IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
NO. 1:13-CV-00949

DAVID HARRIS and CHRISTINE BOWSER,

Plaintiffs,

v.

PATRICK MCCRORY, in his capacity as Governor of North Carolina; NORTH CAROLINA STATE BOARD OF ELECTIONS; and JOSHUA HOWARD, in his capacity as the Chairman of the North Carolina State Board of Elections,

Defendants.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' EMERGENCY MOTION TO STAY FINAL JUDGMENT AND MODIFY INJUNCTION

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I. INTRODUCTION

> [O]nce a State's . . . apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan.

Reynolds v. Sims, 377 U.S. 533, 585 (1964).

This is not an unusual case. Rather, as this Court has stated, it is a case that presents a "textbook" example of racial gerrymandering. *See* ECF No. 142 ("Memorandum Opinion"), at 22. In its thorough and, indeed, exhaustive opinion, this Court detailed at length the mountain of evidence establishing that race was the predominant factor behind Congressional Districts ("CDs") 1 and 12, and the utter dearth of justification for the General Assembly's predominant use of race.

Plaintiffs—and every voter in North Carolina—have already been subjected to two elections under the unconstitutional enacted plan. The General Assembly's improper use of race to sort voters by the color of their skin has violated the Fourteenth Amendment rights of millions of North Carolinian citizens. Unchastened, Defendants now ask the Court to delay implementation of a remedy until *2018*. Defendants fail to argue—let alone demonstrate—that they are likely to prevail on the merits of their pending appeal. They do not even acknowledge the Court's finding that Plaintiffs and millions of other North Carolinians have been forced to vote twice in racially gerrymandered districts and will suffer irreparable injury if they are forced to do so again in 2016. Rather, Defendants' motion is premised entirely on the assertion that it would be easier and less costly for the State to run the 2016 election under an unconstitutional map. Perhaps.

But even if Defendants could establish a likelihood of success on the merits (which they cannot), the harm Plaintiffs and other residents of CDs 1 and 12 will irrefutably suffer if the stay is granted vastly outweighs the administrative inconvenience and additional cost the State will incur if the primary is delayed to facilitate the implementation of a remedial map. This is particularly true here because (as further discussed below) the State is itself responsible for the present "emergency." Knowing full well that this Court might strike down the enacted plan, Defendant McCrory signed a bill passed by the General Assembly that accelerated the primary election from May to mid-March. He did so less than two weeks before the trial in this matter commenced. It was hardly coincidence.

Stripped to its essence, then, Defendants ask the Court to delay remedying the unconstitutional racial gerrymander for two years from this Court's Final Judgment, five years after Plaintiffs filed suit, and to allow two congressional elections to go forward under an unconstitutional map during the pendency of this case. The Court should reject Defendants' motion so that the voters of North Carolina can—for the first time since 2010—vote under a constitutional congressional districting plan.

II. BACKGROUND

On October 24, 2013, well more than two years ago, Plaintiffs filed this lawsuit, challenging the unconstitutional racial gerrymander of CDs 1 and CD 12. ECF No. 1. On December 24, 2013, Plaintiffs filed a motion for preliminary injunction, seeking to enjoin conduct of future elections under the enacted plan. ECF No. 18. On May 22,

2014, the Court denied the motion without prejudice and the 2014 elections proceeded under the enacted plan. ECF No. 65.

On June 6, 2014, the parties filed cross-motions for summary judgment. ECF No. 74-75. On July 29, 2014, the Court denied the parties' cross-motions without prejudice, concluding that there were "issues of fact as to the redistricting which occurred as to both CD 1 and CD 12" that were "best resolved at trial." ECF No. 85 at 2. The Court also continued the trial date pending the United States Supreme Court's then-forthcoming decision in *Alabama Legislative Black Caucus et al. v. Alabama*. *Id.*

In March 2015, the Supreme Court issued its decision in *Alabama*, holding that reliance upon mechanical racial percentages strongly suggests that race was the predominant consideration in drawing district lines and grossly misconstrues the requirements of the Voting Rights Act. *See* 135 S. Ct. 1257 (2015). Thereafter, on May 6, 2015, the Court held a status conference, and set this case for trial commencing on October 13, 2015. *See* ECF No. 91.

On September 30, 2015, Governor McCrory signed a bill moving the congressional primary from May 2016 to March 15, 2016. *See* ECF No. 145-1 ¶ 6 (citing S.L. 2015-258). During debate on this bill, legislators raised an obvious concern—that by accelerating the congressional primary, the General Assembly was "trying to lock in these districts for another cycle and hamstring the courts should they conclude, for whatever reason, that the districts should be redrawn." *See* Taylor Knopf, *Senate Proposes Detailed Plan for Combined March Primary*, RALEIGH NEWS & OBSERVER, Sept. 23, 2015, http://www.newsobserver.com/news/politics-government/politics-

columns-blogs/under-the-dome/article36316269.html. In response, Senator Rucho stated unequivocally that these concerns were a non-issue because if the Court ruled in Plaintiffs' favor, it could (as has been done in past redistricting cycles) simply "stop" the election. *See id.* ("So at any point, if that is a concern [redrawing the districts], the courts can manage that without any issue.").

Starting October 13, 2015, and just two weeks after the State greatly accelerated the primary election, the Court held a three-day bench trial. On February 5, 2016, the Court issued its Memorandum Opinion holding that CD 1 and CD 12 are unconstitutional racial gerrymanders. The Court enjoined the State from holding further elections under the enacted plan, "recogniz[ing] that individuals in CD 1 and CD 12 whose constitutional rights have been injured by improper racial gerrymandering have suffered significant harm" and "are entitled to vote as soon as possible for their representatives under a constitutional apportionment plan." Memorandum Opinion at 62 (quoting *Page v. Va. State Bd. of Elections*, Civil Action No. 3:13cv678, 2015 WL 3604029, at *18 (E.D. Va. June 5, 2015)). Consistent with North Carolina law, the Court provided the State until February 19, 2016 to enact a new, constitutional congressional districting plan. *See id.* (citing N.C. GEN. STAT. § 120-2.4).

On February 8, 2016, Defendants filed the present motion to stay pending appeal.

III. ARGUMENT

Defendants fail to meet their heavy burden of establishing that the Court should stay implementation of its final judgment. Defendants cannot establish the prerequisites for obtaining the extraordinary relief of a stay pending appeal. Defendants have little

likelihood of success on the merits. Plaintiffs will suffer irreparable injury if the stay is granted and they are forced to vote again under the unconstitutional enacted plan, and the public interest weighs heavily against the requested stay for the same reason. Accordingly, any administrative inconvenience and expense to the State necessitated by remedying the racial gerrymander of CDs 1 and 12 for purposes of the 2016 election pales in comparison to the injury Plaintiffs and the public at large will suffer if a stay is granted.

A. Defendants Face a Significant Burden to Establish Their Entitlement to the "Extraordinary Relief" They Seek

A stay is an exercise of judicial discretion. *See Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 125 (4th Cir. 1983) ("[F]ederal district courts possess the ability to, under their discretion, stay proceedings before them when the interests of equity so require."). The granting of a stay pending appeal is "extraordinary relief," and the party requesting a stay bears a "heavy burden." *Winston–Salem/Forsyth County Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971) (Burger, Circuit Justice); *see also Personhuballah v. Alcorn*, No. 3:13CV678, 2016 WL 93849, at *3 (E.D. Va. Jan. 7, 2016) ("[A] stay is considered extraordinary relief for which the moving party bears a heavy burden.") (internal citation omitted).

In determining whether to grant a stay pending appeal, the Court considers four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the

proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009); *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970).

The first two factors of the test outlined above "are the most critical." *Nken*, 556 U.S. at 434; *cf. Johnson v. United States*, No. C-83-186-D, 1984 WL 738, at *2 (M.D.N.C. May 7, 1984) (a stay should be denied unless the moving party can show a strong likelihood of success on appeal, "even if this results in rendering the issues moot"). A party seeking a stay pending appeal "will have greater difficulty demonstrating a likelihood of success on the merits" than one seeking a preliminary injunction because there is "a reduced probability of error" in a decision of the district court based upon complete factual findings and legal research. *Mich. Coal. of Radioactive Material Users, Inc. v. Greipentrog*, 945 F.2d 150, 153 (6th Cir. 1991).

The moving party, moreover, is required to show something more than "a mere possibility" of success on the merits; more than speculation and the hope of success is required. *Nken*, 556 U.S. at 434; *see also Mich. Coal.*, 945 F.2d at 153. By the same token, "simply showing some 'possibility of irreparable injury,' . . . fails to satisfy the second factor." *Nken*, 556 U.S. at 434 (*quoting Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998)).

Under these well-established standards, Defendants cannot begin to meet their burden of showing a stay is appropriate.

B. Defendants Cannot Establish a Likelihood of Success on the Merits

First, and perhaps most obviously, defendants cannot establish a likelihood of success on the merits.

A districting plan fails constitutional muster if it uses race as the predominant factor in determining whether to place a substantial number of voters within or without a district unless the use of race is narrowly tailored to a compelling government interest. *Alabama*, 135 S. Ct. at 1267.

Here, the Court held that race was the predominant factor undergirding CDs 1 and CD 12 and that the General Assembly's use of race to draw these districts was not narrowly tailored. The Court's lengthy and exhaustive Memorandum Opinion speaks for itself. Plaintiffs will not repeat the substance of that Opinion here. Suffice to say, the Court applied well-established law and made well-supported factual determinations.

Indeed, the Court's Opinion was simply a straightforward application of the United States Supreme Court's recent decision in *Alabama*, 135 S. Ct. 1257. As the Court itself explained, here, as in *Alabama*, the North Carolina General Assembly sought to comply with the Voting Rights Act by using a numerical racial threshold unfounded in any evidence whatsoever. The record is replete with both direct evidence of the General Assembly's race-based motives and circumstantial evidence that race was the predominant factor behind CDs 1 and 12. In the course of reaching its ultimate holdings, the Court addressed and resolved the factual disputes that led it to deny the parties' cross-motions for summary judgment. On appeal, those factual findings are subject to "clear error" review. *See Easley v. Cromartie*, 532 U.S. 234, 242 (2001). The Court's conclusion that race predominated and that the use of race was not narrowly tailored is amply supported by the evidence, and Defendants assuredly cannot show that the Court's decision constitutes "error," much less "clear error."

Indeed, perhaps sensing the futility of the task, Defendants barely try. Rather, Defendants' discussion of the merits is limited to a single line—their bald assertion that they "believe this Court's judgment will be reversed by the United States Court." Defendants' Emergency Motion to Stay Final Judgment and to Modify Injunction ("Motion") at 4. At the risk of stating the obvious, Defendants' expression of their *hope* of success on appeal does not meet their burden of establishing a *likelihood* of success on the merits.[1]

Nor is there, as Defendants suggest (Motion at 4), some kind of "per se" rule that redistricting cases are subject to an automatic stay. *See, e.g.*, *Travia v. Lomenzo*, 381 U.S. 431, 431 (1965) (denying motion to stay district court order requiring New York to use court-approved remedial redistricting plan). To the contrary, district courts routinely deny motions to stay implementation of court-adopted remedial redistricting plans. *See, e.g.*, *Personhuballah*, 2016 WL 93849, at *3-5 (order denying motion to stay order during pendency of Supreme Court review); *see also Larios v. Cox*, 305 F. Supp. 2d 1335 (N.D. Ga. 2004) (same, and collecting cases).

Personhuballah, decided only last month by a fellow court in the Fourth Circuit, is highly instructive. There, after a three-judge panel struck down a congressional

[1] *See, e.g.*, *Spirit Airlines, Inc. v. Ass'n of Flight Attendants*, No. 14-CV-10715, 2015 WL 4757106, at *2 (E.D. Mich. Aug. 12, 2015) ("no likelihood of success on appeal where proponent of stay 're-argu[es] . . . the issues without any new analysis or case citation'") (quoting *Smith v. Jones*, No. 05–CV–72971, 2007 WL 3408552, at *2 (E.D. Mich. Nov. 15, 2007)); *Stewart Park & Reserve Coal. Inc. (SPARC) v. Slater*, 374 F. Supp. 2d 243, 263 (N.D.N.Y. 2005) (same, where moving party simply attempted to "to relitigate or reargue" the court's earlier rulings); *Anderson v. Gov't of Virgin Islands*, 947 F. Supp. 894, 898 (D.V.I. 1996) ("Defendants attempt to recharacterize the factual findings in this case fails to show a likelihood of success on the merits of the appeal.").

districting plan as an unconstitutional racial gerrymander, the losing party (intervenors) moved the court to stay its decision. *See Personhuballah*, 2016 WL 93849, at *3-5. As here, intervenors argued that it was simply "too late" to implement a remedial plan in advance of the 2016 elections and that the court should thus "modify [its] injunction to ensure the 2016 election proceeds under the Enacted Plan regardless of the outcome of the Supreme Court's review." *Id.* at *4. And, as here, intervenors argued that stays are granted as a matter of course in redistricting cases where a court has struck down an apportionment plan. The *Personhuballah* court denied the stay motion and rejected these arguments in no uncertain terms, noting that "[t]here is no authority to suggest that this type of relief is any less extraordinary or the burden any less exacting in the redistricting context." 2016 WL 93849, at *3 (citation omitted).

Thereafter, intervenors made a direct application for stay to Circuit Justice Roberts, contending that implementation of a remedial plan for 2016 would cause "electoral chaos." *See* Intervenor-Defendants' Motion to Suspend Further Proceedings and to Modify Injunction Pending Supreme Court Review at 9, *Personhuballah v. Alcorn*, No. 3:13-cv-678 (E.D. Va. Nov. 16, 2015). Circuit Justice Roberts referred the application to the full Supreme Court, which (only one week ago) denied the application. *Wittman v. Personhuballah*, No. 14-A724, Order in Pending Case (Feb. 1, 2016). Precisely the same result should obtain here and for the same reasons.

As *Personhuballah* well illustrates, none of the cases Defendants cite establish any rule relaxing standards for granting the "extraordinary relief" of a stay in the redistricting context. The mere fact that other courts have, on other occasions, in other states, on other

factual records, stayed implementation of remedial redistricting plans is of no moment here.[2]

The Court has entered a final judgment striking down CDs 1 and 12 and enjoining further elections under the unconstitutional enacted plan. That judgment should be implemented promptly. Indeed, Defendants' suggestion that the Court's injunction should have no practical effect absent Supreme Court review is directly refuted by Supreme Court precedent. *See Growe v. Emison*, 507 U.S. 25, 35 (1993) (noting that the Court "does not require appellate review of [a court-adopted remedial] plan prior to the election").

C. Granting a Stay Will Cause Irreparable Injury to Plaintiffs and Is Contrary to the Public Interest

There is no doubt that granting the requested stay would cause irreparable injury to Plaintiffs and the public. As the Court has recognized, "individuals in CD 1 and CD 12 whose constitutional rights have been injured by improper racial gerrymandering have suffered significant harm" and "are entitled to vote as soon as possible for their representatives under a constitutional apportionment plan." Memorandum Opinion at 62 (internal citation omitted).

[2] The cases cited by Defendants are uninformative not only for lack of any articulated basis for granting a stay but also because they involved injunctions issued later in an election year. *See, e.g.*, *Hunt v. Cromartie*, 529 U.S. 1014 (2000) (noting, without explanation, that Court had stayed an order issued on March 7, on March 16, regarding upcoming 2000 elections); *Voinovich v. Quilter*, 503 U.S. 979 (1992) (same, as to an order issued on March 30, on April 20, regarding upcoming 1992 elections); *Wetherell v. DeGrandy*, 505 U.S. 1232 (1992) (same, as to an order issued on July 16, on July 17, regarding upcoming 1992 elections); *Louisiana v. Hays*, 512 U.S. 1273 (1994) (same, as to an order issued on July 25, on August 11, regarding upcoming 1994 elections); *Miller v. Johnson*, 512 U.S. 1283 (1994) (same, as to an order issued on September 12, on September 23, regarding upcoming 1994 elections).

Indeed, the right to vote is one of the most fundamental rights in our democratic system of government and is afforded special protection. *See Reynolds*, 377 U.S. at 554-55, 562; *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined."). Accordingly, any illegal impediment on the right to vote is an irreparable injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). Thus, it is simply beyond dispute that Plaintiffs and other voters will suffer irreparable injury if they are forced to participate in a third election under an unconstitutional redistricting plan. *See Personhuballah*, 2016 WL 93849, at *4 ("To force the Plaintiffs to vote again under the Enacted Plan even if the Supreme Court affirms our finding that the Plan is unconstitutional—and to do so in a presidential election year, when voter turnout is highest, constitutes irreparable harm to them, and to the other voters in the Third Congressional District.") (internal citation omitted); *Larios*, 305 F. Supp. 2d at 1344 ("If the court permits a stay, thereby allowing the 2004 elections also to proceed pursuant to unconstitutional plans, the plaintiffs and many other citizens in Georgia will have been denied their constitutional rights in two of the five elections to be conducted under the 2000 census figures. . . . Accordingly, we find that the plaintiffs will be injured if a stay is granted because they will be subject to one more election cycle under unconstitutional plans.").

Moreover, the public interest also weighs heavily in favor of denying Defendants' motion. Where a court finds that a legislature has impermissibly used race to draw congressional districts, "the public interest aligns with the Plaintiffs' . . . interests, and thus militates against staying implementation of a remedy." *Personhuballah*, 2016 WL

93849, at *5. "[T]he harms to the Plaintiffs would be *harms to every voter in*" CDs 1 and 12 who are being denied their constitutional rights. *Id.* (emphasis added). "[T]he harms to [North Carolina] are public harms" because "[t]he public has an interest in having congressional representatives elected in accordance with the Constitution." *Id.* Indeed, "[a]s the Supreme Court has noted, once a districting scheme has been found unconstitutional, 'it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan.'" *Id.* (quoting *Reynolds*, 377 U.S. at 585).

D. The Balance of Harms Favors Plaintiffs: The State's Administrative Inconvenience Does Not Outweigh the State's Ongoing Violation of the Constitutional Rights of Millions of North Carolina Citizens

Faced with the fact that three of the four relevant factors cut strongly against them, Defendants premise their motion entirely on their claim that the State will suffer irreparable injury in the absence of the requested stay. To that end, Defendants offer two closely-linked rejoinders. First, Defendants express concern that voters will be "confused" if the primary is modestly delayed and they vote in new, constitutional districts, whereas they are intimately familiar with voting under the enacted, unconstitutional plan. *See* Motion at 3. Second, Defendants contend that it will be cheaper and administratively easier for the State to run the 2016 elections under an unconstitutional map rather than to promptly cure the racial gerrymander of CDs 1 and 12. *Id.* Neither of these arguments is availing.

As to "voter confusion," Plaintiffs submit that voters would be justifiably confused to learn that they will be subject, once again, to elections under a map deemed

unconstitutional by this Court. Voters would be particularly perplexed because North Carolina—no stranger to redistricting litigation—has adopted a statute *specifically* designed to address the instant scenario. That statute provides that, in the event a court strikes down a redistricting plan, the court should provide the General Assembly with as little as two weeks to "act to remedy any identified defects to its plan" and if the General Assembly fails to act, to "impose an interim districting plan for use in the next general election." N.C. GEN. STAT. ANN. § 120-2.4.

Defendants' contention that it is simply "too late" to remedy the unconstitutional enacted plan in 2016 is similarly unavailing. There is ample precedent for the adoption of remedial plans to redress racial gerrymandering in North Carolina in election years. Where necessary, courts can and have delayed the primary election to allow time to implement a remedial plan. Indeed, this is precisely what happened in 1998, when the Eastern District of North Carolina struck down a predecessor version of CD 12. Then, the court denied the defendants' motion to stay implementation of a remedial order (as did the United States Supreme Court on a subsequent motion), and the primary election was delayed. *See Cromartie v. Hunt*, 133 F. Supp. 2d 407, 410 (E.D.N.C. 2000) *rev'd sub nom. Easley v. Cromartie*, 532 U.S. 234 (2001). The 2002 primary election was also delayed as a result of ongoing redistricting litigation, with the United States Supreme Court again refusing to stay implementation of a remedial plan in an election year. *See*

Bartlett v. Stephenson, 535 U.S. 1301, 1304 (2002).[3] North Carolina is hardly unique. Numerous courts in other jurisdictions have, likewise, recognized that they have the authority to postpone elections when necessary to implement an appropriate remedy.[4]

Indeed, Defendants' complaints about the administrative inconvenience of delaying the primary ring particularly hollow. Consistent with long-standing practice, the 2016 primary was originally set for May. Anne Blythe, *NC Candidates to File for 2016 Elections Amid Questions About 2011 Redistricting*, RALEIGH NEWS & OBSERVER, Nov. 30, 2015, http://www.newsobserver.com/news/politics-government/state-politics/article47237720.html. Late last year, knowing full well that this case was pending (along with two other lawsuits challenging various state legislative and congressional districts in state and federal court), the General Assembly moved up the

[3] In 2002, the trial court struck down the 2001 Senate and House districting plans on February 20, 2002. The North Carolina Supreme Court enjoined the State from using the 2001 maps to conduct the May 7 primary election, even though the candidate filing period had already closed. Ultimately, the primary was held on September 10, 2002, under a court-drawn plan. This procedural history is detailed at length in *Stephenson v. Bartlett*, 582 S.E.2d 247, 248-49 (N.C. 2003).

[4] *See, e.g.*, *Larios v. Cox*, 305 F. Supp. 2d 1335, 1342 (N.D. Ga. 2004) (denying motion to stay in racial gerrymandering lawsuit and noting "that 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) (noting that "[i]f forced to craft an interim remedy, this court has the authority to postpone . . . local election deadlines if necessary."); *Garrard v. City of Grenada, Miss.*, No. 3:04CV76-B-A, 2005 WL 2175729, at *4 (N.D. Miss. Sept. 8, 2005) (postponing election from October 2005 to November 2005); *Republican Party of Adams Cty., Miss. v. Adams Cty. Election Comm'n*, 775 F. Supp. 978, 981 (S.D. Miss. 1991) (describing procedural history of related state court litigation, where court had "enjoined the primary, runoff, and general elections for Adams County supervisors that were scheduled to occur under state law on September 17, 1991" until November 5, 1991); *Busbee v. Smith*, 549 F.Supp. 494 (D.D.C.1982), *aff'd*, 459 U.S. 1166 (1983) (delaying Georgia's 1982 congressional elections to remedy Voting Rights Act violation); *Heggins v. City of Dallas, Tex.*, 469 F. Supp. 739, 743 (N.D. Tex. 1979) (entering order on February 22, 1979, postponing election scheduled for April 7, 1979); *Griffin v. Burns*, 570 F.2d 1065, 1066 (1st Cir. 1978) (in case involving 42 U.S.C. § 1983 claim, affirming trial court order requiring a new primary be held and postponing the general election).

primary by two months, to March 15. *Id.* Accordingly, any "injury" to the State necessitated by moving the primary *back* to allow for implementation of a remedial plan is directly traceable to the State's precipitous decision to move the primary *forward* in the first place, knowing full well the risk of an adverse determination by this Court. Notably, contrary to the State's position now, at the time the State moved the primary, Senator Rucho declared publicly that doing so would pose no impediment to a court timely adopting a remedy. *See supra* at 3-4.

To be sure, North Carolina likely will incur additional cost and burden in altering its election plans to remedy the unconstitutional congressional plan, as it has done on numerous occasions in the past. But the irreparable *constitutional* injury Plaintiffs and all other North Carolinians will suffer if the stay is granted far outweigh any *administrative* injury North Carolina will suffer if the stay is denied. *See Buchanan v. Evans*, 439 U.S. 1360, 1361 (1978) (in considering a stay, the court "should balance the equities" to "determine on which side the risk of irreparable injury weighs most heavily") (citation omitted). Simply put, a choice between forcing millions of North Carolinians to vote in yet another election under the unconstitutional enacted plan and delaying the congressional primary election is no choice at all. *See, e.g., Dye v. McKeithen*, 856 F. Supp. 303, 306 (W.D. La. 1994) ("The potential injury of an election in which citizens are deprived of their right to vote negates any damage that may be sustained by Vernon Parish in the potential delay of elections.").

IV. CONCLUSION

Stripped to its essence, Defendants—through the guise of the instant motion—ask the Court to grant them the "fruits of victory whether or not [their forthcoming] appeal has merit." *Personhuballah*, 2016 WL 93849, at *4 (internal quotations omitted). Plaintiffs respectfully submit that the Court should be entirely "reluctant" to do so. *Id*. Defendants cannot establish a likelihood of success on the merits and have not even tried, and Plaintiffs and more than a million other North Carolinians will suffer grievous and certain injury if a stay is granted. Plaintiffs respectfully submit that the Court should deny Defendants' motion so that a remedial plan can be adopted promptly and North Carolina's voters can, at long last, have the opportunity to vote under a constitutional congressional map.

Respectfully submitted, this the 9th day of February, 2016.

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CERTIFICATE OF SERVICE

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