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

GLORIA PERSONHUBALLAH, an	:
individual	:
vs.	:
JAMES B. ALCORN, et al.	:

Civil Action No.
3:13CV678
September 2, 2015

COMPLETE TRANSCRIPT OF THE CONFERENCE CALL

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

APPEARANCES:

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1 earlier today and asked permission to be able to listen in on
2 the call. I don't know that she spoke with counsel for the
3 defendants. I think she had a conversation with counsel for
4 the plaintiffs who had no objection.

5 I've conferred with my panelists on the court, and we
6 don't have any objection to her listening and strictly
7 listening but not participating in any way unless we direct her
8 to do so. So, Ms. Riggs, are you on the phone?

9 JUDGE PAYNE: I don't think she called in, Judge
10 Diaz.

11 JUDGE DIAZ: I just had my assistant call her, so she
12 may still be trying to --

13 AUTOMATED VOICE: Joining the meeting.

14 MS. RIGGS: Allison Riggs, Virginia NAACP.

15 JUDGE PAYNE: All right.

16 JUDGE DIAZ: Ms. Riggs, Judge Diaz. We had just
17 mentioned you have been granted permission to listen to the
18 proceedings but not otherwise participate.

19 MS. RIGGS: Thank you.

20 JUDGE DIAZ: Do we have everybody?

21 JUDGE PAYNE: I think everybody is here.

22 JUDGE DIAZ: Judge Payne, I guess I'll start. I
23 certainly expect the panel to chime in when appropriate. As
24 you all know, I'm new to this endeavor and joined the panel
25 after the Court's decision directing remedial action in this

1 case to redraw the boundaries to comply with the dictates of
2 our decision and the *Alabama* Supreme Court decision, and so the
3 reason for this conference call was to seek input from the
4 lawyers as to how to best sufficiently proceed with the case.

5 The agenda that I've sent out has a number of topics.
6 Those are obviously not inclusive. Our goal is to try to
7 formulate a plan that will get us where we need to be so that
8 the map, to the extent that the map is to be redrawn, is
9 redrawn in a sufficiently efficient way that allows for the
10 Virginia Board of Elections and all concerned to be able to
11 implement that result and I guess in theory to allow for any
12 further proceedings if that becomes necessary.

13 I understand from looking at the record in this case
14 that a number of the lawyers have been involved in these kinds
15 of proceedings before, so obviously we value your input, but
16 our goal, the panel's goal is to be sure that we have something
17 in place that will give sufficient time to allow for an orderly
18 election come November 2016.

19 With that, I'll stop and let my colleagues chime in
20 as they think appropriate. Judge Payne?

21 JUDGE PAYNE: I agree. I think it would be a good
22 idea to start off by following the agenda that was in your
23 letter of the 27th of August, Judge Diaz, soliciting the views
24 of the lawyers starting with the plaintiffs about how to
25 proceed, and then I expect all of us have some questions, but

1 that's how I would go. Judge O'Grady?

2 JUDGE O'GRADY: I agree. That's fine.

3 JUDGE PAYNE: How do you think we ought to proceed,
4 Mr. Hamilton, since you're the plaintiff?

5 MR. HAMILTON: Your Honor, counsel for all parties
6 met by telephone conference yesterday to discuss things. I
7 think there was some areas of agreement, some areas of
8 disagreement. I will just state my view, and, of course, let
9 Mr. Carvin and Mr. Raphael state theirs.

10 I think that the Court should adopt a schedule, and I
11 am going to propose one, for the appointment of a technical
12 expert to assist the Court and for the parties to file proposed
13 remedial maps, and the following is a schedule that I would
14 propose, and that would be that by this Friday, September 4,
15 the parties file their respective slate of proposed experts,
16 technical experts to assist the Court. I don't think that's a
17 difficult task. We can do that fairly rapidly.

18 Two weeks later, September 18th, I think the parties
19 should be required to file any proposed remedial maps,
20 including supporting data files and shape files, to allow the
21 Court and the Court's expert and the parties to evaluate those
22 maps and any supporting briefs. That might be an appropriate
23 time for the Court to appoint a technical expert at the same
24 time.

25 And then two weeks after that, on October 2nd, I

1 would propose that parties be required to submit any briefing
2 with respect to the remedial briefs filed by other parties in
3 the case. That would conclude, in my view, the exchange from
4 the parties, and then the Court, with the assistance of the
5 expert, could draw an appropriate map.

6 And I say with the assistance of the expert advisedly
7 and intentionally. I view that in this case, the expert should
8 serve as a technical assistant to the Court in drawing the map
9 as opposed to playing the role like you might see maybe in an
10 impasse case where the expert is delegated the task of drawing
11 the remedial map, of course with input and approval by the
12 Court.

13 I think there's a difference here because this Court
14 heard the evidence at trial, understands the constitutional
15 violation at issue, and is familiar with the record in a way
16 that a technical expert isn't, and delegating the task from *ab*
17 *initio* to the expert I think would be a mistake.

18 So that's what I view the appropriate role of the
19 expert ought to be here, and then the last point is, I don't
20 think that third-party nonparties to the case ought be heard
21 with respect to proposed remedial maps simply for the same
22 reason. They did not participate in the trial, they are not
23 familiar with the record, they're not familiar with the
24 constitutional violation at issue that we're trying to
25 remediate, and I think it would be -- the Court would be

1 ill-advised to convene for a free-for-all like the legislature
2 might do with members of -- well-meaning members of the public
3 submitting maps.

4 I think there are three parties before the Court, the
5 state, the intervenors, and the plaintiffs, who can propose
6 remedial maps, and then the Court, working with the expert, can
7 draw it.

8 The last item on the agenda from Judge Diaz was
9 allocation of costs and fees. I think the Commonwealth of
10 Virginia should bear those costs just like they are bearing the
11 costs of attorneys' fees awarded by the Court on March 12,
12 docket number 139 here, and then obviously there's lots of
13 statutory authority for that. That would be the plaintiff's
14 view.

15 JUDGE DIAZ: Mr. Hamilton, do you foresee hearings at
16 some point following these exchanges and absent assistance by a
17 technical expert on behalf of the Court?

18 MR. HAMILTON: I don't, Your Honor, but I don't have
19 any objection. If the Court would think it would be helpful,
20 I'm sure that counsel for all parties would be happy to appear
21 before the Court and address the merits or concerns that they
22 might -- the merits of various maps or concerns they might have
23 with various maps, and we stand willing to and happy to appear
24 before the Court, provide whatever assistance at a hearing that
25 might be needed.

1 In talking with counsel yesterday, you know, our
2 view -- at least my view was this panel decided the case on the
3 papers after trial without closing argument and instead with
4 post-trial briefing, so I was thinking the panel would likely
5 want to treat this the same way, with briefing and not
6 argument, but I'm always happy to visit the Commonwealth.

7 JUDGE DIAZ: Do you foresee any need for discovery or
8 depositions of experts or anything like that?

9 MR. HAMILTON: I don't, Your Honor, and I think it
10 would be -- it would simply add costs and delay. It's been
11 almost a year now since the Court found this constitutional
12 violation. Every day that goes on is a continuing injury to
13 the citizens of the Commonwealth, and a real injury. By not
14 knowing where the boundaries are, they can't collect
15 signatures, they can't organize politically, and I think
16 expediency is the far more important event.

17 JUDGE PAYNE: Mr. Hamilton, under Rule 706, the
18 expert is to advise the parties of any findings that the expert
19 makes and can be deposed by anybody and can be called to
20 testify by any party and cross-examined. Have you all agreed
21 that 706(b) doesn't apply then?

22 MR. HAMILTON: We haven't discussed it, Your Honor.

23 JUDGE PAYNE: That's what the rules for appointing
24 experts -- I don't know any other authority for doing it other
25 than under 706. Is there another authority for appointing

1 experts other than under 706?

2 MR. HAMILTON: I think the Court has inherent
3 authority to appoint technical experts to assist it in
4 resolving a case. I mean, this isn't a situation -- and I'm
5 looking up evidence Rule 706.

6 JUDGE PAYNE: I've used them several times, and
7 there's a whole set of books put out by the Judicial Center
8 that explains how you do all this, and I'm just unaware of any
9 authority other than in 706, and it would seem to me that if
10 you, in fact, have to -- unless you all agree that the rules
11 are to be suspended, then 706(b) provides rights to various
12 parties once the Court invokes, on its own or even at the
13 suggestion of the parties, the appointment of an expert.

14 But I haven't had to deal with it in this context,
15 and that's why I was soliciting your views. So I take it
16 that -- do you believe 706 is the appropriate authority?

17 MR. HAMILTON: I do believe it is an appropriate
18 authority and provides the Court with the authority to appoint
19 an expert, but it's an expert witness, and so I think it's
20 appropriate authority for the Court to appoint an expert to
21 assist it in drawing the map. Of course, the parties don't
22 have to take advantage of the rights that's given to them under
23 706(b) (2), (3), and (4) for deposition or cross-examination.

24 JUDGE PAYNE: But the other way it's done is under
25 the special master rule where you use an expert as a special

1 master, and in that event, the special master is supposed to
2 make some reports and findings, and people have a right to
3 address those, don't they?

4 MR. HAMILTON: They do, Your Honor.

5 JUDGE PAYNE: So which way did you all see this
6 proceeding; by way of a special master person or by way of an
7 expert under 706?

8 MR. HAMILTON: Well, Your Honor, I don't really have
9 a strong opinion about either one, and the Court's order of
10 October 27 left that open, because it suggested either a
11 special master or an expert. So I had assumed that the Court
12 wanted, using one vehicle or another, to appoint a technical
13 expert to assist it in preparing the remedial map, and I
14 totally understand and agree that that's an appropriate
15 vehicle, and I'm not sure there's a material difference between
16 the authority granted under either approach. So I don't think
17 I would object either way.

18 JUDGE PAYNE: Well, then, how about you, Mr. Carvin,
19 Mr. Raphael, are you willing to forgo the rights conferred on
20 you by the rules and just let the expert advise the Court no
21 matter what we call the expert?

22 MR. CARVIN: This is Michael Carvin, Your Honor. We
23 would not want to forgo that opportunity if the expert was
24 making any findings or opinions as 706(b) contemplates. He
25 must advise the parties of any findings the expert makes.

1 In other redistricting litigation, and I suspect this
2 is what Mr. Hamilton was thinking of, I've been aware of courts
3 making the decisions -- I want to echo what Mr. Hamilton said a
4 minute ago. We think the expert would not have really anything
5 but ministerial duties in this context because the Court would
6 be deciding what kind of remedy is appropriate in light of what
7 kind of violation the Court found.

8 So what I've seen in other cases is, just given the
9 challenges of technology, that the Court will direct somebody
10 to enter a remedy, but the expert will --

11 JUDGE PAYNE: Sorry, we had trouble hearing you
12 there, Mr. Carvin. Some bell was ringing somewhere.

13 MR. CARVIN: Right. To start again, in other
14 redistricting cases, while they're sometimes called experts,
15 they're really just functionaries to assist the Court with the
16 nuts and bolts technicalities of redistricting software and the
17 like where the Court will direct the person to enter a map, and
18 that person will translate that into software code and census
19 data that the parties and the legislature and the Board of
20 Elections are obviously able to understand.

21 If, as I understand Mr. Hamilton to suggest and as I
22 concur with, that's the limited role that would be played here
23 given the fact that the Court is really driving what the scope
24 of the remedy will be since the Court determined the scope of
25 the violation, we don't think in those circumstances it would

1 be necessary and would undoubtedly entail unnecessary delay to
2 depose the expert.

3 If, however, the Court goes in a different direction,
4 certainly if it goes in terms of a special master or gives the
5 expert freedom to make independent judgments about the kind of
6 district that should emerge from this process, then we would
7 want to have a more formal process where we are apprised of his
8 findings, and we are able to challenge those in an appropriate
9 way.

10 JUDGE PAYNE: You said that the other cases that you
11 were familiar with, sometimes they had been appointed, the
12 expert had been appointed for ministerial functions, but even
13 those produce findings. For example, I would think an expert
14 who did -- but I'm interested in what you all think. I'd like
15 to hear what you all think an expert should be doing
16 specifically in a case like this.

17 Are they supposed to do racial polarization studies,
18 are they supposed to do BVAP studies, are they supposed to
19 do -- et cetera. Do they go through the analyses of all of the
20 factors so that we have -- that are used in redistricting so
21 that the Court has the benefit of some technical expertise in
22 respect of compactness and contiguity, et cetera?

23 That's a long way of saying what do you see the
24 expert doing in the case other than as in the general sense
25 doing ministerial duties? I'd like you to answer and Mr.

1 Hamilton and Mr. Raphael.

2 MR. CARVIN: Yes, Your Honor. Again, that depends on
3 -- in the normal case, the plaintiffs, as they have done here,
4 produce an alternative plan which they believe complies with
5 the Constitution. All the BVAP analyses and other kinds of
6 data points that you previously discussed have been already
7 thoroughly vetted during the trial.

8 So in a *Shaw* case, the normal question is whether or
9 not the plaintiff's proposed alternative cures the violation
10 and should be entered. The legislature and the other parties
11 are given an opportunity to say, here's something that complies
12 with whatever the Court thinks is the constitutional norm in a
13 way that is a different configuration than what the plaintiffs
14 have proposed.

15 Typically, given the narrow scope of the violation,
16 given the narrow scope of the remedy that can be entered
17 because the violation has already been identified and the
18 remedy can't exceed the scope of the violation, it's normally
19 not necessary to go through a new analysis of the various
20 remedial alternatives.

21 But if the Court is going to depart from that and
22 have a more generous view of the scope of the remedies that can
23 be entered here, then, yes, I do think that the Court, either
24 in a hearing or pursuant to depositions and findings by an
25 expert, needs to analyze the racial, political, and other kinds

1 of impacts of any proposed alternative, and if the Court is
2 going to take that more formal approach, then we would want an
3 opportunity to engage in that kind of deposition of the expert
4 and/or make presentations to the Court on what the Court has
5 identified as the relevant racial, political compactness
6 factors that are going to shape the remedial district.

7 JUDGE PAYNE: Mr. Raphael?

8 MR. RAPHAEL: Thank you, Judge Payne. Stuart
9 Raphael. Let's get one thing out of the way that I think is an
10 easy one, the issue of the master's or the expert's fees. The
11 Commonwealth agrees that under the circumstances of this case,
12 it's appropriate for those fees to be charged to the
13 Commonwealth. We would reserve the right to seek an allocation
14 of fees against another party or a nonparty who unduly
15 prolonged the process, but I think that answers the last
16 question in Judge Diaz's letter.

17 If I could say one thing briefly about the timeline,
18 as we've said, we think it's important to try to have the
19 judicial plan in place by the end of this year. The candidates
20 can start to collect signatures on January 2nd, and for
21 planning purposes, it would be very important, I think, to have
22 the lines in place no later than by the end of the year if
23 possible.

24 On the issue of whether the plans are limited to the
25 parties or nonparties, we actually think it would be important

1 not to exclude nonparties from filing proposed plans provided
2 they can do so within the short time period that Mr. Hamilton
3 has proposed.

4 Since the Court order reaffirmed that the lines have
5 to be redrawn here -- as you know, the General Assembly did
6 convene but only for one day before they reached an impasse.
7 There were two plans introduced in the House of Delegates --
8 I'm sorry, in the Senate in that session. They were both
9 introduced by Democratic senators.

10 We would have no objection, and we think the Court
11 ought to consider those plans, but we have no objection to if
12 the Republican leadership of the House of Delegates wanted to
13 submit a plan also within that two-week period, we think that
14 that would be appropriate, and we also think it would be
15 appropriate for the Court to consider any plans submitted by a
16 nonparty, another nonparty without requiring those parties to
17 formally intervene.

18 That has been done in other cases. The ones that I
19 have in mind is out of the Eastern District of New York, *Favors*
20 *v. Cuomo*, which is reported at 2012 Westlaw 928216. In that
21 case, the different -- the Republicans, Democrats in the New
22 York legislature submitted their own plans.

23 The Court there appointed a special master. The
24 special master considered the various plans that were proposed
25 but ultimately recommended his own plan, and that plan was then

1 considered by and adopted by the Court.

2 We think that if the Court were to limit the plan to
3 be submitted solely to the parties, it has two adverse
4 consequences. One, it's going to put huge pressure on other --
5 on the current nonparties who seek to intervene which, I think,
6 is not a helpful thing in terms of the expedited timeline that
7 we're on.

8 It's not an unusual circumstance for courts to allow
9 nonparties to submit proposed plans without actually becoming
10 intervenors, and we think that that would be an appropriate
11 thing to do.

12 With regard to the issue of is it a court-appointed
13 expert or special master, particularly in light of what Mr.
14 Carvin said and the possibility of having to depose a
15 court-appointed expert, we actually think the preferable route
16 would be for the Court to appoint a special master, which it
17 can be do under Rule 53 of the Federal Rules of Civil
18 Procedure, and I don't think it would be subject to the Federal
19 Rule of Evidence rule, Judge Payne, that you mentioned.

20 With regard to a timeline for making all of this
21 work, here's what we would propose. Sort of jumping off from
22 Mr. Hamilton's suggestion, the parties could submit proposals
23 for special masters or experts by this Friday. The Court, on
24 Friday, could issue an order with a two-week deadline for
25 parties and nonparties to submit proposed plans. It could use

1 the *Favors* case that I mentioned as the template for that.

2 It could then decide upon and engage a special master
3 in the next, you know, ten days, two-week period after that.
4 The Court could give the master 30 days from the submission of
5 plans to propose a plan. The Court could let the master set a
6 schedule within that window of time to figure out how best to
7 accomplish that task.

8 The master could invite comments from the parties
9 about the other plans. Once the master proposes a plan, the
10 normal process is for any party who doesn't like it to file
11 exceptions to it. The Court could also permit comments from
12 the public about that.

13 That would roughly take you to the beginning of
14 December which would give the Court 30 days to decide whether
15 to adopt the master's plan or potentially a variant on it. I
16 think it would also create a much better appearance that other
17 voices have been taken into account.

18 We represent the Commonwealth in this case, but the
19 Commonwealth is a house divided as you know, because the House
20 and Senate leadership were not able to reach agreement, and
21 under those circumstances, I think the Court would benefit from
22 at least permitting nonparties to submit plans so they can be
23 considered. They don't have to be adopted, of course, and in
24 the *Favors* case that I mentioned, none of the plans submitted
25 by the parties or by the governor was actually adopted, but

1 they were considered. But that's what we think would be a best
2 approach.

3 JUDGE PAYNE: Mr. Raphael, under the structure of the
4 state electoral system, what are the dates that you are talking
5 about? You said they can begin to collect signatures by
6 January 2nd.

7 MR. RAPHAEL: That's correct.

8 JUDGE PAYNE: What are the other dates, and what
9 flexibility does the Court have to address those as part of the
10 process in a run-up to having something that will be available
11 to be put in place to govern the 2016 elections in November in
12 your view?

13 MR. RAPHAEL: Your Honor, I don't have a firm
14 drop-dead date that I could tell the Court as the date by which
15 the wheels will come off if the plan is not in place. What I
16 can say is that I made the inquiry of the in-house counsel for
17 the Board of Elections, and I was told that going anywhere
18 beyond the middle of January increases the risk of error in the
19 process.

20 The other thing to consider, Your Honor, is that
21 Virginia has a presidential primary in March, and the time and
22 attention that that creates is something that registrars and
23 elections officials will have on their plate to deal with at
24 the same time as dealing with this. So if it's possible for
25 the Court to see its way clear to having the plan in place by

1 the end of this year so that come January 2nd, candidates can
2 start to collect signatures and know whether they are in the
3 district for which they're collecting signatures or whether the
4 person they want to sign their petition is in the district,
5 that's obviously an important thing. Delay benefits
6 incumbents --

7 JUDGE PAYNE: Hold on. Hold on. Something is
8 happening. We're not picking up anybody, picking up what you
9 are saying, Mr. Raphael. To the extent what? Go again.

10 MR. RAPHAEL: My last point was simply that the
11 longer the delay goes, it, unfortunately, burdens incumbents --
12 I'm sorry, non-incumbents, challengers --

13 JUDGE PAYNE: Well, I guess what I was asking is
14 something different, and that is, what is the formal schedule
15 established by the board for the 2016 elections? Can you get
16 us that?

17 MR. RAPHAEL: We can provide that to the Court.
18 Roughly it's -- the election is November 8th. By
19 September 24th, the Uniformed and Overseas Absentee Voting Act
20 requires the mailing of absentee ballots. September 16th is
21 the anticipated deadline for the Department of Elections to
22 review the ballot forms which is required by statute.

23 August 9th, between that date and the election, the
24 National Voter Registration Act prohibits list maintenance
25 activities. June 14th is the date for political party

1 primaries and the deadline for submission of recognized party
2 or independent candidates' petitions for qualified voters.
3 April 30 is the deadline to mail absentee ballots.

4 JUDGE PAYNE: Absentee ballots for the primaries?

5 MR. RAPHAEL: Yes. That's correct. April 22nd is
6 the deadline, anticipated deadline for the Board of Elections
7 to review the ballot proofs for the primaries. April 5th is
8 the deadline for political party chairs to certify candidate
9 petitions to the State Board of Elections.

10 March 14th to the 31st is the window for political
11 party primary candidates to submit their ballot access
12 petitions. March 16th is the -- after that date and the
13 primary, the list maintenance activities are prohibited, and
14 then the earliest date after which you start to compress the
15 schedule is in roughly mid January. That's two months prior to
16 the ballot access petition deadline. The time is needed to
17 permit the --

18 JUDGE PAYNE: Mr. Raphael, you are talking too fast.
19 If you don't mind slowing down. Needed to do what, implement
20 or permit?

21 MR. RAPHAEL: To allow the local registrars to
22 implement the maps.

23 JUDGE PAYNE: All right. I think we've got that on
24 the record. Then we can go from there. Thank you.

25 MR. CARVIN: Judge Payne, this is Michael Carvin. I

1 was wondering if I could be heard on the schedule, because I
2 think there's a threshold issue to be resolved.

3 JUDGE PAYNE: Sure. Everybody is going to get heard,
4 but did we give Mr. -- all right, Mr. Carvin, you want to get
5 heard on the schedule, so go ahead.

6 MR. CARVIN: Yeah. I just wanted to make the point
7 that Mr. Raphael has obviously correctly identified the
8 drop-dead dates, and I think he was talking about mid January
9 being the latest.

10 The point I want to make to the Court is that if the
11 Supreme Court grants review on September 29th of our appeal,
12 there will be no time to implement a remedy for the 2016
13 elections. They won't even have arguments in that case until
14 February, and they undoubtedly won't issue an opinion until
15 April or thereabouts.

16 So, obviously, if they rule in our favor, there won't
17 be any remedy, and if they rule against us, it will be too late
18 to enter a remedy for 2016. So our view is that with the
19 possible exception of maybe suggesting experts or putting in
20 alternative plans, there's really no point in making final
21 decisions, particularly a complicated suggestion like Mr.
22 Raphael's about special masters, until the Court knows what the
23 Supreme Court is going to do on September 29th.

24 Again, if they grant on that day, I don't think there
25 will be any -- I think any effort on a remedy at that point

1 would be wasted because there won't be a remedy in place for
2 the 2016 elections given the schedule that Mr. Raphael
3 outlined, and there would be, obviously, ample time to enter a
4 remedy for the 2018 elections.

5 Conversely, if the Court denies review on
6 September 29th, there should be more than enough time to enter
7 alternative plans and get that done by January 1st. I don't
8 think it would make a lot of sense to waste judicial and party
9 resources on anything significant unless and until the Court,
10 this Court knows what the Supreme Court is going to do on
11 September 29th.

12 JUDGE PAYNE: How do you get the 29th, Mr. Carvin,
13 that you know that something is going to happen then?

14 MR. CARVIN: Judge, the Supreme Court establishes its
15 schedule, and this is what they call the long conference, the
16 conference after Labor Day which will be the one where they
17 issue the opinions for the first Monday in October which is the
18 Supreme Court's first official day, and they will tell us
19 either that day, or at the worst the next day, whether or not
20 our case will be heard by the Court.

21 Obviously, this Court couldn't proceed with the
22 remedy until liability had been determined, and the point I was
23 trying to make is liability won't be determined by the Court
24 until well into the primary schedule for next year and well
25 after the dates that Mr. Raphael correctly recited for the

1 Court.

2 MR. HAMILTON: Your Honor --

3 JUDGE PAYNE: Okay. Excuse me a minute, Mr.
4 Hamilton. Are the matters now fully briefed before the Supreme
5 Court, Mr. Carvin?

6 MR. CARVIN: Yes, they are. Both of the other
7 gentlemen on the call have filed their oppositions, and we
8 filed a reply, so it's fully teed up for the court to say yes
9 or no.

10 JUDGE PAYNE: All right, Mr. Hamilton, you said you
11 want to say something, I think.

12 MR. HAMILTON: Sure. First, I wanted to -- I did
13 want to respond to the Court's question of what do you see the
14 expert doing, but let me start with what Mr. Carvin just said.

15 That was an excellent oral rendition of the earlier
16 motion to delay the remedial deadline that the Court's already
17 considered. He argued precisely the same thing in that motion.
18 The Court's already considered it, the Court already denied it,
19 and it's no more compelling now than it was then.

20 So I don't think that's a reason to delay anything,
21 number one. Number two, in the highly unlikely event that the
22 Court were to grant review of this Court, not cert but review,
23 for the second time, and if the Court were to find the
24 constitutional violation, of course there would be time to
25 implement a remedy. The schedule that Mr. Raphael described is

1 the default schedule for the election, but there's plenty of
2 examples out there where constitutional violation is found in
3 advance of an election and the Court has modified those in
4 order to mitigate the constitutional rights of the voters.

5 But that's obviously a problem that, A, is unlikely
6 to occur, and B, is not one that needs to be addressed now.
7 The schedule that we've been discussing here this afternoon,
8 none of that ought be delayed at all, especially not for the
9 highly unlikely contingent possibility that maybe the Court
10 grants review.

11 I think the Court would be well advised to move
12 forward now. If, in September, the highly unlikely event
13 happens that the Court grants review, then the Court could
14 convene another conference like this, and we could decide at
15 that point what to do in that circumstance, but I think that
16 the Court ought to move forward.

17 To address the question the Court asked me, what do I
18 think the expert is doing, I agree in part with what Mr. Carvin
19 said. I think what the expert is doing here is providing
20 technical assistance to the Court in drawing the map to remedy
21 the constitutional violation that the Court has identified.
22 That expert can easily, with the push of a button, generate
23 compactness scores, VTD splits, black voting-age population
24 totals --

25 AUTOMATED VOICE: Joining the meeting.

1 JUDGE PAYNE: Hold on a minute, Mr. Hamilton. Who is
2 joining the call?

3 JUDGE O'GRADY: It's Judge O'Grady. I got cut off
4 and I'm back on.

5 JUDGE PAYNE: How long were you off, Judge O'Grady?
6 Do you need us to go back over things?

7 JUDGE O'GRADY: No. Just about 30 seconds, and I'll
8 get the transcript. Thank you, though.

9 JUDGE PAYNE: We'll have a post-call call at some
10 point anyway, so all right. Go ahead, Mr. Hamilton, I'm sorry
11 to interrupt you.

12 MR. HAMILTON: No problem. Thank you, Your Honor.
13 So I would think that the special master appointed or technical
14 expert appointed by the Court would be less in the nature of a
15 testifying expert and more in the nature of, as in *Favors* in
16 New York or in other redistricting cases, providing the Court
17 with technical assistance in evaluating -- in doing two things:
18 Evaluating proposed plans submitted by the parties to remedy
19 the constitutional violation, and B, developing a proposed
20 remedial plan to address the constitutional violation.

21 So that's what I see the party doing, and I don't
22 think in other instances -- I'm trying to remember the
23 procedural context in New York, and I just can't remember. I
24 don't recall -- I was involved in that case on the periphery,
25 and I don't recall there being depositions.

1 MR. CARVIN: Mr. Hamilton, I apologize for
2 interrupting, but I was involved in that case, and that was an
3 impasse case where the legislature hadn't enacted any plan, and
4 they were losing, as you probably recall, Congressional seats.
5 So the special master had a wide open very de novo kind of job
6 to do which was come up with a new plan. It was not how to fix
7 the one district that was at issue here. Sorry for the
8 interruption.

9 MR. HAMILTON: No. I appreciate the clarification of
10 that, and I remember now that it was an impasse. So I don't
11 think that's a particularly good template or example, because
12 here I think what the Court needs is an expert who is savvy in
13 Maptitude and can draw the map.

14 In connection with that, the expert may be providing
15 VTD splits, compact scores, and black voting-age population
16 totals just like anybody who would be drawing the map would,
17 but that's simply a function of Maptitude. It's simple to do.
18 That's what I would see them doing.

19 Now, I agree -- with respect to the schedule, I agree
20 with Mr. Raphael that this needs to be done quickly. Boy, I
21 would think the Court ought be able to implement a remedial map
22 long before the end of the year. So I would urge the Court in
23 that direction because of the timing involved and the
24 constitutional problem for the associational rights of all the
25 voters of the Commonwealth, and the longer this goes undefined,

1 the more unsettled and more difficult it is for all.

2 JUDGE DIAZ: Mr. Hamilton, this is Judge Diaz. When
3 you described this role of the expert, I guess I'm having a
4 little trouble trying to find the dividing line between a
5 technical expert and somebody who is actually making informed
6 judgments about matters.

7 Ultimately you're right. It's the Court's vision and
8 obligation to decided the question here, but when you say that
9 the expert would evaluate any maps and then determine which
10 ones would best suit the goals of the earlier order in this
11 case, that seems to be the kind of discretionary visionary that
12 requires some kind of evaluation by the opposing parties and
13 some advocacy to decide whether or not that's correct. So what
14 am I missing here?

15 MR. HAMILTON: I actually don't think that the
16 special expert or technical expert would be making judgments
17 like that. I would think that what the expert would be doing
18 would be evaluating the maps. So, for example, the expert
19 might look at Mr. Carvin's map and look at the map the
20 plaintiffs submit and compare the black voting-age population
21 of the two.

22 It might be comparing how many VTD splits are in one
23 map versus the other as compared to the benchmark, might
24 consider and point out for the Court whether a particular city
25 like Norfolk or Newport News has been split in an unusual way.

1 You know, simply pointing out those things for the Court's
2 judgment about whether that's appropriate or not in light of
3 the evidence in the record before the Court, and I don't think
4 that it would be -- it would be appropriate to commission the
5 expert to make those kinds of judgments.

6 I mean the expert wasn't -- this expert that we're
7 talking about wasn't a participant in the trial, did not sit
8 through and read all the deposition transcripts or hear the
9 trial testimony of the experts submitted by the intervenor or
10 the plaintiffs in the case. And so I'm really -- I would be
11 really leery of, you know, even the best intentioned
12 independent expert who doesn't have that familiarity, with
13 unleashing that person to make the kind of judgments that need
14 to be made here.

15 JUDGE DIAZ: You are not in favor -- it doesn't sound
16 like you're in favor of the master proposed by Mr. Raphael even
17 if you open this process to outside parties to recommend maps.

18 MR. HAMILTON: Correct, Your Honor.

19 JUDGE O'GRADY: I may have missed it, and I
20 apologize. This is Judge O'Grady. Does everybody agree that
21 the record from our trial is complete and that there's no
22 necessity of going back and looking at any more areas to
23 determine the BVAP or population?

24 That's what I'm hearing. Is that correct? No
25 discovery -- am I correct that no one believes that further

1 discovery or surveying is necessary?

2 MR. HAMILTON: Very briefly, and I'm happy to defer
3 to Mr. Carvin, but the record contains the data, and the data
4 hasn't changed. It's simply a matter of loading it into
5 Maptitude and altering the shape in order to draw a new map,
6 and the program generates all of the things we just mentioned.

7 It generates total population numbers by district, it
8 generates racial data by district. It demonstrates the number
9 of VTD splits and so on.

10 MR. CARVIN: This is Mr. Carvin. Judge O'Grady, we
11 may be sending you mixed signals. I think that probably Mr.
12 Hamilton and I agree that if he's simply going to look at
13 fixing what the Court has previously identified as the current
14 flaws in District 3, then the record might well be sufficient.

15 However, if he's going to get into issues like
16 whether or not, to quote Mr. Hamilton, something was split in
17 an unusual way or exercise of judgment, then most assuredly
18 we're going to need additional discovery and opportunity to
19 contest and challenge whatever advice he's providing to the
20 Court.

21 And so, again, if he's exercising a ministerial
22 function where the Court is simply directing him on what to do,
23 then I don't think that requires undue delay. If, however, the
24 Court is going to delegate judgment calls to this person, then
25 I think the parties are entitled to an opportunity to challenge

1 that, and I do think the current record needs to be
2 supplemented, particularly just to clarify because sometimes
3 the terminology gets confusing.

4 Mr. Hamilton is a thousand percent right that the
5 normal Maptitude software will tell you how much the black
6 voting-age population is in a district, but Judge Payne had
7 previously asked about racial block voting analysis which goes
8 to the degree of polarization and the electability of
9 minority-preferred candidates. That is far from a ministerial
10 task, highly controversial and very difficult to capture in a
11 short time frame.

12 JUDGE PAYNE: Go ahead, Judge O'Grady.

13 JUDGE O'GRADY: I understand a little better.
14 Obviously we're operating under a requirement that the Supreme
15 Court has dictated, you know, that we look at the data. The
16 plan that the plaintiffs proposed from day one may or may not
17 be the plan that they present to us shortly if, you know,
18 Petersburg is no longer going to be in the proposed plan but
19 the areas of Newport News and Norfolk are. I think what Mr.
20 Carvin is saying is that may dictate whether discovery is
21 necessary; is that right?

22 MR. CARVIN: That's certainly my position, Your
23 Honor, yes.

24 JUDGE O'GRADY: Okay.

25 MR. RAPHAEL: Judge O'Grady, this is Stuart Raphael.

1 If I may weigh in on that. I think the special master -- the
2 expert role described by Mr. Hamilton is very much like what a
3 special master traditionally does. In this case, the master
4 could consider the plan submitted by the parties and, if you
5 agree with us, the nonparties. The master could pick one of
6 those plans, or the master could devise a different plan as
7 happened in the *Favors* case, and the master produces a report
8 that explains why the plan adopted or recommended is the best
9 plan by comparison to everything that was looked at.

10 Instead of deposing the Court-appointed expert as you
11 would in that scenario, the parties have a right to file
12 exceptions to the special master's report which creates a very
13 nice way of reviewing what the master has recommended and
14 allowing the Court to make the ultimate determination. Special
15 masters are not deposed because their report is their report,
16 and you have it and can comment on it.

17 The question about the record, is the record
18 adequate, there was some racial block voting analysis testimony
19 at trial which may be part of the record, but if parties or
20 nonparties are proposing different plans, there might need to
21 be new functional analyses associated with those plans. If
22 that analysis comes in, it might be adequate for the master or
23 the expert to determine that it's sufficient to make judgments
24 about whether the plan complies with the Voting Rights Act.

25 Alternatively, the master or expert might determine

1 that that evidence is not adequate and might need to do the
2 analysis on his or her own. I think the Court can give some
3 discretion to the master as to how to carry out those duties as
4 courts have done in other cases and as the U.S. Supreme Court
5 does when it appoints a special master, but the procedure that
6 is set out for a master to generate a report and for the
7 parties to comment on it, particularly when you've got a
8 compressed period of time here, my thinking, provides the best
9 and most efficient mechanism for you to use.

10 On the question of whether to delay, I agree with Mr.
11 Hamilton that the Court has already ruled on that. I think it
12 would be a mistake to give up a whole month's time, the whole
13 month of September as Mr. Carvin is proposing. Mr. Hamilton, I
14 think, is right that if the Court were to take the *Whitman*
15 case, then this Court could revisit whether it should proceed
16 with the current schedule, but from the Board of Elections'
17 standpoint, it would be a mistake to give up very valuable time
18 where this process could be unfolding.

19 MR. CARVIN: This is Mr. Carvin. If I could maybe
20 respond and propose something that might work. My major point
21 is that, particularly given the very complicated special master
22 scenario that Mr. Raphael was discussing or the potential for
23 depositions and discovery, my only point is purely the common
24 sense one, that there doesn't need to be a long use of judicial
25 resources and party resources to work on a remedial plan that

1 may never, if the Court grants the case, Supreme Court grants
2 the case, that may never be needed, and I don't think anybody
3 can seriously argue would be ready in time for the 2016
4 elections.

5 I think we all agree that this Court will know a lot
6 more on September 29th or September 30th about the real
7 scenario confronting it. I don't think it would make a lot of
8 sense to cross any Rubicons before that.

9 If Mr. Raphael and Mr. Hamilton are genuinely
10 concerned about meeting the January 1 date, I think there might
11 be some interim steps that wouldn't require the Court to make
12 decisions about retaining special masters or defining expert
13 roles where it would be in a position, if it decided on
14 October 1st that it needed to get something done by
15 December 31st, that it could do.

16 For example, it could have experts proposed and it
17 could have parties propose maps. What I don't want to have
18 done, for both the Court and, frankly, the parties' expenses,
19 is to start getting into a complicated scenario where special
20 masters are selected, given assignments, all these kinds of
21 difficult issues that we've been chatting about this afternoon
22 are resolved.

23 Surely all of that can be done after October 1st
24 without unduly burdening either the parties or the Court, and
25 we can, if you want, discuss whether or not it's even remotely

1 feasible if the Court grants review and is going to issue a
2 decision next April or May to squeeze in primaries that right
3 now are scheduled for June into that scenario. I haven't heard
4 Mr. Raphael comment on that, but I would certainly think the
5 State's position would be trying to implement a remedy in the
6 middle of June for primaries and general elections would not be
7 remotely feasible or fair to the voters, particularly the
8 non-incumbent candidates in Virginia.

9 MR. RAPHAEL: I'm happy to respond to that. I think
10 it's wishful thinking to think --

11 JUDGE PAYNE: Wait a minute, Mr. Raphael, we lost
12 you, everything you said. Wishful thinking.

13 MR. RAPHAEL: I think it would be wishful thinking to
14 think that you would hear at the end of September after the
15 long conference. I think you might well see a summary
16 affirmance or dismissal, but I don't think you'll see a grant.
17 The Court's procedure more recently has been to hold cases for
18 at least a week before granting, so you're not going to have
19 something -- you're not going to likely hear something, even if
20 they were going to take the case, by the end of September.

21 Mr. Carvin's proposal would basically take away the
22 Court's ability to have a backup plan, and I think that that's
23 a mistake. We think it's important to have the remedial plan.
24 The Court has ruled on it under a stay-pending-appeal analysis
25 which you applied the last time you denied the request.

1 The intervenors are not likely to prevail on appeal.
2 If circumstances change because the Court takes the case, this
3 Court can decide what to do at the appropriate time, but it's a
4 mistake to assume that the circumstances are going to change.
5 We need to get the plan done and make sure it's available if we
6 need to use it.

7 JUDGE PAYNE: Excuse me just a minute. I think we
8 understand both sides of that, at least right now, but there is
9 one thing I'd like to sort through with you all just to make
10 sure I understand. As I understand it, the plaintiffs intend
11 to submit a plan, and do you have one ready, Mr. Hamilton?

12 MR. HAMILTON: We can -- do we have one ready? We're
13 very close to having one ready. If you ordered me to produce
14 it today, I'm not sure that I could.

15 JUDGE PAYNE: No, but how long until you have one?

16 MR. HAMILTON: We could file one as early as this
17 Friday, although we'd really like to have a little bit longer
18 than that. I'd propose September 18th, but I'd be happy with
19 September 11th.

20 JUDGE PAYNE: Excuse me then. Is your proposal and
21 what you are working on tailored to the prospect of revising
22 District 3 only, or does it go into other districts? If so,
23 what districts -- how many we would be looking at?

24 MR. HAMILTON: I can't answer the question, Your
25 Honor. I honestly and candidly don't know, but it would have

1 to, because, of course, District 3, when you modify the
2 boundaries, you necessarily affect the districts that adjoin
3 it. I can't give you a numerical answer. I simply don't know
4 the answer to that question.

5 JUDGE PAYNE: But you are not talking about doing all
6 11 Congressional districts?

7 MR. HAMILTON: I don't believe all 11 Congressional
8 districts are affected, but it's certainly more than just VD 3,
9 and that's because -- the constitutional violation extends
10 necessarily in VD 3, affects the rest of the map, so there has
11 to be some adjoining districts that are corrected.

12 JUDGE PAYNE: Well, I understand. I was asking you
13 which ones you are looking at. Two and four?

14 MR. HAMILTON: Your Honor, I don't want to make a
15 misrepresentation, and I don't know the answer to the question.

16 JUDGE PAYNE: So we're only looking at a few
17 districts, we're not looking at 11 districts. All right. That
18 helps me. I suppose -- is there anything else that anybody
19 else wants to ask, Judge Diaz or Judge O'Grady?

20 JUDGE DIAZ: I don't. I think this has been helpful.
21 I think we need to go back and --

22 JUDGE PAYNE: Is there any point that any of the
23 lawyers would like to bring up that we haven't touched on that
24 you think we ought to be thinking about when deciding how to
25 proceed?

1 MR. HAMILTON: One point. This is Mr. Hamilton
2 again. One point that we discussed yesterday, and I don't
3 think it needs to be in a court order, but I want to alert the
4 Court that when these maps are exchanged between the parties,
5 Mr. Carvin, Mr. Raphael, and I have agreed that we would
6 discuss exactly what that means, and what it means -- we
7 haven't reached agreement yet, but I'm certain that we will.

8 It will mean a shape file, probably a block
9 equivalency file, and those are technical terms, and they
10 require a related data set. We'll be talking with our experts
11 about that and agreeing on exactly what data so that when we
12 propose a remedial plan or when Mr. Carvin proposes a remedial
13 plan, we'll exchange those files, the technical underlying
14 files, and I would imagine and I would ask the Court that when
15 the Court develops its own remedial plan or any proposed
16 remedial plan, that it also disclose the shape files, block
17 equivalency files, and related data sets to allow the parties
18 to review it.

19 MR. CARVIN: This is Michael Carvin. Just a footnote
20 to what I understand is obviously a very technical point, but
21 if the Court recalls, during the trial, the Department of
22 Legislative Services has a disconnect between the way it
23 analyzes the relevant districts and the census geography
24 because of some things they did.

25 So in terms of any submission of plans, the Court may

1 need to build in, both for the parties and/or the Court, the
2 ability to run these maps through, if you will, the Division of
3 Legislative Services to make sure that we're all -- all parties
4 are working off a common data set, because it would greatly
5 complicate the Court's lives and create unnecessary confusion
6 if the census geography differed from plan to plan.

7 JUDGE PAYNE: Excuse me just a minute, Mr. Carvin.
8 In that regard, can you define the disconnect of which you
9 speak?

10 MR. CARVIN: Only in the most abstract terms, and I
11 apologize, Your Honor, because I can't remember exactly. If I
12 recall correctly, it was something involved, and Mr. Gore,
13 please correct me, in the Newport/Norfolk area where they were
14 correcting some things that would throw off both the black
15 voting-age population and the population count itself so that
16 when Dr. McDonald and Mr. Morgan were submitting plans to the
17 Court on the liability thing, they had to run it through the
18 Department of Legislative Services to correct what I'll call
19 the normal Maptitude data to the unique Virginia situation. Is
20 that a fair summary?

21 MR. GORE: Yes. This is Mr. Gore. That's a fair
22 summary.

23 JUDGE PAYNE: This is not the problem that arose in
24 the *Bethune* case with respect to the definition of "black" in
25 black voting-age population.

1 MR. CARVIN: No, Your Honor. If you do recall, we
2 did have a disagreement, I suppose. I don't think it was of
3 any consequence. Dr. McDonald had his own way of defining the
4 black voting-age population and we had our others, but this is
5 distinct from that, yes.

6 The issue that that impaled was whether or not -- say
7 somebody was of a mixed-race parentage, whether you counted
8 them as black or non-black, but that's distinct from what I
9 just raised.

10 JUDGE PAYNE: But the Division of Legislative
11 Services uses, for the meaning of black, black and Hispanic who
12 have reported themselves as black. There was a dispute in the
13 *Bethune* case about whether the Department of Justice uses just
14 black and not the black-plus-Hispanic, and I guess what I'm
15 trying to figure out is whether that's a problem we have here
16 and we need to have agreement on. Mr. Hamilton, I think you
17 are well-aware of it since you sat through it.

18 MR. HAMILTON: I did, Your Honor. I don't think it's
19 a problem we have here. Mr. Carvin and I see eye to eye on
20 that, and the problem Mr. Carvin is identifying here, it was a
21 mistake with respect to -- a very small mistake with respect to
22 the way the census was calculated in some very small
23 jurisdiction that was then corrected.

24 I think that's an issue that Mr. Carvin and I can
25 work out, simply deciding what's the appropriate data set and

1 what's the accurate data set, and I didn't mean to exclude Mr.
2 Raphael, of course. It would involve him, but I don't think
3 that's going to be a problem.

4 JUDGE PAYNE: For your purposes, counsel, I'm sure
5 we're going to call upon you to identify experts. I would like
6 for you to consider the following and submit any comments you
7 have on them: Theodore Arrington, UNCC; Bruce Cain, Stanford;
8 Richard Engstrom, E-n-g-s-t-r-o-m, University of New Orleans;
9 Bernard Grofman, UC Irvine; Nathan Persily, Stanford; John
10 Alford, Rice; William Cooper, William S. Cooper; Alan J.
11 Lichtman, L-i-c-h-t-m-a-n; Ronald E. Weber. Weber is with
12 University of Wisconsin Milwaukee. Lichtman, I don't think --

13 MR. CARVIN: I'm pretty sure he's at American
14 University.

15 JUDGE PAYNE: I want you all to think about those
16 people, and when we call upon you to do what we're going to ask
17 you to do, please provide your assessment of whether those
18 people would make good, A, experts or special master depending
19 upon what we decide to do. All right, anybody else have
20 anything? No?

21 Judge O'Grady and Judge Diaz, do you all want to
22 convene after we take a break?

23 JUDGE O'GRADY: Sure.

24 JUDGE DIAZ: Sure.

25 JUDGE PAYNE: We'll place the call in 20 minutes.

1 Does that suit you all?

2 JUDGE O'GRADY: Bob, do you have my cell phone
3 number?

4 JUDGE PAYNE: I don't think so. You don't want that
5 out in the public, so -- or do you? I don't know. Maybe you
6 want -- just email it to Anna or to me, either one.

7 JUDGE O'GRADY: Okay.

8 JUDGE PAYNE: Maybe it would be better, we'll call at
9 quarter of 4:00; is that okay? That gives everybody a little
10 extra time.

11 JUDGE O'GRADY: That's fine.

12 JUDGE DIAZ: Sure.

13 JUDGE O'GRADY: Thank you all.

14 MR. RAPHAEL: Judge Payne?

15 JUDGE PAYNE: Yes, sir.

16 MR. RAPHAEL: Stuart Raphael. Could we ask for a
17 copy of the transcript from the court reporter, please.

18 JUDGE PAYNE: Yes, you can. Do you want to get in
19 line? How quickly do you want it and how many of you want
20 copies?

21 MR. RAPHAEL: I'd be happy to take that up now or
22 with the court reporter offline.

23 JUDGE PAYNE: You need to tell her that. That's what
24 you need to do. There are a couple of expedites that are
25 already pending. I know that much.

