whole percentage points below the 50.1% "majority-minority" level in Alternative District 3 that this Court endorsed, Op. 28-32. The NAACP plan effects this precipitous drop in District 3's BVAP to turn District 4 into a 50.8%

black-majority district. *See* NAACP Plan VAP; NCAAP Br. 3, 8-10. The NAACP invokes "Section 2" of the Voting Rights Act as a basis for this race-based remedy, NAACP Br. 3, even though no party has pled or proven a Section 2 violation here, *see Bartlett*, 556 U.S. 1.

The NAACP plan, moreover, is broader than necessary to cure the violation and contravenes the Legislature's redistricting priorities in the following ways:

- The NAACP plan redraws 7 of Virginia's 11 congressional districts, including 2 districts—Districts 5 and 6—that do not border District 3. *See* NAACP Br. Ex. A; NAACP Plan Core Preservation (Ex. F).
- The NAACP plan replaces the Legislature's 8-3 Republican split with a 7-4 split by turning District 4 into a 68.2% supermajority-Democratic district. *See* NAACP Plan Election Data (Ex. G). It also makes District 5 a more closely divided district, increasing its Democratic vote share from 47.3% to 48.5%. *See id.*
- The NAACP plan therefore fails to protect incumbent Republican Congressman Forbes in District 4 and harms incumbent Republican Congressman Hurt in District 5, while protecting all Democratic incumbents. *See id.*
- The NAACP plan preserves only between 51% and 90.2% of the cores of the Benchmark Districts, and only 53.2% of District 3's core. *See* NAACP Plan Core Preservation.
- The NAACP plan splits 14 localities, the same

number as the Enacted Plan and more than the Alternative Plan and Intervenor-Defendants' Proposed Remedial Plan 1 and Proposed Remedial Plan 2. *See* NAACP Plan Locality Splits (Ex. H).

- The NAACP plan's split between Districts 2 and 3 affects the 437,994 people in Virginia Beach, nearly 200,000 *more* people than are affected by the Enacted Plan's splits across Districts 2 and 3. *See id.*
- The NAACP plan splits localities that are not split in the Enacted Plan, the Alternative Plan, or either of Intervenor-Defendants' proposed remedial plans, such as Chesapeake, Culpeper, Dinwiddie, Gloucester, Lynchburg, Mecklenburg, and Virginia Beach. *See id.*

The NAACP spills considerable ink arguing that its proposed remedial plan unites communities of interest in Districts 3 and 4. *See* NAACP Br. 10-16. But the Legislature rejected the 2011 Locke plan upon which the NAACP plan is based, *see id.* 4, and instead opted for the Enacted Plan, which preserves different communities of interest around the Benchmark Districts. *See* Pl. Trial Ex. 5, at 1-2. The Court should defer to the Legislature's redistricting priorities and reject the NAACP's naked effort to reverse the outcome of the 2012 legislative session.

D. The Other Non-Party Proposed Remedial Plans Are Overbroad And Violate The Legislature's Redistricting Priorities

The Court should also reject the remaining non-party proposed remedial plans because they fail to comply with the Court's Order, are broader than

"necessary to cure" the constitutional defect in Enacted District 3, *Upham*, 456 U.S. at 43; *White*, 412 U.S. at 794-95, contravene "the legislative policies underlying" the Enacted Plan, *Perez*, 132 S. Ct. at 941—or all of the above.

Petersen Plan. The Court should reject the plan submitted by Senator J. Chapman Petersen, *see* DE 219, because Senator Petersen did not serve "Shapefiles and Block Equivalency Files" for his plan on "counsel of record" for Intervenor-Defendants, Order ¶ 4 (DE 221). In all events, the Petersen plan is not an appropriate judicial remedy here.

- The Petersen plan violates the Constitution's equal-population requirement. The Constitution requires that all congressional districts be drawn within a +1/-1 deviation from the ideal district population. *See, e.g.*, *Wesberry v. Sanders*, 376 U.S. 1 (1964). The Petersen Plan, however, has a +10/-13 population deviation. *See* Petersen Plan Charts at 1 (Ex. I).
- The Petersen plan redraws every district in the Commonwealth, not merely District 3 and surrounding districts. *See* Petersen Plan Core Preservation (Ex. J); Petersen Br. Ex. 1.
- The Petersen plan creates a statewide Democratic partisan gerrymander, replacing the Legislature's preferred 8-3 Republican split with a 6-5 pro-Democratic split. *See* Petersen Plan Charts at 4 (Ex. I). In particular, the Petersen Plan turns Districts 1, 2, and 10 into majority-Democratic districts. *See id.*

- The Petersen plan thus harms Republican incumbents Congressmen Rigell and Forbes by placing them in renumbered Districts 1 and 2 while turning another previously Republican district into a majority-Democratic district, even though it protects all Democratic incumbents. *See id.*; Petersen Plan Incumbents (Ex. K).
- The Petersen plan also harms incumbents by pairing Congressmen Goodlatte, Hurt, and Griffith in District 6 and Congresswoman Comstock and Congressman Gerry Connolly in District 11, while placing no incumbent in Districts 7, 9, or 10. *See* Petersen Plan Incumbents (Ex. K).
- The Petersen plan sets District 3's BVAP to 50.4%, above the Court's constitutional benchmark of 50.1%. *See* Petersen Plan Charts at 3 (Ex. I).
- The Petersen plan preserves between only 40.5% and 78.9% of the cores of the Benchmark Districts, and only 46.1% of District 3's core. *See* Petersen Plan Core Preservation (Ex. J).
- The Petersen plan splits 29 localities affecting population, more than double the number of locality splits in the Enacted Plan, the Alternative Plan, or either of Intervenor-Defendants' proposed remedial plans. *See* Petersen Plan Split Localities (Ex. L).
- The Petersen plan splits several localities that are not split in the Enacted Plan, the Alternative Plan, or either of Intervenor-Defendants' proposed remedial plans,

including Albemarle, Amherst, Augusta, Bedford City, Botetourt, Colonial Heights, Dinwiddie, Hanover, Hopewell, Lancaster, Loudoun. Louisa, Middlesex, Montgomery, Nelson, Nottoway, Rockbridge, and Virginia Beach. *See id.*

Richmond First Club Plan. The Court should reject the Richmond First Club plan, *see* DE 218, because the Richmond First Club did not serve "Shapefiles and Block Equivalency Files" for its plan on "counsel of record" for Intervenor-Defendants, Order ¶ 4. The Richmond First Club Plan is the J. Miller plan drawn by a William & Mary law student team that the Legislature considered—and rejected—as SB 5003 in 2012. *See* DE 218. It is not an appropriate judicial remedy here for several more reasons.

- The Richmond First Club plan redraws every district in the Commonwealth. *See* SB 5003 Core Preservation (Ex. M); DE 218-2.
- The Richmond First Club plan replaces the Legislature's preferred 8-3 partisan split with a 6-5 Republican split. *See* SB 5003 Charts at 4 (Ex. N). In particular, the Richmond First Club Plan turns District 8 (which it renumbers District 1) and District 7 (which it renumbers District 5) into majority-Democratic districts. *See id.*
- The Richmond First Club plan thus harms at least two Republican incumbents. *See id.*
- The Richmond First Club plan also harms incumbents by pairing Congresswoman Comstock and Congressman Don Beyer in

District 1, Congressmen Forbes and Rigell in District 4, Congressmen Brat and Hurt in District 7, and Congressmen Goodlatte and Griffith in District 8, while placing no incumbent in Districts 5, 6, 9, or 11. *See* SB 5003 Incumbents (Ex. O).

- The Richmond First Club plan preserves between 39.5% and 89.3% of the cores of districts, and only 43.6% of the core of its majority-black District 3. *See* SB 5003 Core Preservation (Ex. M).
- The Richmond First Club plan splits 19 localities affecting population, more than the Enacted Plan, the Alternative Plan, or either of Intervenor-Defendants' proposed remedial plans. *See* SB 5003 Locality Splits (Ex. P).
- The Richmond First Club plan's splits of Hampton, Newport News, Norfolk between District 2 and its majority-black District 3 affect 560,958 people, while its splits of Virginia Beach and Portsmouth between District 3 and District 4 affect 533,529 people. *See id.*
- The Richmond First Club plan splits localities that are not split in the Enacted Plan, the Alternative Plan, or either of Intervenor-Defendants' proposed remedial plans, including Amherst, Caroline, Chesapeake, Colonial Heights, Gloucester, King and Queen, Loudoun, Louisa, Middlesex, Montgomery, and Virginia Beach. *See id.*

Rapoport Plan. The Court may not enter as a remedy the plan submitted by Jacob Rapoport, *see* DE 228, for several reasons.

- The Rapoport plan replaces the Legislature's preferred 8-3 partisan split with a 7-4 Republican split. *See* Rapoport Plan Election Data (Ex. Q). In particular, the Rapoport Plan turns District 4 into a majority-Democratic district. *See id.*
- The Rapoport plan leaves no incumbent in District 4 but pairs incumbent Republican Congressmen Rigell and Forbes in District 2, while it protects all Democratic incumbents. *See* Rapoport Plan Incumbents (Ex. R).
- The Rapoport plan preserves between 46.2% and 90.2% of the cores of districts, and only 47.3% of District 3's core. *See* Rapoport Core Preservation (Ex. S).
- The Rapoport plan sets District 3's BVAP to 50.9%, above the Court's constitutional benchmark of 50.1%. *See* Rapoport Plan VAP (Ex. T).
- The Rapoport plan splits King William, which is not split in the Enacted Plan, Alternative Plan, or either of Intervenor-Defendants' proposed remedial plans. *See* Rapoport Map (DE 228-1).

Bull Elephant Media Plans. The Court should reject the Bull Elephant Media plans, *see* DE 222, because Bull Elephant Media did not serve "Shapefiles and Block Equivalency Files" for its plans on "counsel of record" for Intervenor-Defendants, Order ¶ 4. Moreover, by its own admission, the Bull

Elephant Media plans are drawn to a deviation of "less than 1,000 people," Bull Elephant Media Br. 2-3, so they violate the Constitution's equal-population requirement, *see Wesberry*, 376 U.S. 1. These plans also fail to meet the Court's constitutional benchmark because they draw District 3 to 53.1% and 52.1% BVAP respectively. *See* Bull Elephant Media Br. 2-4.

Garrett Plan. The Court should reject the plan submitted by Donald Garrett, *see* DE 238, because it proposes creating 11 at-large districts comprising "[t]he entirety of the Commonwealth of Virginia," *id.* 1-2, in contravention of the Legislature's decision to create 11 single-member districts, *see* Pl. Ex. 5. Mr. Garrett, moreover, does not explain how his at-large plan could comply with Virginia's obligations under the Voting Right Act. *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 47 ("This Court has long recognized that multimember districts and at-large voting schemes may operate to minimize or cancel out the voting strength of racial minorities in the voting population.").

CONCLUSION

The Court should reject all other plans and enter one of Intervenor-Defendants' proposed remedial plans if a judicial remedy becomes necessary in this case.

Dated: October 7, 2015 Respectfully submitted,

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EXHIBIT C

No. 14-1504

IN THE

Supreme Court of the United States

ROBERT J. WITTMAN, BOB GOODLATTE, RANDY FORBES, MORGAN GRIFFITH, SCOTT RIGELL, ROBERT HURT, DAVID BRAT, BARBARA COMSTOCK, ERIC CANTOR & FRANK WOLF,

Appellants,

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Virginia

APPELLANTS' REPLY BRIEF REGARDING STANDING

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October 20, 2015

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APPELLANTS' REPLY BRIEF REGARDING STANDING

Plaintiffs' and Defendants' briefs resoundingly confirm that Appellants face "direct injury" from the three-judge court's judgment and, thus, have standing to appeal. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 618, 624 (1989). Plaintiffs and Defendants do not dispute that any remedy necessarily requires altering at least one Republican district where an Appellant has voted and been elected. *See* Pl. Br. 7-15; Def. Br. 8-9. Thus, under the undisputed facts, Appellants clearly have standing to appeal because the judgment mandates a remedy that will directly affect at least one Appellant's "chances for reelection," *Meese v. Keene*, 481 U.S. 465, 474 (1987), and interests as a Republican voter, *Swann v. Adams*, 385 U.S. 440 (1967); *see* App. Br. 1-2, 7-15.

Plaintiffs nonetheless argue that Appellants lack standing because (1) any injury to Appellants' clear interest in maintaining the existing districts is not "cognizable" because Appellants have no "legal right" to those districts, and (2) the injury will not be sufficiently certain until the lower court enters a remedy (within the next few weeks) detailing the *extent* of the injury. The first argument fundamentally confuses what *plaintiffs* must show in district court to challenge a *law* and the injury *defendants* must show on appeal to challenge a *judgment* invalidating a law, and would create a rule denying appellate standing to virtually *every* defendant. The second argument seeks to impermissibly convert the requirement that appellants show an "immediate threat" of direct injury into a rule requiring that appellants await

subsequent orders to *confirm* the precise *scope* of the injury. Moreover, awaiting entry of a remedial order before reviewing liability here would create massive confusion for Virginia voters in the 2016 elections and/or effectively deny Appellants timely relief.

I. APPELLANTS HAVE STANDING

Appellants have standing to appeal because the "judgment" causes them "direct, specific, and concrete injury" redressable by appellate reversal. *ASARCO*, 490 U.S. at 623-24. Plaintiffs and Defendants do not dispute that the three-judge court's finding of a *Shaw* violation requires a remedy that swaps black (and largely Democratic) voters from District 3 with non-black (far less Democratic) voters from one or more of the four adjacent districts, *all* of which are represented by a Republican Appellant. Pl. Br. 8-15; Def. Br. 8-9. This harm to at least one Appellant's "chances for reelection," *Keene*, 481 U.S. at 474, and voting strength as a Republican voter, *Swann*, 385 U.S. at 443, provides "a direct stake in the outcome" and, therefore, standing to appeal, *Diamond v. Charles*, 476 U.S. 54, 66 (1986); App. Br. 7-15.

Plaintiffs, however, ask the Court to dismiss this appeal and to delay its review on liability until an appeal from the remedial order, which Plaintiffs expect to issue within the next few weeks. *See* Pl. Br. 14-15. Yet such a delay would be both pointless—because Appellants' clearly have standing to appeal now—and positively harmful, because it will create enormous confusion for Virginia's voters, candidates, and election officials in the fast-approaching 2016 elections, as well as effectively deny Appellants timely relief from the erroneous judgment below.

1. Plaintiffs assert that a defendant's standing to appeal, like a plaintiff's standing to challenge a law in district court, turns on whether the judgment violates the appellant's "constitutional or statutory" "*rights*." Pl. Br. 15. But, of course, *defendants* never assert a violation of *rights* (except as a counterclaim) when they are sued. Rather, a defendant's "legally cognizable interest" on appeal is not that the challenged *law* violated its rights, but that the *judgment* erroneously deprives it of the benefits of the law it is *defending*. Thus, the *ASARCO* intervenors had a "legally protectable interest" in preserving the leases threatened by the holding that they should have been granted pursuant to competitive bidding, even though the intervenors did not assert any legal *right* to receive the leases without such bidding. 490 U.S. at 618. Indeed, defendants rarely if ever argue that the judicial remedy violates their legal rights; they assert only that the order threatens that which they possessed prior to the judgment being appealed—*e.g.*, money, unthreatened leases or, here, the districts which they helped draw to maximize their chances for reelection. Thus, Plaintiffs' radical "legal right" theory would deny virtually all defendants standing to appeal.[1]

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[1] This fundamental difference between defendants' "interests" and plaintiffs' "rights" forecloses Plaintiffs' "absurd" notion that recognizing the "interest" Appellants have in maintaining their existing districts would somehow create a constitutional "right" in all "members of Congress" to preserve their districts. Pl. Br. 12. To use Plaintiffs' example, recognizing that incumbent members would be directly affected by a remedy which removes supportive "university communities" from their districts in no way depends upon, or suggests, a "right" to have those commu-

For the same reason, there is nothing to Plaintiffs' specific argument that defendants appealing a *judgment* finding a *Shaw* violation must establish the same injury as plaintiffs claiming that a *law* violates *Shaw*; *i.e.*, that they must reside in the allegedly gerrymandered district. Pl. Br. 8-10. As even Defendants note, this argument "conflate[s] what is needed to establish standing to assert a [*Shaw*] claim with what an appellant must show to have standing to challenge a judgment on appeal." Def. Br. 7.

United States v. Hays, 515 U.S. 737 (1995) (Pl. Br. 8), held that voters outside the gerrymandered district did "not allege a *cognizable* injury *under the Fourteenth Amendment*" because that Amendment only grants a "*personal*" right to "equal treatment" and the voters had not "suffered such [race-based] treatment." *Id.* at 746-47 (emphases added). Thus, *Hays* merely reaffirms the obvious proposition that those who have not been discriminated against have not suffered a Fourteenth Amendment injury, even if the "racial composition" of their district was affected by discrimination against *others*, just as non-minorities suffer no such injury when employment discrimination against minorities affects the composition of their workforce. *Id.* at 746 ("We have never held that the racial composition of a . . . voting district, without more, can violate the Constitution.").

Thus, *Hays* provides no support for Plaintiffs' baseless assertion that voters or representatives outside the gerrymandered district will not be "affected" or "injured" by altering the district. To the

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nities in one's district. *Id.*

contrary, *Hays* noted that creating the gerrymandered district "of course" "*affects*" the "racial composition" of adjacent districts, but this did not violate the Fourteenth Amendment because any such effect was not motivated by a racial purpose. *Id.* at 746 (no "evidence that the Legislature intended [adjacent] District 5 to have any particular racial composition"). Here, in contrast, that negative effect, even though not racially motivated, provides standing because it produces the requisite "direct stake in the outcome" of the appeal. App. Br. 6-15.

Indeed, Plaintiffs' invented rule makes no sense because representatives and voters in adjacent districts are necessarily affected to the same extent as representatives and voters in the gerrymandered district because any remedial alteration of the population in District 3 will be precisely *equal* to the (cumulative) population alteration of the adjacent district(s). For example, Plaintiffs' Alternative Plan would simply swap 172,778 people between Districts 2 and 3, Int.-Def. Ex. 23, so it would be absurd to conclude, as Plaintiffs urge, that District 3's incumbent has standing to appeal but District 2's incumbent does not, Pl. Br. 8-10. Thus, *Hays* directly *supports* Appellants' standing, particularly because the effect on the adjacent district(s) is equivalent to the effect on District 3, where voters and representatives concededly have standing.

2. Plaintiffs also contend that Appellants' injury "is too speculative to meet Article III's standing requirements" until the three-judge court enters a remedy. Pl. Br. 10. Plaintiffs argue that, even though *any* remedy will alter at least one of Appellants' districts, standing arises only after a

remedial plan is entered and makes "clear" the *extent* of injury—*i.e.*, whether the alteration to districts is "relatively small" or "substantial enough" to likely cause Appellants to "los[e] a bid for re-election." *Id.* 13.[2] But appellants are not required to show that the decision will, at the conclusion of all judicial proceedings, wholly deprive them of what they enjoyed before the judgment. They are only required to show that the adverse decision creates an "immediate threat" to the pre-judgment status quo. *ASARCO*, 490 U.S. at 618; *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334; 2342 (2014) ("credible threat of prosecution").

Again, a defendant appealing a judgment "setting aside a verdict for the defendant" is not *definitively subjected* to a pro-plaintiff verdict on remand and the *extent* of plaintiffs' victory is not knowable at the time of the appeal. *Clinton v. City of New York*, 524 U.S. 417, 430 (1998). Nevertheless, it is axiomatic that such a defendant may appeal *before* the lower court takes further action on remand. *Id.* That is because defendants suffer cognizable injury from a judgment that puts them in a worse position; *i.e.*, being *exposed* to a *potential* adverse verdict after they had been immunized from such exposure. *See id.* There is no requirement that the judgment adversely affect the

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[2] Plaintiffs also repeat their argument that standing to appeal arises only when a judgment orders the appellant "to do or refrain from" some action. Pl. Br. 10. As explained, this argument is meritless. *See* App. Br. 14. Plaintiffs, moreover, do not consistently embrace it: Plaintiffs concede that Appellants "may" have standing to appeal the remedy, but any remedy would not require them "to do or refrain from" any action. Pl. Br. 10, 14.

appellant to the *maximum* extent possible: the appellants in *Clinton* had standing prior to determining whether HHS would grant them the waiver *guaranteed* by the vetoed legislation, and the petitioners in *ASARCO* had standing prior to determining whether the remedy would deprive them of the leases. *Id.*; *ASARCO*, 490 U.S. at 618. Thus, here, since the decision below necessarily alters the pre-decision status quo (with at least the potential for re-election harm), Appellants have standing to appeal, regardless of whether subsequent judicial proceedings subject them to the worst possible injury.

Moreover, the *extent* to which the alteration of Appellants' districts hinders their re-election chances is irrelevant, so it is immaterial whether the remedial order's changes to the district are what Plaintiffs deem "relatively small." First, even a "small" injury supplies standing. *Diamond*, 476 U.S. at 67. This is particularly true in the electoral context, where the Court has found standing over what might otherwise seem to be a "trifle," such as a "fraction of a vote" or a "$1.50 poll tax." *United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973).

Moreover, Plaintiffs' proposed rule that standing is available only if the district has been altered "substantially enough that the reduction is likely to harm the representative's current chances at re-election," Pl. Br. 13, is not only contrary to precedent, but also entirely unworkable and counter-productive. Apparently, Plaintiffs contemplate some sort of mini-trial or evidentiary showing, even after a remedial order has been entered, where the Court makes a *de novo* district-specific prediction about each representative's chances for re-election and then

determines whether the diminution is sufficient "enough" to constitute injury. Only then would appellants have standing to appeal. But political prognostication is both notoriously imprecise and beyond the judicial ken and, in any event, Plaintiffs' "enough" standard cannot be reduced to a "judicially manageable standard." *Cf. Vieth v. Jubelirer*, 541 U.S. 267, 281-82 (2004) (plurality op.). Presumably that is why the Court has never hinted at such an inquiry when it has found standing to appeal in other contexts which have far less direct effect on re-election prospects than that present here. *Keene*, 481 U.S. at 474; *Davis v. FEC*, 554 U.S. 724 (2008).

Anyway, as a factual matter, the undisputed record here plainly establishes sufficient harm to re-election chances under any rational standard. *See* App. Br. 12-13. As Plaintiffs note, even Appellants' own proposed remedies, which, needless to say, minimized the harm to the extent feasible, result in a 0.6% increase in Democratic vote share in *evenly-divided* District 2. Pl. Br. 11. This converts District 2 into a majority-Democratic district and has a tangible negative effect in a previous toss-up district that has repeatedly changed hands in recent history. *See* App. Br. 6-15. All other plans have a far larger negative effect on Appellants and, of course, Plaintiffs did not bring this suit to achieve *de minimis* alteration of District 3. Finally, Appellants' merits contention (which must be taken as true for standing purposes, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)) is that the Enacted Plan maximizes Appellants' re-election prospects to the greatest extent feasible, thus rendering *any* alteration injurious to those prospects. J.S. 17-21, 35.

3. Finally, Plaintiffs' request to delay this Court's review for a remedial order is a transparent effort to deny meaningful review. Plaintiffs nowhere disclose the consequences of their request. The reason is plain: Plaintiffs' delay would allow two lower-court judges to impose a pro-Democratic remedial plan for the 2016 Virginia elections *before* Appellants could obtain review of their erroneous liability decision. Such an outcome would directly contravene Congress' directive that this Court's review is so crucial in redistricting cases that it must be made available to "any party" on direct appeal of a three-judge court's "order granting or denying" an injunction, even before a remedial plan is entered. 28 U.S.C. § 1253.

Plaintiffs and Defendants have informed the three-judge court that it must enter a remedy "at the earliest practicable opportunity after November 17, 2015," and no later than January 1, to avoid disruption to the 2016 election cycle. Order (DE 241); Def. Br. 4. But regardless of the precise timing, awaiting a remedy would delay this Court's review until after the 2016 elections. Even if a remedy issues in late November, jurisdictional briefing and the Court's order noting probable jurisdiction could be completed no earlier than February 2016, and would likely stretch even later. *See* Sup. Ct. R. 18. The Court would therefore not hold oral argument until the October 2016 term.

Two scenarios therefore are possible if the Court waits for a remedy to review liability. In the first, the Court could (and should) stay the remedy pending its review of liability. *See White v. Weiser*, 412 U.S. 783, 789 (1973); *Kirkpatrick v. Preisler*, 390 U.S. 939 (1968) (Mem.); *Whitcomb v. Chavis*, 396 U.S.

1064 (1970) (Mem.). But such a stay would unleash havoc: Virginia's 2016 election cycle would have already travelled a long way under the remedial plan, only to be shifted back mid-cycle to the different districts in the Legislature's Enacted Plan. The Court's stay would come after the January 2 commencement of the candidate signature collection period, and perhaps after the March 31 candidate qualifying deadline. Va. Stat. §§ 24.2-521; 24.2-522; 24-2.515. All administrative efforts would be wasted, candidate signatures and qualifications could be invalidated, and voters would be needlessly confused by such mid-cycle reshuffling of districts.

The second scenario—the Court denying a stay—is even worse. The 2016 election would proceed under a remedial plan whose liability underpinnings raise "substantial questions" that this Court would have concluded warrant its "plenary consideration." *Sanks v. Georgia*, 401 U.S. 144, 145 (1971). The Court thus might well *reverse* the liability decision underlying the remedial plan *after* the plan had been used in the 2016 elections. The irreparable injury to Appellants is self-evident, particularly because at least one Appellant would be compelled to seek and risk losing reelection in a majority-Democratic remedial district. *See* App. Br. 6-15. In similar circumstances, the Court has allowed pre-enforcement challenges precisely to avoid requiring parties to risk irreparable harm as the price of securing the Court's review. *See Susan B. Anthony List*, 134 S. Ct. 2334.

CONCLUSION

Appellants have standing to appeal.

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October 20, 2015