No. 17A790

IN THE
Supreme Court of the United States

STATE OF NORTH CAROLINA, ET AL.,
Applicants,

v.

SANDRA LITTLE COVINGTON, ET AL.,
Respondents.

On Appeal from the United States District Court
for the Middle District of North Carolina

RESPONSE IN OPPOSITION TO 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:

For over six years now, the people of North Carolina have been "systematically assigned" to state legislative districts according to their race. *Covington v. North Carolina*, 316 F.R.D. 117, 137–38 (M.D.N.C. 2016). During this time, the State has conducted three primary and three general elections under redistricting plans containing not one, but *twenty-eight* racially gerrymandered districts. More than seven months ago, this Court summarily rejected the General Assembly's attempts to justify its blatant violations of Respondents' constitutional rights and upheld the unanimous findings of the three-judge district court about the extent of the racial gerrymandering in North Carolina's legislative maps. *North Carolina v. Covington*, 137 S. Ct. 2211 (2017) (mem.). But now, the leaders of the legislature that perpetrated the most extensive racial gerrymander in the Nation's history have returned to this Court, seeking a stay of the district court's remedial order so that they can hang on to the fruits of their racial-gerrymandering labor for at least one more election cycle. This Court should reject that request and afford Respondents and the people of North Carolina the relief to which they are entitled—an election under constitutionally compliant legislative-redistricting plans.

There is no justification for an emergency stay in this case. First, Applicants (four individual state legislators) have offered this Court no reason to think they will succeed on the merits. In fact, Applicants have presented no credible argument for reversal or vacatur. On remand from this Court, the district court gave the General Assembly the opportunity to draw remedial plans. The district court then adopted

plans that respect the General Assembly's principal role in the redistricting process while adhering to the limits imposed by the Constitution of the United States as well as the Constitution of North Carolina. In adopting plans that altered only nine of the 116 legislatively enacted districts, the district court scrupulously followed the guidelines this Court has established for crafting remedial plans in redistricting cases. *See, e.g.*, *Abrams v. Johnson*, 521 U.S. 74, 90 (1997). And the record contains ample evidence to support the district court's findings as to the constitutional infirmities in the remaining districts—far more than enough to conclude that its findings were "plausible" under this Court's deferential standard of review. *Cooper v. Harris*, 137 S. Ct. 1455, 1464–1465 (2017).

Second, Applicants will suffer no irreparable harm absent a stay. Applicants rely entirely on harms that the State of North Carolina would supposedly suffer. But Applicants are incumbent politicians, not the State. The agencies and state actors charged with implementing the court's remedial plans have not sought a stay. Furthermore, the district court has done nothing more than prevent the General Assembly from doing what it has no power to do. That is not even a harm, let alone an irreparable one. Applicants greatly exaggerate the risk of confusion from implementing the district court's remedial order several months before the next election. Indeed, Applicants have already admitted to the district court that there would be no difficulty in implementing a remedial plan after January 2018.

Third, denying the stay application would avoid compounding the severe harms Respondents have already endured for over six years. One general election has already

come and gone since the district court first entered its judgment on the merits. *Covington*, 316 F.R.D. at 177. There are no unusual circumstances that would warrant holding yet another election under unconstitutional maps. And the public interest strongly favors implementing the district court's remedial plans—the vast majority of which are the Applicants' own plans—in time for the 2018 elections so that, for the first time this decade, candidates will stand for election in constitutional districts.

As an alternative to showing that any of the traditional stay factors apply, Applicants have asked this Court to hold this case in abeyance for *Abbott v. Perez*, Nos. 17A225 & 17A245 (U.S.). But the facts and legal issues in this case are not remotely similar to those at issue in *Perez*. The question in *Perez* is whether a legislature's enactment of a court-drawn interim plan can absolve the legislature of any liability for constitutional and Voting Rights Act (VRA) claims. Nothing the Court decides in *Perez* could answer any question in this case, which has nothing to do with permanent legislative adoption of court-drawn interim plans.

This Court has regularly declined to grant stays in racial-gerrymandering cases. *See, e.g.*, *Abrams*, 521 U.S. at 78; *McCrory v. Harris*, 136 S. Ct. 1001 (2016) (mem.); *Wittman v. Personhuballah*, 136 S. Ct. 998 (2016) (mem.). Applicants have given this Court no reason to think this case calls for a different result. For all of these reasons, the Court should deny the stay application.

STATEMENT OF THE CASE

A. The 2011 State-Legislative Redistricting Process

Shortly after the release of the 2010 census data, the North Carolina General Assembly set out to design a redistricting plan with one overriding goal: maximizing

the number of majority-black state House and Senate districts. *Covington*, 316 F.R.D. at 124, 129. In early 2011, the General Assembly appointed Representative David Lewis and Senator Robert Rucho as the Chairs of the House and Senate Redistricting Committees. *Id.* at 126. The Committees hired Dr. Thomas Hofeller to draw their proposed maps, and no one other than the Redistricting Chairs and Dr. Hofeller had "any substantive role in designing the 2011 districts." *Id.*

The Chairs' instructions to Dr. Hofeller were simple. They instructed him to (1) identify African-American populations throughout the state and draw districts around these locations with a black voting-age population (BVAP) of at least 50% plus one; (2) draw these districts first, before deciding the boundaries of any other districts or considering other redistricting criteria; and (3) draw as many of these majority-black districts as possible. *See id.* at 130–34. The Chairs professed to believe that the VRA and this Court's precedent required drawing districts in this manner. *Id.* at 130–31, 134.

To achieve the Chairs' goals, Dr. Hofeller "systematically assigned" voters in these population centers according to their race, doing "whatever it took to meet that racial threshold, even where doing so required major sacrifices in terms of respect for other traditional districting principles." *Id.* at 136–38. After identifying African-American population centers that were sufficiently large and compact, Dr. Hofeller began by drawing VRA "exemplar districts" that satisfied the Chairs' racial targets. *Id.* at 135. That is, using racial data, Dr. Hofeller identified concentrations of black population across the state and drew districts specifically to capture those populations in majority-black districts. As instructed, Dr. Hofeller drew these districts with the

desired BVAP, but paid "little to no attention was paid to political subdivisions, communities of interest, or precinct boundaries when drawing the challenged districts' lines." *Id.* at 138. These exemplar districts, which are part of the record here, were drawn without calculating compactness scores. *Id.* Even political considerations were "an afterthought." *Id.* at 139.

"Those exemplar districts, while modified somewhat . . . to accommodate [state law] criteria, were nevertheless substantially enacted as drawn." *Id.* at 137. The results were stark. The 2011 Plans more than tripled the number of majority-black districts. *Id.* at 134. They also regularly severed municipalities, communities of interest, and precincts on the basis of race. Precinct splitting "occurred most often in the most racially diverse areas of the state, i.e., those areas with both substantial white and substantial black populations," and precincts were "almost never" split between two predominantly white districts. *Id.* at 138. The 2011 districts were also less compact than their benchmark counterparts on at least seven of eight recognized measures. *Id.*

There are four racially gerrymandered districts still at issue in this case.

- Senate District 21 lies in the southeastern part of the state, covering parts of Hoke County and Cumberland County, where the city of Fayetteville is located. The 2011 Senate Plan raised the district's BVAP from 41% to 51.53%, and divided the city of Fayetteville and Cumberland County on the basis of race. Dr. Hofeller testified that this was done to achieve the Committees' 50%-plus-one target. *Id.* at 146–47.

- Senate District 28 lies in Guilford County in the northern part of the state. Guilford County is home to the city of Greensboro. The 2011 Senate Plan raised the district's BVAP from 44.18% to 56.49%. *Id.* at 147. Like Senate District 21, the district split precincts and divided the town of High Point on the basis of race. *Id.* Here too, Dr. Hofeller testified that precincts were split to achieve the Committees' racial targets. *Id.*

- House District 21 lies in the southeastern part of the state. The district was shaped like "an animal eating something," covering "the entire eastern edge of Sampson County, a substantial portion of western Duplin" and snaking along north into Wayne County, "capturing parts of the city of Goldsboro." *Id.* at 155–56. Under the 2011 House Plan, the district split all three counties along racial lines, taking in the areas with higher concentrations of voting-age African Americans while excluding areas with lower concentrations. *Id.* at 156.

- Finally, House District 57 was one of three majority-black House districts drawn to cover the city of Greensboro.[1] *Id.* at 163. The 2011 House Plan raised the district's BVAP from 29.93% to 50.69%. *Id.* Although the district was less bizarrely shaped than some of the other districts in the 2011 Plans, taken together, the three majority-black House districts in the Greensboro-area included 70.67% of the city's total population but 88.39% of its BVAP. *Id.* at 164.

B. The Initial Proceedings Below

In May 2015, thirty-one registered voters in North Carolina filed suit in the United States District Court for the Middle District of North Carolina, alleging that twenty-eight districts under the 2011 Plans were unconstitutional racial gerrymanders.[2] In April 2016, a three-judge panel conducted a five-day bench trial. The trial included substantial direct and circumstantial evidence of the racial imperatives guiding the 2011 Plans, including testimony from Dr. Hofeller and more than 400 exhibits.

The district court ruled for the plaintiffs, finding that race predominated in drawing all twenty-eight districts. *Id.* at 124. Although the Applicants argued that the districts were drawn to comply with the Voting Rights Act, the district court found that the Applicants' explanation lacked a strong basis in evidence because the Committees

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[1] All three districts were eventually held to be unconstitutional racial gerrymanders. *See Covington*, 316 F.R.D. at 163–64.

[2] Specifically, Respondents challenged Senate Districts 4, 5, 14, 20, 21, 28, 32, 38, and 40 and House Districts 5, 7, 12, 21, 24, 29, 31, 32, 33, 38, 42, 43, 48, 57, 58, 60, 99, 102, and 107. *See Covington*, 316 F.R.D at 128. Each of the Respondents resided in at least one of the challenged districts. *Id.* at 128 n.8.

never analyzed whether racially polarized voting was legally significant in the challenged districts—that is, the Committees never analyzed whether African-American voters were prevented from electing their candidates of choice. *Id.* at 167.

Accordingly, the court enjoined the State from using the 2011 Plans for any elections held after November 8, 2016. Order (August 15, 2016), ECF No. 125. In a subsequent order, the court gave the General Assembly until March 15, 2017 to enact remedial plans and ordered the State to hold special elections using the new districts in 2017. Order (Nov. 29, 2016), ECF No. 140. This Court stayed the latter order pending review of the merits. *North Carolina v. Covington*, 137 S. Ct. 808 (2017) (mem.).

On June 5, 2017, this Court summarily affirmed the district court's judgment on the merits. *North Carolina v. Covington*, 137 S. Ct. 2211 (2017) (mem.). But the Court vacated the district court's order requiring special elections and remanded the case for a balancing of the equities and imposition of a remedy. *North Carolina v. Covington*, 137 S. Ct. 1624 (2017) (per curiam). On remand, the district court declined to order special elections. Order at 4 (July 31, 2017), ECF No. 180. Instead, it gave Applicants until September 1, 2017—or up to two weeks longer if requested—to redraw the unconstitutional districts and submit them to the court for review. *Id.* at 8, 10.

C. The District Court Adopts the Special Master's Revisions to Applicants' Remedial Plans.

The Redistricting Committees had more than a year to remedy the constitutional defects in the 2011 Plans, but they waited until August 2017 to reconvene for that purpose. The Committees hired Dr. Hofeller—who had drawn the 2011 Plans—to redraw the very same unconstitutional, racially gerrymandered districts he had spent

hours designing. Before the Committees reconvened, Dr. Hofeller testified in separate but related litigation that he did not need to refer to racial data to understand the racial effects of the congressional districts he had drawn because he had drawn districts in the same general areas before. *See* Dep. of Thomas Hofeller 246:10-12, *League of Women Voters of N.C. v. Rucho*, No. 1:16-cv-1164 (M.D.N.C. Jan. 24, 2017).

The Committees adopted several criteria to guide Dr. Hofeller's work. First, they prohibited any consideration of racial data. Stay App. A at 9. Several members of the Committees pointed out that it was unclear how the State could correct the racial gerrymanders in the 2011 Plans without reference to this data. Second, they adopted incumbency protection as one of their express criteria. *Id.* at 9. This was not limited to the Committees' goal of avoiding pairing of incumbents. Rather, the Committees instructed Dr. Hofeller to protect incumbents elected *under the racially gerrymandered* 2011 Plans. *Id.* The Committees even claimed it was a priority to protect incumbents, like Representative Larry Bell of House District 21, who had publicly announced that they would not be seeking reelection. *Id.* at 55 & n.7. Third, the Committees instructed Dr. Hofeller to draw on "[p]olitical considerations" and consult "election results data," even though election data is highly correlated with racial data in North Carolina. *Id.* at 9. The purpose of using this data was unclear, since the Chairs disavowed any goal of pursuing partisan advantage, with Rep. Lewis saying explicitly that the Committees did not "have a goal of maintaining the current partisan advantage in the House and the Senate." *Id.* at 10. Indeed, the Committees' only

stated political goals were to protect incumbents and avoid pairing them. Adopted Criteria for House and Senate Plans (Sept. 7, 2017), ECF No. 184-37.

Counsel for Respondents submitted correspondence and maps during the legislative process warning the General Assembly that its proposed plans failed to cure the racial gerrymandering and that it was altering more districts than necessary to cure the constitutional infirmities, thus violating the State Constitution's prohibition against mid-decade redistricting. Stay App. A at 11–12. But the Committees nonetheless adopted these criteria within hours of introducing them, and with no amendments. Less than one week later, on August 31, 2017, the General Assembly enacted remedial plans for the House and Senate, which include 116 districts in total (the "2017 Plans"). *Id.* at 12. Applicants submitted the 2017 Plans and related materials to the court on September 7, 2017.

After reviewing the 2017 Plans, Respondents objected to twelve of the 116 districts. *Id.* As Respondents pointed out, the 2017 Plans failed to cure the racial gerrymanders in Senate Districts 21 and 28 and in House Districts 21 and 57 (the "Subject Districts"). Respondents also objected to eight other districts on the grounds that the 2017 Plans for these districts violated the Constitution of North Carolina. Specifically, the Committees redrew five of these districts even though none of them had been challenged as racial gerrymanders, none of them abutted a district that had been found to be racially gerrymandered, and none needed to be changed to remedy an unconstitutional district. Respondents argued that this unnecessary alteration exceeded the scope of the district court's remedial order and was thus a violation of the

State Constitution's unequivocal prohibition on redistricting more than once per decade. *See* N.C. Const. art. II, §§ 3(4), 5(4). Respondents objected further that two districts under the 2017 Plans violated the State Constitution's Whole County Provision, and one was grossly non-compact.

On October 12, 2017, the district court held a hearing on Respondents' objections and invited Applicants to submit evidence in support of its remedial plans. "Legislative Defendants elected not to offer any such evidence, either in written submissions or at the hearing." Stay App. A at 13. Remarkably, Applicants declined to have Dr. Hofeller testify at this hearing, thereby offering no justification or explanation for the retention of the core shapes and compositions of the unconstitutional districts. In contrast, Respondents submitted copious amounts of evidence, including "*Cromartie* Maps" for Senate Districts 21 and 28 and House District 57, expert testimony regarding alternative maps, maps showing the racial density of challenged districts, and testimony of fact witnesses with personal knowledge of the challenged districts.

After reviewing the parties' submissions and the relevant evidence, the district court informed the parties that it had "serious concerns" that the 2017 Plans failed to remedy the racial gerrymanders in the Subject Districts. Stay App. B at 1. "Among other concerns, some or all of the proposed remedial districts preserve the core shape of the unconstitutional version of the district, divide counties and municipalities along racial lines, and are less compact than their benchmark version." *Id.* at 2. In addition, "[i]n some cases, the General Assembly's use of incumbency and political data in drawing its proposed remedial districts embedded, incorporated, and perpetuated the

impermissible use of race that rendered unconstitutional the 2011 districts." *Id.* The district court was also left with serious concerns that several districts violated the State Constitution and thereby "exceeded the authorization to redistrict provided in the Court's previous orders." *Id.*

Because the court recognized that "[c]onstitutionally adequate districts must be in place in time for the 2018 election," *id.* at 3, the court solicited suggestions for a special master to redraw the unconstitutional districts, allowed the parties opportunities to object, and then appointed Dr. Nathaniel Persily of Stanford University as Special Master to draw alternative plans for the court to consider. The court instructed Dr. Persily to draw alternative plans for the four Subject Districts that remedied the racial gerrymanders in those districts, as well as for the five districts that potentially violated the State Constitution. *Id.* at 4–5.

The court's directions were designed to respect the Committees' redistricting choices while remedying any defects in the Applicants' plans. Most importantly, the court directed Dr. Persily to make "reasonable efforts to adhere to . . . state policy objectives, so long as adherence to those policy objections does not conflict with the primary obligations of ensuring that remedial districts remedy the constitutional violations and otherwise comply with state and federal law." *Id.* at 6. This included the Committee's stated goals of reducing the number of split precincts, increasing the compactness of the remedial districts, and giving consideration to municipal boundaries and precinct lines. *Id.* at 7. Consistent with the Committees' stated political objectives, the court permitted Dr. Persily to adjust the districts to avoid pairing incumbents who

had not publicly announced their intention not to run in 2018. *Id.* Otherwise, the court directed Dr. Persily not to consider incumbency or election results in drawing remedial districts, reasoning that court-drawn plans must be designed "in a manner free from any taint of arbitrariness or discrimination." *Id.* at 7–8 (quoting *Wise v. Lipscomb*, 437 U.S. 535, 541 (1978)). This was consistent both with the need to avoid baking the 2011 Plans into the 2017 Plans and with the Committees' own disavowal of any pursuit of partisan advantage. The court permitted Dr. Persily to consider racial data "to the extent necessary to ensure that his plan cures the unconstitutional racial gerrymanders and otherwise complies with federal law." *Id.* at 8–9.

On November 14, 2017, Dr. Persily filed a draft plan with the district court and requested that the parties submit their objections and proposed revisions by November 17th. Corrected Draft Plan and Order (Nov. 14, 2017), ECF No. 213. Applicants did not propose any revisions. Instead, they objected to the "irregular and inappropriate process" of appointing a Special Master to draw alternative remedial maps for the district court to consider. Defs.' Response to Special Master's Draft Report at 1 (Nov. 17, 2017), ECF No. 215. After making some revisions to avoid pairing incumbents, Dr. Persily submitted his final report and recommended plan on December 1, 2017. On January 5, 2017, the court held a hearing on the Special Master's recommendations.

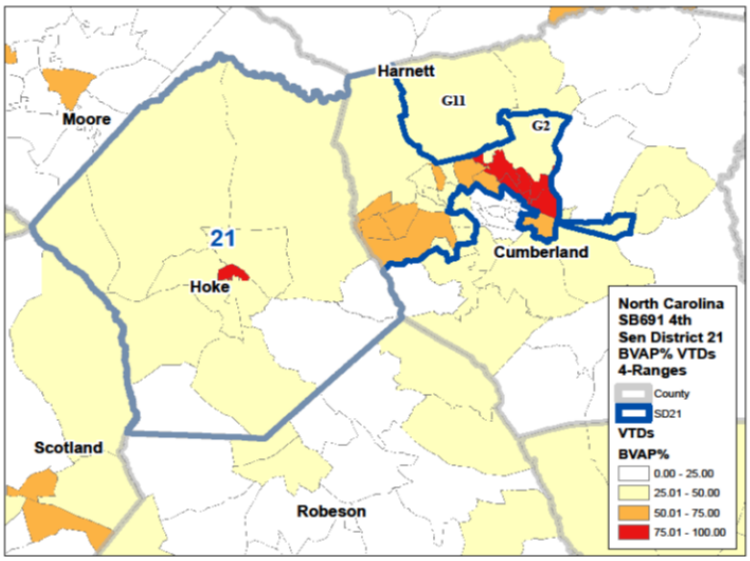
In a ninety-two-page per curiam opinion, the district court sustained several of Respondents' objections, though not all. The district court agreed that the 2017 Plans clearly violated the State Constitution's prohibition on mid-decade redistricting in the five districts that neither were challenged nor had to be changed to remedy a district

that had been invalidated, particularly given that both Respondents and the Special Master had submitted maps that corrected the racial gerrymanders without modifying those districts from their 2011 version. Because the Applicants redrew five districts that did not need to be touched to cure the constitutional violations, the district court found a violation of the State Constitution's prohibition on mid-decade redistricting. Stay App. A at 61–62.[3]

The district court also agreed—unanimously—that the 2017 Plans failed to cure the racial gerrymanders in the four Subject Districts. *Id.* at 59–60. The court made extensive factual findings regarding these districts. For Senate District 21, the court found that the 2017 Plans made only minimal changes. The 2017 Plans reduced the district's BVAP from 51.53% to 47.51%, but this still exceeded the BVAP of the benchmark plan. *Id.* at 45–46. The 2017 version of Senate District 21 retained the core shape of its 2011 counterpart, including a "horseshoe-shaped section of the city of Fayetteville." *Id.* at 45, 46. The district bore a close resemblance to Dr. Hofeller's original exemplar district, drawn with the sole purpose of hitting a mechanical racial target. *Id.* at 46. Unrebutted racial-density maps showed the district would have continued to cut through downtown Fayetteville, picking up only the majority-black precincts and almost all of Fayetteville's majority-black census blocks. *Id.* at 46–47.

[3] The court rejected Respondents' compactness challenge to Senate District 41, reasoning that the North Carolina Supreme Court had held that lack of compactness is not an independent ground for invalidating a district. *See id.* at 69 (citing *Dickson v. Rucho*, 781 S.E.2d 404 (N.C. 2015), *vacated*, 137 S. Ct. 2186 (2017)). The district court declined to exercise pendent jurisdiction over Respondents' Whole County Provision objections because it found that state law on the issue was unsettled. *Id.* at 65–69.

SD 21: black voters included and white voters excluded from the district



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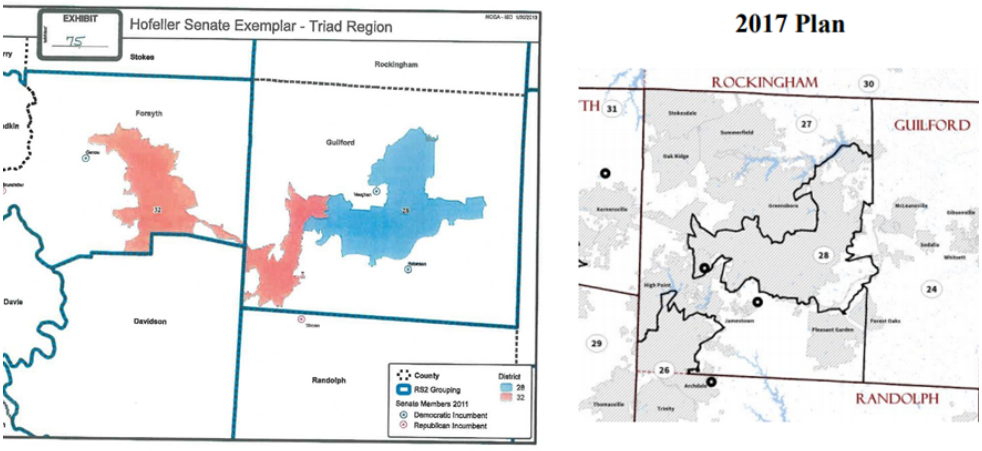
Applicants claimed that this was necessary to "preserve[] the heart of Fayetteville," but for some unexplained reason the "heart" did not include the majority-white precincts downtown. *Id.* at 47. The 2017 version of the district also performed dismally on compactness scores. *Id.* Finally, Respondents submitted the report of Dr. Gregory Herschlag, a mathematics professor at Duke University. Dr. Herschlag generated 78,485 maps for the Cumberland/Hoke county grouping using nearly all the Committees' criteria, including the disregard for race data. Drawn "race blind," not one of those maps contained a district with BVAP numbers as high as those in the 2017 version of Senate District 21, suggesting that it was not just coincidence that the BVAP in the district was so high. *Id.* The district court noted the limitations of these simulations, but found them to be probative evidence that Applicants had failed to cure the racial gerrymander. *Id.* at 47–48 & n.5.

For Senate District 28, while the 2017 Plans cut off the arm stretching into the city of High Point by splitting a precinct where an incumbent lives, the district's core shape and composition remained largely intact. *Id.* at 49. "Indeed, the proposed remedial version's contours *more closely follow* Dr. Hofeller's VRA 'exemplar' than the unconstitutional version, taking on the exemplar's reverse 'L' shape and capturing most of the precincts included in the exemplar." *Id.* (emphasis added).

Hofeller's Exemplar SD 28 Compared to 2017 SD 28



The 2017 Plans reduced the district's BVAP from 56.49% to 50.52%. But this still exceeded the Committee's original 50%-plus-one goal, and it well exceeded the BVAP of the benchmark district (47.2%). The 2017 version of the district also bore several other indicators that the district's racial gerrymandering had not been undone. "Whereas the benchmark version of the district had approximately 2,000 more black voters than white voters, the remedial version of the district has approximately 14,000 more black voters than white voters." *Id.* at 50. Unrebutted racial-density maps showed that the district incorporated every one of the majority-black precincts in the city of Greensboro while

excluding predominantly white sections of the city. The 2017 version of Senate District 28 was also "among the least compact senate districts in the state and is substantially less compact than its benchmark version." *Id.*

For House District 21, the 2017 Plans lowered the district's BVAP from 51.9% to 42.34%. "But the Sampson County section of the district conforms to the bizarre shape of the version of the district previously held unconstitutional." *Id.* at 53. In particular, the district continued to include "a protrusion stretching into the center of the county to capture the disproportionately black sections of the city of Clinton." *Id.* And the district continued to include all but one of the majority-black precincts in Sampson and Wayne Counties. Moreover, the district was the least compact of all House districts on one measure of compactness. Applicants contended that the non-compact configuration was necessary to ensure that African-American Representative Larry Bell was drawn into a district where African-American voters would be able to continue electing him. But Representative Bell had long since announced that he would not seek re-election and had later given sworn testimony to that effect. *Id.* at 54 n.6. Furthermore, the 2017 House District 21 followed the 2011 district's bizarre shape and split counties along racial lines, thereby validating "the very maneuvers that were a major cause of the unconstitutional districting." *Id.* at 55 (quoting *Abrams*, 521 U.S. at 86).

For House District 57, the 2017 Plans actually raised the district's BVAP from 50.69% to 60.75%—the highest of any House or Senate district in the State. *Id.* at 57. The resulting BVAP was more than twice as high as under the benchmark district (29.93%). *Id.* Although the 2017 version of the district departed from the shape of its

2011 counterpart, it took on the core shape of Senate District 28, which also covers Guilford County and the city of Greensboro. The district adopted the reverse "L" shape found in Dr. Hofeller's exemplar district for Senate District 28 and captured the same high-BVAP parts of Greensboro as Senate District 28. *Id.* at 57–58. House District 57's borders closely tracked concentrations of voting-age African Americans and split Greensboro once again on racial lines. For example, the 2017 Plans added heavily black precincts in southeastern Greensboro to House District 57 while removing majority-white precincts in the Irving Park area, severing Irving Park from the downtown-area community of interest of which it has long been a mainstay. *Id.* at 58. The district also scored below mean compactness scores for House districts under the 2017 Plans. In addition, the Special Master's map showed that the district could have been drawn far more compactly while meeting other race-neutral criteria. *Id.*

Accordingly, the district court declined to approve nine of the Applicants' 116 proposed districts. Instead, the district court adopted the Special Master's recommended plan for Senate Districts 21 and 28 and House Districts 21 and 57. The district court held that the Special Master's districts complied with one-person, one-vote, were consistently more compact than under the 2017 Plans, split fewer precincts and municipalities, and mostly avoided pairing incumbents. Most importantly, the Special Master had cured the racial gerrymanders in the four Subject Districts "by not tracking the contours of their racially gerrymandered versions, and not dividing municipalities and counties along racial lines." *Id.* at 72. For the other five districts that violated the State Constitution's prohibition on redistricting more than once per

decade, the court simply restored the districts as they existed under the legislatively-enacted 2011 Plans.

D. The Stay Proceedings Below.

Applicants moved the district court to stay its remedial order, and meanwhile appealed to this Court. The State did not join Applicants' request for a stay and has not appealed to this Court. The district court denied Applicants' stay request in a unanimous per curiam opinion, finding that they fell "far short of meeting their 'heavy burden' to obtain the extraordinary relief of a stay under the unique facts of this case." Resp. App. A at 8.

The court first rejected Applicants' argument that their enactment of the 2017 Plans mooted the case and required Respondents to file a new lawsuit to challenge the new plans. The court noted that the "2017 Plans were enacted pursuant to an order of this Court, not on the Legislative Defendants' own initiative or as a result of any pending state court proceeding" and therefore the court "discharged its ongoing duty to ensure that the proffered remedial plan remedied the constitutional violation." *Id.* at 9.

The court also rejected Applicants' argument that the four Subject Districts could not possibly be racial gerrymanders because the General Assembly did not consider race in enacting them. As the court noted, it "did not simply find that the districts looked 'too much' like the enacted 2011 districts, as the Legislative Defendants suggest . . . . Rather, [it] found that the districts "'partake too much of the infirmity" of their racial gerrymandered versions' to remedy the constitutional violation." *Id.* at 10 (citation omitted). The court reached that conclusion "after conducting a district-

specific analysis to determine whether each district's configuration carried forward the constitutional violation, considering a variety of statistical data and testimony" and undertaking "extensive fact finding." *Id.* at 11.

Finally, the district court rejected Applicants' argument that it should not have exercised jurisdiction over Respondents' claims that five districts violated the State Constitution's prohibition on mid-cycle redistricting. The court noted that "Legislative Defendants' contention would make a federal court, which must review and approve any remedial plan, complicit in a redistricting that obviously violates State law" and that it would not let Applicants "use this Court's remedial order as a vehicle for empowering the General Assembly to exceed its authority under the State constitution." *Id.* at 13.

ARGUMENT

"Stays pending appeal to this Court are granted only in extraordinary circumstances." *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers); *see also Bartlett v. Stephenson*, 535 U.S. 1301, 1304 (2002) (Rehnquist, C.J., in chambers).[4] When deciding whether to grant a stay, courts consider four factors. The first is "whether the stay applicant has made a strong showing that he is likely to succeed on the merits." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). In cases where this Court lacks discretion to decide the merits, as it does here, the applicant must make a strong showing that "five Justices are likely to conclude that the case was erroneously decided below." *Graves*,

[4] Applicants are plainly wrong to suggest that it is the "'ordinary practice'" of this Court to "prevent the district court's order 'from taking effect pending appellate review.'" Stay App. at 37 (citation omitted). In fact, "[d]enial of such in-chambers stay applications is the norm; relief is granted only in 'extraordinary cases.'" *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers).

405 U.S. at 1203; *see also Williams v. Zbaraz*, 442 U.S. 1309, 1312 (1979) (Stevens, J., in chambers). The second is whether "the applicant will be irreparably injured absent a stay." *Nken*, 556 U.S. at 434 (quoting *Hilton*, 481 U.S. at 776). These two factors "are the most critical," though courts also weigh "'whether issuance of the stay will substantially injure the other parties interested in the proceeding'" and "'where the public interest lies.'" *Id.* (quoting *Hilton*, 481 U.S. at 776).

I. Applicants Cannot Show a Likelihood of Success on the Merits Because the District Court Acted Well Within Its Equitable Discretion.

The district court's remedial order approved the enacted 2017 Plans except with respect to nine districts. Applicants have failed to make a showing that five Justices of this Court are likely to conclude that the district court erred by adopting the Special Master's recommendation with respect to four districts and reinstating the General Assembly's prior choices with respect to five districts—especially under this Court's deferential standard of review.

A. The district court followed this Court's instructions for crafting remedies in redistricting cases.

This Court has already noted in this case that "[r]elief in redistricting cases is 'fashioned in the light of well-known principles of equity.'" *North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017) (quoting *Reynolds v. Sims*, 377 U.S. 533, 585 (1964)). Fashioning a remedy for a constitutional violation requires an exercise of equitable discretion, which this Court reviews only for abuse of discretion. *See Abrams*, 521 U.S. at 90; *NAACP v. Hampton Cty. Election Comm'n*, 470 U.S. 166, 182–83 (1985). Moreover, this Court reviews the district court's findings of fact for clear error, and it

affirms those findings so long as they are plausible in light of the full record. *Cooper*, 137 S. Ct. at 1465.

In a non-redistricting case, a court simply orders relief once it finds a constitutional violation. But in a redistricting case, this Court has held that because redistricting is primarily the responsibility of the state legislature, courts generally should give the legislature a "reasonable opportunity" to correct the unconstitutional aspects of its plan before the court orders relief. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). Similarly, this Court has instructed that once the legislature has enacted a remedial plan, courts generally should defer to the policy choices reflected in that plan except to the extent those choices are unlawful or would fail to remedy the original constitutional defects. *See, e.g.*, *Abrams*, 521 U.S. at 85; *Upham v. Seamon*, 456 U.S. 37, 42 (1982) (noting that "[t]he only limits on judicial deference to state apportionment policy" are "the substantive constitutional and statutory standards to which such state plans are subject"); *Reynolds v. Sims*, 377 U.S. 533, 586 (1964). In racial-gerrymandering cases, if the State's proposed remedial plan is inadequate, the district court may make changes to the plan "consistent with [the State's] traditional districting principles." *Abrams*, 521 U.S. at 86. The court may also consider race as a factor so long as it does not allow race to predominate. *Id.*

The district court in this case followed these instructions to the letter. It gave the General Assembly more than a year—from August 2016 to September 2017—to remedy the twenty-eight racially gerrymandered districts in its 2011 Plans. Once the General Assembly finally enacted remedial plans, the district court approved all but

nine of the 116 districts the General Assembly redrew. That includes twenty-four of the twenty-eight districts found to be racial gerrymanders. The district court made only the changes it judged necessary to cure the racial gerrymandering in four districts and restored the General Assembly's original districts with respect to the other five districts that violated the State Constitution's prohibition on mid-decade redistricting. This is a quintessentially sound use of the district court's equitable discretion. Indeed, it is precisely the sort of careful remedy this Court has endorsed time and again.

1. The district court had jurisdiction to review whether the 2017 Plans actually remedied the racial gerrymandering in the 2011 Plans.

Applicants do not seriously dispute that the district court followed these principles. Instead, Applicants make the startling assertion that the court lacked the power to even *review* their remedial plans because the case "became moot as soon as the 2017 Plan repealed and replaced the law creating the 2011 Plan." Stay App. at 19. This is contrary to Applicants' representations to the district court acknowledging that any remedial schedule must leave time not only for "enacting new plans by the end of the year," but also "for [the district court's] review and implementation of the plans in an orderly way in 2018." Legislative Defs.' Position Statement at 29 (July 6, 2017), ECF No. 161. But in any event, if Applicants mean to say that a state can moot a racial-gerrymandering case simply by *enacting* a new plan—and that absent a new suit being filed, any such plan is immune from court review—they are clearly wrong.

By Applicants' logic, a State could moot a racial-gerrymandering case by repealing the old plan and then re-enacting the *exact same* plan. Or it could moot the case by repealing the old plan and enacting new plan with blatant violations of the one-

person, one-vote principle. If federal courts' power to remedy racial gerrymandering means anything, Applicants' jurisdictional theory cannot be correct. And even a cursory review of the law reveals that it is wrong. This Court has never suggested that judicial relief becomes inappropriate simply because a legislature enacts a new districting plan following a court order invalidating the prior plan. Rather, as this Court explained decades ago in *Reynolds v. Sims*, judicial relief is appropriate whenever a "legislature fails to reapportion *according to federal constitutional requisites* in a timely fashion after having had an adequate opportunity to do so." 377 U.S. at 586 (emphasis added); *see also Chapman v. Meier*, 420 U.S. 1, 27 (1975) (holding that responsibility for reapportionment "falls on the District Court" if the legislature fails to "enact a constitutionally acceptable plan").

Applicants' efforts to distinguish *Reynolds* make little sense. In that case, this Court held that the district court in a remedial proceeding acted in a "most proper and commendable manner" when it proceeded on the understanding that "if the legislature failed to act, *or if its actions did not meet constitutional standards*, [the district court] would be under a clear duty to take some action on the matter." *Reynolds*, 377 U.S. at 543, 586 (internal quotation marks omitted) (emphasis added). The district court reviewed a proposed constitutional amendment and a substitute apportionment plan—both passed by the Alabama legislature—"to ascertain whether the legislature had taken effective action to remedy the unconstitutional aspects of the existing apportionment." *Id.* at 546–47. The district court held that neither plan met "the necessary constitutional requirements" because they were "so obviously discriminatory,

arbitrary, and irrational." *Id.* at 547 (quotation marks omitted). This Court found nothing inappropriate about the district court's review of the legislature's remedial plans nor the court's subsequent remedial order addressing the malapportionment violations that the legislature had failed to cure.

Since this Court decided *Reynolds*, it has never doubted that this type of remedial review falls well within the federal courts' jurisdiction. Even when this Court has reversed or vacated a district court's decision to draw its own plan, it has never even hinted at a fundamental jurisdictional problem. None of the cases Applicants cite are even remotely on point. For example, in *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Commission*, the district court held that the plaintiffs' challenge to a 1994 districting plan was moot because the 1994 plan was held to be unconstitutional *two years* before the litigation even began. 366 F. Supp. 2d 887, 901–02 (D. Ariz. 2005). In *Johnson v. Mortham*, the district court observed that plaintiffs' Voting Rights Act challenge became moot before the court "began consideration of a remedial plan" because it had previously granted summary judgment to the plaintiffs, holding that those very same districts were unconstitutional under one-person, one-vote. 926 F. Supp. 1460, 1469–70 (N.D. Fla. 1996). Applicants also miss the mark when they cite *Growe v. Emison*, 507 U.S. 25 (1993). In that case, this Court noted that a plaintiff's Voting Rights Act challenge to a pre-existing plan became moot once a state court held that the plan was unconstitutional "unless those claims also related to the superseding plan." *Id.* at 39. None of these propositions are in dispute, but none have any bearing on this case.

In addition to clashing with this Court's precedents, Applicants' jurisdictional theory cannot be squared with the courts' inherent powers. Once a redistricting plan is found to be unconstitutional, the district court has the power to order the State to draw a new plan that remedies the defects in the existing plan. Applicants do not dispute that the district court acted within its discretion when it ordered the General Assembly to do just this. And it is well-established that federal courts have the inherent power to enforce their orders. *See Peacock v. Thomas*, 516 U.S. 349, 356 (1996); *Riggs v. Johnson Cty.*, 73 U.S. 166, 187 (1867) ("the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied"). Applicants argue, in effect, that the district court had the power to order the General Assembly to remedy the constitutional violations in the 2011 Plans, but no power to enforce its order. They are mistaken, even by their own admission.[5]

2. The district court was not required to adopt a remedy that clearly violated the State Constitution.

Applicants also argue that the district court lacked jurisdiction over Respondents' claim that five of the districts in the 2017 Plans blatantly violated the State Constitution. As described above, when the district court ordered the General Assembly to enact plans to remedy the twenty-eight racially gerrymandered districts, the General Assembly used the court's order as license to redraw five state House districts that had nothing to do with this case. These districts were not challenged and do not touch any districts that were, and the evidence before the court demonstrated

[5] In prior briefing to this Court, Applicants argued that a district court's order appointing a special master to develop a remedial plan in another case "fell squarely within the rule allowing a district court to 'take action to enforce its order'" that the prior plan could not be used in future elections. Applicants' Opposition to Motion to Affirm at 4, *North Carolina v. Covington*, No. 16-1023 (U.S. Mar. 14, 2017).

that the racial gerrymanders could be remedied without altering those districts. Applicants have offered no credible justification for why they were required to alter these districts.

The Constitution of North Carolina says explicitly that state House districts, once established, "shall remain unaltered until the return of another decennial census of population taken by order of Congress." N.C. Const. art. II, § 5(4). And the text means what it says. The Supreme Court of North Carolina has held that "in interpreting our Constitution—as in interpreting a statute—where the meaning is clear from the words used, we will not search for a meaning elsewhere." *State ex rel. Martin v. Preston*, 385 S.E.2d 473, 479 (N.C. 1989). The Supreme Court of North Carolina has also held that the State Constitution "enumerates several limitations on the General Assembly's redistricting authority," including the prohibition on mid-decade redistricting in Article II, section 5. *See Pender Cty. v. Bartlett*, 649 S.E.2d 364, 366 (N.C. 2007), *judgment aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1 (2009). "Those constitutional limitations are binding upon the General Assembly except to the extent superseded by federal law." *Id.* (quoting *Stephenson v. Bartlett*, 562 S.E.2d 377, 389 (N.C. 2002)).

There is no serious argument that state law is unclear here. The General Assembly redrew five House districts that violated no federal law, and which the district court never ordered to be redrawn. There was no conflict between federal law and the State Constitution's prohibition on mid-decade redistricting with respect to these districts. Therefore, the prohibition remained binding on the General Assembly, and the General Assembly clearly violated it.

The goal of a redistricting remedy is to give the plaintiffs relief while respecting a State's legitimate redistricting choices. *White v. Weiser*, 412 U.S. 783, 797 (1973). But by definition, a redistricting choice that violates the State's constitution is one the legislature had no power to make. It is therefore not entitled to any deference at the remedial phase. *Reynolds*, 377 U.S. at 584 (explaining that during the remedial phase of a redistricting challenge, "courts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions insofar as is possible"). It cannot be the case that a district court is obligated to adopt a remedial plan that obviously violates state law—especially when, as here, the plan otherwise fails to remedy the federal constitutional violations at issue. After all, the whole point of respecting a state's redistricting choices is to respect its sovereignty. *See North Carolina v. Covington*, 137 S. Ct. at 1626. That in turn requires a court to respect the limits the people of that State—the true locus of state sovereignty—have imposed on their legislature. *See* N.C. Const. art. I, §§ 2–3 (declaring the sovereignty of the people of North Carolina). A federal district court would clearly abuse its remedial powers if it unilaterally imposed a redistricting plan that violated the state's constitution in a way that was not reasonably necessary to correct a violation of federal law. *See Reynolds*, 377 U.S. at 584. It would be no less an abuse of discretion to allow a state legislature to do the same, at least when the violation is clear.

Applicants ignore all these considerations, and their references to the Eleventh Amendment stray far from the point. Here, it fell to the district court to ensure that the pervasive racial gerrymandering in the 2011 Plans was cured. In fashioning a

remedy, the court had no duty to incorporate a clear violation of state law. In fact, the district court would have abused its discretion had it done so. Applicants cite no authority to the contrary, and they have offered no justification for flouting the State's prohibition on mid-decade redistricting.[6]

3. The district court was not required to give the General Assembly an unlimited number of chances to fix the constitutional violations.

The district court also acted well within its equitable discretion in finding that the State was "not entitled to multiple opportunities to remedy its unconstitutional districts." Stay App. B. at 4. As this Court has stated, a legislature is entitled to "a reasonable opportunity . . . to meet constitutional requirements by adopting a substitute measure," insofar as this is "practicable." *Lipscomb*, 437 U.S. at 540. "[W]hen a legislature fails to reapportion in a timely fashion after having had an adequate opportunity to do so," judicial relief is appropriate. *Reynolds*, 377 U.S. at 586.

Applicants have cited no case standing for the proposition that they are entitled to unlimited chances to enact redistricting plans. The district court gave the General Assembly the remedial opportunity to which it was entitled. Indeed, the court afforded the General Assembly even more leeway than some other district courts have allowed in similar circumstances. For example, when Louisiana's elected branches "persist[ed] in defending the indefensible" and "doggedly [clung] to an obviously unconstitutional

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[6] Applicants' argument that Respondents lacked standing to raise these objections ignores the remedial nature of the proceedings below. At the remedial phase, the district court has an independent duty to determine whether the legislature's remedy is legally unacceptable because it violates "constitutional and statutory standards to which such state plans are subject." *Upham*, 456 U.S. at 42. The court also has an independent duty to fashion a remedy that accommodates "provisions of state constitutions insofar as is possible." *Reynolds*, 377 U.S. at 584. Respondents did nothing more than bring these issues to the district court's attention. Because the district court had the obligation to consider these issues *sua sponte*, there is no standing issue.

plan" in *Hays v. Louisiana*, 936 F. Supp. 360, 372 (W.D. La. 1996), the district court found that "the Legislature has left [it] no basis for believing that, given yet another chance, it would produce a constitutional plan," and ordered into effect its own map without giving the legislature any remedial opportunity at all. *Id.* Similarly, in *Terrazas v. Slagle*, 789 F. Supp. 828 (W.D. Tex. 1991), *summarily aff'd sub nom. Richards v. Terrazas*, 505 U.S. 1214 (1992), the court had "no real hope that further deference to the legislature . . . would yield any result other than continued protection of some members' self-interests to the exclusion of minorities' rights," and so put its own plan into place. *Id.* at 839; *see also, e.g.*, *LULAC v. Perry*, 457 F. Supp. 2d 716, 721 (E.D. Tex. 2006) (imposing the court's own Voting Rights Act remedy immediately, given upcoming elections); *Johnson v. Miller*, 929 F. Supp. 1529, 1567 (S.D. Ga. 1996) (same in racial-gerrymandering case).

The district court was under no obligation to allow the General Assembly unlimited bites at the apple. Here, the district court appropriately afforded Applicants an opportunity to rectify the State's egregious racial gerrymandering. When Applicants failed to provide a "fully adequate" remedy, *White*, 412 U.S. at 797, the court acted well within its equitable discretion by adopting remedial plans that redressed existing constitutional violations without introducing new constitutional violations.

B. The district court correctly found that the General Assembly failed to remedy the racial gerrymandering in four districts.

Applicants have not shown that they are likely to succeed on the merits with respect to the four Subject Districts. Based on the extensive factual record before it, the district court found that the 2017 Plans failed to remedy the extensive racial

gerrymandering in Senate Districts 21 and 28 and House Districts 21 and 57. These factual findings were more than plausible on this record, and the district court's conclusion easily "clears the bar of clear error review." *Cooper*, 137 S. Ct. at 1462.

Applicants do not contest *any* of the district court's findings about the shape and composition of these four districts, and they do not dispute the district court's findings that the four districts "shared many of the constitutional defects" of their 2011 counterparts. *Abrams*, 521 U.S. at 88. In particular, Applicants do not dispute that the districts maintain the core shapes they had under the 2011 Plans, continue to divide counties and municipalities on racial lines in much the same manner, and continue to perform poorly on compactness measures. Most significantly, it is undisputed that the four districts closely track Dr. Hofeller's exemplar districts—which were drawn in 2011 for the sole purpose of hitting the Redistricting Committees' mechanical racial targets. *Covington*, 316 F.R.D. at 135. Indeed, Senate District 28 came to track Dr. Hofeller's exemplar even *more* closely in the 2017 Plans, while House District 57 took on the shape of that same exemplar. Given this undisputed and unrebutted evidence, it cannot seriously be contended that the district court clearly erred in holding that the 2017 Plans failed to remedy the unconstitutional design of these districts.

That alone is sufficient reason to affirm the district court's conclusion that the 2017 Plans were an inadequate remedy. Racial gerrymandering injures voters by classifying and separating them into districts on the basis of race. *Shaw v. Reno*, 509 U.S. 630, 649 (1993); *Miller v. Johnson*, 515 U.S. 900, 911 (1995). "Just as the State may not, absent extraordinary justification, segregate citizens on the basis of race in its

public parks, buses, golf courses, beaches, and schools, so did [this Court] recognize in *Shaw* that it may not separate its citizens into different voting districts on the basis of race." *Miller*, 515 U.S. at 911 (internal citations omitted). As in any other context, once plaintiffs show that the State has impermissibly divided them into districts on the basis of race, they are entitled to have those divisions undone.

So long as those divisions remain enshrined in the State's legislative maps, the injury persists, and the plaintiffs have not received full relief. The harms of racial gerrymandering include not only being "personally . . . subjected to [a] racial classification," but also "being represented by a legislator who believes his primary obligation is to represent only the members' of a particular racial group." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (quotation marks omitted); *see also Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015). As this Court has previously held, an equitable remedy for these harms must be *remedial* in nature, "that is, it must be designed as nearly as possible to 'restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.'" *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995) (quoting *Milliken v. Bradley*, 418 U.S. 717, 746 (1974)). The same principle applies to racial-gerrymandering cases. *See Shaw v. Hunt*, 517 U.S. 899, 915 (1996). It follows that a substitute districting plan is not an adequate remedy if it divides voters in substantially the same manner as its unconstitutional predecessor and continues to place them in districts represented by incumbents elected on the theory that their primary obligation is to represent the members of one racial group.

The situation here is analogous to that in *Abrams*. There, the district court found that Georgia's Eleventh Congressional District, enacted as part of a 1992 plan, was racially gerrymandered. This Court affirmed the district court's judgment and remanded the case for further proceedings. *Miller*, 515 U.S. at 928. On remand, the legislative defendants "proposed a variety of plans," including one that the Georgia Legislature had passed in 1991. *Abrams*, 521 U.S. at 83. The district court declined to adopt this plan because it "closely resembled the Eleventh District in the [challenged] plan" and thus "shared many of the constitutional defects" as the challenged plan. *Id.* at 83, 88. The racial predominance in the challenged plan and the close resemblance it bore to the 1991 Plan made both plans "improper departure points" at the remedial phase. *Id.* at 90. This Court declined to stay the district court's order and allowed the 1996 general elections to proceed under the court's plan while the appeal was pending. *Id.* at 78. The Court ultimately affirmed the district court's judgment on appeal. *Id.* at 101.

The circumstances here call for the same result. After "extensive fact finding," including "a district-specific analysis to determine whether each district's configuration carried forward the constitutional violation, considering a variety of statistical data and testimony," the district court unanimously concluded that the four Subject Districts ""'partake too much of the infirmity" of their racial gerrymandered versions' to remedy the constitutional violation." Resp. App. A at 10–11. Nothing more is required in the remedial phase. Indeed, the district court's findings in this case are far more robust than the findings this Court affirmed in *Abrams*. *See Johnson v. Miller*, 922 F. Supp. 1556, 1563 n.9 (S.D. Ga. 1995), *judgment aff'd*, 521 U.S. 74 (1997).

Applicants' only argument in response is that the 2017 Plans necessarily remedied the racial gerrymandering simply because the Redistricting Committees instructed Dr. Hofeller not to consider racial data when redrawing the plans. The premise of that argument is not as clear as Applicants suggest, given Dr. Hofeller's primary role in drawing the 2011 Plans that "systematically assigned" voters to districts by race. But regardless, the argument misses the point entirely. The State cannot undo the injury of racial gerrymandering simply by claiming to ignore race and then re-enacting substantially the same plan. That would not accomplish the basic purpose of a *remedial* plan, and it cannot be what it means to give plaintiffs meaningful relief for a serious equal-protection violation. By Applicants' logic, the State could have fixed its 2011 Plans by re-enacting the *exact same plans*, so long as Dr. Hofeller simply turned off the racial-data feature in his redistricting software this time around. That radical proposal lacks any foundation in this Court's precedent or in principles of equity.

As the district court correctly noted, this Court has long recognized that a "statute enacted by a state legislature to remedy an unconstitutional race-based election law can perpetuate the effects of the constitutional violation, and thereby fail to constitute a legally acceptable remedy, *even when the remedial law is facially race-neutral*." Stay App. A at 41 (citing *Lane v. Wilson*, 307 U.S. 268 (1939); *Guinn v. United States*, 238 U.S. 347 (1915)) (emphasis added). Declaring that a remedy was enacted without consideration of race does not insulate that remedy from scrutiny as to whether it still perpetuates racial segregation. Indeed, Members of this Court have observed that a "race-conscious remed[y] . . . may be the only adequate remedy after a

judicial determination that a State or its instrumentality has violated the Equal Protection Clause." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519 (1989) (Kennedy, J., concurring in part and concurring in the judgment).[7]

II. Applicants Have Failed to Allege that They Will Suffer Irreparable Harm.

Applicants have not shown they are likely to succeed on the merits of their appeal. But even if they had, "[a]n applicant's likelihood of success on the merits need not be considered . . . if the applicant fails to show irreparable injury from the denial of the stay." *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers). Here, Applicants have not established that they will suffer any irreparable harm absent a stay. That is fatal to their application.

Indeed, Applicants have not argued that they will suffer *any* harm absent a stay, let alone irreparable harm. Instead, their application rests entirely on purported harm to *the State of North Carolina* if it is prevented from implementing the 2017 Plans as drafted. Neither the State nor the state agency most affected by the alterations to the 2017 Plans—the State Board of Elections—is seeking to stay the district court's order, nor have they filed an appeal in this case. This Court does not stay lower courts' orders because *someone* might be irreparably harmed. Rather, it must be shown that "*the*

[7] Applicants also suggest that the district court overlooked the State's political goals as an alternative explanation for why the four Subject Districts so closely resemble their 2011 counterparts. Specifically, Applicants suggest that the similarities can be explained by the State's criteria to protect incumbents elected under the 2011 Plans and to avoid pairing those incumbents. But Applicants offered virtually no evidence supporting this explanation. Furthermore, a state cannot preserve a racially gerrymandered plan in the name of protecting incumbents elected under that plan. *See Easley v. Cromartie*, 532 U.S. 234, 262 n.3 (2001) (Thomas, J., dissenting) (observing that incumbency protection is a "questionable" goal "where, as here, individuals are incumbents by virtue of their election in an unconstitutionally racially gerrymandered district"). That would only serve to perpetuate the racial gerrymandering in the 2011 Plans and "validate the very maneuvers that were a major cause of the unconstitutional districting." *Abrams*, 521 U.S. at 86.

applicant will be irreparably injured absent a stay." *Nken*, 556 U.S. at 434 (emphasis added) (quotation marks omitted). Applicants do not represent any of the districts at issue in this appeal, and they will not be personally affected by the district court's remedial order. Because the Applicants have failed to identify any irreparable harm they would suffer from a denial of a stay, there is no justification for granting one.

In any event, Applicants' argument that the State will be irreparably harmed by a risk of voter confusion if the district court's order is allowed to remain in effect for the 2018 elections is meritless (and is not joined by the State). Applicants themselves told the district court months ago that a remedy implemented in January 2018 would allow for orderly elections in 2018. Resp. App. A at 1–2. Furthermore, it is extremely unlikely that anyone has developed settled expectations about the contours of the districts at issue given that it has been widely known that the 2011 districts would need to be redrawn since at least June 2017, when this Court summarily affirmed the district court's judgment. Applicants did not submit proposed remedial plans to the district court until September 7, 2017. Respondents lodged their objections to those plans just eight days later. The district court informed the parties that it had serious concerns about the adequacy of the plans approximately three months ago. And the Special Master submitted his recommended changes to the plans almost two months ago. Against this background, Applicants cannot seriously argue that anyone will be taken by surprise if the district court's order is implemented now.

Moreover, the district court's remedial plans are already complete, and they have already taken effect. Because the district court's plans are ready now, there is plenty of

time to implement them without disruption. The filing period for the 2018 general elections does not even begin until February 12, 2018, and the General Assembly has the power to extend that filing period if it sees fit. *See* N.C. Gen. Stat. § 163A-970. More importantly, the primary elections will not be held until May 8, 2018—nearly five months from the date of the district court's order. That distinguishes the present case from *Purcell v. Gonzalez*, 549 U.S. 1 (2006), in which the district court enjoined the enforcement of a voter ID statute one month before a *general* election. *Id.* at 3.

The State will have to implement new redistricting plans for the 2018 elections no matter what. That is a direct consequence of the Applicants' racial gerrymandering in the 2011 Plans. The only question is whether to implement the district court's remedial plans or the inadequate and unconstitutional 2017 Plans the General Assembly proposed. If anything, implementing the former will be far less disruptive because they alter five fewer districts than the 2017 Plans. Accordingly, any risk of confusion is slight. And it cannot justify requiring Respondents to wait another two years before they may finally vote in an election free from unconstitutional racial classifications.

III. Denying the Stay Application Would Serve the Public Interest and Finally End the Irreparable Harm Respondents Have Suffered for Six Years.

Applicants have failed to show any likelihood of success on the merits, and they have failed to even allege irreparable harm. Their application cannot possibly warrant the extraordinary relief of a stay. *See Nken*, 556 U.S. at 434 (likelihood of success on the merits and irreparable harm are "the most crucial" factors). There is no need for the Court to balance the equities any further. Still, it is worth recalling that racial gerrymandering is "altogether antithetical to our system of representative democracy."

Shaw v. Reno, 509 U.S. at 648. It robs citizens of their constitutional right to be treated by their government "as individuals, not as simply components of a racial, religious, sexual or national class." *Miller*, 515 U.S. at 911 (quotation marks omitted).

It is plainly in the interest of the people of North Carolina to finally hold elections under a districting plans that respects the Constitution of North Carolina and the Constitution of the United States. "The public has an interest in having . . . representatives elected in accordance with the Constitution." *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 560–61 (E.D. Va. 2016). The citizens of North Carolina have been forced to endure an egregious racial gerrymander for over six years and three election cycles. The General Assembly includes twenty-eight members elected from unconstitutionally-drawn districts. It has now been almost a year-and-a-half since the district court held the legislative plans unconstitutional—a decision this Court summarily affirmed. If the Court grants the stay, the voters of North Carolina will have to endure another election under unconstitutional legislative maps, and Applicants will be rewarded for their tactics of delay at nearly every stage of this case.

Ironically, given their earlier protestations to this Court that the district court was moving too quickly in implementing a remedy, Applicants now blame the district court for delaying the remedial proceedings. Stay App. at 35–36. But "[t]he factual record demonstrates that [the district court] has moved with reasonable dispatch at every turn." Resp. App. A at 1. And in any event, it is undisputed that *Respondents* have done nothing to delay any of these proceedings. Respondents filed their challenges to twenty-eight racially gerrymandered districts nearly three years ago.

They sought a preliminary injunction. They prevailed at trial and received a judgment on the merits almost a year-and-a-half ago, and this Court affirmed that judgment over seven months ago. Applicants had all of this time to remedy the pervasive racial gerrymandering in the challenged districts. But they did not submit remedial plans until the court-ordered deadline, and the plans they did submit were inadequate. Under these circumstances, it would be deeply unfair to punish Respondents based on Applicants' complaints that the wheels of justice should have turned a bit faster.

IV. There Is No Reason to Hold this Case for *Abbott v. Perez*.

Finally, Applicants argue that, as an alternative to granting the stay, this Court should hold this case pending the outcome of *Abbott v. Perez*, Nos. 17A225 & 17A245 (U.S.), which will be argued in April 2018. But the cases are not remotely similar, and nothing this Court decides in *Abbott* will bear on the issues here. The appellants in *Abbott* described that case as involving the "novel" question whether "a map that is constitutional when drawn by a court becomes unconstitutional when adopted by the Legislature." Stay App., *Abbott v. Perez*, No. 17A225 at 6 (U.S. Aug. 25, 2017). This case does not involve any such "novel" questions. Rather, it involves the mundane question whether, based on the facts of this case, the district court abused its equitable discretion by adopting remedial plans that reject the constitutional defects in the Applicants' plans while adopting those plans in all other respects. Applicants simply assert that "this Court's disposition of *Abbott* could well form the basis of a decision by this Court to vacate" the district court's ruling, Stay App. at 26, but they never explain why or how that would happen. To use Applicants' language, the suggestion that the

Court hold this case for *Abbott* appears to be simply a "filibuster to deprive" the people of North Carolina of their rightful opportunity to elect representatives from constitutional districts in 2018. Stay App. at 36.

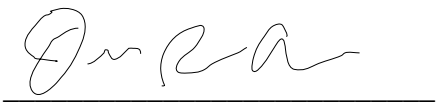
For all the reasons set forth herein, the Court should deny the stay application. However, if the Court grants the stay, Respondents join in Applicants' request, Stay App. at 37, that this Court treat the stay papers as jurisdictional briefing and order expedited briefing and argument this Term.

CONCLUSION

For the foregoing reasons, the Court should deny Applicants' emergency application for a stay.

Dated: February 2, 2018

Respectfully submitted,



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APPENDIX

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

SANDRA LITTLE COVINGTON, et al.,	)	
Plaintiffs,	)	
	)	1:15CV399
v.	)	
THE STATE OF NORTH CAROLINA, et al.,	)	
Defendants.	)	

Before WYNN, Circuit Judge, SCHROEDER, Chief District Judge, and EAGLES, District Judge.

MEMORANDUM ORDER

PER CURIAM:

Before the Court is Legislative Defendants' motion to stay this Court's order approving remedial districts pending appeal to the United States Supreme Court. (ECF No. 243.) Plaintiffs oppose a stay (ECF No. 245), and the State of North Carolina and the State Board of Elections and its members ("State Board Defendants") take no position on the motion, but the State urges that "a swift decision on a remedy would advance the public interest." (ECF No. 246 at 1.) For the reasons set forth below, the motion will be denied.

I.

The factual record demonstrates that this Court has moved with reasonable dispatch at every turn, Legislative Defendants

have themselves acknowledged that the Court's remedy would be timely, and a stay would only prolong the constitutional harms that have persisted for more than six years.

On August 11, 2016, this Court unanimously found that the North Carolina General Assembly unjustifiably relied on race in the drawing of twenty-eight majority-minority House and Senate districts in the 2011 State legislative redistricting plans, in violation of the Equal Protection Clause of the Fourteenth Amendment. *Covington v. North Carolina*, 316 F.R.D. 117, 176 (M.D.N.C. 2016) (*Covington I*), *aff'd*, 137 S. Ct. 2211 (2017). In light of the then-upcoming November 2016 election cycle, we denied Plaintiffs' request for a special election and reluctantly permitted a third biennial general election (2012, 2014, and 2016) to proceed under an unconstitutional redistricting scheme. We issued a final remedial order on November 29, 2016, that required the General Assembly to adopt new districting plans by March 15, 2017, and ordered a special election in the fall of 2017. *Covington v. North Carolina* (*Covington II*), No. 1:15-CV-399, 2016 WL 7667298, at *2-3 (M.D.N.C. Nov. 29, 2016), *vacated*, -- U.S. --, 137 S. Ct. 1624, (2017). The General Assembly made no effort to draw and submit remedial constitutional districts before this deadline.

Instead, Legislative Defendants sought and obtained a stay of our remedial order pending review of the constitutional claims by

the Supreme Court. *North Carolina v. Covington*, -- U.S. --, 137 S. Ct. 808 (2017) (mem.) On June 5, 2017, the Supreme Court summarily affirmed, without dissent, this Court's judgment that the 2011 House and Senate districting plans were racial gerrymanders in violation of Plaintiffs' Fourteenth Amendment Rights. *North Carolina v. Covington*, -- U.S. --, 137 S. Ct. 2211 (2017) (mem.) The Court vacated the final remedial order requiring a mid-cycle election, however, and directed a "careful case-specific analysis" to determine an appropriate remedy. *North Carolina v. Covington*, -- U.S. --, 137 S. Ct. 1624, 1626 (2017).

After obtaining jurisdiction from the Supreme Court, this Court set and held a July 27, 2017 hearing, at which we received evidence, briefing, and argument regarding the appropriate remedy for the constitutional violations. Legislative Defendants opposed a special election and acknowledged that they had not taken any action to draw remedial districts (other than creating new redistricting committees and proposing public hearings); they proposed a schedule that would require the General Assembly to enact remedial districts by November 15, 2017, to be implemented in the 2018 election. (ECF No. 161 at 30; ECF No. 181 at 87, 91.) In support of this proposal, Legislative Defendants represented that adopting "a goal of enacting new plans by the end of the year . . . would leave time for this Court's review and implementation of the plans in an orderly way in 2018." (ECF No. 161 at 29.)

We declined to adopt Legislative Defendants' proposed schedule and gave the General Assembly until September 1, 2017, "to enact new House and Senate districting plans remedying the constitutional deficiencies" with the districts found unconstitutional in this Court's August 2016 opinion and order. *Covington v. North Carolina* (*Covington III*), -- F. Supp.3d. --, 2017 WL 3254098, at *3 (M.D.N.C. July 31, 2017). Our order explained that we selected the September deadline to ensure adequate time "(1) to review the General Assembly's enacted remedial district plans, and (2) if the enacted plans prove constitutionally deficient, to draw and impose its own remedial plan." *Id.*

On August 31, 2017, the General Assembly enacted new redistricting plans for the House and Senate (the "2017 Plans") to be implemented for the 2018 elections. In expedited briefing, Plaintiffs filed objections to 12 of the 116 remedial districts, alleging that those districts failed to remedy the identified racial gerrymander or were otherwise legally unacceptable. (ECF No. 187.) The State and the State Board Defendants took no position on Plaintiffs' objections.

Shortly thereafter, on October 12, 2017, we held a hearing on Plaintiffs' objections to the 2017 Plans. After carefully reviewing Plaintiffs' objections, we informed the parties of our concern that nine district configurations (the "Subject

Districts") within the 2017 Plans either failed to remedy the racial gerrymanders or were otherwise legally unacceptable. (ECF No. 202.) After the parties could not agree on a Special Master, we indicated our intent to appoint Dr. Nathaniel Persily of Stanford University to assist the Court in evaluating and, if necessary, redrawing the Subject Districts in light of the approaching filing period for the 2018 elections, and we provided the parties an opportunity to object to his appointment. (*Id.*) Three days later, we overruled Legislative Defendants' objections and appointed Dr. Persily as Special Master. (ECF No. 206.) Describing our concerns with the Subject Districts and setting forth the Special Master's duties and responsibilities, we gave the Special Master until December 1, 2017, to file a report with recommended plans for each of the Subject Districts, an explanation of those plans, and a comparison of the recommended plans with both the 2011 enacted maps and the 2017 Plans. (*Id.*)

On November 14, 2017, the Special Master filed draft reconfigurations of the Subject Districts as well as an explanation of his rationale behind those reconfigurations, and invited comments from the parties. (ECF No. 213.) After considering those comments, the Special Master revised his maps and filed his Recommended Plans and Report on December 1, 2017. (ECF No. 220 ("Recommended Plans").)

On January 5, 2017, the Court held a hearing during which the

Special Master presented his Recommended Plans and addressed numerous questions raised by the parties. Legislative Defendants introduced expert and lay testimony relating to alleged infirmities of the Recommended Plans. The State and State Board Defendants took no position on Plaintiffs' objections or the Special Master's Recommended Plans. During the hearing, State Board Defendants confirmed that, if the court approved a final redistricting plan three weeks prior to the beginning of the February 12, 2018 candidate filing period, they would be able to assign voters to their respective districts and determine the proper administrative procedures for permitting candidates to file for election without additional delay. (ECF No. 244 at 138-40.)

On January 19, 2018, more than three weeks ahead of the commencement of the candidate filing period, we entered our memorandum opinion and order, rejecting Plaintiffs' proposed maps and approving the General Assembly's 2017 Plans except as modified by the Special Master's Recommended Plans, which were adopted. (ECF No. 242 ("Final Order").)[1]

Shortly thereafter, Legislative Defendants filed the present motion, seeking to stay the Final Order pending appeal to the Supreme Court and requesting an expedited ruling. We ordered that responses be filed within 48 hours. As noted, Plaintiffs urge

[1] On January 21, 2018, the Court issued an amended opinion. All subsequent citations herein are to the amended version.

that the motion be denied (ECF No. 245), and the State and State Board Defendants take no position, but the State urges a swift decision on the remedial districts. (ECF No. 246.)

II.

Federal Rule of Civil Procedure 62 provides for a stay of a final judgment involving injunctive relief. A court must consider four factors when considering whether to issue a stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken*, 556 U.S. at 433 (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)). Rather, it is "an exercise of judicial discretion," and "[t]he propriety of its issue is dependent upon the circumstances of the particular case." *Id.* (citations omitted). It is considered "'extraordinary relief' for which the moving party bears a 'heavy burden,'" and "[t]here is no authority to suggest that this type of relief is any less extraordinary or the burden any less exacting in the redistricting context." *Larios v. Cox*, 305 F. Supp. 2d 1335, 1336

(N.D. Ga. 2004) (quoting *Winston-Salem/Forsyth Cty. Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971) (Burger, C.J., in chambers)). Even though Legislative Defendants have filed notice of appeal to the Supreme Court (ECF No. 247), this Court retains jurisdiction to consider the application for stay. *See* Fed. R. Civ. P. 62(c); Fed. R. App. P. 8(a)(1)(A); *Personhubullah v. Alcorn*, 155 F. Supp. 3d 552, 558-59, 561 (E.D. Va. 2016) (denying request for stay in redistricting case after Supreme Court set earlier liability determination for oral argument).

Legislative Defendants do not specifically address the traditional four-factor test.[2] Nevertheless, in our judgment, Legislative Defendants fall far short of meeting their "heavy burden" to obtain the extraordinary relief of a stay under the unique facts of this case.

A.

First, Legislative Defendants have not made a "strong showing" that they are likely to prevail on the merits. They reprise their contention that this Court's order finding the 2011 districts unconstitutional rendered this proceeding moot,

[2] Legislative Defendants rely on *Perry v. Hollingsworth*, which outlines the standard for a Circuit Justice to consider an in-chambers stay application. 558 U.S. 183, 190 (2010); *see Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (outlining the "principles that control a Circuit Justice's consideration of in-chambers stay applications"). As a result, Legislative Defendants fail to adequately consider whether the stay would substantially injure other interested parties or be in the public interest.

requiring the filing of a new lawsuit to pursue further challenges to their 2017 Plans. This argument has no merit and ignores the remedial posture of this case.

The 2017 Plans were enacted pursuant to an order of this Court, not on the Legislative Defendants' own initiative or as a result of any pending state court proceeding. Accordingly, this court discharged its ongoing duty to ensure that the proffered remedial plan remedied the constitutional violation. *Chapman v. Meier*, 420 U.S. 1, 27 (1975) (noting if the state fails to enact "a constitutionally acceptable" remedial districting plan, then "the responsibility falls on the District Court"). To hold otherwise would vitiate this Court's responsibility to ensure that the constitutional violation is remedied. And holding otherwise would contradict Legislative Defendants' prior acknowledgement of this Court's obligation to review and approve the General Assembly's proposed remedial plans. (ECF No. 161 at 29 (explaining that Legislative Defendants' proposed schedule "of enacting new plans by the end of the year . . . would leave time for this Court's review and implementation of the plans in an orderly way in 2018").)

In fulfilling our responsibility to ensure the constitutionality of the remedial redistricting plans, we found that the Legislative Defendants failed to remedy the racial gerrymanders within House Districts 21 and 57 and Senate Districts

21 and 28. (ECF No. 242 at 59-60.) Legislative Defendants now contend that in doing so we set forth a "new racial gerrymandering test" that requires legislatures to "affirmatively use[] race[]" in redistricting. (ECF No. 243 at 6.) This contention is erroneous and misunderstands our decision.

For reasons explained in our 92-page opinion, we found that in the *remedial context* the General Assembly should be conscious of the prior racially-drawn districts to ensure that its remedial plan remedies the racial gerrymander, particularly where, as here, the General Assembly *chooses* to rely on redistricting criteria highly correlated with race, like preserving the "cores" of unconstitutional districts or using election data to ensure incumbents elected in the racially gerrymandered districts will prevail in their remedial districts. (ECF No. 242 at 44.) Notably, in responding to Plaintiffs' objections as to the Wake and Mecklenburg County districts, Legislative Defendants relied on the *exact same principle*, stating that a remedial plan drawn to preserve the "core of [a] racially gerrymandered district" "would perpetuate [the] racial gerrymander." (ECF No. 192 at 52.)

We did not simply find that the districts looked "too much" like the enacted 2011 districts, as the Legislative Defendants suggest. (ECF No. 243 at 7.) Rather, we found that the districts "'partake *too much* of the infirmity' of their racial gerrymandered versions" to remedy the constitutional violation. (ECF No. 242 at

42 (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939) (emphasis added)).[3] We reached this conclusion after conducting a district-specific analysis to determine whether each district's configuration carried forward the constitutional violation, considering a variety of statistical data and testimony. Our determination that race continued to predominate in the drawing of the Subject Districts rested on extensive fact finding, which will be reviewed under a highly deferential clear error standard. *See Harris v. McCrory*, No. 1:13CV949, 2016 WL 6920368, at *1 (M.D.N.C. Feb. 9, 2016) (concluding Defendants failed to make a "strong showing" they were likely to succeed on merits on appeal of racial gerrymandering decision, where decision rested on extensive factual findings subject to clear error review); *Personhuballah*, 155 F. Supp. 3d at 559 (same).

To be sure, "the Constitution does not place an *affirmative* obligation upon the legislature to avoid creating districts that turn out to be heavily, even majority, minority." *Easley v. Cromartie*, 532 U.S. 234, 249 (2001). As we noted, however, in the remedial context political considerations such as incumbency protection and election data must give way to remedying the constitutional violation. (ECF No. 242 at 39.) *See Cromartie*,

[3] For example, the 2017 Plans proposed replacing House District 57, which we found to be a racial gerrymander designed to create a majority-minority district with a minimum 50%-plus black voting age population, with a remedial version that *increased* the district's black voting age population from 50.69 percent to 60.75 percent. (ECF No. 242 at 57.)

532 U.S. at 262 n.3 (Thomas, J., dissenting) (characterizing as "questionable" the proposition that "the goal of protecting incumbents is legitimate even where, as here, individuals are incumbents by virtue of their election in an unconstitutional racially gerrymandered district"); *Jeffers v. Clinton,* 756 F. Supp. 1195, 1199-1200 (E.D. Ark. 1990); *cf. Personhuballah*, 155 F. Supp. 3d at 564 ("[A]t some point political concerns must give way when there is a constitutional violation that needs to be remedied.").

With regard to the violations of the North Carolina Constitution's prohibition on mid-decade redistricting, this Court properly exercised pendent jurisdiction over those claims, particularly given that "this Court's order governed the scope of the General Assembly's redistricting authority." (ECF No. 242 at 31.) Legislative Defendants now argue for the first time that Plaintiffs lack standing to raise such objections. (ECF No. 243 at 9.) While the Supreme Court has not addressed the application of the standing doctrine set forth in *United States v. Hays* in the remedial context, at least one court has cast doubt on the proposition that the court's duty to ensure that the constitutional violation has been remedied can be so readily frustrated. *Cf. Shaw v. Hunt*, No. 92-202-CIV-5-BR, slip op. at 7 (E.D.N.C. Sept. 12, 1997) ("We are doubtful that the non-inclusion of successful plaintiffs in any particular reconfigured district that is assumed

to be *the* specific remedial district could be thought, because of the *Hays* residence requirement, to deprive them of standing to challenge the remedial plan as inadequate for the purpose at issue.") Taken to its logical conclusion, Legislative Defendants' contention would make a federal court, which must review and approve any remedial plan, complicit in a redistricting that obviously violates State law, yet without consequence. That is precisely what Legislative Defendants seek to do here--to use this Court's remedial order as a vehicle for empowering the General Assembly to exceed its authority under the State constitution. We decline that invitation.

This would be an unjust result given this Court's "independent duty" to ensure that the remedial plan remedies the constitutional violation *and* otherwise complies with applicable law, particularly where the constitutional violation arises from Legislative Defendants' failure to comply with this Court's order. *Wilson v. Jones*, 130 F. Supp. 2d 1315, 1322 (S.D. Ala. 2000), *aff'd sub nom.*, *Wilson v. Minor*, 220 F.3d 1297 (11th Cir. 2000); *McGhee v. Granville Cty., N.C.*, 860 F.2d 110, 115 (4th Cir. 1988); *Large v. Fremont Cty., Wyo.*, 670 F.3d 1133, 1138, 1148–49 (10th Cir. 2012) (rejecting governmental entity's proposed districting plan to remedy Voting Rights Act violation because it failed to comply with state law). At a minimum, in any event, Legislative

Defendants' new contention appears far from likely to prevail, and thus fails to meet the standard for a stay.

B.

Second, Legislative Defendants fail to establish irreparable injury to themselves and others on whose behalf they seek to apply.

Legislative Defendants contend that "[w]ithout a stay, irreparable injury will continue to occur to the General Assembly, the State, and North Carolina voters and candidates." (ECF No. 243 at 3.) Defendants further argue that the Court's actions "harm North Carolina's sovereign interests" by preventing the use of the enacted 2017 Plans in the 2018 election. (*Id.* at 4.) Given that Legislative Defendants have already represented to the Court that they lack the ability to speak on behalf of the General Assembly, however, it is unclear what authority they have to represent the interests of "the State, and North Carolina voters and candidates" as well as "North Carolina's sovereign interests." (ECF No. 215 at 5 (explaining that "the legislative defendants do not themselves speak for the entire General Assembly" and therefore that "[a] few members of the legislature, even if they are leaders, are not authorized to state how the entire legislature would vote on, or amend, draft districts proposed by [the Special Master]").) Legislative Defendants have not alleged they will be personally harmed by the Court's Final Order. Indeed, this Court cannot determine how they could be, much less irreparably so, where all

Legislative Defendants' districts were left unchanged in the Special Master's Recommended Plans.

Even assuming that Legislative Defendants are entitled to represent the interests of the General Assembly or the State, they fail to demonstrate irreparable harm absent a stay. While we acknowledge the implementation of these redistricting plans may cause some hardship to some of the legislators' campaigns, "inconvenience to legislators elected under an unconstitutional districting plan resulting from such legislators having to adjust their personal, legislative, or campaign schedules . . . does not rise to the level of a significant sovereign intrusion." *Covington v. North Carolina* ("*Covington IV*"), -- F. Supp. 3d --, 2017 WL 4162335, at *11 (M.D.N.C. 2017); *Johnson v. Mortham*, 926 F. Supp. 1540, 1542 (N.D. Fla. 1996) ("[T]he mere administrative inconvenience the Florida Legislature and Florida elections officials will face in redistricting simply cannot justify denial of Plaintiffs' fundamental rights.")[4]

Furthermore, the implementation of the redistricting plans well in advance of the 2018 candidate filing period and relatively limited scope of the changes to the 2017 Plans further minimize

[4] To the extent Legislative Defendants contend that administrative interests should be considered, a grant of a stay would surely frustrate the State's request for "a swift decision on a remedy." (ECF No. 246 at 1.)

any potential harm to the interests of the State or individual legislators. The candidate filing period does not begin until February 12, 2018,[5] more than three weeks after the entry of this Court's Final Order, and the primary elections will not take place until May 8, 2018. *See* N.C. Gen. Stat. § 163A-700(b) (establishing that primary elections for state legislatures will be held "on Tuesday next after the first Monday in May preceding each general election to be held in November"). As Legislative Defendants acknowledged during the hearing held on January 5, 2018, the State Board Defendants have recognized that three weeks would be a sufficient period to address any concerns from an election administration standpoint. (ECF No. 244 at 139-140.) Further, Legislative Defendants' criticism that this Court has entered a "last-minute" decision is undermined by their previous assurance to this Court that the General Assembly could "enact[] new plans by the end of the year, which would leave time for this Court's review and implementation of the plans in an orderly way in 2018." (ECF No. 161 at 29.)

The Special Master's Recommended Plans adopted by this Court alter only nine district configurations, retain an overwhelming number of districts under the 2017 Plans, and reinstate five of

[5] The filing period currently runs to the end of the month of February. (ECF No. 244 at 137.) The General Assembly has the authority to adjust these dates. *See* N.C. Gen. Stat. § 163A-970.

the unchallenged districts in the 2011 House plan. Further, the Special Master filed his Recommended Plans on December 1, 2017, such that potential candidates have had notice of those district lines since that time. The Recommended Plans also pair only two incumbents and therefore do not pose a significant hurdle to incumbents running in their new districts.

Accordingly, the Court finds that Legislative Defendants have not demonstrated that they would be irreparably harmed absent a stay.

C.

With regard to the third factor, the issuance of a stay would likely substantially injure, even irreparably harm, other parties interested in the proceeding, namely Plaintiffs and North Carolina voters.

"Deprivation of a fundamental right, such as limiting the right to vote in a manner that violates the Equal Protection Clause, constitutes irreparable harm." *Personhuballah*, 155 F. Supp. 3d at 560 (quoting *Mortham*, 926 F. Supp. at 1543). Delaying Plaintiffs' requested relief pending the outcome on appeal would present a substantial risk that the State would not be able to implement the Special Master's Recommended Plans in time for the 2018 elections in the event that the Supreme Court affirms this Court's judgment. The risk of harm is particularly acute where Plaintiffs and other North Carolina voters have already cast their

ballots under unconstitutional district plans in 2012, 2014, and 2016 (the latter while this lawsuit was pending). Under these circumstances, this Court is "reluctant to grant a stay with the effect of 'giv[ing] appellant the fruits of victory whether or not the appeal has merit.'" *Id.* (quoting *Jimenez v. Barber*, 252 F.2d 550, 553 (9th Cir. 1958)). We thus decline to give Legislative Defendants "the fruits of victory for another election cycle," while forcing North Carolina voters to cast ballots under unconstitutional maps for a fourth consecutive biennial election, especially where Legislative Defendants have resisted all attempts to timely develop remedial plans. *Id.*

Legislative Defendants contend that implementing the Subject Districts risks voter confusion. Relying on *Purcell v. Gonzalez*, 549 U.S. 1 (2006), they argue that "[t]his Court's last-minute decision altering dozens of districts on the eve of the filing period creates precisely the confusion the *Purcell* doctrine aims to avoid." (ECF No. 243 at 4.)

In *Purcell*, the Supreme Court recognized that the substantial risk of voter confusion arising from changes to election law or procedures on the eve of an election may warrant a stay pending appeal. *Purcell*, 549 U.S. at 4–5. However, unlike *Purcell*, where the election was "weeks" away, *id.* at 3, this is not "a voting case decided on the eve of an election" where the balance of the equities favors maintaining the status quo, *Veasey v. Perry*, 769

F.3d 890, 892 (5th Cir. 2014). Legislative Defendants identify no case in which a court relied on the risk of voter confusion to permit the use of an unconstitutional districting plan before the start of an election cycle and over nine months before any general election is set to take place. Indeed, several courts have expressly rejected such arguments with less time before the general election, even where no remedial redistricting plan had been implemented. *See Larios*, 305 F. Supp. 2d at 1344 (rejecting similar disruption argument when general election was "more than eight months away"); *Flateau v. Anderson*, 537 F. Supp. 257, 261, 266 (S.D.N.Y. 1982) (rejecting disruption argument when candidate filing period had not yet begun and general election was seven months away).

Therefore, we find that this third factor weighs heavily in favor of denying Legislative Defendants' motion.

D.

Finally, we consider the public interest and find that it weighs strongly against a stay in this case. The harms to Plaintiffs constitute harms to every voter in the Subject Districts. As the Supreme Court has noted, once a redistricting plan is found to be unconstitutional, "it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). For

the reasons stated above, this is not a case where any equitable considerations justify the withholding immediate relief. *Id.* Indeed, as the State observes, "a swift decision on a remedy would advance the public interest." (ECF No. 246 at 1.)

III.

For these reasons, Legislative Defendants' motion for stay is DENIED.

SO ORDERED.

For the Court:

/s/ James A. Wynn, Jr.
United States Circuit Judge

/s/ Thomas D. Schroeder
United States District Judge

/s/ Catherine C. Eagles
United States District Judge

January 26, 2018

No. 17A790

IN THE

Supreme Court of the United States

STATE OF NORTH CAROLINA, ET AL.,
Applicants,

v.

SANDRA LITTLE COVINGTON, ET AL.,
Respondents.

CERTIFICATE OF SERVICE

I, Jessica Ring Amunson, hereby certify that I am a member of the Bar of this Court, and that I have this 2nd day of February 2018, caused a copy of the Response In Opposition to Emergency Application for Stay Pending Resolution of Direct Appeal to this Court to be served via overnight mail and an electronic version of the document to be transmitted via the Court's electronic filing system to:

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