

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

GOLDEN BETHUNE-HILL, *et al.*,

Plaintiffs,

v.

VIRGINIA STATE BOARD OF ELECTIONS,
et al.,

Defendants.

Civil Action No. 3:14-
cv-00852-REP-GBL-
BMK

**DEFENDANT-INTERVENORS' OPPOSITION TO
PLAINTIFFS' MOTION FOR EXPEDITED BRIEFING**

The Court should deny Plaintiffs' Motion for Expedited Briefing because: (1) it currently lacks jurisdiction over this case and will not have jurisdiction during the proposed time frame for briefing; (2) the proposed briefing schedule is prejudicial to Defendant-Intervenors who are defending this same redistricting plan ("2011 Redistricting Plan") at trial in state court the week of Plaintiffs' proposed briefing; and (3) it is too late for this case to influence elections in 2017.

Jurisdiction. This Court lacks jurisdiction to grant Plaintiffs' expedited relief because it was divested of jurisdiction when Plaintiffs filed their notice of appeal. *See, e.g., Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982). Jurisdiction will not return to this Court until at least 25 days after the issuance of the Supreme Court's decision. *See* Sup. Ct. R. 45.3; *see also Texas v. United States*, 798 F.3d 1108, 1118 (D.C. Cir. 2015), *cert. denied sub nom. Texas v. Davis*, 136 S. Ct. 981 (2016) ("As a formal matter, Supreme Court judgments on review of a federal court decision do not take effect until at least 25 days after they are announced, when the Court issues a certified copy of its opinion and judgment in lieu of a formal mandate."). The 25-day period provides parties a right to file a petition for rehearing. *See* Sup. Ct. R. 44.1 ("Any

petition for the rehearing of any judgment or decision of the Court on the merits shall be filed within 25 days after entry of the judgment or decision, unless the Court or a Justice shortens or extends the time.”). The Supreme Court issued its decision on March 1, so this Court lacks jurisdiction to grant Plaintiffs’ motion until after March 26.¹ Plaintiffs’ Motion should be denied.

Prejudice to Defendant-Intervenors. Plaintiffs’ proposed briefing schedule would be highly prejudicial to Defendant-Intervenors because it spans dates on which Defendant-Intervenors, represented by the same counsel in this case, will be at trial in Virginia state court defending the same 2011 Redistricting Plan. *Vesilind, et al., v. Virginia State Board of Elections, et al.*, No. CL15003886-00 (Richmond Cty. Cir. filed Sept. 14, 2015) (the “state action”). The proposed time frame, which was selected by Plaintiffs without input from Defendant-Intervenors, is prejudicial and unworkable. Additionally, counsel for Defendant-Intervenors are still assessing the import of the Supreme Court’s decision in this case, and it is not at all clear at this time that the remand can be resolved without further evidentiary proceedings. Counsel for Defendant-Intervenors also are currently assessing the potential impact of the ongoing state action and may seek a stay of this case to allow the state action—which may require redrawing of the entire 2011 Redistricting Plan—to proceed to a final judgment.² See *Grove v. Emison*, 507 U.S. 25, 26 (1993) (citing *Scott v. Germano*, 381 U.S. 407 (1965)) (“[T]he Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself.”). Defendant-Intervenors will assess these issues and inform the Court of their position in due course.

¹ Notably, Plaintiffs’ proposed order and briefing schedule would conclude prior to this date.

² Defendant-Intervenors moved the state court to stay proceedings in light of the Supreme Court’s opinion and remand. That motion is currently under advisement and a decision is expected early this week with trial scheduled to begin next Monday, March 13.

The 2017 Elections. Plaintiffs’ sole basis for seeking expedited briefing, that this case can reach a final judgment in time for a new redistricting plan to apply to this fall’s elections, Mot. at 2, is unrealistic. The 2017 election cycle is already underway. The 2017 primaries will occur on June 13, *see* Va. Code § 24.2-515, and accordingly, the registration deadline must be no later than March 30, *see* Va. Code § 24.2-522(A). In the ongoing state action over this plan, the Virginia State Board of Elections has identified March 30, 2017 as the drop-dead date for impacting primaries as “[m]uch must be done prior to June.” Def. Resp. to Mots. to Stay and Certify Interlocutory Appeal, at 2 (*filed* March 18, 2016) (noting the complex process of elections administration, including “ballot preparation, verification, and printing”, requiring substantial time and organization), Ex. A. A final judgment in this case will be reached after the 2017 elections process is well under-way, and federal courts do not lightly tread into the state elections process at this late hour. *See Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006); *see also Reynolds v. Sims*, 377 U.S. 533, 585 (1964).

CONCLUSION

Plaintiffs have moved the Court for relief this Court has no jurisdiction to grant, premised on an “expedited” time-frame that is highly prejudicial to Defendant-Intervenors, in order to achieve an unachievable 2017 elections goal. Accordingly, Defendant-Intervenors respectfully request the Court deny Plaintiffs’ Motion for Expedited Briefing schedule and, instead, hold a status conference after jurisdiction is transferred from the Supreme Court.

Dated: March 6, 2017

Dalton Lamar Oldham, Jr. (*pro hac vice*)
Dalton L Oldham LLC
1119 Susan Street
Columbia, SC 29210
Tel: (803) 237-0886
dloesq@aol.com

Respectfully Submitted,

/s/ Katherine L. McKnight
Katherine L. McKnight (VSB No. 81482)
E. Mark Braden (*pro hac vice*)
Richard B. Raile (VSB No. 84340)
BAKER HOSTETLER LLP
1050 Connecticut Ave NW, Suite 1100
Washington, DC 20036
Tel: (202) 861-1500
Fax: (202) 861-1783
kmcknight@bakerlaw.com
mbraden@bakerlaw.com
rraile@bakerlaw.com

*Counsel to the Virginia House of Delegates
and Virginia House of Delegates Speaker
William J. Howell*

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of March, 2017, a copy of the foregoing was filed and served on all counsel of record pursuant to the Court's electronic filing procedures using the Court's CM/ECF system.

Dalton Lamar Oldham, Jr. (*pro hac vice*)
Dalton L Oldham LLC
1119 Susan Street
Columbia, SC 29210
Tel: (803) 237-0886
dloesq@aol.com

/s/ Katherine L. McKnight
Katherine L. McKnight (VSB No. 81482)
E. Mark Braden (*pro hac vice*)
Richard B. Raile (VSB No. 84340)
BAKER HOSTETLER LLP
1050 Connecticut Ave NW, Suite 1100
Washington, DC 20036
Tel: (202) 861-1500
Fax: (202) 861-1783
kmcknight@bakerlaw.com
mbraden@bakerlaw.com
rraile@bakerlaw.com

*Counsel to the Virginia House of Delegates
and Virginia House of Delegates Speaker
William J. Howell*

Exhibit A

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

| | | |
|---|---|----------------------------|
| RIMA FORD VESILIND, <i>et al.</i> |) | |
| Plaintiffs |) | |
| v. |) | Case No. CL15003886 |
| |) | |
| VIRGINIA STATE BOARD OF ELECTIONS, <i>et al.</i> |) | |
| Defendants. |) | |

**DEFENDANTS' RESPONSE TO
THE MOTIONS TO STAY AND CERTIFY INTERLOCUTORY APPEAL**

Defendants the Virginia State Board of Elections and its members (James B. Alcorn, Clara Belle Wheeler, and Singleton McAllister) in their official capacities, the Department of Elections, and Edgardo Cortés in his official capacity as Commissioner of Elections, hereby respond as follows to the (i) Motion to Stay This Court's February 16 Order Pending Appeal and (ii) Motion to Certify Interlocutory Appeal of This Court's February 16 Order to the Supreme Court of Virginia, both filed on March 7 by counsel for seven non-party members of the Senate of Virginia (the Virginia Senators) and the non-party Division of Legislative Services (DLS).

The Motions do not seem to affect Defendants' interests in this litigation or in elections administration. The movants assert that a stay will not substantially injure Plaintiffs and that discovery and this case may proceed during an interlocutory appeal. (Mot. to Stay at 16.) And even if trial proceeds as scheduled (September 12-16, 2016) and this Court rules in favor of Plaintiffs within a short time after trial, it is not at all clear that this litigation will produce a final result before the 2017 Virginia legislative elections. If this Court rules in favor of Plaintiffs, separation of powers principles and the Constitution's express requirement that legislators "shall be elected from electoral districts established by the General Assembly" (VA. CONST. art. II § 6) dictate looking to the General Assembly to correct any legal flaws in current districts. Further

proceedings, possibly involving a special master, may be necessary if there must be district changes beyond those made by the General Assembly. Any ruling in favor of Plaintiffs likely would be appealed. And it takes time to implement, and organize elections in, new districts. Accordingly, it would be difficult for this litigation to produce a final, altered set of state legislative districts before the 2017 statutory elections deadlines, which begin March 30, 2017.¹

Given that the Motions do not appear to impact Defendants' interests, Defendants neither support nor oppose the Motions. To the extent Va. Code § 8.01-670.1 requires that Defendants expressly agree to an interlocutory appeal of legislative privilege issues, Defendants so agree.

Respectfully submitted,

STATE BOARD OF ELECTIONS
JAMES B. ALCORN
CLARA BELLE WHEELER
SINGLETON MCALLISTER
DEPARTMENT OF ELECTIONS
EDGARDO CORTÉS

By: _____

Counsel

¹ Va. Code § 24.2-515 fixes the date of 2017 primary elections as the second Tuesday in June, or June 13, 2017, and June 13 is also the deadline for independent candidates, or those representing recognized political parties, to file for qualification for the November 2017 general election ballot. *See* Va. Code §§ 24.2-507(1) & 24.2-510(1). Much must be done prior to June, however. Va. Code § 24.2-522(A) requires that primary candidates' declarations of candidacy and petitions be filed no later than 75 days before the primary, or March 30, 2017, a time period that is necessary to allow for other state deadlines (*e.g.*, Va. Code §§ 24.2-527(A)); ballot preparation, verification, and printing; and the requisite mailing of absentee ballots no later than 45 days before the date of the primary election (*see* Va. Code § 24.2-612).

The complex process of elections administration requires substantial time and organization by Defendants and by hundreds of elections officials and thousands of elections staff and volunteers in the 133 counties and cities across the Commonwealth. Defendants do not believe this Court should order alterations to the 2017 elections schedule set by Virginia law. Moreover, Plaintiffs are the main cause of any inability to finalize revised districts before the 2017 Virginia legislative elections, given that Plaintiffs did not file this action until September 14, 2015 – more than **four years** after the current districts were created and enacted in 2011.

Mark Herring
Attorney General of Virginia

Cynthia E. Hudson
Chief Deputy Attorney General

John W. Daniel II
Deputy Attorney General, Commerce, Environment and Technology Division

Heather Hays Lockerman (VSB # 65535)
Senior Assistant Attorney General, Chief, Financial Law & Government Support Section
hlockerman@oag.state.va.us

Joshua D. Heslinga (VSB # 73036)
Assistant Attorney General
jheslinga@oag.state.va.us

Anna T. Birkenheier (VSB # 86035)
Assistant Attorney General
abirkenheier@oag.state.va.us

OFFICE OF THE ATTORNEY GENERAL
900 E. Main Street
Richmond, Virginia 23219
(804) 786-3847
fax: (804) 692-1647
Counsel for the Defendants

CERTIFICATE OF SERVICE

I certify that, on March 18, 2016, I am serving a copy of the foregoing on the following
by mail, with a courtesy copy sent by email:

Wyatt B. Durette, Jr. (wdurette@durettecrump.com)
Debbie G. Seidel (dseidel@durettecrump.com)
Christine A. Williams (cwilliams@durettecrump.com)
J. Buckley Warden IV (bwarden@durettecrump.com)
Nicholas H. Mueller ([nmuellet@durettecrump.com](mailto:nmueller@durettecrump.com))
DURRETECRUMP PLC
1111 E. Main St., 16th Floor
Richmond, VA 23219
Counsel for Plaintiffs

Katherine L. McKnight (kmcknight@bakerlaw.com)
E. Mark Braden (mbraden@bakerlaw.com)
BAKER & HOSTETLER LLP
1050 Connecticut Avenue, NW, Suite 1100
Washington, DC 20036
*Counsel for The Virginia House Of Delegates and Virginia House Of
Delegates Speaker William J. Howell, and counsel for the movant Division
of Legislative Services*

Jason Torchinsky (jtorchinsky@hvjt.law)
J. Michael Bayes (jmbayes@hvjt.law)
Shawn Toomey Sheehy (ssheehy@hvjt.law)
HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC
45 N. Hill Drive, Suite 100
Warrenton, VA 20186
*Counsel to Non-Party Legislative Respondents, including the seven
movant Virginia Senators*

A handwritten signature in black ink, appearing to be "J. Torchinsky", written over a horizontal line.

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