IN THE

SUPREME COURT OF THE UNITED STATES

No. ___

ROBERT A. RUCHO, ET AL.

Applicants,

v.

COMMON CAUSE, ET AL.,

Respondents.

ROBERT A. RUCHO, ET AL.

Applicants,

v.

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ET AL.

Respondents.

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

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

Two years ago, a divided three-judge district court panel invalidated two districts in North Carolina's congressional districting map on racial gerrymandering grounds and ordered the General Assembly to enact a new congressional districting map within 14 days. *See Harris v. McCrory* (*Harris I*), 159 F. Supp. 3d 600 (M.D.N.C. 2016), *aff'd sub nom. Cooper v. Harris* (*Harris II*), 137 S. Ct. 1455 (2017). The General Assembly promptly and dutifully complied, enacting a new map on February 19, 2016—only to have its new map challenged as well, this time on partisan gerrymandering grounds. Now, a mere month before the filing period for the 2018 elections is set to open, once again, a three-judge panel has invalidated North Carolina's duly enacted congressional map, becoming the second court in the post-*Vieth* world to purport to divine a justiciable test for partisan gerrymandering, and the first ever to discern such a test in the Elections Clauses of Article I. After taking months to issue its opinion, the three-judge panel gave the General Assembly just 14 days to enact a new map, and ordered it to submit the map along with a complete description and record of the enactment process for the district court's review once it is enacted. Adding insult to injury, the court also announced its intention to appoint a special master to draw an "alternative" map simultaneously, to be used in the seemingly inevitable event that the court finds that the General Assembly's map "fails to remedy the constitutional violation or is otherwise legally unacceptable." App. A at 190.

Simply put, after taking months to issue an opinion adopting multiple entirely novel theories of partisan gerrymandering, the three-judge court has given the General Assembly just two weeks to draw a third congressional map, which is sufficiently unlikely to pass the court's muster that the court has already decided to have a special master draw a competing map. Having already ignored the prerogatives of the political branches to play the primary role in elections to that degree, it is no surprise that the district court apparently does not even intend to decide which map to impose in time to comply with upcoming voter assignment and filing periods. In sum, the three-judge panel has used an entirely novel legal theory to hopelessly disrupt North Carolina's upcoming congressional elections.

That eleventh-hour disruption is reason enough for this Court to grant a stay pending appeal. Prohibiting the State from using the duly enacted districting map that governed its last election cycle on the eve of the commencement of the 2018 election cycle is not just practically disruptive, but represents a grave and irreparable sovereign injury. But a stay is all the more appropriate because this Court is presently considering two partisan gerrymandering cases. *See Gill v. Whitford*, No. 16-1161 (U.S.); *Benisek v. Lamone*, No. 17-333 (U.S.). One of those cases—*Gill*—was the first post-*Vieth* case to purport to identify a justiciable standard for partisan gerrymandering claims, to invalidate a duly enacted map on such grounds, and to order the state legislature to draw a new map. This Court stayed the order to draw a new map in *Gill* pending this Court's determination whether a justiciable partisan gerrymandering claim even exists.

The decision below constitutes the second-ever post-*Vieth* decision purporting to identify a justiciable theory, invalidating a duly enacted map, and ordering a new map to be drawn. That decision should likewise be stayed. There is no reason to treat this case differently from *Gill*. Indeed, the greater time exigencies here, as well as the fact that the decision below is the first ever to ground a justiciable theory of partisan gerrymandering in the Elections Clauses, only underscore the decision's novelty and the propriety of a stay. Certainly this Court's decisions in *Gill* and *Benisek* will shed light on whether the plaintiffs here have standing, whether partisan gerrymandering claims are justiciable, and, in the events both questions are answered in the affirmative, how a State is to comply with whatever new requirements the Court may impose. Particularly given the relief this Court already granted to Wisconsin, it makes no sense whatsoever to force North Carolina to immediately remedy a purported partisan gerrymandering violation and commence its 2018 election cycle under a new court-imposed map before this Court can even decide whether and under what circumstances such claims may be adjudicated.

The district court's decision is all the more problematic because it will inevitably interfere with North Carolina's congressional election cycle. As the district court is well aware, the filing period for the primary elections is set to open on February 12. If the 2018 election must proceed under a map other than the one that governed the 2016 congressional elections, then the Board of Elections needs lead to time assign voters to their new districts, potential candidates need lead time

to evaluate the new map and make filing decisions, and voters need lead time to understand where they will be voting and for whom. Yet the district court apparently does not even intend to announce what map will govern the 2018 elections until February 12 at the very earliest. The far more sensible course, and the course far more respectful of the core sovereign interests at stake, is to stay the district court's decision pending resolution of Applicants' appeal, just as this Court did in *Gill*, and ensure that this Court can determine whether and how its decisions in *Gill* and *Benisek* impact this case before it is too late to matter for the 2018 elections. Applicants therefore respectfully request that the Court grant a stay. And in all events, given the fast-approaching January 24 deadline that the district court imposed on the General Assembly to enact a new map, Applicants respectfully request a ruling from the Court on this stay application by January 22, 2018.

OPINION BELOW

The opinion of the three-judge district court enjoining the use of North Carolina's congressional map and ordering the General Assembly to enact a new districting plan by January 24, 2018, is reproduced at Appendix A.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1253.

STATEMENT OF THE CASE

Two years ago, on February 5, 2016, a divided three-judge panel for the Middle District of North Carolina concluded that two districts in North Carolina's 2011 congressional districting map, CD1 and CD12, were unconstitutional racial gerrymanders and ordered the General Assembly to draw a new map within 14

days. *See Harris I*, 159 F. Supp. 3d at 627. The General Assembly immediately set to work. Because the court's extraordinary two-week deadline made time of the essence, the chairs of the most recent Senate and House redistricting committee promptly engaged expert mapdrawer Dr. Thomas Hofeller to assist in drawing a new map. App. A at 10. In addition to instructing Dr. Hofeller to comply with the myriad state and federal districting requirements and traditional districting criteria, they also instructed him not to consider racial data *at all*, but to consider political data and endeavor to draw a map that was likely to preserve the existing partisan makeup of the State's congressional delegation. App. A at 11.

Meanwhile, the House and the Senate appointed a new districting committee, and the committee adopted seven criteria to govern the redistricting effort. Those criteria included creating districts with populations "nearly as equal as practicable," ensuring contiguity and compactness, and making "reasonable efforts" to avoid pairing incumbents. App. A at 14. The criteria also stated that racial data shall not be used or considered, but that political data may be used, and that "reasonable efforts" shall be made "to maintain the current partisan makeup of North Carolina's congressional delegation," which at the time was 10 Republicans and 3 Democrats. App. A at 14. The committee unanimously adopted five of the seven districting criteria and adopted the two dealing with racial and political data and partisan advantage on a party-line vote. The committee ultimately approved the map drawn with Dr. Hofeller's assistance by a party-line vote, and on February 19, 2016, the

General Assembly enacted the map, with minor modification, on party-line votes as well. App. A at 17-18.

As a matter of traditional districting criteria, the 2016 Plan fares well by comparison to the 2011 map. Indeed, the 2016 Plan adheres more closely to traditional districting criteria than any congressional map North Carolina has used in the past 25 years. It preserves 87 (out of 100) whole counties and splits only 12 (out of well more than 2000) precincts across the entire State. App. A at 18. No county is split into more than two congressional districts. By contrast, the 1992 plan that spawned the infamous "serpentine" version of CD12 divided 44 counties, seven of which were split into three congressional districts, and split at least 77 precincts. Legislative Defs.' Proposed Findings of Fact and Conclusions of Law at 143, ECF No. 114. The 1997 plan divided 22 counties, the 1998 plan divided 21, the 2001 plan divided 28, and the 2011 plan divided 40. *Id.* The 2016 Plan also is more compact "[u]nder several statistical measures" than the 2011 Plan, and it paired only two incumbents. App. A at 18.

Because the 2016 Plan was enacted on the order of the district court in *Harris*, that court claimed the power to review the map—not only to determine whether it remedied the racial gerrymander the court had found, but for any and all potential legal or constitutional deficiencies. he *Harris* plaintiffs filed objections, claiming both that the map did not remedy the racial gerrymandering violation because the General Assembly did not "conduct [a] racial analysis" or consider racial data when drawing it, and that the map was an unconstitutional *partisan*

gerrymander. *See* Pls.' Objs. and Mem. of Law Regarding Remedial Redistricting Plan at 25, 30-32, No. 1:13-cv-949 (M.D.N.C. Mar. 3, 2016), ECF No. 157. The district court rejected both of those challenges, concluding that the plaintiffs "failed to state with specificity" why the General Assembly's decision *not* to consider race failed to cure the racial gerrymander, and had not provided a "clear and manageable" standard that would render their partisan gerrymandering claim justiciable. *Harris v. McCrory*, No. 1:13-cv-949, 2016 WL 3129213, at *2 (M.D.N.C. June 2, 2016). At the same time, the court essentially invited further challenges to the 2016 Plan, twice expressly stating that its decision "does not constitute or imply an endorsement of, or foreclose any additional challenges to," the plan. *Id.* at *1, *3.

The *Harris* plaintiffs filed a jurisdictional statement challenging the partisan gerrymandering aspect of that order, and this Court directed the parties to file supplemental briefs addressing whether the plaintiffs had standing to press that claim, and whether the order denying their objections to the 2016 Plan is appealable. *See Harris v. Cooper*, No. 16-166 (U.S.). The parties filed supplemental briefs on June 6, 2017, and the case has remained pending on this Court's docket since then.

Shortly after the *Harris* district court issued its decision denying the plaintiffs' objections, Common Cause, the North Carolina Democratic Party, and 14 voters took the court up on its implicit invitation to further challenge the 2016 Plan and filed one of the two lawsuits out of which this application arises, alleging that the 2016 Plan is an unconstitutional partisan gerrymander. About a month later,

the League of Women Voters and 12 other voters followed suit. Collectively, their two complaints allege that the 2016 Plan is an unconstitutional racial gerrymander that violates the Equal Protection Clause; the First Amendment; Article I, Section 2 of the Constitution ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States…."); and Article I, Section 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof….").

The cases were assigned to a three-judge district court, which consolidated them and originally scheduled trial for June 26, 2017, but subsequently postponed trial on its own motion. Shortly thereafter, on June 19, 2017, this Court issued orders agreeing to hear the *Gill* case on the merits and staying the *Gill* district court's order directing Wisconsin to enact a conditional remedial districting plan for its 2018 elections by November 1, 2017. *See Gill v. Whitford*, No. 16A1149. At that point, Applicants promptly filed a motion in the district court asking the court to stay proceedings in this case pending resolution of *Gill*, explaining that it would make little sense to proceed with a trial while this Court was actively considering whether partisan gerrymandering claims are justiciable at all, and, if so, whether the same "efficiency gap" measure pressed by the plaintiffs in this case is a viable means of trying to prove them. *See* Legislative Defs.' Mem. of Law in Supp. of Mot. to Stay, ECF No. 75. But the district court denied the motion and forged ahead, holding a four-day bench trial in mid-October.

Approximately three months later, on January 9, 2018, the district court issued a divided opinion holding that plaintiffs have standing to bring their statewide partisan gerrymandering claims, that such claims are justiciable under the Equal Protection Clause, the First Amendment, and Sections 2 and 4 of Article I, and that the 2016 Plan violates all four of those provisions. *See* App. A at 25-187. Judge Osteen concurred in part and dissented in part, rejecting the exceedingly low intent standard the majority adopted for Equal Protection Clause claims, and dissenting from the majority's conclusion that the 2016 Plan violates the First Amendment because he was "unconvinced that Plaintiffs have proven an injury to their First Amendment rights." App. A at 192.

The district court immediately enjoined the State from using the 2016 Plan in any future elections, declaring that course of action the appropriate one "[a]bsent unusual circumstances." App. A at 187. Although the court acknowledged that "the deadline for candidates to file to compete in the 2018 election" is "fast approaching," it concluded that the State should nonetheless be prohibited from using its map because "the 2018 general election remains many months away and the 2018 election cycle has not yet formally begun." App. A at 187, 189. While the court stated that it would not ordinarily "afford a legislature a second 'bite-at-the-apple' to enact a constitutionally compliant plan" after finding its first remedial map deficient, it concluded that it would make an exception to that purported rule here because, "at the time the General Assembly drew the 2016 Plan, the [Supreme]

Court had not established a legal standard for adjudicating partisan gerrymandering claims." App. A at 188.

The court then ordered the General Assembly to enact a new map by 5pm on January 24, thus giving it a mere two weeks—the absolute *minimum* time permissible under state law, *see* N.C. Gen. Stat. §120-2.4(a) (the "period of time" to draw a new map if a court finds a duly enacted one deficient "shall not be less than two weeks")—to draw, consider, debate, and vote on a new congressional map, and further ordered the General Assembly to submit its new map, along with a description and entire record of the process through which it is enacted, to the court by January 29. App. A at 189-90. And while the filing period for the 2018 elections is set to open on February 12, the court set a briefing schedule under which objections to the General Assembly's map will not even be fully briefed until then. App. A at 190.

Finally, the court deemed "it appropriate to take steps to ensure the timely availability of an alternative remedial plan for use in the event the General Assembly does not enact a remedial plan or enacts a plan that fails to remedy the constitutional violation or is otherwise legally unacceptable." App. A at 190. The court accordingly announced its intention to appoint a special master "to assist the Court in drawing an alternative remedial plan," and directed the parties to submit a list of mutually acceptable candidates by January 16. App. A at 190-91.

Applicants filed an emergency motion first thing in the morning on January 11 asking the district court to stay its decision pending an appeal to this Court, and

expressly asked the court to rule on the motion that day, to ensure sufficient time for this Court to consider an emergency stay application if necessary. Legislative Defs.' Emergency Mot. to Stay, ECF No. 119. Instead, the district court issued an order giving the plaintiffs until 5pm on January 16—more than a third of the time period the General Assembly has been given to draw and enact a new map—to respond to the stay motion. App. B at 2. And the court expressly ordered that all of "Defendants' obligations under the Order remain in effect during the pendency of this Motion." *Id.* Because waiting until (at a minimum) the evening of January 16 to file a stay application would leave this Court with very little time given the looming January 24 deadline for the General Assembly to enact a new map, Applicants have filed this application now to ensure that this Court has sufficient time to consider it.

REASONS FOR GRANTING THE APPLICATION

To obtain a stay pending appeal, an applicant must show (1) a reasonable probability that the Court will consider the case on the merits; (2) a fair prospect that a majority of the Court will vote to reverse the decision below; and (3) a likelihood that irreparable harm will result from the denial of a stay. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Those factors are readily satisfied here. The issues at the heart of this case are the same as those at the heart of both *Gill* and *Benisek*—namely, whether partisan gerrymandering claims are justiciable and, if so, under what standard(s). Because the resolution of *Gill* and *Benisek* will inevitably impact the resolution of this case, it is certainly "reasonably probable" that the Court will hold this case pending their resolution, just as it is presently holding the partisan

gerrymandering petition filed by the *Harris* plaintiffs challenging the same map at issue here. There is also certainly the requisite "fair prospect" that one or both of those cases will be resolved in a way that necessitates reversal or vacatur in this case.

Finally, for the same reasons that this Court found the remaining stay factors satisfied when it granted a stay in *Gill*, those factors are satisfied here as well. Indeed, a grant of a stay here follows almost directly from the grant of a stay in *Gill*. It makes no sense for a sovereign State to have to comply with a constitutional norm that may not exist. There are only two salient differences between this case and *Gill*, both of which cut strongly in favor of a stay pending appeal. First, the various deadlines for the 2018 elections are much nearer in time now than when the Court granted the stay in *Gill*. Second, the decision below is even more novel than *Gill*, in that it is the first decision ever to ground a justiciable partisan gerrymandering claim in the Elections Clauses. Accordingly, the Court should issue a stay to preserve the status quo pending appeal and ensure that North Carolina will not be forced to enact a third congressional map on an exceedingly expedited basis or commence its fast-approaching 2018 election cycle under a map that the district court may well have no authority to impose.

I. There Is A Reasonable Probability That The Court Will Hold Or Review This Case, And A Fair Prospect That The Court Will Vacate Or Reverse The Decision Below.

This case plainly satisfies the first two factors in this Court's stay analysis, as there is both "a reasonable probability" that the Court will either hold this case or set it for consideration on the merits, and a "fair prospect" that the Court will vacate or

reverse the decision below. The threshold questions in this case are (1) whether the plaintiffs have standing to press their statewide partisan gerrymandering claims, (2) if so, whether those claims are justiciable under any or all of the constitutional provisions the plaintiffs invoked, and (3) if so, what standard(s) a court should apply when adjudicating those claims. Those are precisely the same threshold questions this Court is actively considering in the pending *Gill* and *Benisek* cases. And if this Court were to conclude either that statewide partisan gerrymandering claims fail for lack of standing, or that some or all forms of partisan gerrymandering claims are nonjusticiable, then that would necessitate reversal of the decision below. Accordingly, so long as there is a "fair prospect" that the defendants in either *Gill* or *Benisek* will prevail on either of those issues, then there is a fair prospect that the defendants in this case will as well.

There is also a fair prospect that this Court will reverse or vacate even if the plaintiffs in one of both of those pending cases prevail. Even assuming partisan gerrymandering claims are justiciable under one of the assorted constitutional provisions the plaintiffs have invoked here, the district court candidly acknowledged that "th[is] Court ha[s] not established a legal standard for adjudicating" such claims. App. A at 188. Accordingly, even if a majority of this Court ultimately concludes that some or all forms of partisan gerrymandering claims may proceed, the Court may well vacate and remand for the district court to reconsider the plaintiffs' claims under whatever standard(s) the Court may articulate.

That result is all the more likely given the dubious standards (or lack thereof) the majority embraced. For instance, on the plaintiffs' Equal Protection Clause claims, the majority concluded that *any* intent to district for partisan advantage is constitutionally suspect, inferring from the fact that a majority of this Court has rejected "sole" or "predominant intent" standards as too "indeterminate" and "vague," *Vieth v. Jubelirer*, 541 U.S. 267, 284-85 (2004) (plurality op.); *see also League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 417-18 (2006) (opinion of Kennedy, J.), that an even *less* demanding intent standard must be the right one. App. A at 84-86. The majority readily acknowledged that this would make the intent prong easier to satisfy for partisan gerrymandering claims than for racial ones, but it deemed that anomalous result "appropriate" on the theory that "redistricting bodies can—and, in certain circumstances, should—consider race in drawing district lines," while there is purportedly never "*any* legitimate constitutional, democratic, or public interest" in considering partisan advantage. App. A at 84 n.16. Accordingly, in the district court's view, the Equal Protection Clause—a provision indisputably passed for the principal purpose of prohibiting race-based discrimination—is less offended by divvying up voters on the basis of race than by divvying up voters on the basis of politics.

That startling proposition finds no support whatsoever in this Court's cases. To the contrary, as Judge Osteen explained in rejecting that aspect of the majority's test, "[t]he Court has recognized many times in redistricting and apportionment cases that some degree of partisanship and political consideration is constitutionally

permissible in a redistricting process undertaken by partisan actors." App. A at 196-97 (collecting cases). Indeed, even Justices who have taken the position that partisan gerrymandering claims are justiciable have acknowledged that *some* degree of districting for partisan advantage is both inevitable and permissible. *See, e.g.*, *Vieth*, 541 U.S. at 344 (Souter, J., dissenting) ("[S]ome intent to gain political advantage is inescapable whenever political bodies devise a district plan, and some effect results from the intent …. Thus, the issue is one of how much is too much[.]"); *id.* at 360 (Breyer, J., dissenting) ("The use of purely political boundary-drawing factors, even where harmful to the members of one party, will often nonetheless find justification in other desirable democratic ends[.]"); *Davis v. Bandemer*, 478 U.S. 109, 164-65 (1986) (Powell, J., concurring in part and dissenting in part) ("the common practice of the party in power to choose the redistricting plan that gives it an advantage at the polls" does not "amount[] to unconstitutional gerrymandering").

The majority embraced an equally amorphous, indeterminate, and unsustainable "discriminatory effects" test, concluding that "a plaintiff must show that a districting plan's bias towards a favored party is likely to persist in subsequent elections such that an elected representative from the favored party will not feel a need to be responsive to constituents who support the disfavored party." App. A at 120. The majority did not purport to identify how much "bias" must exist or persist, or what evidence will suffice to prove that it does. Instead, it concluded that plaintiffs may rely on any and all manner of social science metrics to try to prove their case under a "totality of the evidence" approach, and ultimately need

only demonstrate that the plan has some "discernable discriminatory effects." App. A at 144. That hardly amounts to a "limited and precise rationale" for distinguishing permissible districting for partisan advantage from unconstitutional partisan gerrymandering. *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring).

The majority's First Amendment standard fares no better. According to the majority, to prove a First Amendment violation, a plaintiff must prove: "(1) that the challenged districting plan was intended to favor or disfavor individuals or entities that support a particular candidate or political party, (2) that the districting plan burdened the political speech or associational rights of such individuals or entities, and (3) that a causal relationship existed between the governmental actor's discriminatory motivation and the First Amendment burdens imposed by the districting plan." App. A at 162-63. Just as under its Fourteenth Amendment test, the first prong is proven whenever districting for partisan advantage is *any* part of a legislature's motivation. *But see, e.g.*, *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) ("Our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering"); App. A at 196-97 (collecting cases stating same). And the second prong is proven whenever that intent has anything more than a "*de minimis*" "chilling effect or adverse impact" on any First Amendment activity, be it the desire to vote, motivation to engage in political discourse, or "raising money, attracting candidates, and mobilizing voters to support … political causes and issues." App. A at 164-67.

As for the third prong, the majority's circular "causation" test asks only whether the impacts of the legislature's intent to district for at least some degree of partisan advantage can be explained by something other than its intent to district for at least some degree of partisan advantage—in other words, it asks only whether the legislature did in fact intentionally district for at least some degree of partisan advantage. App. A at 174. Accordingly, as Judge Osteen correctly observed in rejecting it, "the majority's adopted test would in effect foreclose all partisan considerations in the redistricting process" and render *any* degree of districting for partisan advantage constitutionally verboten, App. A at 201—a proposition that nearly every member of this Court to consider a partisan gerrymandering case has emphatically rejected. Thus, even assuming this Court finds partisan gerrymandering claims justiciable under the First Amendment, there is more than a fair prospect that it will reject the majority's toothless test, which would invalidate nearly every legislatively drawn districting plan in the country and essentially substitute the federal judiciary for the state legislatures as the ultimate mapdrawers, despite a host of cases reaffirming the primary role of the States. *See, e.g., Bush v. Vera*, 517 U.S. 952, 978 (1996); *Miller v. Johnson*, 515 U.S. 900, 915 (1995); *Voinovich v. Quilter,* 507 U.S. 146, 156 (1993).

Finally, there is at least a fair prospect that this Court will independently review and reverse the district court's entirely novel conclusion that partisan gerrymandering violates Sections 2 and 4 of Article I of the Constitution. *See* U.S. Const. art. I, §2 ("The House of Representatives shall be composed of Members

chosen every second Year by the People of the several States…."); art. I, §4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof…."). According to the district court, partisan gerrymandering violates Section 4 because it "exceeds" the States' "delegated authority under the Elections Clause," App. A at 178, and it violates Section 2 because it deprives "the People" of their right to elect Representatives, App. A at 181. While these additional purported constitutional violations were in part derivative of the majority's Equal Protection Clause and First Amendment holdings, *see* App. A at 180, the majority once again justified them on the theory that partisan advantage is a forbidden consideration that *always* "exceeds" a State's powers under the Elections Clause, and *always* deprives "the People" of their right to elect their representatives. *See* App. A at 180, 184. Accordingly, no matter how this Court resolves the Equal Protection Clause and First Amendment claims at issue in *Gill* and *Benisek*, there is at least a fair prospect that the Court will independently review and reverse the district court's unprecedented conclusion that Article I obviates the need to determine "[h]ow much political motivation and effect is too much." *Vieth*, 541 U.S. at 297 (plurality op.).[1]

In sum, there is undoubtedly a reasonable probability that this Court will hold this case pending resolution of *Gill* and *Benisek*, as there is at least a fair prospect that the resolution of each of those cases will impact this one and require

[1] Notably, the very same day that the district court issued its opinion, another district court rejected the proposition that "Art. I, § 4, of the Constitution prohibits any political or partisan considerations in redistricting." Memorandum at 3, *Agre v. Wolf*, No. 17-4392 (E.D. Pa. Jan. 10, 2018), ECF No. 211; *see also* ECF No. 212 at 2 ("the legal test [the plaintiffs] propose for an Elections Clause claim is inconsistent with established law").

either reversal or vacatur. Accordingly, the first two factors of the stay analysis are readily satisfied.[2]

II. The State And Its Citizens Will Suffer Irreparable Harm Absent A Stay, And The Balance Of Equities Favors A Stay.

Without a stay of the decision below, irreparable injury is certain. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012). That injury is exacerbated in the redistricting context, as "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Miller*, 515 U.S. at 915; *see also, e.g.*, *id.* at 934-35 (Ginsburg, J., dissenting) ("federalism and the slim judicial competence to draw district lines weigh heavily against judicial intervention in apportionment decisions"). Accordingly, that the district court has enjoined the use of the 2016 Plan in the fast-approaching 2018 election cycle is itself sufficient irreparable injury to warrant a stay—as is the court's demand that the General Assembly "either adopt an alternative redistricting plan" for the district court's review in a matter of weeks "or face the prospect that the District Court will implement its own." *Karcher v. Daggett*, 455 U.S. 1303, 1306 (1982) (Brennan, J., in chambers).

The irreparable injury is all the more acute given the eleventh-hour issuance of the district court's decision, and the inevitable interference with the 2018 election cycle that it will produce. The 2016 Plan has been in place for nearly two years and

[2] While Applicants submit that the most appropriate course of action at this juncture is to hold their appeal pending resolution of *Gill* and *Benisek*, Applicants 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.

was used in the most recent congressional elections. Voters thus are already familiar with the 2016 Plan and have developed relationships with incumbents elected under that plan. Moreover, candidates have been preparing to run under that plan for months, if not longer. Yet barely a month before the filing period is set to open on February 12, the district court has decreed that the 2018 elections will not take place under the 2016 Plan. And having taken nearly three months to fashion novel theories of partisan gerrymander to condemn the 2016 Plan, the three-judge court has given the General Assembly just 14 days to enact a new plan. Making matters worse, the court has instructed that not one, but two, new maps must be drawn, thus foreshadowing the court's skepticism of the General Assembly's efforts and producing a situation in which voters and candidates are entirely uncertain which of three different potential maps will govern the upcoming elections. Moreover, given the late date on which the court issued its decision and the briefing schedule it has imposed, the court will not even be in a position to decide which of the competing maps before it to select until the February 12 opening of the filing period has come and gone. The court's injunction thus is bound to "result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006).

The propriety of a stay here follows *a fortiori* from the grant of a stay in *Gill*. There, the district court issued its remedial order *more than a year* before the 2018 election cycle was set to commence, and gave the State *nine months* to draw a new map. Moreover, the court specifically emphasized that the Wisconsin mapdrawers

had "produced many alternate maps, some of which may conform to constitutional standards," which it thought would "significantly assuage the task now before them." *Whitford v. Gill*, No. 15-cv-421-bbc, 2017 WL 383360, at *2 (W.D. Wisc. Jan. 27, 2017). Here, by contrast, the district court issued its decision more than a year after *Gill* and barely a month before the 2018 election cycle is set to commence, and gave the General Assembly a mere two weeks to enact a new map. And far from suggesting that enacting a new map that passes muster with the court would be an easy task, the court declared itself so lacking in confidence in the General Assembly's ability to accomplish that task that it announced its intention to appoint a special master to simultaneously draw an alternative map to be used should the court yet again find the General Assembly's effort deficient.[3] Moreover, while *Gill* was the first post-*Vieth* decision to invalidate a map on partisan gerrymandering grounds, this case is only the second, and is the first ever to rely on the Elections Clauses. Accordingly, if a stay was warranted in *Gill*, then a stay is even more appropriate here.

[3] Indeed, the district court even went so far as to make the extraordinary insinuation that *all* voting-related legislation enacted by the North Carolina General Assembly is presumptively unconstitutional. App. A at 50 n.13. As the court noted in doing so, another three-judge panel, also presided over by Judge Wynn, has made clear that it intends to invalidate North Carolina's state legislative districting plan any day now as well, and replace it with maps drawn by a special master. *See* Order, *Covington v. North Carolina*, No. 1:15-cv-399 (M.D.N.C. Oct. 26, 2017), ECF No. 202. While the legislative defendants in that case have repeatedly implored the court to issue a prompt decision, in hopes of avoiding yet another eve-of-election emergency stay application to this Court, the panel has refused to do so. *See, e.g.*, Order, ECF No. 228 (Dec. 12, 2017) (denying motion to expedite). Accordingly, the General Assembly will in all likelihood have both its congressional *and* its state plans invalidated mere weeks before the 2018 election cycle is set to commence, and, absent intervention by this Court, will in all likelihood have both plans replaced by plans drawn by a special master of the district court's choosing.

A stay pending appeal is also in the public interest. The public is always well-served by stability and certainty, and always disserved when the state legislature is forced to devote considerable resources to empty gestures. And the public interest will further be served by preserving this Court's ability to consider the merits of this case before the district court's order inflicts irreparable harm on a sovereign State. This Court should therefore follow its "ordinary practice" and prevent the district court's order "from taking effect pending appellate review." *Strange v. Searcy*, 135 S. Ct. 940, 940 (2015) (Thomas, J., dissenting) (citing *Herbert v. Kitchen*, 134 S. Ct. 893 (2014), and *San Diegans for Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301 (2006) (Kennedy, J., in chambers)).

CONCLUSION

For the foregoing reasons, Applicants respectfully request that this Court grant this emergency application for a stay of the district court's order pending resolution of Applicants' direct appeal of that order. Given the January 24, 2018, deadline the district court has imposed for the General Assembly to enact a new congressional districting map, Applicants further request that, if possible, the Court rule on this application by January 22, 2018.

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