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

DAWN CURRY PAGE, et al.,

Plaintiffs;

v.

Civil Action

3:13CV678

VIRGINIA STATES BOARD OF ELECTIONS,
et al.,

Defendants.

May 12, 2014
Richmond, Virginia
2:00 p.m.

TELECONFERENCE

BEFORE: HONORABLE ROBERT E. PAYNE
United States District Judge

APPEARANCES: JOHN M. DEVANEY, ESQ.
KEVIN HAMILTON, ESQ.
MARK B. RHOADS, ESQ.

Counsel for Plaintiffs;

MICHAEL A. CARVIN, ESQ.
MIKE MELIS, ESQ.
JOHN M. GORE, ESQ.

Counsel for Defendants.

JEFFREY B. KULL
OFFICIAL COURT REPORTER

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P-R-O-C-E-E-D-I-N-G-S

(TELECONFERENCE)

THE COURT: Hello. This is Page against Virginia State Board of Elections, 3:13CV678. Please identify yourselves, starting with the plaintiff, and who you represent. And when you speak, please give your name so the court reporter can identify you.

MR. DEVANEY: John Devaney on behalf of the plaintiffs with the law firm Perkins Coie.

MR. HAMILTON: Kevin Hamilton from the law firm Perkins Coie representing the plaintiff as well.

MR. RHOADS: This is Mark Rhoads from McCandlish Holton also representing the plaintiffs.

MR. CARVIN: This is Michael Carvin representing the intervenor defendants.

MR. MELIS: This is Mike Melis with the State Board of Elections defendants.

MR. GORE: Your Honor, this is John Gore of Jones Day representing the intervenor defendants.

THE COURT: All right. Thank you very much, gentlemen. I need to touch base with you on a number of matters respecting the trial. I have reviewed the orders and the pleadings in the case. And there were provisions

1 for expert witness disclosures and discovery deadlines and
2 witness exhibit and deposition designations to be
3 exchanged by the, I guess it was the 7th of April -- 11th
4 of April, I guess it was. And after that deadline passed,
5 there was the litigation over the subpoena issued to
6 Mr. Marston. Have those documents been produced,
7 Mr. Devaney?

8 MR. DEVANEY: Your Honor, this is John Devaney
9 for the plaintiffs. We just received those documents this
10 morning, Your Honor, and we are in the process of
11 reviewing them. And Your Honor, if I could mention one
12 more procedural item while I have your attention: I have
13 on the line with me, and he introduced himself before, my
14 partner, Kevin Hamilton. And Kevin has been involved in
15 this case from -- Mr. Hamilton has been involved in this
16 case from the start. And as you know, I've been taking
17 the lead up until now. I actually have a simultaneous
18 trial in a Florida redistricting case that begins a week
19 from today, so I will not be attending the trial in this
20 matter. And Mr. Hamilton is going to be stepping in and
21 taking over as lead counsel. I wanted to introduce him
22 and explain our transition.

23 THE COURT: All right. Well, I guess
24 Mr. Hamilton will be speaking for the plaintiffs then in
25 this conference; is that right?

1 MR. DEVANEY: Yes, Your Honor.

2 MR. HAMILTON: That's correct, Your Honor.

3 Thank you very much. I look forward to appearing before
4 you.

5 THE COURT: All right. Well, it is a pleasure
6 to have you, Mr. Hamilton.

7 So I guess the real question that I have now is,
8 how many documents were produced in response to the
9 subpoena after the order was issued, the orders were
10 issued?

11 MR. HAMILTON: From our initial examination, it
12 appears to be around a thousand pages of materials were
13 produced this morning.

14 THE COURT: That's Mr. Hamilton?

15 MR. HAMILTON: That is. I'm sorry, Your Honor.

16 THE COURT: All right. So you don't know what
17 the substance of the documents is.

18 MR. HAMILTON: That's correct. We have the
19 documents in hand and we are quickly reviewing them as
20 rapidly as we can this morning in order to determine the
21 substance and whether there are any that we intend to
22 identify and mark as potential exhibits.

23 THE COURT: But exhibits have been identified
24 and served on each other and the objection process has
25 gone forward; is that correct?

1 MR. HAMILTON: That's correct, Your Honor. To
2 date, the parties have worked really cooperatively to try
3 and streamline this trial. And any party can correct me
4 if I am wrong here, but I believe at least as to all the
5 documents that have been identified and marked as exhibits
6 to date, there are no objections as to either authenticity
7 or admissibility. And I anticipate that, and I hope that
8 when we appear before you next week, that will remain
9 true.

10 THE COURT: Well, we are going to need to settle
11 that out, settle that before trial if we can, but at least
12 we are going to need to identify the ones you have
13 objections to, if anybody has objections, and what those
14 objections are in some kind of orderly procedure. And
15 given the way that you all have worked together, perhaps
16 you all can talk a little bit further after we are
17 finished today and you get your hands around the magnitude
18 of documents that you think you might want to use, and get
19 back in touch later, a little bit later in the week as to
20 whether there remains -- whether there is a problem with
21 respect to any exhibit or group of exhibits. But for now,
22 as I understand it, you all have agreed that as to each
23 side, there are no objections to the authenticity or
24 admissibility of the documents that each side intends to
25 offer as exhibits; am I correct with that, Mr. Hamilton?

1 MR. HAMILTON: You are correct, Your Honor.
2 There are no objections from any party as to any of the
3 documents that have been identified to date, and I
4 anticipate the universe of any potential future objections
5 would relate solely to any documents that we identify as
6 exhibits from this last batch of documents we received
7 this morning.

8 THE COURT: Right. Mr. Marston.

9 MR. CARVIN: This is Mike Carvin. Mr. Hamilton
10 accurately recited the state of the exhibits thus far, and
11 I'm happy to have a follow-up call with Mr. Hamilton. But
12 I'm a little worried you won't be able to give us
13 realistic estimates of what if any documents from the
14 Marston documents you want to introduce, so I was
15 wondering, Kevin, if you could give us some indication
16 when you would be in a position to let us know; because as
17 Judge Payne just indicated, we would like to work out any
18 issues prior to trial, not the day of.

19 MR. HAMILTON: This is Mr. Hamilton. Given the
20 scope of the document production, I would say end of the
21 day Thursday we should be able to identify any potential
22 exhibits we might want to offer in our case in chief, and
23 then perhaps we could set up a call on Friday morning and
24 alert the Court that afternoon if there's any issues.

25 THE COURT: Excuse me just a second. How many

1 are there, a thousand documents or a thousand pages?

2 MR. HAMILTON: Pages, Your Honor. Counsel that
3 produced the documents, I guess, is not on the phone, so
4 they can't confirm one way or another. But I believe it
5 is a thousand pages, not documents.

6 THE COURT: If you were to look at them, in the
7 old days, about a hundred pages was about an inch, so if
8 you are looking at them, do you estimate that you have
9 about ten inches of documents to go through and decide --

10 MR. HAMILTON: Your Honor, I, like you, I like
11 to look at documents on paper copy. And these have all
12 been transmitted to us electronically, so we haven't had a
13 chance to print them out. A thousand pages is about two
14 reams of paper. And so I don't anticipate that we would
15 have any trouble getting through them. And if Your Honor
16 believes that we should identify the trial exhibits
17 sooner, we can certainly do that. I would like to have
18 enough time to review them and consider whether we really
19 need them or not, because I really don't want to overload
20 the Court with exhibits that aren't useful or have a
21 point.

22 THE COURT: Let's do this. This is Monday. You
23 got them today. Let's shoot for you having, identifying
24 for Mr. Carvin and Mr. Melis the documents that you think
25 you are going to want to introduce into evidence by Monday

1 morning -- I mean by Wednesday morning at 9 o'clock. And
2 then you all talk on the telephone and get back in touch
3 with me late Thursday afternoon and let me know if there
4 is a problem that we are going to have to hear argument
5 on, et cetera, on Friday. And I will need to see the
6 documents, I think, in order to rule on them. As a
7 general proposition, that happens to be something that
8 makes the process go better. So you will need to work out
9 a way to e-mail them to me or something so that I can read
10 them and look at them. You think you can work on that
11 schedule on that, Mr. Hamilton, for now?

12 MR. HAMILTON: Absolutely, Your Honor. Just a
13 point of clarification, that would be 9 a.m. eastern time.

14 THE COURT: Where are you?

15 MR. HAMILTON: I'm in Seattle.

16 THE COURT: Eastern time is what I had in mind.
17 I don't mean to make your life hard.

18 MR. HAMILTON: It doesn't, Your Honor. I am
19 happy to meet that deadline. I just want to be clear.
20 That actually allows us more time for Mr. Melis and Mr.
21 Carvin to have a chance to look at them. So it is not an
22 issue for us and we will meet that deadline.

23 THE COURT: The fact of the matter is, given
24 that there is a late production, if something later comes
25 up that you feel like is important and you need to get it

1 in front of the Court, we will have to deal with it. But
2 let's try to get the bulk of it out of the way by Thursday
3 and Friday on a hearing if necessary. Do I have my book
4 here?

5 MR. HAMILTON: All right. And Your Honor,
6 should we just inform the Court by telephone call to
7 chambers on Thursday if we have an issue?

8 THE COURT: Yes. You all, let's schedule now a
9 conference call for about 4 o'clock, 4:30. Can we do
10 that?

11 MR. HAMILTON: That's fine with me, Your Honor.

12 MR. CARVIN: That's fine -- this is Mr. Carvin.
13 That's fine with intervenor defendants as well.

14 THE COURT: Let's try for 4 o'clock to see where
15 we stand. And if we have to have a hearing on the issues,
16 we will have it at 10:30 on the 16th. Actually, we will
17 give you more time to sort it out if we have it at 1:30 on
18 the 16th, which is Friday. Is that available to you all,
19 gentlemen?

20 MR. HAMILTON: Your Honor, 10:30 -- I assume all
21 these times are eastern times -- 10:30 would work.
22 Unfortunately, at 1:30 I'm on an airplane until --

23 THE COURT: You don't get in here until late
24 then, do you?

25 MR. HAMILTON: Sad to say, I'm flying to San

1 Diego first where I've got a conference on Friday and
2 Saturday, and then flying into Richmond. But I'm
3 available, I really apologize, Your Honor, I could be
4 available at any time after 3 o'clock on Friday if it is
5 necessary to have a hearing.

6 THE COURT: All right. Let me ask you this
7 question: Are you not available then Thursday afternoon,
8 did I hear you say?

9 MR. HAMILTON: Thursday afternoon I absolutely
10 am available and will make myself available at any time
11 for the Court's and parties' convenience.

12 THE COURT: On Friday you could have a
13 conference if there is anything that is disputed that we
14 need to sort out at what time, Mr. Hamilton?

15 MR. HAMILTON: At either the 10:30 eastern time
16 that you identified before, that's 7:30 in the morning
17 here, and that's fine, I can do that, or at any time after
18 3 p.m. eastern.

19 THE COURT: All right. Why don't we make it at,
20 would it be easier for you to do it at 10:30, or are you
21 trying to catch a plane or something and need to get out
22 of there?

23 MR. HAMILTON: I appreciate your concern, Your
24 Honor. 10:30 would be fine. That's just fine.

25 THE COURT: Mr. Carvin, do you get to work --

1 MR. CARVIN: 10:30 is fine.

2 THE COURT: Do you get to work by 10:30 up there
3 in the nation's capital?

4 MR. CARVIN: Very rarely, but I'll set my alarm.

5 THE COURT: Okay.

6 MR. CARVIN: 10:30 is fine with us.

7 THE COURT: That's if needed. I don't know who
8 initiated this call, but the other side can initiate the
9 other one. You all can work it out amongst yourselves.
10 That takes care of those tentative plans, and we may not
11 need them at all.

12 The next thing I'd like to know is how many
13 exhibits and how many witnesses do you have and how long
14 do you think your respective presentations or the trial
15 will take? Start with you, Mr. Hamilton. How many
16 witnesses do you have?

17 MR. HAMILTON: We have one witness, Your Honor.
18 It is Dr. McDonald. He is our expert.

19 THE COURT: All right. And how many exhibits do
20 you have?

21 MR. HAMILTON: We have identified 51 exhibits,
22 and all of which are stipulated. And then, of course,
23 there may be a handful of extra ones from this latest
24 document production. But as it stands today, there are 51
25 exhibits that plaintiff has identified. We are working

1 with defendants' counsel in order to try and eliminate all
2 of the duplicate exhibits from both sets, because in some
3 instances, the plaintiffs and defendants have identified
4 duplicative exhibits and given them two different numbers.
5 We are going to eliminate all the duplicates and renumber
6 that and exchange exhibits and provide the Court with a
7 consistently numbered and hopefully slightly reduced set
8 of exhibits.

9 THE COURT: For the defendants, Mr. Melis, what
10 do you have? Do you have a combined set?

11 MR. MELIS: Your Honor, I have 51 -- I'm sorry,
12 not 51 exhibits. I just wrote that down. I have 27
13 exhibits that I have identified in our trial exhibit list.
14 And I believe, I haven't had a chance to confer with
15 Mr. Hamilton, I think he has been conferring with the
16 intervenor defendants about the extent to which exhibits
17 are duplicative or not, and I'm happy to be involved in
18 trying to eliminate duplicates as well.

19 THE COURT: All right. Mr. Carvin, how many
20 exhibits do you have?

21 MR. CARVIN: We have 55 exhibits. I think that
22 we have completed the process that Mr. Hamilton described
23 a minute ago of eliminating duplicates, et cetera, with
24 the plaintiffs, and we will plug Mr. Melis into that very
25 shortly. And I would think by tomorrow we should all have

1 a pared-down, non-redundant list.

2 THE COURT: Okay.

3 MR. CARVIN: May I ask one question in that
4 regard, Your Honor? It is just a -- we should deliver
5 exhibit binders to the Court, and I think the rules say an
6 original plus two. So I was just wanting to ask Your
7 Honor how many exhibit binders should we provide given
8 that there's three judges, and to avoid confusion and
9 potential mishaps, we were thinking of delivering these to
10 Richmond hopefully to your chambers this week. But
11 obviously, I wanted to know if there was a better way to
12 get the exhibit binders to the individual judges.

13 THE COURT: Well, I think that you need three,
14 one for each judge, and then one set for the witness. And
15 the witness set will be the Court's set, the official set.
16 And it is fine for you to -- right now, unless you hear
17 differently from me, you can deliver them to our chambers
18 and we will get them to the courtroom on Monday. We will
19 put them in there Monday afternoon. And that will be all
20 right.

21 Are you using deposition designations,
22 gentlemen? Mr. Hamilton, are you using deposition
23 designations of anybody?

24 MR. HAMILTON: We are not, Your Honor. To the
25 extent we are using the depositions, it will be for

1 impeachment only. We don't intend to offer the
2 transcripts by designation.

3 THE COURT: How about you, Mr. Carvin, are you
4 offering evidence by deposition?

5 MR. CARVIN: No, Your Honor, we would use it
6 strictly for impeachment as well.

7 THE COURT: How about other discovery:
8 Interrogatories, Requests for Admissions, so forth? Are
9 either of one of you offering that kind of evidence,
10 Mr. Hamilton?

11 MR. HAMILTON: No, Your Honor. there are some
12 transcripts of some hearings before the General Assembly,
13 but those have been already transcribed and provided to
14 counsel and there is no objection as to the authenticity
15 or admissibility of those.

16 THE COURT: All right.

17 MR. HAMILTON: This is one thing, the one
18 wrinkle I might add is, there are some DVDs or videos of
19 those same hearings. For the Court's convenience, we have
20 offered both, we have offered the DVD, a physical DVD, and
21 then in addition the transcript of the hearing. So the
22 numbering might change here, but it is Exhibits 46 and 47.
23 So the Court can either watch it if it wants to see the
24 actual video, or read it in the transcript, which may be
25 more accessible and easier to find.

1 THE COURT: I don't know about the other judges,
2 but I can read faster than people talk. There's some
3 lawyers that the court reporters would take issue with,
4 but I don't think either one of you are in that category.

5 Okay, well, you go ahead and get, leave them in
6 there. That's the next question I have. Well, let's see,
7 I didn't get to you, Mr. Carvin. How many witnesses are
8 you going to have, Mr. Carvin?

9 MR. CARVIN: Just one expert witness,
10 Mr. Morgan.

11 THE COURT: How about you, Mr. Melis?

12 MR. MELIS: We are relying on Mr. Morgan as
13 well, Your Honor. We don't have any additional witnesses.

14 THE COURT: All right. Do either one of you
15 plan as part of your expert's presentation or otherwise to
16 be using the technology system in the Court that displays
17 the exhibits on screens and you can highlight them, et
18 cetera, or display them in a highlighted fashion? Do
19 either of you plan to be using that system? Mr. Hamilton?

20 MR. HAMILTON: Hamilton. Yes, Your Honor, we do
21 intend to use that. And our paralegal has been in touch
22 with the courtroom deputy with respect to a technology
23 walk-through on Monday, the day before the trial
24 commences. But we had hoped to use both the PowerPoint
25 presentation in connection with opening statement and

1 during the expert examination, and then in addition, I
2 understand the courtroom has an Elmo projector, so with
3 Mr. Rhoads's able assistance, we will be hoping to use
4 that as well. Finally, just to complete the triad, we
5 will probably have a few maps blown up on a board on
6 easels, and again, we are preparing a letter for the
7 Court's review requesting permission to bring in certain
8 electronics to help us display that. Specifically, a
9 laptop, associated correspondence, and, of course, the
10 phone cord, oversized maps and exhibits.

11 THE COURT: We will just -- Ms. Hooper will just
12 do a letter saying whatever electronic equipment you wish
13 to bring in, you are clear to bring in.

14 MR. HAMILTON: Thank you, Your Honor.

15 THE COURT: But here is the difference: If you
16 are going to -- are you going to use your own computer?

17 MR. HAMILTON: Yes, Your Honor.

18 THE COURT: All right. So your PowerPoint, for
19 example, is on your computer.

20 MR. HAMILTON: That's correct, Your Honor.

21 THE COURT: You need to make sure that you all
22 know, work with our IT people to assure that your set-up
23 with your computer actually synchronizes with the Court's
24 system. Because we have had some difficulty getting that
25 accomplished. It can be done; it is just they need, the

1 IT people, need to know what you are doing and then need
2 to be able to make certain small adjustments to make sure
3 that your system works efficiently. So you need to have
4 whoever you are going to bring down here on Monday walk
5 through that. I assume you all know how to use the
6 system, because there is nothing worse than a lawyer not
7 knowing how to use the system.

8 MR. HAMILTON: I hope I do, Your Honor. We have
9 been speaking with Skip Neal, who has been extremely
10 helpful, and he has been working with the IT people and
11 that's, as I understand it, the purpose for the
12 walk-through on Monday, to make sure everything works
13 seamlessly. I assume the system is probably similar to
14 the systems in use in federal courts in Minnesota and
15 Washington state and elsewhere. We will make sure that it
16 works.

17 THE COURT: They are similar, but nevertheless,
18 each of them has their little peculiarities.

19 So how long do you estimate your case to be
20 taking, Mr. Hamilton?

21 MR. HAMILTON: Well, Your Honor, what I had
22 hoped to do is have an hour for an opening, and I assume
23 the defendants collectively would have an hour as well,
24 and then present our expert. You know, we've got 51
25 exhibits, most of them stipulated. The expert will be

1 talking about some of them but not most of them, and
2 that's the reason why I would ask the Court for an hour
3 for opening statements, simply to kind of orient the Court
4 to the case as we see it, and explain some of the exhibits
5 and what they say. And then, of course, I assume the
6 defendants are going to want to cross-examine Dr.
7 McDonald, so I would anticipate being, if we start on
8 Tuesday morning and we do an hour each, we would be able
9 to start Dr. McDonald before luncheon Tuesday, and I would
10 anticipate being done with his direct presentation maybe
11 late afternoon, mid-afternoon, sometime in there.

12 THE COURT: You think you have about four hours
13 with McDonald, including cross-examination; is that what
14 you are saying?

15 MR. HAMILTON: I don't know about
16 cross-examination. I don't know how long they would take.
17 I'm saying two to three hours on direct.

18 THE COURT: Okay.

19 MR. HAMILTON: And then there would be
20 cross-examination, obviously, which I've given it some
21 thought, I assume that would take us sometime into
22 Wednesday morning, and then that would really be it. We
23 would wrap at that point and turn it over to defendants.

24 THE COURT: And Mr. Carvin and Mr. Melis, how
25 long do you think your cases will take?

1 MR. CARVIN: Your Honor, again, we have only got
2 the one witness. The one-hour opening, I think, is ample
3 from our perspective. I would anticipate one-and-a-half,
4 two hours of direct on Mr. Morgan.

5 THE COURT: And you have cross-examined
6 Mr. Morgan or somebody has for you, Mr. Hamilton. Based
7 on what has previously happened at the depositions, how
8 long do you think the cross would take of Dr. Morgan,
9 Mr. Morgan?

10 MR. HAMILTON: Depending on how cooperative the
11 witness is, I anticipated a two-hour cross. It could be a
12 little bit longer. There's some differences here that I
13 think will be helpful for the Court to straighten out.

14 THE COURT: How much by way of cross-examination
15 do you anticipate, Mr. Carvin and Mr. Melis, of Dr.
16 McDonald?

17 MR. CARVIN: It will be a lengthy cross, Your
18 Honor. As Mr. Hamilton has indicated, I think this will
19 be the most part of our case is the cross. I would
20 anticipate three hours.

21 THE COURT: All right. Now, one thing you need
22 to both talk to your witnesses about is this: Experts are
23 not free once they have been asked the question to
24 consider that they have a go light and that they can talk
25 forever. They must listen to the question, answer only

1 the question, and then be quiet. And if they -- they will
2 be gently reminded the first time. Future excursions from
3 the rule may result in the witness's departure from the
4 courtroom. That way, we generally assure that the witness
5 really focuses on what the lawyers think are the proper
6 issues, put and posited in the proper way. And experts
7 have today, just as they did many years ago when I was
8 trying cases, a penchant for talking and making the case
9 and being adversary, and that doesn't help a finder of the
10 facts if it is a court any more than it does a jury. So
11 you all get your witnesses, as Judge Williams says, used
12 to say, "coached up to do right."

13 MR. HAMILTON: Understood, Your Honor. And I
14 appreciate the caution. I think that's absolutely
15 terrific.

16 THE COURT: All right.

17 MR. CARVIN: Your Honor, I'm sorry to interrupt.
18 I was just trying to, in figuring out the scheduling,
19 would the Court be anticipating closing arguments given
20 the shortness of the trial?

21 THE COURT: Well, what I am wondering is whether
22 you want post-trial briefs, I don't know, keyed to the
23 transcript. I know you think you know how these things
24 are going to go, but they don't always go quite the way,
25 or maybe you all are better than I was, but they never did

1 go quite the way I wanted them to. But before you do
2 that, I have a couple questions. So hold that thought
3 there, Mr. Carvin. We will get back to it.

4 I noticed in reviewing the pleadings in the case
5 in preparation for the call that the Board of Elections
6 defendants have posited one affirmative defense, and that
7 is the defense of laches. And the intervenor defendants
8 have posited five or four, four affirmative defenses.
9 Failure to state a claim is gone, I assume. The second
10 affirmative defense posited is standing. Do you intend to
11 pursue the standing issue post-trial as part of your
12 post-trial submission? I notice it is not in
13 your -- mentioned in your briefs anywhere, Mr. Carvin.
14 Your trial briefs, excuse me.

15 MR. CARVIN: Yes. We have concerns about
16 standing, but obviously, it is the plaintiffs' burden to
17 establish the standing under HAYES v. LOUISIANA and other
18 cases. So I can't intelligently comment on that at this
19 point. But we certainly haven't abandoned our standing
20 concerns.

21 THE COURT: Your third affirmative defense is
22 the lack of justiciable controversy. What is that all
23 about? You say that they are not ripe or moot.

24 MR. CARVIN: Well, that went to the original
25 theory of this case, which was this SHELBY COUNTY theory,

1 that because SHELBY COUNTY had come down, that Section 5
2 was no longer a permissible defense and we were saying
3 that we would ask the Court to issue an advisory opinion
4 on facts that didn't exist. To the extent the plaintiffs
5 are still pursuing their SHELBY COUNTY theory, we are
6 still making that claim, but that doesn't go to the new
7 theory they are going to try the case on, which is whether
8 or not District 3 is narrowly tailored to comply with
9 Section 5.

10 THE COURT: So it sounds to me like that that
11 one is no longer at issue.

12 MR. CARVIN: If the Court has de facto rejected
13 what I keep calling their SHELBY COUNTY theory, that for
14 some reason we don't have any kind of compelling
15 government interest under Section 5 because after the law
16 was enacted, SHELBY COUNTY struck down Section 5, then it
17 is not going to be an issue at trial.

18 THE COURT: Mr. Hamilton?

19 MR. HAMILTON: Your Honor, the SHELBY COUNTY
20 argument is still very much a part of this case, and I
21 don't think the Court has ruled on that one way or the
22 other. It is a legal issue. I'm happy to address it
23 whenever the Court would like us to address the issue, but
24 it is still a part of this case. And at least from our
25 perspective, unless the Court directs otherwise, it will

1 be part of the trial, although, you know, it is not
2 something we intend to examine either of the experts on.
3 But it is a legal issue, and I think the Court will be
4 asked or I intend to ask the Court to address it in our
5 closing argument or post-trial briefs.

6 THE COURT: And the issue is what? What is the
7 issue as you see it?

8 MR. HAMILTON: The issue as I see it is whether
9 the state has a compelling interest in the wake of SHELBY
10 COUNTY, which invalidated Section 4 of the Voting Rights
11 Act and made Virginia no longer subject to Section 5, the
12 pre-clearance requirements. In the trial briefs, there is
13 an extended exchange on that issue, and we have outlined
14 in the trial brief saying exactly why we find that
15 argument. But as Mr. Carvin indicated, it is an
16 alternative argument.

17 THE COURT: All right. So in the fourth
18 affirmative defense of the intervenor defendants, they
19 also claim laches. I did not see in any of the pretrial
20 briefs a theory of laches that would bar the claim here.
21 In fact, I didn't see laches discussed at all. So what is
22 your laches theory here, Mr. Melis and Carvin?

23 MR. CARVIN: Our laches theory went to when the
24 plaintiffs were seeking to have a remedial plan entered in
25 2014, and the laches would have been then waiting for no

1 apparent reason for two years and then trying to jam in a
2 remedy at the end. We have certainly interpreted the
3 Court's initial order on the summary judgment as making it
4 clear to everybody that there would be no remedial efforts
5 prior to the 2014 elections. Notwithstanding that clear
6 directive from the Court, I noticed that plaintiffs' trial
7 brief assumes that that's still on the table. If it is
8 still on the table, even though we have certainly read the
9 Court's initial order as rejecting it out of hand, we
10 would renew our laches and we would want briefing on that
11 if the Court had not already decided, as I think it
12 clearly expressed, that given the plaintiffs'
13 extraordinary delay, that they were not going to try and
14 disrupt the pending election schedule at this late date.

15 THE COURT: They say they want the Court to rule
16 now and make any remedy effective in the 2014 election,
17 even though various dates would have to be changed after a
18 decision, even considering that the trial is not being
19 held until May, which is after some of the deadlines. As
20 I understand it, they still ask for that, for some kind of
21 schedule that I am not quite sure of that would allow
22 redistricting to occur in time for the 2014 election. Am
23 I wrong about that, Mr. Hamilton?

24 MR. HAMILTON: No, Your Honor, you are exactly
25 right. That is a remedy. We do not, have not understood

1 the Court to have ruled that, just as Mr. Carvin just
2 described, that there would be no possibility for an
3 effective remedy if the Court were to determine there is a
4 constitutional violation. Courts adjust election
5 deadlines all the time, and in fact, so does the
6 legislature in Virginia. But I think that's a question
7 that doesn't need to be addressed until the Court
8 determines the liability. And then we can confront the
9 question of what, okay, if there is a constitutional
10 violation here, then if there's greater harm allowing an
11 election to proceed under an unconstitutional
12 redistricting or taking steps to modify the deadlines and
13 then put in place a process for addressing it.

14 THE COURT: All right.

15 MR. HAMILTON: That's an issue that the Court
16 actually had asked the parties to address months ago with
17 the exchange on remedial issues. With the Court's
18 foresight, thankfully, there is a set of briefing on the
19 remedy.

20 THE COURT: All right. Now, Mr. Melis, is your
21 laches defense also keyed only to the remedy and not to
22 whether or not they could bring a claim? They said that
23 the fault lay in what went on in 2014 -- I mean 2012. Is
24 your defense likewise limited to the remedy?

25 MR. MELIS: That's correct, Your Honor. We are

1 making the same argument as the intervenor defendants on
2 that point.

3 THE COURT: All right. So I'm correct, neither
4 one of you are arguing that if as we get to the point
5 that, apart from SHELBY COUNTY, there was a problem with
6 the redistricting in 2014, neither one of you are -- of
7 the defendants are contending that such a suit alleging
8 that there was an unconstitutionality that occurred then
9 in 2012 is barred by the doctrine of laches, that is, the
10 suit, the claim itself. It is only the remedy. Am I
11 right about all of that? Defendants, Mr. Melis? Mr.
12 Carvin? Go ahead.

13 MR. CARVIN: Yes, sir.

14 MR. MELIS: Yes, sir.

15 THE COURT: Mr. Melis says yes. Mr. Carvin, yes
16 for you, too?

17 MR. CARVIN: Just to be precise, the short
18 answer is yes. We would argue that any remedy now is too
19 late and we would also think if there was a remedy for
20 2016, how the Court proceeds is also affected by the
21 plaintiffs' extreme delay. But we wouldn't argue that in
22 any and all circumstances, if they could prove up their
23 case, they are never entitled to a remedy.

24 THE COURT: All right, I see. All right.

25 MR. HAMILTON: Your Honor, Mr. Hamilton. May I

1 raise just one question?

2 THE COURT: Sure.

3 MR. HAMILTON: The affirmative defense of
4 standing, Mr. Carvin indicated that they have some
5 concerns, and they have not abandoned the defense. If it
6 is necessary, we can call the two plaintiffs to identify
7 that they are registered voters and that they live where
8 they live. It seems to me to be a waste of everybody's
9 time since it is undisputed that the defendants have both
10 taken the deposition of the plaintiffs. But if that's an
11 actual, you know, live question about whether -- you know,
12 where they live and their status as registered voters and
13 citizens of the Commonwealth, then I'd like to know it now
14 because we may need to call those two witnesses and extend
15 the trial just to prove that up if that's an issue.

16 THE COURT: Mr. Carvin?

17 MR. CARVIN: It is their burden. And yes, I
18 think there is a real issue as to whether or not they are
19 going to be affected by the remedy and whether or not they
20 have standing to complain, particularly about the
21 extraordinarily narrow remedy they are now seeking.

22 THE COURT: So yes, you say if they are going to
23 have to call the witnesses, or -- let me go at it this
24 way. Do you stipulate that they are residents of the
25 district, the two plaintiffs?

1 MR. CARVIN: Yes.

2 THE COURT: All right.

3 MR. CARVIN: I don't know that we have
4 any stipulation. I don't know where they live. But I can
5 tell the Court I don't have any contrary evidence.

6 THE COURT: I thought you deposed them.
7 Mr. Melis, did you handle those depositions?

8 MR. MELIS: I did depose them, Your Honor, and
9 they did indicate that they live in the district.

10 THE COURT: All right. So, Mr. Hamilton, they
11 don't -- I gather the defendants don't contest that the
12 plaintiffs live in the district. The question is whether
13 they have, given that they live in the district, do they
14 have standing. And as Mr. Carvin put it, the question is
15 do they have standing given the particular remedy posed in
16 the alternative. Is that correct, Mr. Carvin; did I say
17 that right?

18 MR. CARVIN: That's correct, Your Honor.

19 THE COURT: Okay. Mr. Melis, then he says
20 that's a legal issue as to which -- I guess that in part
21 depends upon what the evidence is about the plan itself.
22 I don't know. But I haven't -- so I guess the issue is,
23 Mr. Carvin and Mr. Melis, as you see this, standing has to
24 be dealt with on the basis of a legal issue addressed in
25 the post-trial briefs; is that right?

1 MR. CARVIN: Your Honor, this is Carvin. I
2 would like to chat with Mr. Melis, just because he was
3 really taking the lead on this, but if he is comfortable
4 with their current addresses, then my answer would be yes.
5 I don't think we need to have them come in to state their
6 addresses. And I suppose the rest can be dealt with in
7 briefing. But I'll defer to Mr. Melis somewhat on that.

8 THE COURT: Well, I think their residence has to
9 be at the time the suit was filed, I would assume.
10 Because that's when standing is decided. Standing is a
11 component of jurisdiction. So that is decided at the time
12 the suit was filed. Is there an issue on that?

13 MR. MELIS: This is Mike Melis. I'm sorry, I
14 haven't, to be frank with the Court, I haven't reviewed
15 the plaintiffs' depositions in the recent, last few days
16 or so, so I'm going by my recollection. And I don't
17 have -- I think Mr. Carvin framed it correctly -- I don't
18 have any contrary evidence to show that they were not
19 residents of their district at the time as far as the
20 evidence goes.

21 THE COURT: All right. It seems to me this:
22 You and Mr. Carvin review the matter, you review the
23 evidence, he can review the evidence, and if you are going
24 to need the plaintiffs to testify about where they lived
25 at the time suit was filed, you need to -- and you want

1 them called, you need to tell Mr. Hamilton that so he will
2 know to put them on. Otherwise you will stipulate that
3 they lived in the district at the time the suit was filed.
4 Then the matter of standing will be dealt with as a legal
5 question based on what happens in the rest of the case, as
6 I understand it. And that can be done. All right. Does
7 that suit you all? Anybody have any objection to that
8 proposal? All right. That's how it will be handled.

9 MR. HAMILTON: No objection. Thank you, Your
10 Honor.

11 THE COURT: Is there anything else that either
12 of you all need to take up?

13 MR. CARVIN: This is Michael Carvin. I had a
14 couple quick housekeeping items. I did think we should
15 inform the Court and Mr. Hamilton, please correct me if I
16 am wrong, I think the plaintiffs and the intervenor
17 defendants and defendants have agreed to exchange
18 demonstratives this Friday, and I suspect that might
19 include some of the maps you were talking about. Is that
20 correct, Mr. Hamilton? And we would have any objections,
21 I suppose, at the beginning of trial on that.

22 MR. HAMILTON: This is Mr. Hamilton. Yes, there
23 was a proposal and we have no objection to exchanging
24 demonstratives. There may be some created on the fly
25 during the midst of the examination where we put something

1 up on an Elmo and circle or highlight a passage. But in
2 terms of pre-prepared demonstratives, we should have those
3 to opposing counsel by the close of business Friday.

4 THE COURT: And you are going to then let me
5 know if you have any objections to those on Monday.

6 MR. CARVIN: That's what I was asking, Your
7 Honor. Would that be convenient for the Court if we gave
8 you our objections on Monday?

9 THE COURT: Well, I think we need to do that,
10 yes. And I'd like to see your objections. File them
11 early and let me know, we will get them and then have a
12 hearing on Monday if need be. Are you all here or are you
13 going to be doing it over the telephone, gentlemen?

14 MR. CARVIN: This is Mr. Carvin. We will be in
15 Richmond on Monday.

16 MR. HAMILTON: This is Mr. Hamilton. I will be
17 in Richmond on Monday. We will actually be at the
18 courthouse at 11 o'clock on Monday morning for the
19 technology walk-through with Mr. Neal.

20 THE COURT: Do you want to do the objections if
21 there are any at, say, 1:30?

22 MR. HAMILTON: That would be fine, Your Honor.

23 MR. CARVIN: That's fine with us as well, Your
24 Honor.

25 THE COURT: All right. We will do those here in

1 Court.

2 MR. CARVIN: As Mr. Hamilton said, we have been
3 trying to streamline this trial and make it as simple as
4 possible, as he accurately represented. I don't think
5 there's any objections, the Marston documents to the side,
6 to the authenticity or admissibility of any of the
7 plaintiffs' or the defendants' exhibits. These are all
8 largely public documents, either Section 5 submissions or
9 expert reports or legislative testimony. In some cases,
10 particularly in bench trials, we have, the plaintiffs,
11 have moved to admit en masse, and we don't object, and
12 that we would move to admit them as well. Do you think
13 that procedure would be acceptable to the Court?

14 THE COURT: The general rule in this district is
15 if at a pretrial conference an objection is not lodged to
16 the exhibit, it is in. So the procedure that you talk
17 about is generally what's done here with a slight
18 variation of the process given if there is not a final
19 pretrial conference. And given that you all have agreed,
20 you can move the exhibits at the commencement of your
21 trial.

22 MR. CARVIN: Thank you, Your Honor. We would
23 like some access to the Court on Monday as well. I don't
24 know if it would be more or less convenient for the
25 Court's staff and Mr. Hamilton if we tried to get over

1 there at 11 or Mr. Hamilton, do you have any objection to
2 that?

3 MR. HAMILTON: If we went over at the same time?
4 I don't have any objection for purposes of meeting at 11.
5 Skip Neal, who we have been working with, and I assume you
6 may want to call Mr. Neal to coordinate that. I don't
7 know if he will have any concerns about that, but I don't.

8 MR. CARVIN: We have been in contact with him as
9 well.

10 THE COURT: You know, it just occurred to me,
11 the judges are going to have the law clerks, and you
12 better have a set of those exhibits available so there
13 will be one for each law clerk. There will be three of
14 them.

15 MR. CARVIN: So one for the witness and six?

16 THE COURT: Six others.

17 MR. CARVIN: Six others. Okay.

18 MR. HAMILTON: Okay. That's fine. The one
19 thing, and this is really for Mr. Carvin, the three-judge
20 courtroom that we are actually trying the case in, I
21 understand, is not available on Monday at 11. And we will
22 actually be looking at the technology in Judge Payne's
23 courtroom at 11. So I just wanted to make that clear.

24 THE COURT: That's right. The courtrooms, the
25 difference is that the courtrooms are at different ends of

1 the building so they are reversed in their layout, and the
2 courtroom that you will be in on Tuesday is larger. But
3 the equipment that is used is the same equipment in both
4 courtrooms. And --

5 MR. CARVIN: So in terms of bringing in exhibits
6 and boxes and easels and such, we would do that all
7 Tuesday morning then?

8 THE COURT: I would think so. I'll tell you
9 what we will do. I know they are having a hearing in the
10 case involving Governor McDonnell, and I don't know when
11 Judge Spencer is going to be through with that courtroom.
12 It may be -- I don't even know when that hearing is. But
13 we will check, and if you can bring your things in on
14 Monday afternoon and just leave them there, that's fine,
15 they will be secured. You should talk with Mr. Neal about
16 that. He will find that out. But he is not in this
17 afternoon. He will be in tomorrow. He will work with you
18 and we will get him a message that he needs to talk about
19 that, check that out.

20 All right, it will be easier for you if you
21 don't have to schlep all that stuff and worry about moving
22 it around. One caveat: Don't put boxes on the benches,
23 or briefcases on the desks. All right. Anything else?
24 All right --

25 MR. HAMILTON: Mr. Hamilton, I'll be very brief.

1 Two questions. Number one, can we plan on an hour for
2 opening; is that permissible? Is that okay with the
3 Court?

4 THE COURT: I'm going to run that by the other
5 judges. That's longer than the Fourth Circuit gives in
6 any case by a long shot. District judges are accustomed
7 to hour-long arguments. I expect it will be all right,
8 and if it is not I'll let you know.

9 MR. HAMILTON: Thank you. I appreciate that.
10 Is it appropriate to have the defendants collectively take
11 an hour and the plaintiffs collectively take an hour,
12 assuming an hour is appropriate?

13 THE COURT: Is that all right with you, to have
14 equal time for openings, Mr. Carvin?

15 MR. CARVIN: I'll confer with Mr. Melis, but my
16 initial reaction is I sure can't talk for an hour so I
17 think it will work.

18 MR. MELIS: I would agree, Your Honor.

19 THE COURT: Mr. Carvin, you shouldn't make
20 statements like that.

21 MR. DEVANEY: This is John Devaney. I concur.

22 THE COURT: Okay.

23 MR. HAMILTON: The last thing, Your Honor, if I
24 might, we would like to reserve the possibility of calling
25 Dr. McDonald in our rebuttal case. I don't know if it

1 will actually end up being necessary, and I don't imagine
2 it would be lengthy testimony, but that would be our only
3 rebuttal witness so I just wanted to make sure that
4 everyone was aware of that possibility.

5 THE COURT: Sure. That's possible. You've got
6 to do the rebuttal, so McDonald maybe. All right. Well,
7 I think that takes care of everything that needs to be
8 attended to, and I thank you for your time. Given that
9 there have been a lot of things said and understandings
10 commented upon, I'm assuming that you would each like a
11 copy of the transcript so you have the playbook, a
12 transcript of this hearing that we are on today. Do you
13 each want a copy of it?

14 MR. HAMILTON: Yes, Your Honor.

15 MR. CARVIN: Yes, Your Honor.

16 THE COURT: Okay.

17 MR. MELIS: This is Mike Melis. Yes, Your
18 Honor.

19 THE COURT: The court reporter will do it. And
20 there is no need for simultaneous -- I mean, what do you
21 call it, expedited transcript on the trial?

22 MR. HAMILTON: Not from the plaintiffs'
23 perspective, Your Honor.

24 MR. CARVIN: This is Mr. Carvin. Not from our
25 perspective, either.

1 MR. MELIS: I agree.

2 THE COURT: Okay.

3 MR. DEVANEY: This is John Devaney. Since I'll
4 be bowing out for the trial, I want to thank the Court for
5 the considerable time and attention you have given our
6 case over these past multiple months. We really
7 appreciate it.

8 THE COURT: You all have done a commendable job
9 in keeping the Court uninvolved, and the little bit of
10 time I've put in is attributable to the fact you have
11 worked as adversaries who are contesting things the way
12 that things ought to be contested in the system. And
13 thank you very much for doing that. Thank you all. Good
14 luck in getting ready. And just remember that getting
15 down to Richmond now is a true test of discipline. All
16 right, take care.

17 (Proceedings adjourned at 3:02 p.m.)

18 CERTIFICATE OF REPORTER

19 I, Jeffrey B. Kull, Official Reporter, certify that
20 the foregoing is a correct transcript from the record of
21 proceedings in the above-entitled matter.

22

23

24 _____/s/_____

25 Jeffrey B. Kull,
Official Federal Reporter

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