No. 17A745

In the Supreme Court of the United States

ROBERT A. RUCHO, ET AL.

Applicants,

v.

COMMON CAUSE, ET AL.,

Respondents.

MOTION FOR LEAVE TO FILE AMICUS BRIEF, MOTION FOR LEAVE TO FILE BRIEF ON 8 1/2 BY 11 INCH PAPER, AMICUS BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR STAY FOR THE STATES OF LOUISIANA, TEXAS, MICHIGAN, AND SOUTH CAROLINA

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The States of Louisiana, Texas, Michigan, and South Carolina, move the Court for leave to file an amicus brief in support of Applicants' Emergency Application for Stay.

In support of their motion, Amici States assert that the district court ruling at issue has the potential to affect prior redistricting decisions as well as future redistricting efforts in the states. The ruling raises grave concerns among the Amici States about disruption of 2018 elections. Amici States assert the ruling creates exceptional circumstances that warrant being permitted to be heard on the issue of Applicants' Emergency Application for Stay and request their motion to file the attached amicus brief be granted.

Respectfully submitted:

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MOTION FOR LEAVE TO FILE BRIEF ON 81/2 BY 11 INCH PAPER FOR THE STATES OF LOUISIANA, TEXAS, MICHIGAN, AND SOUTH CAROLINA.

The States of Louisiana, Texas, Michigan, and South Carolina, move the Court for leave to file their amicus brief in support of Applicants' Emergency Application for Stay on 8 ½ by 11-inch paper rather than in booklet form.

In support of their motion, Amici States assert that Applicant members of the North Carolina legislature filed its Emergency Application for Stay in this matter on the afternoon of January 12, 2018. The expedited filing of Applicants' application due to the highly compressed timeline they were granted by the district court, *See Common Cause v. Rucho*, Nos. 16-1026, 16-1164, slip op. at 189 (M.D.N.C. Jan. 9, 2018) (three-judge court), and the resulting compressed deadline for any response impaired amici's

ability to get their brief prepared for printing and filing in booklet form. Amici desire to be heard on the application and request the Court grant this motion and accept the paper filing.

Respectfully submitted:

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Louisiana, Texas, Michigan, and South Carolina. The district court's ruling has widespread implications for States entering the 2018 election cycle, potentially destabilizing the impending elections across multiple States. Additionally, amici curiae are or were defendants or intervenor-defendants in either racial or partisan redistricting litigation since the 2010 decennial census. Furthermore, amici curiae States all conduct reapportionment by and through their legislative bodies arising out of the power granted them by Article 1, Section 4, of the United States Constitution. *See* U.S. Const. art. 1, § 2. The federal constitution states that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, *shall*

be prescribed in each State by the Legislature thereof; but Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." *Id.* (emphasis added). Given the States duty to conduct congressional reapportionments as dictated by the Constitution, amici curiae write in support of Applicants' Emergency Motion for Stay Pending disposition of Applicant's Jurisdictional Statement.[1]

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae made a monetary contribution to its preparation or submission. On January 14-17, 2018, undersigned counsel sought consent of the parties for the filing of this brief. Counsel for the Applicants granted consent on January 14, 2018. On January 16-17, 2018, Counsel to Plaintiffs/Appellees also consented to the filing of this amicus brief. On January 16, 2018, counsel to the State of North Carolina provided blanket consent to the filing of amicus briefs.

ARGUMENT

Multiple state legislators (collectively "Applicants") have moved to stay a three-judge district court's order declaring unconstitutional North Carolina's legislatively created congressional map on Equal Protection, First Amendment, and Election's Clause grounds. *Common Cause v. Rucho*, Nos. 16-1026, 16-1164, slip op. at 189 (M.D.N.C. Jan. 9, 2018) (three-judge court). This ruling, based on novel and intellectually contorted reinterpretations of Supreme Court precedent, wholly ignores—or entirely misinterprets or rejects—the plain text of the U.S. Constitution, over forty years of Supreme Court precedent, and ample evidence of the Founders intent to the contrary.

The instant case was filed shortly after a three-judge court denied consideration of a partisan gerrymandering objection to a remedial map adopted by the Legislature following a finding of racial gerrymandering. In *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016), the three-judge court found the congressional districting map to be a racial gerrymander. In reviewing objections to the remedial plan, the same three-judge court declined to hear the partisan gerrymandering claims lodged against the remedial map. *Harris v. McCory*, 2016 U.S. Dist. LEXIS 71853 (M.D.N.C. June 2, 2016). When this Court reviewed that decision in *Cooper v. Harris*, this Court made clear that if politics rather than race had been the primary motivating factor in the drawing of the original map, it would have been upheld by the courts. *See Cooper v. Harris*, 137 S. Ct. 1455 (2017).

Fundamentally, partisan gerrymandering is the undeniable and historically permitted consequence of entrusting reapportionment to an inherently political body: state legislatures. Notwithstanding the misgivings that fact arises in this, or any other federal court, the simple truth is that there exists now—and has always existed—a non-judicial remedy to partisan gerrymandering claims: the power of the people to choose their State representatives. *See Davis v. Bandemer*, 478 U.S. 109, 152 (1986) (O'Connor, J. concurring) ("There is no proof before [the Court] that political gerrymandering is an evil that cannot be checked or cured by the people or by the parties themselves."). Therefore, for the following reasons, this Court should stay the Memorandum Order of the three-judge panel in *Common Cause v. Rucho* pending review in this Court.

I. This Court Should Grant Petitioners' Stay Because Failure To Do So Opens Up States to Additional Litigation and Unsettles Congressional Districts that have Been In Place Since the 2010 Decennial Census.

States are now quickly approaching the fourth congressional election since the 2010 decennial census and are still without clarity on if they can conduct congressional elections under maps passed *over 6 years ago*. New cases are being filed all the time, some with the hope of forcing a redistricting before the 2018 congressional elections. *See e.g. Agre v. Wolf*, No. 17-4392 (E.D. Pa. October 10, 2017), ECF No. 20 (three-judge court) (scheduling order granting setting trial on December 4, 2017, a mere 63 days after the filing of the complaint); *Diamond v. Torres*, 5:17-cv-5054 (E.D. Pa. 2017), ECF Nos. 2,

40, 69 (motion to expedite and subsequent order of stay pending trial in *Agre,* and renewed motions to stay following the decision in *Agre*); *League of Women Voters of Michigan v. Johnson*, 2:17-cv-14148-DPH-SDD (E.D. Mich. December 22, 2017), ECF No. 1; *Georgia State Conference NAACP v. Kemp*, 1:17-cv-01427-TCB-WSD-BBM (N.D. Ga. November 1, 2017) (three-judge court), ECF No. 46 (consolidating *Georgia State Conference NAACP v. Kemp*, 1:17-cv-1427-TCB-WSD-BBM (N.D. Ga. April, 24, 2017) (three-judge court), ECF No. 1 and *Brooks v. Kemp*, 1:17-cv-3856-TCB (ND. Ga. October 3, 2017), ECF No. 1).

District courts, with claims largely similar to those in *Gill*, should be staying those actions. In fact, the district court in *this* very action refused to grant a stay, even though the claims are nearly identical to those in *Gill*. *See Common Cause v. Rucho*, Nos. 16-1026, 16-1164 (M.D.N.C. August 29, 2017) (three-judge court), ECF No. 85 (order denying motion to stay). Other courts have stayed these claims. *Benisek v. Lamone*, 1:13-cv-03233-JKB (D. Md. August 24, 2017) (three-judge court), ECF No. 204 (order granting Stay pending the outcome of *Gill v. Whitford*). Other Courts have accelerated these cases from filing of the Complaint to trial in two months. *See e.g. Agre v. Wolf*, No. 17-4392 (E.D. Pa. October 10, 2017) (three-judge court), ECF No. 20. Other courts have dismissed these claims. *See e.g. Alabama Legislative Black Caucus v. Alabama*, 2:12-cv-00691-WKW-MHT-WHP (M.D. Ala. October 12, 2017) (three-judge court), ECF No. 372 (decision finding lack of

standing or alternatively partisan gerrymandering claim non-justiciable). This shotgun approach to jurisprudence leaves the States in the unenviable position to never know if their reapportionment plans will draw the ire of the federal judiciary, and leave three-judge panels without guidance as to how to handle these cases while *Gill* and *Benisek* are pending before this Court.

a. District Courts Continue to Potentially Expose the Judiciary to "Embarrassment From Multifarious Pronouncements."

One of the key features of the political question doctrine, as set forth in *Baker v. Carr*, is the avoidance of "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker v. Carr*, 369 U.S. 186, 217 (1962). This is the situation the federal judiciary is quickly finding itself in. There have been several instances of judicial rulings in this area that defy good jurisprudence and due process in order to, *inter alia*, attempt to make deadlines or decisions effecting the 2018 congressional elections. *See e.g. See e.g. Agre v. Wolf*, No. 17-4392 (E.D. Pa. October 10, 2017) (three-judge court), ECF No. 20 (ordering a highly expedited schedule of discovery and trial within 63 days); *Common Cause v. Rucho*, Nos. 16-1026, 16-1164 (M.D.N.C. August 29, 2017) (three-judge court), ECF No. 85 (order denying motion to stay).

Chief Justice Roberts points out that a key concern for the judiciary is with the "integrity of the decisions of this Court in the eyes of the country." Transcript of Oral Argument at 38:2-4, *Gill v. Whitford*, No. 16-1161 (October

3, 2017). In fact, as the Chief Justice said:

> The main problem for me [is] . . . if the claim is allowed to proceed, there will naturally be a lot of these claims raised around the country. Politics is a very important driving force and those claims will be raised. And every one of them will come here for a decision on the merits . . . . We will have to decide in every case whether the Democrats win or the Republicans win. So[,] it's going to be a problem [for the Court] across the board.

Id. at 36:24-37:10. In the end, it turns out that the Chief Justice was right. However, claimants are not waiting for a decision in *Gill* or *Benisek*. Rather they are moving forward based on a presumption of justiciability afforded them by *Bandemer* and the invitation to search for a standard in *Veith,* and to no small extent the district court's ruling supposedly finding a "judicially manageable standard" in *Whitford v. Gill*. *See Bandemer*, 478 U.S. 109; *Veith*, 541 U.S. 267; *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016). Indeed, part of the explanation provided in the instant case for denying a stay pending *Gill* was that this Court did not have a First Amendment claim squarely pending before it. Rather than acknowledge this Court's decision to hear *Benisek* under the Jurisdiction Postponed order, the Rucho court proceeded to issue the instant ruling prior to this Court's consideration of *Benisek*. This Court should send a message to the district courts that its pending pronouncements should not be taken lightly by issuing a stay here.

II. This Case Should be Stayed Because the District Courts "None-Means-None" Approach to Partisanship in Redistricting Cases Has Never Been Accepted by This or Any Other Court.

The three-judge court in *Rucho* found that "a judicially manageable

framework for evaluating partisan gerrymandering claims need not distinguish an 'acceptable' level of partisan gerrymandering from 'excessive' partisan gerrymandering." *Common Cause v. Rucho*, 1:16-cv-01026-WO-JEP (MD NC 2018) (three-judge court) (memo. op.). Effectively, what the district court is endorsing is a "none-means-none" approach to partisan redistricting cases that has *never* been countenanced by this Court.[2] *See e.g. Baker v. Carr,* 369 U.S. 186, 324 (1962) ("Apportionment battles are overwhelmingly party or intra-party contests."); *Gaffney v. Cummings,* 412 U.S. 735, 753 (1973) ("The reality is that districting inevitably has and is intended to have substantial political consequences."); *Bandemer,* 478 U.S. at 128 (plurality op.) ("Politics and political considerations are inseparable from districting and apportionment."); *Vieth v. Jubelirer,* 541 U.S. 267, 286 (2004) (plurality op.) (noting that "partisan districting is a lawful and common practice . . . ."); *League of Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (acknowledging that partisanship is a permissible factor to consider when redistricting).

In fact, partisan gerrymandering has historically and recently been treated by this Court as a defense to racial gerrymandering claims. *See*

[2] The *Rucho* district court also seemed to endorse some form of proportional representation, which has *never* been permitted by this Court. *See e.g. Vieth*, 541 U.S. at 288 (The "standard [proposed by appellants] rests upon the principle that groups (or at least political-action groups) have a right to proportional representation. But the Constitution contains no such principle. It guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups. It nowhere says that . . . Republicans or Democrats, must be accorded political strength proportionate to their numbers.").

Cooper, 137 S. Ct. at 1463-64 (2017) (part of proving a racial gerrymandering claim is "demonstrating that the legislature subordinated other factors—compactness, respect for political subdivisions, *partisan advantage* . . .—to racial considerations.") (emphasis added). *Easley v. Cromartie*, 532 U.S. 234, 243 (2001) ("If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify") (quoting and citing *Bush v. Vera*, 517 U.S. 952, 968 (1996)). It is inconceivable for something to be a defense in the racial gerrymandering context yet also be—if you take the *Rucho* courts holding at face value—a First Amendment, Equal Protection, and Elections Clause violation in the partisan gerrymandering context. *See Common Cause v. Rucho*, Nos. 16-1026, 16-1164, slip op. at 189 (M.D.N.C. Jan. 9, 2018) (three-judge court) (memo. op.). In fact, the argument adopted by the three-judge panel in *Rucho* was rejected by another three-judge panel of the Middle District of North Carolina in June of 2016. *Harris v. McCrory*, 2016 U.S. Dist. LEXIS 71853 (M.D.N.C. June 2, 2016).

a. **Justice O'Connor's Concurrence in *Bandemer* Correctly Predicted the Scenario This Court Now Faces, and Therefore the Court Should Stay this Case Pending Appeal.**

Over 40 years ago, when she wrote her concurrence in *Davis v. Bandemer*, Justice O'Connor correctly predicted the quandary in which this Court now finds itself. 478 U.S. at 144 (O'Connor, J. concurring).[3] Deciding in

[3] This is unsurprising since Justice O'Connor was, and is to this day, the only

the first instance that partisan gerrymandering claims were justiciable was an error this court should now fix. *See Citizens United v. FEC*, 558 U.S. 310, 362-63 (2010) ("Our precedent is to be respected unless the most convincing reasons demonstrates that adherence to it puts us on a course that is sure error . . . . [The Court] also examine[s] whether 'experience has pointed up a precedent's shortcomings.'") (citing and quoting *Pearson v. Callahan*, 555 U.S. 223, 233 (2009)). Finding partisan gerrymandering claims justiciable was "a momentous" step "which if followed in the future can only lead to political instability and judicial malaise." *Bandemer,* 478 U.S. at 147.

Experience has now shown that Justice O'Connor could not have been more correct. In fact, "Federal Courts will have no alternative but to attempt to recreate the complex process of legislative apportionment in the context of adversary litigation in order to reconcile the competing [groups] claims . . . ." *Bandemer*, 478 U.S. at 147. This is precisely the spot the district court placed themselves in when ordering that "[n]o later than 5 p.m. on January 29, 2018, the State shall file with the Court any enacted proposed remedial plan," nearly all records of what the legislature will consider in creating a remedial plan, and a list of candidates to serve as a special master. *Common Cause v. Rucho*, Nos. 16-1026, 16-1164, slip op. at 189-90 (M.D.N.C. Jan. 9, 2018) (three-judge court) (memo. op.). This is nothing if not the "unwarranted

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Supreme Court Justice who has actually had occasion to draw a map as a member of a legislative body due to her position in the Arizona Senate during the 1970's reapportionment. *See* Federal Judicial Center, Sandra Day O'Connor, https://www.fjc.gov/history/judges/oconnor-sandra-day.

judicial superintendence of the legislative task of apportionment." *Bandemer*, 478 U.S. at 147 (O'Connor, J. concurring). More pressingly, "the fact remains that the losing party or the losing group of legislators in every apportionment will now be invited to fight the battle anew in federal court." *Id*. It is a battle that has been fought, is being fought, and will continue to be fought until this Court intervenes. *See e.g. Common Cause v. Rucho*, Nos. 16-1026, 16-1164, slip op. at 189 (M.D.N.C. Jan. 9, 2018) (three-judge court) (memo. op.) (finding congressional plan violates the First Amendment, Fourteenth Amendment, *and* the Elections Clause of Article 1, Section 4); *Agre v. Wolf*, No. 17-4392, slip op. (E.D. Pa Jan 10, 2018) (three-judge court) (the majority finding that a claim under the Elections Clause is either non-justiciable or precluded by precedent, while the dissenting judge would apply a "visual" test to strike down the map); *League of Women Voters of Michigan v. Johnson*, 2:17-cv-14148-DPH-SDD ECF 1 (E.D. MI December 22, 2017) (requesting injunctive relief under First and Fourteenth Amendment theories); *Benisek v. Lamone*, 266 F. Supp. 3d 799 (Md. August 24, 2017), docketed No. 17-333 (challenging a single district under a First Amendment retaliation theory).[4]

[4] The best example of this phenomena is the litigation currently ongoing in Pennsylvania. First, a case was filed in the Pennsylvania Commonwealth Court on June 15, 2017, on state constitutional grounds. *League of Women Voters v. Commonwealth*, 261 MD 2017 (June 15, 2017). A separate yet similar case was filed several months later in the District Court for the Eastern District of Pennsylvania on October 2, 2017, alleging U.S. Constitutional violations of the Elections Clause, Fourteenth Amendment, and First Amendment. *Agre v. Wolf*, No. 17-4392 (E.D. Pa. October 2, 2017)

CONCLUSION

The judiciary is under threat from itself. We live in a representative republican democracy and on that basis, we elect people to make decisions for us. The United States Constitution, pursuant to Article I, Section 4, recognizes that very fact by making the peoples representatives in the legislatures of the States responsible for crafting reapportionment plans. This same provision of the Constitution permits Congress to "make or alter" restrictions on Congressional Districting, and Congress has in fact exercised that power. See e.g. 2 U.S.C. 2c (requiring single member districts for the House of Representatives).

"To allow district courts to strike down apportionment plans on the basis of their prognostications . . . invites 'findings' on matters as to which neither judges nor anyone else can have confidence." *Bandemer*, 478 U.S. at 160 (O'Connor, J. concurring). This Court should act to prevent further erosion of citizens' faith in the federal judiciary. For the aforementioned reasons, amici States request that the Court stay this matter pending further review.

(three-judge court), ECF No. 1. When the *Agre* court failed to stay and/or abstain—despite clear precedent from this Court for them to do so—another party moved to intervene in *Agre* on November 3, 2017. *Agre v. Wolf*, No. 17-4392 (E.D. Pa. November 3, 2017) (three-judge court), ECF No. 54 (the "*Diamond* plaintiffs"). The motion for intervention was denied and the *Diamond* plaintiffs predictably filed *yet another* federal lawsuit challenging the 2011 Pennsylvania congressional apportionment on November 9, 2017, also alleging U.S. Constitutional violations of the Elections Clause, Fourteenth Amendment, and First Amendment. *Diamond v. Torres*, 5:17-cv-5054 (E.D. Pa. 2017) (three-judge court), ECF No. 1. That case remains pending, and Plaintiffs there have asked that court to determine liability in advance of the 2018 primary elections.

Date: January 17, 2018

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CERTIFICATE OF SERVICE

I, Elizabeth B. Murrill, a member of the Supreme Court Bar, hereby certify that three copies of the attached Amicus Brief and Motions in support of Applicants' Emergency Application for Stay, filed by hand-delivery to the United States Supreme Court, were served via Next-Day Service and on the following parties listed below on this 17th day of January, 2018. An electronic pdf of the Application has been sent to the following counsel via e-mail:

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