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' REPLY BRIEF
IN SUPPORT OF MOTION TO STAY

INTRODUCTION

Plaintiffs' responses (D.E. 77, 79) to the legislative defendants' ("legislative defendants" or "defendants") motion to stay accuse defendants of reading the tea leaves in the pending appeal of *Gill v. Whitford*, Dkts. 16-1161; 16A1149 ("*Whitford*") but then engage in their own mind reading in assuming *Whitford* won't affect these cases. Even plaintiffs seem to understand that no matter how the Supreme Court disposes of the *Whitford* case, the guidance from it will shape these cases and others like it. Other than wasting judicial resources, then, there is no good reason to proceed.

Indeed, *Whitford* will shape the instant cases in at least two key ways that plaintiffs refuse to acknowledge. First, it is undisputed that only one election has taken place under the 2016 congressional plan. The Supreme Court has previously criticized using just one set of election results to prove unconstitutional discrimination. If the Supreme Court continues to reject one election as sufficient, these cases will need to be not only stayed pending *Whitford*, but dismissed. Second, whether a statewide partisan gerrymandering claim is justiciable is squarely at issue in *Whitford*, and plaintiffs' claims here are identical. The plaintiffs here, whether it be under the First Amendment, Fourteenth Amendment, or otherwise, are not attacking individual districts that have been allegedly gerrymandered by ignoring traditional redistricting principles. Thus, even if a partisan gerrymandering claim survives in some form after *Whitford*, it is unlikely to resemble plaintiffs' claims.

Finally, plaintiffs concede, at least implicitly, that there will be sufficient time for this Court to order a remedy for the 2018 election cycle even if the case is stayed. That is

because the Supreme Court has scheduled *Whitford* for argument on October 3, 2017 (Dkt. 16-1161) making it one of the first cases it will hear in its new term. Under these circumstances, proceeding would be futile and unnecessary.

ARGUMENT

I. A Stay is Necessary to Avoid a Wasteful and Unnecessary Exercise in Futility.

Plaintiffs' responses do not refute the high likelihood that whatever this Court does in this case before *Whitford* is decided by the Supreme Court will need to be re-done after the *Whitford* decision is released. Instead, plaintiffs rely on sheer conjecture about the outcome of *Whitford* while ignoring the plain reality of its effect on this case.

A. Plaintiffs' conjecture about *Whitford* misses the point.

Plaintiffs accuse defendants of attempting to read the "*Whitford* tea leaves" but ignore the reality of what *Whitford* means for this case. Defendants do not, as alleged by plaintiffs, assume the "worst-case-scenario" for the appellees there or the plaintiffs here. (D.E. 77, p. 5) While it is certainly ominous for the *Whitford* appellees that the Supreme Court voted to hear the case, postponed the question of jurisdiction, and stayed the lower court order, all in one fell swoop, it is the fact that the Supreme Court agreed to hear the case at all, and expedited its hearing, that makes it a game-changer in the instant cases. No matter what happens in *Whitford*, the stage is now set for judicial guidance from the Supreme Court on issues there that are identical to the issues here.

Instead of grappling with that reality, plaintiffs invite the Court to engage in a race to beat the Supreme Court to a decision. (D.E. 77, p. 8) ("But, if a trial is held

expeditiously, this Court would have the opportunity to announce its judgment before the Supreme Court decides *Whitford*.") To make such a statement is to demonstrate its absurdity. It is unclear why a lower federal court would ever want to beat the Supreme Court to a ruling on issues identical to those being decided by the Supreme Court. Plaintiffs suggest that if this Court is successful in the race against the Supreme Court they advocate, then "a decision in *Whitford* that implicates the legal theory adopted by the Court in this case can be taken account of in the appellate process." (D.E. 77, p. 3) That is surely an understatement, and ignores that the decision in *Whitford* will by definition implicate any legal theories adopted by this Court prior to a decision in *Whitford*. And the way such an implication will be "taken account of in the appellate process" is that this Court's decision will be handed right back to it to do again in light of the Supreme Court's guidance 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. App'x 120 (2001) (ordering district court to reconsider case in light of new Supreme Court case issued while appeal was pending). This Court should reject the wasteful exercise in futility proposed by plaintiffs.

B. *Whitford* will shape the instant cases in key ways that plaintiffs ignore.

Whitford will shape the instant cases in at least two key ways. First, it is undisputed that only one election has taken place under the 2016 congressional plan. The Supreme Court has previously criticized using just one set of election results to prove unconstitutional discrimination. If the Supreme Court continues to reject one election as sufficient, these cases will need to be not only stayed pending *Whitford*, but dismissed.

As noted by the Supreme Court in its plurality opinion in *Davis v. Bandemer*, 478 U.S. 109, 135 (1986), "relying on a single election to prove unconstitutional discrimination is unsatisfactory." No court has ever found a redistricting plan unconstitutional after a single election, regardless of the theory of illegal gerrymandering advocated by the plaintiffs or adopted by a court.

Plaintiffs' entire case relies upon an amorphous "entrenchment" test adopted by two of the three judges who constituted the majority in *Whitford*. But even these two judges agreed that the Wisconsin legislative plan was subject to judicial review only because two elections had been held under that plan. *Whitford v. Gill*, 218 F. Supp. 3d 837, 902 (W.D. Wis. 2016). The test advocated by plaintiffs in this case, i.e. that a plan is subject to constitutional scrutiny based upon its efficiency gap score following the very first election under the plan, is completely unprecedented. As noted by the dissent in *Whitford*, it is unfathomable that the Supreme Court would affirm any ruling by this Court finding the 2016 congressional plan unconstitutional after just one election. Indeed, it is likely that all nine Justices would reject plaintiffs' legal claims that are based

exclusively upon one of several theories of "partisan symmetry" as applied after only one election. *Whitford*, 218 F. Supp. 3d at 947 (Griesbach, J., dissenting). Justice Kennedy's opinion in *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 419-20 (2016) could not be clearer that he would reject this standard.

Second, whether a statewide partisan gerrymandering claim is justiciable is squarely at issue in *Whitford*, and plaintiffs' claims here are identical. While the Common Cause plaintiffs emphasize their First Amendment theories (D.E. 79, pp. 2-6), the fact is that plaintiffs are not attacking individual districts that have been allegedly gerrymandered by ignoring traditional redistricting principles. This is unlike the claims in *Shapiro v. McManus*, 203 F. Supp. 3d 579 (D. Md. 2016) (single-district partisan gerrymandering claim), and is true regardless of whether plaintiffs pursue theories under the First Amendment, Fourteenth Amendment, or otherwise. Any claim to the contrary is specious. The only evidence plaintiffs rely on is statewide comparisons of so-called statewide wasted votes and other statewide evidence. Plaintiffs make no allegations explaining how any individual district is gerrymandered with reference to evidence pertaining only to that district. Thus, even if a partisan gerrymandering claim survives in some form after *Whitford*, it is unlikely to resemble plaintiffs' claims.

II. Plaintiffs Implicitly Concede that a Stay Does Not Foreclose 2018 Relief.

The Supreme Court's decision to set *Whitford* for oral argument on October 3, 2017, leaves open the possibility that a decision could be announced in time to implement it prior to the 2018 election cycle. While the plaintiffs engage in some mind reading of

their own in speculating that the Supreme Court will not announce its decision until between "January and June of 2018" (D.E. 77, p. 8), nothing precludes the Supreme Court from disposing of the case earlier. Certainly, the Supreme Court has indicated its intent to resolve the case quickly by setting it for argument during the first week of the new term.

The plaintiffs implicitly concede that 2018 relief could be obtained even with a stay. They point out that in 2016 the legislature was only given two weeks to enact a new congressional plan following a racial gerrymandering trial. (D.E. 77, p. 7) In that case, *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016), the legislature was ordered to redraw congressional districts on February 5, 2016. The court's order ultimately required a special congressional primary to be held in June 2016 in advance of the regular November general election. When combined with their concession that the *Whitford* decision could be announced in January 2018 (and of course it could be even earlier given that the case will be argued on October 3, 2017), it is clear that the trial in the instant cases could be resumed with time to implement relief in advance of the 2018 elections. If this Court tries these cases now, the Supreme Court's decision in *Whitford* will likely result in that court remanding these cases back to this Court anyway. This Court would then need to conduct another trial or, at a minimum an evidentiary hearing which could approximate a trial, before entering a final judgment. The only thing that plaintiffs gain by a trial now is a waste of judicial time and resources.

CONCLUSION

The legislative defendants respectfully request that this Court stay these proceedings pending the Supreme Court's decision in *Whitford*.

This, the 31st day of July, 2017.

OGLETREE, DEAKINS, NASH
SMOAK & STEWART, P.C.

/s/ Phillip J. Strach
Phillip J. Strach
N.C. State Bar No. 29456
Thomas A. Farr
N.C. State Bar No. 10871
thomas.farr@ogletreedeakins.com
phil.strach@ogletreedeakins.com
4208 Six Forks Road, Suite 1100
Raleigh, North Carolina 27609
Telephone: (919) 787-9700
Facsimile: (919) 783-9412
Counsel for Legislative Defendants

CERTIFICATE OF SERVICE

I, Phillip J. Strach, hereby certify that I have this day electronically filed the foregoing **LEGISLATIVE DEFENDANTS' REPLY BRIEF 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:

Edwin M. Speas, Jr.
Carolina P. Mackie
Poyner Spruill LLP
P.O. Box 1801 (27602-1801)
301 Fayetteville St., Suite 1900
Raleigh, NC 27601
espeas@poynerspruill.com
cmackie@poymerspruill.com
Attorneys for Plaintiffs

Gregory L. Diskant
Susan Millenky
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, New York 10036
gldiskant@pbwt.com
smillenky@pbwt.com
Attorneys for Plaintiffs

Emmet J. Bondurant
Jason J. Carter
Benjamin W. Thorpe
Bondurant, Mixson & Elmore, LLP
1201 W. Peachtree Street, NW, Suite 3900
Atlanta, Georgia 30309
bondurant@bmelaw.com
carter@bmelaw.com
bthorpe@bmelaw.com
Attorneys for Plaintiffs

Alexander McC. Peters
Senior Deputy Attorney General
apeters@ncdoj.gov
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602

This the 31st day of July, 2017.

OGLETREE, DEAKINS, NASH
SMOAK & STEWART, P.C.

/s/ Phillip J. Strach

30698639.1