IN THE

SUPREME COURT OF THE UNITED STATES

No. 17A745

ROBERT RUCHO, ET AL.,

Applicants,

v.

COMMON CAUSE, ET AL.,

Respondents.

ROBERT RUCHO, ET AL.,

Applicants,

v.

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

Respondents.

COMMON CAUSE PLAINTIFFS' OPPOSITION TO EMERGENCY APPLICATION FOR STAY PENDING RESOLUTION OF DIRECT APPEAL TO THIS COURT

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

By the instant application, the four Republican leaders of the North Carolina General Assembly ("Applicants") seek a stay of the District Court's unanimous judgment that the State's present Congressional map is an egregious partisan gerrymander that must be promptly remedied. The District Court denied such a stay, and this Court should as well. Applicants pay lip service to concerns such as State sovereignty and administrative inconvenience. But their true motive is as plain as day: the Republican contingent of the legislature wants to enjoy the fruits of their grossly unconstitutional actions for yet another election cycle. That is not a proper reason to seek a stay, let alone grant one.

Applicants cannot meet the substantive requirements for the "extraordinary" relief of a stay pending appeal. For starters, they cannot show a likelihood that the District Court's judgment will be reversed. Applicants soft-pedal the shocking facts of this case—virtually all of them undisputed—which violate the Constitution under *any* rubric for partisan-gerrymandering claims that this Court could conceivably adopt in the pending *Gill* and *Benisek* cases. Although social-science metrics were presented below, that evidence merely corroborated extensive "smoking gun" evidence of invidious partisanship that may be unparalleled in modern electoral history. For example, the principal legislators responsible for the map *expressly stated* on the legislative record that the map is a "political gerrymander"; that it was drawn to maximize Republican electoral power at the expense of Democratic

electoral power because "electing Republicans is better than electing Democrats"; and that the only reason the map is not even more lopsided in Republicans' favor is that such a map would be a cartographic impossibility. The written map-drawing criteria that Applicants adopted *expressly state* that the overarching goal will be to ensure a 10–3 Republican advantage in North Carolina's Congressional delegation. And the same counsel now representing Applicants *expressly confessed*, at oral argument in this Court, that the predecessor map—whose 10–3 split Applicants concededly sought to carry forward—was a partisan gerrymander. *See* Tr. of Oral Argument at 10–11, *Cooper v. Harris*, No. 15–1262 (argument of Paul D. Clement, Esq.) ("[Applicants'] map drawer … looked at the 2008 presidential election and the political results from that, and drew the map in order to bring … Democrat voters [into 'packed' districts] and exclude Republican voters.").

Nor can Applicants show that the denial of a stay would impose on them *any* irreparable harm—let alone one that outweighs the harm that millions of North Carolinians would suffer if a stay were granted. Applicants argue that a stay is necessary to protect North Carolina's sovereignty and to guard against "disruption" in the State's electoral processes. But Applicants are four state legislators, *not the sovereign State of North Carolina*. Tellingly, the State itself—which was a party below and is bound by the District Court's judgment—has not joined in the instant application; nor has it even filed an appeal of that judgment. And as for "disruption," Applicants' claims are conclusory, overblown, and contradicted by this Court's precedents denying stays in redistricting cases with similar timelines.

Meanwhile, it is well-settled that the denial of constitutional rights—"for even minimal periods of time"—constitutes irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). That goes double for the right to vote, which is the preservative of all other rights. If the Court were to accede to Applicants' demands and postpone the remedy ordered by the District Court until after the 2018 elections, the people of North Carolina will have been forced to live and vote in unconstitutionally drawn Congressional districts—as determined by multiple courts, including this Court—*nearly the entire 2012–20 decennial period*. The votes of North Carolina's Democratic voters will continue to be diluted, and their right to full and fair representation in Congress will continue to be denied. That harm easily outweighs whatever speculative administrative inconvenience may result from the denial of a stay.

Finally, a decision in Applicants' favor would harm the public more broadly. Not only is there a strong public interest in constitutionally drawn legislative districts, but moreover, a stay would tend to legitimize the flagrant partisan abuses of the North Carolina legislature—abuses that have continued now for almost a decade—and would invite legislatures across the Nation to follow suit. The Court should not signal that it will reward gamesmanship and obstinacy, especially when fundamental constitutional rights are at stake. The application should be denied.

At an absolute minimum, however, if this Court has any concerns about the remedy ordered by the District Court, it should "construe this application as a jurisdictional statement and set this case for expedited merits briefing and

argument," as Applicants invite the Court to do. Appl. at 19 n.2. In particular, it should set a briefing and argument schedule that would allow sufficient time for a constitutionally compliant map to be adopted before the November 2018 Congressional elections.

STATEMENT OF THE CASE

A. Partisan Politics in North Carolina

North Carolina is the archetypal "purple state": its electorate is split down the middle. Results in statewide races reflect this. For the last four quadrennial elections, the chart below shows which party's candidate won each top-tier statewide race and the margin of victory. The results are divided evenly (8–7) between Republicans and Democrats. Eleven of the 15 races were won by single-digit margins, and three by less than half of a percentage point:

	2004	2008	2012	2016
President	R +12	D +0.4	R +2	R +4
U.S. Senate	R +5	D +9	n/a	R +6
Governor	D +13	D +3	R +12	D +0.2
Lieut. Gov.	D +13	D +5	R +0.2	R +7

But one would never guess this from the makeup of North Carolina's General Assembly or its Congressional delegation. Its districts are so egregiously gerrymandered that the Republican Party commands *veto-proof supermajorities* in both legislative houses and a *10–3 supermajority* in the State's Congressional

delegation. This Court struck down North Carolina's gerrymandered district lines twice last year alone—but on the grounds of race, not partisanship.[1] *See Cooper v. Harris*, 137 S. Ct. 1455 (2017) (affirming ruling that two districts in North Carolina's 2011 Congressional map were racial gerrymanders); *North Carolina v. Covington*, 137 S. Ct. 2211 (2017) (summarily affirming *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. Aug. 11, 2016), which ruled that 28 districts in North Carolina's 2011 state House and Senate maps were racial gerrymanders).

In recent months, Republicans have used their ill-gotten veto-proof control to further entrench themselves in a series of controversial party-line votes on voting- and election-related legislation—for example, shifting the partisan makeup of the statewide and county Boards of Elections in Republicans' favor and placing a Republican in charge of the state Board during all even-numbered years (*i.e.*, all years when major elections occur). *See* Elections and Ethics Enforcement Act, N.C. Session Law 2017–6 (2017). As the District Court noted, many of these legislative power-grabs have been struck down as unconstitutional or unlawful. *See* D. Ct. Op.[2] at 50 n.13 (citing *N.C. State Conference of NAACP v. McCrory*, 831 F.3d at 214–15 (4th Cir. 2016); *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, 827 F.3d

[1] Of course, in North Carolina, there is an "inextricable link between race and [party] politics" because "the race of voters correlates with the selection of … candidates." *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 62 (1986) (discussing North Carolina)), *cert. denied*, 137 S. Ct. 1399 (2017).

[2] "D. Ct. Op." refers to the Opinion of the District Court for the Middle District of North Carolina in *Common Cause, et al. v. Rucho, et al.*, No. 1:16–CV–1026 (Jan. 9, 2018), attached as Appendix A to the instant application.

333, 352 (4th Cir. 2016); *City of Greensboro v. Guilford Cnty. Bd. of Elections*, – F. Supp. 3d —, No. 1:15–CV–559, 2017 WL 1229736, at *13 (M.D.N.C. April 3, 2017); *Cooper v. Berger*, No. 16–cvs–15636 (Wake Cnty. Super. Ct. Mar. 17, 2017)).

B. The 2011 Plan

This Court is familiar with the 2011 North Carolina Congressional plan ("2011 Plan") from its recent decision in *Cooper v. Harris*. That plan was first used in the 2012 Congressional election. Even though the Democratic Party won the majority of the statewide Congressional vote that year, and even though North Carolina's delegation had historically split 7–6 or 6–7, the 2011 Plan resulted in a 9–4 partisan advantage for Republicans. After the 2014 election, that gulf widened even further to 10–3. *See* D. Ct. Op. at 9.

Although the 2011 Plan was the result of both political and racial gerrymandering, *Harris* challenged the 2011 Plan as a racial gerrymander only. D. Ct. Op. at 9–10. The State's "defense"—in public, at trial, and before this Court—was that the 2011 Plan was intended to disadvantage *Democrats*, not African-Americans. In other words, in an attempt to escape liability for racial gerrymandering, the State openly admitted that the 2011 Plan was an intentional partisan gerrymander. At trial, Dr. Thomas B. Hofeller, who drew the challenged map, testified that "[p]olitics was the primary … determinant in the drafting" and that the "overarching goal … was to create as many safe [or] competitive districts for Republican[s] … as possible." D. Ct. Op. at 108. And at oral argument before this Court, the State's counsel—who also represents Applicants in connection with this

application—conceded that Dr. Hofeller "drew the map to draw the Democrats [into 'packed' districts] and the Republicans out." Tr. of Oral Argument at 10–11, *Cooper v. Harris*, No. 15–1262 (argument of Paul D. Clement, Esq.).

Notwithstanding the State's "party, not race" defense, this Court affirmed the decision of the District Court invalidating two districts in the 2011 Plan as racial gerrymanders. *Harris*, 137 S. Ct. at 1463.

C. The 2016 Plan

On February 5, 2016, the District Court in *Harris* ordered that a new Congressional map be promptly drawn. D. Ct. Op. at 10. In response, Representative David Lewis and Senator Robert Rucho—both Republicans—re-engaged Dr. Hofeller, who had drawn the unconstitutional 2011 Plan, to create a new map that would cure the racial gerrymander while preserving the 10–3 Republican advantage from that plan. *Id.* at 10–11.

At a meeting of the Joint Congressional Redistricting Committee, Representative Lewis presented a set of seven written criteria for the development of the 2016 Plan. *Id.* at 14–15. A number of these criteria were explicitly partisan. Most obviously, the criterion labeled "Partisan Advantage" stated:

> **Partisan Advantage**
>
> The partisan makeup of the congressional delegation under the [2011 P]lan is 10 Republicans and 3 Democrats. The Committee shall make reasonable efforts to construct districts in the 2016 Contingent Congressional Plan to maintain the current partisan makeup of North Carolina's congressional delegation.

Similarly, the criterion labeled "Political data" stated:

Political data

> The only data other than population data to be used to construct congressional districts shall be election results in statewide contests since January 1, 2008, not including the last two presidential contests.

Even certain purportedly non-partisan criteria drew partisan distinctions: under the criterion labeled "Compactness," for example, Dr. Hofeller was authorized to—and in fact did—split counties for reasons of "political impact." Although certain neutral criteria were adopted on a bipartisan basis, the explicitly partisan criteria were adopted by a straight party-line vote of the Joint Committee. *Id.* at 16. The final 2016 Plan was also adopted by straight party-line votes in both legislative chambers. *Id.* at 17–18.

The legislators primarily responsible for the 2016 Plan unabashedly admitted their partisan motivation. For example, Representative Lewis made the following public statements about the 2016 Plan:

- "[W]e want to make clear that to the extent we are going to use political data in drawing this map, it is to gain partisan advantage. … I'm making clear that our intent is to use … the political data … to our partisan advantage." *Id.* at 15.
- "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." *Id.* at 16.
- "I think electing Republicans is better than electing Democrats. So I drew this [2016] map to help foster what I think is better for the country." *Id.* at 17.

For his part, Senator Rucho literally stated that the 2016 Plan "***would be a political gerrymander***." In his understanding, there was "nothing wrong with

political gerrymandering"—no matter how extreme or brazen—because "[i]t is not illegal." *Id.* at 88 (emphasis added).

Just as intended, 10 Republicans and 3 Democrats were elected to Congress from North Carolina in 2016. Thus, Republicans won 77% of North Carolina's Congressional seats to Democrats' 23%—even though the Republican Party received just 53% of the statewide Congressional vote to Democrats' 47%. The gerrymandering of the 2016 Plan was so extreme that, had the two parties' statewide vote shares been reversed, *just a single Congressional seat* would have flipped Democratic; the Republican Party would still have won a 69% supermajority of the State's Congressional seats with a minority of the statewide vote.

D. Procedural History

In August 2016, Common Cause, along with the North Carolina Democratic Party and 15 voters from all 13 Congressional districts, filed a complaint challenging the 2016 Plan as an unconstitutional partisan gerrymander. Plaintiffs alleged that the 2016 Plan—both "as a whole, and [as to] each … individual district[]"—violates the First Amendment (Count I), the Equal Protection Clause (Count II), and Article I, § 2 of the U.S. Constitution (Count III), and that in adopting the 2016 Plan, the Legislature exceeded the authority delegated to it by the Elections Clause (Count IV). Compl. at 17–25, *Common Cause v. Rucho,* No. 1:16–cv–1026 (M.D.N.C. filed Aug. 5, 2016). The named Defendants were the State of North Carolina, the North Carolina State Board of Elections and Ethics Enforcement, and the four Republican leaders of the General Assembly.

The suit was subsequently consolidated with another partisan-gerrymandering challenge to the 2016 Plan, *League of Women Voters of N. Carolina v. Rucho*, No. 1:16–cv–1164 (M.D.N.C. filed Sept. 23, 2016). In March 2017, the District Court denied the Defendants' motion to dismiss, *Common Cause v. Rucho*, No. 1:16–cv–1026, 2017 U.S. Dist. LEXIS 30242 (M.D.N.C. Mar. 3, 2017), and discovery proceeded.

Common Cause Plaintiffs retained two experts—one in political science and one in mathematics—to demonstrate (1) that the 2016 Plan could not have been drawn without the intent to systematically favor the Republican Party; and (2) that the 2016 Plan could not be justified as necessary to comply with traditional redistricting criteria. Those experts used computers to generate tens of thousands of alternative districting maps using only neutral principles and completely disregarding partisan identification. The experts then used actual voting data from each geographic precinct in North Carolina to simulate an election under each of these alternative maps. The cumulative results of these thousands of simulations were then used to calculate the probability that the 10–3 partisan split under the 2016 Plan was attributable to North Carolina's political geography or compliance with traditional districting criteria, rather than a result of intentional partisan gerrymandering. Both experts concluded that this probability was essentially zero and that the 2016 Plan was an extreme statistical outlier.

After this Court agreed to hear oral argument in *Gill v. Whitford*, No. 16–1161, the legislator Defendants filed a motion to stay the proceeding pending this

Court's judgment in *Gill*, which Plaintiffs opposed. The State and the Board took no position on the motion. That motion was denied on August 29, 2017, and the District Court issued a written opinion on September 8, 2017. *Common Cause v. Rucho*, No. 1:16–cv–1026, 2017 U.S. Dist. LEXIS 145590, at *24–25 (M.D.N.C. Sep. 8, 2017) (denying stay because of "material legal and factual differences between [*Gill*] and the instant case" and the substantial prejudice Plaintiffs would suffer if forced to "cast votes … under unconstitutional maps in 2012, 2014, 2016, *and* 2018").

The District Court held a four-day bench trial of the consolidated *Common Cause* and *League of Women Voters* cases during the week of October 19, 2017. Counsel for the State and the Board attended the trial but put on no evidence and took no position on the appropriate resolution of the case.

E. The District Court's Decision

On January 9, 2018, the District Court issued its opinion holding unanimously that the 2016 Plan is a partisan gerrymander that violates the Equal Protection Clause of the Fourteenth Amendment and Article I, §§ 2 and 4 of the federal Constitution, and holding by a 2–1 majority that the 2016 Plan also violates the First Amendment.

As the District Court observed, the central facts were almost entirely undisputed. For example, the District Court found:

> Legislative Defendants do not dispute that the General Assembly intended for the 2016 Plan to favor supporters of Republican candidates and disfavor supporters of non-

> Republican candidates. Nor could they. The Republican-controlled North Carolina General Assembly expressly directed the legislators and consultant responsible for drawing the 2016 Plan to rely on "political data"—past election results specifying whether, and to what extent, particular voting districts had favored Republican or Democratic candidates, and therefore were likely to do so in the future—to draw a districting plan that would ensure Republican candidates would prevail in the vast majority of the state's congressional districts.

D. Ct. Op. at 2–3. Similarly, the District Court found:

> Legislative Defendants also do not argue—and have never argued—that the 2016 Plan's intentional disfavoring of supporters of non-Republican candidates advances any democratic, constitutional, or public interest. Nor could they.

Id. at 3.

After reciting the factual background leading up to the 2016 Plan, *see id.* at 4–19, the District Court "conclude[d] that Plaintiffs have standing to raise statewide *and* district-by-district partisan gerrymandering challenges to the 2016 Plan" and "that Plaintiffs' … claims are not barred by the political question doctrine." *Id.* at 25–26 (emphasis added). The District Court then made detailed findings in support of its conclusions that the 2016 Plan violated four separate provisions of the federal Constitution.

***Equal Protection*:** As to the intent prong of the Equal Protection analysis, the District Court found that Plaintiffs had

> presented more-than-adequate evidence … to demonstrate that the General Assembly was motivated by invidious partisan intent in drawing the 2016 Plan. Although we do not believe the law requires a finding of predominance, we nonetheless find that Plaintiffs' evidence—particularly the facts and circumstances surrounding the

> drawing and enactment of the 2016 Plan and [Plaintiffs' experts'] analyses—establish that the pursuit of partisan advantage predominated over the General Assembly's non-partisan redistricting objectives. … [W]e find that Plaintiffs' evidence distinguishes between permissible redistricting objectives that rely on political data or consider partisanship, and what instead here occurred: invidious partisan discrimination.

Id. at 114.

The District Court also found that Plaintiffs "satisfied their burden under the discriminatory effects prong by proving the 2016 Plan dilutes the votes of non-Republican voters and entrenches Republican control of the state's congressional delegation." *Id.* at 120. In so finding, the District Court relied on an array of evidence, including

- "the results of North Carolina's 2016 congressional election conducted using the 2016 Plan";
- "expert analyses of those results revealing that the 2016 Plan exhibits 'extreme' partisan asymmetry";
- the "simulation analyses" of *Common Cause* Plaintiffs' experts; and
- "the results of North Carolina's 2012 and 2014 elections using the 2011 Plan—the partisan effects of which the General Assembly expressly sought to carry forward when it drew the 2016 Plan—and empirical analyses of those results."

Id. at 120–21.

***First Amendment*:** The District Court found that

> [t]he 2016 Plan discriminates against a particular viewpoint: voters who oppose the Republican platform and Republican candidates. The 2016 Plan also discriminates against a particular group of speakers: non-Republican candidates and voters who support non-Republican candidates. The General Assembly's use of Political Data—individuals' votes in previous elections—to draw district lines to dilute the votes of individuals likely to support non-Republican candidates imposes

> burdens on such individuals based on their past political speech and association. And the 2016 Plan's partisan favoritism excludes it from the class of "reasonable, politically neutral" electoral regulations that pass First Amendment muster.

Id. at 159 (citing *Burdick v. Takushi*, 504 U.S. 428, 438 (1992)).

The District Court also found First Amendment injury and causation, relying on Plaintiffs' unrebutted testimony concerning the impact of the 2016 Plan on their speech and associational activities: "Plaintiffs' evidence establishes that the 2016 Plan's pro-Republican bias had the effect of chilling the political speech and associational rights of individuals and entities that support non-Republican candidates." *Id.* at 173. The District Court "further [found] that the 2016 Plan adversely affected such individuals' and entities' First Amendment rights by diluting the electoral speech and power of voters who support non-Republican candidates." *Id.*

***Elections Clause*:** Relying on *Cook v. Gralike*, 531 U.S. 510 (2001), and *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), the District Court found that

> the 2016 Plan exceeds the General Assembly's delegated authority under the Elections Clause for three reasons: (1) the Elections Clause d[oes] not empower State legislatures to disfavor … supporters of a particular candidate or party in drawing congressional districts; (2) the 2016 Plan's pro-Republican bias violates other constitutional provisions, including the First Amendment, the Equal Protection Clause, and Article I, section 2; and (3) the 2016 Plan represents an impermissible effort to "dictate electoral outcomes" and "favor or disfavor a class of candidates."

D. Ct. Op. at 178 (quoting *Thornton,* 514 U.S. at 833–34).

***Article I, §2*:** The District Court also found that "[t]he 2016 Plan … violates Article I section 2's grant of authority to 'the People' to elect their Representatives."

Id. at 181. The District Court found that, "[b]y rendering Representatives responsive to state legislatures who drew the districts rather than the People, the 2016 Plan … upsets the careful balance struck by the Framers … by 'interpos[ing]' the General assembly between North Carolinians and their Representative in Congress." *Id.* at 184.

Having concluded that the 2016 Plan was unconstitutional, and recognizing "the fast approaching deadline for candidates to file to compete in the 2018 election and [its] obligation to review any remedial plan to ensure that it remedies the constitutional violation," the District Court concluded by ordering the General Assembly to enact a remedial districting plan by 5 p.m. on January 24, 2018. *Id.* at 189. The District Court also ordered the parties to submit recommendations for the appointment of a Special Master pursuant to Federal Rule of Civil Procedure 53 to assist the Court in drawing a constitutionally compliant alternative map should the General Assembly fail to do so. *Id.* at 190.

F. Post-Judgment Developments

On January 11, 2018, the legislator Defendants (but not the State or the Board) noticed an appeal to this Court and moved the District Court to stay its judgment pending the resolution of that appeal. On January 16, 2018, the District Court denied that motion in a unanimous *per curiam* opinion. *See Common Cause v. Rucho,* No. 1:16–cv–1026 (M.D.N.C. Jan. 16, 2016) (appended hereto and henceforth cited as "App'x").

The District Court found that the legislator Defendants had "fail[ed] to make

a 'strong showing' that they are likely to succeed on the merits," especially as "their Motion [did] not dispute [the District] Court's unanimous conclusions" of fact, nor did it "identify any particular errors in [the District] Court's legal reasoning, let alone errors in *each* of [the District] Court's bases for concluding that the 2016 Plan violated the Constitution." *Id.* at 5–6.

The District Court further found that the legislator Defendants had failed to "show[] an 'irreparable injury that outweighs any injury to Plaintiffs and the public.'" *Id.* at 8. As a threshold matter, the District Court "emphasize[d] that the State Defendants ha[d] [neither] requested … [a] stay" nor "appealed [the District] Court's Order"—only "the Republican leadership of the North Carolina General Assembly" had done so. *Id.* This alone undermined the assertion of irreparable harm, as "whether, and to what extent, [the legislator] Defendants are authorized to represent the State's interest in federal election law litigation is an unsettled question of [North Carolina] law." *Id.* (citing *North Carolina v. N.C. State Conf. of NAACP*, 137 S. Ct. 1399, 1399–1400 (2017) (statement of Roberts, C.J., respecting denial of certiorari)).

In any event, the District Court held, "[t]he mere administrative inconvenience" that the General Assembly or State officials would allegedly "face in redistricting simply cannot justify denial of Plaintiffs' fundamental rights." *Id.* at 9–10 (citation omitted). And "[b]y adopting a remedy now," the District Court noted, "the [State] faces the lesser evil of implementing new districts at a time when it remains a relatively manageable task; then, if the [Supreme] Court reverses, the

[State] need only revert to districts that it has operated under for years—a much less daunting challenge." *Id.* at 10 (citation omitted).

ARGUMENT

Contrary to Applicants' suggestion that a stay pending appeal is this Court's "ordinary practice," Appl. at 22, "*[d]enial* of such in-chambers stay applications is the norm; relief is granted only in 'extraordinary cases.'" *Conkright v. Frommert*, 566 U.S. 1401, 1401 (2009) (Ginsburg, J., in chambers) (emphasis added). A stay pending appeal constitutes "extraordinary relief," and the party seeking that relief bears a "heavy burden." *Winston-Salem/Forsyth Cnty. Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971) (Burger, C.J., in chambers); *see also Williams v. Zbaraz*, 442 U.S. 1309, 1311 (1979) (Stevens, J., in chambers). "A stay is not a matter of right, even if irreparable injury might otherwise result." *Ind. State Police Pension Trust v. Chrysler LLC*, 556 U.S. 960 (2009). Moreover, the burden on applicants for a stay is even more exacting where, as here, "the lower court [has] refused to stay its order pending appeal." *Graves v. Barnes*, 405 U.S. 1201, 1203–04 (1972).

"There is no authority to suggest that [a stay pending appeal] is any less extraordinary or the burden any less exacting in the redistricting context." *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 558 (E.D. Va. 2016); *see also Larios v. Cox*, 305 F. Supp. 2d 1335, 1336 (N.D. Ga. 2004) (noting that "stays are not commonly granted in redistricting, or any other type of litigation"). Indeed, this Court has long recognized that once a districting plan has been found unconstitutional, "it will be the unusual case in which a court would be justified in

not taking appropriate action to ensure that no further elections are conducted under the invalid plan." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964).[3]

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 a 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, 433–34 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). Here, *each* of these factors militates against the requested relief.

I. APPLICANTS HAVE NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR APPEAL

To make the required "strong showing" of likelihood of success on a direct appeal, a party must show both (1) a "reasonable probability that four Justices will consider the issue sufficiently meritorious" to note probable jurisdiction, *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010), and that "five Justices are *likely* to conclude that the case was erroneously decided below," *Graves*, 405 U.S. at 1203

[3] *See, e.g.*, *McCrory v. Harris*, 136 S. Ct. 1001 (2016) (denying stay pending appeal in racial-gerrymandering challenge to earlier iteration of the same North Carolina Congressional plan at issue here); *Wittman v. Personhuballah*, 136 S. Ct. 998 (2016) (same, in racial-gerrymandering challenge to Congressional districting plan); *Bartlett v. Stephenson*, 535 U.S. 1301 (2002) (Rehnquist, C.J., in chambers) (same, in Voting Rights Act challenge to North Carolina districting plan); *Abrams v. Johnson*, 521 U.S. 74 (1997) (same, in racial-gerrymandering challenge to Congressional districting plan); *Graves*, 405 U.S. 1201 (same, in racial-gerrymandering and one-person-one-vote challenge to state districting plan); *Mahan v. Howell*, 404 U.S. 1201, 1203 (1971) (Black, J., in chambers) (same, in one-person-one-vote challenge to state redistricting plan); *Travia v. Lomenzo*, 381 U.S. 431 (1965) (same, in one-person-one-vote challenge to state districting plan).

(emphasis added). Applicants have not established the requisite "strong showing" that they are "likely" to succeed on the merits—or *any* showing whatsoever. *Nken*, 556 U.S. at 434 ("a mere 'possibility'" of success on the merits is insufficient).

The facts, as found by the District Court, are sufficiently egregious to make out a constitutional violation under *any* standard this Court might plausibly adopt in the pending *Gill* and *Benisek* cases. Those facts are reviewed only for clear error—and, in any event, Applicants did not dispute most of them below, and do not even attempt to dispute them here. Instead, Applicants maintain that the Court's forthcoming decisions in *Gill* and *Benisek* might impose legal standards that conflict with those that the District Court employed. This argument misses the mark: there is vanishingly little chance—let alone a *strong* possibility—that the standards adopted in *Gill* and *Benisek* would require reversal of the District Court's judgment.

First of all, Applicants are incorrect to suggest that *Gill* and *Benisek* are likely to result in a pronouncement that partisan-gerrymandering claims are universally nonjusticiable. This Court's precedent says the opposite, *see, e.g., Davis v. Bandemer*, 478 U.S. 109, 118–27 (1986); *Vieth v. Jubelirer*, 541 U.S. 267, 309–12 (2004) (Kennedy, J., concurring in the judgment), and no party in *Gill* or *Benisek* has asked the Court to overturn these precedents. The *Gill* appellants do ask the Court to hold that *statewide* partisan-gerrymandering claims are nonjusticiable, at least when the plaintiffs do not reside in all of a State's districts. Appellants' Br. at 34–41, *Gill v. Whitford*, No. 16–1161. But, as the District Court recognized in denying a stay, Plaintiffs in *this* case include voters from every single Congressional

district in North Carolina—so the chief justiciability problem in *Gill* (if it is indeed a problem) is not present in this case. App'x at 13. Furthermore, if a majority of this Court intended to hold partisan-gerrymandering claims nonjusticiable across the board, the Court would have had no reason to call for full briefing in *Benisek* and add that case to its argument calendar after *Gill* had already been fully briefed, argued, and conferenced.

Secondly, the "manageable standards" debate presented in *Gill* and *Benisek* is largely beside the point here. Plaintiffs in this case adduced a variety of highly compelling social-science evidence—they did not rely solely on the "efficiency gap" metric at issue in *Gill*. *Cf.* Appl. at 8 (incorrectly suggesting otherwise). Indeed, randomly generated maps of the type that Plaintiffs submitted below have been viewed favorably by the Court in prior gerrymandering cases. *See Cooper*, 137 S. Ct. at 1486–87 (Alito, J., dissenting). And, in any event, as the District Court correctly noted, social-science evidence is merely corroborative where, as here, the drawer of the challenged map, the principal legislative proponents of the map, the legislative committee that formalized the map-drawing criteria, and the attorney for those defending the map *have all expressly admitted* that the map is a naked partisan gerrymander—and that the only reason the map is not gerrymandered *even further* is that doing so was cartographically impossible. App'x at 14–15.

In the same vein, though Applicants cavil at the specific legal tests the District Court applied to Plaintiffs' Equal Protection Clause, First Amendment, and Article I claims, even if these complaints had merit (and they do not), the egregious

facts of this case would support a judgment of unconstitutionality under *any* legal test that has been proposed for cases like these—and it is well-settled that "this Court reviews [lower courts'] judgments, not [their] opinions." *Chevron, USA, Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984).

As Justice Kennedy recognized in *Vieth*, the partisan-gerrymandering cases that demand "manageable standards" are those where "a legislature … attempt[s] to reach [a partisan] result *without* [an] express [partisan] directive." 541 U.S. at 312 (emphasis added). This is not such a case. By contrast, Justice Kennedy observed, "if a State … declared" *expressly* that district lines "'shall be drawn so as most to burden Party X's rights to fair and effective representation'"—as North Carolina did here—then "we would surely conclude," without more, that "the Constitution had been violated." *Id.* At oral argument in *Gill*, counsel for both Wisconsin and its legislative *amici* conceded the correctness of this proposition:

> JUSTICE KENNEDY: … If the state has a law or constitutional amendment that's saying all legitimate factors must be used in a way to favor party X or party Y, is that lawful? … Is there an Equal Protection violation or First Amendment violation?
>
> * * *
>
> MS. MURPHY [counsel for Wisconsin State Senate, *et al.*, as *amici curiae*]: ***Yes. It would be an unconstitutional, if it was [discriminatory] on the face of it***, and I think that that would be … an equal protection violation, but you could think of it just as well, I think, as a First Amendment violation in the sense that it is viewpoint discrimination against the individuals who the legislation is saying you have to specifically draw the maps in a way to injure….
>
> * * *

> MR. TSEYTLIN [counsel for Wisconsin]: I would like to begin by answering Justice Kennedy's question. ***A facially discriminatory law in a state [requiring map-drawers to favor one party over another] would violate the First Amendment*** because it would stigmatize [the disfavored] party.

Tr. of Oral Argument, *Gill v. Whitford* at 26–27, 63, No. 16–1161 (emphasis added). Thus, nothing this Court might decide in *Gill* or *Benisek* about the persuasiveness of various social-science metrics or about the specific "manageable standards" for a partisan-gerrymandering claim could possibly require reversal here.

As the District Court recognized in denying a stay pending appeal, there are many other reasons why the outcomes of *Gill* or *Benisek* are unlikely to control in this case. App'x at 13–18; *see also Common Cause v. Rucho*, 2017 U.S. Dist. LEXIS 145590, at *12–17 (denying motion to stay trial and identifying "numerous legal and factual difference between [*Gill*] and the instant case"); Brief of *Amicus Curiae* Common Cause at 26–33, *Gill v. Whitford*, No. 16–1161 (distinguishing this case from *Gill*). For example, *Gill* focuses primarily on the Equal Protection Clause and *Benisek* focuses entirely on the First Amendment; neither appeal involves claims under Article I of the Constitution, as this case does. In addition, *Gill* is a challenge to a *state*-level legislative plan, where there may be at least a colorable argument that federalism concerns are implicated; here, by contrast, Plaintiffs have challenged a *Congressional* map, and the States have no inherent sovereign interest in the administration of federal elections. *Cook*, 531 U.S. at 523.

In sum, Applicants have not made a "strong" showing—or, indeed, *any* showing—that they are "likely" to succeed on the merits of their appeal. Just the

opposite: the invidious, express, and *admitted* partisan discrimination perpetrated by the General Assembly in this case is unconstitutional under any standard.

II. APPLICANTS HAVE NOT SHOWN THAT THEY WILL SUFFER IRREPARABLE HARM ABSENT A STAY

Applicants assert that three types of "irreparable harm" will ensue absent a stay: first, the inability to "effectuat[e] [a] statute[] enacted by representatives of [North Carolina's] people"; second, harm to North Carolina's sovereignty as a State; and third, "disruption" of North Carolina's electoral processes.

As a threshold matter, however, none of these putative "harms" is the Applicants' to assert in the first place. It is black-letter law that an applicant seeking a stay pending appeal must show that "*the applicant* will be irreparably injured absent a stay." *Nken*, 556 U.S. at 433–34 (emphasis added). Here, "the applicants" are the Republican co-chairs of the Joint Committee responsible for drawing the unconstitutional 2011 and 2016 Plans and the Republican leaders of the North Carolina House and Senate. But as the District Court recognized below, the putative harms cited in their application are not harms to *them*; they are harms to *North Carolina* as a sovereign State. App'x at 7–9. Applicants are not permitted to seek a stay solely on the basis of putative harms to *other litigants*—especially those who have not themselves complained of such harms. *Cf. Hollingsworth*, 133 S. Ct. at 2663 ("In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests

of third parties." (quoting *Powers v. Ohio,* 499 U.S. 400, 410 (1991))).[4]

Tellingly, North Carolina and its Board of Elections, which were also Defendants below and are also bound by the District Court's judgment, have *not* appealed the District Court's judgment or sought a stay, either from the District Court or from this Court. App'x at 2–3. Moreover, on January 16, 2018, counsel for North Carolina informed the undersigned that they take no position on this Application, and counsel for the Board informed the undersigned that the Board stands ready to implement the 2018 elections process *whatever* the schedule may be. These are not the words or actions of a State or a State agency that would suffer irreparable harm absent a stay.

Even setting these threshold issues aside, Applicants have not made a sufficient showing of irreparable harm. First, Applicants cite the Chief Justice's in-chambers opinion in *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J.), for the proposition that "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." D. Ct. Op. at 19. But this proves far too much, as the interest in enforcing state statutes is present in *every* case involving such a statute—yet it is well-settled that stays pending appeal are "extraordinary," even in cases involving statutory

[4] In *Hollingsworth*, the Court recognized that entities beside a State's attorney general—such as legislative leaders in their official capacity—may have standing to "speak for the State in federal court," but only where state law so provides. 133 S. Ct. at 2664. Surprisingly, Applicants do not even bother to address this threshold issue here—even though the Chief Justice recently noted the uncertainty on this very point of North Carolina law. *See N.C. State Conf. of NAACP*, 137 S. Ct. at 1399–1400 (statement of Roberts, C.J., respecting denial of certiorari).

challenges. Indeed, a majority of this Court has never adopted this proposition; it has been held far more often that a State cannot "claim an[y] interest in the enforcement of an unconstitutional law." *ACLU v. Ashcroft*, 322 F.3d 240, 251 n.11 (3d Cir. 2003); *see also N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013); *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 191 (4th Cir. 2013). Moreover, the entire point of the decision below is that the 2016 Plan was *not* duly enacted by the "representatives of [North Carolina's] people," but by an unconstitutionally non-representative faction of the legislature.

Second, Applicants invoke the sovereign dignity of the State of North Carolina, but, as noted above, States have no inherent "sovereign" interests when it comes to *federal* elections. *See Cook*, 531 U.S. at 523 ("[T]he States may regulate the incidents of [Congressional] elections … only within the exclusive delegation of power under the Elections Clause."); *Thornton*, 514 U.S. at 801–02 (States "can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not [expressly] delegate to them." (quoting Joseph Story, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627 (3d ed. 1858))). Indeed, even when *state* elections are at issue—which is not the case here—this Court has long held that the constitutional rights of voters trump any sovereign interest the States may have in the drawing of district lines. *Compare Baker v. Carr*, 369 U.S. 186, 330 (1962) (Harlan, J., dissenting) (criticizing the majority for "putting the federal courts into [an] area of state concerns") *with id.* at 231 (majority) (federalism is no defense "when state power is used as an

instrument for circumventing a federally protected right").[5]

Third and finally, Applicants assert that, absent a stay, North Carolina will suffer irreparable harm in the form of a "disruption" to its electoral processes given the "fast-approaching 2018 election[s]." Appl. at 2, 12. This prediction is conclusory and unsupported by record evidence—if not outright illogical. *See Nken*, 566 U.S. at 434 ("simply showing *some possibility* of irreparable injury fails to satisfy" applicant's burden (quotation marks omitted)). For example, Applicants argue that "[v]oters … are already familiar with the 2016 Plan and have developed relationships with incumbents elected under that plan." Appl. at 20. But the purported "familiarity" of a constitutional violation has never been grounds for perpetuating it. And in any event, the only evidence in the record about voter sentiment shows that North Carolinians *do not desire* to be subject to the unconstitutional 2016 Plan or represented by officials elected under it for yet another election cycle. *See* D. Ct. Op. at 33 n.8 (quoting and citing deposition testimony); 38–40 (same); 166–68 (same).

Similarly, Applicants assert that "the filing period for the primary elections is set to open on February 12." Appl. at 3. The District Court was well aware of that fact, which is why it ordered that a remedial plan be created by January 24, 2018.

[5] Applicants cite *Miller v. Johnson*, 515 U.S. 900, 915 (1995), for its dicta that "[f]ederal-court review of redistricting legislation represents a serious intrusion on … local functions." But *Miller* did not involve a stay pending appeal, let alone suggest that such a stay should routinely be granted in redistricting cases. To the contrary, *Miller* found that Georgia's districting plan *had indeed* violated the federal constitution, "intrusion" or no.

In any event, when that period *begins* is irrelevant if there remains sufficient time for candidates to file once a remedial plan is adopted. Applicants do not bother to note when the filing period *ends*—February 28, 2018[6]—or argue that the time remaining will be inadequate to file. Furthermore, since that period is fixed by state law, the Legislature is free to extend it if it believes the remaining time will be insufficient. *See Second City Music, Inc. v. City of Chicago*, 333 F.3d 846, 850 (7th Cir. 2003) ("Self-inflicted wounds are not irreparable injury."); 11A Charles Alan Wright, et al., FEDERAL PRACTICE & PROCEDURE § 2948.1 (3d ed. 2013) (same). The District Court is also free to extend the filing period if necessary pursuant to its inherent equitable powers. App'x at 20–21.

Notably, the Court has rejected similar "disruption" arguments in redistricting cases on timelines similar to this one. For example, two years ago, after a three-judge District Court struck down Virginia's Congressional districting plan as a racial gerrymander, the State sought a stay pending appeal to this Court. As Applicants do here, Virginia argued that it was "too late" to implement a remedial plan in advance of the 2016 elections. *Personhuballah*, 155 F. Supp. 3d at 560. The District Court disagreed and denied the stay. *See id.* On January 12 of an election year, the State made a stay application to this Court, asserting that going forward with the District Court's remedial plan would cause "electoral chaos." Application for Stay at 9, *Wittman v. Personhuballah*, No. 14–A724 (Jan. 12, 2016).

[6] *See* North Carolina State Board of Elections & Ethics Enforcement, *Candidate Filing Information*, https://www.ncsbe.gov/Elections/Candidate-Filing (visited Jan. 16, 2018).

On February 1, this Court denied the application, necessarily rejecting the argument that it was "too late" to institute a remedial map without causing undue disruption.

Similarly, the Court denied a stay pending appeal the last time North Carolina's Congressional map was before it, notwithstanding even greater temporal pressure. There, the District Court had struck down the 2011 Plan as a racial gerrymander. On February 10 of an election year, and after the candidate filing period had *already closed*, the State made a stay application to this Court, arguing that the District Court's remedial order "would impose significant and unanticipated challenges and costs" for election administrators. Emergency Application to Stay Final Judgment at 16, *McCrory v. Harris*, No. 15A809 (Feb. 9, 2016). On February 19, this Court denied the stay application, rejecting the argument that a remedial map could not be imposed in February of an election year without undue disruption. *McCrory v. Harris*, 136 S. Ct. at 1001.

In this case, the timeline is similar to that in *Wittman* and *less* advanced than that in *McCrory*; accordingly, Applicants' "disruption" argument is no more convincing than it was in those cases. Unsurprisingly, the sole case on which Applicants rely for the proposition that stays must be granted in election years to avoid causing "confusion" involved a timeline far more compressed than that in this case. *See Purcell v. Gonzales*, 549 U.S. 1 (2006) (granting stay where lower court enjoined Arizona voter-identification law, requiring extensive retraining of election officials, *just weeks* before election). *Purcell* is distinguishable in other ways besides:

it was not a redistricting case; it concerned an unreasoned lower-court order that failed to address the State's claims of irreparable harm; it involved an appeal of the grant of a preliminary injunction, not a judgment after a full trial; and it emphasized the "hotly contested" facts of that case. *Id.* at 8; *see also* App'x at 19–21 (considering and distinguishing *Purcell*).

Applicants also complain that the District Court's order gave them "just 14 days to enact a new plan" and threatened to impose a map of its own choosing if their proposed map is unsatisfactory. Appl. at 20, 21 n.3. But this cannot constitute an irreparable harm, because North Carolina has enacted a statute *specifically inviting* such action by the District Court. Namely, N.C. Gen. Stat. § 120–2.4 provides that, when a court strikes down a North Carolina districting plan, it may allow the General Assembly as little as two weeks to "act to remedy any identified defects [in] its plan," and that if the General Assembly fails to act within that time frame, the court may "impose an interim districting plan for use in the next general election." The District Court did nothing more than what North Carolina's duly enacted statutes permitted it to do. Notably, when North Carolina's Congressional plan was last before this Court, the State Defendants made the very same argument, *see* Appl. for Stay at 2, *Cooper v. Harris*, No. 15–1262 (complaining that the District Court "provid[ed] only two weeks to draw new plans"), and this Court rejected it outright. Thereafter, those Defendants had no difficulty adopting the

2016 Plan at issue in this case in precisely two weeks' time.[7]

Stripped of their conclusory assertions of disruption and confusion, Applicants are left with only the fallacious assertion that because this Court (by a bare 5–4 majority) granted a stay pending appeal in *Gill*, which is also a partisan-gerrymandering case, it is bound to do the same here. But as discussed above, and as the District Court correctly found, the facts and legal issues in *Gill* are not at all the same as those present in this case. App'x at 13–18. Indeed, counsel for the appellants in *Gill*, and counsel for their state-legislator *amici*, conceded at oral argument that the scenario present in this case would present a justiciable and cognizable constitutional violation, even if the facts of *Gill* itself do not.

Moreover, when this Court granted a stay in *Gill* last June, it advanced the oral argument date in an apparent effort to ensure that a remedy could go into effect safely in time for the 2018 election cycle. Notably, in their filing with this Court supporting a stay, the Wisconsin State Senate and Assembly argued that "because the next state legislative elections [would] not take place until November 2018, granting a stay would in no way preclude … a remedy before that election." Brief of *Amici Curiae* Wisconsin State Assembly and Senate at 3, *Gill v. Whitford*,

[7] It is also common for courts in redistricting cases to appoint a special master to develop a remedial map in the event the state legislature fails to submit a map or submits a map that does not remedy the constitutional violation. *See, e.g.*, *Connor v. Finch*, 431 U.S. 407, 415 (1977); *Baldus v. Members of Wis. Gov't Accountability Bd.*, 862 F. Supp. 2d 860, 861 (E.D. Wis. 2012); *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004); *Butterworth v. Dempsey*, 237 F. Supp. 2d 302, 309 (D. Conn. 1964). That the District Court did so preemptively is not an affront to the legislator Defendants; it is merely an acknowledgment of the time pressures at play. *See* App'x at 21.

No. 16–1161. Here, by contrast, granting a stay pending resolution of Applicants' direct appeal would self-evidently "preclude" any remedy in time for the 2018 election cycle—unless, of course, the Court greatly expedites briefing and argument in that appeal. *See* Point IV, *infra*.

III. GRANTING A STAY WOULD IMPOSE IRREPARABLE HARM ON NORTH CAROLINA'S CITIZENS AND HARM THE PUBLIC INTEREST

On the other hand, it is self-evident that staying the District Court's remedy would impose irreparable harm on the citizenry of North Carolina. *See Holtzman v. Schlesinger*, 414 U.S. 1304, 1308–09 (1973) (Marshall, J., in chambers) (in evaluating stay application, Court must "determine on which side the risk of irreparable injury falls the most heavily"). Again, the denial of constitutional rights—even for the briefest period of time—constitutes an irreparable injury. *Elrod*, 427 U.S. at 373; *see* App'x at 10–12. That is true *a fortiori* where the right to vote is at stake, because "[o]ther rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

Here, as described above, the citizenry of North Carolina has been forced to live and vote in unconstitutionally drawn Congressional districts for the entire decennial period to date. If the instant application is granted, then that denial of constitutional rights will be guaranteed to endure throughout the decade, and the Republican legislative majority in North Carolina will be permitted to retain "the fruits" of their constitutional violations "for another election cycle, even if they lose in the Supreme Court." *Personhuballah*, 155 F. Supp. 3d at 560. That easily

satisfies the test for irreparable harm. *See id.* ("To force the Plaintiffs to vote again under the Enacted Plan even if the Supreme Court affirms our finding that the Plan is unconstitutional … constitutes irreparable harm to them, and to the other voters in the Third Congressional District"); *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 [irreparably harmed] if a stay is granted…."); *Vera v. Bush*, 933 F. Supp. 1341, 1348 (S.D. Tex. 1996) (denying stay of remedy because "[t]o force the plaintiffs to vote again under the unconstitutional plan … constitutes irreparable harm to them, and to the other voters in [the challenged districts]").

Here, the "public interest" aligns with Plaintiffs' interest. App'x at 12. The constitutional harms to Plaintiffs are shared by voters throughout North Carolina. *See Personhuballah*, 155 F. Supp. 3d at 560 ("The harms to the Plaintiffs would be harms to every voter in [the gerrymandered districts]."). The general "public," moreover, "has an interest in having congressional representatives elected in accordance with the Constitution." *Id.* at 560–61. And, as noted above, permitting Applicants to enjoy the fruits of their outrageous conduct for yet another election cycle would invite gamesmanship by State legislatures across the Nation and send a dangerous and corrosive message to the general public that the judiciary is powerless to prevent even egregious violations of democratic norms.

IV. EXPEDITED RESOLUTION OF THE MERITS IS APPROPRIATE

For the reasons discussed above, the instant application should be denied outright and the District Court's remedial plan should proceed apace. However, should the Court conclude otherwise, it should not stay this case until *Gill* and *Benisek* are decided. By that time, it will most likely be too late for the Court to give this case plenary consideration in time to make a difference in the 2018 elections. That would risk denying relief on the merits for purposes of 2018.

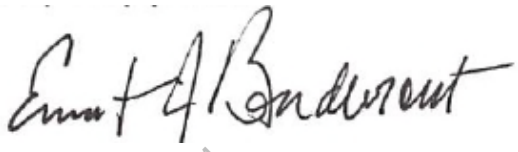
Instead, whether or not the Court denies the application, it should accept Applicants' invitation to "construe [it] as a jurisdictional statement and set this case for expedited merits briefing and argument," Appl. at 19 n.2, and it should issue its decision on the merits by June. *Cf. Nken v. Mukasey*, 555 U.S. 1042 (2008) (granting application for stay, treating application as a petition for a writ of certiorari, and granting the writ). This expedited treatment would allow sufficient time for a constitutionally compliant map to be implemented in time for the November 2018 Congressional elections—especially if the Legislature adopts a contingent redistricting plan in the meantime, as it did in *Cooper v. Harris*. Indeed, if the Court adds this case to its calendar for this Term, it may amend the District Court's order to require the *creation* of a contingent plan while staying that plan's *implementation* until the merits are decided. *Cf. Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (Court may "tailor a stay so that it operates with respect to only some portion of the proceeding"). Proceeding in this manner would be vastly superior to forcing millions of North Carolinians—for a *fourth*

consecutive election—to vote in unconstitutionally drawn Congressional districts.

CONCLUSION

The application for a stay should be denied, and the Court should construe the application as a jurisdictional statement and set this case for expedited merits briefing and argument during this Term.

Respectfully submitted,



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January 17, 2018

APPENDIX

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.	No. 1:16-CV-1026

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 Joint Select Committee on Congressional Redistricting, et al., Defendants.	No. 1:16-CV-1164

MEMORANDUM OPINION AND ORDER DENYING LEGISLATIVE DEFENDANTS' EMERGENCY MOTION TO STAY

PER CURIAM:

In a memorandum opinion and order entered January 9, 2018 (the "Order"), this Court held that North Carolina's 2016 Congressional Redistricting Plan (the "2016 Plan") constitutes an unconstitutional partisan gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment, the First Amendment, and Article I of the Constitution. *Common Cause v. Rucho* (*Common Cause II*), --- F. Supp. 3d ---, 2018 WL 341658 (M.D.N.C. Jan. 9, 2018). Before the Court is a motion (the "Motion") by only the Legislative Defendants[1] in this matter—four Republican members of the North Carolina General Assembly—to stay this Court's Order pending Supreme Court review. Leg. Defs.' Emerg. Mot. to Stay Pending S. Ct. Rev. & Request for Exp. Rul'g, Jan. 11, 2018, ECF No. 119. Neither the State of North Carolina nor any of the State Board

[1] Legislative Defendants in both actions are 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; David R. Lewis, in his official capacity as Chairman of the North Carolina House of Representatives Redistricting Committee for the 2016 Extra Session and Co-Chairman of the 2016 Joint Select Committee on Congressional Redistricting; Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives; and Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate. Plaintiffs also name as defendants A. Grant Whitney, Jr., in his official capacity as Chairman and acting on behalf of the North Carolina State Board of Elections ("Whitney"); the North Carolina State Board of Elections (collectively, with Whitney, the "State Board Defendants"); and the State of North Carolina (collectively, with the State Board Defendants, "State Defendants").

Defendants have sought an emergency stay. Nor has the State of North Carolina or the State Board Defendants appealed this Court's Order to the Supreme Court.

After careful consideration of Legislative Defendants' arguments, we conclude that Legislative Defendants have failed to meet their "heavy burden" in seeking the "extraordinary relief" of staying this Court's order. *Harris v. McCrory*, No. 1:13CV949, 2016 WL 6920368, at *1 (M.D.N.C. Feb. 9, 2016) (internal quotation marks omitted). Therefore, and as further explained below, we exercise our discretion to deny Legislative Defendants' motion to stay.

I.

On February 5, 2016, a panel of three federal judges held that two districts established by North Carolina's 2011 decennial congressional redistricting plan constituted racial gerrymanders in violation of the Equal Protection Clause. *Harris v. McCrory*, 159 F. Supp. 3d 600, 604 (M.D.N.C. 2016), *aff'd sub nom. Cooper v. Harris*, 137 S. Ct. 1455 (2017). Less than two weeks later, the General Assembly adopted the 2016 Plan. *Common Cause II*, 2018 WL 341658, at *7. Several months later, Plaintiffs filed the instant actions. *Id.* at *8–9.

On June 26, 2017, Legislative Defendants moved to stay these proceedings pending the Supreme Court's final decision in *Gill v. Whitford*, Nos. 1161, 16A1149. ECF Nos. 74, 75. Plaintiffs opposed Legislative Defendants' motion, and State Defendants took no position. ECF Nos. 78, 79. In an August 29, 2017 order, and subsequent opinion, this Court denied Legislative Defendants' stay motion. *Common*

Cause v. Rucho (*Common Cause I*), Nos. 1:16-CV-1026, 1:16-CV-1164, 2017 WL 3981300, at *2 (M.D.N.C. Sept. 8, 2017).

In October 2017, this Court held a four-day trial, during which the parties introduced evidence and presented testimony and arguments. *Common Cause II*, 2018 WL 341658, at *9. Thereafter, the parties filed extensive post-trial briefing. *Id.* at *9–10. On January 9, 2018, this Court ruled in favor of Plaintiffs on all of their claims and gave Defendants until January 24, 2018, to enact a remedial plan. *Id.* at *10, *74–76.

On January 11, 2018, Legislative Defendants filed the Motion and also noticed an appeal to the Supreme Court. Leg. Defs.' Notice of Appeal, Jan. 11, 2018, ECF No. 121. Plaintiffs oppose the Motion. ECF No. 122. State Defendants—including the State of North Carolina—have not asked this Court to stay its Order, nor have they filed an appeal from the Order to the Supreme Court.

II.

"The Court considers four factors when determining whether to issue a stay pending appeal: '(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.'" *Harris*, 2016 WL 6920368, at *1 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *accord Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970). "A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right,

even if irreparable injury might otherwise result to the appeal." *Nken v. Holder*, 556 U.S. 418, 417 (2009) (internal quotation marks omitted).

"[A] stay is considered 'extraordinary relief' for which the moving party bears a 'heavy burden,'" and "[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." *Larios v. Cox*, 305 F. Supp. 2d 1335, 1336 (N.D. Ga. 2004) (quoting *Winston-Salem/Forsyth Cty. Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (Burger, Circuit Justice, 1971)); *see Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 558–59 (E.D. Va. 2016) (Diaz, J.) (same); *Does 1-5 v. Cooper*, No. 1:13CV711, 2016 WL 10587195, at *1 (M.D.N.C. Mar. 2, 2016) ("The granting of a stay pending appeal is 'an extraordinary remedy.'" (quoting *Adams v. Walker*, 488 F.2d 1064, 1065 (7th Cir. 1973)). To that end, "[a]s with other types of cases, district courts evaluating redistricting challenges have generally denied motions for a stay pending appeal." *Harris*, 2016 WL 6920368, at *1 n.1 (collecting cases).

A.

Legislative Defendants' Motion does not specifically address the four factors set forth in *Hilton*. We nonetheless conclude that even assuming Legislative Defendants had addressed the governing four factors, they could not satisfy their "heavy burden" to obtain the "extraordinary relief" of a stay of this Court's Order.

1.

To begin, Legislative Defendants fail to make a "strong showing" that they are likely to succeed on the merits. In particular, their Motion does not dispute this Court's unanimous conclusions that, in enacting the 2016 Plan, the General Assembly (1)

predominantly intended to subordinate the interests of non-Republican voters and entrench Republican control of the State's congressional delegation, (2) that the 2016 Plan had its intended effect, and (3) that the 2016 Plan's invidious partisan effects were not attributable to the State's political geography or other legitimate redistricting criteria. *Common Cause II*, 2018 WL 341658, at *35–60. Likewise, Legislative Defendants do not dispute that (1) the 2016 Plan was intended to disfavor individuals and entities that previously supported non-Republican candidates, (2) the 2016 Plan burdened the political speech and associational rights of such individuals and entities, and (3) a causal relationship existed between the General Assembly's discriminatory motivation and the First Amendment burdens imposed by the 2016 Plan. *Id.* at *64–69. Nor do they dispute that the 2016 Plan amounted to a successful attempt by the General Assembly to favor a class of voters and candidates and dictate the outcomes of congressional elections. *Id.* at *74. Those conclusions rest on extensive factual findings concerning a variety of pieces and types of evidence, *id.* at *35–60, *64–69, *74—all of which will be reviewed by the Supreme Court under the highly deferential "clear error" standard, *see Harris*, 2016 WL 6920368, at *1 (holding Legislative Defendants failed to make "strong showing" that they were likely to succeed on merits of appeal of racial gerrymandering decision, when decision rested on extensive factual findings subject to clear error review); *Personhuballah*, 155 F. Supp. 3d at 559 (same).

Likewise, other than the unsupported statement that Legislative Defendants "believe this Court's Order will be reversed by the Supreme Court on appeal," Motion 6, Legislative Defendants do not identify any particular errors in this Court's legal

reasoning, let alone errors in *each* of this Court's bases for concluding that the 2016 Plan violated the Constitution—as would be necessary for the Supreme Court to reverse this Court's judgment. Additionally, we note that with regard to several uncertain legal issues, this Court's opinion rendered factual findings under multiple legal standards. For example, recognizing that the Supreme Court has not decided whether a plaintiff seeking relief under the Equal Protection Clause must show that invidious partisanship was one consideration motivating a challenged districting plan's lines or that the mapdrawers were predominantly motivated by invidious partisanship, this Court found that Plaintiffs' intent evidence satisfied either standard. *See id.* at *45; *id.* at *78–79 (Osteen, J., concurring). Likewise, the Court concluded that regardless of whether Plaintiffs or Defendants bore the burden under the Equal Protection Clause's justification prong, the evidence adduced at trial proved the 2016 Plan's invidious partisanship was not justified by the state's political geography or other legitimate state interests. *Id.* at *57 n.33 (majority op.). And the majority concluded that regardless of whether the First Amendment's "burden" requirement demands that a plaintiff prove that a partisan districting plan "chills" or "adversely effects" the plaintiffs' speech or associational rights, Plaintiffs' evidence proved that they suffered cognizable burdens on their First Amendment rights. *Id.* at *65–69. That this Court rendered factual findings under multiple potential legal standards makes it all the more likely that the Supreme Court will affirm this Court's judgment, regardless of what standard the Supreme Court adopts.

2.

Turning to whether Legislative Defendants have shown an "irreparable injury that outweighs any injury to the Plaintiffs and the public," *Personhuballah*, 155 F. Supp. at 559, we emphasize at the outset that the State Defendants have *not* requested that this Court stay its Order, nor have State Defendants appealed this Court's Order. Rather, *only* Legislative Defendants—the Republican leadership of the North Carolina General Assembly and the legislative redistricting committee responsible for drawing the 2016 Plan—seek a stay of this Court's Order.

Chief Justice Roberts has recognized that whether, and to what extent, Legislative Defendants are authorized to represent the State's interests in federal election law litigation is an unsettled question of State law. *North Carolina v. N.C. State Conf. of NAACP*, 137 S. Ct. 1399, 1399–1400 (2017) (Statement of Roberts, C.J., respecting the denial of certiorari). During the pendency of this litigation, the General Assembly enacted legislation, over a veto by the Governor, purporting to authorize the General Assembly to control representation of the State's interests in litigation challenging the constitutionality of State statutes. N.C. Gen. Stat. § 114-2(10), *as amended by* 2017 N.C. Sess. Law 57, § 6.7(m). But the Governor, as head of the State's executive branch, has the authority and obligation under the North Carolina Constitution "to take care that the laws be faithfully executed." N.C. Const. art. III, § 5(4); *State ex rel. McCrory v. Berger*, 781 S.E.2d 248, 258 (N.C. 2016). And the State Attorney General, a constitutional officer elected statewide, also may have constitutional, common law, and statutory authority to represent the State's interests in litigation. *Martin v. Thornburg*, 359 S.E.2d 472, 479 (N.C. 1987); *see also* John E. Harris, Note, *Holes in the Defense: Evaluating the*

North Carolina Attorney General's Duty to Defend and the Responses of Other Government Actors, 92 N.C. L. Rev. 2027, 2048 (2014) ("[T]he [North Carolina] [C]onstitution seems to contemplate that the legal representation of the State's positions falls to the executive branch."). Additionally, in separate redistricting litigation—in which the court has asked a Special Master to draw alternative configurations for 9 of 116 districts included in a remedial plan enacted by the General Assembly—Legislative Defendants have represented that, in that posture, Legislative Defendants lack authority to represent the interests of the General Assembly as a whole. Leg. Defs.' Resp. to Special Master's Draft Rep. 5, *Covington v. North Carolina*, No. 15-cv-399, (M.D.N.C. Nov. 17, 2017), ECF No. 215 (stating that "the [L]egislative [D]efendants do not themselves speak for the entire General Assembly," and therefore that "[a] few members of the legislature, even if they are leaders, are not authorized to state how the entire legislature would vote on, or amend, draft districts proposed by a law professor").

To the extent Legislative Defendants, as individual legislators, lack authority to represent the State's interests, then Legislative Defendants can show no meaningful harm, let alone irreparable harm. In particular, requiring Legislative Defendants—four members of one of the State's three branches of government, none of whom are running for or elected to Congress—to participate in drawing new maps while they await a ruling from the Supreme Court does not amount to an "irreparable injury." *Johnson v. Mortham*, 926 F. Supp. 1540, 1542 (N.D. Fla. 1996) ("[T]he mere administrative inconvenience the Florida Legislature and Florida elections officials will face in redistricting simply cannot justify denial of Plaintiffs' fundamental rights."); *Covington v.*

North Carolina, --- F. Supp. 3d ---, 2017 WL 4162335, at *11 (M.D.N.C. Sept. 19, 2017) (stating that "inconvenience to legislators," including having to "adjust their personal, legislative, or campaign schedules," does not amount to substantial harm).

And even if Legislative Defendants are entitled under State law to represent the State's interests—again, an unsettled question of state law—the timeline for drawing a new districting plan established by this Court's Order—which requires the General Assembly to adopt a new districting plan before the candidate filing period *begins* and *months before* both the primary and general elections—minimizes any harm to state interests. As another three-judge panel concluded in rejecting a similar motion in a redistricting case, "[b]y adopting a remedy now, the [State] faces the lesser evil of implementing new districts at a time when it remains a relatively manageable task; then, if the [Supreme] Court reverses, the [State] need only revert to districts that it has operated under for years—a much less daunting challenge." *See Personhuballah*, 155 F. Supp. 3d at 560.

3.

Whereas staying this Court's order would not materially injure Legislative Defendants, it would substantially injure—indeed, irreparably harm—Plaintiffs. As numerous courts have recognized in cases holding that a state redistricting plan violates the Constitution or federal law, "[d]eprivation of a fundamental right, such as limiting the right to vote in a manner that violates the Equal Protection Clause, constitutes irreparable harm." *Id.* (quoting *Johnson*, 926 F. Supp. at 1543); *see Harris*, 2016 WL 6920368, at *1 (same). "[T]o prolong the creation of a [remedial] plan by the Legislature would only

serve to prolong the harm that plaintiffs have suffered for many years." *Cousin v. McWherter*, 845 F. Supp. 525, 528 (E.D. Tenn. 1994).

Additionally, Plaintiffs reasonably seek relief from the unconstitutional 2016 Plan prior to the 2018 election cycle, which begins in February 2018. Delaying Plaintiffs relief until after the Supreme Court resolves Legislative Defendants' appeal creates a substantial risk that, in the event the Supreme Court affirms this Court's judgment, this Court will not have adequate time to afford Plaintiffs the relief to which they are rightfully entitled—constitutionally compliant districting maps for use in the 2018 election. As this Court previously explained, "given the Court's 'responsibility to ensure that future elections will not be conducted under unconstitutional plans,' this substantial risk weighs strongly against granting the requested stay." *Common Cause I*, 2017 WL 3981300, at *7 (quoting *Larios*, 305 F. Supp. 2d at 1344).

That Plaintiffs and other North Carolina voters cast their ballots under an unconstitutional congressional redistricting plan in 2012, 2014, and 2016 only enhances the potential prejudice to Plaintiffs associated with staying these proceedings. If Plaintiffs—and North Carolina voters in general—are denied relief before the 2018 election, Legislative Defendants would reap the benefits of their invidious partisan districting efforts "for another election cycle." *Personhuballah*, 155 F. Supp. 3d at 560. As a result, North Carolinians would cast votes in congressional elections conducted under unconstitutional maps in 2012, 2014, 2016, *and* 2018—virtually the entire decade. Additionally, staying this Court's order pending Legislative Defendants' appeal would perversely "giv[e] [Legislative Defendants] the fruits of victory whether or not the appeal

has merit," *Jimenez v. Barber*, 252 F.2d 550, 553 (9th Cir. 1958), sending a troubling message to state legislatures that there is little downside to engaging in unlawful districting practices because "the federal courts are powerless to effectively redress [voters'] grievances," *Coal. for Educ. in Dist. One v. Bd. of Elections*, 370 F. Supp. 42, 58 (S.D.N.Y. 1974). We decline to send such a message.

4.

Finally, the public interest strongly weighs against staying this Court's Order. This Court found that the 2016 Plan violates "both the structure of the republican form of government embodied in the Constitution and fundamental individual rights preserved by the Bill of Rights" and the Fourteenth Amendment, *Common Cause II*, 2018 WL 341658, at *19. The 2016 Plan, therefore, inflicts "public harms," *Harris*, 2016 WL 6920368, at *2, including "harms to every voter in the [unconstitutional districts]," *Personhuballah*, 155 F. Supp. 3d at 560. These injuries "are magnified each time they are repeated." *Larios*, 305 F. Supp. 2d at 1344 (denying request to stay remedial proceedings pending Supreme Court review of a decision invalidating state districting plan). "The public has an interest in having congressional representatives elected in accordance with the Constitution." *Harris*, 2016 WL 6920368, at *2. Accordingly, as 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." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964).

B.

Rather than specifically addressing the four stay factors in *Hilton*, Legislative Defendants argue that this Court should stay its Order for three reasons: (1) the Supreme Court's pending review of two three-judge panel decisions in partisan gerrymandering cases—*Gill v. Whitford*, Nos. 1161, 16A1149, and *Benisek v. Lamone*, No. 17-333—makes it likely that the Supreme Court will vacate this Court's Order; (2) the Supreme Court stayed remedial proceedings in *Whitford*; and (3) implementation of the Court's Order prior to the 2016 election will be unduly disruptive to the State's election processes. To the extent these arguments are relevant to the stay inquiry, we find them unpersuasive.

1.

As to the potential impact of Supreme Court review of *Whitford* and *Benisek* on this Court's decision, in denying a previous motion by Legislative Defendants to stay these proceedings, we explained that *Whitford* differs from the instant case "in a number of significant ways." *Common Cause I*, 2017 WL 3981300, at *4. In particular, we noted that there is a distinct possibility that the Supreme Court could reverse *Whitford* on standing grounds, without addressing the merits, because the *Whitford* plaintiffs do not reside in all of the challenged districts. *Id.* (citing *Whitford v. Gill*, 218 F. Supp. 3d 837, 929 (W.D. Wisc. 2016)). By contrast, Plaintiffs in these matters reside in all thirteen North Carolina congressional districts, and therefore have standing to assert statewide and district-by-district challenges to the 2016 Plan as a whole. *Common Cause II*, 2018 WL 341658, at *14 n.9.

Additionally, *Whitford* involved state legislative districts, whereas the instant cases involve congressional districts. *Common Cause I*, 2017 WL 3981300, at *5. This Court unanimously concluded that the 2016 Plans violate provisions in Article I of the Constitution that pertain only to congressional redistricting, *see Common Cause II*, 2018 WL 341658, at *71–74; *id.* at *80–81 (Osteen, J., concurring in part), and therefore are not—and cannot be—at issue in *Whitford*. Likewise, because States have only "delegate[d]" authority to draw congressional districts, as opposed to their "sovereign" authority to draw state legislative districts, the instant cases do not present the same federalism concerns as those in *Whitford*. *Id.* at *70 (majority op.) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 802–05 (1995)). And whereas the *Whitford* plaintiffs advanced a single framework for evaluating partisan gerrymandering claims under the First Amendment and Equal Protection Clause, Common Cause Plaintiffs proposed—and this Court adopted—a distinct framework for assessing partisan gerrymandering claims under the First Amendment. *Id.* at *64.

Finally, the trial revealed numerous meaningful factual differences between *Whitford* and the instant cases. For example, the *Whitford* districting plan was enacted as part of a decennial redistricting, whereas the General Assembly drew the Plan to preserve the partisan make-up of the General Assembly after federal courts held that North Carolina's 2011 congressional districting plan constituted a racial gerrymander. *Id.* at *4. Additionally, Plaintiffs adduced direct evidence of the General Assembly's invidious partisan intent—including statements by the legislators and consultant responsible for drawing the 2016 Plan, *id.* at *35–45—whereas the *Whitford* Court appears to have

largely relied on circumstantial evidence of intent. And Plaintiffs introduced numerous persuasive empirical analyses demonstrating the discriminatory partisan intent motivating adoption of the 2016 Plan, the 2016 Plan's discriminatory effects, and the lack of legitimate justification for those effects, most of which were not presented to the *Whitford* court. *Id.* at *35–60.

Although there are similarities between the instant cases and *Benisek*—both cases involve congressional districts and rely on similar First Amendment theories—*Benisek* also is meaningfully distinguishable in numerous ways. Most significantly, *Benisek* is before the Supreme Court on appeal from a denial of the plaintiffs' motion for the "extraordinary remedy" of a preliminary injunction. *Benisek v. Lamone*, 266 F. Supp. 3d 799, 808–09 (D. Md. 2017). To that end, unlike the instant cases, which were decided after full discovery and a four-day trial, *Benisek* involved only limited factual development. *Id.* at 809. In particular, whereas this Court made *dozens* of pages of factual findings based on thousands of pages of evidence and testimony, *e.g.*, *Common Cause II*, 2018 WL 341658, at *3–8, 35–60, the preliminary injunction record before the *Benisek* majority allowed it to render only *two* pages of factual findings, 266 F. Supp. 3d at 808–09. And the *Benisek* Court emphasized that the limited evidence available at the preliminary injunction stage suggested that the effects of the alleged gerrymander might not persist in subsequent elections. *Id.* at 808 ("[T]he razor's-edge Sixth District race in 2014 is evidence that suggests significant party-crossover voting and calls into doubt whether the State engineered an *effective* gerrymander."). By contrast, a variety of expert analyses presented by Plaintiffs to this Court proved the 2016 Plan's discriminatory

partisan effects and demonstrated that those effects were likely to persist under all probable electoral scenarios. *Common Cause II*, 2018 WL 341658, at *47–57. Notably, the *Benisek* majority acknowledged that with the benefit of a full trial record the plaintiffs "might" prevail, but that it could not conclude the plaintiffs were "likely" to prevail on the limited preliminary injunction record before it. 266 F. Supp. 3d at 808–09; *see also id.* at 814 ("The Court remains open to the possibility that the evidence Plaintiffs have adduced, when subject to robust cross-examination and the development that only a trial can bring, may satisfy Plaintiffs' burden of proof.").

Benisek also meaningfully differs from the instant case from a legal perspective. Unlike the instant cases, in which this Court held that the 2016 Plan violated the Equal Protection Clause and Article I, Section 4, *Common Cause II*, 2018 WL 341658, at *1, *Benisek* does not include challenges under either constitutional provision. And although the *Benisek* plaintiffs asserted a claim under Article I, Section 2—which this Court found the 2016 Plan also violates, *id.* at *72–73—the *Benisek* preliminary injunction opinion did not separately address that claim. And whereas *Benisek* involves a challenge to a single congressional district, the instant cases challenge the 2016 Plan as a whole. *Id.* at *8, 13–14 & n.9. Accordingly, the Supreme Court's conclusion as to whether the *Benisek* plaintiffs satisfied their burden to obtain the extraordinary relief of a preliminary injunction on their First Amendment claim is highly unlikely to resolve, from either a factual or legal perspective, all issues decided by this Court's Order.

In light of the numerous legal and factual differences between *Whitford* and *Benisek* and the instant case, any decision the Supreme Court renders in those cases is

highly unlikely to undermine all of the factual and legal bases upon which this Court found the 2016 Plan violated the Constitution and enjoined further use of that plan. Indeed, the only way *Whitford* and *Benisek* would completely dispose of this Court's factual findings and legal conclusions would be if the Supreme Court holds that partisan gerrymandering claims are nonjusticiable under any legal theory, not just the Equal Protection framework adopted by the *Whitford* majority and the First Amendment framework considered by the *Benisek* majority. But, as this Court recognized in denying Legislative Defendants' previous stay motion, "the Supreme Court recently stated that '[p]artisan gerrymanders . . . are incompatible with democratic principles.'" *Common Cause I*, 2017 WL 3981300, at *6 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) (alteration in original)). "And the Court's last three decisions addressing partisan gerrymandering claims under the Equal Protection Clause have held that such claims are justiciable." *Id.* "It is axiomatic that "if a precedent of [the Supreme] Court has direct application in a case . . . [lower courts] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Id.* (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (internal quotation marks omitted)). Accordingly, in ruling on Legislative Defendants' Motion, we must follow the Supreme Court's holding that partisan gerrymandering claims are justiciable and, therefore, refrain from exercising our discretion to stay our Order "on the bare possibility that the Supreme Court may reverse its precedent and flatly bar claims challenging a practice the Court has characterized as

'incompatible with democratic principles.'" *Id.* (quoting *Ariz. State Leg.*, 135 S. Ct. at 2658).

2.

Next, Legislative Defendants maintain that the Supreme Court's decision to stay remedial proceedings in *Whitford* renders it highly likely that the Supreme Court will stay remedial proceedings in these matters. Again, we disagree. The Supreme Court did not explain its decision to stay the remedial proceedings in *Whitford*. And there are a variety of reasons the Supreme Court may have decided to stay the remedial proceedings in *Whitford* that have no bearing on the instant cases. For example, the Supreme Court may have concluded that the state appellant in *Whitford* was likely to prevail on its statewide standing argument. Or the Court may have believed that the substantial federalism concerns with invalidating state legislative districts, as opposed to congressional districts, weighed heavily in favor of staying remedial proceedings until the Court rendered a final decision. Or the Court may have concluded that the less extensive empirical evidence introduced in *Whitford* was insufficient to demonstrate the challenged plan's discriminatory effects. Given that the Supreme Court provided no explanation for its decision to stay the remedial order in *Whitford* and that there are a variety of reasons for staying remedial proceedings in *Whitford* that have no bearing on this case, the Supreme Court's decision to stay remedial proceedings in *Whitford* does not justify the "extraordinary relief" of staying this Court's Order and risking that North Carolina will conduct a fourth congressional election under an unconstitutional districting plan.

Legislative Defendants nonetheless suggest that the Supreme Court will stay this Court's Order because the *Whitford* trial court gave the State a longer period of time to draw the remedial plan and the record in *Whitford* included several constitutionally compliant alternative plans. Motion 5. But the *Whitford* Court was able to give the state months to draw remedial maps because the next election was nearly two years away when the court rendered its liability decision. By contrast, the two-week window this Court provided to the State to draw remedial maps was dictated by the goal of minimally disrupting the State's election cycle, which begins in February, and conforms to the timeframe established by state law. *Common Cause II*, 2018 WL 341658, at *75. And contrary to Legislative Defendants' contentions, the record in this case includes a number of alternative districting plans. In particular, a bipartisan group of former judges convened to serve as a simulated nonpartisan redistricting commission drew an alternative congressional plan that conforms to virtually all traditional non-partisan districting criteria. *Id.* at *36 n.18. And two of Plaintiffs' experts drew thousands of simulated districting plans that conform to traditional districting criteria. *Id.* at *36–42.

3.

Finally, Legislative Defendants maintain "this Court should stay the Order under the Supreme Court's doctrine in *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006)," because requiring the State to adopt and implement remedial districts at this time will disrupt the State's electoral processes. Motion 5–6. As this Court recognized in enjoining further use of the 2016 Plan, the Supreme Court long has held that once a court finds a redistricting plan violates the Constitution, "courts should take 'appropriate action to

insure that no further elections are conducted under the invalid plan.'" *Common Cause II*, 2018 WL 341658, at *74 (quoting *Reynolds*, 377 U.S. at 585). In *Purcell*, the Supreme Court highlighted an exception to this rule: when a state's election machinery is already in progress and an election is imminent, courts should be wary of making changes to state election laws. 549 U.S. at 4–5.

But *Purcell* involved an election that was "weeks" away. *Id.* at 4. By contrast, here the general election is more than *ten months* away. Indeed, the election cycle has not yet officially started. The candidate-filing period does not *begin* until February 12, 2018, more than two weeks *after* this Court's deadline for the General Assembly to enact a new plan, and the primary elections will not take place until May 2018. Legislative Defendants identify no cases holding that a Court violates the *Purcell* exception by enjoining the use of an unconstitutional districting plan before the start of an election cycle and months before any election is set to take place. And other courts have enjoined the use of unlawful election laws with less time until the next general election. *See, e.g.*, *Harris*, 2016 WL 6920368, at *1–2 (denying motion to stay order enjoining use of unconstitutional redistricting plan when general election was nine months away); *Larios*, 305 F. Supp. 2d at 1344 (rejecting disruption argument when general election was "more than eight months away"); *Flateau v. Anderson*, 537 F. Supp. 257, 266 (S.D.N.Y. 1962) (rejecting disruption argument when general election was seven months away and candidate filing period had not started).

We further "observe that the court has broad equitable power to delay certain aspects of the electoral process if necessary." *Larios*, 305 F. Supp. 2d at 1342 (citing

Sixty-Seventh Minn. State Senate v. Beens, 406 U.S. 187, 201 n.11 (1972); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971)). Accordingly, if this Court needs to extend the candidate-filing period to ensure any proposed remedial plan enacted by the General Assembly completely remedies the constitutional violation and is otherwise legally acceptable, it is within our power to do so. *Id.* at 1343. Additionally, we emphasize that the majority's decision to appoint a special master to draw a back-up plan concurrent with the General Assembly's opportunity to enact a remedial plan, and the Court's review of any such plan, further ensures that the state's election cycle will be minimally impacted. In particular, in the event the General Assembly fails to enact a remedial plan or enacts a remedial plan that is legally unacceptable, the special master's back-up plan will be more quickly available—and thereby subjecting the State's electoral process to less disruption—than if the Court waited until after it reviewed the General Assembly's remedial to appoint a special master.

III.

For the foregoing reasons, we deny Legislative Defendants' motion to stay.

DENIED

Date: January 16, 2018

/s/ Hon. James A. Wynn, Jr.

/s/ Hon. William L. Osteen, Jr.

/s/ Hon. W. Earl Britt