IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

COMMON CAUSE, *et al.*, PLAINTIFFS, v. ROBERT A. RUCHO, in his official capacity as Chairman of the North Carolina Senate Redistricting Committee for the 2016 Extra Session and Co-Chairman of the Joint Select Committee on Congressional Redistricting, *et al.*, DEFENDANTS.	CIVIL ACTION NO. 1:16-CV-1026-WO-JEP THREE-JUDGE COURT

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *et al.*, PLAINTIFFS, v. ROBERT A. RUCHO, in his official capacity as Chairman of the North Carolina Senate Redistricting Committee for the 2016 Extra Session and Co-Chairman of the 2016 Joint Select Committee on Congressional Redistricting, *et al.*, DEFENDANTS.	CIVIL ACTION NO. 1:16-CV-1164-WO-JEP THREE JUDGE COURT

COMMON CAUSE PLAINTIFFS' RESPONSE IN OPPOSITION TO LEGISLATIVE DEFENDANTS' MOTION TO STAY

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INTRODUCTION

Legislative Defendants seek an immediate stay of these proceedings pending the Supreme Court's decision in *Gill v. Whitford*, Dkts. 16-1161; 16A1149 ("*Whitford*"); Dkt. 74. To support that motion, they assert—incorrectly—that "[i]t is not in dispute that the legal theories advanced by the plaintiffs in *Whitford* are essentially identical to plaintiffs' case here." Dkt. 75 at 5. To prevail, Legislative Defendants "must justify" the proposed stay "by clear and convincing circumstances [that] outweigh[ ] potential harm to" the Plaintiffs in these consolidated cases. *Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983). This they cannot do.

First, Defendants' proffered justification for the stay—that these consolidated cases and *Whitford* present identical challenges—is untrue, particularly as to the claims raised and evidence presented by the *Common Cause* Plaintiffs. Second, Plaintiffs seek to enjoin a cognizable and ongoing injury to their constitutional rights. The harm to the Plaintiffs of a stay far outweighs any prejudice to Defendants of proceeding to trial, especially given that discovery and pre-trial briefing are already complete. In reality, the Supreme Court's decision to review *Whitford* merely provided Defendants with another pretext for an outcome they have sought throughout this litigation—delay sufficient to deny Plaintiffs a remedy prior to the 2018 congressional elections. No reasonable balancing of the equities supports staying these cases until the *Whitford* decision, which may come as late as June 2018 (or could even be scheduled for re-argument).

Moreover, Legislative Defendants put the cart before the horse with respect to *Whitford*, which by necessity presents only a narrowly-defined set of facts and a particularly-pled set of legal claims. Granting the proposed stay would merely ensure that the Supreme Court will decide *Whitford* deprived of a broader set of factual circumstances and legal theories the Justices may find relevant to their analysis of the issues presented. If anything, the pendency of *Whitford* counsels haste to ensure that the Supreme Court has the opportunity to review the unique facts and legal theories presented by these consolidated cases *before* it renders a decision in *Whitford*.

For these reasons, this Court should deny Legislative Defendants' motion and schedule this case for trial at the earliest possible opportunity.

ARGUMENT

I. THE SUPREME COURT'S RESOLUTION OF *WHITFORD* WILL NOT RESOLVE CORE ISSUES PRESENTED BY THE *COMMON CAUSE* PLAINTIFFS.

The *Common Cause* Plaintiffs present at least four issues entirely distinct from "the legal theories advanced by the plaintiffs in *Whitford*," and thus very unlikely to be resolved by the Supreme Court's decision in that case.

a) The First Amendment Claim

The *Common Cause* Plaintiffs allege—and at every stage of briefing have emphasized—that the 2016 North Carolina Congressional Plan (the "2016 Plan") violates the First Amendment. Dkt. 12 ¶¶ 25-38; Dkt. 33 at 10-15; Dkt. 43 at 2-7; Dkt 65 at 58-67. In crafting the 2016 Plan, the same Legislative Defendants who now move to stay

these proceedings instructed their favored mapmaker—Dr. Tom Hofeller—to use the voting history of North Carolina's citizens ("Political Data") to sort those voters into congressional districts to maintain a 10-3 Republican "Partisan Advantage" in North Carolina's congressional delegation. Their partisan purpose was explicit and the resulting partisan effect undeniable. By their very design, each of North Carolina's thirteen congressional districts penalize or burden likely Democratic voters for what is unquestionably First Amendment-protected expression.

"[G]eneral First Amendment principles" illustrate that these "burdens in other contexts are unconstitutional absent a compelling government interest." *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment) (citing *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (plurality opinion)). As this Court noted in denying Defendants' motions to dismiss, Justice Kennedy's *Vieth* concurrence "suggested that the First Amendment, as opposed to the Fourteenth Amendment, may be the best vehicle for addressing the constitutionality of partisan gerrymanders." Dkt. 50 at 19 (citing *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment)).

The legal standards governing First Amendment claims are well-established and claim-specific. "Premised on mistrust of governmental power," *Citizens United v. FEC*, 558 U.S. 310, 340 (2010), the First Amendment bars the government from abridging freedom of private speech. U.S. Const. amend. I; *see also Gitlow v. New York*, 268 U.S. 652 (1925) (incorporating against the states). Two lines of First Amendment law are

particularly relevant here: (1) the duty to govern impartially; and (2) the presumptive unconstitutionality of content-based and viewpoint-based government speech restrictions.

"If there is any fixed star in our constitutional constellation, it is that no official . . . can prescribe what shall be orthodox in politics." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). "The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). The Supreme Court's repeated application of these core First Amendment principles to rein in long-standing practices of political patronage demonstrates the relevance of the duty to govern impartially in the redistricting context. *See, e.g., Elrod*, 427 U.S. at 373 (plurality opinion) (patronage dismissals); *Branti v. Finkel*, 445 U.S. 507 (1980) (partisan firing of assistant public defenders); *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990) (*preferential* partisan consideration in employment, promotion, or transfer of state employees or job applicants). These cases make clear that government is forbidden from "adversely affect[ing]" citizens for their protected speech or association. *Rutan*, 497 U.S. at 73. And "there is no redistricting exception to this well-established First Amendment jurisprudence." *Shapiro v. McManus*, 203 F. Supp. 3d 579, 598 (D. Md. 2016). "[T]he fundamental principle that the government may not penalize citizens . . . . [for] exercis[ing] their First Amendment rights thus provides a . . . *a discernable and manageable standard*." *Id.* at 596 (emphasis added).

Separately, "government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S.

819, 828 (1995) (citations omitted). "[T]he violation of the First Amendment is all the more blatant" "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject." *Id.* at 829 (emphasis added). "The government must abstain from regulating speech when the specific motivating *ideology or the opinion or perspective of the speaker* is the rationale for the restriction." *Id.* (emphasis added).

Yet that is precisely how the Legislative Defendants implemented the 2016 Plan. North Carolina voters exercised their First Amendment rights in casting ballots in prior elections. Defendants and their agents gathered "political data" regarding those votes and sorted voters into congressional districts designed to enhance the political impact of preferred viewpoints (the Republican Party and Republican voters) and diminish the political impact of disfavored viewpoints (the Democratic Party and Democratic voters).

This textbook viewpoint discrimination is just "a more blatant and egregious form of content discrimination." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015). And even content-based regulations are "presumptively unconstitutional and may be justified only if the government proves that [the regulation is] narrowly tailored to serve compelling state interests." *Id.* at 2226.

The Supreme Court has yet to review a partisan-gerrymandering claim presenting this First Amendment approach. At present, that theory remains "uncontradicted by the majority in any of [the Supreme Court's] cases." *Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015). The *Common Cause* Plaintiffs have therefore emphasized the distinctiveness of their First Amendment claim as a vehicle for challenging the 2016 Plan.

Other challengers have taken a different approach. Though they reference the Equal Protection Clause, the Fourteenth Amendment, and the First Amendment, the *Whitford* Plaintiffs' central focus is not on their underlying constitutional claim, but rather on presenting a standard that determines when a partisan gerrymander is so excessive as to cross a constitutional line. As a result, the *Whitford* panel opinion collapsed the distinctions between claims, yielding sentences such as: "It is clear that the First Amendment and the Equal Protection Clause protect a citizen against state discrimination as to the weight of his or her vote when that discrimination is based on the political preferences of the voter." *Whitford v. Gill*, 218 F. Supp. 3d 837, 883 (W.D. Wis. 2016).

b) The District-Specific Allegations

Legislative Defendants take the position that both sets of Plaintiffs present only a statewide claim. Again, this is incorrect. The *Common Cause* Plaintiffs allege that "[t]he 2016 Plan as a whole, and *each of its thirteen individual districts*, were gerrymandered based on the content of the political beliefs, political affiliations, and voting histories of the voters in each district and are, both individually and collectively, subject to strict scrutiny." Dkt. 12 ¶ 37 (emphasis added). And, without rehearsing all of the evidence they stand ready to present at trial on this point, the *Common Cause* Plaintiffs will prove this allegation with both fact and expert testimony. *See*, *e.g.*, Dkt. 65 at 25-30 (discussing findings of Drs. Mattingly and Chen), Id. at 32 (discussing district-specific gerrymanders

of CD 11 and CD 8), Id. at 38 (discussing single-district injury to individual plaintiffs), Id. at 49-50 (same).

The allegation of district-specific injury distinguishes this case from *Whitford* in two important respects. First, the *Common Cause* individual-voter Plaintiffs claim no entitlement to any *statewide* number or percentage of seats in North Carolina's congressional delegation; the interest they seek to protect is the power of their individual votes. That harm is concrete and well-recognized. "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Further, "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* And the injury articulated by the *Common Cause* Plaintiffs—as distinct from the plaintiffs in *Whitford*—is precisely that debasement or dilution of their votes. This injury is not contingent on some other outcome (such as attaining majority control of a legislative body or congressional delegation).

Second, among the various threads of Supreme Court views expressed regarding partisan gerrymandering, one consistent strain—perhaps most clearly espoused by Justice Stevens—has been that partisan gerrymandering claims, like racial gerrymandering claims, should proceed on a district-by-district rather than statewide basis. *See Vieth*, 541 U.S. at 335-36 (Stevens, J., dissenting).

Unlike the plaintiffs in *Whitford*, the *Common Cause* Plaintiffs have alleged and intend to prove at trial that pursuit of partisan advantage *predominated* in the drawing of *individual districts*, and that Defendants subordinated legitimate redistricting criteria to that illegitimate purpose. *See Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 345 (4th Cir. 2015) (holding that an "'intentional effort' to create a 'significant partisan advantage'" showed "the predominance of a[n] illegitimate reapportionment factor" (quoting *Cox v. Larios*, 542 U.S. 947, 947-49 (2004)); *see also N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016) ("Nor … can legislatures restrict access to the franchise based on the desire to benefit a certain political party." (citing *Anderson v. Celebrezze*, 460 U.S. 780, 792-93 (1983)).

This presents a sharp distinction. Indeed, the first question presented by the *Whitford* appellants is whether that three-judge district court erred "when it held that it had the authority to entertain a *statewide* challenge to Wisconsin's redistricting plan, instead of requiring a *district-by-district* analysis." Jurisdictional Statement, Dkt. 16-1161. Should the *Whitford* appellants prevail on these grounds, this Court would receive no guidance in exchange for the lengthy and prejudicial delay a stay of the *Common Cause* Plaintiffs' claims would require.

c) The Article I, Section IV Claim

Another critical distinction between this case and *Whitford* is that *Whitford* involved a challenge to district lines drawn for *state* elections, while this case involves a challenge to lines drawn for *federal* elections. As such, additional provisions of our

federal Constitution provide a basis for the federal courts to intervene here. As noted in this Court's denial of the motions to dismiss, "[t]he *Common Cause* Plaintiffs further ask the court to declare that, by enacting a political gerrymander, the General Assembly exceeded its authority under Article I, Section 4 of the Constitution, which empowers states to determine the 'Times, Places and Manner of holding Elections.'" Dkt. 50 at 10-11 (citing Dkt. 12 ¶¶ 50-54) (emphasis added). This Elections Clause claim by definition applies only to *federal* elections and thus was unavailable to—and not raised by—the *Whitford* plaintiffs.

"[T]he Framers understood the Elections Clause as a grant of authority to issue *procedural regulations*, and not a source of power *to dictate electoral outcomes, to favor or disfavor a class of candidates*, or to evade important constitutional restraints." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833-34 (1995) (emphasis added); *Cook v. Gralike*, 531 U.S. 510, 524 (2001) (same). By systematically favoring the class of Republican candidates and disfavoring the class of Democratic candidates, Legislative Defendants far overstepped the well-defined constitutional delegation of authority regarding state regulation of *congressional* elections. Legislative Defendants offer no argument—nor could they—that the resolution of *Whitford* will present any guidance on the Elections Clause, and staying this claim would be particularly inappropriate.

d) An Alternative Manageable Standard

"The object of districting is to establish 'fair and effective representation for all citizens.'" *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment) (quoting

Reynolds v. Sims, 377 U.S. 533, 565–568 (1964)). But "whether political classifications" during this process relate to that worthwhile object or "instead burden representational rights" presents a persistent challenge. *Id.* At the time *Vieth* was decided, Justice Kennedy's controlling concurrence concluded that "there [were] yet no agreed upon substantive principles of fairness in districting" providing a "basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights." *Id.* at 307-08.

As this Court acknowledged in its denial of the motions to dismiss, however, *Vieth* "opened the door for lower courts to 'search for a judicially manageable standard' for evaluating such claims, such as the standards and statistical methods proposed by Plaintiffs." Dkt 50 at 26. As Justice Kennedy stated: "That no such standard has emerged in this case should not be taken to prove that none will emerge in the future." *Vieth*, 541 U.S. at 310 (Kennedy, J., concurring in the judgment).

The *Whitford* Plaintiffs seek to prove their case by further developing a standard with which some courts are familiar: "partisan symmetry." As an additional means of calculating the asymmetry of the Wisconsin plan, the *Whitford* Plaintiffs also rely on the "efficiency gap," which effectively calculates "wasted" votes as a measure of built-in asymmetry under a statewide districting plan. These and other tools that demonstrate partisan bias may meaningfully supplement the direct evidence of partisan effect, but these metrics are not necessary to demonstrate a manageable standard in this case.

The *Common Cause* Plaintiffs also present separate proof of the burden on representational rights imposed by the 2016 Plan. Through their experts, Drs. Mattingly and Chen, the *Common Cause* Plaintiffs will present clear evidence of not only the burdens on representational rights imposed by the 2016 Plan, but also the degree to which the 2016 Plan necessarily subordinated *legitimate* criteria in the drawing of district lines.

Dr. Mattingly, a mathematician, and Dr. Chen, a political scientist, have simulated thousands of maps using accepted mathematical and computational principles to construct districts using traditional, non-partisan redistricting criteria—but not for partisan advantage. Each then projected the likely partisan distribution of congressional seats for the simulated maps. The results are vivid proof that the maps Legislative Defendants drew were no accident: they achieve partisan results using explicitly partisan criteria and subordinated the traditional redistricting criteria the mapmaker claimed to follow. These experts establish a clear path toward the development of new and workable standards by demonstrating, through simulated maps, how traditional redistricting principles were sacrificed in pursuit of naked partisan advantage.

This type of proof is exactly what the Supreme Court has been looking for as it seeks a manageable standard for resolving partisan gerrymandering cases. Over ten years ago, Justice Kennedy hoped that "the rapid evolution of technologies in the apportionment field" would "produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties" and that would "facilitate court efforts to identify and remedy the burdens, with judicial

intervention limited by the derived standards." *Vieth*, 541 U.S. at 312-13 (Kennedy, J., concurring in the judgment).

Alternative maps such as those the *Common Cause* Plaintiffs present have already been accepted as "key evidence" in proving racial gerrymandering cases. *See Cooper v. Harris*, 137 S. Ct. 1455, 1462 (2017); *id.* at 1491 (Alito, J., dissenting); *Easley v. Cromartie*, 532 U.S. 234, 252, 258 (2001). These maps help establish a fair and reasonable baseline against which the 2016 Plan can be compared and then demonstrate the degree to which 2016 Plan is a sufficiently dramatic deviation from the reasonable baseline that it must constitute a constitutional violation. Moreover, this approach—indeed, as presented by Dr. Chen—has been accepted as powerful evidence in recent redistricting cases in this Circuit. *See Raleigh Wake Citizens Ass'n*, 827 F.3d at 350-51.

The maps presented by Drs. Mattingly and Chen demonstrate that the explicit partisan intent of the 2016 Plan yielded clear and substantial partisan effect, and that no neutral districting principle or natural population distribution could have produced the same result. This approach was not presented in *Whitford*, and the Supreme Court's resolution of that case will not resolve its relevance to cases such as this one.

II. THE BALANCE OF INTERESTS WEIGHS STRONGLY AGAINST A STAY.

This Court has broad discretion to stay proceedings, but in exercising that discretion it "must weigh competing interests and maintain an even balance." *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936). "[I]f there is even a fair possibility that the stay . . . will work damage to some one" other than the movant, the movant "must make

out a clear case of hardship or inequity in being required to go forward." *Id.* at 255; *see also Westfield Ins. Co. v. Weaver Cooke Constr., LLC*, No. 4:15-CV-169-BR, 2017 WL 818260, at *2 (E.D.N.C. Mar. 1, 2017) (Britt, J.) ("A party seeking a stay must demonstrate a pressing need for one . . . and that the need for a stay outweighs any possible harm to the nonmovant."). "Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Landis*, 299 U.S. at 255. To be clear, that is the Legislative Defendants' *best-case* argument. The reality—that *Whitford* will not likely resolve the claims of the *Common Cause* plaintiffs (*see* Section I, *supra*)—further illustrates why this is not the "rare circumstance" the *Landis* Court described.

Three factors are relevant "in determining whether to grant a motion to stay: (1) the interests of judicial economy; (2) hardship and equity to the moving party if the action is not stayed; and (3) potential prejudice to the non-moving party." *White v. Ally Fin. Inc.*, 969 F. Supp. 2d 451, 462 (S.D. W.Va. 2013) (internal quotation omitted). The balance of factors here weighs heavily against a stay. *See Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 452 (M.D.N.C. 2015).

With respect to the first consideration, discovery in this case has concluded. The parties have filed all pre-trial pleadings and motions. All that remains is the presentation to this Court of the distinct evidence and legal claims made by Plaintiffs in these consolidated cases—a process that would take only a few days.

Defendants' entire argument boils down to the incorrect claim that *Whitford* will overrule settled precedent that partisan gerrymandering is justiciable, thereby rendering this trial a wasted effort. As discussed in Section I, *supra*, however, the Court's resolution of *Whitford*—whatever that may be—is unlikely to control the outcome here.

Moreover, Legislative Defendants' assumption that *Whitford* will be decided as they predict is sheer speculation. "The grant of certiorari on an issue does not suggest [the Supreme Court's] view on the merits." *Schwab v. Sec'y, Dep't of Corr.*, 507 F.3d 1297, 1299 (11th Cir. 2007); *Gissendaner v. Comm'r, Ga. Dep't of Corr.*, 779 F.3d 1275, 1284 (11th Cir. 2015). And what holds true for certiorari holds doubly true for the Supreme Court's mandatory direct appellate review in apportionment cases. *See Personhuballah v. Alcorn*, 155 F. Supp. 3d 552 (E.D. Va. 2016) (denying motion to stay remedy pending Supreme Court's direct appellate review review *in that very same case*). Indeed, the logical conclusion of Legislative Defendants' flawed argument is that a stay must be granted in *any* case so long as some case on a higher court's docket touches on similar issues. But the Supreme Court's decision to review a lower court opinion, in and of itself, is not a basis on which to grant a stay. *See Speer v. Whole Food Market Group, Inc.*, No. 8:14-cv-3035, 2015 WL 2061665, at *1 (M.D. Fla. Apr. 29, 2015) (declining to stay a case pending Supreme Court's ruling in *Spokeo*).

As to the second factor, Legislative Defendants do not identify any extraordinary burden that they would face should this case proceed to trial. At best, they hint generally at confusion in the law. But that is simply the status quo in North Carolina. As the panel

is well aware, *these same Defendants* are already required to re-draw state legislative districts that subordinated traditional redistricting principles to an improper purpose—the predominant consideration of race. *See Covington v. North Carolina*, 316 F.R.D. 117, 129 (M.D.N.C. 2016), *aff'd*, No. 16-649, 2017 WL 2407469 (U.S. June 5, 2017) (Wynn, J.); *see also N. Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 226 n.6 (4th Cir. 2016), *cert. denied sub nom. North Carolina v. N. Carolina State Conference of NAACP*, 137 S. Ct. 1399 (2017) ("Of course, state legislators also cannot impermissibly dilute or deny the votes of opponent political parties[.]").

This Court's evaluation of the constitutionality of the 2016 Congressional Plan—as with *Covington*, drawn following a three-judge court's determination that the 2011 Congressional Plan was an unconstitutional racial gerrymander—is far more likely to provide relevant guidance to Legislative Defendants on the state of the law than whatever the Supreme Court eventually decides in *Whitford.*

Finally, as to the third factor, there is no doubt that a stay "would allow [Defendants'] alleged violations to persist," and "thus has the potential to substantially harm" the Plaintiffs. *Id.* "Plaintiffs' injury in the face of a stay is significant and this factor therefore weighs in favor of denying the motion." *Henry v. N. Carolina Acupuncture Licensing Bd.*, No. 1:15CV831, 2017 WL 401234, at *9 (M.D.N.C. Jan. 30, 2017). Here, Plaintiffs brought suit in a timely fashion to achieve a remedy before the 2018 elections; a stay would, as a practical matter, deny Plaintiffs the remedy they seek.

Further, "a stay would unnecessarily interfere with the [Plaintiffs'] 'right to have [their] case resolved without undue delay."' *Yadkin*, 141 F. Supp. 3d at 452 (quoting *Williford*, 715 F.2d at 128). "It is well settled that any deprivation of constitutional rights 'for even minimal periods of time' constitutes irreparable injury." *Condon v. Haley*, 21 F. Supp. 3d 572, 587–88 (D.S.C. 2014) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). "[T]he public interest is best served by the denial of a stay that would allow the continued enforcement of a state law found to be unconstitutional." *Id.* at 588.

III. STAYING THIS CASE WOULD DEPRIVE THE SUPREME COURT OF CRUCIAL INPUT AND WOULD INCREASE THE LIKELIHOOD THAT IT DECIDES *WHITFORD* ERRONEOUSLY.

Legislative Defendants argue that proceeding to trial before *Whitford* is decided would be "an enormous waste." Dkt. 75 at 2. Indefinitely staying these proceedings would be a disservice not just to Plaintiffs and the citizens of North Carolina, but to the Supreme Court itself: a stay would deprive the high court of the benefit of this Court's analysis in developing a constitutional standard for partisan- gerrymandering claims.

The Justices have long recognized that, when it comes to "frontier legal problems," being able to consult "diverse opinions from … [lower] courts" will "yield a better informed and more enduring final pronouncement." *Arizona v. Evans*, 514 U.S. 1, 24 n.1 (1995) (Ginsburg, J., dissenting); *see also United States v. Mendoza*, 464 U.S. 154, 160 (1984) ("Allowing only one final adjudication [by a lower court] would deprive this Court of the benefit it receives from permitting several [lower courts] to explore a difficult question…."). Lower courts, too, understand that "the Supreme Court …

[prefers to] have the benefit of a variety of views from the inferior courts before it chooses an approach to a legal problem," *Hart v. Massanari*, 266 F.3d 1155, 1173 (9th Cir. 2001) (Kozinski, J.), and that "testing a legal principle against a variety of factual backgrounds … can be of valuable assistance to the Supreme Court in resolving a troublesome issue," *Goodman's Furniture Co. v. United States Postal Serv.*, 561 F.2d 462, 465 (3d Cir. 1977) (Weis, J., concurring).

Few legal questions are of greater import to the civic life of this Nation than the constitutionality of partisan gerrymandering. And, as reflected in the splintered opinions in *Vieth*, 541 U.S. 267 (2004), the development of a constitutional framework for evaluating such claims on which a majority of Justices may agree has proved elusive. Thus, this is a paradigm situation where the Supreme Court would benefit from "a variety of views from the inferior courts," and from those courts' application of the relevant law to "a variety of factual backgrounds." As discussed in Section I, *supra*, there is substantial overlap as to the relevant *legal* background, but the consolidated cases now before this Court present a number of issues for resolution not presented by *Whitford*. The factual background is wholly different; the expert approaches the *Common Cause* Plaintiffs present here were not presented at trial in *Whitford*; and, critically, several of the *Common Cause* Plaintiffs' legal theories are different. The Supreme Court would be well-served by being able to consider this Court's views on those facts, that evidence, and those legal theories as it considers whether partisan-gerrymandering claims should be permitted and the proof necessary to sustain such claims.

This Court's independent analysis of the claims presented by the *Common Cause* and *League of Women Voters* Plaintiffs serves an additional interest. The *Whitford* appellants ask that the Supreme Court now hold that all partisan-gerrymandering claims are non-justiciable. Presumably, this is a plea to Justice Kennedy to concede that which he would not in *Vieth*—that no "workable standard" for trying such claims will emerge. *Vieth*, 541 U.S. at 311 (Kennedy, J., concurring); *See* Aplts.' Jur. Stat. at 40, *Gill v. Whitford*, No. 16-1161 (Mar. 24, 2017) ("[E]xperience [since *Vieth*] has failed to yield [a workable] standard."). Should the Supreme Court determine the *Whitford* plaintiffs' approach yields no such standard, this Court's evaluation of whether the *Common Cause* or *League of Women Voters* Plaintiffs have presented a workable standard could prove essential to ensuring future judicial review of constitutional challenges to partisan gerrymandering. As discussed in Section I, *supra*, the *Common Cause* Plaintiffs have throughout this litigation placed great emphasis on developing and demonstrating the workability of the First Amendment standard inaugurated by Justice Kennedy's *Vieth* concurrence. Should this Court halt these consolidated cases pending *Whitford* only to have *Whitford* announce the absence of any workable standard (and thus the permanent unavailability of the claim), the consequences of staying this case will have been disastrous—not only for Plaintiffs and the state of North Carolina, but for our democracy.

It is no answer to argue—as Legislative Defendants imply—that by "agree[ing] to hear *Whitford* on the merits" (Dkt. 75 at 2), the Supreme Court has signaled its readiness for a sweeping determination of the availability of partisan-gerrymandering claims (and

thereby its indifference to any subsequent analysis present by lower courts). Lower courts often decide cases after the Supreme Court has granted certiorari in a case raising similar issues, and the Supreme Court willingly consults those post-certiorari decisions in its own opinions. As just one prominent example, in recognizing a constitutional right to same-sex marriage, the Court cited three post-certiorari lower-court opinions (together with a number of pre-certiorari opinions), noting that those "thoughtful" decisions "help[ed] to explain and formulate the underlying principles this Court must now consider." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 & appx. A (2015).

Furthermore, *Whitford* is an appeal from a three-judge district court, and thus the Supreme Court had a "statutory obligation to decide [it] on the merits." Robert L. Stern, et al., SUPREME COURT PRACTICE 276 (8th ed. 2002) (citation omitted); *see Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975) ("[W]e ha[ve] no discretion to refuse adjudication of [such a] case on its merits as would have been true had the case been brought here under our certiorari jurisdiction."). Thus, this Court should not read any signal into the Supreme Court's "agreement" to decide *Whitford*—let alone that the Court has determined all relevant facts, expert approaches, and legal theories have been fully explored. Indeed, to the degree the Justices anticipate that an alternative—and potentially preferable—standard for adjudicating these claims could soon make its way before the Supreme Court, they could postpone a final decision in *Whitford* until they also have the opportunity to consider a broader range of lower court experiences and views. A prompt

trial and decision in these consolidated cases would provide the Justices precisely that.[1] In sum, the Defendants have it backwards: the Supreme Court's pending review of *Whitford* makes it *more* important that the Court act with dispatch, not *less* so.

CONCLUSION

This Court should not delay its review of the pressing constitutional questions presented by these cases. Whether this Court ultimately implements an immediate *remedy* should be irrelevant to this Court's determination of whether an "immediate stay" of proceedings is appropriate. For the reasons outlined above, it is not.

To stay the proceedings at this point would unquestionably harm Plaintiffs—including by drastically decreasing the likelihood of an available remedy in advance of the 2018 congressional elections. A stay would not substantially further interests of judicial economy, as *Whitford* presents related but factually and legally distinct claims to those the *Common Cause* Plaintiffs present here. And it would deprive the Supreme Court of this Court's unique perspective as it addresses an issue of historic importance. In these circumstances, Legislative Defendants cannot possibly make the necessary showing that the balance of equities tips in their favor—let alone "clearly" so. Their motion should be denied.

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[1] Indeed, should this Court schedule trial and render a decision with some speed, this case could be ripe for a Supreme Court decision during the October 2017 Term—just like *Whitford*. The contrasts between this case and *Whitford* discussed in Section I, supra, would make them ideal companion cases for the high court's consideration. *See, e.g.*, *Gratz v. Bollinger*, 539 U.S. 244, 260 (2003) (noting that the Court had granted certiorari in *Gratz* so that it could be considered alongside *Grutter v. Bollinger*, thereby permitting the Court to "address the constitutionality of the consideration of race in university admissions in a wider range of circumstances").

Respectfully submitted, this 17th day of July, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel and parties of record.

This the 17th day of July, 2017.

/s/ Edwin M. Speas, Jr.
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