

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

GOLDEN BETHUNE-HILL, et al.,)	
)	
Plaintiffs,)	
)	
v.)	
)	
VIRGINIA STATE BOARD OF)	Civil Action No. 3:14-cv-00852-REP-AWA-
ELECTIONS, et al.,)	BMK
)	
Defendants,)	
and)	
)	
M. KIRKLAND COX, SPEAKER OF THE)	
HOUSE OF DELEGATES, and THE)	
HOUSE OF DELEGATES,)	
)	
Intervenor-Defendants.)	

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS’
MOTION TO MODIFY THIS COURT’S JUNE 26, 2018 ORDER AND
PROCEED IMMEDIATELY WITH REMEDIAL PHASE**

On June 26, 2018, this Court issued an opinion and order concluding that 11 of Virginia’s House of Delegates districts “violate the Equal Protection Clause of the United States Constitution” and enjoining the Commonwealth “from conducting any elections after this date for the office of Delegate . . . in the Challenged Districts until a new redistricting plan is adopted.” June 26, 2018 Order at 1 (ECF No. 235). The Court did not begin the process of drawing new, constitutionally compliant districts. Instead, the Court “allow[ed] the Virginia General Assembly until October 30, 2018 to construct a remedial districting plan that rectifies the constitutional deficiencies identified in [its] opinion.” June 26, 2018 Op. at 93 (ECF No. 234).

1. It is now clear that the General Assembly does not intend to avail itself of the opportunity provided by the Court. On June 26, 2018—the same day as this Court’s order—the Speaker of the House of Delegates (Speaker) stated that “[i]t would be premature to even consider any action by the General Assembly until the Supreme Court speaks on these districts.”¹ Ten days later, on July 6, the Intervenor-Defendants filed a motion asking this Court “to stay its injunction pending direct appeal to the Supreme Court” and arguing that “it will be impossible for the legislature, or anyone, to draw a remedial map that passes this court’s muster.” Defs.-Intervenors’ Mot. to Stay Injunction Pending Appeal Under 28 U.S.C. § 1253 at 1, 8 (ECF No. 237). On July 13, 2018, the minority leader of the House of Delegates asked the Speaker (one of the two Intervenor-Defendants) to convene a special session to begin drawing a map that would remedy the constitutional deficiencies identified in this Court’s June 26 Opinion and Order, see Ex. B (Letter from House Minority Leader David J. Toscano to Speaker Kirkland M. Cox), but received no response.

¹ Statement of Speaker Kirk Cox on Eastern District Court’s decision in *Bethune Hill v. Virginia*, Twitter (June 26, 2018 5:46 PM), <https://twitter.com/SpeakerCox/status/1011742403089371136>.

On August 8, this Court entered an order directing “the Intervenor-Defendants [to] file a Statement of Position advising the Court whether the redistricting opportunity afforded in paragraph 3 of [that] order will, or will not, be pursued.” Aug. 8, 2018 Order, at 1-2 (ECF No. 252). On August 13, the minority leader sent a second letter asking the Speaker to convene a special session, see Ex. C (Letter from House Minority Leader David J. Toscano to Speaker Kirkland M. Cox), but once again received no response. On August 20, the Governor issued a proclamation calling the Virginia General Assembly into special session on August 30 for purposes of redistricting. On August 24—four days later—the Intervenor-Defendants filed the statement of position required by this Court’s August 8 order. In that document, the Intervenor-Defendants asserted that “the redistricting opportunity afforded in the Court’s order, ECF No. 235, will be pursued,” but provided no details other than noting the then-upcoming August 30 special session that had been convened by the Governor rather than the Intervenor-Defendants. Defs.-Intervenors’ Statement of Position in Resp. to Court Order ECF No. 252, at 1-2 (ECF No. 255).

The special session of the General Assembly convened as scheduled on August 30. At that session, neither the Speaker nor any member of the majority party proposed a new districting plan. That same day, the House adjourned without setting a date for the body or its relevant committees to reconvene at any point before October 30. There is thus no realistic prospect that the House of Delegates will avail itself of the opportunity set forth in this Court’s June 26 Opinion and Order. See Ex. A (Letter from Governor Ralph S. Northam to Speaker Kirkland M. Cox).

2. The Defendant state elections officials will, of course, exercise utmost efforts to ensure that fair, timely, and orderly elections are held under any remedial plan adopted by this

Court. At the same time, administering elections is a complicated, multi-step process, and every day matters in ensuring that Virginia's 2019 elections are held using districts that remedy the constitutional deficiencies identified in this Court's June 26 Opinion and Order.

For example, the remedial phase in the *Personhuballah* litigation lasted 126 days from this Court's appointment of Special Master on September 3, 2015, through its adoption of a remedial plan for use in the next election on January 7, 2016. See *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552 (E.D. Va. 2016). Even if this Court appointed a special master on October 31, a remedial period of that same duration would result in new districts not being adopted in this case until March 6, 2019. Though still approximately eight months before November 5, 2019, general election date, that date is more than two months *after* prospective candidates are permitted to begin collecting the signatures (January 2, 2019) that are necessary for their name to appear on a primary ballot, see Va. Code Ann. § 24.2-521, and *after* the expiration of the statutory window (February 6 to February 26) during which political parties are required to notify the State Board of Elections that a relevant party committee has adopted a primary as its method of candidate selection, see § 24.2-516; see also *Personhuballah*, 155 F. Supp. 3d at 557 (noting that “[t]he 2016 congressional election cycle” had already “begun” as of January 2, 2016). In short, the 2019 election cycle will begin again on January 2, 2019.

But there is more. Even March 6, 2019, would be: (a) just 22 days before the expiration of the statutory deadline for candidates to submit to party officials the required number of signatures, see Va. Code Ann. § 24.2-522; (b) just 27 days before political parties are required to provide state election officials with the names of candidates who have qualified for the primary ballot, see § 24.2-527; and (c) just 52 days before the deadline for general registrars to make

absentee ballots available for the June 2019 primary, see § 24.2-706.² And, of course, the remedial task in this case (which involves constitutional deficiencies with 11 House of Delegate districts) is at least as complicated than the remedial task in *Personhuballah* (which involved constitutional violations in just one district for the United States House of Representatives, see 155 F. Supp. 3d at 555), which means that there are inherent practical limits to how much time the Court would be able to shave off an already tight remedial phase.

* * *

Virginia has already conducted four rounds of elections using a map that this Court has held violates the Constitution, and every day that passes increases the risk that the fifth and final set of elections before the next round of constitutionally mandated redistricting will be held using the same unconstitutional map. See *Common Cause v. Rucho*, No. 1:16-CV-1026, 2018 WL 4214334, at *1 (M.D.N.C. Sept. 4, 2018) (per curiam) (declining to enjoin use of an unconstitutional map during the upcoming November 6, 2018, general election in part because “imposing a new schedule for North Carolina’s congressional elections would, at this late juncture, unduly interfere with the State’s electoral machinery and likely confuse voters and depress turnout”). The Court has already unanimously declined to stay its order pending appeal, see Aug. 30, 2018 Order (ECF No. 256), with Judge Payne specifically noting that “the public interest is served by having the redrawn districts before the Supreme Court of the United States when it considers the merits of the case,” *id.* at 3 (Payne, J., concurring). Another week has elapsed, and the Intervenor-Defendants have now filed their Jurisdictional Statement with the

² In fact, it is unclear under the Court’s June 26, 2018 Order whether the Commonwealth would be permitted to conduct a primary election in the challenged districts. See June 26, 2018 Order at 1 (“The Commonwealth of Virginia is hereby enjoined from conducting *any elections* after this date for the office of Delegate . . . in the Challenged Districts until a new redistricting plan is adopted.”) (emphasis added).

Supreme Court without making any request to have this Court's order stayed pending that putative appeal. The time for delay is passed. The Intervenor-Defendants have made clear through their actions that they do not intend to pursue the opportunity afforded by this Court's June 26 Opinion and Order, the Court should modify paragraph 3 of that Order and proceed immediately with the remedial phase.

Respectfully submitted,

By: /s/
Toby J. Heytens, VSB # 90788
Solicitor General
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(804) 786-7773 – Telephone
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Mark R. Herring
Attorney General

Stephen A. Cobb
Deputy Attorney General

Matthew R. McGuire, VSB # 84194
Principal Deputy Solicitor General

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2018, a true and accurate copy of this paper was filed electronically with the Court's CM/ECF system, which will then send a notification of such filing to the counsel of record in this case

By: /s/
Toby J. Heytens

EXHIBIT A



COMMONWEALTH of VIRGINIA

Office of the Governor

Ralph S. Northam
Governor

September 7, 2018

Via email

The Hon. M. Kirkland Cox
Speaker of the Virginia House of Delegates
DelKCox@house.virginia.gov

Dear Speaker Cox:

On June 26, 2018, the United States District Court for the Eastern District of Virginia ruled that 11 Virginia House of Delegates districts are unconstitutional and allowed the General Assembly until October 30, 2018 to enact a constitutional map (Order). There have been four elections with unconstitutional districts, and I believe it is imperative that these districts be redrawn as soon as possible so Virginians have constitutional lines enacted in time for the June 2019 primaries.

I called a special session for August 30 to give the General Assembly the opportunity to comply with the Order in a timely fashion. Delegate Lamont Bagby introduced a map on August 29, HB 7001, that met fierce criticism from the majority. In statements to the press, responses to the Order, speeches on the House floor, and in an hours-long committee hearing on the proposal, the House majority has never committed to proposing its own remedial districting plan. On the same day that the House of Delegates convened the special session, it adjourned without setting a date for the body or the relevant committee to reconvene, despite individual Delegates making two efforts to establish specific dates.

The Court has ruled the current map unconstitutional. Yet, the House majority has offered no alternative map and do not appear inclined to do so. Moreover, as of the date of this letter, the General Assembly has not set a deadline by which any proposed map will be passed or rejected or even a date on which the relevant committee will reconvene. I have stated that I expect the General Assembly to produce a constitutional map pursuant to the Court's Order. At this point, however, I do not believe the General Assembly is likely to pass a constitutional map that I can sign.

This raises substantial concerns with respect to Virginia's June 2019 House of Delegates primaries. It is imperative that constitutional district lines be in place in time for the 2019 election cycle to avoid letting another election (the last this redistricting cycle) take place under an unconstitutional map. I am committed to implementing a remedy and hope that one can be in place as soon as possible to minimize any impact on the state's administrative election process. I

see no reason to delay a court-drawn remedy where all signs indicate that the General Assembly will not enact a constitutional map by the current October 30 deadline.

Thus, given my concerns related to timing and my belief that the legislative process has reached an impasse, I urge you and others to request that the Court begin the remedial phase as soon as possible to provide Virginians with the certainty that we will have constitutional districts well in advance of the June 2019 primaries.

Sincerely,

A handwritten signature in black ink, appearing to read "Ralph S. Northam". The signature is fluid and cursive, with the first name "Ralph" being the most prominent.

Ralph S. Northam
Governor

cc:

The Honorable Mark R. Herring, Attorney General (*via hand delivery*)
The Honorable Thomas K. Norment, Jr. (*via email* district03@senate.virginia.gov)
The Honorable Richard L. Saslaw (*via email* district35@senate.virginia.gov)
The Honorable C. Todd Gilbert (*via email* delTGilbert@house.virginia.gov)
The Honorable David J. Toscano (*via email* delDToscano@house.virginia.gov)

EXHIBIT B

COMMONWEALTH OF VIRGINIA
HOUSE OF DELEGATES
RICHMOND



DAVID J. TOSCANO
MINORITY LEADER

211 EAST HIGH STREET
CHARLOTTESVILLE, VIRGINIA 22902
FIFTY-SEVENTH DISTRICT

COMMITTEE ASSIGNMENTS:
COURTS OF JUSTICE
COMMERCE AND LABOR
RULES

July 16, 2018

Honorable Kirkland M. Cox
Speaker of the House
House of Delegates
PO Box 1205
Colonial Heights, VA 23834

Dear Kirk:

On June 26, 2018, the U. S. District Court for the Eastern District of Virginia issued a Memorandum Opinion in *Golden Bethune-Hill, et al, v. Virginia State Board of Elections, et al*, finding that the Virginia House of Delegates had improperly used race in drawing district boundaries following the 2010 Decennial Census in violation of the Fourteenth Amendment's Equal Protection Clause to the United States Constitution. This hopefully will bring to an end to protracted litigation which began in 2014, and which has now cost Virginia taxpayers over \$5 million to defend the drawing of unconstitutional districts.

As you recall, the Eastern District had been directed by the U. S. Supreme Court to reconsider its decision following an initial trial on this matter in July of 2015. The U. S. Supreme Court remanded the case to the district court finding that the court had not applied the appropriate legal analysis to the case. After a second trial in October of 2016, the district court has now issued an opinion consistent with the earlier opinions of the U. S. Supreme Court as applied to the evidence in this case.

The District Court's opinion is clear and unambiguous. It found overwhelming evidence that, contrary to the constitutional requirements, the House plan improperly sorted voters into districts based on the color of their skin and, concluded therefore, that the 2011 Virginia House of Delegates redistricting plan violates the Equal Protection Clause of the U. S. Constitution.

Toscano to Cox
July 16, 2018
Page 2

The court's June 26, 2018 188-page opinion analyzed each challenged district in exhaustive detail to develop its findings about constitutional infirmities. The court further stated that it would "allow the Virginia General Assembly until October 30, 2018, to construct a remedial redistricting map that rectifies the constitutional deficiencies identified in this opinion."

This is the second case where the courts have found recent House redistricting plans to be unconstitutional. On June 5, 2015, the U. S. Supreme Court struck down the House plan to redraw Virginia's Congressional districts, finding that the body illegally concentrated African-Americans in one Congressional district to reduce their influence in others. New maps were subsequently drawn by the court.

The opinion of the district court allows the General Assembly to address the constitutional infirmities, and I believe it is our duty to do so. We have now conducted four legislative elections using district lines that violate the Constitution. Delaying further simply frustrates the rule of law and our obligation to uphold the Constitution.

For these reasons, I propose that we move expeditiously to reconvene the General Assembly to draw new maps that can pass the constitutional tests set forth by the U. S. Supreme Court and which were recognized in the June 26, 2018, decision of the U. S. District Court. In my view, there are several ways in which this can be accomplished:

1. We can change the procedural resolution under which we presently sit in special session to include consideration of the required redistricting. Since August 16, 2018, had been earlier reserved by our colleagues to return to Richmond, it would be fairly easy to bring us together on that date.
2. We could agree to call our own special session for the sole purpose of drawing new maps. This would require a super majority vote and therefore is more problematic, but it is an option. August 16 remains a possibility because we have already reserved it on our schedule.

Toscano to Cox
July 16, 2018
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3. We could request the Governor to call us into special session for this purpose.

I hope we can agree that the legislature should exercise its responsibility and act expeditiously to bring us back on August 16 to begin the process of drawing constitutional lines consistent with the court's opinion and the criteria set forth by the U. S. Supreme Court.

When the courts struck down the House's drawing of the U. S. Congressional District lines as constitutionally infirmed, the General Assembly reconvened in special session on August 17, 2015, to remedy this problem. We ultimately failed, with the result that the court had to intervene to draw the lines. We can do better this time, but only if we act quickly. We have a constitutional responsibility to draw fair district boundaries and do it as quickly as possible. We should move forward without expending more taxpayer monies on this case.

I hope you can consult with your leadership and get back to me by the end of this week (by Friday, July 20, 2018) so our colleagues can plan to return on August 16 and begin this process.

Sincerely

A handwritten signature in black ink, appearing to read "David J. Toscano". The signature is fluid and cursive, with a large initial "D" and "T".

David J. Toscano

EXHIBIT C



COMMONWEALTH OF VIRGINIA
HOUSE OF DELEGATES
RICHMOND

DAVID J. TOSCANO
MINORITY LEADER

211 EAST HIGH STREET
CHARLOTTESVILLE, VIRGINIA 22902
FIFTY-SEVENTH DISTRICT

August 13, 2018

COMMITTEE ASSIGNMENTS:
COURTS OF JUSTICE
COMMERCE AND LABOR
RULES

Via USPS and email: delKCox@house.virginia.gov
Honorable M. Kirkland Cox
Speaker of the Virginia House of Delegates
P. O. Box 1205
Colonial Heights, VA 23834

Dear Kirk:

On August 8, 2018, the U.S. District Court for the Eastern District of Virginia issued a new Order to follow its June 26, 2018, Memorandum Opinion in *Golden Bethune-Hill, et al, v. Virginia State Board of Elections, et al.* The June 26, 2018, Opinion found that the Virginia House of Delegates had improperly used race in drawing district boundaries following the 2010 Decennial Census in violation of the Fourteenth Amendment's Equal Protection Clause to the United States Constitution. In that decision, the court provided the General Assembly the opportunity to redraw the districts by October 30, 2018. The Court has now requested the "House-Intervenors" to provide information as to whether the House will convene to address the problem and draw new lines. They have requested this information by August 24, 2018.

This litigation began in 2014. As you recall, the Eastern District was directed by the U.S. Supreme Court to reconsider its initial decision upholding the constitutionality of the decision, stating that the court had not applied the appropriate legal analysis to the case. After a second trial in October of 2016, the District Court issued an opinion on June 26, 2018, consistent with the earlier opinions of the U.S. Supreme Court as applied to the evidence in this case.

Based on this opinion, I wrote to you on July 16, 2018, to request we convene immediately to modify the challenged districts. I read in the paper that you refused this request. In light of the most recent court order, I renew my request that a session be scheduled as soon as possible.

The District Court's June 26 opinion is clear and unambiguous; it found overwhelming evidence that the 2011 House redistricting plan improperly sorted voters into districts based on the color of their skin and concluded that the plan violates the Equal Protection Clause of the U.S. Constitution.

Toscano to Cox
August 13, 2018
Page 2

The court's June 26, 2018, 188-page opinion analyzed each challenged district in exhaustive detail to develop its findings about constitutional infirmities. The court further stated that it would "allow the Virginia General Assembly until October 30, 2018 to construct a remedial redistricting map that rectifies the constitutional deficiencies identified in this opinion."

This is the second case where the courts have found the House's redistricting plans to be unconstitutional. On June 5, 2015, the U. S. Supreme Court struck down the House plan to redistrict Congressional districts, finding that the body illegally concentrated African-Americans in one Congressional district to reduce their influence in others. The opinion of the District Court places the responsibility for addressing the constitutional infirmities squarely in the hands of the General Assembly, and it is our duty to the citizens of the Commonwealth of Virginia to remedy these constitutional deficiencies as quickly as possible. We have now conducted four legislative elections using district lines that violate the Constitution. Delaying further simply frustrates the rule of law and our obligation to uphold the Constitution.

For these reasons, I propose that we move expeditiously to reconvene the General Assembly to draw new maps that can pass the constitutional tests set forth by the U.S. Supreme Court and recognized in the June 26, 2018, decision of the U. S. District Court. Since we are presently in session, all that needs to be done is to modify the procedural resolution so we can take up new maps.

The Court has given us until August 24 to tell them if and when we will act. October 30 is looming. We have a constitutional responsibility to draw fair district boundaries and do it as quickly as possible. We should move forward without expending more taxpayer monies on this case.

I hope you can consult with your leadership and get back to me by no later than 12:00 pm on Friday, August 17, 2018, so our colleagues can plan to return as soon as possible and begin this process.

Sincerely

A handwritten signature in black ink, appearing to read "D. Toscano", written in a cursive style.

David J. Toscano