No. _____
(Related to No. 17A745)

Supreme Court of the United States

ROBERT RUCHO, ET AL.,

Appellants,

v.

COMMON CAUSE, ET AL.,

Appellees.

ROBERT RUCHO, ET AL.,

Appellants,

v.

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

Appellees.

APPELLEES' MOTION FOR EXPEDITED BRIEFING AND ORAL ARGUMENT SCHEDULE

Gregory L. Diskant
Jonah M. Knobler
Peter A. Nelson
Elena Steiger Reich
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, NY 10036

Edwin M. Speas, Jr.
Steven B. Epstein
Caroline P. Mackie
POYNER SPRUILL LLP
301 Fayetteville Street, Suite 1900
Raleigh, NC 27601

Emmet J. Bondurant
Counsel of Record for
Common Cause *Appellees*
Benjamin W. Thorpe
BONDURANT MIXSON & ELMORE LLP
1201 West Peachtree Street, NW #3900
Atlanta, GA 30309
(404) 881-4100
bondurant @bmelaw.com

Counsel for Common Cause *Appellees*
Additional Counsel listed on inside cover

Allison J. Riggs
Jaclyn Maffetore
SOUTHERN COALITION FOR SOCIAL JUSTICE
1415 W. Hwy 54, Suite 101
Durham, NC 27707

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

Paul M. Smith
Counsel of Record for League of Women Voters *Appellees*
CAMPAIGN LEGAL CENTER
1411 K Street NW, Suite 1400
Washington, DC 20005
(202) 736-2200
psmith@campaignlegalcenter.org

Ruth M. Greenwood
Annabelle E. Harless
CAMPAIGN LEGAL CENTER
73 W. Monroe St., Suite 322
Chicago, IL 60603

Counsel for League of Women Voters *Appellees*

Appellees[1] respectfully move, pursuant to Supreme Court Rule 21, that this Court construe the Legislative Appellants'[2] stay application as a jurisdictional statement, note probable jurisdiction, and establish an expedited schedule for merits briefing and oral argument of the Legislative Appellants' appeal of the District Court's unanimous judgment that North Carolina's current Congressional map is an unconstitutional partisan gerrymander that must be promptly remedied. An expedited briefing schedule is warranted given the urgency of resolving this appeal in time to implement a constitutional plan for the 2018 Congressional election in North Carolina. Expedited briefing will also enable the Court to address the constitutionality of partisan gerrymandering—a practice that is "incompatible with democratic principles," *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. __, 135 S. Ct. 2652, 2658 (2015) (quotations

[1] "Appellees" include both the *Common Cause* and *League of Women Voters* Appellees. The *Common Cause* Appellees are Common Cause; the North Carolina Democratic Party; Larry D. Hall; Douglas Berger; Cheryl Lee Taft; Richard Taft; Alice L. Bordsen; Morton Lurie; William H. Freeman; Melzer A. Morgan, Jr.; Cynthia S. Boylan; Coy E. Brewer, Jr.; John Morrison McNeill; Robert Warren Wolf; Jones P. Byrd; John W. Gresham; and Russell G. Walker, Jr. The *League of Women Voters* Appellees are the League of Women Voters of North Carolina; William Collins; Elliott Feldman; Carol Faulkner Fox; Annette Love; Maria Palmer; Gunther Peck; Ersla Phelps; John Quinn, III; Aaron Sarver; Janie Smith Sumpter; Elizabeth Torres Evans; and Willis Williams.

[2] The "Legislative Appellants" are Senator Robert Rucho, in his official capacity as co-chair of the Joint Select Committee on Congressional Redistricting; Representative David Lewis, in his official capacity as co-chair of the Committee; Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives; and Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate. The remaining defendants—A. Grant Whitney, Jr., in his official capacity as Chairman and acting on behalf of the North Carolina State Board of Elections ("Whitney"); the North Carolina State Board of Elections (collectively, with Whitney, the "Board"); and the State of North Carolina (the "State")—have not filed a notice of appeal.

omitted)—in the contexts of Congressional elections (unlike *Gill v. Whitford*, No. 16–1161) and a statewide challenge (unlike *Benisek v. Lamone*, No. 17–333).

STATEMENT

In early 2016, Republican legislators in North Carolina enacted a Congressional districting plan (the "2016 Plan") to replace their prior plan, which had been invalidated as an unconstitutional racial gerrymander. *See Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017). The 2016 Plan is a brazen and undeniable partisan gerrymander. Nobody disputes this: the Legislative Appellants responsible for devising the 2016 Plan expressly admitted that the map is a partisan gerrymander, and the criteria the North Carolina legislature adopted for the map included explicit, written requirements that the map be drawn to perpetuate the 10–3 Republican "partisan advantage" of the prior, invalidated map. Just as intended, 10 Republicans and 3 Democrats were elected to Congress from North Carolina in 2016. Thus, Republicans won 77% of North Carolina's Congressional seats to Democrats' 23%—even though Republicans received just 53% of the statewide Congressional vote to Democrats' 47%.[3]

The *Common Cause* Appellees filed a lawsuit challenging the 2016 Plan as a partisan gerrymander that violates the First Amendment, the Equal Protection

[3] Having set forth the facts and history of this case at length in their stay oppositions, Appellees respectfully direct the Court to those discussions for further detail. *See Common Cause* Plaintiffs' Opposition to Emergency Application for Stay Pending Resolution of Direct Appeal to this Court, No. 17A745 (Jan. 17, 2018) ("*Common Cause* Stay Opp."), at 4–17; Response in Opposition to Emergency Application for Stay Pending Resolution of Direct Appeal to this Court, No. 17A745 (Jan. 17, 2018) ("*League* Stay Opp."), at 7–15.

Clause of the Fourteenth Amendment, and Article I, §§ 2 and 4. The *League of Women Voters* Appellees filed a separate lawsuit asserting First and Fourteenth Amendment claims. The cases were consolidated and, following a four-day bench trial in October 2017, the District Court issued its opinion holding unanimously that the 2016 Plan is a partisan gerrymander that violates the Equal Protection Clause and Article I, §§ 2 and 4, and holding by a 2–1 majority that the 2016 Plan also violates the First Amendment.

On January 11, 2018, four members of the North Carolina General Assembly who were named as defendants—but *not* the State of North Carolina or its Board of Elections, both of which were parties below and are bound by the District Court's judgment—noticed an appeal to this Court and moved the District Court to stay its judgment pending the resolution of that appeal. On January 16, 2018, the District Court denied that motion in a unanimous *per curiam* opinion. *See Common Cause v. Rucho*, No. 1:16–cv–1026 (M.D.N.C. Jan. 16, 2016).

Separately, on January 12, 2018, the same Legislative Appellants filed an emergency stay application with this Court. In their application, the Legislative Appellants stated that they "have no objection should this Court prefer to construe this application as a jurisdictional statement and set this case *for expedited merits briefing and argument*." Emergency Application for Stay Pending Resolution of Direct Appeal to this Court, No. 17A745 (Jan. 12, 2018), at 19 n.2 (emphasis added). The *Common Cause* and *League of Women Voters* Appellees both also requested that the Court, if it granted the stay, "set a briefing and argument schedule that would

allow sufficient time for a constitutionally compliant map to be adopted before the November 2018 Congressional elections." *Common Cause* Stay Opp. at 3; *see id.* at 33–34; *League* Stay Opp. at 5–6 ("[M]erits briefing should be expedited so as to allow a decision this Spring, in time for a new plan to be used in the 2018 election. A single election under an unconstitutional map is one too many; four are intolerable."). On January 18, 2018, the Court granted the stay "pending the timely filing and disposition of an appeal in this Court." 583 U.S. __ (Jan. 18, 2018). The Court's order is silent on the briefing and argument schedule for the appeal, leaving the rights of North Carolina voters in limbo.

Notably, neither the State nor the Board joined in the Legislative Appellants' stay application. On January 16, 2018, counsel for the Board informed the undersigned counsel that the Board stands ready to implement the 2018 elections process *whatever* the schedule may be. Unfortunately, the Board's willingness to give North Carolinians an opportunity to elect their members of Congress in 2018 under a constitutional map will be for naught if this appeal is not resolved in time for the Board to implement a new map should Appellees prevail.

ARGUMENT

An expedited schedule for merits briefing and oral argument is warranted because the issues presented concerning the constitutionality of partisan gerrymandering are of exceptional importance and because the resolution of this case is highly time-sensitive. This Court has followed a similar approach in other cases, treating a stay application as a jurisdictional statement and granting

expedited briefing and argument. *See, e.g.*, *Perry v. Perez*, 565 U.S. 1090 (2011) (holding that "the application for stay is treated as jurisdictional statement, and in each case probable jurisdiction is noted"); *see also Clinton v. Glavin*, 525 U.S. 924 (1998) (granting a "motion to expedite consideration of the jurisdictional statement and to set an expedited briefing schedule").

If the Court leaves the stay in place without expediting resolution of this appeal, the 2018 North Carolina congressional election will likely proceed under the existing plan, which was found by the District Court to violate the Equal Protection Clause of the Fourteenth Amendment, the First Amendment, and Article I, §§ 2 and 4 of the Constitution. The cost of leaving resolution of this appeal until it is too late to redraw the Congressional district lines in North Carolina is extraordinarily high: if this Court ultimately affirms the District Court's judgment and declares the 2016 Plan an unconstitutional partisan gerrymander, but that decision comes too late for the map to be redrawn in time for the 2018 election, then North Carolina voters will have voted in *four consecutive Congressional elections* under unconstitutional maps. The Court should not risk perpetuating—or being seen as condoning—this sordid history of constitutional violations.

Expedited merits briefing and oral argument are also warranted because the questions presented in this case overlap but are not co-extensive with issues now before the Court in *Gill* and *Benisek*. Thus, those cases will not necessarily resolve all of the issues presented here. As the District Court noted, "[*Gill*] differs from the

instant case in a number of significant ways," D. Ct. Op. at 13 (quotations omitted),[4] and "*Benisek* also meaningfully differs from the instant case from a legal perspective," *id.* at 16. For example, while the plaintiffs in *Gill* reside in many (but not all) of Wisconsin's 99 State Assembly districts, and *Benisek* concerns only a single Congressional district in Maryland, Appellees in this case reside in all 13 Congressional districts in North Carolina and thus unquestionably have standing to assert both statewide and district-by-district challenges to the 2016 Plan. The appeals in *Gill* and *Benisek* also do not include Article I claims—nor could *Gill,* which concerns a state legislative map rather than a Congressional map—whereas the District Court in this case "unanimously concluded that the 2016 Plan violates provisions in Article I of the Constitution that pertain only to congressional redistricting." D. Ct. Op. at 14. Finally, the factual records differ: the record in this case contains overt and undisputed evidence—including *explicit admissions*—of the Legislative Appellants' intent to discriminate against Democratic voters in North Carolina, dilute their votes, and dictate the electoral outcome. As the District Court noted, the record here further includes "numerous persuasive empirical analyses demonstrating the discriminatory partisan intent motivating adoption of the 2016 Plan, the 2016 Plan's discriminatory effects, and the lack of legitimate justification for those effects." D. Ct. Op. at 15. Not all of these analyses

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

were relied upon by the District Court in *Gill* (even though most but not all were presented at trial), and none of them were employed in *Benisek*.

Thus, while the issues presented in this case are integrally related to those in *Gill* and *Benisek*, this appeal will not necessarily be resolved by those cases. Expedited briefing in this appeal will enable this Court to address the constitutionality of partisan gerrymandering in a wider range of circumstances than those before the Court in *Gill* and *Benisek* and will "yield a better informed and more enduring final pronouncement." *Arizona v. Evans*, 514 U.S. 1, 24 n.1 (1995) (Ginsburg, J., dissenting); *cf. Gratz v. Bollinger*, 539 U.S. 244, 260 (2003) (noting that the Court had granted certiorari in *Gratz* so that it could be considered alongside *Grutter v. Bollinger*, thereby permitting the Court to "address the constitutionality of the consideration of race in university admissions in a wider range of circumstances").

Given the urgent nature of this appeal and its relationship with *Gill* and *Benisek*, Appellees request that the Legislative Appellants and any amicus curiae in support be directed to file briefs on or before March 1, 2018; all Appellees and any amicus curiae in support be directed to file opposition briefs on or before April 2, 2018; the Legislative Appellants be directed to file a reply on or before April 16, 2018; and oral argument be scheduled for the week of April 23, 2018.

CONCLUSION

For the reasons stated, Appellees respectfully request that the Court construe the Legislative Appellants' stay application as a jurisdictional statement, note

probable jurisdiction, and order expedited merits briefing and oral argument on the schedule proposed above.

Respectfully submitted,

Emmet J. Bondurant
Counsel of Record for
Common Cause *Appellees*
Benjamin W. Thorpe
BONDURANT MIXSON & ELMORE LLP
1201 West Peachtree Street, NW #3900
Atlanta, GA 30309
(404) 881-4100
bondurant @bmelaw.com

Gregory L. Diskant
Jonah M. Knobler
Peter A. Nelson
Elena Steiger Reich
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, NY 10036

Edwin M. Speas, Jr.
Steven B. Epstein
Caroline P. Mackie
POYNER SPRUILL LLP
301 Fayetteville Street, Suite 1900
Raleigh, NC 27601

Counsel for Common Cause *Appellees*

Paul M. Smith
Counsel of Record for League of
Women Voters *Appellees*
CAMPAIGN LEGAL CENTER
1411 K Street NW, Suite 1400
Washington, DC 20005
(202) 736-2200
psmith@campaignlegalcenter.org

Allison J. Riggs
Jaclyn Maffetore
SOUTHERN COALITION FOR SOCIAL
JUSTICE
1415 W. Hwy 54, Suite 101
Durham, NC 27707

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

Ruth M. Greenwood
Annabelle E. Harless
CAMPAIGN LEGAL CENTER
73 W. Monroe St., Suite 322
Chicago, IL 60603

Counsel for League of Women Voters *Appellees*

January 23, 2018