No. 17A745

In the Supreme Court of the United States

ROBERT A. RUCHO, ET AL.
Applicants,

v.

COMMON CAUSE, ET AL.,
Respondents.

ROBERT A. RUCHO, ET AL.
Applicants,

v.

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ET AL.,
Respondents.

RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION FOR STAY PENDING RESOLUTION OF DIRECT APPEAL TO THIS COURT

PAUL M. SMITH
Counsel of Record
CAMPAIGN LEGAL CENTER
1411 K St. NW, Suite 1400
Washington, DC 20005
(202) 736-2200
psmith@ campaignlegalcenter.org

ALLISON J. RIGGS
JACLYN MAFFETORE
SOUTHERN COALITION FOR SOCIAL JUSTICE
1415 W. Hwy 54, Suite 101
Durham, NC 27707

NICHOLAS O. STEPHANOPOULOS
UNIVERSITY OF CHICAGO LAW SCHOOL
111 E 60th St.
Chicago, IL 60637

RUTH M. GREENWOOD
ANNABELLE E. HARLESS
CAMPAIGN LEGAL CENTER
73 W. Monroe St., Suite 322
Chicago, IL 60603

Counsel for the League of Women Voters of North Carolina, et al.

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CORPORATE DISCLOSURE STATEMENT

The League of Women Voters of North Carolina is a non-profit corporation that has no parent corporation and issues no stock.

INTRODUCTION

The League of Women Voters *et al.* ("League Plaintiffs") submit this brief in opposition to the legislative defendants' emergency application for a stay pending appeal. Appellants seek that extraordinary remedy in order to deny relief in 2018 to millions of North Carolina's voters whose First and Fourteenth Amendment rights already were abridged in 2016 by use of a set of congressional districts intentionally designed to ensure that their voices are not heard in Congress. That should not occur again.

In the oral argument in *Gill v. Whitford*, Justice Kennedy raised the hypothetical of a state law that "says all districts shall be designed as closely as possible to conform with traditional principles, but the overriding concern is to increase [seats] for party X." Oral Argument Tr. at 19, *Gill v. Whitford*, No. 16-1161 (U.S. Oct. 3, 2017). Counsel for the legislative amici (who also represents the Appellants here) agreed that such overt partisan discrimination would be unconstitutional. "[T]hat could be your instance of a problem that can be actually solved by the Constitution." *Id.* at 26.

Justice Kennedy's hypothetical *is* this case. As with his example, the Adopted Criteria for North Carolina's 2016 congressional plan (the "2016 Plan") required that several traditional criteria be followed: contiguity, compactness, and respect for

county and VTD boundaries. App. A to Stay Application, at 14-15 (hereinafter, "App. A"). But the Adopted Criteria also included a provision labeled "Partisan Advantage." *Id.* at 14. This provision mandated that "[t]he partisan makeup of the congressional delegation" be "10 Republicans and 3 Democrats." *Id.* According to the author of the Adopted Criteria, no greater Republican edge was possible. *Id.* at 16.

Not only did the Adopted Criteria aim—on their face—to disadvantage Democratic candidates and voters, but the map that was ultimately drawn achieved this goal to a nearly unprecedented extent. In the 2016 election, Republican congressional candidates received slightly more than 50% of the statewide vote in North Carolina. *Id.* at 121. With this slim majority, they won *ten* of North Carolina's thirteen congressional seats. *Id.* The resulting partisan asymmetry was the largest in the country in the 2016 election, and the fourth-largest, on net, of all congressional plans nationwide since 1972. *Id.* at 125-27.

The 2016 Plan's partisan asymmetry is also extremely durable. It would take a seven-point pro-Democratic swing for Democrats to capture just one more seat. *Id.* at 123. For the Plan's skew to disappear—that is, for it to treat Democratic and Republican candidates and voters symmetrically—Democrats would have to improve on their 2016 showing by *nine* points. This would be a wave whose only precedent in North Carolina is the post-Watergate election of 1974. *Id.*

Nor is there any legitimate explanation for the 2016 Plan's extreme pro-Republican tilt. Appellees' expert used a simulation technique to produce 3,000 separate congressional maps for North Carolina. *Id.* at 97-101. All of these maps

matched or surpassed the Plan's performance in terms of the nonpartisan Adopted Criteria. *Id.* Yet *not one* of the maps ever resulted in a 10-3 Republican advantage. *Id.* at 111-12, 141-42. In fact, the typical map leaned slightly in a *Democratic* direction. *Id.* Thus, far from justifying the Plan's pro-Republican asymmetry, North Carolina's political geography and the nonpartisan Adopted Criteria are perfectly consistent with partisan fairness.

The first reason why the Court should deny Appellants' emergency stay application, then, is that they have failed to show that "five Justices are likely to conclude that the case was erroneously decided below." *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers). This is true even though this Court has not yet ruled in the *Whitford* case. As suggested by the oral argument colloquy quoted above, the 2016 Plan is actionable and unconstitutional under any standard for partisan gerrymandering the Court might plausibly adopt. For instance, the League Plaintiffs advocated the same three-part test in this litigation that was previously adopted by the district court in *Whitford*, requiring (1) discriminatory intent, (2) a large and durable discriminatory effect, and (3) a lack of a valid justification for this effect. *See Whitford v. Gill*, 218 F. Supp. 3d 837, 884 (W.D. Wis. 2016). There is no question this test is satisfied here, since the Plan's authors advertised their quest for partisan advantage in the Adopted Criteria, achieved a near-record partisan asymmetry that would take a wave unseen in decades to undo, and managed this feat in a State with a pro-Democratic political geography.

The same result would be required if the Court were to adopt an approach that

looks at the treatment of individual districts rather than statewide asymmetry. *See* Jurisdictional Statement, *Benisek v. Lamone*, No. 17-333 (U.S. Sept. 1, 2017) (advancing a single-district theory). While the Plan as a whole is highly asymmetric, this skew was produced by cracking particular Democratic clusters (like Greensboro, split between the Sixth and Thirteenth Districts) and packing other ones (like Charlotte, squeezed into the Twelfth District). App. A at 89-90. Moreover, for the reasons noted at the outset, this is not a case where justiciability should be a concern. *Maximum* partisan advantage was expressly required by the governing criteria and was fully achieved in the map-drawing process.

The second reason the Court should deny Appellants' stay request is because they previously *told* the district court that redistricting at this juncture would not be overly burdensome. In the briefing on Appellants' pretrial motion to stay, they wrote that there would be "time to implement relief in advance of the 2018 elections" if "the trial in the instant cases" took place "in January 2018." Dkt. 79 at 7. *A fortiori*, if the General Assembly could have redrawn North Carolina's congressional map substantially *later* than January—after the conclusion of trial and the district court's entry of judgment—it can do so now without undue disruption.

In fact, we know the General Assembly can do so because, just two years ago, it did exactly that, and at an even later point in the election cycle. On February 5, 2016, a district court struck down two North Carolina congressional districts as unlawful racial gerrymanders. *See Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016). The district court also gave the General Assembly two weeks to enact a

remedial plan. *See id.* at 627. In response, the General Assembly filed another emergency stay petition with this Court. But while this petition was pending, the General Assembly held committee meetings, a public hearing, and legislative debates, and successfully passed a new map prior to the district court's deadline. App. A at 10-19. What was actually accomplished in February 2016 is surely also feasible in January 2018.

Third, Appellants' motion should be denied because, if remedial proceedings are stayed, North Carolina's voters will likely be condemned to a *fourth consecutive* election under an unconstitutional congressional map. In 2012 and 2014, the districts eventually invalidated on racial gerrymandering grounds in *Cooper v. Harris*, 137 S. Ct. 1455 (2017), were used. In 2016, North Carolina's voters went to the polls in an election in which, thanks to partisan gerrymandering, their preferences were not reflected in the makeup of their congressional delegation. And in 2018, this injury will be inflicted anew if a stay is granted. Under its normal timetable, the Court would not even hear this case until its 2018 Term—too late to avoid yet another election in contravention of democratic norms.

The League Plaintiffs therefore join Appellants in asking that the Court, *if* it stays the district court's remedy, treat Appellants' stay motion as a jurisdictional statement and note probable jurisdiction forthwith. *See* Emergency Application for Stay Pending Resolution of Direct Appeal to this Court ("Emergency Application") at 19 n.2, *Rucho v. Common Cause*, No. ___ (U.S. Jan. 12, 2018). Moreover, in that event, the merits briefing should be expedited so as to allow a decision this Spring, in

time for a new plan to be used in the 2018 election. A single election under an unconstitutional map is one too many; four are intolerable.

Lastly, it does not follow that, because the Court granted a stay in *Whitford*, it should do the same here. The first crucial difference between the cases is timing. The Court heard argument in *Whitford* at the beginning of this Term and will presumably reach its decision by the Term's end—likely in time for a 2018 remedy if the district court's judgment is affirmed. Here, however, there is no hope for relief in 2018 if a stay is issued and the Court follows its usual procedures. Barring extraordinary measures, a stay is a guarantee that North Carolina's partisan gerrymander will remain in place for another election.

The second difference between this case and *Whitford* is that the evidence of unconstitutionality is even stronger here. Discriminatory intent had to be inferred from circumstantial material in *Whitford*; here it was trumpeted by the Adopted Criteria. The district court in *Whitford* focused on one measure of partisan asymmetry (the efficiency gap); here the court explained that three separate metrics supported its conclusion. The district court record in *Whitford* did not include computer simulations of district maps; here the court made full use of this powerful technique. And while the League's three-part test was novel when it was endorsed by the district court in *Whitford*, the test is now increasingly familiar and its manageability increasingly clear.

STATEMENT OF THE CASE

As this Court has held, race unjustifiably predominated in the construction of two North Carolina districts in the State's 2011 congressional plan (the "2011 Plan"). *See Cooper*, 137 S. Ct. at 1481-82. The map as a whole was also highly partisan in both intent and effect. As to aim, the 2011 Plan's architect, Thomas Hofeller, admitted that his "primary goal" was "to create as many districts as possible in which GOP candidates would be able to successfully compete for office." App. A at 8; *see also id.* (noting Hofeller's testimony that he sought "to minimize the number of districts in which Democrats would have an opportunity to elect a Democratic candidate").

As to effect, Republican congressional candidates received a slight minority of the statewide vote in 2012, and a slight majority in 2014. Yet in these nearly tied elections, they won *nine* of thirteen seats in 2012, and *ten* of thirteen in 2014. *Id.* at 9. Thanks to these staggeringly unrepresentative outcomes, the 2011 Plan recorded the single worst average efficiency gap of any congressional map, anywhere in the country, since 1972. *Id.* at 125, 143.

This evidence prompted one of the district court judges in *Harris*, Judge Cogburn, to write separately "to express [his] concerns about how unfettered [partisan] gerrymandering is negatively impacting our republican form of government." 159 F. Supp. 3d at 628 (Cogburn, J., concurring). "Elections should be decided through a contest of issues, not skillful mapmaking," he observed. *Id.* District maps like the 2011 Plan are "in disharmony with fundamental values upon which this country was founded," and an "affront to democracy." *Id.* at 629.

After the *Harris* court struck down two of the 2011 Plan's districts, the co-chairs of the Joint Select Committee on Congressional Redistricting (the "Committee"), Representative David Lewis and Senator Robert Rucho, could have taken Judge Cogburn's remarks to heart. Unfortunately, they did nothing of the kind. Instead, Lewis and Rucho presided over a redistricting process that was even more infected with partisanship than its 2011 antecedent.

As noted at the outset, Lewis and Rucho recommended (and the Committee agreed, on a party-line vote) that the 2016 Plan be crafted on the basis of "Partisan Advantage." App. A at 16. A further criterion, "Political Data," elaborated that, "other than population data," only "election results in statewide contests" would "be used to construct congressional districts." *Id.* Lewis added a series of comments at the Committee's meetings that are startling in their naked partisanship. He "acknowledge[d] freely" that a map drawn pursuant to the Adopted Criteria "would be a political gerrymander." *Id.* at 15. He proposed a map that would likely elect 10 Republicans and 3 Democrats. He explained, "I propose that we draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because I do not believe it's possible to draw a map with 11 Republicans and 2 Democrats." App. A at 16. And he "ma[d]e clear that to the extent we are going to use political data in drawing this map, it is to gain partisan advantage." *Id.* at 15.

There is more. Hofeller, the actual mapmaker in 2016 as in 2011, used a sophisticated multi-election average that, in his expert view, would accurately evaluate district partisanship "in every subsequent election." *Id.* at 11-13. Employing

this metric, he carefully divided clusters of Democratic voters that could have anchored congressional districts, as in Asheville and Greensboro. *Id.* at 90. Where Democratic concentrations were too large to be split, as in Charlotte and Raleigh-Durham, he meticulously packed them into the smallest possible number of districts. *Id.* Hofeller also designed the map without input from anyone other than Lewis and Rucho. In fact, he completed his work before the sole public hearing about the 2016 Plan even took place—rendering the event a sham—and declined to consult with Democratic members of the Committee. *Id.* at 14, 17. And just as the "Partisan Advantage" criterion was adopted by the Committee on a party-line vote, so was the Plan itself, by both the Committee and the General Assembly. *Id.* at 17-18.

In the 2016 election, North Carolina's electorate was again closely divided. Yet again, Republican candidates comfortably won ten of the State's thirteen congressional seats—none by a margin of less than ten points. *Id.* at 122. These election results produced a pro-Republican efficiency gap of 19%, indicating that votes for Democratic candidates were wasted at a rate of 19 points higher than votes for Republican candidates. *Id.* at 125. The results also yielded a pro-Republican partisan bias of 27%, meaning that in a hypothetical tied election, Republicans would have won 77% of North Carolina's seats. *Id.* at 137. The results further revealed a pro-Republican mean-median difference of 5%: a median Republican vote share of 58% minus a mean Republican vote share of 53%. *Id.* at 139.

To put these scores in perspective, the League's expert, Professor Simon Jackman, calculated all three measures of partisan asymmetry for all congressional

plans with at least seven seats from 1972 to the present. *Id.* at 126. This unprecedented dataset of 136 plans, used in 25 states for 512 elections, made possible the conclusion noted earlier: that "the 2016 Plan produced the fourth-largest average efficiency gap of the 136 plans." *Id.* at 127. The dataset also disclosed that "the 2016 Plan's partisan bias was the *second largest* observed," "roughly three standard deviations from the historical mean." *Id.* at 137-38.

While this analysis established the magnitude of the 2016 Plan's partisan asymmetry, Professor Jackman also conducted sensitivity testing to demonstrate its durability. That is, he "took the two parties' statewide vote share[s] in the 2016 election, and then shifted those shares by one-percent increments ranging from 10 percent more Republican to 10 percent more Democratic." *Id.* at 123. This is the testing that showed that Democrats need a seven-point swing to capture one more seat, and a Watergate-sized nine-point swing to eliminate the Plan's asymmetry. *Id.* In other words, the unfair partisan advantage is so severe there is very little hope of voters being able to overcome it.

To be sure, a party's edge under a map may stem from intentional gerrymandering or from more benign factors like political geography or compliance with traditional redistricting criteria. To prove that these factors do not justify the 2016 Plan's partisan asymmetry, the League's other expert, Professor Jowei Chen, used a simulation technique previously relied on by the Fourth Circuit, *see Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 344-45 (4th Cir. 2016), to generate 3,000 different congressional maps for North Carolina. App. A at

97-101. All of these maps performed at least as well as the Plan in terms of equal population, contiguity, compactness, and respect for county and VTD boundaries. 2,000 of the maps also paired no more incumbents than the Plan, and roughly 300 matched the district in the Plan with the largest African American population (even though race was not considered in the Plan's design). *Id.*

As mentioned above, *none* of these computer-simulated maps ever resulted in a 10-3 Republican advantage or an efficiency gap as large as the 2016 Plan's. Whether Professor Chen used Hofeller's multi-election average or a predictive regression model, whether he acknowledged incumbency or ignored it, and whether he took race into account or set it aside, *all* of the maps were more symmetric than the Plan, and the median map slightly favored Democrats. *Id.* at 111-12, 141-42. The combination of North Carolina's political geography and the nonpartisan Adopted Criteria would therefore be expected to produce a neutral map in the absence of deliberate gerrymandering. It would not be expected to yield—and so cannot justify—a map sharply skewed in Republicans' favor.

The League Plaintiffs filed their complaint in September 2016, advancing from the beginning of this litigation the same three-part test for partisan gerrymandering under both the First and Fourteenth Amendments. Dkt. 1 at 4-5. Appellants moved to dismiss in November 2016, Dkt. 30, having previously sought (and received) an extension of more than a month to file a responsive pleading, Dkt. 17 at 4. The district court unanimously denied Appellants' motion in March 2017. Dkt. 50 at 27. The court

originally scheduled trial for June 2017, Dkt. 53, but was forced to push it back to October 2017 for personal reasons, Dkt. 87.

Appellants moved to stay the proceedings in June 2017. Dkt. 73. It was in briefing on this motion that they conceded that there would be "time to implement relief in advance of the 2018 elections" if trial took place "in January 2018." Dkt. 79 at 7. At the stay hearing, defense counsel also "remind[ed] the Court that in 2016, the *Harris* decision was issued in February of that year, the legislature redrew the districts and new elections were held in 2016." Dkt. 85 at 18. Counsel "further state[d] that that was in a year where the primary was in March," while the 2018 congressional primary is not until May, suggesting that the legislature would be under less time pressure in developing a remedial plan in early 2018, if necessary, than it was in 2016. *Id.*

The district court unanimously denied Appellants' stay motion in September 2017. Dkt. 86. The court explained that a stay would "create[] a substantial risk that, in the event Plaintiffs prevail, this Court will not have adequate time to afford Plaintiffs the relief they seek—constitutionally compliant districting maps for use in the 2018 election." *Id.* at 17. As a result, "North Carolinians would cast votes in congressional elections conducted under unconstitutional maps in 2012, 2014, 2016, *and* 2018," sending "a troubling message to state legislatures that there is little downside to engaging in unlawful districting practices." *Id.* at 18.

A four-day trial including testimony from five expert witnesses was held in October 2017. Less than three months later, the district court issued its 205-page

decision invalidating the 2016 Plan. In its decision, the district court unanimously[1] held that the 2016 Plan violates the Equal Protection Clause.[2] The court also adopted a three-part test essentially identical to the one proposed by the League Plaintiffs and endorsed by the district court in *Whitford*. Under this test, "a plaintiff satisfies the discriminatory purpose or intent requirement by introducing evidence establishing that the state redistricting body acted with an intent to 'subordinate adherents of one political party and entrench a rival party in power.'" App. A at 86 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015)). Next, "to meet the discriminatory effects requirement," a plaintiff must "prove[] a districting plan 'subordinates' the interests of supporters of a disfavored candidate party by demonstrating that the redistricting plan is biased against such individuals." *Id.* at 119. A plaintiff must also establish "entrenchment" in the sense that a plan "insulates legislators from popular will," "renders them unresponsive to portions of their constituencies," and exhibits a "bias toward a favored party [that] is likely to persist in subsequent elections." *Id.* at 119-21. Lastly, if the first two prongs

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[1] Appellants wrongly characterize the opinion as "divided." Emergency Application at 9. Judge Osteen would have required partisan advantage to be the "predominant factor" motivating a plan's adoption, App. A at 192, but he otherwise "concur[red] with the well-reasoned opinion of the majority" that "Plaintiffs have shown both an intent to subordinate the interests of non-Republican voters and entrench Republican candidates in power, all with the effect of controlling electoral outcomes to continue a 10-3 Republican control of Congressional seats," *id.*

[2] The district court also set forth separate standards under the First Amendment and the Elections Clause. Throughout the litigation, the League Plaintiffs advocated the same three-part test under both the First and Fourteenth Amendments. The League Plaintiffs therefore do not address the other standards identified by the court.

are met, the defendant has the opportunity to show that a plan's "discriminatory effects are attributable to a legitimate state interest or other neutral explanation." *Id.* at 146.

Finding the 2016 Plan unlawful under this test, the district court ordered exactly the same remedy as the one imposed by the district court in *Harris*—and then not stayed by this Court. *See McCrory v. Harris*, 136 S. Ct. 1001 (2016). That is, it gave the General Assembly two weeks to enact a valid plan. App. A at 189. This two-week period is derived from state law. *See* N.C. Gen. Stat. § 120-2.4(a). It is also *more* generous than courts' usual practice when a prior *remedial* map (like the 2016 Plan) has itself been ruled unconstitutional. In these circumstances, courts typically craft a remedy themselves rather than handing the elected branches a second bite at the apple. App. A at 190.

As is common in redistricting cases, the district court further announced its intention to appoint a special master. *See* Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 Geo. Wash. L. Rev. 1131, 1148 (2005) ("The modal arrangement involves the appointment of a special master . . . ."). The special master would play no role whatsoever if the General Assembly complies with the court's order and enacts a plan that is not a partisan gerrymander. App. A at 190. But if the General Assembly fails to do so, the special master would "assist the Court in drawing an alternative remedial plan." *Id.*; *see also id.* at 205 (statement by Judge Osteen that "there is merit to the majority's procedure in identifying a Special Master at this juncture").

ARGUMENT

"Stays pending appeal to this Court are granted only in extraordinary circumstances." *Graves*, 405 U.S. at 1203. This is because "[a] lower court judgment, entered by a tribunal that was closer to the facts . . . is entitled to a presumption of validity." *Id.* A party seeking a stay therefore "bears the burden of showing [1] that the decision below was erroneous and [2] that the implementation of the judgment pending appeal will lead to irreparable harm." *Id.* "[I]n cases presented on direct appeal," the first inquiry is equivalent to asking "whether five Justices are likely to conclude that the case was erroneously decided below." *Id.*[3]

Because the standard for stays is so demanding, the Court frequently refuses to grant them in redistricting cases. *See, e.g.*, *McCrory*, 136 S. Ct. at 1001 (racial gerrymandering); *Wittman v. Personhuballah,* 136 S. Ct. 998 (2016) (racial gerrymandering); *Bartlett v. Stephenson*, 535 U.S. 1301, 1304 (2002) (Rehnquist, C.J., in chambers) (Voting Rights Act); *Abrams v. Johnson*, 521 U.S. 74, 78 (1997) (racial gerrymandering); *Graves*, 405 U.S. at 1204 (reapportionment); *Mahan v. Howell*, 404 U.S. 1201, 1203 (1971) (Black, J., in chambers) (reapportionment); *Travia v. Lomenzo*, 381 U.S. 431, 431 (1965) (per curiam) (reapportionment).

There is no reason for the Court to deviate from this practice here. *First*, far from being erroneous, the district court's decision that the 2016 Plan is unconstitutional would be upheld under any plausible test for partisan

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[3] Appellants erroneously cite the stay standard for discretionary (rather than direct) appeals. Emergency Application at 11.

gerrymandering. *Second*, the only harms alleged by Appellants, associated with redrawing a map on an expedited basis in January of an election year, are harms they have already admitted are not very onerous. *Third*, while Appellants would not be unduly injured by the denial of a stay, North Carolina's voters would face a fourth straight election under an unconstitutional map if one were granted. And *fourth*, the distinctions between this case and *Whitford* support the refusal of Appellants' motion.

I. Appellants Have Not Shown That the Decision Below Was Erroneous.

As the Court is aware, cases pending before it present different approaches to the problem of partisan gerrymandering. *Whitford* involves the same three-part test advocated here by the League Plaintiffs, requiring (1) discriminatory intent, (2) a large and durable discriminatory effect, and (3) a lack of a valid justification for this effect. *Whitford* also raises the question of whether partisan gerrymandering is cognizable under the First Amendment or the Equal Protection Clause. And *Benisek* both focuses on the First Amendment and offers a district-specific (rather than a statewide) standard.

While the differences between these approaches are important, they are immaterial for present purposes. Under any of the tests submitted to the Court—and under any test that can reasonably be imagined, so long as partisan gerrymandering remains justiciable—the 2016 Plan is unconstitutional. Appellants therefore cannot meet their burden of showing that the district court's decision was erroneous.

Start with the three-part test recognized by the district courts both here and in *Whitford*. Appellants do not even *try* to argue that the 2016 Plan is lawful under

it. And for good reason. The Plan's authors made no effort to hide their discriminatory intent, instead inscribing it into the Adopted Criteria. The Plan also produced a discriminatory effect so large it is an outlier on every measure of partisan asymmetry, and so durable it would take the biggest wave of the past half-century to dislodge. And the Plan did so in a State where a map drawn only according to traditional criteria, without considering election results, would likely exhibit a slight Democratic lean. So compelling was this evidence that all three members of the district court agreed that all three of the test's prongs were satisfied.[4]

The outcome would be the same under the district-specific standard proposed in *Benisek*. The 2016 Plan (like most gerrymanders) does its damage by "cracking" some clusters of Democratic voters and "packing" others in order to elect more Republicans from across North Carolina. The overall statewide harm could easily be disaggregated into claims against particular districts. The Sixth and the Thirteenth Districts, for example, slice Greensboro down the middle, resulting in two Republican constituencies rather than an urban Democratic district and an exurban Republican one. The Tenth and Eleventh Districts similarly divide Asheville in half. At the same time, almost every Democratic precinct in Mecklenburg County (home to Charlotte) is crammed into the Twelfth District, yielding one deep-blue constituency instead of two moderately Democratic districts. Similar packing occurred in the Raleigh-Durham area. There is thus no reason to stay the decision below as a result of the

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[4] As noted above, concerns about justiciability have to be at their lowest ebb here where maximum bias was expressly required and fully achieved.

Court's consideration of *Benisek*. If the *Benisek* approach were applied here, the outcome would be the same.

Appellants do not dispute any of this analysis. Instead, they quibble with the formulations used by the district court in articulating its discriminatory intent and discriminatory effect prongs.[5] Appellants' gripe with the court's intent analysis seems to be that it does not require a "predominant" or "sole" partisan motivation to be shown. Emergency Application at 14. However, Appellants ignore the court's explanation for *why* it declined to impose such a requirement: It could not have done so because "Supreme Court precedent forecloses a 'predominant' or 'sole' intent standard in partisan gerrymandering cases." App. A at 83.

Appellants also blatantly misstate the district court's intent prong. It simply is not satisfied by "*any* intent to district for partisan advantage." Emergency Application at 14. Rather, as the court made clear, the prong is met only by a showing that "the state redistricting body acted with an intent to 'subordinate adherents of one political party and entrench a rival party in power.'" App. A at 86 (quoting *Ariz. State Legislature*, 135 S. Ct. at 2658). An intent to *subordinate* the opposing party's backers and to *entrench* the mapmaking party in office is plainly different from a garden-variety partisan motivation. And as the quotation indicates, this formulation is drawn not from thin air but rather from this Court's own words. Even Appellants do not claim it was error for the district court to adhere to this Court's definition of partisan gerrymandering.

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[5] Appellants apparently have no objection to the test's justification prong.

Appellants' semantic cavils, furthermore, make no difference to the outcome of this case. Judge Osteen shared Appellants' view that plaintiffs must prove that partisan gain "predominated over other considerations in the redistricting process." App. A at 197. Nevertheless, he *joined* the majority's equal protection holding because "there is ample evidence in the record to find that Plaintiffs have met this [higher] burden." *Id.* at 199. Appellants cite the beginning of Judge Osteen's discussion but overlook its conclusion: that all nonpartisan "considerations were secondary to Defendants' primary goal of entrenching Republican candidates in power." *Id.* at 200.

Turning to the district court's discriminatory effect prong, Appellants again misconstrue it. They quote a single sentence from the court's opinion, Emergency Application at 15, thus distorting beyond recognition the careful sequence of the court's reasoning. The district court began, once more, with this Court's definition of a partisan gerrymander as a plan that "'subordinates the interests of one political party and entrenches a rival party in power.'" App. A at 119 (internal alterations omitted). The court next explained that a plan "subordinates" a party's supporters if it is "biased" against them, failing to "treat [these] voters as standing in the same position" as the other party's backers. *Id.* (internal quotation marks omitted). The court further observed that a distinct "entrenchment requirement" is necessary in order to ensure that "a districting plan's bias towards a favored party is likely to persist in subsequent elections." *Id.* at 120. If there was error in this logic—all grounded in this Court's own conception of gerrymandering—Appellants have not identified it.

Nor does Appellants' complaint about the district court's reliance on "any and all manner of social science metrics" hit the mark. Emergency Application at 15. It is true that the court cited several measures and methods as support for its conclusion that the 2016 Plan's discriminatory effect is large and durable: the Plan's near-record efficiency gap, partisan bias, and mean-median difference, Professor Jackman's sensitivity testing, his historical analysis of plans' skews, and so on. App. A at 120-44. But the court should be commended (not criticized) for considering such a wide range of evidence, and for finding the effect prong satisfied only because all of this material pointed ineluctably in the same direction. In the court's words, "when a variety of different pieces of evidence . . . point to the same conclusion . . . courts have *greater* confidence in the correctness of the conclusion because even if one piece of evidence is subsequently found infirm other probative evidence remains." *Id.* at 75.

As for Appellants' point that the district court "did not purport to identify how much 'bias' must exist," Emergency Application at 15, the court had no need to do so, for the obvious reason that the 2016 Plan is an extreme outlier by any metric, at the far tail of the historical distribution. There is no plausible asymmetry hurdle, in other words, that the Plan does not comfortably clear. The district court's approach is also supported by this Court's reapportionment decisions, which took more than a decade to arrive at the presumptive 10% population deviation cutoff for state legislative plans. *See Connor v. Finch*, 431 U.S. 407, 418 (1977). This Court recognized then, as the district court did here, that it is sensible not to try to set a precise effect threshold

until the judiciary has gained more experience with a new kind of quantitative evidence.[6]

II. Appellants Have Not Established That They Would Suffer Irreparable Harm if a Stay Is Denied.

While Appellants have failed to identify any genuine reversible error in the district court's decision, "[a]n applicant's likelihood of success on the merits need not [even] be considered . . . if the applicant fails to show irreparable injury from the denial of the stay." *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers). Here, Appellants have failed to make the case that the equities favor denial of a stay. They offer up a variety of arguments, but none is remotely persuasive.

Appellants' first argument is the boilerplate point that there is irreparable harm whenever a state law is enjoined. That may be technically true, but the extent of that injury has to be assessed based on the facts and circumstances of a given case. Their second argument seems to be that this decision comes very late and they do not have enough time to craft yet another congressional map for North Carolina. That argument rings hollow in light of the assurances of Appellants' own counsel that it would not be particularly difficult for the General Assembly to redistrict at this juncture. As described earlier, defense counsel expressed confidence that a 2018 remedy could be enacted even if *trial*—not the district court's entry of judgment after

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[6] But precisely because the evidence *is* quantitative, it does lend itself to the setting of a threshold. *See* App. A at 127 (discussing Professor Jackman's suggested cutoff of "at least one seat likely changing hands").

trial—took place in January 2018. Dkt. 79 at 7. Counsel also emphasized that the 2018 congressional primary is not until May, or two months later than it was originally scheduled in 2016. Dkt. 85 at 18. The Court should take counsel at his word. If redistricting was thought feasible at this point in the election cycle in the summer of 2017, it remains so now that the anticipated moment has arrived.

Moreover, if the General Assembly now finds itself obliged to redraw North Carolina's congressional map later than it might like, it has only itself to blame. As also noted above, Appellants sought to protract this litigation at every stage. They asked to extend their deadline for moving to dismiss the claim against them. Dkt. 17 at 4. They recommended a trial date three months after the one originally set by the district court. Dkt. 36 at 2. And they both moved to stay the trial, Dkt. 73, and "waited until the eve of trial to file their motion to stay," even though the developments their motion cited took place months before, Dkt. 86 at 16. It takes chutzpah, then, for Appellants to claim it is now too late for a 2018 remedy, when their own actions are responsible for much of the delay. "[S]elf-inflicted wounds," after all, "are not irreparable injury." *Second City Music, Inc. v. City of Chicago,* 333 F.3d 846, 850 (7th Cir. 2003).

Lastly, in evaluating Appellants' stay request, the Court is in the unusual position of having considered almost exactly the same circumstances in *Harris* just two years ago. The *Harris* district court reached its decision, invalidating two North Carolina congressional districts, in February 2016. The court also gave two weeks to the General Assembly to enact a remedy. *See Harris*, 159 F. Supp. 3d at 627. The

General Assembly then filed an emergency stay petition with this Court nearly identical to the one at issue here. This petition also asserted that "[t]he eleventh-hour action . . . will trigger electoral turmoil," that "[d]ozens of candidates for congressional seats are relying on the existing districts," and that voters will fail "to understand which districts they live in and what candidates they may vote for." Emergency Application to Stay the Final Judgment at 14-15, *McCrory v. Harris*, No. 15A-809 (Feb. 9, 2016). Unlike here, the petition further argued that "the primary election process is already well underway," with thousands of ballots having been sent to voters and hundreds having been returned. *Id.* at 15.

Yet the Court was unmoved. It refrained from acting during the two weeks allotted by the district court, and then denied the stay motion on the day the General Assembly officially approved the 2016 Plan. *See McCrory*, 136 S. Ct. at 1001. While the motion was pending, the General Assembly belied its predictions of doom by conducting an orderly (if expedited) redistricting process. This process included two Committee meetings, a public hearing, two days of legislative debate—and more than enough time for Hofeller to design a flagrant gerrymander. App. A at 10-18. When it ratified the Plan, the General Assembly also rescheduled the congressional primary for June 2016. Both the primary and the general elections subsequently unfolded without incident. The League Plaintiffs are unaware of reports of candidates or voters confused by the new districts, nor have Appellants pointed to any.

In every respect, then, this case is easier than *Harris*, meaning the same result should follow. The district court issued its decision a month earlier here than in

Harris--January of an election year instead of February. Because the 2018 congressional primary is in May (rather than March), there is a four-month (rather than a one-month) window between the decision and the primary. And after seeing none of Appellants' "sky-is-falling" forecasts materialize in *Harris*, the Court has no reason to credit them now.

III. The Balance of the Equities Weighs Strongly Against Appellants' Request for a Stay.

While Appellants have not made a persuasive claim of irreparable harm, the *voters* of North Carolina *will* be irreparably injured if a stay is granted. When considering a stay request, the Court must "balance the equities." *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). That is, it must "explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Id.*; *see also, e.g.*, *Holtzman v. Schlesinger*, 414 U.S. 1304, 1309 (1973) (Marshall, J., in chambers) (the Court must "determine on which side the risk of irreparable injury weighs most heavily"). Here, this equitable balancing tilts strongly against a stay.

The harm that North Carolina's voters will suffer in the event of a stay, of course, is a fourth consecutive election under an unconstitutional congressional plan. In 2012 and 2014, the residents of the State's First and Twelfth Districts were subjected to unlawful racial gerrymandering. *See Cooper*, 137 S. Ct. at 1481-82. The State "segregate[d] [these] voters by race," thus "reinforc[ing] the perception that members of the same racial group . . . think alike, share the same political interests,

and will prefer the same candidates at the polls." *Shaw v. Reno*, 509 U.S. 630, 647 651 (1993).

In 2016, North Carolina's voters endured a different but equally insidious injury: a partisan gerrymander that transformed an evenly divided electorate into a congressional delegation skewed dramatically in Republicans' favor. This gerrymander "penalize[ed]" the State's Democrats "because of . . . their association with a political party, or their expression of political views." *Vieth v. Jubelirer*, 541 U.S. 267 at 314 (2004) (Kennedy, J., concurring in the judgment). It "subordinate[d] adherents of [the Democratic] party and entrench[ed] [the] rival [Republican] party in power." *Ariz. State Legislature*, 135 S. Ct. at 2658.

And in 2018, the 2016 Plan will inflict the same harm if the Court grants Appellants' motion. Supporters of the Democratic Party will again be targeted because of their political beliefs, their votes devalued and their voices muted. Republican candidates will again win representation in North Carolina's congressional delegation entirely unreflective of their actual appeal to the State's voters. A historically extreme gerrymander will be allowed to persist for yet another election.

It is precisely to avoid this scenario—the perpetuation of a constitutional violation—that many courts have denied stays in redistricting cases. "[T]he practical effect of a stay would be that the State . . . would conduct the [next] elections using unconstitutional apportionment plans." *Larios v. Cox*, 305 F. Supp. 2d 1335, 1344 (N.D. Ga. 2004). "To force the Plaintiffs to vote again under the Enacted Plan [despite]

our finding that the Plan is unconstitutional . . . constitutes irreparable harm to them . . . ." *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 560 (E.D. Va. 2016). Or in this Court's words, "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).

The Court, then, should either deny Appellants' motion or, if it grants a stay, take the measures necessary for this case to be heard and decided this Term, in time for a 2018 remedy. The Court should *not* follow its usual timetable if it grants a stay, under which this case could not be argued until the fall, too late for the voters of North Carolina to avoid another tainted election.

IV. The Court's Entry of a Stay in *Whitford* Does Not Support Granting One Here.

Appellants' final argument is that, because the Court granted a stay in *Whitford*, "a fortiori" it must also enter one here. Emergency Application at 20. The conclusion, though, does not follow from the premise. The first difference between *Whitford* and this case is that *Whitford* came much earlier in the election cycle. The *Whitford* district court issued its decision in November 2016, this Court postponed its jurisdiction in June 2017, and this Court heard argument in October 2017. Assuming the Court decides the case by the end of its current Term, there will therefore be sufficient time for a 2018 remedy in *Whitford* if the district court's judgment is affirmed. But not so here. As discussed above, if the Court grants a stay and adheres to its normal schedule, then no 2018 relief will be available for North Carolina's beleaguered voters.

Appellants make this point themselves when they observe that "the district court issued its decision more than a year after *Gill* and barely a month before the 2018 election cycle is set to commence." Emergency Application at 21. It is indeed for these reasons that a stay is inadvisable here even though one was granted in *Whitford*. The *Whitford* stay did not preclude a 2018 remedy. Barring extraordinary steps, though, a stay here would.

The other difference between *Whitford* and this case is that, with respect to each legal issue, the record is even stronger here. As to standing: there were plaintiffs in *Whitford* from many, but not all, of Wisconsin's ninety-nine state house districts. Here, in contrast, there are both individual plaintiffs from every North Carolina congressional district and several institutional plaintiffs with statewide interests (like the League). As to discriminatory intent: there was abundant circumstantial evidence that the *Whitford* plan was designed to durably benefit Republicans, but no smoking gun. Here, in contrast, there is as clear an admission as the Court is ever likely to see that maximizing partisan advantage was a motive for the 2016 Plan.

As to discriminatory effect: even though the *Whitford* plaintiffs presented evidence about multiple measures of partisan asymmetry, the *Whitford* district court chose to focus only on the newest and most flexible of these metrics, the efficiency gap. Here, in contrast, the district court carefully considered three separate statistics—the efficiency gap, partisan bias, and the mean-median difference—all of which supported its conclusion that the 2016 Plan's asymmetry is historically severe. And as to justification: while the *Whitford* plaintiffs introduced computer-simulated

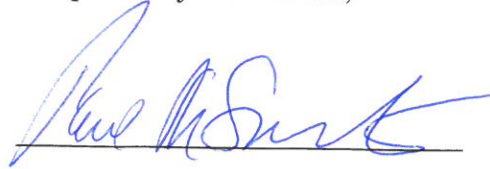
district maps of the Wisconsin State Assembly, the *Whitford* district court again opted to discuss only other material establishing the lack of a legitimate explanation for the enacted plan's asymmetry. Here, in contrast, the district court fully exploited the power of redistricting simulations, relying on them at each stage of its analysis.

Lastly, it is significant, as Appellants put it, that this is the "*second*-ever post-*Vieth* decision . . . identify[ing] a justiciable theory, invalidating a duly enacted map, and ordering a new map to be drawn." *Id.* at 3 (emphasis added). When only one such case was on the books, one could reasonably have asked if the three-part test adopted by the *Whitford* district court was actually judicially manageable. But now that another district court has endorsed and applied virtually the same test—this time unanimously—it is becoming clearer that the test is workable. Notably, neither court expressed any particular difficulty determining whether the challenged plan's asymmetry was intentional, large, durable, and unjustified. Neither court, that is, had trouble employing a test that flags the most egregious gerrymanders but does *not* "commit federal and state courts to unprecedented intervention in the American political process." *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment).

CONCLUSION

For the foregoing reasons, the Court should deny Appellants' emergency application for a stay. If the Court grants the application, it should take all necessary measures to enable a 2018 remedy in the event that it affirms the district court's judgment.

Respectfully submitted,



PAUL M. SMITH
Counsel of Record
CAMPAIGN LEGAL CENTER
1411 K St. NW, Suite 1400
Washington, DC 20005
(202) 736-2200
psmith@ campaignlegalcenter.org

RUTH M. GREENWOOD
ANNABELLE E. HARLESS
CAMPAIGN LEGAL CENTER
73 W. Monroe St., Suite 322
Chicago, IL 60603

ALLISON J. RIGGS
JACLYN MAFFETORE
SOUTHERN COALITION FOR SOCIAL JUSTICE
1415 W. Hwy 54, Suite 101
Durham, NC 27707

NICHOLAS O. STEPHANOPOULOS
UNIVERSITY OF CHICAGO LAW SCHOOL
111 E 60th St.
Chicago, IL 60637