IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

GLORIA PERSONHUBALLAH, an individual	:	Civil Action No. 3:13CV678
vs.	:	December 14, 2015
JAMES B. ALCORN, et al.	:	

COMPLETE TRANSCRIPT OF THE MOTIONS HEARING

HEARD BEFORE: THE HONORABLE LIAM O'GRADY
THE HONORABLE ALBERT DIAZ
THE HONORABLE ROBERT E. PAYNE

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P R O C E E D I N G S

THE CLERK: Case number 3:13CV678, Gloria Personhuballah, et al., versus James B. Alcorn, et al., and Robert Wittman, et al. The plaintiffs are represented by John Devaney and James Snyder. The defendants are represented by Stuart Raphael and Trevor Cox. The intervenor defendants are represented by Michael Carvin and John Gore. Are counsel ready to proceed?

MR. CARVIN: Yes.

MR. RAPHAEL: Yes, we are.

JUDGE PAYNE: All right. Welcome. We had planned for everyone to have about half an hour if you need it to talk about what you want to talk about. If you feel like you need more, you can let us know then.

We need to hear from you on the stay and then on the merits of the plans proposed by the special master. Intervenor defendants on the stay, the movant, we'll hear first. That's not to say you have 30 minutes on each motion.

MR. GORE: Thank you for the clarification. Your Honor, for the record, John Gore for intervenor defendants, and if I can just clarify the Court's instructions on the order, would the Court like to hear argument on the motion to suspend proceedings in total from all counsel first and then move to --

JUDGE PAYNE: I think it will make more sense to do

that.

MR. GORE: Okay. So I'll be up here twice then. May it please the Court, Virginia currently does not have a redistricting plan in place to conduct the 2016 Congressional elections, so there's universal agreement in this case that the Court must take some action in regard to its existing injunction.

So the question presented by our motion to suspend proceedings and modify the injunction is a straightforward one. It presents a straightforward choice for this Court. The Court can grant our request to modify the injunction and allow one election to proceed under the enacted plan due to the Supreme Court's pending plenary review on liability and avoid --

JUDGE DIAZ: Are you assuming that if the Supreme Court affirms, that there won't be enough time to go back, to remedy the constitutional violation?

MR. GORE: I think that's shown in our briefs, and I don't know that we're going to get any dispute on that today, but --

JUDGE DIAZ: I thought there was uncertainty about that, but go ahead.

MR. GORE: Given the new requirements of the federal MOVE Act, Your Honor, which was enacted in 2009, and that postdates the cases that the defendants cited in their brief, but that requires Virginia to mail its absentee ballots to

deployed military personnel and other overseas voters at least 45 days in advance of any primary election and a general election. So the effect that has on the calendar is to shorten the amount of wiggle room that there would be to delay the primaries, and, in fact, it would be impossible to delay the primaries on the calendar that we have because even if the primaries were delayed to -- the latest date would be about August 23rd, and if you work backward from that date under the MOVE Act, all candidate qualification would have to be completed by June 9th in order for Virginia to be able to prepare and vet and print all of its ballots.

But by June 9th, we may not have a decision from the Supreme Court on the merits one way or the other, and, of course, it takes at least weeks to complete the candidate qualification process. So there's really no time to enter a remedy even if the Supreme Court affirms on liability --

JUDGE DIAZ: Why shouldn't we put the onus on the Supreme Court to decide whether or not it wants to stay these proceedings in order to resolve this case?

MR. GORE: Well, I think if this Court were to deny our motion, we certainly would head to the Supreme Court and ask the Supreme Court to stay, but the law here in this area is clear that the Court faces two choices: The Court can grant our request to follow the well-trod path that's set out already, and the Supreme Court's case law makes very clear what

the Court should do here. It should not run the extraordinary risk of electoral chaos that would ensue if the Court enters a remedial plan and there's the risk that the Supreme Court will reverse on liability sometime in the spring of 2016. Such a reversal would immediately revert to the enacted plan.

JUDGE DIAZ: You say there's a well-trodden path. What's the best case that suggests that that should be the result?

MR. GORE: Let's look at *Karcher v. Daggett*, Your Honor. That's a case we've cited in our briefs and the defendants have also cited in their briefs, and in that case the Supreme Court made clear that the balance of equities favors proceeding under a legislative plan rather than a judicial plan while the Supreme Court's review of liability remains pending even if that means conducting one election under a plan that a three-judge court has invalidated.

That's exactly the posture that we face here. We're facing an imminent election, and we're an even stronger posture on the equities than *Karcher v. Daggett* because the election is coming up. It's at our doorstep. And any reversal by the Supreme Court would come down right in the middle of the election calendar, and we've laid out what the consequences of that might be.

JUDGE DIAZ: *Karcher* was a single justice opinion?

MR. GORE: That's correct. A single justice does

have the power to grant a stay in a case like this, and that's exactly what was done, and we've cited other cases in our brief where stays have been granted, but we don't even think the standard for a stay is the applicable standard, because the plaintiffs are asking the Court to enter new relief.

As of today, there's no remedial plan in place from this Court. Virginia is not obligated to use a particular remedial plan as of right this minute. The only injunction prohibits Virginia from using the enacted plan for the 2016 election, but it doesn't say that Virginia has to use a particular plan.

So the plaintiffs are asking this Court to take another step and enter new relief, and we don't think a stay is the proper way to think about that. Really the question is weather this Court has jurisdiction to enter new relief at this point and whether it should do so, and given the balance of equities in this case and the risk of electoral chaos which is undisputed -- the plaintiffs and the defendants in their briefs have not disputed the picture that we've painted as to what could happen if this Court enters a remedial plan and it's vacated in the middle of the primary election cycle.

JUDGE DIAZ: This is a bit of an unusual case because you've got a finding of liability, a constitutional violation but no remedy, no relief, and in the typical case in a civil case, if you've got a finding of liability, assuming that the

parties can even appeal that finding, generally a court would not be stayed, absent an entry of a stay, from entering an award of damages or some other relief. Why is this case different?

MR. GORE: This may be unusual for other contexts but not in the redistricting context. For example, *Karcher v. Daggett*, the injunction was exactly the same as the injunction in this case. It prevented New Jersey from conducting elections under an enacted plan, but there was no remedial plan that the three-judge court had put in place. Other cases we cite in our briefs are in exactly the same posture as this case.

So you have a negative injunction prohibiting use of an enacted plan but no injunction requiring use of a particular remedial plan. That was true in *Karcher v. Daggett* and has been true in other cases. It's not that uncommon within the redistricting context.

Now, we've pointed out in our briefs as well that there are at a minimum serious doubts about this Court's jurisdiction to enter a remedy at this time given that the notice of direct appeal divested this Court of jurisdiction and transferred the entire case to the Supreme Court.

The plaintiffs and the defendants haven't cited a single case in our posture in which a three-judge court has proceeded to enter a remedial plan while the Supreme Court was

actively considering liability.

JUDGE PAYNE: In your judgment, would there be any difficulty in the completion of this Court's task in drafting a remedial plan but making that plan conditional upon the affirmance by the Supreme Court of the liability decision by this Court?

MR. GORE: I think you would have the same problem, Your Honor, that we're warning against which is that would constitute a change in plan in the middle of the election cycle.

JUDGE PAYNE: It wouldn't take effect. It would not be effective at all in the question that I asked unless and until the Supreme Court affirmed liability. Therefore, that would have the advantage of allowing both sides to take the completed package to the Supreme Court and allowing review of the remedy as well as the liability in the event the Supreme Court found liability. Do you know any reason why that couldn't be done or shouldn't be done?

MR. GORE: Yes. Let me give a couple reasons, Your Honor. First of all, if this Court were to make a remedial plan conditional on the Supreme Court's affirming liability, we're not going to have an affirmance from the Supreme Court until at least the spring of 2016. The plaintiffs and the defendants have consistently advised the Court that a plan has to be in place by January 1st.

So if we proceeded under the enacted plan for half of the election cycle and then we switched to another plan in the middle --

JUDGE PAYNE: You wouldn't proceed under the new plan at all. All it would be is that the Court says, this is what the redistricting should be, no part of it takes effect unless and until the Supreme Court of the United States decides the case and then goes from there was the question I was asking.

MR. GORE: I appreciate that, Your Honor. It's all about the timing of the affirmance from the Supreme Court is the problem here, because any affirmance, any decision from the Supreme Court in this case is going to come after statutory deadlines have already passed for this election cycle including candidate qualification and candidate signature collection. It's most likely going to happen after the federal MOVE Act deadline of April 30th and expose Virginia to the --

JUDGE O'GRADY: That's inevitable. That we're proceeding on a difficult schedule is really not even the primary issue at this stage. What Judge Payne is asking about and I'm asking about is, how do you want the Supreme Court to handle this matter?

They've got the liability issue there now, and they'll rule. If we wait, they will rule on that in the spring, and we'll go back and we'll revisit the redistricting plan, we'll reach a decision on that, and that will be

appealed, and we'll go and we'll be back into another year before the Supreme Court, and then we're into the spring of 2017.

What sense does it make to wait that long to put in place, at least advise Virginia what the redistricting plan would be? Why shouldn't it all be argued at one time?

MR. GORE: Let me give an answer to that, Your Honor. First of all, a remedy entered in the spring of 2017 is more than timely for the 2018 elections. There's no Congressional election in 2017. The only question is whether this Court should rush to enter a remedy now for the 2016 elections.

JUDGE O'GRADY: We've been at this for years, Mr. Gore. Timely is not the right word.

MR. GORE: At this point it would be, because the Supreme Court is actively reviewing liability. So there's no way for the Court to enter a remedy that will be guaranteed to be effective for the 2016 elections, because there may be a reversal by the Supreme Court.

JUDGE DIAZ: Are you saying the Commonwealth wouldn't recognize that reality on the ground?

MR. GORE: I'm sorry.

JUDGE DIAZ: Are you saying that the Commonwealth would not recognize that reality if, in fact, you are correct that any remedy that we were to enter, even if conditional, as a practical matter could not be implemented for 2016? You seem

to be suggesting that there might be a way for that to happen.

MR. GORE: I don't believe there's a way for that to happen. I don't know what --

JUDGE DIAZ: Why are you concerned about the Court entering a conditional remedy if the reality is it can't be -- it would not be implemented in any event until 2018?

MR. GORE: Well, I think if the Court entered a conditional remedy and said it takes effect on the date of an affirmance by the Supreme Court, we'd have a massive problem because the timing of the affirmance from the Supreme Court would come right in the middle of the 2016 election cycle.

If the Court, for example, said that its remedy would become effective only for the 2018 elections on condition of affirmance by the Supreme Court that would be a different scenario because we wouldn't be in the middle of an election cycle.

It's the defendants who have said that the Commonwealth has a compelling interest in avoiding a mid calendar change in a redistricting plan, and the only way to do that, the only way to guarantee that there won't be a mid calendar change in plan is to grant our request and allow this election to go forward under -- just one election under the enacted plan that's subject to appellate review.

And if I can return to Judge O'Grady's question briefly, he asked a question about how long this litigation has

been going on. Well, plaintiffs complain they've been through two elections under the enacted plan, but the Court's already pointed out that the plaintiffs have no one but themselves to blame for that.

They didn't even file suit until 11 months after the 2012 election, and then the Court said they're largely responsible for the fact that there could be no remedy in 2014. We've been extraordinarily diligent in pursuing our appellate rights. We saved 199 days through early filings in the Supreme Court.

We're trying to get the case to the Supreme Court. We would like the Supreme Court to decide it as soon as possible and even asked the Court to do that in the last term. Thank you.

MR. RAPHAEL: May it please the Court, Stuart Raphael for the Commonwealth defendants. I think it's important, as the panel has pointed out, to distinguish between two things. One is do you finish work on the remedial plan, and the second is do you implement the remedial plan.

To Judge Payne's suggestion, we think that the conditional implementation that you mentioned would be a good fallback position, but we think that you should both complete the remedial plan and implement it. There's no -- with regard to finishing work on the remedial plan, there's no good reason to delay doing that, and the intervenors really have offered

none. The work is nearly completed. The master's work is done, and not finishing it may disable the Court from implementing the plan even if the Supreme Court decides the case in time to implement it.

JUDGE O'GRADY: This is kind of the same question to you, Mr. Raphael. What happens if the Supreme Court doesn't rule until the spring, and, you know, assume that the remedial plan is put in place in time for it to be consolidated with the rest of the action before the Supreme Court? What is possible with the new plan as far as the 2016 elections are concerned?

MR. RAPHAEL: Right. The intervenors are correct that the MOVE Act requires that ballots be sent 45 days before a primary or the general election. It is possible to move the primary. That did happen in 2012 as the Court may recall.

In 2012, the preclearance from the Department of Justice did not occur until March of 2012. The General Assembly, in HB 736, in 2012 actually postponed the primary date until, I believe it was August 9th, and if the Court is interested, I have copies of that bill, but it postponed the primary date until August 9th which pushed back the 45-day limit.

We've been trying to drill down to answer what is the obvious question, what is the drop-dead date, and I regret I can't tell the Court a precise drop-dead date. What I can tell the Court is we're told by the Department of Elections that it

would be important for them to have -- to know what the plan is by late March in order to avoid significant problems.

Now, it's true we have been saying during the course of this litigation that it would be important to have a plan in place if possible by January 1st, because under the code, the candidates can begin to collect signatures beginning January 2nd. So we have been saying all things being equal, it would be good to have a plan in place by January 2nd.

JUDGE PAYNE: What are the choices for the real date -- what did you call it? -- the drop-dead date? I don't like that term, but what is the last date that it could get started? We need to know that, and the Commonwealth of Virginia has people who need to tell us that.

MR. RAPHAEL: I understand, Your Honor.

JUDGE PAYNE: If we have to get them up here to ask them questions and let them study for awhile, maybe we'll do that, but surely you can tell us the date.

MR. RAPHAEL: I understand, Your Honor. Two things on that. One, it was said before that the party seeking the stay has the burden, and they have not shown that it can't be done. We have tried to find out what the last possible date would be.

The Department of Elections' view on this is if you order them to do something, they will do their darnedest to do it, but the risk of error goes up the later it is. What

they've told me through their counsel is that if they know what the plan is by late March, they think they can make it work if the primary is moved back to August.

So the Court does have the remedial power to do that, but I think we need to get back to what the question before the Court is on this motion, and that question is, should you stay proceedings pending appeal.

Whichever plan ends up being the right one to implement, there's going to be disruption either way, so you have to balance those things, and in doing that balance, you apply the four-factor test.

JUDGE DIAZ: Let's go to that for a moment, because the intervenor defendants say that we don't even get to the stay because effectively the Court has been ousted from jurisdiction. What's your response to that?

MR. RAPHAEL: That's clearly not correct. If they were right, then you wouldn't have to bother with Federal Rule of Appellate Procedure 8 or Federal Rule of Civil Procedure 62. There would be an automatic stay.

All of the cases they cited involved one of two situations, either where a lower court essentially pulled the rug out from the appellate court by trying to change the issue that was pending before the appellate court -- that was *Donovan*, *Zimmer*, and *Lewis* -- or their cases involve a situation where the district court was expanding a remedial

order beyond the one that was then on review in the higher court. That's *Shuffler* and *City of Cookeville*. They are also wrong in arguing that a reapportionment plan would expand the relief it's already been granted. They focus only on the injunction, but this Court --

JUDGE PAYNE: When something is on appeal, it is on appeal from an order, is it not?

MR. RAPHAEL: Yes.

JUDGE PAYNE: The order here which is the subject of the appeal is what?

MR. RAPHAEL: The order is the order invalidating the plan, but the Court's opinion at page 49 of ECF 170 said, "we will require that new districts be drawn forthwith to remedy the unconstitutional districts."

JUDGE PAYNE: But the issue is -- they say that we're changing what was -- what's the extant appellate order, and in the Fourth Circuit, it is quite clear that you can't do that. Why isn't that the same rule before the Supreme Court?

MR. RAPHAEL: Because I think it's a distinction between liability and remedy. Liability ruling is on appeal, but the remedy is in effect unless it's stayed, and that's what Rule 8 of the appellate rules say, and that's what Rule 62 of the civil rules say.

JUDGE DIAZ: We haven't gotten to the remedy. There is no remedy, because we haven't gotten to the remedy yet.

MR. RAPHAEL: We're in the midst of it.

JUDGE DIAZ: That's a problem, right?

MR. RAPHAEL: That's always true when there's a remedy that's in play in the district court while the liability ruling is on appeal. It seems pretty clear that the way to analyze this is under Rule 8. It's the four-factor test. There's not any automatic elimination of jurisdiction.

I think the best case for that -- you asked the best case of the intervenors. I think the best case for that is the *Larios v. Cox* case from 2004. In that case, the three-judge court struck down Georgia's state districts as a partisan gerrymander. That was in February of 2014. It gave the legislature a few weeks to come up with a new plan.

Three days later, the state filed a notice of appeal to the Supreme Court and filed a motion to stay the same day. A week later, the three-judge court denied the motion to stay, it applied the four-factor test, it found the state there was not likely to succeed on the merits of the appeal. It also found -- in that case, the state was opposing the interim plan.

Here, the state wants the interim plan to be put into place because we think it's going to minimize disruption, but the Court in *Larios* rejected the state's argument that it would be prejudiced if it won the appeal because it would have to revert to the old plan. The court said at page 1433, "even if the state were to devise new plans... the General Assembly

would not be precluded from replacing the interim plans with ones of its own creation if the defendant is successful on appeal."

Moreover, the Court in *Larios* held that the harm to the appellate interests of the state were outweighed by the need to correct the constitutional violation. It said, "The irreparable harm to the plaintiffs, and to all voters in Georgia who have had their votes unconstitutionally debased, outweighs the harm the state may encounter by being unable to resolve an appeal of this decision prior to the 2004 elections."

JUDGE DIAZ: Had the Court in *Larios* actually entered a plan before the stay request was submitted?

MR. RAPHAEL: It entered -- the stay was filed, it was denied. The appeal -- there was an appeal taken both from liability and from an application to stay in the Supreme Court. The Supreme Court denied the stay motion while liability was on appeal. The Court summarily affirmed a few months later --

JUDGE PAYNE: I have the same question. *Larios*, the Court had actually entered a remedy that affected almost all of the state, didn't it --

MR. RAPHAEL: I believe that's --

JUDGE PAYNE: -- before the request for the stay?

MR. RAPHAEL: That's correct.

THE COURT: So the remedy had been entered before

anything happened -- well, in the stay process; right?

MR. RAPHAEL: I don't think that's correct, Your Honor. The stay motion was filed on February 13th. The district court denied the stay motion on February 20th. The Court had given the state until March 1st to come up with a new plan. The state failed to come up with a new plan.

On February 26th, the U.S. Supreme Court denied the stay motion. That's 540 U.S. 1216. On March 1st, the legislature failed to come up with a new plan, and the Court came up with an interim plan which was the plan that was enacted for November of 2004.

The Supreme Court affirmed summarily the liability ruling on June 30th, but in terms of being dispossessed of jurisdiction, that's clearly not the case. That's why you have these stay motions, right, and to Judge Diaz's point, whatever the Court does here, it's -- the loser is going to file an application in the Supreme Court to go the other way.

So in light of that, this Court should call balls and strikes. Try to do what is the right thing to do, and you do that by applying the four-factor test, and the reason that we think that you should implement -- not only finish the remedial plan but implement it is because the intervenors are not likely to succeed on the merits of the appeal, and we've laid that out in our papers.

It's, frankly, inconceivable that five justices, let

alone any justice, would conclude that a mechanical racial floor does not trigger strict scrutiny, and it was conceded in this case that there is no basis for saying that the plan would be narrowly tailored if strict scrutiny applied.

THE COURT: How many does it take to take a case?

MR. RAPHAEL: It takes -- I believe it takes five to set it, but the Court has to dispose of a direct appeal case, and obviously the Court is struggling with whether the intervenors have standing. The plaintiffs and we disagree about that. I actually think that they do have standing. At least one of them would have standing.

The plaintiffs disagree with that, but the fact that the Supreme Court is adding the standing question doesn't help the intervenors on likelihood of success on the merits. That's another obstacle that they would have to get over, but when you're looking at the four-factor test, there's going to be disruption potentially either way. So you want to try to pick the plan that is going to be the plan that you need in November.

JUDGE PAYNE: What disruption is there if this whole thing is stopped until the Supreme Court decides? They continue the way it's continued under the same districts since 1998 basically, and then the Supreme Court affirms, it just continues to march.

If the Supreme Court reverses, then the new plan, if

it's conditionally -- if it's approved would go into effect. I don't see how you can make the argument that the disruption happens equally both ways no matter what happens. I'm having trouble with that.

MR. RAPHAEL: Well, the Supreme Court has informed us that it's going to set argument in either February or March, so it's very conceivable that we could have a decision as early as late March or April, and if the Court knows that there's a deadline out there that is going to affect whether a new plan can be in place, I think the Court would do its best to try to decide the case by that deadline. The Court has decided cases in a shorter period than two months.

But to your point, if the Court decides the case in March, in time for the remedial plan to be implemented, that's going to require postponing the primaries. There will be some disruption there. I'd rather -- we'd rather have the plan in place now so we know what we're dealing with. We think it's the plan that is likely going to have to be in effect in November, and it's easier to revert to the old plan than to convert at the last minute to the new one, and that's why -- it's a difficult case in the sense that you're balancing the equities, but as we cited from the Supreme Court's decision in *Williams v. Zbaraz*, "Balancing the equities is always a difficult task," and when there's doubt, it weighs against the party seeking the stay.

That's why we think the Court should not only implement -- not only finish work on the remedial plan since you are nearly there but implement it as well.

JUDGE PAYNE: Thank you. Do you have anything to say that Mr. Raphael didn't say eloquently or sufficiently?

MR. DEVANEY: Good morning, Your Honors. John Devaney for the plaintiffs. Your Honor, I'll take that hint and try to keep this brief. I guess what I would say is we certainly believe that, at a minimum, the Court should adopt a remedial plan in this proceeding so there is a remedial plan that's ready to go.

THE COURT: And we do one conditionally, do you believe?

MR. DEVANEY: Your Honor, no, we think that the preferred course is to implement that plan now.

JUDGE PAYNE: I understand that's the preferred course. I meant to say, ask you, and I'll try again, are we able under the law to say, this is the plan but it's conditioned, it's not going to take effect until the Supreme Court decides the case?

MR. DEVANEY: Your Honor, certainly you have the ability to do that. Obviously we think the preferred course is that you adopt the plan and implement it, and in support of that, I would point to the Supreme Court holding in *Reynolds v. Sims* where the Court said there that if a reapportionment plan

is deemed to be unconstitutional, it would be the very unusual case where a court wouldn't take action to prevent use of that unconstitutional plan in an upcoming election.

So there's a strong presumption in favor of judicial remedies to prevent elections from taking place under unconstitutional plans, and here, in this case, if we don't have a plan in place, if it's not implemented in time for the 2016 election, then we would be looking at our third election under a plan that this Court has found twice to be unconstitutional in violation of the equal protection clause. The Court ought to take, consistent with *Reynolds v. Sims*, every action possible to prevent that from happening.

I would point out, the intervenors have a parade of horribles about what might happen if the Court were to adopt a remedial plan and implement it and then the Supreme Court would actually reverse this Court's two findings.

Well, actually the parade of horribles, I think, weighs much more in favor of implementing the plan now, because if you don't do that, there's going to be a risk again of a third unconstitutional election in 2016. Moreover, if you implement a remedial plan now, the Virginia Election Board and the Virginia election officials will be able to adapt to the remedial plan, they'll have it in place ready to go for the election.

If the Supreme Court unexpectedly reverses this

Court, Virginia can revert back to the plan that it's familiar with, the plan that's been enacted, and it can do so relatively quickly. It would be harder to revert back to a new plan that's being implemented for the first time.

JUDGE O'GRADY: Have you thought about -- and I apologize for my own ignorance here. Say we issue an opinion, we decide to choose a plan now and that's appealed. Is the Supreme Court likely, at this stage in late December, early January, to consolidate and have argument still in March on liability and the remedy?

MR. DEVANEY: Your Honor, I don't know the answer to that, to be honest. At this point, I think it would be hard for the Court to consolidate, and I don't know if there's sufficient time to do that, but, honestly, I don't know the clear answer to that question.

I would point out then that the overriding interest here that should trump everything is the right to vote and the fact that our plaintiffs and voters in CD 3 in Virginia have a right to a constitutional election that's not in violation of the equal protection clause.

JUDGE DIAZ: Intervenor defendants say that you all have been complicit in not aggressively pursuing that right by the delays that have occurred in this case. Do you have a response to that?

MR. DEVANEY: My response to that, Your Honor, is

that certainly that is true for 2012. We didn't challenge the map in time for that election. However, we now have a finding of unconstitutionality twice by this Court, and regardless what has happened in the past, it should be incumbent on the Court to prevent a third unconstitutional election in 2016. That really is the interest that ought to trump and ought to prevail.

I would point out that, and I won't go through all the four factors, but I do want to point out that the burden on intervenors to obtain a stay is extraordinarily high. That is extraordinary relief, and it's very sparingly granted. In this case, it is even -- their burden, I would say, is even more impossible than the case law typically establishes, and that is because we have two findings from this Court of unconstitutionality.

We also have a finding from this Court that denied another motion to stay, and in that, in that ruling, this Court found that intervenors don't have a likelihood of success in their appeal to the Supreme Court and also found that there had not been a demonstration of irreparable harm. So one could argue that there's actually law of the case with respect to the motion to stay, and then very quickly going through the four factors on likelihood of success, it's -- the Supreme Court would be reviewing this Court's decision, particularly the fact findings based on the clear error standard, and this Court's

very familiar with the evidence that it relied upon to find that strict scrutiny applies, Delegate Janis's comments about the use of race in developing the plan, the lack of any --

JUDGE PAYNE: I think we're all aware of that.

MR. DEVANEY: Okay. And so the fact findings are very strongly based, and the same is true for the narrow tailoring findings. I won't recite through those. Under a clear error standard, it's highly, highly unlikely that intervenors would prevail.

They also have the significant standing problem which the Supreme Court has addressed, we think, by requesting specific briefing on that. Similarly, irreparable harm, they point to irreparable harm from the administrative electoral process, but the irreparable harm has to be theirs. It cannot be a general harm to the public. It has to be specific to these intervenors, and they've not alleged any.

By contrast, the harm to our plaintiffs, without beating it into the ground, is another unconstitutional election and a dilution of their voting rights.

JUDGE PAYNE: Thank you very much. We'll hear on the merits now.

MR. DEVANEY: Thank you.

JUDGE PAYNE: We'll hear the merits, and the objection to the special master's plan is by the intervenor defendants, so you get to go first and last.

MR. GORE: Thank you, Your Honor. If I can address a couple of quick points on rebuttal just to answer Judge O'Grady's question. It would be impossible for the Supreme Court to hear any appeal on a remedy this term. Jurisdictional briefing alone would kick it to the next term.

Again, no one has disputed the common sense points that we've made about the risk of electoral chaos if there's a change in plan. The defendants didn't dispute it, and the plaintiffs didn't dispute it. Mr. Raphael said that a plan would need to be in place by late March, but then he recognized that any decision from the Supreme Court would come no earlier than late March and perhaps even after that.

Let me clarify one final point, if I may. We don't have a problem with a conditional remedy entered from this Court if it's made clear that it would not come into effect until the 2018 elections. We think that the common sense points and the balance of the equities is as we've laid out in our brief, including the harm -- there's a mention of harm, but Congressman Forbes's district in District 4 would be dramatically overhauled under either of the special master's proposals as we'll talk about in a minute. So given all of that, I just wanted to make those few points.

So let's go ahead and talk about our objections on the special master. There are two important rules that limit judicial redistricting. The first is the rule in *Upham v.*

Seamon that a judicial remedy may be no broader than necessary to cure the violation, and the second is the rule of *White v. Weiser*, that a federal court must be guided by the legislative policies underlying the enacted plan to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act.

White v. Weiser further held that where a court is faced with a choice between two different redistricting plans, one that serves the legislature's political and incumbency objectives and one that does not, it must choose the one that serves those objectives. The special master's plan --

JUDGE PAYNE: Has that ever actually been held by the Supreme Court of the United States, that it is available for a court to make a decision on the basis of a purely political partisan predicate? I know of no case in which that has ever been approved, and I know it has been done three times under very limited circumstances to limit very unusual factual circumstances basically having to do with fairness, but I've never -- I don't know of any case that would allow us to pursue the objective of what you want here which is an eight-to-three split.

MR. GORE: The Supreme Court's decision in *White v. Weiser* is the most on-point decision in this area. There were two plans before the federal court. There was a plan B -- the plan under challenge was an incumbency protection and partisan

plan. That was conceded, and when it came to a remedy, the three-judge court had two plans in front of it. It had what was called plan B and what was called plan C. And one of those lead to the political impact that the legislature wanted, and the other didn't.

The three-judge court chose the plan that didn't lead to that result, and the Supreme Court reversed and said, no, you should have chosen the other plan.

JUDGE PAYNE: The Court decided it that way, but did the Court actually go through the process of determining whether it was constitutional to effectuate a pure partisanship gerrymander? I don't read *White* that way.

MR. GORE: I don't think there was a partisan gerrymandering claim or challenge in *White*.

JUDGE PAYNE: Right, and the issue I'm raising wasn't raised in *White* as best I know.

MR. GORE: I think the issue we're raising now is a remedial issue which is to what extent does this Court have to respect the policies and decisions of the legislature.

THE COURT: Right, but what you said is we have to follow the legislative policies unless it provides a constitutional impediment, and the question I'm asking you is -- the pure question, doesn't a pure partisanship structure, and using that as the only basis for effectuating a plan, constitute a violation of the Constitution itself, in and of

itself, thereby keeping us from taking it on?

MR. GORE: I don't think the Supreme Court has resolved that question, because in the most recent partisan gerrymandering case to reach the Court, you had four votes holding that that was a political question and one vote saying there might be a standard out there but the Court didn't know what it was. But let me move to our specific objections on the special master's plan.

JUDGE PAYNE: The bottom line is, the Supreme Court has never held that we can do that, effectuate a pure partisan gerrymander; is that correct?

MR. GORE: I don't think the Supreme Court has resolved one way or another the question of a partisan gerrymander -- the constitutionality of a partisan gerrymander. I think *White v. Weiser* is the scenario that we are talking about here which is a remedial scenario.

Let me talk specifically about the special master's proposals. The special master admits that he does not make minimal changes to District 3. He says he makes major changes to District 3 and substantial changes to District 4. I want to try to put these changes into a little bit of context with these exhibits.

This first chart is the chart we've prepared that shows the population moved by the special master --

JUDGE PAYNE: Are these the ones in your brief?

MR. GORE: These are demonstratives --

THE COURT: Do you have any hand-ups? Old eyes have trouble seeing.

MR. GORE: Absolutely, Your Honor.

JUDGE PAYNE: Mr. Robertson, if you'd get them and hand us copies of each, that would help. I guess you can see, can't you?

MR. GORE: The special master says he makes major changes to District 3 and substantial changes to the four surrounding districts. So across these five districts are the only five districts that he changes, but let's look at the extent of those changes.

In his first Congressional modification 16, he moves 1,111,088 people. In his other proposal, it's 1,332,440 people. To put that into context, he's moved 30.5 percent of the total population of those five districts in Congressional modification 16, and he's moved 36.6 percent of the total population in his other plan. That's an extraordinary number.

Another way to think of these numbers is that it's 1.5 or 1.8 whole Congressional districts out of the five that he changes, he moves into some new district. Another way to understand this is to look at maps that are in the record in this case, and that's the next demonstrative we have, is the 1998 remedial map that Judge Payne referred to earlier today.

This was the map that the legislature adopted in 1998

to remedy the *Shaw* violation that was found in *Moon v. Meadows*. This district conformed to all requirements of law when it was adopted, and you see the basic shape of the district. It starts in Richmond and Henrico, goes through New Kent, Charles City, Surry, Isle of Wight, and then uses water contiguity to connect through Hampton Roads and Newport News, Hampton, and Norfolk. This district had a black voting-age population of 50.4 percent.

The next district that we have a map of is the benchmark district. This is the district that the legislature enacted in 2001 after the 2000 census. It retains the same basic shape as the 1998 remedy. It starts in Richmond and Henrico, connects through all these counties, and then uses water contiguity to connect to Hampton Roads. That district had a black voting-age population of 53.1 percent, and it was never challenged under *Shaw* even though there was a challenge to state House of Delegates districts that were adopted the same year.

The next district we have is the enacted District 3 which is the district that plaintiffs challenged in this case. It's here in yellow on this map and, again, retains the same basic shape, runs from Richmond and Henrico down through Surry, picks up Petersburg in this version of the map, and connects by water through the Hampton Roads. This district made some improvements over the benchmark plan. Plan-wide, the benchmark

plan had 19 locality splits. The enacted plan has 14. But it retains the same basic shape, and the black voting-age population here was 56.3 percent.

So let's look now at the plaintiff's alternative plan. This is the plan that the plaintiffs proposed at trial and that was the subject of the liability trial that we sat through last year.

Now, Dr. McDonald, who was the plaintiff's expert, testified that both enacted District 3 and this alternative District 3 closely resembled the benchmark district. This district retains the same basic shape. It made no changes to District 4 or District 7 or District 1. It simply shifted the boundary between Districts 2 and 3. It moved about 200,000 people between two and three.

Again, it retains the same basic shape, and it maintained a majority black voting-age population at 50.1 percent which Dr. McDonald testified was narrowly tailored to avoid vote dilution under Section 2 of the Voting Rights Act. Plaintiffs, as masters of their complaint and theory of liability, thought this district proved the *Shaw* violation in this case.

Let's go now to plaintiff's remedial plan which is the remedy that plaintiffs have proposed this Court adopt, and, again, it retains the same basic shape. It is a Richmond-to-Hampton-Roads district. It's also a majority black

district. It's 51.5 percent black voting-age population. And this is the district that the plaintiffs have asked the Court to adopt in this case.

So plaintiffs, by proposing this district, have conceded that a proper remedy in this case can maintain the same basic shape as District 3 and can maintain a majority black voting-age population.

JUDGE PAYNE: That plan adopts -- changes other districts, doesn't it?

MR. GORE: Their plan definitely changes other districts. It changes --

JUDGE PAYNE: So you're not in favor of the plaintiffs' plan as proposed.

MR. GORE: Absolutely not.

JUDGE PAYNE: You are in favor of the plaintiffs' alternative plan, P-049 in the handout --

MR. GORE: We're not in favor of that. That's illustrative --

JUDGE PAYNE: -- as opposed to the plaintiffs' current plan; is that right or wrong?

MR. GORE: I believe Your Honor is asking me to choose between the lesser of evils.

JUDGE PAYNE: I'm asking you what your view is, because your brief argues extensively that the plaintiffs' alternative plan cured the violation, and if you had your

choice between the two, the plaintiffs' alternative plan offered at the liability stage which cures the problem in their view and the plaintiffs' plan as posited in the remedial phase, you would prefer, I take it, the plaintiffs' alternative plan from the liability phase; is that right or wrong?

MR. GORE: Let me explain what our position would be on that. We obviously don't think there was a violation.

JUDGE PAYNE: I got that one.

MR. GORE: The Court found there was a violation and used the alternative plan to illustrate the violation. The Court praised the alternative plan for some of the changes that it made, and the Court found that it illustrated the violation.

As between the two, the alternative plan is a much better plan than the plaintiffs' remedial plan because the plaintiffs' remedial plan, among other things, changes districts that aren't anywhere near District 3 including District 9 which is in the southwest corner of the state.

JUDGE PAYNE: In your view, is the plaintiffs' alternative plan preferable to either of the plans posited by the special master?

MR. GORE: We think that there are significant problems with the plans posited by the special master. Again, we don't sponsor the plaintiffs' alternative plan.

JUDGE PAYNE: I'm not asking you to do that, but if my choice is to say the plaintiffs' alternative plan is the

right one or one of the special master's is the right one, and those are the only three choices that I'm going to be choosing from, which would you have me vote for?

MR. GORE: I think the plaintiffs' alternative plan does far less redrawing of districts and, for that reason, would be preferable.

JUDGE PAYNE: Thank you. You are not, in saying that, waiving --

MR. GORE: We are not waiving anything --

JUDGE PAYNE: So don't think that and don't worry about it.

MR. GORE: Thank you, Your Honor. Let's turn now to our proposed remedial plans which, like the plaintiffs' remedial plan and the alternative plan and all the plans we've looked at, maintain the same basic shape of District 3. Here's our proposal one. It reunites Richmond and District 3, connects through the Hampton Roads using water contiguity as a 50.1 percent district.

Our plan two, more of the same. Same basic shape, same majority black voting-age population that this Court complimented the plaintiffs' alternative plan for maintaining in its liability opinion.

The special master doesn't say that he ever looked at any pre-enacted versions of District 3. He comes along and redraws District 3 entirely and District 4 in the process.

Look at the next map. District 3 is this district here in purple concentrated in the Hampton Roads. He's moved District 3 entirely out of Richmond, Henrico, Charles City, Prince George, and Surry, he's moved it into Isle of Wight and Franklin city. He's still using water contiguity to connect the districts, and he's cut District 3 in half by his own admission.

He's also cut District 4 in half and moved District 4 into what was the remainder of District 3 to create a second minority opportunity district. This is what moving 1.1 or 1.3 million people across three districts looks like. It's a dramatic overhaul. He's dropped District 3's black voting-age population to 45 percent. He's raised District 4's to about 41 percent all in the name of creating a second minority opportunity district.

JUDGE PAYNE: You are now talking about current Congressional modification 16.

MR. GORE: I am, Your Honor, and now we're going to talk about NAACP modified six which, again, is more of the same. It's even more dramatic. District 3 is this pink district here concentrated in the Hampton Roads, and, again, District 4 has moved into Richmond and Petersburg and Prince George and all those areas of the state.

Again, this is a complete two-district overhaul that the special master has proposed in contrast to the minor

changes that plaintiffs thought demonstrated liability in the alternative plan.

So the special master's scopes of his changes is simply remarkable, and his rationale for making these changes shows that his --

JUDGE PAYNE: Excuse me a minute. You keep saying that the plaintiffs' alternative plan was not their alternative plan, that it was offered for a limited purpose of proving liability. Are you saying -- do you mean by that to say that they offered the alternative plan to prove that something else could have been done, thereby demonstrating that what was done was unlawful? Is that the purpose of the alternative plan --

MR. GORE: Yes, and I think in their view, it cured the violation, because Dr. McDonald testified that it was narrowly tailored to a Section 2 problem. If we can look at the next maps, I think this will clarify it. We're simply making the point right now, in addition to the point Your Honor has just pointed out, that the trial was about the enacted plan versus the alternative plan which are pretty similar districts, both in appearance and in composition, and then what we got as proposed remedies from the special master are these two plans here at the bottom which dramatically redraw District 3 and District 4.

So that exceeds the scope of the violation. It goes well beyond anything that this Court said violated *Shaw*, and so

the special master's own rationale confirms that because he says, the least change requirement only limited the districts he could change but not the extent to which he could change them, and he says that he was trying to cure packing in District 3 and fragmentation in District 4, but there was no finding in this case of any packing in District 3 or fragmentation in District 4.

We didn't litigate a vote dilution claim. We litigated a *Shaw* claim. *Shaw* claims aren't about vote dilution. They're not about packing and fragmentation. They're about an intentional use of race to classify voters through subordination of traditional districting principles.

JUDGE DIAZ: But there was a finding that there was an arbitrary percentage of black voting-age population in District 3 that needed to be remedied.

MR. GORE: But that was a finding to show that there was a *Shaw* violation in that the -- in the Court's view, the legislature had subordinated traditional principles, but there was no finding that that resulted in packing or somehow diluted minority voting strength, and that's exactly what the special master says happened here.

In fact, there couldn't have been any finding of packing or fragmentation on the record in this case because plaintiffs' own expert conceded it away. He said on the stand that there's no packing in District 3. That was his testimony.

He also said that maintaining a majority black voting-age population in District 3 was narrowly tailored to avoiding Section 2 liability under the Voting Rights Act, and now the special master has come in and said there is packing in District 3, and maintaining the majority black character of District 3 would violate some packing principle, whether it's from Section 2 or somewhere else.

Those two things are completely inconsistent. The special master's attempt to cure packing that the plaintiffs conceded away shows that the scope of the remedy is overbroad. It's addressing something that the Court didn't find. It has no basis in the Court's findings, and neither the plaintiffs nor the defendants nor Dr. Grofman have identified any such finding in the Court's opinion.

JUDGE PAYNE: Where in the special master's report do you say he makes -- he says that what he's trying to do is remedy packing and fracturing as opposed to avoiding the happening of it?

MR. GORE: I'd be happy to read from his report, Your Honor. It's on page 65 of his report.

JUDGE PAYNE: All right.

MR. GORE: He says on page 65 in the middle of the second paragraph, "The current configurations of CD 3 and CD 4 reflect a combination of packing of minority voting strength in central and southeastern Virginia in CD 3 and fragmentation of

minority voting strength in central and southeastern Virginia in CD 4 that can and should be remedied."

Special master proceeded to remedy things that the Court didn't find violated any principle of law. This Court cannot enter a remedy absent a finding of a violation. With fragmentation it's even worse, because there was no evidence at trial of any fragmentation and no allegation of fragmentation anywhere at trial, and there's not a word about fragmentation in the Court's liability opinion.

Now Dr. Grofman has come along and said, in fact, just to drive the point home, the plaintiffs' alternative plan didn't make any changes in District 4 at all. The plaintiffs didn't think there was a violation in District 4 and didn't present any evidence to that effect, and now Dr. Grofman has said that there's fragmentation in District 4 that can and should be remedied.

This is not some kind of semantic debate as the plaintiffs and the defendants want to make it out to be. This is a debate with real world consequences. This case would have been litigated far differently if it were a packing or fragmentation case than it was as a *Shaw* case, because *Shaw* and vote dilution claims are different.

For example, the plaintiffs would have been required to show that it's possible to create a second majority black district, but Dr. McDonald conceded that that's not possible to

do, and Dr. Grofman even conceded that in his report.

So this would have been a much different case, it would have been litigated differently. Dr. Grofman says in the supplement he filed on Friday that he was applying a political science definition of packing and fragmentation rather than a legal definition, but all that is beside the point for two reasons.

In the first place, we haven't been able to discern any difference in the political science and legal definitions. Dr. Grofman's definition tracks the wordings of the Voting Rights Act both in Section 2 and Section 5. But even so, even if it were a political science definition or some other definition, there's no finding from this Court that holds -- finds any kind of packing or fragmentation under any definition.

JUDGE PAYNE: In your view, if the plaintiffs' alternative plan were adopted, would it be even appropriate to consider suspending the implementation of the program?

MR. GORE: Implementation of which program?

JUDGE PAYNE: The remedial program.

MR. GORE: Oh, absolutely, because you still have all the same issues that you face if the Supreme Court reverses liability in the middle of the cycle. You still have districts that would have to be redrawn, and you would have changes that would have to be made to the map.

JUDGE PAYNE: He only redrew one district, didn't he?

MR. GORE: There's still disruption as Mr. Raphael noted, that there would be disruption no matter what the Court does, and we won't know in time to revert back to another plan.

JUDGE PAYNE: I didn't say it very well, and I apologize. The disruption would be considerably lessened under the plaintiffs' alternative plan as opposed to the remedial plans offered by the special master in your view or not?

MR. GORE: There would be less disruption because fewer voters are being moved, but I think the fact that there's disruption at all is a common sense reason why the Court should not enter that as a remedy for 2016, because you would have at least some voters and candidates having their districts changed.

Another reason is that plaintiffs' changes, although they involve 200,000 people, which is still fairly significant, change the political composition of District 2. It goes from a toss-up district to a heavily -- what Dr. McDonald called a heavily democratic district. That changes the dynamic --

JUDGE PAYNE: You mean the alternative plan does?

MR. GORE: The alternative plan, yes. Alternative District 2 imperils Congressman Rigell who is the incumbent, makes it what Dr. McDonald called a heavily democratic district which is going to change the dynamic of the election very significantly.

So you'll have all the same problems in term of disruption of candidate expectations, of voter confusion, and you also have costs to the Commonwealth, and apparently, according to Mr. Raphael, there's a risk of error as well the longer this goes on and the deeper it goes into the cycle if there's a change in plan.

JUDGE DIAZ: How does your proposed plan remedy the question raised by *Alabama*, that is the use of an arbitrary percentage to arrive at a sufficient black voting-age population to maintain the district as a minority district?

MR. GORE: That's a great question, and there's been some allegation that we used race predominantly in our remedies, and that's something I just, candidly, don't understand. This Court said that the alternative plan illustrated the remedy, complimented that plan because it maintained a majority black voting-age population --

JUDGE O'GRADY: It identified very quickly a plan that was, according to the defendants, incapable of being done. It didn't really say a whole lot more than that. It was used as an example of why the statement -- that you couldn't draw it without major changes, and so it was used as an example, but the opinion really talked about the fact that the General Assembly chose the 55 percent margin without any kind of empirical data and then went about putting that into effect, ignoring the other requirements in redistricting, contiguity

and the narrow tailoring, and so that Dr. Grofman was required to look at that, and he decided that the district in considering all those, should -- District 3 should be narrowed and include the Norfolk area and that Richmond was -- once that was done and your one-person-one-vote was considered, that left the western side of the present district out just from the one-person-one-vote. And then he looks at, well, what am I going to do with the rest of the district that was District 3 now, and he completed his analysis as we can read.

So I understand your argument about packing, but it really is a product of the General Assembly's decision to use no empirical evidence in originally forming the District 3 as it is which, you know, I think runs you straight into the *Alabama* decision as to how incorrect the General Assembly was in doing that.

MR. GORE: Let me offer a couple of responses. I think there may have been a few questions in there, but if the Court didn't endorse the plaintiffs' alternative plan as a constitutional benchmark, then I don't know how the Court could have found liability. In any constitutional case, you can only decide that something is unconstitutional if you know what the constitutional practice would look like.

So that's what -- that's why the alternative plan was entered in this case, was to show that there was a constitutional alternative out there. And this Court said that

the alternative plan demonstrated that, because it maintained a majority black voting-age population while improving on locality splits and improving on compactness.

JUDGE O'GRADY: So your position is that if there had been no alternative plan proposed, we could not have found a constitutional violation?

MR. GORE: I think that's the clear holding of the Supreme Court in *Easley v. Cromartie*, but even more to the point here --

JUDGE PAYNE: That's a vote dilution issue, isn't it?

MR. GORE: *Easley v. Cromartie*? No, *Easley v. Cromartie* is a *Shaw* case.

JUDGE PAYNE: No, but the use of the map is required in dilution cases whereas it is not required in Section 5 cases where you are arguing predominance as a motive; isn't that right?

MR. GORE: No, I don't believe that's correct, Your Honor. I believe it's required in both cases for the reasons I just articulated.

JUDGE PAYNE: Didn't the majority opinion and even the dissent both say that that wasn't the rule here, that a plan wasn't required?

MR. GORE: Yes, but one of the issues we've raised in the Supreme Court is that *Easley v. Cromartie* requires that, but just more generally, how was anyone supposed to draw a

remedial plan if we didn't know what the violation was, and the alternative plan was an illustration, as this Court said, demonstrated the violation, and we're better than the alternative plan on those factors. We maintain a majority black district just like the alternative plan. We improve on locality splits. We get locality splits all the way down to 12 in the plan in our proposal one. We improve on the compactness of the district, and we serve the legislature's preferred policies much better.

JUDGE DIAZ: The alternative plan was submitted to the Court without the benefit of a racial bloc voting analysis. We have that now. We have numbers that more specifically identify the logical thresholds that should be met in this case. Why shouldn't we consider that?

MR. GORE: Well, if the Court is inclined to draw a district to the lowest non-retrogressive level, I don't see how that can be done without making race the predominant consideration. Any time you would choose any predetermined level of black voting-age population, you would have to tailor the district to get there because every move you would make would move you off of that.

And so I don't see how that would be any different than what was alleged to have happened in the enacted plan, but to get back to the point about our plan, we did not use a racial -- arbitrary racial threshold. We redrew the district

according to the alternative plan that this Court endorsed.

Let me make a couple of other points about Dr. Grofman's proposed plan. For one thing, it's conceded that his plan has very low core preservation numbers. Now, this Court held that politics and incumbency protection inarguably played a role in the enacted plan and that the legislature achieved that goal through core preservation, but Dr. Grofman's plans performed very importantly on core preservation.

For example, the Court said -- criticized enacted District 3 because it moved about 180,000 voters in and out of District 3, but Dr. Grofman's plans both move 600,000 or more people in and out of Districts 3 and Districts 4. He reduces the core preservation compared to the benchmark plan by as much as 40 percent even though Dr. McDonald testified at trial that 13.9 percent reduction in core preservation would be significant. That's the amount of core preservation reduction in alternative District 3 compared to enacted District 3.

So, again, there are problems under *White v. Weiser* with Dr. Grofman's plans because they don't advance the policies of the legislature, and as we've mentioned, it's worse politically, it's worse on incumbency protection, both of which the Court held inarguably played a role in the enacted plan, and as we pointed out in our briefs, Dr. Grofman said that his highest priority was, one, complying with one-person-one-vote and then avoiding packing and fragmentation and retrogression.

That's exactly what Delegate Janis said in the floor debates and exactly what this Court held indicated use of race as a predominant factor. So under this Court's own decision, Dr. Grofman's plans would run afoul of the *Shaw* standard as this Court applied it in addition to obviously subordinating the traditional districting principles I've mentioned and not doing any better than the enacted plan and certainly doing worse than our plans on locality splits, both plan-wide and in District 4 which he draws as a second minority opportunity district to cure fragmentation and packing this Court never found.

So for all of these reasons, the Court should not adopt either of Dr. Grofman's proposals in this case because neither is an appropriate remedy.

THE COURT: We'll take a 20-minute recess and resume.

(Recess taken.)

MR. RAPHAEL: Stuart Raphael for the Commonwealth defendants. I'd like to start with the master's conclusion rejecting the intervenor defendants' proposed plans. We agree with the special master that those plans ought to be disqualified because they did use a racial target in coming up with their proposed BVAP scores.

The evidence at trial was that the alternative plan

that the plaintiffs offered had a BVAP score of 50.2 percent. The intervenor seems to think that this Court somehow embraced that as the right number which, as the Court pointed out, it did not do, and, yet, the intervenors have now said they targeted that number in coming up with their plans.

JUDGE PAYNE: How do you ever make a judgment like this without considering the BVAP figure?

MR. RAPHAEL: You have to consider BVAP, but really the question is how do you draw the lines and when do you look at the BVAP, and what the master did, which we think was the right way to do it is, you redraw the lines not using race as the predominant factor, using traditional factors, and as the master explained, and maybe, Mr. Cox, if you could put up the map, as the master explained -- this is a page from our brief, Your Honor. It's ECF 290 at page 23, and I've blown up the map so you can see them better.

What the master did was he said, look, when you look at the enacted CD 3, there are really, for lack of better terms, two nodes to it. There's the node in the Tidewater area and the node in the Richmond area. The first map shows Congressional modification plans on the left, and the NAACP modification plan is on the right.

JUDGE PAYNE: Are they population nodes or are they racial population --

MR. RAPHAEL: Those are population and locality nodes

in terms of -- as he points out, when you use traditional factors of keeping communities and localities together and you see that the bulk of the district is in the Tidewater area and when you draw a map around that area, you already have about 90 percent of what you need to get to the correct population number.

So what the master did was not use race as the predominant factor. He redrew the map appropriately using nonracial considerations, but then you do have to evaluate it for Voting Rights Act purposes. The way you do that is you say, okay, what is the BVAP. Well, it turns out it's in the low forties. Is that high enough so it doesn't retrogress? Answer yes, because we know from Dr. Handley's racial bloc voting analysis which was submitted by the governor and from Mr. McDonald's racial bloc voting analysis that was admitted at trial that the BVAP you need to avoid retrogression is in the low thirties, and as the master said, something in the low forties would be enough to avoid retrogression.

So strict scrutiny does not apply to what he did, because he didn't make race the predominant factor, but what the intervenors are doing is they're saying, oh, we need to hit a milestone, a target of 50.1 or 50.2 percent. Once you do that, that does make race the predominant factor. As Judge O'Grady said, you are just substituting -- you would be substituting one racial target for another and, therefore,

strict scrutiny would apply to it.

Okay, do you have to have 50.1 percent, is that narrowly tailored? Answer, no, because we know from the racial bloc voting analysis that the number's a lot less than that. So that's the difference.

I think that they have disqualified their plan by conceding that they picked a racial floor. They just have a different number than 55 percent. They have 50.1 percent. So I think the Court would commit reversible error by adopting their plan. That one ought to be disqualified.

The right way to do it is, as I've said, is to use nonracial considerations, and the master explains all of this, I think, very well in his report. You use nonracial --

THE COURT REPORTER: Mr. Raphael, I need you to slow down.

MR. RAPHAEL: I apologize. I'm a recidivist when it comes to that, and I'll try to do better.

THE COURT: You know what happens to them, don't you?

MR. RAPHAEL: Yes, I do.

JUDGE PAYNE: Under Virginia law.

MR. RAPHAEL: We wouldn't want that to happen. So, the master did it the right way, used nonracial considerations. As you can see from the map, he said, let's center the third Congressional district in the Tidewater area. There are different ways of doing it. He came up with two alternatives

of that. And that means that what used to be in CD 3 needs to go somewhere else, and he said it properly belongs in CD 4. That's consistent, by the way, with what happened --

JUDGE DIAZ: I guess the argument could be made that centering the district in the Tidewater area is taking race into account.

MR. RAPHAEL: I think the way he explains it is, you were aware of what the communities of interest are. We know that the communities in the Tidewater area have a high minority population, but that's not why he did it. He did it with the knowledge of that, but as *Shaw* explains and all of those Supreme Court cases explain, knowing what the racial effect is doesn't necessarily mean that race is predominating.

He didn't draw the lines in order to get to a particular BVAP number. He drew the lines to keep communities of interest and localities together. That does not -- that clearly does not make race the predominant factor. So strict scrutiny doesn't apply to it.

You then have to evaluate what he did, as I said, and you do that by looking at what the BVAP score is and determining from a functional analysis whether that's high enough to avoid retrogression, and it is. I think that's the correct way to go about doing it.

I think Mr. Gore misstates the evidence at trial about packing. He says, you know, the plaintiffs' expert,

McDonald, testified there was no packing. We explain this at page 11 and 12 of our brief. He's taking out of context what McDonald said at trial. McDonald had a very narrow definition of packing which was putting so many black voters in one district that you would disable the state from having two minority/majority or minority-influenced districts.

That's very different from how we've been using the term or the special master has been using the term of packing which is putting way more black people in a district than you need to protect the minority ability to elect.

JUDGE DIAZ: Is there any consistency in the master's assertion that he effected the least change possible to the districts as a whole and the intervenor defendants' claim that there were massive movements of people across the districts?

MR. RAPHAEL: That's their core preservation argument, and, Trevor, if you could put up the next slide. The next slide, Your Honor, is from Mr. Cox's declaration. This is ECF 291-1, the summary chart that we put together, and the master has cited this in his supplemental report.

So the -- I think that the intervenors have engaged in a bit of sleight-of-hand when it comes to talking about core preservation. On the one hand, they say, you've got to stick with the legislature's enacted plan as much possible; right? On the other hand, when they give you the core preservation numbers that they just showed you, they are comparing what the

master's plan does against the 2002 benchmark; right? So they're going back more than one plan, and that pumps up the core preservation or -- or decreases the core preservation percentages.

It showed, for example, CD 1 as being like 56 percent core preservation when you skip over the enacted plan and compare the benchmark, the 2002 plan to the master's plan. What we did in this chart for core preservation is we looked at the changes the master made to the enacted plan, the 2012 plan, and what you will see in the far right column is that the changes to the enacted plan by his two plans are actually within -- well within the range of what the General Assembly did in 2012 for CD 1, CD 2, and CD 7, and depending on which plan you like better, you have higher core preservation in the Congressional modified 16 plan than in the NAACP modified six plan, but all of them are within the range of what the General Assembly had allowed when it redrew the districts the first time around.

But the other thing to keep in mind about core preservation is that to insist on a high core preservation simply is another way of saying you don't want to change the districts very much, but having found that CD 3 is unconstitutional and has to be remedied, you have to fix it, and the master came up with a least change approach to fixing CD 3 using a method that does not make race the predominant

factor, and it results in a significant population move. That's a given.

That population move goes into CD 4. That's why the core preservation numbers are lower for CD 3 and CD 4, but to say we want high core preservation is another way of saying we don't want to unpack it very much. That's the trade-off.

JUDGE PAYNE: Of the two plans that were proffered by the special master as desirable, which do you think is the preferable one?

MR. RAPHAEL: The defendants have not taken a position as between the two plans.

JUDGE PAYNE: So far you haven't. Now I'm asking you if you will.

MR. RAPHAEL: We don't, Your Honor, and here's why: The Congressional modified 16 plan has higher core preservation, but it has lower -- it has a worse performance when it comes to locality splits.

I think the numbers are -- the total number of locality splits for the enacted plan for these five districts is 22. For Congressional modified 16 the total is 18, and for the NAAC modified the total is 16.

So if you want to -- you can trade off core preservation, you have more people moved, but you get fewer locality splits, and that's -- I think either of those decisions is appropriate, and that's why the defendants didn't

take a position as between those two plans. The governor has said he prefers the Congressional modified plan because it results in fewer people being moved, but the defendants don't have a preference as between the two of them.

Another way to think about core preservation is that you are dealing with five districts here, the CD 3 and the ones immediately around them. Each district has an ideal population it's got to get to of 727,000 people. Multiplied by five, that's 3.6 million people in those five districts, and every move from one district means you are moving an equal number of people into one or more of the others.

The moves here under the master's plan affect about 30 percent of the people net in those five districts, but, again, there's a trade-off between core preservation and improving locality splits and improving contiguity, and if you go back to the map, there's a section of the intervenor defendant's argument where they say, well, the Reock scores are, you know, confused because the master's numbers were different from McDonald's numbers at trial.

I think that the supplemental declaration from Kevin Hamilton explained that there was an error in the Reock numbers, but when the right numbers are in there, it shows that the revised CD 3, either one of them, is considerably more compact than the enacted one, and that's just obvious.

If you look at the map, I have got on the top two

that shows you Congressional modified on the left, NAACP on the right. The orange was the enacted CD 3. The blue is the one that the special master is recommending. It is obviously more compact. It's obvious, and as the master points out, it's two to four times more compact than enacted CD 3.

So it's a trade-off. By adopting one of the two master's plans, you are fixing the constitutional violation. It's wrong to say, as the intervenors do, that the master went out of his way to fix a fragmentation problem in CD 4 that no one complained about before. He is absolutely clear in his report, and he's clarified it even further in the supplemental report, he didn't set about to fix any problem with CD 4, but the problem with packing in one district is it's the opposite side of the coin of fragmentation or cracking in the other district. So by fixing the problem in CD 3, it had the effect of fixing the fragmentation problem in CD 4.

JUDGE DIAZ: The fact that packing and cracking, however you want to define it, wasn't the focus of the Court's opinion the first time around, does that somehow limit the remedial choices here today?

MR. RAPHAEL: I think that the right remedial solution is a least change approach to CD 3, but, as the Court said in *Milliken*, you've got to fix the problem, and here you fix the problem by coming up with a solution to how you draw CD 3 that does not make race the predominant factor but that

generally respects the General Assembly's approach, and I think the master's solution to that is quite eloquent.

Now, having found that his -- that centering CD 3 in the Tidewater area is the right solution, you've got to move the voters who have to be put somewhere else, and he selected CD 4 because the orange area, as you'll see in the old CD 3, is right next to CD 4 and it doesn't -- the same thing happened in the earlier redistricting case where the city of Petersburg was moved out of the CD 3 back into CD 4.

You are centering CD 4 around the Richmond area which is where it properly belongs as opposed to having a snaking district that has a node in Tidewater and a node in Richmond. But I think the master is clear that the -- he did not go about, on purpose, to fix a problem in CD 4. It was the byproduct of fixing the cracking problem in CD 3. The Court, we think, should adopt one of the two remedial plans.

You know, we were on their side at trial. We defended these districts at trial with the defendants, with the intervenors because we thought it was defensible, but the Court, having found these districts unconstitutional, it needs to fix them, and it was wise to employ Special Master Grofman who came up with a very elegant solution. We think either of them would fix the problem and would be desirable to have, and the Court should choose one of them.

JUDGE PAYNE: All right. For the plaintiffs?

MR. DEVANEY: John Devaney again for the plaintiffs, Your Honors. I'll be brief. Mr. Raphael said most of what I would have said. I just want to make it clear for the record that the plaintiffs also support either of the special master's plans.

We do have a preference for Congressional modification plan 16 because of its better core preservation than the NAACP version, but that said, we are comfortable with either plan, and we would again urge the Court to adopt one of those two plans and do so in time for the 2016 election, not making it conditional.

JUDGE PAYNE: What's wrong with the alternative plan that you proffered at trial as saying it was a constitutionally acceptable solution that could have been adopted but wasn't in your effort to prove your case?

MR. DEVANEY: Your Honor, that plan, of course, was submitted into evidence for the purpose of demonstrating how the district could have been drawn without race as the predominate purpose. It was put into the record not as a remedy but as a demonstration that the General Assembly engaged in racial gerrymandering.

JUDGE PAYNE: Yes, you did, but now that it's there, it's something that can be considered, and my question is, what's wrong with it as a remedy? It seems to me like your expert sponsored it, you all sponsored it and thought it was a

constitutional remedy. Tell me why you don't think it is if you do not think it is, or if you think it is, would you mind saying why you think it is.

MR. DEVANEY: Your Honor, we do believe it is a constitutional version of the map. That said, it was a map that was drawn before the Court issued its two decisions in this case, and the special master's maps both respond directly to the Court's decisions.

We think his maps implement the decisions more precisely than the map that we created before the trial even began. That said, as a fallback, if the Court is inclined not to adopt either of the special master's two maps or the map the plaintiffs put in as a remedy, certainly the map we introduced in the liability phase of the trial would be a fallback for us. It is constitutional, it is acceptable. For the reasons I stated, we think the special master's two maps are preferable. Thank you.

THE COURT: Anybody have anything else, any questions for the parties? Mr. Raphael has something.

MR. RAPHAEL: Just two clarification points on the alternative map that was offered at trial. I agree with the plaintiffs' version that they didn't offer that as a remedy. I don't believe the special master has evaluated the alternative plan. The Court's order asked him to evaluate the ones that were offered at the remedial stage, but he didn't evaluate the

alternative plan, so I don't know that that's been vetted.

My other concern about the alternative plan is I don't know enough about how it was devised to know whether it used intentionally a racial threshold above 50 percent, and I would worry about that aspect of it. The thing that makes the master's plans so desirable is that he makes it clear that he did not use race as the predominant factor in drawing the map. That is essential, and that's why I think either of his two plans is the best.

JUDGE DIAZ: Mr. Raphael, before you sit down, Judge O'Grady asked the parties earlier in the motion to suspend whether combining the liability with the remedy and sending it up to the Supreme Court would allow the Court to decide the case before the end of its term. Do you have a position on that?

MR. RAPHAEL: I don't think that the remedial piece of it can catch up to the liability piece of it. My other concern about tying them together like that is you're going to give these gentlemen the argument of, see, it's really the same thing, liability is remedy, and I think they are different. The Court has ordered a remedy --

JUDGE PAYNE: Run that up the flagpole again.

MR. RAPHAEL: If the Court says that we're going to implement the remedial plan conditionally upon the Supreme Court affirming, you're going to see those folks argue that,

see, liability and remedy are really all the same, and I think they are different. I think the Court has determined liability. The Court's order and the memorandum opinion requires a new remedy to be drawn, and that's what we're doing now. And that is a separate thing from appealing liability.

So just like in the *Larios* case, the Court determined that the plan was invalid, it ordered an interim plan. There was an appeal on the liability piece of it. I don't think the remedy was separately appealed, but they are different things, and when the Supreme Court gets this case and hears it, hopefully in February, it will be on the liability issue, and we would urge the Court not only to finish work and adopt a remedial -- one of the two of the master's remedial plans as the right plan but also to implement it now.

JUDGE PAYNE: Suppose we were to adopt the plan today and tell you we've made our decision and this is it. Are you telling me you couldn't get that before the Supreme Court in time for them to decide the merits of the case on liability?

MR. RAPHAEL: I'm not telling you that, Your Honor, because the way that would play out, if the Court said, we adopt one of the two master's plans and this is the plan that is in effect beginning in January, which is what we think you should do, but what would happen is these gentlemen would file an application this month, probably within a few days, with the U.S. Supreme Court asking to stay that ruling. We'd brief it,

and the Court is going to decide that.

So the stay issue is going to be decided one way or the other by the Supreme Court. This Court's job, respectfully, ought to be to make the best call that you can on what the right answer is, and you do that by applying the four-factor test, and what is dispositive in this case is likelihood of success on the merits. They're not likely to succeed on the merits, so you should put in place the plan that we're likely going to need in November.

JUDGE PAYNE: Thank you. Anything else from the intervenor defendants? No? Thank you. The matter is submitted.

(End of proceedings.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/
P. E. Peterson, RPR

Date