**IN THE**

**SUPREME COURT OF THE UNITED STATES**

---

No. 18-281

---

VIRGINIA HOUSE OF DELEGATES, et al.,

*Applicants*,

v.

GOLDEN BETHUNE-HILL, et al.,

*Respondents.*

---

# EMERGENCY APPLICATION FOR STAY PENDING RESOLUTION OF DIRECT APPEAL TO THIS COURT

---


EFREM M. BRADEN
KATHERINE L. MCKNIGHT
RICHARD B. RAILE
BAKER & HOSTETLER LLP
1050 Connecticut Ave., NW
Suite 1100
Washington, DC 20036

PAUL D. CLEMENT
*Counsel of Record*
ERIN E. MURPHY
ANDREW C. LAWRENCE
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

DALTON LAMAR OLDHAM, JR.
DALTON L. OLDHAM LLC
1119 Susan Street
Columbia, SC 29210

*Counsel for Applicants*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**

TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT:

This Court is no stranger to this long-running redistricting case. In 2015, a divided panel of a three-judge district court rejected claims that 12 majority-minority districts in Virginia's bipartisan-supported 2011 House of Delegates plan amounted to unconstitutional racial gerrymanders. *See Bethune-Hill v. Va. State Bd. of Elections* (*Bethune-Hill I*), 141 F. Supp. 3d 505 (E.D. Va. 2015). Two Terms ago, after hearing arguments from the plaintiffs and the House, this Court upheld one district as satisfying strict scrutiny, and remanded for further consideration of whether strict scrutiny was even applicable as to the 11 remaining districts. *Bethune-Hill v. Va. State Bd. of Elections* (*Bethune-Hill II*), 137 S. Ct. 788 (2017). In June 2018—after a new judge replaced one member of the original panel who had previously rejected plaintiffs' claims—the result flipped in the district court, with the original dissenter now the author of the majority opinion, and the original opinion's author now in dissent. The new majority invalidated all 11 remaining districts as unconstitutional, finding strict scrutiny applicable but not satisfied, and enjoined future elections in the challenged districts under the 2011 plan, while ultimately ordering a UC Irvine professor to prepare a new map. *See Bethune-Hill v. Va. State Bd. of Elections* (*Bethune-Hill III*), 326 F. Supp. 3d 128 (E.D. Va. 2018). Armed with a 95-page dissent from the original opinion's author—who explained that the challenged districts do not even trigger, let alone fail, strict scrutiny—Applicants appealed the district court's decision to this Court. On November 13, rather than summarily dispose of

the case, the Court instead set it for full briefing and argument. *See Va. House of Delegates v. Bethune-Hill*, No. 18-281, 2018 WL 4257757, at *1 (U.S. Nov. 13, 2018).

As all of that underscores, there is a very real prospect that this Court will vacate and reverse the decision below, either in whole or in part. Such a ruling would leave undisturbed some or all of the 11 challenged districts in the duly enacted legislative map, which would mean that those districts govern the next House general election slated for November 2019, just as they have governed the previous four elections since the 2010 census. But apparently confident that this Court will affirm its decision *in toto* (or that it would be impossible to devise districts that comply with *this Court's* decision in time for the November 2019 elections), the district court has forged ahead with proceedings to displace the existing map with a special master-designed remedial map—a map designed to implement the decision that is *sub judice* here, and that will "reconfigure" not just the 11 districts challenged here, but numerous surrounding districts.

The district court's rush to devise a new map is seemingly premised on the assumption that the only way to hold constitutionally compliant elections in 2019 (some election deadlines are set to expire in March) is to implement a map based on its own constitutional analysis as soon as possible, without waiting for this Court's ruling. But even if this Court were to affirm in full—a dubious proposition—the district court's critical assumption is incorrect. With its off-year election cycles and the attendant difficulties of making adjustments to late-breaking census data, Virginia has routinely delayed election deadlines in previous election cycles

(especially in years ending with a "1"), including by holding primaries at the end of the summer of an election year. There is thus no reason to rush forward with maps based on the district court decision under review (and all the attendant confusion caused by having two potential election maps with different districts), as there will be an opportunity to draw maps consistent with this Court's decision even in the event some districts are invalidated and a remedial map is necessary.

Recognizing as much, in November, Applicants sought a political solution and, when that failed, renewed their request that the district court stay the remedial proceedings and, as appropriate, adjust the election deadlines until later in 2019 to accommodate this Court's review. Last week, the district court denied that motion in a brief docket order, while holding out the possibility of a stay at some later point (which, if denied, would presumably require an emergency application to this Court in the midst of its consideration of the merits). *See* App. A. Immediately thereafter, the special master publicly released various proposed remedial districts throughout the Commonwealth, radically redrawing districts in ways that disregard traditional districting principles. Applicants must submit any objections and briefing in response to the smorgasbord of proposed districts by this Friday. The district court will then hold a remedial hearing on January 10, and after that date—and almost certainly before this Court has time to consider the merits—will adopt a final plan that purports to cure the "constitutional infirmity" that it discovered in the existing plan.

None of this has anything to recommend it. Releasing a competing House plan before any final determination on the duly enacted 2011 plan will cause considerable confusion among voters and candidates alike, for as its name suggests, the 2011 plan has governed every election since 2011. Even the mere issuance of the special master's proposed districts has engendered considerable confusion, and the district court's formal adoption of some set of these districts will double down that confusion, as candidates will have little choice but to begin campaigning with both the remedial districts and legislatively enacted districts in mind. A stay at that point will have little practical effect, as the dual-track districts will have been enshrined in a court order that, stayed or not, will shape candidates' and voters' expectations. Worse still, if this Court does anything other than affirm in full or reverse as to all 11 districts, the courts will need to fashion yet a third set of maps to comply with this Court's decision. There is no need for this dual or triple tracking. As noted above, there is ample time, especially given Virginia's unique history of adjusting its off-year elections, to draw remedial maps reflecting this Court's decision. And until this Court considers the merits and issues its opinion, the district court proceedings should be stayed, and the only map in view should be the duly enacted map that has governed the last four election cycles. The proper course to preserve this Court's ability to decide the appeal, to avoid voter and candidate confusion, and to free the parties to focus on briefing and argument in this Court is to grant a stay.

## ORDERS BELOW

The district court's order denying Applicants' renewed motion for stay pending appeal and motion resetting Virginia House election dates is reproduced at Appendix

A. The district court's original order denying Applicants' motion for stay pending appeal is reproduced at Appendix B.

## JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1253.

## STATEMENT OF THE CASE

A. This Court is already well acquainted with this case, which concerns the current districting map for the Virginia House of Delegates. In 2011, following the decennial census, Virginia's General Assembly drew that map to restore population equality across all 100 districts in the House, as required to comply with the Equal Protection Clause's one-person, one-vote principle. *See Reynolds v. Sims*, 377 U.S. 533, 568 (1964). In devising the map, the legislature widely agreed that, to comply with the "nonretrogression" principle under Section 5 of the Voting Rights Act (VRA), it needed to preserve the State's 12 pre-existing majority-minority districts with a black voting-age population (BVAP) of at least 55%, which would ensure that the plan would not diminish black voters' ability to elect their preferred candidates of choice.[1] *See* 52 U.S.C. §10304(b). Those majority-minority districts had existed in substantially the same form for decades, and thus targeting a BVAP of at least 55% did not pose an artificial, unrealistic, or particularly severe constraint on the legislature. Indeed, although adjustments would need to be made based on population changes (which generally reflected increased population in northern

[1] In 2013, this Court held that the coverage formula in Section 4(b) of the VRA could no longer be used to require preclearance under Section 5. *Shelby County v. Holder*, 570 U.S. 529, 556-57 (2013). At the time of the 2011 redistricting process, however, Virginia was a covered jurisdiction.

Virginia, leaving the districts at issue here relatively underpopulated), nine districts already had a BVAP that exceeded 55% in the 2001 map, which served as the "benchmark" plan for the 2011 map, and the other three districts were close behind, with one at 54.4%.

As such, while the legislature considered race as one factor during the redistricting process to the extent the VRA at the time required—Section 5 of the VRA, which was in force then, "obviously demanded consideration of race," *Abbott v. Perez*, 138 S. Ct. 2305, 2315 (2018)—it also relied on traditional districting principles, such as core retention, incumbency protection, compactness, contiguity, and preserving communities of interest, in designing the 12 majority-minority districts. In the end, the legislature passed the House plan with broad bipartisan support, including the support of all but two members of the House Black Caucus, and the State obtained preclearance for the plan from the U.S. Department of Justice (DOJ). JS.App.6.[2] The State then used the plan in two full election cycles, and it remained unchallenged by anyone for years.

B. In December 2014, 12 plaintiffs who collectively reside in each of the 12 majority-minority districts filed suit against the Virginia State Board of Elections, the Virginia Department of Elections, and various election officers (state defendants), belatedly challenging (after a switch in the Governor's mansion) the 12 districts as unconstitutional racial gerrymanders, JS.App.6—*i.e.*, charging that the legislature "subordinated traditional race-neutral districting principles … to racial

[2] "JS.App." refers to the appendix to the jurisdictional statement in this case. *See* No. 18-281.

considerations" and lacked "good reasons" for doing so, *Bethune-Hill II*, 137 S. Ct. at 797, 802 (emphasis omitted). The House and its Speaker—Applicants here—quickly intervened in the litigation (without objection from any party) to take over the defense of the constitutionality of the House's districts and their role in enacting them, and in 2015, in a 2-1 decision, a three-judge district court of the Eastern District of Virginia rejected plaintiffs' claims across the board. JS.App.7, 204-356. As for 11 of those districts, the majority concluded that racial considerations did not "predominate" and thus did not trigger strict scrutiny; as for the final district (HD75), the majority concluded that the State had good reasons to believe that Section 5 of the VRA required it to target a BVAP of at least 55%, thereby satisfying strict scrutiny. JS.App.298-338.

Two Terms ago, this Court affirmed the district court as to HD75, and then remanded for the district court to conduct a more "holistic analysis" of the 11 remaining districts, all while underscoring that courts must proceed with "extraordinary caution" in cases like this one and not impose impossible burdens on state legislatures. *See Bethune-Hill II*, 137 S. Ct. at 797, 799-800, 802. On remand, after the replacement of one judge who had been in the majority in the district court's first decision, the district court reached the exact opposite result. A new majority—*viz.*, the judge who dissented in the first decision (and would have struck down even HD75 as unconstitutional) and the new panel member—concluded that race predominated in the design of all 11 of the remaining majority-minority districts. JS.App.82. The majority also concluded that even though the legislature targeted

the same 55% BVAP threshold in the 11 challenged districts that this Court upheld in the context of HD75, the legislature nonetheless lacked "good reasons" to believe that Section 5 of the VRA required it to consider race in the way it did in any of the challenged districts. JS.App.96. Accordingly, the court permanently enjoined the use of all 11 challenged districts in the 2011 plan. JS.App.202-03. Judge Payne, who had authored the original majority opinion, issued a 95-page dissent that once again concluded that race did not predominate in the design of any of the 11 challenged districts, and therefore that none of them should trigger, let alone flunk, strict scrutiny. JS.App.98-201.

C. As relevant here, the court then directed the General Assembly to pass a remedial map that eliminated the "constitutional infirmity" in the 2011 map (as discerned by the district court majority), and also set an October 30, 2018 deadline for a court-run remedial proceeding should that attempt fail. JS.App.203. Applicants thereafter filed a motion to stay the district court's order while it sought review here, *see* ECF No. 237, but the district court denied that motion on August 30, reasoning that there was little prospect of success on the merits in this Court, App. B. at 2. The district court further reasoned that delaying the construction of a remedial plan until after this Court's plenary review likely would result in the November 2019 general election "proceeding under the unconstitutional districts," and thus that the public interest "favor[ed] immediate implementation of our injunction." App. B. at 2. On September 4, Applicants filed a jurisdictional statement seeking this Court's review as to whether the district court correctly concluded that the 11 challenged districts

are unconstitutional. Although this Court had the option to summarily affirm the decision below or dismiss the appeal altogether, it opted instead to set this case for full briefing and argument in an order dated November 13.[3] *See Va. House of Delegates*, 2018 WL 4257757, at *1.

D. Meanwhile, Virginia's Governor announced that he would not sign any new districting plan passed by the General Assembly. ECF No. 275, Ex. 1. Accordingly, a few weeks before this Court granted review, the district court appointed a UC Irvine professor to serve as a special master and draw a remedial redistricting plan. ECF No. 276. In light of this Court's November 13 decision to set this case for plenary consideration, and recognizing that even if this Court affirmed in part it would be feasible to fashion remedial districts that reflect *this Court's* decision in time for the 2019 elections, Applicants sought to reach a political solution that would reset key election-related deadlines and thus accommodate this Court's review process and obviate the need for district court remedial proceedings designed to comply with a district court decision that is pending this Court's review.

As currently scheduled, many of the default election deadlines almost certainly would pass before this Court issues its decision in this case. For example, under the current schedule, candidates must obtain signatures and meet other requirements to have their names placed on the primary ballot by March 28, *see* Va. Code §24.2-522(A); by April 2, party officials must certify primary candidates to the State Board of Elections, *see id.* §24.2-527; between April 25 and June 11, the parties must hold

[3] The Court also directed the parties to brief whether the House has standing to appeal.

their primaries, *see id.* §24.2-510; and by June 16, parties must certify candidates for the general election, *see id.* §24.2-511. Because of the obvious problems presented by maintaining these election deadlines, which are default statutory deadlines that have often been adjusted to accommodate Virginia's off-year elections, Applicants and others engaged with the Governor and the Commissioner of Elections to reset them. Applicants proposed new deadlines modeled on previous postponements to Virginia election deadlines, which typically have occurred in years (including 2011) when the Commonwealth redistricts in light of new census data. *See, e.g.*, HB 1507 (Feb. 17, 2011) (resetting primaries and nominating events from June 14, 2011 to August 23, 2011); HB 1536 (April 9, 2000) (resetting primaries and nominating events from June 12, 2001 to September 11, 2001). Notwithstanding this precedent, the Governor and the Board ultimately declined Applicants' repeated overtures.

At that point, on November 28—the same day that the executive branch conveyed its refusal to compromise—Applicants filed in the district court a renewed motion for stay pending appeal and, in the alternative, an order resetting the Virginia House election dates. *See* ECF Nos. 310, 311. Plaintiffs and the named state defendants[4] opposed both motions, *see* ECF Nos. 319, 320, and on December 7, in a brief docket order, the district court denied the motions "without prejudice to refiling after the Court's remedial plan is adopted," App. A. In denying the motions, the court "adopt[ed] the reasoning set forth in its order on August 30." App. A.

[4] Virginia's attorney general, who represents the named state defendants, has declined to appeal the decision invalidating Virginia's bipartisan-supported 2011 plan.

The same day that the district court denied the motions, the special master issued multiple sets of proposed remedial districts. These various permutations propose to reconfigure not only the 11 challenged districts, but numerous districts surrounding them—indeed, perhaps more than 25% of all House districts. *See* ECF No. 323 at 5. Applicants must submit their objections and any briefs in response to the special master's submission no later than December 14, and the court has scheduled a hearing on the special master's proposed remedial plan for January 10. ECF Nos. 278, 280.

## REASONS FOR GRANTING THE APPLICATION

A stay pending resolution of a direct appeal is a well-established remedy in redistricting cases. *See, e.g.*, *North Carolina v. Covington*, 138 S. Ct. 974 (2018); *Rucho v. Common Cause*, 138 S. Ct. 923 (2018); *Abbott v. Perez*, 138 S. Ct. 49 (2017); *Gill v. Whitford*, 137 S. Ct. 2289 (2017); *North Carolina v. Covington*, 137 S. Ct. 808 (2017); *Perry v. Perez*, 565 U.S. 1090 (2011); *Miller v. Johnson*, 512 U.S. 1283 (1994); *Karcher v. Daggett*, 455 U.S. 1303 (1982) (Brennan, J., in chambers). To obtain a stay pending appeal, an applicant must show (1) a reasonable probability that the Court will consider the case on the merits; (2) a fair prospect that a majority of the Court will vote to reverse the decision below; and (3) a likelihood that irreparable harm will result from the denial of a stay. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Those factors are amply satisfied here. Indeed, this Court has already decided to set this case for a hearing on the merits, and there is certainly a "fair prospect" that the Court will vacate or reverse and uphold the challenged districts, just as it upheld HD75 two

Terms ago. The Court should therefore issue a stay to preserve the status quo pending the disposition of the appeal.

Doing so will ensure that Virginia is not required to implement a House map that the district court may well have no authority to impose and that will only generate confusion to candidates and voters throughout the Commonwealth. Conversely, doing so need not pose any risk of irreparable injury to plaintiffs. If this Court ultimately affirms in part, rather than reversing in a manner that obviates the need for *any* remedial map, there will still be sufficient time to devise a remedial map that complies with *this Court's decision* (as opposed to a remedial map designed to implement the very decision *sub judice* here). Doing so will require adjusting some default statutory deadlines, but Virginia has ample experience doing just that for reasons less pressing than avoiding substantial confusion and preserving this Court's role as the final adjudicator of the constitutionality of the districts at issue.

## I. The Court Has Already Agreed To Review This Case, And There Is A Fair Prospect That It Will Vacate Or Reverse The Decision Below.

This case plainly satisfies the first two factors in this Court's stay analysis. On November 13, this Court agreed to "hear[] … the case on the merits," *Va. House of Delegates*, 2018 WL 4257757, at *1, and Applicants are presently preparing their opening brief on the merits, which is due on December 28. To be sure, in issuing its November 13 order, the Court also instructed the parties to brief whether Applicants have standing to appeal, thus "postpon[ing]" "the question of jurisdiction … to the hearing of the case on the merits." *Id.* But the mere fact that the Court has deferred a standing question to assure itself of jurisdiction, as it is required to do in every case,

does not change that it will consider plenary briefing on both standing and the merits and that there is at least a "reasonable probability" that the Court will, in fact, proceed to the merits rather than decide this case on a threshold standing question. After all, the Court had the opportunity to summarily dispose of this case last month, just as it has done in numerous redistricting cases—no matter how legally and factually complex those cases may have been. *See, e.g.*, *North Carolina v. Covington*, 138 S. Ct. 2548 (2018) (per curiam); *id.* at 2555 (Thomas, J., dissenting). If the Court had already concluded that Applicants lacked standing to appeal and that it would never reach the merits of this long-running dispute, it would not have asked for briefing on both questions. There were far more efficient means of disposing of this case.

In all events, Applicants plainly do have standing (and unquestionably have standing to ask this Court to preserve the status quo while the Court considers both the merits and standing questions). The district court never doubted Applicants' standing to litigate this case generally or seek stays on two separate occasions, even as the executive branch defendants (the only party with standing to seek such stays under the executive's cramped view) staunchly opposed those requests and actively peddled the idea that Applicants lack standing. *See* App. A; App. B; ECF Nos. 246, 319; *see also Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) ("an intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing"). That is presumably because the district court, which watched Applicants litigate this case throughout,

understood that Applicants have had a personal stake in this litigation all along, as "ordering the legislature to enact" a new redistricting plan as a substitute for its duly enacted plan, subsequently reassigning the legislature's mapmaking authority to a UC Irvine political science professor, and forcing Applicants to prepare for next November's elections under a remedial plan designed to implement the very decision that is *sub judice* in this Court all amount to palpable injuries. App. A; ECF No. 276.

This Court too has recognized that such injuries are sufficient under Article III, and they are traceable to the district court's judgment and redressable by this Court. *See, e.g.*, *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2665 (2015); *Karcher v. May*, 108 S. Ct. 388 (1987); *Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 194 (1972); *Coleman v. Miller*, 307 U.S. 433, 438 (1939). Applicants therefore had standing in the court below and continue to have standing on appeal. And at a bare minimum, Applicants have standing to seek relief preserving the status quo so that this Court can consider, *inter alia*, objections to their standing. Any other rule would force this Court to resolve standing questions before acting on a stay request designed to preserve this Court's ability to resolve the case, including the standing question, in the normal course.

That the Court has decided to set this case for plenary review also goes a long way toward establishing that there is a "fair prospect" that a majority of the Court will vote to vacate or reverse the decision below, either in whole or in part, and thereby uphold some or all of the challenged districts. Indeed, when this case made its first trip here two Terms ago, this Court upheld the constitutionality of the only district it

considered in any depth (HD75)—a district that the author of the post-remand district court decision would have struck down. *See Bethune-Hill II*, 137 S. Ct. at 800-02. Much of the Court's analysis of HD75 is applicable to the other challenged districts in ways that create at least a "fair prospect" that they would survive strict scrutiny, and there are equally good reasons for finding that the 11 remaining challenged districts do not even trigger strict scrutiny, as Judge Payne explained at length.

The threshold merits question in this case is whether plaintiffs have proven that "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale" in designing the 11 challenged districts. *Id.* at 798. The majority below answered that question in the affirmative for each challenged district, but its reasoning is dubious at best, as Judge Payne's 95-page dissent well illustrates. The majority's treatment of HD92 is illustrative. That district had a starting BVAP of 62.1% in the benchmark plan, JS.App.62, and in *Bethune-Hill I*, the district court majority found "it hard to imagine a better example of a district that complies with traditional, neutral districting principles," JS.App.335. The majority below likewise never identified any "actual conflict with traditional districting principles," acknowledging that HD92's "compactness score" improved and that "the number of split [voting districts] … declined from three to zero." JS.App.62. Nonetheless, the majority "easily" concluded that "race predominated" over race-neutral principles in HD92's design, JS.App.58, 62, notwithstanding the fact that "this Court to date has not affirmed a predominance

finding … without evidence that some district lines deviated from traditional principles," *Bethune-Hill II*, 137 S. Ct. at 799.

The majority rested its conclusion on the theory that purported "race-based maneuvers" in a *different* district allowed HD92 to "receive[]" additional black voters. JS.App.63. But this Court made clear in *Bethune-Hill II* that the "ultimate object of the inquiry" in racial gerrymandering cases is not "the legislature's predominant motive" in some *other* district; it is the legislature's predominant motive in "the district at issue." 137 S. Ct. at 793, 800. And there is a conspicuous lack of evidence that racial considerations dominated and controlled the construction of HD92—in fact, just the opposite. *See* JS.App.171-72. In the end, moreover, HD92 emerged from the 2011 redistricting process with a BVAP of 60.7%, which amounted to a difference of 1.4% from the benchmark plan—and was nearly 6% above the purportedly constraining 55% BVAP floor. If that is a presumptive violation of the Equal Protection Clause, it is hard to imagine how legislatures have any "breathing room" to perform the core sovereign function of redistricting without facing disruptive litigation throughout the decennial cycle. *Bethune-Hill II*, 137 S. Ct. at 802. And HD92 is hardly an isolated case.

Moreover, even if the Court were to decide (or assume) that race predominated in some of the challenged districts, they would satisfy strict scrutiny regardless. That is exactly the path the Court followed in *Bethune-Hill II* with HD75, assuming that racial considerations predominated without expressly addressing the question. In finding the legislature's use of a target BVAP threshold of 55% in HD75 narrowly

tailored to the State's compelling interest in complying with Section 5 the VRA, the Court underscored that a State need not show that its consideration of race was "actually ... necessary" to avoid a violation of Section 5, that "[t]he law cannot insist that a state legislature … determine *precisely* what percent minority population [Section] 5 demands," that a State is not required to "compile a comprehensive administrative record" when seeking to comply with Section 5, and that "reducing the BVAP below 55% well might have" an impermissible retrogressive effect. *Bethune-Hill II*, 137 S. Ct. at 801-02. Instead, the salient point was that "the State had '*good reasons*' to believe a 55% BVAP floor was necessary to avoid liability under [Section] 5." *Id.* at 802. Any more demanding standard, the Court explained, would "ask too much from state officials charged with the sensitive duty of reapportioning legislative districts." *Id.*

The majority below deemed the 11 challenged districts to flunk strict scrutiny only by ignoring these teachings. It faulted the legislature for utilizing a "mechanically numerical" BVAP target even though this Court acknowledged the utility of BVAP targets in this very case, JS.App.87; it relied on questionable expert analysis to conclude that a 55% BVAP target was not "required" to comply with the VRA despite this Court's admonition that legislatures need not prove actual necessity, JS.App.90-91; it blamed the legislature for lacking certain voting data for the challenged districts when that data simply did not exist, JS.App.95; it suggested that getting "close enough" to the right BVAP level could not get the job done despite this Court's instruction that legislatures need not operate with surgical precision,

JS.App.94; and it reprimanded the legislature for not taking time to "compile" purportedly relevant information when this Court has made clear that such make-work is unnecessary, JS.App.88.

More fundamentally, the majority overlooked that the legislature engaged in "good-faith efforts" to reach a bipartisan consensus on a target BVAP threshold of 55% with limited data and significant time constraints. *Bethune-Hill II*, 137 S. Ct. at 801. As this Court explained with respect to HD75, while it may be "unlikely" that "reducing a district's BVAP 'from, say, 70% to 65% would have a significant impact on the black voters' ability to elect their preferred candidate … reducing the BVAP below 55% well might have that effect in some cases." *Id.* at 802. That reasoning applies with equal force to the 11 districts here, as there was no information available to the legislature that could warrant any further BVAP reduction without rendering the plan "potentially and fatally retrogressive." *Georgia v. Ashcroft*, 539 U.S. 461, 493 (2003) (Souter, J., dissenting).

In short, whether this case is decided under the racial-predominance prong or the narrow-tailoring one, the bottom line is that there is certainly a "fair prospect" that a majority of the Court will vote to vacate or reverse at least some, if not all, of the challenged districts.

## II. Virginia And Its Citizens Will Suffer Irreparable Harm Absent A Stay, And The Balance Of Equities Favors A Stay.

Without a stay of the district court's order and the special master-led remedial proceedings, irreparable injury is certain. As this Court stated last Term in another redistricting case involving 2011 districting maps, "the inability to enforce its duly

enacted plans clearly inflicts irreparable harm on the State." *Abbott*, 138 S. Ct. at 2324 n.17; *see also Miller v. Johnson*, 515 U.S. 900, 915 (1995) ("Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions."). Accordingly, that the district court has enjoined "[t]he Commonwealth of Virginia … from conducting any elections after [June 26, 2018] for the office of Delegate in the Commonwealth's House of Delegates in the Challenged Districts until a new redistricting plan is adopted"—and that a UC Irvine professor is now taking the lead in "reconfigur[ing]" some 25% of the entire 2011 plan—is itself irreparable injury. JS.App.203.

And a stay of the injunction and remedial proceedings is particularly appropriate now that this Court has decided to set this case for plenary review, and thus to consider whether plaintiffs' constitutional rights have even been violated. This Court's "ordinary practice is to suspend … injunctions from taking effect pending appellate review" "[w]hen courts declare state laws unconstitutional and enjoin state officials from enforcing them." *Strange v. Searcy*, 135 S. Ct. 940, 940 (2015) (Thomas, J., dissenting) (citing *Herbert v. Kitchen,* 134 S. Ct. 893 (2014), and *San Diegans for Mt. Soledad Nat. War Mem'l v. Paulson,* 548 U.S. 1301 (2006) (Kennedy, J., in chambers)). There is no reason to deviate from that practice here; in fact, allowing the injunction to remain in effect and the remedial proceedings to move forward will only generate "voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006).

Under the district court's existing schedule, the court may "adopt[]" a final remedial plan that "reconfigure[s]" all of the challenged districts (and many others) at any time after the hearing on January 10. App. A; ECF No. 280; JS.App.203. Because the State is presently enjoined from holding elections in the challenged districts under the 2011 plan, the district court's newly adopted plan will govern across Virginia from that point forward—including for critical election events like candidate-qualification deadlines (March 2019) and primary elections (no later than June 2019). JS.App.203. But merits briefing in this case will extend through February; oral argument will likely occur in late February; and a decision will come later in the spring or even as late as June. And after considering the briefing and the parties' arguments, this Court could very well decide to *reverse* the district court's decision entirely, or at least its conclusions as to certain districts.

Because the district court's remedial plan is premised on the notion that this Court will *affirm* as to *all* districts, there is a real possibility that House candidates and voters will spend months preparing for elections in districts that will not even exist come November. After all, if this Court agrees with Applicants that the 2011 map is constitutional, then *that* duly enacted plan—not the district court's special master-designed plan—must govern the 2019 elections. *See, e.g.*, *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978) ("The Court has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt."); *Chapman v. Meier*, 420 U.S. 1, 27 (1975) ("reapportionment is primarily the duty and responsibility of the State through its

legislature or other body, rather than of a federal court"). Indeed, even if this Court reverses only in part, the remedial map would have to be redrawn to remedy the constitutional violations found *by this Court*, not to conform to a district court decision that is already *sub judice* and may well be reversed in whole or part.

In denying Applicants' motions, the district court (implicitly) acknowledged that generating a new House map could sow chaos and undermine the public interest in an orderly elections process, for it denied those motions "without prejudice to refiling after the Court's remedial plan is adopted." App. A. But that makes no sense logically or practically. It makes no sense logically to stay the remedial proceedings only *after* the remedial proceedings have effectively concluded. Nor does it make sense practically. After all, the mere existence of a competing House plan—after four straight election cycles under the 2011 plan—will create confusion, as it will result in election preparations beginning to proceed on dual tracks. Furthermore, the denial without prejudice grants Applicants nothing they would not have after a denial simpliciter. Parties always have the right to renew a stay request in light of changed circumstances, as Applicants did in renewing their request after this Court granted plenary review. Thus, the district court's denial remains a denial and gives Applicants no indication that the third time will be the charm. Moreover, if a third request is denied next month, it will just compress this Court's time table for considering another stay application and once again distract the parties from briefing the issues before this Court. Thus, the time for this Court to issue a stay is now.

Indeed, the only conceivable reason to rush the development of a remedial plan now is to implement such a plan before any of the upcoming election deadlines, such as the candidate-qualification deadline in March and the primaries in June. But those deadlines pose a problem only if they are immovable, and as this very case makes clear, they most certainly are not. As one of the few jurisdictions in the country to hold off-year elections for state office, Virginia engages in a redistricting process the very same year that it receives decennial census data, which introduces significant complications and unusual time constraints. In the past, the Census Bureau has typically released census data to the State between January and March, and in 2011 (*i.e.*, the year the 2011 plan came into effect), the State received the census data in February. JS.App.220. Although the legislature worked diligently to develop a new districting plan after receiving that data, the Governor did not sign the 2011 plan into law until April 29, 2011, and DOJ did not grant preclearance until June 17, 2011. JS.App.6 & n.7, 230-31. Accordingly, the State postponed the originally scheduled primary date from June 14 to August 23, and yet it still managed to hold general elections on time in November. *See* HB 1507. And that was not a one-off event. In 2001, Virginia also delayed its primaries from June 12 to September 11 to accommodate the redistricting process. *See* HB 1536.

As that history reveals, the question here need not be treated as either/or. Instead, there is a ready way to craft interim relief that preserves the prospect of holding a constitutionally complaint election that complies with *this Court's decision* no matter *how* this Court rules. Accordingly, after this Court set this case for briefing

and argument, Applicants proposed a delay to the 2019 election cycle along these lines: (1) a July 17, 2019 deadline for candidate qualification; (2) a July 22, 2019 deadline for party officials to notify state election officials of the names of qualified candidates; and (3) a September 10, 2019 deadline for primaries or nominating conventions. ECF No. 310 at 2. No party in this case has ever suggested that these proposed dates are unworkable, and all agree that the district court has equitable authority to implement these changes. *See* ECF No. 319 at 4 ("Defendants agree that federal courts may, in appropriate cases, modify state election dates when necessary to remedy constitutional violations and vindicate federal rights."); ECF No. 320 at 12 ("Plaintiffs obviously agree that the Court has equitable authority to alter election deadlines[.]"); *see also Beens*, 406 U.S. at 201 n.11 ("If time presses too seriously, the District Court has the power appropriately to extend the time limitations imposed by state law."); *Larios v. Cox*, 305 F. Supp. 2d 1335, 1342 (N.D. Ga. 2004) ("the court has broad equitable power to delay certain aspects of the electoral process if necessary"); *Petteway v. Henry*, No. CIV.A. 11-511, 2011 WL 6148674, at *3 n.7 (S.D. Tex. Dec. 9, 2011) ("this court has the authority to postpone these local election deadlines if necessary").

Thus, to the extent this Court is concerned that allowing the 2019 election cycle to begin proceeding under the State's duly enacted district map may cause irreparable injury to plaintiffs, there is an available solution: The Court may instruct the district court to work with the parties to craft a revised election schedule. Simply put, the existing deadlines provide no excuse for forging ahead with the district

court's plan to displace a bipartisan-supported districting map with a map that the district court may have no authority to impose and that will only generate confusion during the 2019 elections.

## CONCLUSION

For the foregoing reasons, Applicants respectfully request that this Court grant this emergency application for a stay of the district court's order pending resolution of Applicants' direct appeal of that order.

Respectfully submitted,


EFREM M. BRADEN
KATHERINE L. MCKNIGHT
RICHARD B. RAILE
BAKER & HOSTETLER LLP
1050 Connecticut Ave., NW
Suite 1100
Washington, DC 20036

PAUL D. CLEMENT
*Counsel of Record*
ERIN E. MURPHY
ANDREW C. LAWRENCE
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

DALTON LAMAR OLDHAM, JR.
DALTON L. OLDHAM LLC
1119 Susan Street
Columbia, SC 29210

*Counsel for Applicants*


December 13, 2018