

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

)	
PERSONHUBULLAH,)	
et al.,)	
)	
<i>Plaintiffs,</i>)	
)	
v.)	Civil Action No. 3:13cv678
)	
ALCORN, et al.,)	
)	
<i>Defendants.</i>)	
)	

**BRIEF IN RESPONSE TO THE PROPOSED CONGRESSIONAL REDISTRICTING
PLANS SUBMITTED BY PARTIES AND NON-PARTIES**

The Virginia State Conference of NAACP Branches (hereinafter, “Virginia NAACP”) respectfully submits this brief addressing the merits and deficiencies of the proposed remedial plans submitted to this Court on September 18, 2015, by parties and non-parties to the litigation. While the plans submitted were whole-state plans, the Virginia NAACP restricts its comments to proposed iterations of Congressional District 3 and Congressional District 4—the district invalidated as a racial gerrymander by this Court and the other district in the state with the potential to create a new opportunity for African-American voters to elect their candidate of choice. In short, when compared with other proposed maps, the remedial plan proposed by the Virginia NAACP best remedies the constitutional violation identified by this Court *and* complies with Section 2 of the Voting Rights Act.

As an overarching matter, while the Virginia NAACP did make drastic improvements to the enacted plan in compactness, split political subdivisions and respect for communities of interest, the need to comply with the Voting Rights Act and the Equal Protection Clause still

trumps all of those other considerations. This Court’s finding that CD 3 was non-compact was not a constitutional violation in and of itself—it was circumstantial evidence that race predominated in the drawing of the district. The same is true with split precincts and political subdivisions. This Court’s duty in developing a remedial plan is not to adopt the plan that is most compact overall, or that splits the fewest political subdivisions overall. It is instead to redraw CD 3—and unavoidably the districts surrounding it—in a way that best respects federal law.

The Parties’ Plans

The parties submitted three proposed remedial congressional redistricting plans, discussed below. The Defendants—members of the Virginia State Board of Elections—did not submit a proposed remedial plan.

Defendant-Intervenors’ Plans

Defendant-Intervenors—Republican members of Congress—submitted two proposed remedial maps for this Court’s consideration, hereinafter referred to as Defendant-Intervenors’ Plan 1 and Defendant-Intervenors’ Plan 2. In both of their proposed plans, Defendant-Intervenors make only superficial corrections to Congressional District 3, and neither plan actually cures the constitutional deficiency identified by this Court.

Defendant-Intervenors prioritize and laud their efforts to maintain Congressional District 3 as a majority-minority district, but that misinterprets this Court’s earlier ruling and misapplies well-settled law with respect to what Section 5 of the Voting Rights Act required, when it was in effect. According to Defendant-Intervenors’ representations, their Plan 1 draws the district at

50.1% black voting age population and Plan 2 draws the district at 50.2% black voting age population. Defendant-Intervenors' Brief at 8.¹

As the Supreme Court recently affirmed, Section 5 “does not require a covered jurisdiction to maintain a particular minority percentage” in a district in which minority voters have the ability to elect their candidate of choice.” *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1272 (2015). That is true whether the “particular percentage” is 55% or 50% black voting age population. Both are arbitrary numbers when viewed in context of what Section 5 of the Voting Rights Act *did* require—preserving the ability to elect. A district with less than 50% black voting age population may still be a district in which black voters have the ability to elect their candidates of choice. Just because this Court noted that Plaintiffs' alternative map proffered during the trial stage of this action did maintain CD 3 as a majority-black district, that did not constitute a mandate that the district *had* to be majority black. *Op.* at 32.

And indeed, the conclusion of Dr. Lisa Handley and personal experiences of the thousands of members of the Virginia NAACP who live in the greater Hampton Roads region is that CD 3 can be drawn in a compact way, encompassing an easily-identifiable community of interest, without race being overused, and still protect the ability of black voters to elect the candidate of choice. Even if Section 5 were still in effect in Virginia, which it is obviously not, Defendant-Intervenors' arbitrary insistence on maintaining the black voting age population in CD 3 at 50% would not be necessary to comply with Section 5.

Nor does Section 2 of the Voting Rights Act compel the drawing of CD 3 as a majority-black district. Section 2 requires the drawing of a district of at least 50% minority voting age

¹ According to the Virginia NAACP's calculations, however, the black voting age population when considering the “Any Part Black” census category indicates that CD 3 in Plan 1 is 50.95% and 50.93% in Plan 2.

population where white bloc voting acts to usually defeat of the candidates of choice of minority voters. *Thornburg v. Gingles*, 478 U.S. 30, 48-49 (1986); *Bartlett v. Strickland*, 556 U.S. 1, 16 (2009). As this Court noted, in CD 3, the candidate of choice of African-American voters was consistently elected in the district from the district's creation in 1992 until the present. Op. at 45. Because of that electoral success, it cannot be said that black voters in this area have not had the opportunity to participate in the political process, and thus a Section 2 remedy is not required in that particular area.

The same is not true, though, for black voters in the Southern Piedmont region. While black voters in the remote communities strung along the James River have had the opportunity to elect their preferred candidate, and that opportunity should not be taken away from them, black voters who live in the historically more agricultural parts of the Commonwealth have not been able to elect their candidates of choice. The critical flaw with the Defendant-Intervenors' plans is that they do not create any new opportunity for these voters who have been shut out of the political process. In a state where African Americans constitute 19.7% of the population, African Americans ought to have the opportunity to elect their candidate of choice in two out of the eleven congressional districts. And because the *Gingles* preconditions can be satisfied in the Southern Piedmont region, Section 2 compels the drawing of a district that does provide that opportunity. The Defendant-Intervenors' plans do not satisfy Section 2.

It is important to note, though, that the Virginia NAACP is certainly not endorsing the dismantling of the Congressional District 3—but it can be drawn in a way that is compliant with the Equal Protection Clause and still protects African-American voting abilities. Despite the loss of Section 5, it remains an important policy interest that a remedial plan preserves the ability of black voters to elect their candidate of choice in CD 3. Virginia has a long, sad history of racial

discrimination in voting, and black voters have only had *any* success in electing their candidates of choice to Congress for two decades. Black voters are still substantially underrepresented in the halls of Congress. This Court should reject the suggested remedial plans proffered by Defendant-Intervenors because they do not remedy the unconstitutional packing in CD 3 and do not provide an opportunity for black voters to elect their candidate of choice in CD 4.

Plaintiffs' Plan

Plaintiffs' plan does not fare any better in correcting the constitutional flaw in Congressional District 3. Like Defendant-Intervenors' plans, Plaintiffs' proposed plan offers a version of CD 3 that is only superficially more compact. It still strings together different African-American populations along the James River. It still operates under the legal misunderstanding that CD 3 must be maintained as a majority-black district. And importantly, it still does not create additional opportunity for black voters elsewhere in the state, as unavoidably happens when a compact, commonsensical version of CD 3 is drawn. As such, this Court should not adopt the remedial plan proposed by Plaintiffs.

The Non-Parties' Plans

A number of non-parties in addition to the Virginia NAACP submitted proposed remedial plans. The Virginia NAACP will focus its response on the plan submitted by the Governor of Virginia.

The Governor's Plan

Of all the plans submitted other than the Virginia NAACP's plan, the Governor's plan comes closest to both rectifying the constitutional deficiency in CD 3 and providing the equitable opportunity for black voters to elect a second candidate of their choice (in a geographic region

where black voters have not previously had that opportunity) that necessarily results from the drawing of CD 3 in a manner that respects communities of interest.

According to his brief, the Governor's plan draws CD 3 to have a black voting age population of 41.9%, and neighboring CD 4 to have a black voting age population of 48.0%.² With his plan, as mentioned above, the Governor submitted the racially polarized voting analysis of Dr. Lisa Handley. Dr. Handley opined that CD 3 in the Governor's plan (adopting the plan put forth by Senator Mamie Locke during the special session) would amply preserve the continued ability of black voters to elect their candidates of choice. The Virginia NAACP agrees with that conclusion.

While the Governor's plan employs a similar strategy as does the Virginia NAACP's plan, the Virginia NAACP's plan is preferable based on several different objective measures. According to the Virginia NAACP's analysis, the Governor's plan splits 18 counties or subdivisions, while the Virginia NAACP's only splits 14. The Virginia NAACP's plan splits no VTDS (VTD is short for Voter Tabulation District, which is usually coterminous with precincts), while the Governor's plan splits 23 VTDS.

Finally, the Virginia NAACP's version of CD 4 satisfies the Supreme Court's requirement that should a district be determined to be required under Section 2 of the Voting Rights Act, it be drawn to be at least 50% minority voting age population. To be sure, the Virginia NAACP does not believe that the Governor's version of CD 4 violates Section 2, as it would provide an opportunity for black voters to elect their candidate of choice. But given that this district is needed to provide new and equal opportunity under the Act, drawing the district at

² Again, according to the Virginia NAACP's calculations, however, the black voting age population when considering the "Any Part Black" census category indicates that CD 3 is 42.75% any part black voting age population and CD 4 is 48.53% any part black voting age population.

50% as the Virginia NAACP did insulates this Court from any accusations that it employed too much discretion in construction of a remedial map.

Conclusion

The Virginia NAACP respectfully urges this Court to adopt an approach to developing a remedial map that fully remedies the racial gerrymandering in Congressional District 3 and complies with Section 2 of the Voting Rights Act by creating a new opportunity for black voters to elect their candidate of choice in the Southern Piedmont region. Adoption of the Virginia NAACP's proposed remedial map would ensure those goals are met.

Respectfully submitted this 7th day of October, 2015.

/s/ David O. Prince

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