IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

COMMON CAUSE, *et al.*, Plaintiffs, v. ROBERT A. RUCHO, in his official capacity as Chairman of the North Carolina Senate Redistricting Committee for the 2016 Extra Session and Co-Chairman of the Joint Select Committee on Congressional Redistricting, *et al.*, Defendants.	CIVIL ACTION NO. 1:16-CV-1026-WO-JEP THREE-JUDGE COURT
League of Women Voters of North Carolina, *et al.*, Plaintiffs, v. Robert A. Rucho, in his official capacity as Chairman of the North Carolina Senate Redistricting Committee for the 2016 Extra Session and Co-Chairman of the 2016 Joint Select Committee on Congressional Redistricting, *et al.*, Defendants.	CIVIL ACTION NO. 1:16-CV-1164-WO-JEP THREE JUDGE COURT

LEGISLATIVE DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO STAY

INTRODUCTION

This action should be immediately stayed pending the United States Supreme Court's final decision in *Gill v. Whitford*, Dkts. 16-1161; 16A1149 ("*Whitford*"), a political gerrymandering case out of Wisconsin. On June 19, 2017, the Supreme Court took several actions in *Whitford* which warrant a stay here. First, and most importantly, the Supreme Court agreed to hear *Whitford* on the merits in its next term. *Whitford* involves the same claims before the Court in this case and will ultimately resolve currently unanswered questions regarding the justiciability, legal standards, and appropriate remedy in political gerrymandering claims. Additionally, the Supreme Court stayed the *Whitford* court's order directing Wisconsin to enact a remedial plan by November 1, 2017 and notified the parties that it would postpone consideration of its jurisdiction over the plaintiffs' claims in *Whitford* until the hearing on the merits.

Continuing with proceedings in the instant cases in light of *Whitford* will clearly be an exercise in futility no matter what action the Supreme Court takes in that case. If the Supreme Court finds that political gerrymandering claims are nonjusticiable, these proceedings will have been an enormous waste of time and money for all involved with nothing to show for it other than public confusion. If the Supreme Court recognizes these claims as justiciable, its opinion in *Whitford* will contain guidance and legal standards bearing directly on the claims in the instant cases and, at a minimum, will require a new trial under the new standard. Moreover, if this Court proceeds to trial and rules against defendants, any remedy it attempts to impose will likely be stayed for at least the same amount of time that the *Whitford* remedial order remains stayed by the Supreme Court.

The only consequence of proceeding under this cloud of uncertainty would be irreparable confusion by the public as to the status of North Carolina's congressional districts. For these reasons, and as explained below, the Court should enter an order immediately staying this action pending the Supreme Court's final decision in *Whitford.*

BACKGROUND

In 2011, North Carolina's legislature enacted new congressional districts for North Carolina ("2011 Plan"). *Common Cause* Amended Complaint ("Am. Compl.") ¶ 7. On February 5, 2016, a three-judge court found that Congressional Districts ("CD") 1 and 12 in the 2011 Plan constitute racial gerrymanders and enjoined any further elections under the 2011 Plan. *Harris v. McCrory*, 159 F. Supp. 3d 600 (2016) (ordering the State to enact new plans no later than Feb. 19, 2016), *appeal docketed*, No. 15-1262 (U.S. Apr. 11, 2016). Am. Compl. ¶ 9.

In response, the legislature enacted a new congressional plan on February 19, 2016 in accordance with the deadline set by the three-judge court in *Harris* ("2016 Plan"). Am. Compl. ¶ 21. The plaintiffs in the *Harris* litigation subsequently filed objections to the 2016 Plan and alleged that the plan was unlawful because of political gerrymandering. These objections were overruled by the three-judge court. *See Harris v. McCrory*, No. 1:13-CV-949, 2016 WL 3129213, *1 (M.D.N.C. Jun. 2, 2016).

The *Harris* plaintiffs appealed this decision to the Supreme Court and it is currently pending as Docket No. 16-166. On May 26, 2017, the Supreme Court directed the parties in *Harris* to submit letter briefs on, among other issues, whether the *Harris*

plaintiffs have standing to challenge the 2016 Plan as a partisan gerrymander. Dkt. 16-166. The parties submitted letter briefs on June 6, 2017.

On August 5, 2016, the plaintiffs in *Common Cause* filed a complaint alleging that the 2016 Plan is an unconstitutional partisan gerrymander. In particular, the *Common Cause* plaintiffs alleged that the 2016 Plan violated the First and Fourteenth Amendments and Articles I, Sections 2 and 4 of the United States Constitution. The complaint in *League of Women Voters* was filed on September 22, 2016 and includes the same allegations regarding the 2016 Plan and seeks the same remedies as in *Common Cause*. Both complaints named the same defendants. After initial pleading and responses, the *Common Cause* plaintiffs, the *League of Women Voters* plaintiffs, and defendants jointly moved to consolidate the two actions for discovery and trial. D.E. 40. On February 7, 2017, this Court ordered that *League of Women Voters v. Rucho*, No. 1:16-cv-1164, and *Common Cause v. Rucho*, No. 1:16-cv-1026 be consolidated for the purposes of discovery and trial. D.E. 41.

Plaintiffs do not allege that the North Carolina General Assembly engaged in political gerrymandering by failing to follow traditional districting criteria in the creation of one or more specific districts. Instead, the crux of plaintiffs' claims rest on the theory that political parties should have roughly proportionate shares of "wasted votes" analyzed on a statewide basis. Trial of plaintiffs' consolidated actions was scheduled to begin June 26, 2017 but was recently postponed by the Court on its own motion.

STANDARD OF REVIEW

Courts have broad discretion to issue a stay of the matters before it. "'[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.'" *Int'l Nickel Co. v. Martin J. Barry, Inc.*, 204 F.2d 583, 586 (4th Cir. 1953) (*quoting Landis v. North Am. Co.*, 299 U.S. 248, 254-255 (1936)). *See also Natuzzi Americas, Inc. v. Petrook*, No. 1:12-cv-559, 2013 WL 6628763 (M.D.N.C. Dec. 16, 2013) (recommending stay of action pending outcome of related foreign action).

ARGUMENT

I. A STAY IS NECESSARY TO AVOID A WASTEFUL AND CONFUSING EXERCISE IN FUTILITY.

The Supreme Court's decision to hear and decide *Whitford* is a game-changer for this case. Proceeding here will be futile no matter what final action the Supreme Court takes in that case. It is not in dispute that the legal theories advanced by the plaintiffs in *Whitford* are essentially identical to plaintiffs' case here. In *Whitford*, plaintiffs challenged statewide redistricting plans on grounds that Wisconsin's legislature engaged in political gerrymandering in violation of the First and Fourteenth Amendments.[1]

[1] In *Davis v. Bandemer*, 478 U.S. 109 (1986), the Supreme Court had previously held political gerrymandering claims are justiciable, and failed to overrule that holding later in *Vieth v. Jubelirer*, 541 U.S. 267 (2004) even while discarding the test the Court had created in *Bandemer* to identify unlawful political gerrymandering. *Vieth*, 541 U.S. at 283-84 (plurality op.); *id.* at 308 (Kennedy, J., concurring in the judgment); *see id*. at 317

Plaintiffs proposed a legal test that included use of a purported "efficiency gap" measure to determine whether the districts exhibited partisan bias.

Plaintiffs' claims in this case are simply a re-tread of the *Whitford* claims. As in *Whitford*, plaintiffs claim that defendants politically gerrymandered a statewide redistricting plan in violation of the First and Fourteenth Amendments of the United States Constitution. *See* Am. Compl. ¶¶ 25-54. Additionally, plaintiffs argue that this Court should apply the same standards the Supreme Court is currently reviewing in *Whitford*. In Plaintiffs' Preliminary Outline of Legal Standards, plaintiffs state that they intend to prove at trial both partisan intent and partisan effect of the 2016 Plan. D.E. 43, pp. 4-6. To do so, they will rely on election data which they claim will show an "efficiency gap" showing votes "wasted" under the plan. D.E. 43, p. 6. Plaintiffs argue that the partisan intent and partisan effect standard is applicable to their First and Fourteenth Amendment claims. D.E. 43, pp. 4-6, 9-10.

Thus, if the Supreme Court in *Whitford* decides that political gerrymandering claims are not justiciable, the instant proceedings will have been for naught. The amount of time and money that would be unnecessarily wasted by all parties involved would be enormous. If, on the other hand, the Supreme Court permits political gerrymandering claims to be brought, then for the first time since discarding the *Bandemer* test in *Vieth* it will likely announce a new standard for these claims. And that new standard is unlikely to resemble anything proposed by the plaintiffs here. It is unlikely if not improbable that

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(Stevens, J., dissenting); *id.* at 346 (Souter, J., joined by Ginsburg, J., dissenting); *id*. at 355-56 (Breyer, J., dissenting).

the Supreme Court would adopt a new standard in *Whitford* that re-hashes a standard the Court rejected over a decade ago. In any event, whatever outcome results from the upcoming trial in this case is at a minimum likely to be vacated and remanded by the Supreme Court in light of its forthcoming decision in *Whitford*. *See, e.g., Kirksey v. City of Jackson, Miss.*, 625 F.2d 21, 22 (1980) ("We have many times held that fact findings that were made under the spell of legal principles, which were either improper or since then declared to be improper, really can't be credited one way or the other.") (vacating and remanding in light of new Supreme Court precedent); *Coastal Lumber Co. v. N.L.R.B.*, 24 Fed. Appx. 120 (2001) (ordering district court to reconsider case in light of new Supreme Court case issued while appeal was pending).[2] The futility of proceeding further here is inevitable.

While the Supreme Court's decision to hear *Whitford* on the merits alone warrants a stay, the Supreme Court's other actions in *Whitford*, in context, bear on the calculus this Court should consider in weighing a stay. Unlike many other substantive areas of the Supreme Court's jurisprudence, the issue of justiciability in political gerrymandering cases has been hotly contested. In *Vieth*, a plurality of the Court would have held that the

[2] This Court has also previously recognized the wisdom of staying redistricting litigation until gaining better guidance from the Supreme Court. When the *Harris* case was pending before a different three-judge panel of this Court, the parties and the Court agreed that the proceedings should be stayed until such time as the Supreme Court issued its decision in *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015). D.E. 85 in Case No. 13-949. The same logic applies to this case but with even more force. In *Whitford* and the pending Supreme Court *Harris* appeal, the Supreme Court may not only clarify relevant legal standards applicable to this case, but it may also decide whether federal courts even have jurisdiction over claims of this nature.

political gerrymandering claim itself is not justiciable, and all of the Justices were hopelessly divided on whether a judicially manageable standard exists for adjudicating the claims. *Vieth*, 541 U.S. at 283-84 (plurality op.); *id.* at 308 (Kennedy, J., concurring in the judgment); *see id*. at 317 (Stevens, J., dissenting); *id.* at 346 (Souter, J., joined by Ginsburg, J., dissenting); *id*. at 355-56 (Breyer, J., dissenting). Thus, the Supreme Court's refusal in *Whitford* to concede the question of jurisdiction even implicitly through a noting of probable jurisdiction is at least some indication that a majority of the Supreme Court may have serious reservations about the continued viability or parameters of the political gerrymandering cause of action.[3]

Moreover, the combination of the Supreme Court's decision to hear *Whitford* and its stay of the *Whitford* court's remedial order significantly impacts how much this Court can accomplish with a trial before *Whitford* is decided. In *Whitford*, a divided three-judge panel of the United States District Court for the Western District of Wisconsin invalidated Wisconsin's legislative redistricting plans as a partisan gerrymander. In its opinion, the district court stated for the first time its own test for political gerrymandering claims:

> (1) [The plan] is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation,

[3] Significantly, the *Harris* appeal of the three-judge court's refusal to overturn the 2016 Plan on political gerrymandering grounds is also still pending with the Supreme Court. It not only involves the same legal claim as this case, it also involves the exact same congressional redistricting plan. When the Supreme Court's directive to brief the standing issue in *Harris* is considered in combination with the Supreme Court's postponing the question of jurisdiction in the *Whitford* appeal, it is clear that the position of the four Justices in the plurality opinion in *Vieth*, i.e., that political gerrymandering claims are nonjusticiable, is again under serious consideration.

(2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds.

Whitford v. Gill, 218 F. Supp. 3d 837, 884 (W.D. Wis. 2016). The court stated that the intent prong of this test could be satisfied by establishing "intent to entrench a political party in power." *Id.* at 887. In many respects, then, the gerrymandering test the district court divined in *Whitford* is simply a re-hashing of the *Bandemer* test: "[if] there were a discriminatory effect and a discriminatory intent, then the legislation would be examined for valid underpinnings." *Bandemer*, 478 U.S. at 141. This test was rejected by all nine Justices in *Vieth*. *Vieth*, 541 U.S. at 283-84 (plurality op.); *id.* at 308 (Kennedy, J., concurring in the judgment); *see id*. at 317 (Stevens, J., dissenting); *id.* at 346 (Souter, J., joined by Ginsburg, J., dissenting); *id*. at 355-56 (Breyer, J., dissenting).

Rather than conduct a new trial on its newly minted legal standard, or stay its order pending Wisconsin's appeal to the Supreme Court, the district court doubled down and ordered Wisconsin to draw new legislative districts by November 1, 2017. *Whitford v. Gill*, 2017 WL 383360, at *3 (W.D. Wisc. Jan. 27, 2017). The district court noted that, during the redistricting process that led to the plans found unconstitutional, the State "produced many alternate maps, some of which may conform to constitutional standards" and opined that "the State's thorough earlier work may significantly assuage the task now before them." *Whitford*, 2017 WL 383360, at *2. Following the district court's rulings, the defendants appealed to the Supreme Court and sought a stay on May 22, 2017. *See Gill v. Whitford*, Dkts. 16-1161; 16A1149 (Application for Stay Pending Resolution of Direct Appeal).

On June 19, 2017, the Supreme Court stayed the district court's remedial order pending a hearing and decision in the case. This is in contrast to other cases in which the Supreme Court has refused to stay a remedy while it reviewed a case. In *Harris*, for example, the State sought a stay of the district court's order requiring new congressional plans to be enacted. The Supreme Court denied the stay request, 136 S. Ct. 1001 (2016), and ultimately went on to affirm the district court's judgment. 137 S. Ct. 1455 (2017).

There is no urgency for the Court to proceed to trial in this matter because, even if plaintiffs win, any relief this Court imposes would likely be stayed, as in *Whitford*, at least until the Supreme Court decides *Whitford*. Indeed, there may be more reason to think the Supreme Court would stay such an order here. In *Whitford*, the district court gave the Wisconsin legislature nine months from the date of its remedial order to enact new plans. Even if the instant cases are tried by the end of July or August 2017, it would be impossible for this Court to give that much time to the North Carolina legislature to redistrict the statewide congressional plan. Additionally, the *Whitford* district court took pains to note that the Wisconsin mapdrawers had "produced many alternate maps, some of which may conform to constitutional standards," which it thought would "significantly assuage the task now before them." *Whitford*, 2017 WL 383360, at *2. There is no evidence or indication that any such alternate maps exist here. Thus, there is every reason to expect that the circumstances here would draw a stay from the Supreme Court.[4]

[4] This reality would be no different even if plaintiffs were to prevail at the upcoming trial and this Court was to stay its judgment. A post-trial stay would in effect be no different than a stay entered now if the Supreme Court changes the legal standards applicable to political gerrymandering claims. Of course, if the Supreme Court agreed with the

Whether such a stay would foreclose relief in time for the 2018 elections would depend on the timing of a decision by the Supreme Court in *Whitford*. If the Supreme Court acts quickly on the merits of *Whitford*, and depending on how quickly, there may yet be a possibility of 2018 relief. But before this Court could get to that relief, it would be required to give the parties an opportunity to take discovery and try the case under whatever standard the Supreme Court may adopt for political gerrymandering cases. Under these circumstances, there is no good reason to proceed, and many good reasons not to.

II. THE BALANCE OF THE EQUITIES REQUIRES A STAY

The Court has the power to stay proceedings on its docket in a manner that best promotes economy of time and effort for itself, for counsel, and for litigants. *Whiteside v. UAW Local 3520*, 576 F.Supp.2d 739, 742 (M.D.N.C. 2008) (*quoting Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936)). When determining whether to issue a stay, the court should balance various factors relevant to the expeditious and comprehensive disposition of the matters on its docket. *Id.* (*quoting United States v. Georgia Pacific Corp.*, 562 F.2d 294, 296 (4th Cir. 1977)).

The balance of equities weighs heavily in favor of issuing a stay. Absent a stay of this action, the Court risks entering a judgment that may be quickly invalidated by the Supreme Court's forthcoming *Whitford* decision. Refusing to stay the case would compel the Court and parties to unnecessarily expend significant time and resources at

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Whitford court's standard for such claims, it could have summarily affirmed the decision, but it did not. Instead, the Supreme Court took the case and stayed the district court's remedy.

trial, only to have to re-try the case later or dismiss it. Moreover, in the interim, the State would proceed as directed by this Court. If the Court rules against the defendants, the State would likely be required to re-draw the 2016 Plan in a manner that conforms to the Court's guidance. But any such relief is likely to be stayed by the Supreme Court at least until the *Whitford* decision is announced, and would have to be completely re-done if that decision shows this Court applied the wrong standard at trial. The time, effort, and taxpayer resources that would be wasted and never recovered are incalculable. This is not to mention the irreparable confusion this course of events would bring the public with respect to their congressional districts and the state of North Carolina's voting laws.

Conversely, the plaintiffs will suffer *no* harm during the pendency of a stay in this action. The Supreme Court's actions in *Whitford* strongly indicate that the plaintiffs here will not be able to obtain relief until after *Whitford* is decided. There is no reason for plaintiffs to spend time and resources at trial pursuing relief that, as a practical matter, won't be available until after *Whitford* is over. And if *Whitford* is argued and decided early in the Supreme Court's next term, this Court could lift its stay and allow plaintiffs to pursue such relief then. Thus, the harm to the defendants if this case moves forward, regardless of its outcome, substantially outweighs any harm that plaintiffs could possibly allege if a stay is entered. This Court should therefore stay these proceedings pending the outcome of *Whitford*.

CONCLUSION

For the foregoing reasons, the Court should enter an immediate stay of this action.

This the 26th day of June, 2017.

OGLETREE, DEAKINS, NASH
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CERTIFICATE OF SERVICE

I, Phillip J. Strach, hereby certify that I have this day electronically filed the foregoing **LEGISLATIVE DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STAY** with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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