IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

STATE OF NORTH CAROLINA, et al.,

Applicants,

v.

SANDRA LITTLE COVINGTON, et al.,

Respondents.

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

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

This is a case of déjà vu all over again. Less than 24 hours after this Court issued a stay of a decision invaliding North Carolina's *congressional* districting map, the Middle District of North Carolina was at it again. This time, a three-judge panel (the same one this Court summarily reversed last Term for trying to order an off-cycle special election) has invalidated North Carolina's *state* districting maps on the eve of the commencement of the 2018 election cycle. While the congressional maps were invalidated based on a novel theory of partisan gerrymandering, the state maps have run afoul of an equally novel theory of non-racial racial gerrymandering. Even though it is undisputed that the 2017 Plan was drawn without any consideration of race, the three-judge court still rejected it for failing to adequately remedy the "effects" of a prior finding of racial gerrymandering in the 2011 Plan. That ruling is unprecedented. The closest analog is the decision of a three-judge court in Texas that invalidated a remedial plan adopted without consideration of race based on perceived intentional discrimination in an earlier map. This Court promptly stayed that ruling and will resolve the case on the merits this Term. *See Abbott v. Perez*, Nos. 17A225 & 17A245 (U.S.). The orders below should likewise be stayed and either considered on the merits in due course or held for and vacated in light of the forthcoming ruling in *Abbott*.

In fact, the finding of racial gerrymandering in a map drawn without consideration of race is just the tip of the iceberg when it comes to the flaws in the

decision below. The Court lacked jurisdiction to consider the challenges to the 2017 Plan in the first place, as plaintiffs refused to amend their complaint to challenge that new legislation after the General Assembly repealed the 2011 Plan. To make matters worse, the three-judge court allowed plaintiffs to expand their case to bring state-law challenges to districts never even challenged in their original lawsuit. The court then redrew those districts based on state-law claims that are jurisdictionally invalid three times over. Not only is there no properly pleaded claim challenging the 2017 Plan, but no plaintiff even lives in those districts, and the federal courts have no power to enjoin state districts on state-law claims. There is neither a plaintiff with standing nor a federal-law claim as to any of those districts. There is essentially no prospect whatsoever that this aspect of the decision below will survive this Court's appellate review, which is reason enough to enter a stay.

But there is more. The maps the district court imposed were drawn by a special master who was appointed to draw them before the district court even found any violations, with the General Assembly expressly taken out of the process based on a combination of procedural machinations and a misguided rule that legislatures have but one chance to remedy a racial gerrymandering problem. Even putting aside that the General Assembly's first effort remedied the impermissible use of race in the most direct way possible—namely, by redrawing the maps with no consideration of race—this one-bite-at-the-apple theory is profoundly misguided. In the end, there is no plausible scenario in which the decisions below will withstand appellate review and no reason that North Carolina should have to conduct its 2018 state house elections

under a map drawn by a special master and a court without jurisdiction. This Court should enter a stay and either note probable jurisdiction or dispose of the appeal in light of *Abbott*.

OPINIONS BELOW

The opinion of the three-judge district court invalidating the challenged districts and imposing a districting plan designed by a court-appointed special master is reproduced at App. A. The three-judge district court's previous order appointing a special master is reproduced at App. B.

JURISDICTION

While the decision of the three-judge district court should be vacated for lack of jurisdiction, this Court has jurisdiction over Applicants' appeal of that decision under 28 U.S.C. §1253.

STATEMENT OF THE CASE

In July 2011, the North Carolina General Assembly enacted a state legislative districting plan that was then used in the 2012 and 2014 state legislative elections. In May 2015, after the North Carolina Supreme Court rejected various state and federal challenges to the 2011 Plan, *see Dickson v. Rucho*, 766 S.E.2d 238 (N.C. 2014), plaintiffs turned to the federal courts, filing this lawsuit in the U.S. District Court for the Middle District of North Carolina alleging that 28 districts in the 2011 Plan were unconstitutional racial gerrymanders. *Covington v. North Carolina*, 316 F.R.D. 117, 124 (M.D.N.C. 2016). Plaintiffs did not assert a vote-dilution claim under Section 2 of the Voting Rights Act or make any allegations based on the effects of the districts on minority voting power.

The court granted plaintiffs' request to convene a three-judge district court, *see* 28 U.S.C. §2284, and in August 2016, the three-judge district court invalidated the 2011 Plan. *Covington*, 316 F.R.D. at 124. The court agreed with the plaintiffs that race was the predominant factor in the design of each challenged district, and that the General Assembly's use of race was not "supported by a strong basis in evidence and narrowly tailored to comply with [the Voting Rights Act]." *Id.* at 176. The court declined to require changes before the November 2016 election, but ordered the General Assembly to enact a new districting plan before the next regularly scheduled election in 2018. *Id.* at 176-78. The State appealed the district court's judgment to this Court. *See North Carolina v. Covington*, No. 16-649.

Three weeks after the November 2016 election, and while the State's appeal was pending, the district court entered a further order requiring the State to enact a new districting plan by March 15, 2017, and to hold special primary and general elections in the fall of 2017 in every district that was modified in the new plan. *Covington v. North Carolina*, No. 15-CV-399, 2016 WL 7667298 (M.D.N.C. Nov. 29, 2016). The State separately appealed that order to this Court, *North Carolina v. Covington*, No. 16-1023, and this Court granted a stay of the remedial order pending appeal, *North Carolina v. Covington*, 137 S. Ct. 808 (2017). In June 2017, the Court summarily affirmed the district court's merits ruling, *North Carolina v. Covington*, 137 S. Ct. 2211 (2017), but summarily vacated its remedial order, *North Carolina v. Covington*, 137 S. Ct. 1624 (2017). In vacating the remedial order, the Court explained that the district court had failed to undertake the required equitable

weighing process, instead "address[ing] the balance of equities in only the most cursory fashion" and "provid[ing] no meaningful basis for even deferential review." *Id*. at 1626. Accordingly, the Court "vacate[d] the District Court's remedial order and remand[ed] the case for further proceedings." *Id*. Although the plaintiffs asked this Court to expedite its issuance of its judgment so they could seek a special election *yet again*, this Court denied that request. Accordingly, the Court's judgment issued in the ordinary course on June 30, 2017.

Meanwhile, the district court wasted no time getting to work on another remedy. Indeed, the court "invite[d]" the parties to brief the remedial issue *three weeks before* this Court issued its judgment returning jurisdiction to the district court. Notice Inviting Position Statements, ECF 153. The district court then issued an order on July 31, 2017, declining the plaintiffs' request to impose a special election once again, and instead ordering the General Assembly to enact new "districting plans remedying the constitutional deficiencies with the Subject Districts" by September 1, 2017, and to file the newly enacted plan with the court within seven days. Order, ECF 180 at 8.[1] The court also ordered the State to file the entire legislative record for the new plan, including the criteria applied in drawing the districts; transcripts of all committee hearings and floor debates; the "stat pack" for the enacted plan; a "description of the process the Senate Redistricting Committee, House Redistricting

[1] In a separate 48-page opinion issued one week later, the district court explained in detail why it still considered a special election the more appropriate remedy and did not "mean to criticize Plaintiffs for pursuing such relief." Mem. Op., ECF 191 at 43. Instead, the district court criticized this Court for issuing its summary reversal and judgment on a date that "left precious little time to provide such relief before the start of the 2018 election cycle." *Id.*

Committee, and General Assembly followed in enacting the new plans"; any alternative plan considered; and, "as to any district with a BVAP greater than 50%, the factual basis upon which the General Assembly concluded that the Voting Rights Act obligated it to draw the district at greater than 50% BVAP." *Id.* at 8-9.

The General Assembly complied with the district court's order. On August 28, 2017, the House of Representatives passed HB 927, the House redistricting plan, and the Senate passed SB 691, the Senate redistricting plan. Each bill was sent to the other chamber of the General Assembly, and each chamber passed the other's bill on August 30, 2017. Both bills were ratified the next day, and the 2017 Plan thus officially became the duly enacted law of North Carolina. *See* Notice of Filing, ECF 184 at 1-2. Applicants then provided the court with the duly enacted maps, the underlying shapefiles, the "stat pack," all required legislative materials, and detailed descriptions of the legislative process that culminated in the enactment of the 2017 law. *See id.* at 1-10. In response to the court's question about districts "with a BVAP greater than 50%," Order, ECF 180, the General Assembly explained that it did not use *any* racial data in the drawing the districts:

> Data regarding race was not used in the drawing of districts for the 2017 House and Senate redistricting plans. No information regarding legally sufficient racially polarized voting was provided to the redistricting committees to justify the use of race in drawing districts. To the extent that any district in the 2017 House and Senate redistricting plans exceed 50% BVAP, such a result was naturally occurring and the General Assembly did not conclude that the Voting Rights Act obligated it to draw any such district.

Notice of Filing, ECF 184 at 10-11.

One week later, pursuant to a court-ordered schedule, and without filing an amended complaint or a new lawsuit, plaintiffs filed four sets of "objections" to the 2017 Plan. The first set was the only one that took issue with any of the districts that had been challenged and invalidated at previous stages of this litigation—specifically, SD21, SD28, HD21, and HD57. Although plaintiffs acknowledged that the General Assembly did not consider any racial data while drawing and enacting the 2017 Plan, Pls.' Objs., ECF 187 at 31, they nonetheless contended that the new versions of those four districts "fail to cure the racial gerrymandering violations." *Id.* at 1. The rest of plaintiffs' "objections" were brand-new, state-law complaints about districts that had never before been challenged in this litigation. Plaintiffs argued that the General Assembly violated the state constitution's prohibition on mid-decade redistricting "by unnecessarily altering … mid-decade" House Districts 36, 37, 40, 41, and 105. *Id.* at 37 (citing N.C. Const. Art. II, §§3(4), 5(4)). Plaintiffs also argued that House Districts 10 and 83 violated the North Carolina Constitution's Whole County Provision. *Id.* at 38 (citing N.C. Const. Art. II, §§3(3), 5(3)). And plaintiffs argued that SD41 violated the state constitution because "it is grossly non-compact." *Id.* at 41 (citing *Stephenson v. Bartlett*, 357 N.C. 301 (2003)).

Applicants filed a response to those objections one week later, maintaining that "this matter is moot and that if plaintiffs want to pursue additional claims, they must file a new lawsuit." Resp. to Pls.' Objs., ECF 192 at 19. Applicants explained that "[b]ecause the claims asserted by all plaintiffs are directed at legislation that has now been repealed and replaced"—namely, the 2011 Plan—plaintiffs could no longer

demonstrate any harm from those now-defunct plans, "rendering the case moot and divesting this Court of subject matter jurisdiction." *Id.* at 21. With respect to plaintiffs' state-law objections to districts never previously challenged, Applicants argued that in addition to plaintiffs' failure to file a new lawsuit directed to the 2017 law, the three-judge federal district court lacked jurisdiction to consider a state-law challenge to a state redistricting plan. *Id.* at 21-27.

After receiving additional briefing on the scope of its remedial power, the district court held a hearing on plaintiffs' fully briefed objections on October 12, 2017. That same day, the district court issued an order stating: "In order to avoid delay should the Court decide that some or all of plaintiffs' objections should be sustained the parties are directed to confer and to submit the names of at least three persons the parties agree are qualified to serve as a special master." Order, ECF 200.

One week later, the district court issued an order informing the parties that it had conducted a "careful review of the parties' written submissions, arguments, and evidence," and was "concerned" that nine of the challenged districts "either fail to remedy the identified constitutional violation or are otherwise legally unacceptable." Order, ECF 202 at 1-2. Rather than enter an order definitively resolving that question, however, the district court confirmed its intention "to appoint a Special Master pursuant to Federal Rule of Civil Procedure 53," "[i]n anticipation of the likely possibility" that it would invalidate the 2017 Plan. *Id.* at 2. The court explained that it expected the special master to assist in "developing an appropriate plan remedying the constitutional violations allegedly rendering the Subject Districts

legally unacceptable." *Id.* The district court identified Professor Nathaniel Persily as the Special Master it intended to appoint, *id.* at 3, and gave the parties two business days to raise any objections to his appointment, *id.* at 4.

Applicants objected, arguing that the appointment of a special master was both premature and procedurally improper. Opp. to Appointment, ECF 204. As they explained, before appointing a special master to craft a remedy, the court must first find a violation in need of a remedy. *Id.* at 2-6. That rule carries particular force, they further explained, in the redistricting context, where this Court has repeatedly made clear that the legislature should be given an opportunity to enact a new districting plan when its existing one has been found deficient, and where court-drawn plans should be imposed only as a last resort in extraordinary instances when the legislature is unwilling or unable to act. *Id.* at 7-8. Because, at that point, there was still time for the General Assembly to enact a new plan for the 2018 elections if the 2017 law were found deficient in some respect, Applicants implored the court to definitively resolve that question *before* forcing the State to fund a special master's effort to draw provisional remedial maps. *Id.*

The district court overruled those objections, appointed Professor Persily as Special Master, and ordered him to "submit a report and proposed plans" by December 1, 2017. App. B. at 5. The court reiterated that it "has serious concerns" that four districts "fail to remedy the identified constitutional violation" in the 2011 Plan, and that the changes to five other districts "exceeded the authorization to redistrict provided in the Court's previous orders." App. B at 1-2. But the court still

declined Applicants' request to definitively rule on the validity of the 2017 Plan so that the General Assembly would have an opportunity to remedy any deficiencies, maintaining that "[t]he State is not entitled to multiple opportunities to remedy its unconstitutional districts." App. B at 4. Instead, the court announced that it did not "anticipate[] scheduling a hearing on the [Special Master's] report [until] early January 2018." App. B at 14. And only at that point would the court "issue an order finally deciding whether the Plaintiffs' objections will be sustained and determining the districting plan to be used going forward." App. B at 3.

In the meantime, the court authorized the Special Master to "hire research and technical assistants and advisors" and to "buy any specialized software reasonably necessary," and ordered that all salaries and expenses be paid by the State. App. B at 9. The court also provided a detailed set of guidelines for the Special Master to follow in drawing his remedial maps. Among other things, the court informed the Special Master that, in direct contradiction to the race-blind policy choice that the General Assembly made, he "may consider data identifying the race of individuals or voters to the extent necessary to ensure that his plan cures the unconstitutional racial gerrymanders and otherwise complies with federal law." App. B at 8-9; *see id.* at 5-14.

The Special Master filed a "Draft Plan" on November 13, 2017, and after making minor changes in response to plaintiffs' suggestions, issued his final recommended plan ("Special Master's Plan") and report ("Special Master's Report") on December 1, 2017. The Special Master's Plan makes two categories of changes to

the 2017 Plan. First, it makes significant changes to the four districts (SD21, SD28, HD21, HD57) that the district court suggested "fail[ed] to remedy" the "impermissible use of race that rendered unconstitutional the 2011 districts." App. B at 2. Second, the Special Master's Plan restored five House districts (HD36, HD37, HD40, HD41, and HD105) to the form they had taken in the 2011 Plan, on the theory that those districts "were redrawn [in the 2017 Plan] in violation of the provision of the state constitution that prohibits redistricting more than once per decade." Special Master's Recommended Plan & Report, ECF 220 at 3. At the same time, the Special Master made changes to 15 additional adjoining districts. Applicants again objected, incorporating their previous arguments. Resp. to Special Master's Recommended Plan & Report, ECF 224.

On December 11, 2017, Applicants made a final effort to impress upon the court the need for prompt resolution, filing a Motion to Expedite asking the court to rule on plaintiffs' objections "on or before January 10, 2018—the next date that the North Carolina General Assembly is scheduled to be in session." Br. in Supp. of Mot. to Expedite, ECF 227 at 1. As they explained, that would at least "protect the State's ability to seek meaningful Supreme Court review and take additional legislative action if necessary." *Id.* Applicants also suggested that the court hold the hearing on the Special Master's Recommended Plan and Report "on or before December 22, 2017," instead of waiting until January. *Id.* The district court denied the order the next day, chastising Applicants for "seek[ing] to impose their own expedited schedule

on the Court, the Special Master, and other parties at virtually the last moment." Order, ECF 228.

Almost one month later, on January 5, 2018, the district court held a hearing on the Special Master's Report. Two weeks later, on January 19, 2018—the very last business day before, as the court had been informed, the Board of Elections must begin assigning voters to districts to complete that task before the filing period commences on February 12—the district court entered an order invalidating the 2017 Plan and requiring the State to implement the Special Master's Plan for the 2018 state legislative elections.

Remarkably, after having taken four months to resolve challenges to maps that it ordered drawn in four weeks, the court began its opinion by chastising the General Assembly for declining to draw new maps until this Court resolved its previous appeals of the district court's merits and remedial decisions. App. A at 7. In doing so, the district court made no mention of the fact that this Court had *stayed* the district court's remedial order pending appeal, and had *denied* a request to expedite issuance of its judgment after ruling on the appeals in early June. Indeed, the district court's opinion makes no mention of its first remedial order *at all*, or the fact that this Court unanimously vacated that extraordinary effort to impose off-cycle special elections, declaring the district court's order so "cursory" in its analysis of the serious equities at stake that it "provide[d] no meaningful basis for even deferential review." *Covington*, 137 S. Ct. at 1626. Instead, the district court's opinion simply proceeds

as if that first remedial order never happened, and the General Assembly sat on its hands for six months for no reason at all.

Turning to the jurisdictional issues, the court ruled that plaintiffs' challenges were not moot because "federal courts *must* review a state's proposed remedial districting plan to ensure it completely remedies the identified constitutional violation and is not otherwise legally unacceptable," App. A at 22, and because the court "has the inherent authority to enforce its own orders," App. A at 23. The court then determined that its inherent remedial authority empowered it to address not just challenges to districts that had been invalidated in the 2011 Plan, but also new, state-law challenges to previously unchallenged districts, reasoning that plaintiffs should not "be forced to incur the costs of litigating a new action" alleging that the plan "violated a different constitutional or statutory provision." App. A at 28. The court also rejected the argument that it lacks jurisdiction under the three-judge district court statute, 28 U.S.C. §2284, to consider any claims not based on a federal constitutional violation. According to the court, it could exercise pendent jurisdiction over plaintiffs' state-law claims in the interest of "judicial economy, convenience, fairness to the litigants, and comity." App. A at 30.

Turning to the merits, the court invalidated nine of the districts in the 2017 Plan—some as racial gerrymanders and some as violations of state law. In the first category were SD21, SD28, HD28, and HD57. The court made no finding that the General Assembly acted with an illicit motive in designing those districts—nor could it, given the undisputed fact that the General Assembly *did not consider race*.

Instead, the court held that these four districts "fail to remedy the racial gerrymander that served as the basis for invalidating the 2011 version of those districts." App. A at 32-33. According to the district court, courts "in [a] remedial posture … must ensure that a proposed districting plan completely corrects—rather than perpetuates—the defects that rendered the original districts unconstitutional or unlawful." App. A at 36. And while the court did not and could not claim that the General Assembly actually engaged in the irreducible minimum of a racial gerrymandering challenge—namely, consideration of race—the court nonetheless concluded that those districts "fail to completely remedy the constitutional violation," reasoning that "the General Assembly's efforts to protect incumbents by preserving district cores and through use of political data perpetuated the unconstitutional effects of the four districts that are the subject of Plaintiffs' racial gerrymandering objections." App. A at 41; *see* App. A at 44-59.

The court next ruled that HD36, HD37, HD40, HD41, and HD105 "violate the [state] constitutional prohibition on mid-decade redistricting." App. A at 60. While acknowledging that "the Supreme Court of North Carolina has not addressed the scope of the General Assembly's authority to engage in mid-decade redistricting when a decennial districting plan is found to violate the Constitution or federal law," the court determined that "the plain and unambiguous language of Sections 3(4) and 5(4) [of the North Carolina Constitution] prohibits the General Assembly from engaging in mid-decade redistricting." App. A at 60-61. Although the General Assembly had engaged in mid-decade districting only because the district court *invalidated* the duly

enacted decennial plan and enjoined the State from using it in future elections, the court reached the topsy-turvy conclusion that because "a *court* may redraw only those districts necessary to remedy the constitutional violation" "[w]hen a court must draw remedial districts *itself*," courts must impose the same constraint on state legislatures when they order them to draw remedial maps. App. A at 62 (emphasis added).

In other words, from this Court's repeated admonishments that federal courts should *avoid* interference with the legislature's duty to draw maps to the greatest extent possible, the district court drew the lesson that it was bound to *constrain* the legislature's power to determine how best to remedy the violations the court identified. Accordingly, while the court's remedial order said nothing whatsoever about which districts the General Assembly could or could not change, *see* Order, ECF 180 at 8, the court concluded that "the General Assembly exceeded its authority under our order by disregarding the mid-decade redistricting prohibition." App. A at 62. The court then proceeded to adopt the Special Master's proposed maps in full, including all the reconfigurations of other districts that the Special Master deemed "necessitated" by undoing the General Assembly's purportedly "unnecessary" alterations to those five districts, and ordered that the 2018 elections must take place under the new court-imposed plan.[2]

Applicants filed a motion for a stay pending appeal on Sunday, January 21, 2018, asking the district court to rule by the end of the day on Monday, January 22.

[2] Roughly 36 hours later, the court vacated its January 19 opinion and order and replaced it with an amended version. All cites in this application are accordingly to the court's January 21 amended opinion and order.

The district court issued an order on January 22 asking any interested parties to respond by 5pm on January 23, and plaintiffs timely filed an opposition. While the stay motion remains pending before the district court, given the exigencies, Applicants have filed this application now to ensure that this Court can resolve it as expeditiously as possible given the fast-approaching 2018 election cycle.

REASONS FOR GRANTING THE APPLICATION

A stay pending direct appeal is a well-established remedy in redistricting cases. *See, e.g.*, *Abbott v. Perez*, 138 S. Ct. 49 (2017); *Gill v. Whitford*, 137 S. Ct. 2289 (2017); *North Carolina v. Covington*, 137 S. Ct. 808 (2017); *Perry v. Perez*, 565 U.S. 1090 (2011); *Miller v. Johnson*, 512 U.S. 1283 (1994); *Karcher v. Daggett*, 455 U.S. 1303 (1982) (Brennan, J., in chambers). Indeed, this Court issued just such a stay of an order directed at North Carolina's *congressional* districts less than twenty-four hours before the extraordinary order here overturning North Carolina's *state* maps. *See Rucho v. Common Cause*, No. 17A745 (U.S.). To obtain such a stay, an applicant must show (1) a reasonable probability that the Court will note probable jurisdiction; (2) a fair prospect that a majority of the Court will vote to reverse the judgment 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 plainly satisfied here, as the district court's hostile takeover of the state redistricting process is procedurally and substantively inexcusable, and its finding of racial gerrymandering in a map drawn without consideration of race is well-nigh unprecedented. Indeed, the only thing approaching a precedent are the orders of a three-judge district court in Texas that were promptly stayed and will be briefed and argued this Term. *See Abbott*

v. Perez, Nos. 17A225 & 17A245 (U.S.). Under the circumstances, this Court is likely to note probable jurisdiction and vacate or reverse.

I. There Is A Reasonable Probability That This Court Will Note Probable Jurisdiction And Vacate or Reverse The Decision Below.

This case plainly satisfies the first two factors in the Court's stay analysis. As for the first, there is unquestionably "a reasonable probability" that the Court will review the decision below, as this case falls within the Court's appellate jurisdiction, 28 U.S.C. §1253, and this Court has "no discretion to refuse adjudication of the case on its merits" when an appeal is brought under §1253. *McCutcheon v. FEC,* 134 S. Ct. 1434, 1444 (2014). There is also unquestionably at least the requisite "fair prospect" that the Court will reverse or vacate for any number of reasons, not the least of which is that the district court did not have jurisdiction to subject the General Assembly to an *ad hoc* "preclearance" proceeding under the guise of determining whether racial gerrymandering defects in a now-repealed plan had been sufficiently "cured." And the court certainly did not have jurisdiction to entertain state-law challenges to districts that were never at issue in the federal-law litigation, and in which no plaintiff even appears to reside.

But even assuming the three-judge court had jurisdiction over some or all of the "remedial" proceeding, the decision below is still overwhelmingly likely to be reversed or vacated because it is manifestly wrong on the merits. "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007). And that is precisely what the General Assembly did when it declined to consider

race at all when drawing and enacting the 2017 Plan. Yet the district court remarkably concluded that the challenged districts were still racially gerrymandered because the General Assembly did not ensure that the various *non*-racial criteria it used would not "perpetuate the effects" of the prior racial gerrymander. In other words, the district court concluded that the General Assembly engaged in racial gerrymandering by failing to consider the racial effects of its districting criteria. That reasoning defies law and logic. The only thing close to a precedent for finding racial discrimination in maps drawn for remedial purposes *without* any consideration of race are the Texas orders that this Court stayed and then decided to review on the merits this Term. The case for a stay here is even stronger, as this Court is likely to either reverse the decision below outright or vacate it in light of its resolution of the *Abbott* proceedings.

A. The District Court Lacked Jurisdiction Over Plaintiffs' Challenges to The 2017 Plan.

The first fatal problem with the decision below is that the district court lacked jurisdiction to enter it. "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). Where, as here, a lawsuit challenges the validity of a statute, the controversy ceases to be "live" if the statute is repealed. *E.g.*, *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). If a challenged statute no longer exists, then absent unusual circumstances not present here (like actions capable of repetition yet evading review) there can be no real controversy over the repealed law,

and absent an amended complaint any cases challenging the repealed statute must be dismissed as moot. *See, e.g.*, *Burke v. Barnes*, 479 U.S. 361, 363 (1987); *Diffenderfer v. Cent. Baptist Church of Miami, Inc.*, 404 U.S. 412, 414-45 (1972). That rule applies equally to redistricting legislation. *See, e.g.*, *Growe v. Emison*, 507 U.S. 25, 39 (1993); *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 366 F. Supp. 2d 887, 901-02 (D. Ariz. 2005); *Johnson v. Mortham*, 926 F. Supp. 1460, 1469-70 (N.D. Fla. 1996).

Here, plaintiffs' lawsuit challenged only the 2011 Plan, alleging that certain districts in the plan were racially gerrymandered. Those claims became moot as soon as the 2017 Plan repealed and replaced the law creating the 2011 Plan. At that point, plaintiffs challenge to the 2011 law became moot, and plaintiffs had two options to challenge the new districting legislation: They could either seek to amend their complaint to add challenges to the 2017 law or file a new lawsuit challenging the newly enacted law. Plaintiffs did neither. Instead, they insisted on pursuing their challenges to the 2017 Plan through "objections" pressed in a remedial proceeding. But that is simply not an option. The 2017 Plan is not a "proposed remedial districting plan," App. A at 22, to take effect only upon a federal court's approval. It is a duly enacted legislative act that replaces the 2011 Plan, and both procedurally and substantively, it needs to be separately challenged. By stubbornly refusing to amend or file a new suit, plaintiffs are left without a live current case or controversy in a proceeding limited to the now-repealed 2011 Plan.

Neither *Reynolds v. Sims*, 377 U.S. 533 (1964), nor *Chapman v. Meier*, 420 U.S. 1 (1975), provides any support for the district court's contrary claim. Indeed, those cases have nothing to do with the scope of a federal court's power to review a new map enacted to replace an invalidated one; to the contrary, each involved a situation in which the court was in the extraordinary position of being forced to impose its *own* remedial plan because the legislature failed to enact a new plan altogether. And most of the lower court cases on which the district court relied did not even involve state legislation; instead, they involved municipal maps, and remedial plans that the municipality did not enact into any kind of law, but just proposed directly to the court. *See Large v. Fremont Cty.*, 670 F.3d 1133 (10th Cir. 2012); *Williams v. City of Texarkana*, 32 F.3d 1265 (8th Cir. 1994); *McGhee v. Granville Cty.*, 860 F.2d 110 (4th Cir. 1988); *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984).[3] There is a fundamental difference between a proposed map designed to be judicially imposed and a redistricting map duly enacted through legislation. A duly enacted redistricting map that repeals the earlier statute is a *new law*. Like any other law, it must be challenged in a new lawsuit (or an amended complaint) filed by a plaintiff with standing to challenge the specified aspects of that new legislation as unlawful.

In all events, even assuming the district court had jurisdiction to review the changes to the *invalidated* districts to ensure that they "cured" the racial

[3] The district court also cited *Harris v. McCrory*, No. 13-cv-949, 2016 WL 3129213 (M.D.N.C. June 2, 2016), but in that case—as in *Hunt v. Cromartie*, 526 U.S. 541, 545 n.1 (1999)—the newly enacted plan provided that the state would revert to the old plan if this Court reversed the judgment invalidating that plan, which kept the controversy over the old plan alive. The only potentially relevant case that the district court cited was *United States v. Osceola County*, 474 F. Supp. 2d 1254 (M.D. Fla. 2006), and it does not appear that any party raised the mootness issue there.

gerrymandering violation, the court certainly did not have jurisdiction to entertain entirely new state-law challenges to districts that were never even challenged in the original litigation. Indeed, federal courts do not even have the power to entertain *state-law* challenges to state districting laws. *See infra* Part I.D. Moreover, precisely because the court did not even require plaintiffs to comply with the minimal requirement of pleading actual *claims* raising those entirely new challenges, plaintiffs never even bothered to address whether they had standing to complain about those districts, which it appears they do not. *See infra* Part I.D.

As all of that underscores, abandoning the ordinary rules of jurisdiction, mootness, pleading, and procedure in the "remedial" districting context not only is inconsistent with Article III, but also has little to recommend it. Indeed, the only conceivable justification for refusing to require plaintiffs to plead their challenges to the 2017 Plan as new claims is to short-circuit both the legal analysis and the procedural protections that would apply were those challenges litigated in the ordinary course. And that is precisely what happened here—the district court not only failed to consider threshold issues like standing, but then abandoned ordinary rules of discovery and presentation of evidence, *see, e.g.*, Per Curiam Order, ECF 233, and subjected the 2017 Plan to a form of "preclearance" under which the court declared itself empowered to review the plan for any and all potential legal deficiencies, state, federal, or otherwise. The district court's failure to dismiss this case as moot once plaintiffs refused to amend their complaint to allege claims

challenging the 2017 Plan was therefore just part and parcel of the fundamentally flawed manner in which the entire "remedial" proceeding was conducted.

B. The District Court's Conclusion that the General Assembly Engaged in Racial Gerrymandering By Declining to Consider Race Is Unprecedented and Incoherent.

The district court's ruling is also likely to be reversed on the merits, as its conclusion that the General Assembly engaged in racial gerrymandering by declining to consider race is incoherent and unprecedented. To prevail on a racial gerrymandering claim, a plaintiff must prove that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Unlike a vote-dilution claim, which focuses on the effects of a districting plan on voting rights, a racial gerrymandering claim is concerned with the legislature's intent. As this Court recently put it, "[t]he constitutional violation in racial gerrymandering cases *stems from the racial purpose of state action*," and the inevitable "harms that flow from racial sorting." *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 799 (2017) (emphasis added). Accordingly, the irreducible minimum of a racial gerrymandering claim is intentional racial sorting. Indeed, that is not just the irreducible minimum; it is the essence of the claim.

Here, there is no dispute that the General Assembly did not consider race when designing the 2017 Plan—not as a predominant motive, a secondary motive, or any motive at all. That undisputed fact that should have been the end of the plaintiffs' racial gerrymandering challenges to SD21, SD28, HD21, and HD57; to state the obvious, a legislature cannot engage in racial gerrymandering by declining to

consider race. Instead, the district court took it upon itself to resuscitate those challenges by asking not whether "race was the predominant factor" in the drawing of those districts, but whether those districts "eliminate[d] the discriminatory *effects* of the racial gerrymander" that led to the 2011 Plan being invalidated. App. A at 33-35 (emphasis added). That novel proposition is triply incoherent.

At the outset, it bears repeating that the district court was not reviewing a "proposed remedial districting plan," App. A at 22; it was reviewing a duly enacted piece of legislation. The General Assembly remedied the racial gerrymandering that the district court found infected the 2011 Plan by repealing that plan and replacing it with new districting legislation. Accordingly, whatever power the district court may have had to determine whether that legislation fully "remedied" the constitutional infirmity in the previous plan was constrained by the bedrock rule that a court may not invalidate duly enacted legislation without finding that it actually violates some provision of the Constitution or federal law. The question for the district court thus was not whether the 2017 Plan "eliminate[d] the discriminatory effects of the racial gerrymander" in the 2011 Plan, but whether the challenged districts themselves were racially gerrymandered. Yet the district court never even asked—let alone made any findings on—whether "race was the predominant factor" in drawing any of the challenged districts. *Miller*, 515 U.S. at 916.

Instead, the court asked only whether the new legislature "eliminated the discriminatory effects" of the *prior* racial gerrymander. But it is the height of incoherence to ask whether the legislature "eliminate[d] the discriminatory *effects*" of

an intent-based violation like racial gerrymandering. The injury caused by racial gerrymandering flows directly from the legislature's discriminatory *intent*: the stigmatizing "harms that flow from racial sorting." *Bethune-Hill*, 137 S. Ct. at 797. Accordingly, once voters are no longer sorted into districts on the basis of race, "the discriminatory effects of the racial gerrymander" are, by definition, eliminated, as an individual cannot complain about the stigmatizing injury of being placed in a district on the basis of race if she was not placed in her district on the basis of race. Again, then, the question the district court should have asked was whether SD21, SD28, HD21, and HD57 were drawn on the basis of race. If they were not (and the district court did not and could not find that they were), then the district court had no basis to invalidate them even under its own misguided test, as those districts *did* eliminate the discriminatory effects of the 2011 Plan.

In concluding otherwise, the district court found fault with the General Assembly's use of certain traditional *non-racial* districting criteria—namely, "preserving district cores and relying on political data" to protect incumbents. App. A at 44. To be clear, the court did *not* find that either of these criteria was used as a pretext or proxy for race. Indeed, the court made no finding whatsoever about the General Assembly's intent (which is reason enough to reverse its holding that the 2017 Plan perpetuated a racial gerrymander). Instead, the court held that these otherwise-permissible criteria are inherently suspect when used to draw a *remedial* map, and that the General Assembly was therefore under an obligation "to ensure that its reliance on those considerations did not serve to perpetuate the effects of the

racial gerrymander." App. A at 44. In other words, the court concluded that the only way for the General Assembly to "cure" the past racial gerrymander was by examining its *non-racial* districting criteria to determine what racial impact they would have—*i.e.*, by once again districting on the basis of race.

That is clear from the court's district-by-district analysis of the districts it invalidated, which focused not on whether the General Assembly was motivated by race, but on whether the General Assembly made affirmative efforts to ensure that each district's BVAP was not "too high," or to move municipalities, precincts, and communities of interest around to ensure that the district's lines did not unintentionally correlate with race. *See, e.g.*, App. A at 45-59. Likewise, when the district court instructed the Special Master on how to draw his alternative maps, it specifically instructed that he "may consider data identifying the race of individuals or voters to the extent necessary to ensure that his plan cures the unconstitutional racial gerrymanders." App. B at 8-9; *see id.* at 5-14. In short, the district court's protests notwithstanding, *see* App. A at 44, there is no other way to understand its opinion than as holding that the General Assembly engaged in racial gerrymandering by failing to consider race.

The three-judge court's finding of racial gerrymandering in a legislative map drawn without considering race is without precedent. But the closest thing to a precedent for this effort to apply a heightened standard to remedial maps is the decision of the three-judge district court in Texas to invalidate the Texas Legislature's adoption of a judicially crafted remedial map. Of course, those extraordinary orders

were stayed by this Court and will be considered on the merits this Term. *See Abbott v. Perez*, Nos. 17A225 & 17A245 (U.S.). There are even stronger grounds for a stay here, as this Court's disposition of *Abbott* could well form the basis of a decision by this Court to vacate the extraordinary and unprecedented order below. Accordingly, the first two stay factors are readily satisfied, as there is certainly at least a fair prospect that the district court's racial gerrymandering holding will be vacated or reversed.

C. The District Court Should Not Have Considered, Let Alone Substantiated, the Plaintiffs' State-Law Challenges.

The district court erred just as egregiously by invalidating several districts on the theory that the General Assembly violated a state-law prohibition on mid-decade districting by altering too many districts after the district court *invalidated* the State's decennial districting plan. According to the district court, state law prohibited the General Assembly from altering the 2011 configuration of five districts—HD36, HD37, HD40, HD41, and HD105—because the General Assembly failed to demonstrate that redrawing those districts was "necessary to remedy the racially gerrymandered districts." App. A at 62. That holding is exceedingly likely to be reversed, either on jurisdictional grounds or on the merits.

At the outset, the district court never should have adjudicated the state-law challenges to those districts. First, whatever conceivable basis plaintiffs might have claimed to challenge the 2017 Plan without amending their original complaint could not extend to never-before-raised state-law challenges to mid-decennial redistricting that, by their very nature, could not have been included in the original challenge to

the 2011 Plan. Moreover, precisely because the original complaint did not and could not include such challenges, there are no plaintiffs with standing to bring them. This Court has repeatedly held that individuals do not have standing to challenge the configuration of districts in which they do not reside. *See United States v. Hays*, 515 U.S. 737, 744-745 (1995); *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015). The original complaint in this case, which challenged the 2011 Plan, included plaintiffs from each of the 28 districts it challenged, but it did not include any plaintiffs from the five districts that plaintiffs now maintain state law required the General Assembly to preserve in the 2017 Plan. Instead, these five districts were challenged for the first time after their enactment in the 2017 Plan—by the same plaintiffs who live only in the 28 originally challenged districts, not in HD36, HD37, HD40, HD41, or HD105.[4]

And that was not even the only insurmountable obstacle to plaintiffs' brand-new state-law challenges. The Eleventh Amendment also forbids federal courts from enjoining state laws on state-law grounds. As to these five districts, the court's ruling is based entirely on state law: The court did not hold that these districts were racially gerrymandered; it held only that the state legislature violated the state constitution by altering these districts mid-decade. But as this Court has squarely held, "a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when—as here—the relief sought and ordered has an impact directly on

[4] The districts in which plaintiffs currently reside are available in the State of North Carolina's online voter registration database. *See Voter Search*, North Carolina State Board of Elections, https://vt.ncsbe.gov/RegLkup.

the State itself." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 117 (1984). The fact that plaintiffs' *federal* claims were properly in federal court, and that the Fourteenth Amendment abrogates state sovereign immunity as to those federal claims, does not make any difference, as "neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment." *Id.* at 121. Because plaintiffs' only challenges to HD36, HD37, HD40, HD41, and HD105 were based on purported violations of the state constitution, the district court lacked jurisdiction to rule on those challenges and to enjoin the State from using the 2017 Plan on state-law grounds.

In all events, the district court's novel interpretation of state law is simply wrong. The relevant provisions of the North Carolina Constitution state only that districts drawn after a decennial census "shall remain unaltered until the return of another decennial census." N.C. Const. Art. II, §§3(4), 5(4). They do not say anything whatsoever about the General Assembly's power to redistrict mid-decade when a federal court *invalidates* the State's duly enacted map. And the district court readily conceded that "[t]he Supreme Court of North Carolina has not addressed the scope of the General Assembly's authority to engage in mid-decade redistricting when a decennial districting plan is found to violate the Constitution or federal law." App. A at 61. At a bare minimum, that should have sufficed to persuade the court to decline to exercise jurisdiction over plaintiffs' novel state-law challenges, and avoid putting this Court in the unwelcome position of resolving a federalism-sensitive question of

state law.[5] Instead, the district court opted to craft out of whole cloth a rule that districts may be altered mid-decade only if doing so is "necessary to remedy" whatever infirmity the federal court found. App. A at 62.

Remarkably, the court purported to derive that novel constraint from this Court's repeated admonitions that federal courts should avoid "unnecessarily interfer[ing] with state redistricting choices." App. A at 61-62 (citing *Upham v. Seamon*, 456 U.S. 37 (1982)). But those admonitions arose out of rare instances in which district courts were forced to draw new maps *themselves*, because legislatures were unwilling or unable to do so. That a *federal court* should not "substitute[] its own reapportionment preferences for those of the state legislature," *Upham*, 456 U.S. at 41, when it has been forced to "take up the state legislature's task," *Perry*, 565 U.S. at 392, hardly compels the conclusion that a federal court should prohibit *the legislature* from determining how best to effectuate its legitimate redistricting choices in a new map when a federal court has *invalidated* its existing map. After all, the whole point of cases like *Upham* is that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Chapman*, 420 U.S. at 27; *see also Upham*, 456 U.S. at 42. Accordingly, a federal court should not read state law to impose constraints on a legislature's ability to determine how best to respond to a federal-court order that

[5] Indeed, the court did just that with respect to plaintiffs' challenges under another provision of state law, declining to exercise jurisdiction over those challenges "[i]n light of the absence of … guidance from North Carolina courts" on the interpretation of the relevant provision. App. A at 68. The court conveniently declined to explain why it was willing to entertain one set of state-law challenges "in the absence of such guidance," but not the other.

necessitates new districting maps unless state law does so in the absolute clearest of terms, which no one could plausibly claim is the case here. There is thus at least a fair prospect that this Court will reverse the district court's state-law holding as well.

D. The District Court Deprived The State of Its Sovereign Right to Draw Its Own Districts.

Even assuming some or all of the district court's merits ruling were to survive, this Court still would be likely to reverse or vacate the court's imposition of the Special Master's Plan because the district court improperly deprived North Carolina of its sovereign right to draw its own districts. By repeatedly rejecting Applicants' pleas to give the General Assembly a chance to draw a new map that remedied whatever problems the court may perceive, and then withholding its merits ruling until the absolute last possible moment, the court committed an extreme overreach that intruded upon North Carolina's sovereign right to redistrict, in direct and obvious contravention of this Court's precedent.

Decades ago, this Court established an important principle of federalism from which it has never wavered: Federal courts must allow States to remedy any constitutional infirmities in their districting plans. *See Scott v. Germano*, 381 U.S. 407 (1965). Since then, this Court has repeatedly reaffirmed that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Chapman*, 420 U.S. at 27; *accord Perry v. Perez*, 565 U.S. 388, 392 (2012); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 414 (2006) (plurality opinion); *Miller*, 515 U.S. at 915; *Growe*, 507 U.S. at 34. If a federal court invalidates a State's districting plan, the State itself must be provided

"the opportunity to make its own redistricting decisions so long as that is practically possible and the State chooses to take the opportunity." *Lawyer v. Dep't of Justice*, 521 U.S. 567, 576 (1997). Only in the truly rare circumstance when the legislature is actually unwilling or unable to enact a new map itself may "a court … take up the state legislature's task." *Perry v. Perez*, 565 U.S. 388, 392 (2012).

The district court violated that bedrock rule of redistricting. The court made crystal clear as early as October that it intended to invalidate the 2017 Plan. Indeed, the court was so confident that it "likely" would reach that outcome that it took the "exceptional" step of appointing a special master to start drawing his own substitute maps, and even ordered the State to foot the bill for all of his work. Order, ECF 202. At that point, the only option consistent with this Court's precedents and due respect for state sovereignty was to enter an injunction and explain the specific infirmities in the 2017 Plan. The General Assembly would then have ample time to enact a new districting plan that remedied whatever defects the district court identified and to appeal to this Court on a relatively standard timeline. But instead of proceeding in the required fashion, the district court outright refused to give the General Assembly a chance to enact a new map, and then simply ran out the clock.

The district court's hostile takeover of the State's redistricting process blatantly violated this Court's decision in *Growe*. There, parallel actions challenging Minnesota's congressional districts were filed in state and federal court, and Minnesota quickly conceded that the challenged plan was unconstitutional. The Minnesota Supreme Court then appointed a Special Redistricting Panel to design a

remedial districting plan. *Growe*, 507 U.S. at 28. At that point, the proceedings were essentially aligned with the proceedings at an earlier stage in this case, with the State willing and able to enact a new districting plan. But just as the district court here disabled Applicants from enacting a new plan by refusing to enter a final order, the district court in *Growe* disabled the Minnesota Special Redistricting Panel from acting by enjoining the state-court parties from "attempting to enforce or implement any order of the ... Minnesota Special Redistricting Panel." *Id.* at 30 (alteration in original). The federal court then adopted a congressional plan designed by its own special masters before the Panel could act. *Id.* at 31.

This Court reversed, concluding that the district court erred by wresting control of the redistricting process from the State. The district court erred at the outset by impeding the Panel's "timely development of a plan" with an injunction, and then compounded its error by imposing its own plan before the Panel could adopt one. *Id.* at 36-37. Reiterating that "the Constitution leaves with the States primary responsibility" for redistricting, this Court held that "a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Id.* at 34. As the Court put it: "What occurred here was not a last-minute federal-court rescue of the Minnesota electoral process, but a race to beat the Minnesota Special Redistricting Panel to the finish line. That would have been wrong, even if the Panel had not been tripped earlier in the course." *Id.* at 37.

The district court's actions here are virtually indistinguishable from the district court's actions in *Growe*. Just as the district court in *Growe* disabled the State

by enjoining it from adopting a remedial plan, the district court here disabled the State by running out the clock. The district court was well aware—and did not even dispute—that the General Assembly stood ready and willing to carry out its sovereign duty as soon as the 2017 Plan was invalidated, and on a timeline that would allow the district court to review those maps and this Court to do the same on appeal. *See* Opp. to Appointment, ECF 204 at 8. And Applicants repeatedly implored the court to rule on plaintiffs' objections as quickly as possible precisely because that was the only way to ensure both that the General Assembly would have time to exercise its sovereign right to remedy any potential violation(s) in time for the 2018 elections, and that recourse to this Court could be sought (if necessary) in the ordinary course.

In squarely rejecting those pleas, the district court adopted an unprecedented one-chance-only rule, holding that States surrender their sovereign right to redistrict if their first attempt at a remedial map is unsuccessful—no matter how much time is left for the State to try again, and no matter how willing the State is to act. In the district court's view, a State simply "is not entitled to multiple opportunities to remedy its unconstitutional districts." App. B at 4. The district court purported to divine that rule from this Court's decision in *Reynolds*, which it described as "affirming remedial districting map drawn by a district court after district court found state legislature's first proposed remedial map failed to remedy constitutional violation." App. B at 4. But that is a plainly inaccurate description of *Reynolds*, which actually *forecloses* the district court's one-chance-only rule.

As noted, *Reynolds* did not involve a situation where the district court insisted on drawing its own map even though the State stood ready and willing to do so. Instead, the legislature there failed to enact *any* new plan for a fast-approaching election, and enacted only (ultimately invalidated) plans that, by their terms, would not take effect for another *four years*. 377 U.S. at 543. The district court thus was faced with the unwelcome task of imposing a temporary map to be used in the upcoming election. *Id.* at 546-51. That a court may impose its own temporary map when the State fails to enact any map *at all* of course in no way suggests that a State gets only one bite at the remedial apple. Indeed, *Reynolds* actually approved the very second bite at the apple that the district court claimed it precludes, as the Court there invalidated the State's first attempt to draw remedial maps, yet nonetheless made clear that the State had a sovereign right to try again, and that the district court could intervene as to future elections only if the "Legislature fail[s] to enact a constitutionally valid, permanent apportionment scheme." *Id.* at 587. *Reynolds* thus reinforces the rule that federal courts may impose court-drawn maps only in the truly rare circumstance when, after its own plan has been adjudicated or admitted legally deficient, the State is unwilling or unable to do so itself—*i.e.*, only when "a last-minute federal-court rescue" is the only option. *Growe*, 507 U.S. at 37.

The district court's outright refusal to give the General Assembly a chance to remedy any perceived deficiencies in the 2017 Plan is impossible to reconcile with this Court's repeated admonishments that "reapportionment is primarily the duty and responsibility of the State." *Chapman*, 420 U.S. at 27. Indeed, it would turn the

well-established policy favoring legislative reapportionment on its head and render traditional federalism principles meaningless if district courts were permitted to justify typically unwelcome and reluctant judicial interference with the legislative reapportionment process merely by sitting on their hands until it is too late for the legislature to remedy any violations. Accordingly, even assuming the decision below were right on the merits, the district court (once again) got the remedy plainly wrong.

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

Without a stay of the district court's order, irreparable injury is certain. "Any 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) (Roberts, C.J., in chambers). That injury is exacerbated in the redistricting context, where the enjoined statutes effectuate the State's "constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders." *Gregory v. Ashcroft*, 501 U.S. 452, 462 (1991); *see* U.S. Const. art. IV §4. And it is exacerbated further still where, as here, the district court refuses to allow the state legislature to enact its own remedial plan, instead insisting that elections to determine the composition of North Carolina's government be held under a districting plan designed by a professor from California and imposed by a federal court. Accordingly, the district court's command that the State use the Special Master's Plan in the fast-approaching 2018 election cycle is itself sufficient irreparable injury to warrant a stay, particularly given the "voter confusion and

consequent incentive to remain away from the polls" that the late-breaking decision is bound to create. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006).

A stay is also particularly appropriate because the urgency of this request is a product of the district court's own making. Had the court invalidated the 2017 Plan back in October, when it declared that outcome sufficiently "likely" that it was willing to appoint a special master to design a remedy (with the people of North Carolina footing the bill), Applicants could have appealed that order immediately, allowing this Court to assess the merits of the district court's ruling on a fairly standard timeline. Instead, the district court spent more than *four months* adjudicating challenges to a plan that it ordered the General Assembly to enact in *four weeks*, and withheld an appealable order until the last possible moment—a single business day before the date by which the court had been informed that the Board of Elections needed a decision to ensure that it could assign voters to new districts before the February 12 commencement of the filing period.

The fact that this Court must consider this case in an emergency posture, and when it is too late to conduct full merits review before the candidate filing period begins, is therefore owing entirely to the inexplicable delay of the district court—not anything the State could control. Indeed, to this day, the district court has never even tried to explain why it needed an additional *three months* to reduce to an appealable opinion the writing that was already on the wall in October. To allow the district court's filibuster to deprive the State of sovereign control over its own elections would do nothing but add insult to irreparable injury.

A stay pending appeal is also in the public interest. The public is always well-served by stability and certainty, yet the district court's eleventh-hour decision sows only confusion. Moreover, a stay will promote the public interest in having the legislature, not a federal court (or a special master), draw the State's congressional districts: "The Court has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978). 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)).

The most sensible course would be to enter a stay and allow jurisdictional briefing in the ordinary course, which would give this Court the option to hold this case and vacate and remand the decision below in light of the Court's resolution of *Abbott*. Alternatively, the Court could enter a stay, and treat the stay papers as jurisdictional briefing and order expedited briefing and argument this Term. But either way, this Court should not allow a decision ordering elections pursuant to a map drawn by special master to remedy non-racial racial gerrymandering to take effect. The decision below is entirely unprecedented, and the people of North Carolina

should not have to prepare for an election under a map drawn without the involvement of the General Assembly just because a court without jurisdiction inexplicably found racial gerrymandering in a plan drawn without consideration of race.

CONCLUSION

For the foregoing reasons, Applicants respectfully request that this Court grant this emergency application for a stay pending resolution of a direct appeal to this Court.

Respectfully submitted,

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