No. 17A790

IN THE

Supreme Court of the United States

NORTH CAROLINA, *ET AL.*,

Applicants,

v.

SANDRA LITTLE COVINGTON, *ET AL.*,

Respondents.

MOTION FOR LEAVE TO FILE AMICUS BRIEF, MOTION FOR LEAVE TO FILE BRIEF ON 8 1/2 BY 11 INCH PAPER, AMICUS BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR STAY FOR THE SECRETARIES OF STATE OF THE STATES OF ALABAMA, ARIZONA, ARKANSAS, KANSAS, LOUISIANA, MISSOURI, SOUTH CAROLINA, AND WEST VIRGINIA

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John Merrill, Michele Reagan, Mark Martin, Kris Kobach, Tom Schedler, John R. Ashcroft, Mark Hammond, and Mac Warner ("Amici Secretaries of State"), Secretaries of State for the States of Alabama, Arizona, Arkansas, Kansas, Louisiana, Missouri, South Carolina, and West Virginia, respectively, respectfully move for leave of Court to file the accompanying amicus brief in support of Applicants' Emergency Application for Stay. Amici Secretaries of State are the chief elections officers, or involved in the election processes of their respective States, and charged with the various aspects of

the administration of federal, state, and local elections and the integrity of those elections.

In support of their motion, Amici Secretaries of State assert that the January 21, 2018 district court ruling at issue raises grave concerns about disruption of the May 2018 elections in North Carolina and the specter of precedent for similar disruptions in other States if other courts follow suit. Amici Secretaries of State assert the ruling creates exceptional circumstances that warrant being permitted to be heard on the issue of Applicants' Emergency Application for Stay and request their motion to file the attached amicus brief be granted.

Respectfully submitted on this 31st day of January, 2018,

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John Merrill, Michele Reagan, Mark Martin, Kris Kobach, Tom Schedler, John R. Ashcroft, Mark Hammond, and Mac Warner respectfully move for leave of Court to file their amicus brief in support of Applicants' Emergency Application for Stay on 8½ by 11 inch paper, rather than in booklet form.

In support of their motion, Amici Secretaries of State assert that the Emergency Application for Stay filed by North Carolina in this matter was filed on Wednesday, January 24, 2018. The expedited filing of North Carolina's application and the resulting compressed deadline for any response prevented

Amici Secretaries of State from being able to get this brief prepared for printing and filing in booklet form. Nonetheless, Amici Secretaries of State desire to be heard on the application and request the Court grant this motion and accept the paper filing.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are the Secretaries of State of the States of Alabama, Arizona, Arkansas, Kansas, Louisiana, Missouri, South Carolina, and West Virginia. As such, they are the chief elections officers, or intimately involved

[1] Pursuant to this Court's Rule 37.3(a), *amici* state that applicant and respondents have consented to the filing of this brief. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party. The Republican State Leadership Committee, a nonprofit organization and the largest caucus of state Republican leaders in the country, and the National Republican Redistricting Trust, an organization formed to support Republican redistricting efforts, made monetary contributions intended to fund the preparation or submission of this brief. No other person or entity, other than *amici* or their counsel, made such a monetary contribution.

in the election processes of their respective States, and charged with the various aspects of the administration of federal, state, and local elections and the integrity of those elections. *Amici,* therefore, have a vital interest in the appropriate equitable standard—and the application thereof—governing the timing of judicial orders that would substantially interfere with the orderly administration of elections.

The district court's ruling late in the evening of January 21, 2018,[2] threatens to cause significant disruption in the conduct of imminent elections in North Carolina, and thus to undermine the integrity of those elections. If other courts were to follow this district court's example, that could have dramatic impacts in other States as well, threatening the ultimate integrity of elections.

ARGUMENT

The remedial order entered by the district court in this case is every elections official's nightmare. The district court, despite initially stating that it had "concerns" about the State's adopted remedial map in October of last year, delayed until January 21, 2018—only three short weeks until the candidate filing period for North Carolina's primary opens, on February 12, 2018—before ordering North Carolina's State Board of Elections to implement

[2] The district court's recent opinion denying the stay requested by the Legislative Defendants states that its remedial order was entered on January 19, 2018. *Covington v. North Carolina*, 2018 U.S. Dist. LEXIS 12945, *9 (M.D.N.C. Jan. 26, 2018). In fact, however, that order was withdrawn a few hours later, the final order being issued two days later, very late in the evening on Sunday, January 21, 2018.

significant changes to boundaries for 24 state Senate and House districts. For the district court to express "concerns" with the existing lines in October yet wait months, until the eve of the nomination period, to order the implementation of new district boundaries runs counter to this Court's long-standing admonition to exercise caution in issuing orders affecting imminent elections, and threatens to create chaos in electoral administration. It also runs counter to fundamental principles of federalism and separation of powers.

I. LAST-MINUTE REMEDIAL ORDERS, LIKE THE DISTRICT COURT'S ADOPTION OF NEW HOUSE AND SENATE DISTRICTS IN THIS CASE, THREATEN THE ORDERLY ADMINISTRATION OF ELECTIONS AND RISK SIGNIFICANT CONFUSION TO VOTERS, CANDIDATES, AND ELECTIONS OFFICIALS.

As detailed in the Motion for Stay, filed with this Court, North Carolina's primary election will be conducted on May 8, 2018. The candidate nomination period opens on February 12, 2018, just three weeks after the district court's order for redistricting, and runs until February 28. For the nomination process to proceed, and for candidates to determine whether and how to run for office, districts must be known, and voters must be properly assigned. It is therefore highly prejudicial to the orderly conduct of elections to wait until the eve of imminent election deadlines to order the implementation of 24 newly redrawn legislative districts. Such a rush, after a delay of months, is not necessary, fair, or workable, and it puts elections officials in an untenable position in executing their responsibilities of the conduct and integrity of elections.

This Court has previously recognized that "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy"; that "[a] State indisputably has a compelling interest in preserving the integrity of its election process"; and that "[c]ourt orders affecting elections … can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam) (overruling order enjoining enforcement of voter identification laws issued shortly before the election). Accordingly, the Court has for decades recognized the wisdom of not interfering with imminent elections, even when electoral practices are found to violate the law. In *Reynolds v. Sims*, 377 U.S. 533 (1964), the Court held:

> [U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.

Id. at 585. Following this sage advice, this Court has "authorized District Courts to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to the legal requirements, even

constitutional requirements," *Upham v. Seamon*, 456 U.S. 37, 44 (1982), and has repeatedly affirmed lower court orders declining to enjoin imminent elections, even in the face of adjudicated constitutional violations.

For example, in *Ely v. Klahr*, 403 U.S. 108 (1971), this Court affirmed a district court decision allowing the 1970 legislative elections in Arizona to proceed under a redistricting map adopted by the Legislature in response to a prior court order, even though the remedial map was also "found wanting," where the nomination period was three weeks away, just like it is in this case. *Id.* at 113, 115.

In *Wells v. Rockefeller*, 394 U.S. 542 (1969), the Court affirmed an order permitting a legally deficient map to be used for the 1968 elections where the primary election was only three months away. *Id.* at 547.

In *Whitcomb v. Chavis*, 396 U.S. 1055, and 396 U.S. 1064 (1970), the three-judge district court found that Indiana's multimember districts violated Section 2 and ordered a new plan implemented for the 1970 elections. Justice Marshall temporarily stayed that order, referring the case to the full Court. The full Court then refused to vacate that stay, allowing the election to occur under a plan the district court had found to be illegal.

And in *Kilgarlin v. Hill*, 386 U.S. 120 (1967) (per curiam), this Court approved of permitting the 1966 elections to go forward in Texas legislative districts that had been deemed unconstitutional in February of that year.

Other examples abound. *See, e.g., Kirkpatrick v. Preisler*, 390 U.S. 939 (1968) (permitting 1968 elections to proceed in districts deemed by the district court to be constitutionally void); *Martin v. Bush*, 376 U.S. 222 (1964) (affirming determination of unconstitutionality, but staying relief to permit the State to seek equitable relief in the district court "in light of the present circumstances including the imminence of the forthcoming [1964] election and 'the operation of the election machinery of Texas'").

A host of lower courts have, wisely, followed this Court's lead, exercising great caution in ordering new district lines close to an election. *See, e.g., Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (affirming district court's refusal to enjoin imminent election); *Chisom v. Roemer*, 853 F.2d 1186 (5th Cir. 1988) (vacating injunction); *Md. Citizens for Representative General Assembly v. Governor of Md.*, 429 F.2d 606, 610 (4th Cir. 1970) (denying relief where a new plan "in final form could not have been expected until close upon the eve of the July 6, 1970 deadline for the filing of candidacies. Such a result would necessarily impose great disruption upon potential candidates, the electorate and the elective process."); *Cardona v. Oakland Unified Sch. Dist.*, 785 F. Supp. 837 (N.D. Cal. 1992) (declining to enjoin use of malapportioned districts in primary election four months away); *Kostick v. Nago*, 878 F. Supp. 2d 1124, 1147 (D. Haw. 2012) (three-judge court) (declining to enjoin use of existing boundary lines when primary was three months away).

Amici wholeheartedly endorse this counsel of restraint, especially where, as here, the remedial order in question is one that requires significant reworking of electoral boundaries by elections officials. Election administration is a complicated-enough undertaking as it is, without the uncertainty created by last minute orders changing election rules. Indeed, in the decades since *Reynolds* was decided election administration has grown ever more complicated.

For one thing, in many states implementing new district boundaries requires reprecincting, and it will always require reassigning voters—sometimes hundreds or even thousands of voters—to new precincts or polling places, and ensuring that they receive the correct ballot. *See Kostick*, 878 F. Supp. 2d at 1147-48 (refusing relief in part because "[a] critical part of the election process is precincting, which is both staff and time intensive," and would not be practical in the months prior to the primary). Elections officials in many states must accomplish these changes before the opening of the candidate nomination process, because candidates must generally solicit signatures on nominating petitions from voters in their district. Moreover, where the remedial order is issued at the very last minute, or remains subject to ongoing appeal, the risk of error in preparing for the election significantly increases. Mistakes in the reassignment of voters following redistricting can happen in the best of circumstances. *See United States v. Jones*, 57 F.3d 1020 (11th Cir. 1995) (Voting Rights Act challenge to election based on misallocation

of voters following redistricting of county commission); *Wright v. Williams*, 720 So. 2d 763 (La. Ct. App. 1998) (invalidating election where precinct misassigned to wrong district following redistricting, thereby resulting in between 7 and 14 voters voting in the wrong district). Expediting the process, as is necessitated in this case, significantly increases that risk. In addition, in some cases elections officials can be placed in the near-impossible position of having to guess which districts will ultimately be implemented, and possibly making expedited precinct changes and/ or voter reassignments multiple times, increasing the risk of error and certainly engendering confusion in candidates and voters.

In addition, elections officials must implement ordered changes while still ensuring continued compliance with a host of federal laws designed to protect the integrity of elections and the free exercise of the franchise—laws such as the Help America Vote Act, 52 U.S.C. 20901-21145, and the Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. §§ 20301-20311, which requires the distribution of overseas ballots to begin at least 45 days before election day—as well as state laws governing voter registration, candidate residency and qualifications, and the use of voting technology, and myriad other laws designed to ensure the integrity of voting.

Elections have many moving parts that can be affected by these additional burdens. Once districts are in place, polling places must be identified; pollworkers must be retained and properly trained; accurate new

written instructions for those workers must be produced; voting machines must be reprogrammed with a view toward both accuracy—ensuring that voters are given the correct ballots—and ballot security, including testing and re-testing; and ballots must be properly printed to reflect the correct contests for each precinct and polling place, and also to ensure that they are promptly and accurately translated into multiple languages where necessary.

Last-minute changes obviously strain already heavily burdened elections officials like *Amici*, who must devote substantial resources to ensuring the changes are made accurately and thoroughly, but they also impact voters and candidates as well.

With respect to voters, the potential for errors being made in performing on an expedited basis the detailed tasks required to implement district boundary changes is not insignificant, and could possibly even cause the disenfranchisement of voters if they are incorrectly assigned in the rush. Such disenfranchisement is obviously a problem enough in itself, but the negative effects can ripple beyond just the directly affected voters. Such mistakes, when they occur, threaten to decrease voter confidence in the States' electoral systems more broadly. *See Purcell*, 549 U.S. at 4 ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy."); *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 197 (2008) ("public confidence in the integrity of the electoral process has

independent significance, because it encourages citizen participation in the democratic process.").

As for candidates, they are put in the untenable position of not knowing which district they can run in until the eleventh hour, and whether they even live in the district in which they anticipate running, potentially forcing their campaign into a holding pattern. Such delays can also deprive candidates of timely access to accurate voter registration information to begin circulating nomination papers, raising funds, seeking endorsements, sending mailers, and other campaign activities that are typically in full swing in the weeks leading up to the nomination period. *See, e.g., Banks v. Bd. of Educ.*, 659 F. Supp. 394, 403 (C.D. Ill. 1987) (denying injunctive based on reliance interests of candidates and their supporters); *United States v. Upper San Gabriel Valley Mun. Water Dist.*, 2000 U.S. Dist. LEXIS 13353 (C.D. Cal. Sept 8, 2000) (same).

In its order of January 26, 2018, denying North Carolina's request for a stay, the district court asserted that "[d]uring the hearing, State Board Defendants confirmed that, if the court approved a final redistricting plan three weeks prior to the beginning of the February 12, 2018 candidate filing period, they would be able to assign voters to their respective districts and determine the proper administrative procedures for permitting candidates to file for election without additional delay. (ECF No. 244 at 138-40.)," *Covington*, 2018 U.S. Dist. LEXIS 12945, at *5-6, and also that "[a]s Legislative Defendants acknowledged during the hearing held on January 5, 2018, the

State Board Defendants have recognized that three weeks would be a sufficient period to address any concerns from an election administration standpoint. (ECF No. 244 at 139-140.)" *Id.* at *17-18. A review of the cited passages of the transcript, however, give less reason for confidence.

The passages in question are more accurately characterized as a lawyer for the state elections board (rather than an elections official with direct knowledge) stating that if the court orders new districts the State Board of Elections will do what it has to do to comply. However, he also acknowledged that he could not speak to the impact on candidates. *See* Tr. at 136:19-22 ("That's not taking into account, however, for candidates—the ability to know which district they might be running in and to prepare for that and everything."). He further acknowledged that compliance would require ad hoc workarounds as candidates filed nominating petitions, and "[t]he suggestion that had been offered earlier that, if necessary, county boards and the State Board could make the determination on a candidate-by-candidate basis, that was kind of the 'if we absolutely have to do it that way, that's what we will do,' but that's not the preferable way to do it." Tr. at 140:6-10. This is exactly the point Amici are making herein—belated judicial orders so close to an election require ad hoc departures from established procedures designed to ensure the integrity of the election and greatly increase the likelihood of error.

Elections are like a battleship—they cannot turn on a dime. Last-minute, court-imposed changes risk significant negative impacts to the

integrity of the election, and courts should be extremely reluctant to impose them, especially where, as here, the district court was so convinced months in advance possible defects existed in the Legislature's remedial plan, that it took the unusual step of appointing a special master, also months in advance, to draw alternative district boundaries. It is simply inexplicable that the district court then waited until three weeks before the opening of the candidate filing period to issue its final remedial order rejecting the legislative plan and adopting the Special Master's.

II. THE DISTRICT COURT'S REMEDIAL APPROACH GIVES INSUFFICIENT RESPECT TO STATES' INTEREST IN STRUCTURING THEIR OWN ELECTORAL SYSTEMS.

Under this Court's case law, the proper remedy in a federal voting rights case must be guided by a due respect for the twin principles of federalism and separation of powers. Thus, in overturning the district court's prior attempt to force special elections in 2017 in this case, this Court specifically noted "the need to act with proper judicial restraint when intruding on state sovereignty." *No. Carolina v. Covington*, 137 S. Ct. 1624, 1626 (U.S. 2017). The Court has also repeatedly recognized that "legislative reapportionment is primarily a matter for legislative consideration and determination," *Reynolds*, 377 U.S. at 586, and "'intervention by the federal courts in state elections has always been a serious business,' [citation] not to be lightly engaged in." *Chisom*, 853 F.2d at 1189 (quoting *Oden v. Brittain*, 396 U.S. 1210 (1969) (Black, J., opinion in chambers)). And it has admonished that "[a]bsent evidence that these state

branches will fail timely to perform that duty [*i.e.*, drawing appropriate lines], a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Growe v. Emison*, 507 U.S. 25, 34 (1993).

In this case, the district court gave those dual principles of federalism and separation of powers insufficient weight. By delaying until January 21, months after identifying "concerns" with the Legislature's map, to issue an order declaring North Carolina's new lines invalid, rather than doing so back in October when it first expressed those concerns, the district court unnecessarily deprived the North Carolina Legislature of an opportunity to address and remedy any remaining deficiencies.

But last-minute court orders can offend this fundamental principle of federalism in other ways as well. "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Burdick v. Takushi*, 504 U.S. 428, 433 (1991) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). Consistent with this principle, States establish detailed timelines and procedures in the lead-up to an election ensure the orderly, fair and proper conduct of elections. The later in the elections process a district court waits before ordering redistricting, the more likely it is that the court will have to rewrite provisions

of the State's elections code as well, such as filing deadlines, runoff dates, etc. *See, e.g., Kostick*, 878 F. Supp. 2d at 1147-48 (noting other elections that would have to be adjusted to permit reapportionment in the months prior to the primary); *LULAC v. City of Boerne*, 675 F.3d 433, 441 (5th Cir. 2012) (remanding for modifications to pre-election deadlines).

In other words, ordering the implementation of new districts on the eve of an election *maximizes* the potential for intrusion by federal courts into State electoral processes, rather than adhering to this Court's instruction not to "intrude upon state policy any more than necessary." *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971). *See also Perry v. Perez*, 565 U.S. 388 (2012) (overruling remedial districting plan for insufficient deference to State's legitimate policies); *White v. Weiser*, 412 U.S. 783, 795-96 (1973) (same). As a practical matter, this Court's precedents indicate that, except in the most egregious of circumstances, remedial redistricting should not be ordered in the year of an affected election, but rather should be delayed until the next election cycle.

CONCLUSION

The district court in this case identified perceived defects in the North Carolina Legislature's newly-adopted districting plans months prior to issuing its remedial order, yet the court chose to wait until a mere three weeks prior to the opening of the candidate nomination period to order the alteration of 24 legislative districts.

Such an approach to implementing a remedy sets a bad precedent that, if emulated elsewhere, would make the already-difficult job of elections officials across the country even harder, by encouraging district courts to order new district lines—and the major administrative changes that accompany them—on the eve of an election, despite this Court's persistent teachings to the contrary. And, by its delay, the district court showed insufficient regard for federalism and separation of powers concerns, both by depriving the North Carolina Legislature of a further opportunity to adopt adjusted maps, and by maximizing the prospect that further changes to the State's election law may be required to permit the new lines to be implemented.

Respectfully submitted on this 31st day of January, 2018,

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