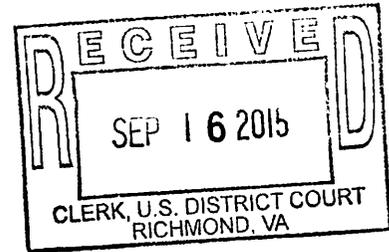


GREGORY E. LUCYK, ESQUIRE
300 SENECA ROAD
RICHMOND, VIRGINIA 23226
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September 16, 2015

Honorable Fernando Galindo
Clerk
United States District Court
Eastern District of Virginia
701 East Broad Street
Richmond, VA 23219

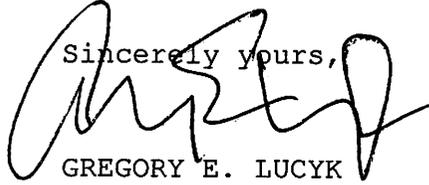


RE: Gloria Personhuballah, et. al, v. James B. Alcorn,
et. al, C.A. No. 3:13-cv-678

Dear Mr. Galindo,

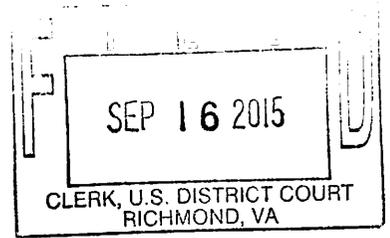
In accordance with the Court's order of September 3, 2015, enclosed please find for filing in the referenced matter an original and one copy of a **Brief of OneVirginia2021 Urging the Court to Adopt a Remedial Plan That Addresses the Specific Deficiencies in the Third Congressional District**. A copy of this brief has been mailed this day to counsel of record.

Thank you for your attention.

Sincerely yours,

GREGORY E. LUCYK
Attorney at Law

cc: (with enclosure)
Mike Melis
John K. Roche
Marc Erik Elias
John Devaney
Kevin Hamilton
Jonathan Andrew Berry
John Matthew Gore
Michael Anthony Garvin
Cullen Dennis Seltzer
Frederick W. Chockley, III
Jennifer Marie Walrath

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division



GLORIA PERSONHUBALLA, et. al,)
)
Plaintiffs,)
)
v.)
)
JAMES B. ALCORN, et.al,)
)
Defendants.)

Civil Action No. 3:13-cv-678

**BRIEF OF ONEVIRGINIA2021 URGING THE COURT
TO ADOPT A REMEDIAL PLAN THAT ADDRESSES THE
SPECIFIC DEFICIENCIES IN THE THIRD CONGRESSIONAL DISTRICT
IDENTIFIED BY THE COURT IN THIS CASE**

In response to the Court’s Order of September 3, 2015, concerning the filing of briefs and remedial plans in this case, OneVirginia2021, Virginians for Fair Redistricting, submits this brief urging the Special Master to recommend and the Court to adopt a remedial plan that addresses all of the deficiencies in the Third Congressional District identified in the opinion of the Court. These deficiencies, aside from the predominance of race, include a highly non-compact district, the absence of true contiguity, and numerous divided political subdivisions and voting precincts that were split solely to create an unconstitutionally gerrymandered congressional district.

INTRODUCTION

OneVirginia2021, Virginians for Fair Redistricting, is a corporation formed under the laws of the Commonwealth of Virginia and granted exempt status under Sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code. OneVirginia2021 was organized to initiate a comprehensive effort to remove gerrymandering from the redistricting process in Virginia, by seeking an amendment to the Constitution of Virginia establishing an impartial Redistricting

Commission – independent of the General Assembly – to draw legislative and congressional district lines. The commission would be required to use specific, objective and well-defined redistricting criteria in performing the redistricting function, to invite public participation in the process and to be fully transparent.

This case presents an important opportunity to demonstrate the need for a fair process and the use of enforceable, well-defined redistricting criteria in creating legislative and congressional districts. The Constitution of Virginia establishes mandatory redistricting criteria to be applied by redistricting authorities. “Every electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district.” Va. Const. Art. II, Sec. 6. As this Court recognized, in drawing the Third Congressional District, aside from population, the General Assembly made no effort to comply with these mandated redistricting criteria. Any remedial plan, accordingly, should be tailored specifically to address these glaring deficiencies.

This Court is not without guidance in ascertaining precise standards and criteria to apply in the remedial process now before the Court. There is a model available that would address all of the redistricting deficiencies at issue in this proceeding. In the 2015 session of the Virginia General Assembly, Senator John Watkins introduced SB 840, a bill amending the Code of Virginia to set forth clear and specific redistricting criteria derived from the constitution and jurisprudence of the Commonwealth. His bill passed the Senate unanimously on a vote of 38-0, but was left in a House subcommittee on a 4-3 vote without consideration by the full committee. A copy of SB 840 is attached to this brief as an Exhibit A. (The bill also is available online at: <http://lis.virginia.gov/cgi-bin/legp604.exe?151+ful+SB840+pdf>).

Among the specific, well-defined criteria in the Watkins bill to direct the districting process were the following: (1) Existing political subdivision boundaries and voting precincts should be respected to the maximum extent possible. If a departure from existing political subdivision boundaries is necessary in order to comply with other districting criteria, then district lines should be drawn using clearly observable natural or man-made physical boundaries; (2) legislative and congressional districts should contain substantially equal population in accordance with the legal standards established by the courts; (3) legislative and congressional districts must comply with the laws requiring racial and ethnic fairness, including following the proper procedures for ensuring that minorities can elect candidates of their choice; (4) every legislative and congressional district should be composed of contiguous territory. A district is contiguous if it is possible to travel from one point in the district to any other point without crossing the boundary of the district. Districts divided by water are contiguous if a common means of transport, such as a bridge or ferry, connects the two parts of the district or, if the water were to be removed, the land on one side of the district would be adjacent to the land on the other side of the district, i.e., eliminating water contiguity upriver or downstream; (5) every legislative and congressional district should be composed of compact territory. Districts should not be oddly shaped or have irregular or contorted boundaries, unless necessary because the district adheres to political subdivision lines. Fingers, tendrils or land bridges extending from a district core should be avoided, as well as thin and elongated districts, and districts with multiple core populations connected by thin strips of land or water. Districts should be drawn using one or more standard numerical measures of individual and average district compactness to provide an objective assessment of a districting plan's compactness, both statewide and district-by-district; and (6) political data and election results should not be considered in creating districting

maps, unless an analysis of election results is necessary to determine if racial or ethnic minorities can elect candidates of their choice. These are the criteria that, as a practical matter, should guide the Special Master and the Court in adopting a remedial redistricting plan to address the unconstitutional racial gerrymandering in the Third Congressional District.

LEGAL STANDARDS GOVERNING THE COURT'S ROLE

When the judicial branch performs redistricting, it lacks the political authority of the legislative and executive branches and, therefore, must act in a restrained and deliberative manner. Connor v. Finch, 431 U.S. 407, 415 (1977). However, when the legislature fails to pass a new redistricting plan, and the old plan is no longer constitutional, the court's powers are broad. O'Sullivan v. Brier, 540 F.Supp. 1200, 1202-03 (D.Kan. 1982). And while "[t]he remedial powers of an equity court must be adequate to the task. . . they are not unlimited." Upham v. Seamon, 456 U.S. 37, 43 (1982). When adherence to state policies does not detract from the requirements of the federal Constitution, the district court should honor state policies in the context of congressional redistricting. White v. Weiser, 412 U.S. 783,795 (1973). In addition, the court should consider "remedies required by the nature and scope of the violation." White v. Weiser, supra at 793. In this case, the nature and scope of the violation require the Court to address the extreme deviations in compactness, contiguity and political subdivision splits that render the Third Congressional District unconstitutional. To this end, the Court should perform its task utilizing politically neutral and well-defined redistricting principles, derived from state and federal law, to promote public confidence and the perception of fairness in the remedial process. The redistricting standards and criteria set forth in SB 840, the Watkins bill, clearly provide the well-settled state and federal standards that this Court should "honor" in order to accomplish the task at hand.

ARGUMENT

The Court's opinion in this case filed on October 7, 2014 clearly identifies the significant deficiencies in the Third Congressional District that should be corrected in the remedial plan.

Compactness

As noted above, compactness is a districting criteria specifically mandated by the Virginia Constitution. See, Va. Const. Art. II, Sec. 6. This Court has stated that the Third Congressional District is “the least compact and most bizarrely shaped district in the 2012 plan.” Page v. Virginia State Board of Elections, C.A. No. 3:13cv678 (October 7, 2014) (Slip op. at 36). The legislature did not examine compactness scores in creating the district, and a visual test shows it is “well deserving the kind of descriptive adjectives. . . that have traditionally been used to describe acknowledged gerrymanders.” Page, Slip op. at 24. It crosses the James River from the City of Richmond and Charles City County into Prince George County with an appendage jutting out west from the district core to capture the City of Petersburg. The district then wanders eastward, “loosely connected by the James River,” id. to pick up isolated and unconnected portions of Newport News, the City of Hampton and the City of Norfolk. In sum, the district fails to meet any reasonable standard of compactness, using either a basic “eyeball” test or well-accepted mathematical measures, and the remedial plan adopted by this Court should correct this violation of a constitutionally mandated districting criteria in Virginia.

Contiguity

Like compactness, contiguity of legislative and congressional districts is constitutionally required in the Commonwealth of Virginia. See Va. Const. Art. II, Sec. 6. The Third Congressional District does not meet any reasonable standard of traditional contiguity, and even violates allowances for water contiguity that have been recognized by the Supreme Court of Virginia. See, e.g., Wilkins v. West, 571 S.E.2d 100 (2002). In this case, “the legislature used

water contiguity as a means to bypass white communities and connect predominantly African-American populations in areas such as Norfolk, Newport News and Hampton.” Page, Slip op. at 26. Contrary to this Court’s conclusion in Page that the third district was “legally contiguous,” Page, Slip op. at 25, such purported water contiguity, created by running district lines up along a river bank or downstream, to connect separate and distinct sections of land on the same side of the water, is not an accepted part of Virginia jurisprudence. In Wilkins v. West, supra, the Supreme Court of Virginia defined the constitutional parameters of contiguity by land and by water in Virginia. “Clearly, a district that contained two sections completely severed by another land mass would not meet this constitutional requirement. Moreover, no one disputes that the geography and population of this Commonwealth necessitate that some electoral districts include water, and that land masses separated by water may nevertheless satisfy the contiguity requirement in certain circumstances.” Wilkins 571 S.E.2d at 109 (emphasis added). In this case, the precincts in Newport News and Hampton are not separated by water. Rather, they are completely severed by another land mass. The Third Congressional District is not contiguous, and this Court’s remedial plan should correct this deficiency.

Political Subdivision and Precinct Splits

As this Court pointed out in its earlier opinion, the Third Congressional District split more local political subdivisions than any other congressional district. Nine cities and counties were divided, and this “contributed to the majority of splits in neighboring congressional districts.” Page, Slip op. at 26. It also split more voting precincts than any other congressional district. This Court referred specifically to the plaintiffs’ alternative plan that, “unlike the 2012 Plan, keeps the cities of Newport News, Hampton, and Norfolk intact. This is a particularly important accomplishment because it reflects the fulfillment of a strong public sentiment, as

expressed during the 2010 redistricting forums, against splitting localities, and in favor of keeping cities like Hampton and Norfolk intact.” *Id.* at 29. It also should be noted that split precincts complicate the election process and impose hardships and substantial additional costs on local election officials. This Court’s remedial plan should establish a Third Congressional District that minimizes to the greatest extent possible such political boundary and precinct splits, both in the Third District and its neighboring congressional districts.

Compliance with the Voting Rights Act

In holding that the Third Congressional District was a racial gerrymander, this Court stated that the 2012 congressional redistricting plan “was not informed by a racial bloc voting or other, similar type of analysis.” *Id.* at 10. Instead, the General Assembly adopted a racial “threshold,” concluding that all majority-minority districts should have a minimum black voting age population (VAP) of 55%. In considering a remedial plan, it is anticipated that the Court will examine proposed alternative plans to determine whether racial bloc voting analyses have been provided, and whether the proposed district will allow minority voters to elect candidates of their choice. The Court also may wish to consider the Third Congressional District redraw that was implemented in 1998, after this Court first struck down the third district as a racial gerrymander in *Moon v. Meadows*, 952 F. Supp. 1141 (E.D.Va. 1997). The new district enacted following the decision in *Moon* had a black VAP of 50.4%. In 1998, the incumbent Congressman in the third district won re-election with 75.97% of the vote. Since that time, the incumbent has won every contested election with at least 68.7% of the vote. These results show there is no need for a “super-majority” minority district in order to protect the rights of minority voters in the Third Congressional District. The Court’s remedial plan accordingly should be tailored to reflect the actual performance of the district.

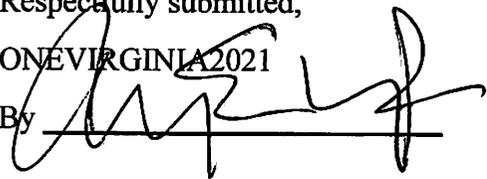
CONCLUSION

For the reasons stated above, OneVirginia2021 respectfully submits that this Court should (1) adopt objective, well-defined districting criteria, such as that set forth in SB 840, the Watkins bill, in order to guide the Special Master and this Court in approving a remedial redistricting plan, and (2) that the Special Master recommend and the Court adopt a remedial plan that corrects all of the deficiencies in the Third Congressional District identified in the opinion of the Court.

Dated: September 16, 2015

Respectfully submitted,

ONE VIRGINIA 2021

By 

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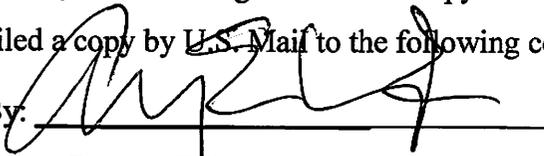
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*Counsel wishes to express his gratitude and appreciation to our Legal Intern, Emily Wagman, 2L at William and Mary Law School, for her outstanding research, drafting and editing assistance in the preparation of this brief.

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2015, I filed an original and one copy of this document with the Clerk of the Court, and mailed a copy by U.S. Mail to the following counsel:

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2015 SESSION

INTRODUCED

15101549D

SENATE BILL NO. 840

Offered January 14, 2015

Prefiled January 5, 2015

A BILL to amend the Code of Virginia by adding in Article 2 of Chapter 3 of Title 24.2 a section numbered 24.2-304.04, relating to standards and criteria for congressional and state legislative districts.

Patron—Watkins

Referred to Committee on Privileges and Elections

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Article 2 of Chapter 3 of Title 24.2 a section numbered 24.2-304.04 as follows:

§ 24.2-304.04. Standards and criteria for congressional and state legislative districts.

A. Every congressional and state legislative district shall be constituted so as to adhere to the following criteria, in the order in which the criteria are set forth in subsections B through G.

B. Existing political boundaries shall be respected to the maximum extent possible. Political boundaries shall include the boundaries of counties, cities, towns, county magisterial and election districts, municipal councilmanic districts, and voting precincts. If a departure from existing political boundaries is necessary in order to comply with other districting criteria, the district lines shall be drawn utilizing clearly observable physical boundaries. A "clearly observable boundary" shall include (i) any named road or street; (ii) any road or highway that is a part of the federal, primary, or secondary state highway system; (iii) any river, stream, or drainage feature shown as a polygon boundary on the TIGER/Line Files of the United States Bureau of the Census; or (iv) any other natural or constructed or erected permanent physical feature that is shown on an official map issued by the Virginia Department of Transportation, on a United States Geological Survey topographical map, or as a polygon boundary on the TIGER/Line Files of the United States Bureau of the Census. No property line or subdivision boundary shall be deemed to be a clearly observable boundary unless it is marked by a permanent physical feature that is shown on an official map issued by the Virginia Department of Transportation, on a United States Geological Survey topographical map, or as a polygon boundary on the TIGER/Line Files of the United States Bureau of the Census.

C. Legislative and congressional districts shall be established on the basis of population. Senate and House of Delegates districts, respectively, shall each have a population that is as substantially equal to the population of every other such district as practicable. Congressional districts shall have populations that are as nearly equal as practicable. The General Assembly shall be guided by the most recent federal and state judicial decisions defining standards for equal population for the respective districts, including permissible deviations from ideal population if the deviation is necessary in order to achieve some other legitimate districting criterion.

D. Districts shall be drawn in accordance with the requirements of federal and state laws, and judicial decisions interpreting such laws, that address racial and ethnic fairness, including the Equal Protection Clause of the United States Constitution and the provisions of the federal Voting Rights Act of 1965, as amended.

E. Each legislative and congressional district shall be composed of contiguous territory. A district shall be deemed contiguous if it is possible to travel from one point in the district to any other point in the district without crossing the boundary of the district. Territory that touches the rest of a district only by a point shall not be deemed contiguous territory. Districts divided by water shall be deemed contiguous if a common means of transport, such as a bridge or ferry, connects the two parts of the district or, if the water were to be removed, the land on one side of the district would be contiguous with the land on the other side of the district.

F. Each legislative and congressional district shall be composed of compact territory. Districts shall not be oddly shaped or have irregular or contorted boundaries, unless justified because the district adheres to political subdivision lines. Fingers or tendrils extending from a district core shall be avoided, as shall thin and elongated districts and districts with multiple core populations connected by thin strips of land or water. The General Assembly shall employ one or more standard numerical measures of individual and average district compactness to provide an objective assessment of a districting plan's compactness, both statewide and district-by-district.

G. Consideration may be given to communities of interest by creating districts that do not carve up homogeneous neighborhoods or separate groups of people living in an area with similar interests or

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59 *needs in transportation, employment, or culture.*

60 *H. The General Assembly shall not include political data or election results as part of a redistricting*
61 *database, and no district shall be drawn using political data or election results in order to favor a*
62 *political party or incumbent legislator. This prohibition includes using addresses of incumbent*
63 *legislators, political affiliations of voters, and previous election results. This prohibition shall not apply*
64 *to minority or ethnic districts drawn pursuant to subsection D if an analysis of election data is required*
65 *in order to determine if racial or ethnic minorities can elect candidates of their choice.*