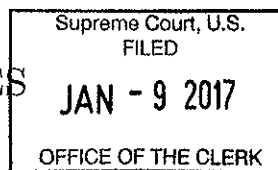


IN THE
SUPREME COURT OF THE UNITED STATES



STATE OF NORTH CAROLINA, *ET AL.*,

Applicants,

v.

SANDRA LITTLE COVINGTON, *ET AL.*,

Respondents.

ON APPLICATION FOR A STAY OF REMEDIAL ORDER
PENDING RESOLUTION OF DIRECT APPEAL

**RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION
FOR A STAY PENDING APPEAL**

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

The Plaintiffs are individual voters living in bizarrely-shaped legislative districts that divide them from their neighbors based solely on the color of their skin. They filed this suit in May of 2015, eighteen months before the general election in 2016 and sought relief from the government's use of districts that classify them based on their race, and that unfairly entrench racial stereotypes in the structure of North Carolina's representative democracy without justification. Guided by this Court's holding in *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015) (hereinafter "*ALBC*"), that a state's use of mechanical racial targets in redistricting is strong evidence that race was the predominant factor in drawing majority-black districts, and knowing that mechanical racial targets were the basis for drawing the twenty-eight state house and state senate districts challenged in this case, the voters filed suit within weeks of that decision being handed down.

Plaintiffs sought a preliminary injunction, which was denied. They asked the trial court to rule in time to implement new districts for the next regularly scheduled general elections in November 2016, which did not occur even though the trial of the case concluded on April 15, 2016. When the district court did rule in August 2016, the court made clear it would be considering additional relief even though it would allow the regularly scheduled elections in November 2016 to continue using the unconstitutional districts. After allowing the parties two rounds

of post-trial briefing on the question of an appropriate remedy and the timing of that remedy, the district court issued the order the State now appeals.

In these circumstances, it would be fundamentally unjust, and contrary to this Court's precedents, to stay the district court's unanimous and well-reasoned remedial order requiring the State of North Carolina to put an end to its unconstitutional use of race in redistricting. There is no justification for further perpetuating the extraordinary harm of using race-based districts to elect representatives in a system that has earned the state the reputation of being "not only the worst state in the USA for unfair districting but the worst entity in the world ever analyzed by the Electoral Integrity Project." Andrew Reynolds, *North Carolina is No Longer Classified as a Democracy*, News & Observer, Dec. 22, 2016, <http://www.newsobserver.com/opinion/op-ed/article122593759.html#storylink=cpy>.

Defendants' application for an emergency stay glibly ignores the prolonged harms to voters and the general public that result from the use of racially gerrymandered districts, which the district court rightly observed "is axiomatic" because the deprivation of a fundamental right is irreparable harm. (Resp. App.¹ 7) As the district court explained, a special election is necessary because "[a]bsent such relief, a large swath of North Carolina citizens will lack a constitutionally adequate voice in the State's legislature, even as that unconstitutionally constituted

¹ The district court's Opinion and Order on the Defendants' emergency motion for a stay is attached as an Appendix to this Response. References to this Appendix hereinafter are "Resp. App." References to the district court's Memorandum Opinion issued August 11, 2016 and its Remedial Order issued November 29, 2016 are contained in the Appendix to the Emergency Application and hereinafter are designated "App."

legislature continues to pass laws that materially affect those citizens' lives." (Resp. App. 5)

At the same time, Defendants grossly exaggerate the impact of the remedial order. There was no "vastly expanded" remedy here that "deals a *coup de grace* to federalism," (Stay Appl. 2) but rather a careful and considered remedial process that continues to afford great deference to state policies while also asserting appropriate federal authority to vindicate Plaintiffs' federal constitutional right to equal protection of the laws. *See United States v. Paradise*, 480 U.S. 149, 184 (1987) (it is within the court's "sound discretion" to craft remedies for racial discrimination); *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.")

Indeed, a district court has "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965). Moreover, this Court has not "required remedial plans to be limited to the least restrictive means of implementation. We have recognized that the choice of remedies to redress racial discrimination is 'a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court.'" *Fullilove v. Klutznick*, 448 U.S. 448, 508 (1980) (Powell, J., concurring) (quoting *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 794 (1976) (Powell,

J., concurring in part and dissenting in part)). Having ruled that based on the facts before the General Assembly at the time it drew the challenged districts, the Voting Rights Act did not require or justify the creation of these highly irregular districts that frequently divide multiple counties more than otherwise necessary, the district court's remedial order actually frees the state to give full force to the North Carolina Constitution's whole county provisions. N.C. Const. art. II, §§3(3) and 5(3). Rather than "obliterating" federalism, (Stay Appl. 14), the remedial order vindicates it.

A stay in these circumstances grants the State of North Carolina the authority to impose on its citizens twenty-eight race-based legislative districts for three years following a court finding that the districts in question are unconstitutional, for four years after the Plaintiffs filed suit and for nearly the entire decade. This is an extraordinary request. Such a delay in implementing a remedy is contrary to this Court's admonition that "once a State's . . . apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). Moreover, as one trial court has observed, staying the remedial order here would have the effect of giving the State "the fruits of victory for another election cycle, even if they lose in the Supreme Court. This we decline to do." *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 560 (E.D. Va. 2016). This Court should likewise decline to award Defendants the fruits of victory for another two full years. Earlier this term the Court denied stays pending appeal in

two cases involving claims of racial gerrymandered districts and allowed remedial orders to be implemented, and should do so again in this case. *See McCrory v. Harris*, 136 S. Ct. 1001 (2016) (denying stay application pending direct appeal); *Wittman v. Personhuballah*, 136 S. Ct. 998 (2016) (same).

Defendants have little likelihood of success on the merits. They do not even attempt to address the vast majority of the evidence the district court relied on to support its ruling. Indeed, the application does not so much as mention the stark and compelling *direct* evidence of the General Assembly's racial motives. The district court's factual findings are subject to the deferential "clear error" standard of review. *See Easley v. Cromartie*, 532 U.S. 234, 242 (2001). In this case the district court's conclusion that race predominated and that the use of race was not narrowly tailored is amply supported by the evidence.

Fundamentally, Defendants' stay application is based on statements contradicted by the record, misrepresentations of the district court's ruling, mischaracterizations of the law, questionable assumptions about future events, and unsupported assertions about the dangers of implementing remedial districts in 2017. Most notably, Defendants wrongly assert that the district court changed its original remedial order from one granting injunctive relief for the 2018 election cycle to, once the 2016 election results were known, one that imposes a requirement of special elections in 2017. (Stay Appl. 2, 12, 13, 18, 22, 29) This accusation is false. In rejecting remedies proposed by Plaintiffs that would impose new districts for the next regularly scheduled elections in 2016, or postpone those 2016 elections,

the district court's August 11, 2016 Order acknowledges the harm created by the use of race-based districts and then states:

These citizens are entitled to swift injunctive relief. Therefore, we hereby order the North Carolina General Assembly to draw remedial districts in their next legislative session to correct the constitutional deficiencies in the Enacted Plans. By separate order, we will direct the parties to file supplemental briefs on an appropriate deadline for such action by the legislature, on whether additional or other relief would be appropriate *before* the regularly scheduled elections in 2018, and, if so, the nature and schedule of that relief.

App.163-64 (emphasis added). By no stretch of imagination can those words be read to provide for a final remedy implemented in 2018 that is later “modified” by the court's subsequent Order of November 29, 2016. To the contrary, the court's November 29 Order provides the expected detail of the remedy it contemplated earlier – it sets forth a deadline for drawing remedial districts and orders special elections in the affected districts in 2017. As detailed below, the actual record of proceedings in this case further documents that there was no such post-election “change” in the court's remedial orders. *See infra* pp. 8-11.

The Defendants' counter-factual framing of events unjustifiably calls into question the motives and integrity of the three-judge panel of the district court which, as the complete record of proceedings demonstrates, has been measured, and unanimous, in all stages of this litigation. There is no factual basis whatsoever for the assertion that the 2016 election results played any role in the district court's November 29, 2016 Order. Indeed, the record contradicts this allegation.

In 2015, this Court held that if the Alabama legislature used mechanical racial targets in drawing majority-black districts, that factor could be a strong

indicator that race predominated in the drawing of those districts and further, that Section 5 of the Voting Rights Act does not require a state to maintain majority-black districts at a set black voting age population percentage. *See ALBC*, 135 S. Ct. at 1267, 1272-73. The individual North Carolina voters who filed this lawsuit acted within weeks of that decision because their own legislative districts were created pursuant to two mechanical racial targets and nearly all of these district populations had an increased percentage of BVAP, which the legislature repeatedly claimed was required by the Voting Rights Act. They requested a preliminary injunction and relief in time for the 2016 elections. Those requests were opposed by Defendants and denied by the court.

Granting the stay requested here would establish the perverse rule that voters aggrieved by the unconstitutional use of race in redistricting must file suit more than eighteen months before the next general election to obtain any relief and even then, must endure at least one additional election cycle using unconstitutional districts while the appellate process is underway. Given that redistricting plans are only in place for five election cycles, such an outcome would mean that justice delayed is justice denied. The extraordinary relief of a stay pending appeal is not warranted in this case.

OPINIONS BELOW

In addition to the opinions identified by Defendants, on January 4, 2017 the three-judge district court issued a unanimous Opinion and Order denying the State

of North Carolina's emergency motion to stay the court's November 29, 2016 remedial order, which is reproduced here at Resp. App. 1-9.

STATEMENT OF THE CASE

A. Background to the District Court's Remedial Order.

Delay was a part of Defendants' strategy in this case from the beginning. The complaint was filed in May 2015. Plaintiffs initially sought a trial date no later than December 14, 2015, (Doc.² 20) which Defendants opposed, claiming they required nearly a year, until April 15, 2016, to complete discovery. As early as November 10, 2015, in their response to Plaintiff's Motion for Preliminary Injunction, Defendants stated that it was too late for any remedial districts to be employed in the 2016 elections. (Doc. 33 at 53) In large part the court's November 25, 2015 order denying a preliminary injunction was based on the district court's agreement with the Defendants that Plaintiffs' request for preliminary relief was made too close to the time of the next election cycle. (Doc. 39)

The question of the timing and nature of an appropriate remedy, should the Plaintiffs prevail on their claim of racial gerrymandering with regard to any of the challenged districts, arose again in the parties' trial briefs filed in March of 2016. At that time the Defendants took the position that "in the event that the Court decides this case in favor of the plaintiffs, the Court should stay its order for the 2016 election cycle and order the General Assembly to propose remedial legislative redistricting plans for the 2018 election cycle." (Doc. 81 at 19) When the trial

² All "Doc." references are to documents filed in the district court in this action with the ECF filing number that identifies the document.

ended on April 15, 2016, at the express request of the district court, the parties filed post-trial briefs exclusively addressing remedial issues. The Defendants' filing, on May 6, 2016, argued that there was no possible remedy that could be implemented in time for the 2016 election cycle because to administer any elections in any new districts the State Board of Elections would need new maps by May 12, 2016. The Plaintiffs' position, supported by affidavits and deposition testimony from retired state and local election administrators and others, consistently was that immediate relief was both warranted and feasible, and that elections in new districts could be held in 2016 if the court were to rule by June 3, 2016. (Doc. 115)

On August 11, 2016 the district court issued its ruling on the merits, which also partially addressed the question of the timing and nature of an appropriate remedy. (App. 160-64) Balancing the equities, the district court concluded that there was not sufficient time to implement new districts for the next regularly scheduled elections in 2016, but left open the question of the appropriate deadline by which the General Assembly should draw new districts and "whether additional or other relief would be appropriate before the regularly scheduled elections in 2018, and, if so, the nature and schedule of that relief." (App. 163-64)

Four days after its ruling on the merits, the district court issued an Order for Supplementary Briefing Schedule. (Doc. 124) That Order states in its entirety:

The Court has previously found the challenged districts of the North Carolina House and Senate to be unconstitutional and determined that relief in advance of the 2016 elections is not feasible. The Court directs the parties to meet and confer about the appropriate deadline for the North Carolina legislature to draw new districts, the question of whether additional relief would be appropriate before the

regularly scheduled elections in 2018, and, if so, the nature and form of that relief.

No later than August 30, 2016, the parties shall advise the Court of their views on an appropriate deadline. If the plaintiffs request additional relief, they shall file a supplemental motion and brief no later than September 23, 2016, and the defendants' response is due October 21, 2016. These briefs shall be no longer than twelve pages. No later than November 8, 2016, the plaintiffs may file a reply brief no longer than five pages.

To the extent agreement is reached on any or all of these issues, the parties shall immediately advise the Court.

(Doc. 124) The parties conferred, failed to reach agreement, filed reports with the district court, and, as expressly permitted by the court's order, after having obtained a one-week extension of time requested jointly by all parties, the Plaintiffs filed a supplemental motion and brief seeking further relief.

Specifically, the Plaintiffs asked the court to (1) allow the North Carolina General Assembly until January 25, 2017 to "enact legislation creating new districts to remedy the constitutional violations found by the Court to exist in twenty-eight specific districts in the 2011 House and Senate Redistricting Plans,"³ (2) appoint a special master to draw remedial districts should the General Assembly fail to do so; and (3) order the Defendants to conduct special elections in 2017 "in any district modified by the General Assembly in 2017 to cure the constitutional defects found by the court herein." (Doc. 132)

³ Defendants erroneously state that Plaintiffs "insisted that there also be special elections in unchallenged districts" in order to get "a second chance at every contest in the state." (Stay Appl. 24) This is false. Plaintiffs have only ever sought a remedy in the challenged districts and only requested new elections for those seats and any others necessarily impacted by newly drawn boundaries. Defendants themselves represented to the district court that the parties in this litigation agree that new elections are "only needed in districts that are affected, directly or indirectly, by any potential remedial maps, and as a result it is possible that less than the entire State will be affected by any order of this Court." (Doc. 117 at 3)

On November 29, 2016, the district court entered an order specifying that the appropriate remedy for the constitutional violations it found to exist in twenty-eight of North Carolina's state house and state senate districts was (1) to allow the North Carolina General Assembly until 5pm. on March 15, 2017 to draw new district plans for the challenged districts, and (2) to require the State of North Carolina to hold special primary and general elections in the fall of 2017 to elect new legislators in the challenged districts and any other districts redrawn in order to cure the constitutional defects of the challenged districts. (App. 168) That Order weighs the equities on both sides of the two major issues the court decided: the time allotted to the General Assembly to devise a remedial plan and the implementation of a special election in 2017. (App. 169-72)

On January 4, 2017, the district court issued its Opinion and Order on the Defendants' motion for a stay of the November 29, 2016 remedial order. The court applied the four-part test applicable to whether stays of remedial orders are appropriate as articulated in *Hilton v. Branskill*, 481 U.S. 770, 776 (1987). Noting that numerous other courts have ordered special elections as remedies for voting rights violations, the district court was skeptical that Defendants would succeed in an appeal of the court's order. The court weighed the harm of using a large number of racially gerrymandered districts with the costs of a special election and concluded the harm in being governed by representatives elected from unconstitutional districts based on race outweighs administrative costs. (Resp. App. 7)

B. Factual Background of the Underlying Constitutional Violations.

In the 2011 redistricting process, the legislature's Redistricting Chairmen, Senator Rucho and Representative Lewis, and their Chief Architect consultant, Dr. Thomas Hofeller, set out to draw a racially-proportionate number of majority-black voting age population (BVAP) districts for the state house and senate, each at greater than 50% BVAP. They mechanically applied these two racial targets without regard to whether candidates of choice of black voters had been usually successful in winning in the prior districts with less than 50% BVAP. Senator Rucho and Representative Lewis issued public statements explicitly saying that alternative plans that failed to meet these race-based criteria would not be considered by the legislature. (App. 34) Application of these goals increased the total number of majority-black districts in the state house from nine to twenty-three and the number of majority-black districts in the senate from zero to nine, (App. 29-30 & n.15), and produced bizarrely shaped districts in which traditional redistricting criteria were subordinated to race. (App. 40-45)

In the over thirty years since this Court decided *Thornburg v. Gingles*, 478 U.S. 30 (1986), the State has not once been sued under Section 2 of the Voting Rights Act for vote dilution in its legislative redistricting plans.⁴ While the number of majority-black legislative districts in the state has been decreasing over the last few decades, the number of African-American legislators in the General Assembly has been simultaneously increasing. (App. 6-7) Election and demographic data

⁴ Defendants erroneously assert that the State "has faced both Section 2 liability and Section 5 objections ... multiple times over the past three decades." (Stay Appl. 32) With regard to state legislative districts, the only Voting Rights Act liability the state has faced was the holding in 1986 in *Thornburg v. Gingles*. Previous redistricting plans for the state legislature with many fewer majority-black districts were precleared by the Department of Justice under Section 5 of the VRA.

available to the redistricting chairmen, Senator Robert Rucho and Representative David Lewis, (App. 147-49 & n.54), showed that in the several election cycles immediately preceding the 2011 redistricting, African Americans were winning a large number of seats for state legislative office in districts that were not majority-black. The Redistricting Chairs did not consider that information or convey it to their mapdrawer, Dr. Hofeller, for consideration in construction of the twenty-eight districts challenged here. (App. 134-37, 147-50)

Indeed, Rucho and Lewis issued several public statements during the redistricting process which provided direct evidence on the rationale behind the challenged districts. Their own contemporaneous words uncontrovertibly establish that Rucho and Lewis gave Dr. Hofeller three basic instructions: draw “VRA districts” first, draw each VRA district to be at least 50% BVAP; and draw the total number of VRA districts to be proportional to the State’s black voting age population. (App. 19-35) The first task that Dr. Hofeller completed was to create a racial proportionality chart in March 2011 to determine how many majority-black districts would be needed to satisfy the proportionality requirement. Then he proceeded to draw that number of VRA districts, and testified that he drew them “without reference to any communities of interest or geographic subdivisions, such as county lines and precinct lines.” (App. 35-36)

Map-drawing commenced long before any racially polarized voting study was done. (App. 9, 135-39) To create a proportional number of VRA districts, Dr. Hofeller had to split counties, cities, towns, precincts and communities of interest on

racial lines. (App. 41-43) Black voters were overwhelmingly assigned to the challenged districts, and white voters were disproportionately assigned to adjoining bleached districts. *Id.* The districts drawn to comply with Rucho and Lewis' racial instructions are irregularly-shaped and non-compact, whether measured visually or quantitatively. (App. 43-127)

Senator Rucho and Representative Lewis first released to the public maps showing only the so-called VRA districts on June 17, 2011. (App. 11) Leading civil rights leaders and African-American legislators explained to the Legislature that increasing the BVAP in so many districts was unnecessary and not required by the VRA because there has been "no problem" electing African-American candidates in the existing districts. (App. 149) Despite this, the VRA districts were enacted essentially unchanged from their first public introduction six weeks earlier, (App. 12-13), and no African American legislator voted for either state legislative plan.

C. District Court's Ruling on the Merits.

After a five-day bench trial on all issues, App. 16, the three-judge panel unanimously ruled that race predominated in the drawing of the twenty-eight districts challenged by Plaintiffs and that the Defendants had failed to demonstrate that their predominant use of race was narrowly tailored to further a compelling governmental interest. (App. 3) In assessing whether Plaintiffs had carried their burden to prove racial predominance, the court considered both direct and circumstantial evidence of legislative intent and both statewide and district-specific evidence. Specifically, the court considered 1) statements by legislators identifying

race as the chief districting criterion; 2) statements that attaining a specific racial percentage within a given district was nonnegotiable; 3) maps illustrating the bizarre and non-compact district shapes; 4) maps showing that district lines disregarded traditional redistricting criteria such as preservation of political subdivisions, including precincts; and 5) evidence that there was a “policy of prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote).” (App. 18 (citing *ALBC*, 135 S. Ct. at 1267))

After hearing the Redistricting Chairs testify and reviewing their public statements, the Court concluded that their redistricting criteria and instructions to Dr. Hofeller amounted to a requirement to maximize the number of majority-black districts in the state and use race as the predominant factor in district construction. The district court found that race-neutral districting criteria, including recognizing political subdivisions and communities of interest, geographic compactness, and the state constitution’s whole county provision, were all sacrificed to the unyielding directive of drawing a racially proportionate number of majority-black districts wherever possible. (App. 40-47)

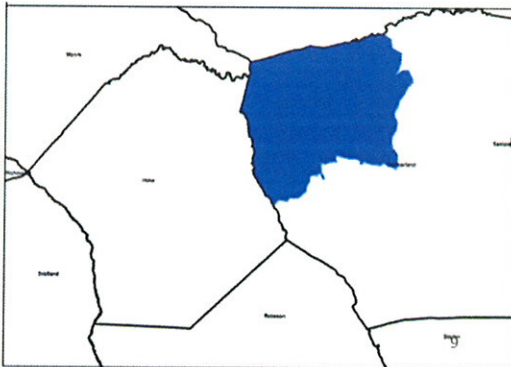
The court rejected Defendants’ arguments that North Carolina’s state constitutional Whole County Provision (“WCP”) explained better than race how the district lines were drawn because (1) many of the challenged districts were drawn wholly within single counties and thus the WCP was inapplicable; (2) the VRA districts were drawn before the county groupings necessary to comply with the WCP were determined; and (3) even if the WCP determined which counties were

necessarily grouped together, that provision still did not explain at all how the district lines within those groupings were drawn. (App. 24-26, 45-47)

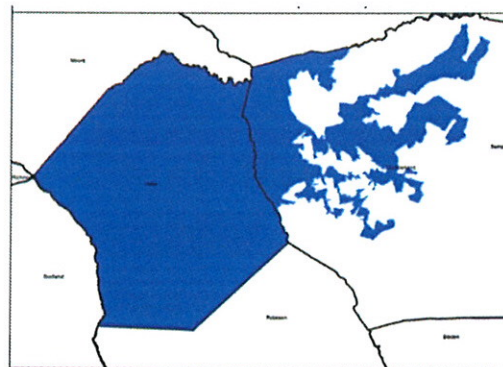
The district court then analyzed the district-specific evidence of racial predominance in each of the twenty-eight challenged districts. The court considered (1) the extent to which the districts divided precincts, cities, counties and communities of interest on the basis of race; (2) how black population was assigned to the challenged districts in the portions of split precincts, cities, communities of interest and counties kept in the challenged districts, (3) the shape of each individual district, and (4) how the district compared in geography and demographics to the prior district. (App. 55-128)

For example, the court first considered maps such as the ones below that depict the pre-2011 and post 2011 version of Senate District 21.

Benchmark SD 21



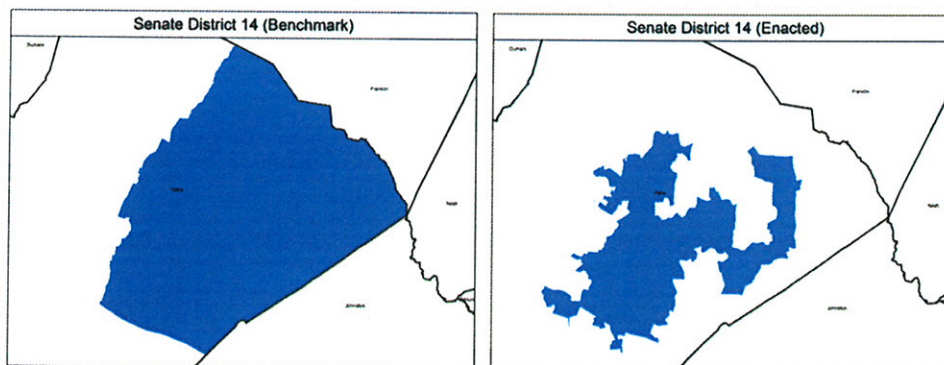
Enacted SD 21



Senate District 21 was previously entirely within Cumberland County and had a BVAP of 41%. (App. 67) The enacted SD 21, with a BVAP of 51.53%, combines Cumberland with Hoke County and extends throughout Cumberland County with many oddly-shaped appendages. (App. 67-70) The district is less

compact than the prior district visually, and scores lower on each of eight mathematical compactness measures when compared to the prior district. (App. 69) The enacted districts splits thirty-three of the forty-one precincts in Cumberland County, and in those split precincts, 60.3% of the BVAP is assigned to majority-black SD 21. (App. 69-70) Dr. Hofeller testified that splitting those precincts was necessary to increase the BVAP to over 50%. (App. 70)

Likewise, the court examined similar factors in its analysis of Senate District 14, a district that was entirely contained within Wake County both before and after the 2011 redistricting process.



SD 14 was 41.01% BVAP before 2011, and the BVAP was increased to 51.28% when redrawn in 2011. (App. 59-60) The district previously was geographically compact, and now has several bizarrely-shaped protrusions, and is less compact than the benchmark district on all eight mathematical measures considered by the court. (App. 61) The candidate of choice of black voters had long been elected from SD 14. (App. 147-48) Dr. Hofeller split twenty-nine of the fifty-one precincts in the district to construct SD 14, which he testified were necessary to split in order to increase the BVAP to over 50%. (App. 61-62) Looking at similar evidence for each

of the other districts Plaintiffs challenged, the court similarly concluded that the evidence supported a conclusion that race predominated.

After finding that Plaintiffs carried their burden on proving race predominated, the court first assumed without deciding that compliance with Section 2 or Section 5 of the Voting Rights Act would constitute a compelling state interest, and focused its inquiry on whether the state had a strong basis in evidence to conclude that each of the challenged districts, as drawn, was required to comply with the VRA and whether each district was drawn in such a way as to actually remedy the potential VRA violation. (App. 128-30) The court held that “a general finding regarding the existence of any racially polarized voting, no matter the level, is not enough” to establish a strong basis in evidence. (App. 133) Instead the legislature must consider the actual effect of bloc voting on electoral outcomes. *Id.*

The court also considered and rejected the evidence Defendants offered to suggest that the State would be subject to Section 2 litigation had it not drawn the challenged districts. The court identified obvious flaws in the racially polarized voting studies by Drs. Block and Brunell, and explained that, most critically, neither expert performed the third *Gingles* prong analysis to determine whether candidates preferred by African-American voters were winning elections. (App. 138-44) However, the information vital to establishing any strong basis to believe potential vote dilution needed remedying was available to, but ignored by, the General Assembly—election data that made clear that white bloc voting, at whatever level it might have existed—as not keeping black voters from electing

their candidates of choice. (App. 140-50 & n.54) The court then concluded that none of the challenged districts were narrowly tailored to comply with Section 2 or 5 of the VRA.

Importantly, the court below noted that its decision “should in no way be read to imply that majority-black districts could not be drawn – lawfully and constitutionally – in some of the same locations as the districts challenged in this case.” (App. 164) Based on the evidence presented to it, the court held that Plaintiffs and other North Carolinians were unconstitutionally assigned to districts on the basis of race, without justification, and ordered that the legislature draw new districts after the 2016 elections. (App. 163)

REASONS WHY THE STAY APPLICATION SHOULD BE DENIED

When voters in the racially gerrymandered districts challenged in this litigation went to the polls in November 2016 most of them had no choice whatsoever because, as the Defendants point out, candidates in 20 of the 28 challenged districts ran unopposed. (Stay Appl. 24) Defendants cannot meet their heavy burden of demonstrating that the Court should countenance their attempt to delay an effective remedy for the Plaintiffs and millions of other North Carolinians regardless of the merits of their appeal. First, Defendants cannot demonstrate that they are likely to prevail on the merits of their appeal. Equally important, Defendants cannot demonstrate that any administrative expense involved in conducting a special election in the affected parts of the state far outweighs the injury experienced by the Plaintiffs and the public at large from the continued use

of race-based election districts. The granting of a stay pending appeal is “extraordinary relief,” and the party requesting a stay bears a “heavy burden.” *Winston–Salem/Forsyth Cty. Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971) (Burger, Circuit Justice). Defendants have failed to meet that burden here.

A. Standard for Granting a Stay.

The standard governing in-chambers applications for equitable relief such as this one is well-established: in this case Defendants must show that there is (1) a “reasonable probability” that four Justices will consider the issue sufficiently meritorious to note probable jurisdiction; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; (3) a likelihood that irreparable harm will result from the denial of a stay; and, (4) “[i]n close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent.” *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (citing *Lucas v. Townsend*, 486 U. S. 1301, 1304 (1988) (Kennedy, J., in chambers); *Bellotti v. Latino Political Action Committee*, 463 U.S. 1319, 1320 (1983) (Brennan, J., in chambers) (denying stay of remedial order in redistricting case); *Rostker v. Goldberg*, 448 U. S. 1306, 1308 (1980) (Brennan, J., in chambers)). In cases on direct appeal, in contrast to petitions for certiorari, the second inquiry may involve somewhat different considerations than the first because while the case may fall within the court’s appellate jurisdiction, the second factor still requires careful scrutiny. *Rostker*, 448 U.S. at 1308, (citing *Times-Picayune Publishing Corp. v.*

Schulinkamp, 419 U.S. 1301, 1305 (1974); *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972)).

In applying this standard, the “judgment of the court below is presumed to be valid.” *Wise v. Lipscomb*, 434 U.S. 1329, 1333 (1977) (Powell, J., in chambers). Irreparable harm to the applicant alone is not enough to establish entitlement to a stay. *Curry v. Baker*, 479 U.S. 1301, 1302 (1986) (Powell, J., in chambers) (denying stay where candidate might experience irreparable harm, but case does not meet standards for granting certiorari). *See also Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926) (denying stay pending direct appeal, holding that “[a] stay is not a matter of right, even if irreparable injury might otherwise result to the appellant.”). Further, “[t]he conditions that are *necessary* for issuance of a stay are not necessarily *sufficient*.” *Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers) (emphasis in original). “Denial of such in-chambers stay applications is the norm; relief is granted only in ‘extraordinary cases.’” *Conkright v. Frommert*, 556 U.S. 1401 (2009) (Ginsburg, J., in chambers) (quoting *Rostker*, 448 U.S. at 1308). “The party requesting a stay bears the burden of showing that the circumstances justify” such extraordinary relief. *Nken v. Holder*, 556 U.S. 418, 433-34 (2009).

B. These Appeals are Not Sufficiently Meritorious to Note Probable Jurisdiction on Liability or Remedy.

These appeals raise no novel questions of law and there is no serious dispute over the district court’s findings of fact. *See* Mot. to Affirm, *State of North Carolina v. Covington*, No. 16-649, (Dec. 16, 2016) (hereinafter “*Covington* Mot. to Affirm”).

The ruling that race predominated in the drawing of some of North Carolina's legislative districts and that the use of race in constructing those districts was not narrowly tailored to a compelling governmental interest was squarely based on this Court's precedents and relied primarily on the direct evidence of statements by the legislative leaders and their redistricting consultant as well as undisputed demographic data and prior election returns. The mere fact that this Court has appellate jurisdiction does not, as Defendants contend, automatically mean that the Court will note probable jurisdiction. *See* Sup. Ct. R. 18.12. To be entitled to a stay, they bear the burden of showing that their appeals merit full consideration by the Court, which they have failed to do.

C. The Court is Not Likely to Vacate the Decision of the District Court on the Underlying Question of Liability for Racially Gerrymandered Districts.

1. *Race Predominated.* The Defendants admitted in writing, from the very beginning of the redistricting process, that they were using two race-based criteria that could not be compromised: draw a racially proportionate number of majority BVAP districts for the house and senate, and make each of them at least 50% or greater in BVAP. These two racial targets were, without question, applied mechanically and virtually without exception, by the Redistricting Chairs and their consultant. *See supra* p. 12. The resulting crazy quilt of bizarrely shaped districts disregarded traditional redistricting criteria, eschewing geographical compactness and political subdivision boundaries for race-based imperatives. *See Covington* Mot. to Affirm, App. A. Black voters were moved into districts and white voters moved

out of them, to create majority-black districts where previously there were none.⁵ One of the more fanciful falsehoods advanced by the Defendants is the unsupported assertion that in every North Carolina redistricting plan since 1986, “the legislature has included majority-minority and coalition districts where feasible,” (Stay Appl. 7) implying that the challenged districts were simply a continuation of past practices. In fact, the racially-gerrymandered districts were a radical departure from the past, as there were huge increases in BVAP percentages, in some instances by as much as twenty percentage points higher. *See Covington Mot. to Affirm 34-5* (tables showing increases in challenged districts’ BVAP compared to the benchmark district).

The court below examined the district-specific evidence relating to each of the districts challenged in this case to determine whether race was the predominant factor in the drawing of that district. (App. 55-128) The court reviewed the extent to which each district failed to comply with traditional redistricting criteria, evaluating compactness scores and the spike in county, city and precinct splits, which is why the Defendants’ bald misrepresentation that the district court failed “to recognize that the legislature created majority-minority districts *only* where doing so was consistent with traditional districting principles,” (Stay Appl. 31), is completely wrong.

⁵ The Defendants refer to districts variously as “VRA,” “majority-minority,” “coalition,” “crossover” and “ability to elect” without defining how they are using those terms. This matters because the Defendants use the terms interchangeably in places where the distinctions matter. *See, e.g., Stay Appl. 3, 7, 10, 11, 16, 18, 29, 32, 33.* The district court was careful to note that it used the term “VRA districts” to refer to the districts the Redistricting Chairs designated in that manner without intending to imply that those districts actually were required by the Voting Rights Act. *See App. 11 n.5.* The district court did not use the terms “ability to elect” or “cross-over” at all to refer to districts. By often conflating those terms in their argument, the Defendants’ misrepresent the holding of the district court.

Contrary to Defendants' mischaracterization of the ruling, the court below did not simply ask "whether the legislature created majority-minority districts" but rather methodically reviewed in detail, at both the statewide and district-specific levels, the direct and indirect evidence of the overriding role that race played in explaining the district's boundaries. Plaintiffs did not challenge every majority-black district drawn by the legislature in 2011, only those where the district in question was explainable only on the basis of race. On the issue of whether race predominated in the drawing of the challenged districts, Defendants' only response is to completely mischaracterize the trial court as "reflexively applying strict scrutiny just because majority-minority districts were involved." (Stay Appl. 31) They offer no alternative explanation of the districts (which is unsurprising, since there are none in the record) and identify no clearly erroneous finding of fact.

The district court applied the appropriate standards to evaluate whether race predominated, as articulated in *ALBC*, *Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995) and *Bush v. Vera*, 517 U.S. 952 (1996). See App. 16-18. The evidence in this case is precisely "the kind[] of direct evidence [this Court has] found significant in other redistricting cases." *Easley v. Cromartie*, 532 U.S. at 254 (citing *Bush v. Vera*, 517 U.S. at 959, *Miller v. Johnson*, 515 U.S. at 907; *Shaw v. Hunt*, 517 U.S. at 906.) The lower court's conclusion that race was the predominant factor in the districts challenged here was correct. "A lower court judgment, entered by a tribunal that was closer to the facts . . . is entitled to a

presumption of validity.” *Graves v. Barnes*, 405 U.S. at 1203 (denying stay application in redistricting case).

2. *The Districts Are Not Narrowly Tailored.* As more fully elaborated in Plaintiffs’ Motion to Affirm, the central question in applying strict scrutiny here is whether the challenged districts were reasonably necessary to comply with Section 2 of the VRA. *Covington Mot. to Affirm* 24-35. The district court focused on whether the challenged districts satisfied the third prong of the *Gingles* test, which asks whether the majority votes sufficiently as a bloc “usually to defeat the minority’s preferred candidates.” *Gingles*, 478 U.S. at 56. The uncontroverted factual finding by the district court is that the map drawers never even made the effort to analyze *Gingles*’ third factor. (App. 132-37) It is not that they made the wrong evaluation, or that the court chose to replace the Defendants’ analysis of that factor with its own. The Redistricting Chairs and their consultant did not even take into account anywhere in the state the extent to which white bloc voting defeats the candidates of choice of black voters. (App. 135-37) In fact, the record evidence before the legislature that African-American legislators were winning elections in majority-white districts (which defeats any claim that *Gingles*’ third prong might apply) was extensive. (App. 144-49 & n.54)

Defendants repeatedly assert that the court below concluded the legislature “lacked good reasons to draw any ability-to-elect districts at all.” (Stay Appl. 11, 16, 18, 29, 32) That is not what the district court held. (App. 164) Based on the uncontroverted facts before it, the court concluded that the General Assembly’s

mechanical approach to maximizing the number of majority-BVAP legislative districts failed to satisfy the constitutional requirement that such districts be narrowly tailored, and the fact that candidates of choice of African-American voters have been winning election in legislative districts that are less than 50% BVAP was strong evidence that majority-black districts were not needed in those areas.

Overall, Defendants refuse to engage with the ruling below as it is actually written and the record as it actually exists. Rather, Defendants repeatedly mischaracterize both the district court's factual findings and legal conclusions, creating and then slaying a straw man with great fanfare. Yet the fact remains that the court below did not rule that race cannot be taken into account in redistricting, only that the extreme use of race by the Defendants in the way they drew the twenty-eight specific districts at issue here was not narrowly tailored.

Defendants argue that it is "highly debatable" that a constitutional violation occurred here because the North Carolina Supreme Court upheld many of the same districts in *Dickson v. Rucho*, 368 N.C. 481, 766 S.E.2d 238 (2015), *petition for cert. filed* (U.S. June 30, 2016) (No. 16-24). (Stay Appl. 1, 15) They further advance the novel proposition that the district court in this case should not be allowed to implement a remedy for the violation of Plaintiffs' federal constitutional rights that occurred here, in light of *Dickson*, because that creates "the prospect of federal district courts elevating themselves to the top of the judicial hierarchy." (Stay Appl. 35) It has long been axiomatic that federal courts are not bound by state court interpretations of federal constitutional rights, indeed, the reverse is true. *See, e.g.,*

James v. City of Boise, 136 S. Ct. 685, 694-95 (2016); *Am. Tradition P'Ship v. Bullock*, 132 S. Ct. 2490 (2012). In addition, the district court correctly ruled that Defendants failed to establish the necessary elements to reach a finding that Plaintiffs here should be bound by a ruling obtained in a different case by different plaintiffs.⁶ (App. 15 n.9)

D. The District Court's Order Requiring a Special Election is Well-Founded in Law and Precedent.

A stay is only appropriate in the extraordinary case “where the applicant is able to rebut the presumption that the decisions below – both on the merits and on the proper interim disposition of the case – are correct.” *Bellotti*, 463 U.S. at 1320. The relief granted by the district court here is precisely what the three-judge panel ordered in *Smith v. Beasley*, 946 F. Supp. 1174 (D.S.C. 1996), following its holding that multiple house and senate districts in South Carolina’s legislative redistricting plans were unconstitutional racially gerrymandered districts. That court held that the 1996 elections could go forward using the unconstitutional districts because at the time of its ruling on September 26th, the general election was roughly six weeks away, but that a special election would be held in 1997 in any districts that had to be redrawn as a result of the court’s ruling. *Id.* at 1212.

The Plaintiffs in this case are entitled to the same relief. “Particularly where ‘voters are represented by unconstitutionally elected officials . . . [courts have] had

⁶ The notion that deference is owed the N.C. Supreme Court’s opinion in *Dickson v. Rucho* is undermined by the fact that the largest contributor in support of Justice Newby’s 2012 re-election to the Court, the Republican State Leadership Committee (the “RSLC”), had a significant stake in the outcome of that appeal. The RSLC’s agent, Dr. Thomas Hofeller, was the principal architect of the redistricting maps challenged in this litigation. On December 17, 2012, Plaintiffs’ motion for recusal was denied without a written opinion. *Dickson v. Rucho*, 366 N.C. 425, 735 S.E.2d 193 (2012).

no difficulty in determining that the terms of the officials elected' should be shortened and special elections held." *Ketchum v. City Council of Chicago*, 630 F. Supp. 551, 565 (N.D. Ill. 1985) (quoting *Tucker v. Burford*, 603 F. Supp. 276, 279 (N.D. Miss.1985) (redistricting case)). See also *Keller v. Gilliam*, 454 F.2d 55, 57-58 (5th Cir. 1972) (approving the shortening of terms of office as a remedy for a voting rights violation).

Defendants acknowledge *Smith v. Beasley* in a footnote but attempt to distinguish it on the grounds that "notice" of special elections was provided prior to the regularly scheduled elections in *Smith* whereas, they claim, the same is not true here. But this assertion is based entirely on their demonstrably false premise that the district court in this case gave no such indication of the possibility of special elections. (Stay Appl. 25 n.2). In fact, the plaintiffs did seek immediate relief from the beginning of this litigation and the district court did signal numerous times, as was covered by the media,⁷ that special elections might be required, undermining this entire line of the Defendants' argument.

In any case, the order and reasoning of *Smith v. Beasley* belies the State's exaggerated claims that ordering special elections where constitutional violations in redistricting have occurred is somehow the death knell of federalism. See also *Cosner v. Dalton*, 552 F. Supp. 350, 364 (E.D. Va. 1981) (three-judge court)

⁷ See e.g., Anne Blythe, *NC Lawyers Ask Judges to Consider Special Election in 2017 for NC House and Senate Races*, News and Observer, Sept. 9, 2016, <http://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article100978762.html>; Lynn Bonner, *Federal Judges Find NC Legislative District Unconstitutional*, News and Observer, Aug. 11, 2016, <http://www.newsobserver.com/news/politics-government/state-politics/article95080647.html> (raising possibility of special elections in 2017).

(ordering special elections and holding that “[b]ecause Virginia's citizens are entitled to vote as soon as possible for their representatives under a constitutional apportionment plan, we will limit the terms of members of the House of Delegates elected in 1981 to one year.”). In reality, “[f]ederal courts have often ordered special elections to remedy violations of voting rights.” *Ketchum*, 630 F. Supp. at 565; see also *Cousins v. City Council*, 503 F. 2d 912, 914 (7th Cir. 1974) (in resolving challenge to Chicago City Council redistricting, district court ordered special elections in the affected wards); *United States v. Osceola County*, 474 F. Supp. 2d 1254, 1255 (M.D. Fla. 2006) (ordering special elections and shortening terms to implement remedial districting plan in Section 2 vote dilution case).

“Particularly where ‘voters are represented by unconstitutionally elected officials . . . [courts have] had no difficulty in determining that the terms of the officials elected’ should be shortened and special elections held.” *Ketchum*, 630 F. Supp. at 565 (quoting *Tucker v. Burford*, 603 F. Supp. at 279) (redistricting case)); see also *Keller*, 454 F.2d at 57-58 (approving the shortening of terms of office as a remedy for a voting rights violation). Plaintiffs’ request for a special election in 2017 also is bolstered by the fact that Plaintiffs sought relief in the form of a preliminary injunction in advance of the challenged election. See *Smith v. Cherry*, 489 F. 2d 1098, 1103 (7th Cir. 1973), *cert. denied*, 417 U.S. 910 (1974).

Defendants’ argument that the district court failed to balance equities in deciding to order a special election is not supported by the record. (Stay Appl. 22-24) The court reviewed two rounds of briefing, affidavits and sworn testimony

submitted by the parties, *see supra* pp. 8-10, and considered the relative harms. App. 160-64, 169-172, Resp. App. 4-9. To the extent that any of the cases cited by Defendants on the question of special elections are relevant here, since none of them involve unconstitutional redistricting plans,⁸ the circumstances in this case are egregious, the district boundaries most certainly impact who can run and who is elected, and the need for an expeditious remedy outweighs the administrative costs of holding additional elections during the 2017 municipal election cycle. Thus, the district court's remedy is entitled to deference. *See Gjersten v. Board of Election Comm'rs*, 791 F.2d 472 479 (7th Cir. 1986) ("An appellate court will normally give great deference to the district court's decision as to the precise equitable relief necessary in a particular case.").

Defendants also wrongly argue that the district court lacked jurisdiction to order a special election because the Order was issued after a notice of appeal had been filed. (Stay Appl. 2, 20-22). First, filing a notice of appeal divests the district court of jurisdiction only with respect to those matters involved in the appeal. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance — it confers jurisdiction on the court of appeals and divests the district court of its control *over those aspects of the case involved in the appeal.*") (emphasis added). Matters not part of the appeal

⁸ Defendants cite *Lopez v. City of Houston*, 617 F.3d 336 (5th Cir. 2010) (frivolous claim regarding city's calculation of population); *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002) (First Amendment challenge to state statute governing judicial candidate speech); *Hadnott v. Amos*, 394 U.S. 358 (1969) (ballot access rules not precleared under Section 5 of the VRA); *Gjersten v. Board of Election Comm'rs*, 791 F.2d 472 (7th Cir. 1986) (challenge to ballot access rules); *Bowes v. Ind. Sec'y of State*, 837 F.3d 813 (7th Cir. 2016) (constitutional challenge to ballot access rules for judicial candidates).

remain within the district court's jurisdiction. *Resolution Trust Corp. v. Smith*, 53 F.3d 72, 77 (5th Cir. 1995).

Defendants' Notice of Appeal did not incorporate the issue of remedies. Indeed, Defendants proceeded to actively litigate the nature and timing of appropriate remedies in the district court following the August 11, 2016 ruling on liability. Consequently, the question of appropriate remedies was not an "aspect of the case involved in the appeal." As such, it was properly before the district court. This is apparent from the record, *supra* pp. 8-12, and reflected in the Defendants' own litigation conduct.

Defendants submit that they filed a Notice of Appeal (Doc. 130) on September 13, 2016. (Stay Appl. 22). But Doc. 130 noticed an appeal specifically with regard to the district court order (Doc. 125) finding the districts unconstitutional. The court had concurrently entered a second order, inviting briefing on the timing, scope, and nature of the relief. *See* Doc. 124. Defendants never appealed that order. Indeed, they exhaustively litigated the scope, timing and nature of relief in subsequent district court proceedings. *See e.g.* Doc. 136. The issue of relief was not an aspect of the case on appeal.

But perhaps the nail in the coffin on this point is that Defendants did in fact ultimately file a Notice of Appeal on the issue of remedies. It was filed on December 22, 2016, and specifically referred to the district court's November 29, 2016 order (Doc. 140). *See* Doc. 142. If Defendants' are correct that the district court lacked all jurisdiction after September 13, 2016, their decision to file the December 22, 2016

Notice of Appeal is inexplicable. By their own argument, it was untimely, void, or both. In reality of course, there is no great mystery: the issue of remedies remained with the district court, Defendants litigated it, and when confronted with an adverse verdict, they made the appropriate filings to preserve the matter for review.

A similar argument citing the same cases cited by the State here was made by parties in the Virginia congressional redistricting case, where the district court easily dispatched it, holding that “these cases support only the claim that we could not now alter our liability decision; they do not speak to our jurisdiction to enter a remedy.” *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 558, (E.D. Va. 2016), stay denied by *Wittman v. Personhuballah*, 136 S. Ct. 998 (2016).

Finally, the general rule of general jurisdictional divestiture contains exceptions. One applies where, as here, the district court supervises a continuing course of conduct between the parties. *Liddell v. Board of Educ.*, 73 F.3d 819, 822 (8th Cir. 1996) (exception appropriate “where the court supervises a continuing course of conduct and where, as new facts develop, additional supervisory action by the court is required”); *In re Grand Jury Subpoenas Duces Tecum*, 85 F.3d 372, 375 (8th Cir. 1996) (“Because the district court was supervising the continuing debate over appellants’ compliance with the subpoenas, it should not be rendered powerless by the filing of an appeal.”). Therefore, even if remedies had been properly an issue on appeal, the district court was correct in drafting a remedy after extending considerable leeway to Defendants throughout the second half of 2016.⁹

⁹ Indeed, it requires considerable chutzpah for Defendants, who have dragged their feet throughout this litigation, to insist on instant relief bypassing all procedural prerequisites.

Finally, Defendants' argument is incorrect in that it presumes that the mere filing of a notice of appeal renders the entire judgment below a nullity. Absent a stay pending appeal, parties must comply with court orders. *Maness v. Meyers*, 419 U.S. 449, 458-59 (1975). And it is hornbook law that "[u]nless the judgment is stayed, the district court may act to enforce it despite the pendency of an appeal." 16A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3949.1 (4th ed. 2016). The appellant seeking relief must obtain a stay.¹⁰ *Id.* § 3954. Finally, Federal Rule of Civil Procedure 62(c) expressly authorizes district courts to issue or modify an injunction during the pendency of appeal, and "even after notice of the appeal has been filed, the trial court still has jurisdiction to make an order under Rule 62(c)." 11 Fed. Prac. & Proc. Civ. § 2904 (3d ed.) (collecting cases).

Defendants make much of the district court's order changing residency requirements as a serious threat to federalism. This is a red herring. Plaintiffs requested that the Court slightly shorten the residency requirement contained in Article II, §§ 6-7 of the North Carolina Constitution, so that candidates for the new legislative districts in 2017 need only be residents of the district from which they seek election for the period of time between the close of filing for the 2017 special election and the date of the election. However, where the district boundaries are not even known one year before the date of the election, this one-year residency

¹⁰ A second well-established exception to the general rule of jurisdictional divestiture provides that, notwithstanding an appeal, the district court retains jurisdiction to enforce any portion of its judgment not stayed. *See Resolution Trust Corp. v. Smith*, 53 F.3d at 76; *American Town Ctr. v. Hall, 83 Assocs.*, 912 F.2d 104, 110-11 (6th Cir. 1990); *Deering Milliken, Inc. v. FTC.*, 647 F.2d 1124, 1128-29 (D.C. Cir. 1978).

requirement unfairly limits citizens' ability to run for office and voters' ability to elect candidates of their choice.

Federal courts have broad authority to modify election deadlines in order to ensure that elections under remedial plans proceed in an orderly fashion, and that authority includes the power to modify state constitutional residency requirements.

Reynolds v. Sims, 377 U.S. at 585; *Butterworth v. Dempsey*, 237 F. Supp. 302, 306 (D. Conn. 1964). In *Butterworth*, the court explained:

It is fundamental that state limitations -- whether constitutional, statutory or decisional -- cannot bar or delay relief required by the federal constitution ... of course it is elemental that if we have the power to enjoin an election to the General Assembly pursuant to an unconstitutional plan of districting and apportionment, we certainly have the power to approve a special election pursuant to a constitutional redistricting and reapportionment and to allow such election at the earliest practicable date without delay because of state constitutional or statutory limitations.

Id. See also *Valenti v. Dempsey*, 211 F. Supp. 911, 913 (D. Conn. 1962) (same). This principle applies here to the state constitutional residency requirement. Where equity requires relaxing that requirement to allow the scheduling of a special election, vindication of the federal constitutional right to equal protection takes precedence.

It is common for federal courts to alter residency requirements, election deadlines and term lengths when necessary to implement remedial plans, even where those requirements are established by state constitutions. See, e.g., *Perez v. Perry*, Case No. 5:11-cv-360, ECF No. 486 at *3 (W.D. Tex. Nov. 4, 2011) (shortening the residency requirement in Texas Constitution in connection with ordering special

election schedule); *Brown. v. Ky. Leg. Research Comm'n*, 966 F. Supp. 2d. 709, 726 (E.D. Ky. 2013) (noting that state constitution residency requirement for state legislative office does not constrain deadline for drawing reapportionment plan consistent with federal constitutional standards); *see also Smith v. Beasley*, 946 F. Supp. at 1212-13 (shortening terms from 2 years to 1 year and ordering 1997 special elections for state legislative seats, even though the South Carolina Constitution set the terms for Senators as four years and Representatives as two years. S.C. Const. art. III, §§ 2, 6). This additional relief is supported by precedent and necessary for equitable implementation of remedial districts to end the improper use of racial classifications in redistricting that occurred in 2011 when the current districts were enacted.

E. The State of North Carolina Will Not Suffer Irreparable Harm is a Stay is Not Granted.

Defendants' application repeatedly asserts that requiring the General Assembly to enact remedial districts to replace the twenty-eight unconstitutional racially-gerrymandered districts somehow overtakes the agenda of the legislature during its "precious first weeks," that the legislature should be "free to pursue the people's business," and that "voters in affected districts will have been deprived of the representation to which they are entitled." (Stay Appl. 4-5, 15-16, 25-26) This completely misrepresents the reality that drawing remedial districts can be quickly accomplished. As an initial matter, Defendants have already completed one of the most involved steps of drawing remedial legislative districts. They have provided to the district court their "optimal county grouping" schemes for both the state house

and state senate districts, which they contend, under state law, must be employed to comply with the state whole county provision. Decl. of Thomas B. Hofeller, Ph.D. at 6-7, Oct. 28, 2016, Doc. 136-1.¹¹ Defendants and the general public have known since August 19, 2016 that the twenty-eight legislative districts found to be unconstitutional racial gerrymanders in this case must be redrawn. Indeed, there was nothing to stop the North Carolina General Assembly from redrawing those unconstitutional districts before the end of the year.¹²

The steps needed to enact a remedial plan in this case are not more complicated than those involved in the *Harris* case, where public hearings were held on one day in six locations, criteria were adopted, and remedial districts were enacted, all within the two weeks allowed by the court. *See Harris v. McCrory*, 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016) (ruling on February 5, 2016 that legislature has until February 19, 2016, to enact a remedial districting plan.”). Here there is more than six months between the date of the district court’s decision and the March 15, 2017 deadline established by the district court’s November 29 Order. In fact, state law provides that, in analogous circumstances, state courts need only allow the legislature two weeks to remedy constitutional defects identified in a redistricting plan. *See* N.C. Gen. Stat. § 120-2.4. There is more than sufficient time for the General Assembly to engage in the people’s business, including the

¹¹ According to Dr. Hofeller’s declaration, there are 35 counties in the current state senate map and 41 counties in the state house map that are not impacted by the Court’s opinion and do not need to be changed in any way. *See* Hofeller Decl., Map 3 and Map 6.

¹² The North Carolina General Assembly held two special sessions in December. *See* North Carolina General Assembly, *Legislative Calendar*, December 2016, <http://www.ncleg.net/LegislativeCalendar/LegislativeCalendar.pl?view=month&timePeriod=12/1/2016>.

important task of remedying the unconstitutional use of race in drawing certain district boundaries.

The burden is on the Defendants to demonstrate that they will experience irreparable harm, and “simply showing some ‘possibility of irreparable injury,’ fails to satisfy” this burden. *Nken*, 556 U.S. at 434 (quoting *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998)). The type of injury they assert, namely the cost of a special election, is not the kind of injury that is considered irreparable by this Court. “Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.” *Conkright v. Frommert*, 556 U.S. 1401 (2009) (denying stay pending appeal).

A party is entitled to an emergency stay only in the most extraordinary of circumstances. Defendants’ asserted injury of not being able to “effectuate statutes enacted by representatives of its people” is inapplicable here, where the only thing the state is being prevented from doing is conducting elections using racially gerrymandered districts. The cases Defendants cite for this proposition, *Maryland v. King*, 133 S. Ct. 1 (2012) and *New Motor Vehicle Bd. of Cal. V. Orrin W. Fox Co.*, 434 U.S. 1345 (1977) do not involve redistricting. To suggest that the harm of not being able to collect DNA samples from arrestees, as in *Maryland v. King*, or not being able to regulate relocations of car dealerships, as in *New Motor Vehicle Bd.*, is analogous to this case and somehow supports the continued use of race-based legislative districts is absurd.

Even if the Defendants demonstrate irreparable injury, that harm must be balanced against the injury to other parties to the case or to the public at large. *See Times-Picayune*, 419 U.S. at 1305 (1974); *see also, Barnes v. E-Systems, Inc.*, 501 U.S. at 1304-05 (1991) (Scalia, J.). A Circuit Justice deciding on an emergency stay application should be “bound to the equities...and determine on which side the risk of irreparable injury falls the most heavily.” *Holtzman v. Schlesinger*, 414 U.S. 1304, 1308-09 (1973) (Marshall, J.).

F. The Remote and Tenuous Injury to Defendants Does Not Outweigh the Harm to the Public of Granting a Stay.

The General Assembly’s improper use of race to sort voters by the color of their skin has violated the Fourteenth Amendment rights of millions of North Carolinian citizens. Where a court finds that a legislature has impermissibly used race to draw congressional districts, “the public interest aligns with the Plaintiffs’ . . . interests, and thus militates against staying implementation of a remedy.” *Personhuballah*, 155 F. Supp. 3d at 560. “[T]he harms to the Plaintiffs would be *harms to every voter in*” the unconstitutional districts who are being denied their constitutional rights. *Id.* (emphasis added). “[T]he harms to [North Carolina] are public harms” because “[t]he public has an interest in having congressional representatives elected in accordance with the Constitution.” *Id.*

The State concludes its stay application by suggesting that granting such stays is this Court’s “ordinary practice.” (Stay Appl. 39) This misrepresents controlling precedent and recent practice. *See, e.g., McCrory v. Harris*, 136 S. Ct. 1001 (2016) (denying stay application pending direct appeal); *Wittman v.*

Personhuballah, 136 S. Ct. 998 (2016) (same); *Graves v. Barnes*, 405 U.S. at 1204 (denying stay of remedial order imposing certain single-member districts for Texas legislature); *Travia v. Lomenzo*, 381 U.S. 431, 431 (1965) (denying stay of district court order requiring New York to use court-approved remedial redistricting plan in upcoming election). In fact, “[d]enial of such in-chambers stay applications is the norm; relief is granted only in “extraordinary cases.” *Conkright v. Frommert*, 556 U.S. 1401 (2009) (citations omitted). In the redistricting context, courts have recognized that stays threaten either to permit unlawful plans to be used in additional elections or to force the courts into acting more hastily and less deliberatively than they would like. See, e.g., Order Denying Motion for Stay, at 3 *Harris v. McCrory*, 2016 WL 6920368, ECF No. 148, at *1 (M.D.N.C. February 9, 2016), (citing *Vera v. Bush*, 933 F. Supp. 1341, 1348 (S.D. Tex. 1996)) (declining to stay the remedy phase 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]”); *Personhuballah*, 155 F. Supp. 3d at 560 (same because “[t]he effect would be to give the Intervenor the fruits of victory for another election cycle”); *Larios v. Cox*, 305 F. Supp. 2d 1335, 1344 (N.D. Ga. 2004) (same because “the practical effect of a stay would be that the State of Georgia would conduct the 2004 elections again using unconstitutional apportionment plans” and collecting cases denying stays during pendency of Supreme Court proceedings); *Cane v. Worcester Cty.*, 874 F. Supp. 695, 698 (D. Md. 1995) (same because “to delay to all citizens of the County their right to a voice in their

government is a significant harm”); *Cousins v. McWherter*, 845 F. Supp. 525, 528 (E.D. Tenn. 1994) (same because “to prolong the creation of a plan by the Legislature would only serve to prolong the harm that plaintiffs have suffered for many years”).

This Court has endorsed district courts’ aversion to staying their remedies, *see Wittman*, 136 S. Ct. at 998 (denying stay of remedial order in racial gerrymandering case); *see also Bartlett v. Stephenson*, 535 U.S. 1301, 1304 (2002) (Rehnquist, C.J., in chambers) (observing in a Voting Rights Act case that the Court “will grant a stay only in extraordinary circumstances”); *Abrams v. Johnson*, 521 U.S. 74, 78 (1997) (noting the Court’s refusal to stay a judicially crafted remedial map in a racial gerrymandering case); *Graves v. Barnes*, 405 U.S. at 1203 (Powell, J., in chambers) (“Stays pending appeal to this Court are granted only in extraordinary circumstances. A lower court judgment, entered by a tribunal that was closer to the facts . . . is entitled to a presumption of validity.”); *Mahan v. Howell*, 404 U.S. 1201, 1203 (1971) (Black, J., in chambers) (declining to stay a court-imposed map in a one-person, one-vote case where “the facts are complicated” and “[t]he case is difficult”); *Travia v. Lomenzo*, 381 U.S. at 431 (denying stay). The remedial order issued by the district court in this case should not be stayed pending appeal.

CONCLUSION

The emergency application by the State of North Carolina for a stay of the remedial order issued November 29, 2016 by the United States District Court for the Middle District of North Carolina should be denied.

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Respectfully submitted,

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