No. 14-1504

IN THE

Supreme Court of the United States

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

Appellants,

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,

Appellees.

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

APPELLANTS' BRIEF REGARDING STANDING

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October 13, 2015

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APPELLANTS' BRIEF REGARDING STANDING

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

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

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

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

BACKGROUND

A. District 3 And Surrounding Districts

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

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

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

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

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

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

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

B. Plaintiffs' Lawsuit

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

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

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

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

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

C. Proposed Remedies

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

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

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

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

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

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

District 11. App. 28a.

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

Respectfully submitted,

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October 13, 2015

APPENDIX

APPENDIX A

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

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

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

* * *

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

PARTIES ARE OVERBROAD AND CONTRAVENE THE LEGISLATURE'S REDISTRICTING PRIORITIES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In particular:

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

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

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

Warren. *See id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Dated: October 7, 2015 Respectfully submitted,

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