IN THE

SUPREME COURT OF THE UNITED STATES

No. 16A646

STATE OF NORTH CAROLINA, et al.,

Applicants,

v.

SANDRA LITTLE COVINGTON, et al.,

Respondents.

REPLY BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR STAY OF REMEDIAL ORDER

THOMAS A. FARR
PHILLIP J. STRACH
MICHAEL D. MCKNIGHT
OGLETREE, DEAKINS,
NASH SMOAK &
STEWART, P.C.
4208 Six Forks Road
Suite 1100
Raleigh, NC 27609

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
MICHAEL D. LIEBERMAN
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Applicants

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

Plaintiffs' response identifies nothing that makes this the extraordinary case in which a *Shaw* claim cannot be remedied by simply ordering new maps before the next regularly scheduled election, but instead demands the extreme remedy of a special election that cuts more than two-thirds of the state legislators' constitutionally prescribed terms in half. To the contrary, there are multiple factors that make the extraordinary remedy of a special election particularly inappropriate here, including the pending merits appeal in this Court, the first-in-time state-court litigation that rejected indistinguishable *Shaw* claims, the failure to make clear *ex ante* that the 2016 elections were for abbreviated terms, and the reality that further guidance will emerge from this Court before the special elections even occur. All of that makes the remedy here entirely unprecedented and entirely imprudent.

The normal remedy for a *Shaw* violation is an order requiring the maps to be redrawn for the next regularly scheduled election. Such a remedy also has the incidental benefit of allowing this Court to exercise its appellate jurisdiction in an orderly fashion. The extraordinary special election remedy ordered by the district court, by contrast, has nothing to recommend it. It inflicts irreparable harm on all three branches of state government, it interferes with this Court's review, it orders the legislature to draw maps that may be outmoded by the time the special elections are slated to occur, and it profoundly upsets federalism values and the reasonable expectations of voters. This extraordinary order calls out for a stay.

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

1. At the outset, plaintiffs fail to explain how the district court even had jurisdiction to order a special election after the State filed its notice of appeal from the court's original final judgment. *See* App.20-22. Plaintiffs acknowledge the general rule that a notice of appeal divests the district court of jurisdiction, but they contend that the State's notice of appeal somehow did not "incorporate the issue of remedies." Opp.31. That contention is meritless. In its initial order, which it explicitly labeled a final judgment, the district court addressed both liability and remedy: It declared that the challenged districts were unconstitutional, enjoined future elections "until a new redistricting plan is in place," and ordered the State to "redraw new House and Senate district plans." Dkt.125. The State noticed its appeal from that order, placing the question of liability *and* remedy squarely before this Court—and divesting the district court of jurisdiction over both. Dkt.130.

Plaintiffs resist that conclusion with two equally unsatisfying objections. First, they argue that the initial remedy is not within the scope of the appeal because the State did not file a separate notice of appeal from the district court's supplemental order inviting additional briefing. Opp.31; *see* Dkt.124. That theory is profoundly mistaken. The district court's initial order imposed an injunction and expressly stated that it was a final judgment. Dkt.125. The State appropriately noticed an appeal of that final judgment. The State was not required to (and indeed could not) file an additional notice of appeal from a scheduling order requesting additional briefing, which is hardly an appealable order. Second, plaintiffs claim

that the State somehow waived its right to contest jurisdiction by filing a notice of appeal from the district court's *ultra vires* remedial order. Opp.31-32. That remarkable proposition has no support in the law, and plaintiffs unsurprisingly do not cite any case espousing it. Parties do not forfeit their right to contest the district court's lack of jurisdiction by appealing an order they believe was *ultra vires*.

Finally, plaintiffs claim that the district court retained jurisdiction over the remedial phase of proceedings because it noted in its final judgment that it "retains jurisdiction to enter such orders as may be necessary to enforce this Judgment and to timely remedy the constitutional violation." Dkt.125. But the district court cannot expand its jurisdiction by purporting to retain it. And while the district court surely can retain jurisdiction to *enforce* its judgment—and could expand its injunction *before* the State filed its notice of appeal—plaintiffs do not identify any authority that allows a court to expand the scope of relief after a notice of appeal has been filed. The cases they cite stand only for the proposition that a court may take "additional supervisory action" to ensure continued compliance with the order that is on appeal. *Liddell v. Bd. of Educ.*, 73 F.3d 819, 822 (8th Cir. 1996). Thus, while the district court retained (and still retains) the power to ensure that the State draws new districts before the next scheduled election, as it initially ordered,

the State's notice of appeal divested it of jurisdiction to expand the scope of relief beyond that ordered in its original final judgment.[1]

2. Even assuming the district court retained jurisdiction, there is at least a fair prospect that its remedial order will be vacated no matter how this Court resolves the underlying merits of this case. Plaintiffs make no effort to explain why this case is so extraordinary that the ordinary remedy for a *Shaw* violation—*i.e.*, the one the district court initially ordered—would be insufficient. Indeed, just like the district court, they refuse to meaningfully weigh the relevant equitable considerations. They do not elaborate on their bald assertion that the constitutional violation here is egregious (much less explain how that could be true in light of the state supreme court's decisions upholding the districts, or their own failure to even identify that purported violation for five years); they do not explain how the allegedly unconstitutional districts affected election results in any of the challenged districts; and they do not identify any benefits that a special election would bring that would not obtain if the State simply enacted a new districting plan for use in the next regularly scheduled election.[2]

Instead, plaintiffs' position seems to be that special elections are *always* an appropriate remedy for *Shaw* violations, notwithstanding that they could find only

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[1] Far from suggesting that the "entire judgment below [is] a nullity," Opp.33, Defendants acknowledged in their application that the district court retains jurisdiction to enforce the injunction it issued in its original final judgment.

[2] In this Court's most recent case dealing with redistricting in North Carolina, the remedy was to redraw the challenged districts before the next election, even though only one district was at issue and that election was more than a year away. *See Pender Cty. v. Bartlett*, 649 S.E.2d 364, 376 (N.C. 2007), *aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1 (2009).

two courts over a 40-year period that imposed such a remedy—in readily distinguishable circumstances. First, in a case that pre-dates *Shaw* by two decades, the Seventh Circuit, in *Cousins v. City Council of Chicago*, 503 F.2d 912, 914 (7th Cir. 1974), noted (without actually reviewing or endorsing the remedy) that the district court ordered a special election in *a single city council ward* because of "purposeful" discrimination in drawing the ward's boundaries. Here, by contrast, the district court expressly disclaimed any finding that the legislature acted in bad faith, and yet it ordered special primary and general elections in approximately *116 districts*—more than two-thirds of the State's districts, and nearly four times as many as were actually challenged.[3]

In *Smith v. Beasley*, 946 F. Supp. 1174, 1212 (D.S.C. 1996), which was noted and distinguished in the stay application, the district court ordered special elections in only 30 of the State's 170 districts, and also ordered that relief *before* the general election, thereby ensuring that voters and candidates were at least fully informed on election day. Perhaps more important, South Carolina in *Smith* did not appeal either the finding of a violation or the special-election remedy, meaning none of the difficulties with interfering with this Court's review of the merits appeal (or jurisdictional questions implicated by the filing of a notice of appeal) were confronted or addressed in *Smith*. Whatever the merits of a special election remedy

[3] Plaintiffs obliquely suggest that they did not request special elections in unchallenged districts, but they concede in the same breath that they requested "new elections for those seats and any others necessarily impacted by newly drawn boundaries." Opp.10 n.3. Plaintiffs do not deny that approximately 116 districts would be impacted.

where the district court's merits ruling is the final word, the issuance of a special-election remedy while the merits appeal is pending before this Court is wholly unprecedented and inappropriate.

The handful of other special election orders that plaintiffs identify involve either one-person, one-vote violations or Section 2 violations. In that context, a special election is at least a logical (albeit extreme) cure for the type of ongoing harms at issue, as those kinds of violations inflict ongoing representational harms throughout the constitutionally prescribed term. But *Shaw* claims are different. In a *Shaw* claim, the constitutional violation occurs when the legislature groups people with dissimilar interests solely because of the color of their skin. In other words, the violation occurs when the maps are drawn, but there is not an ongoing representational injury that will continue until the next election—particularly where, as here, the special election is unlikely to change any outcomes in the districts that were actually challenged. Accordingly, the district court's order not only is an extreme outlier, but arguably does not even do anything to remedy the alleged harms.

3. The district court's merits decision is every bit as much of an outlier—as evidenced by the fact that plaintiffs cannot bring themselves to defend the decision the court actually issued. Plaintiffs *wanted* the court to rule that the State used the wrong type of ability-to-elect district and that the Constitution requires States to remedy potential Section 2 violations by drawing coalition or crossover districts instead of majority-minority ones (which would just so happen to maximize

Democratic partisan advantage). But what the court *in fact* held was that the General Assembly lacked good reasons to draw *any* type of ability-to-elect districts *anywhere* in the State. No matter how many times plaintiffs use the word "mechanical" to suggest that the court disapproved of the State's utilization of majority-minority districts instead of coalition or crossover ones, or characterize the court's decision as focused on whether the challenged districts were "narrowly tailored," the reality is that the court expressly declined to decide how much flexibility legislatures retain when remedying potential VRA problems. App.18 n.10. The only question the court purported to resolve was whether the legislature had good reasons to fear a "potential Section 2 violation" in the first place—*i.e.*, whether it had a compelling interest in considering race at all. *Id.*

Plaintiffs alternatively try to substantiate the district court's conclusion that the legislature did not have a reasonable basis to fear Section 2 liability by claiming it is "uncontroverted" that the legislature "never even made the effort to analyze *Gingles*' third factor." Opp.25. That is nothing short of remarkable given that plaintiffs still have yet to dispute *any* of the evidence of racially polarized voting on which the legislature relied in deciding to draw ability-to-elect districts. They do not dispute any of the public testimony about the continuing need for ability-to-elect districts, or that all three alternative plans proposed during the legislative process included ability-to-elect districts in the same regions as the challenged plan, or that minority-preferred candidates have seldom had success in majority-white districts. That is exactly the kind of evidence legislatures should be considering when

analyzing the third *Gingles* factor, and that evidence readily confirmed that racially polarized voting continues to have real, tangible effects on election results in all of the challenged districts.

In all events, the district court never should have reached the strict scrutiny question because, contrary to plaintiffs' contentions, the legislature's proportionality goal was not one that "could not be compromised." Opp.22. In insisting otherwise, plaintiffs ignore the indisputable fact that the legislature did not achieve a proportional number of majority-minority districts in the final plan—precisely because it subordinated that goal to traditional districting principles. Indeed, even the district court grudgingly accepted that the Chairmen ultimately "fell one majority-black district short in each chamber of the targets they set." App.27 n.15. Simply put, a proportional number of majority-minority districts cannot have been a goal that "could not be compromised" when the legislature *in fact* compromised in failing to achieve the goal.[4] Accordingly, there is at least a fair prospect that this Court will reverse on the merits and find that there was no constitutional violation for the district court to remedy in the first place.

II. Absent A Stay, The District Court's Remedial Order Will Irreparably Injure The State And Harm The Public Interest.

In insisting that the equities weigh in favor of allowing the district court's extraordinary remedial order to stand pending appeal, plaintiffs simply ignore the

[4] Moreover, proportionality is not the nefarious consideration plaintiffs make it out to be. As this Court explained in *Johnson v. De Grandy*, 512 U.S. 997 (1994), proportionality is "an indication that minority voters have an equal opportunity … to elect representatives of their choice." *Id.* at 1020.

most obvious—and obviously irreparable—injury that the State stands to suffer without a stay: There will be no way to undo a special election that will have ousted duly enacted legislators and overridden several indisputably constitutional provisions of the North Carolina Constitution if this Court grants review and reverses only after that election has occurred. Moreover, even if the Court were to grant review and reverse on an expedited basis, or GVR before Term's end in light of its decisions in *McCrory v. Harris*, No. 15-1262, and/or *Bethune-Hill v. Virginia State Board of Elections*, No. 15-680, it would still be too late to get back the time and resources the legislature will have expended drawing new maps on an abbreviated schedule.

Indeed, even if the Court were to affirm on the merits, there is a very real possibility that *McCrory* and/or *Bethune-Hill* will alter the legal landscape for how new districting maps should be drawn, thus potentially necessitating yet another round of redistricting (or, at a bare minimum, more litigation) in which the State is not bound by the district court's idiosyncratic view that ability-to-elect districts—whether majority-minority, crossover, or coalition—should not be drawn in North Carolina *at all*. That reality makes a stay particularly appropriate here. This is not a situation where an injunctive remedy, like returning a contested document, will suffice if the district court's merits ruling is affirmed on an alternative basis. Here, even if this Court ultimately finds a *Shaw* violation, the task of drawing new maps will be profoundly influenced by the reasoning this Court employs in finding a *Shaw* violation. Thus, unless this Court is likely to affirm the district court's

idiosyncratic view that the legislature did not establish a reasonable basis to fear Section 2 liability, despite the reality that every party to this litigation believes that racially polarized voting remains a problem, then the redrawing of the maps for the special elections will be for naught and those maps will need to redrawn yet again in light of guidance from *Harris*, *Bethune-Hill*, and/or this Court's decision in this case. All of that wasted effort is a classic irreparable injury even apart from the principle that "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers).

Plaintiffs make the remarkable claim that North Carolina's interest in enforcing its duly enacted laws "is inapplicable" here because this case "involve[s] redistricting." Opp.37. They conspicuously fail to cite any authority for the proposition that districting legislation is the exception to this federalism-protecting rule—and understandably so, as this Court has repeatedly recognized that States have just as much of an interest in their districting laws as in any other duly enacted laws. *See, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 462 (1991). And that interest is even stronger in this case because the district court's remedial order not only invalidates the State's districting legislation but also overrides numerous state constitutional provisions. No one has ever suggested that there is anything suspect about North Carolina's sovereign determination that legislators should serve two-year terms and that candidates should live in the district they seek to represent for one year before an election, N.C. Const. art. II §§6-8, and yet the district court's

extraordinary remedy casts both those provisions aside without even acknowledging the legitimate and important public interests that they serve.

Plaintiffs also downplay the consequences of forcing the legislature to begin its new session by drawing new districts, claiming that "drawing remedial districts can be quickly accomplished." Opp.35. To be sure, the General Assembly might be able to draw new, race-neutral districts quickly enough if plaintiffs would disavow any intention of filing a vote-dilution claim. But because plaintiffs (and who knows how many others) will be ready to file a Section 2 claim the moment the legislature enacts a new districting plan that does not include ability-to-elect districts, the only way for the legislature to avoid even more litigation is to marshal enough evidence of racially polarized voting to satisfy the overly demanding standard that led the district court to invalidate the districts the first time around. Indeed, that same dynamic already played out with respect to the State's congressional districts: When the General Assembly drew a race-neutral congressional map to remedy the purported racial gerrymander in the *McCrory* case, the plaintiffs turned around and accused it of vote dilution for failing to pay *enough* attention to race. *See Harris v. McCrory*, No. 15-1262, Dist. Ct. Dkt.154-1, at 21-30. Notably, plaintiffs declined the opportunity to assure this Court that they would not do the same here.

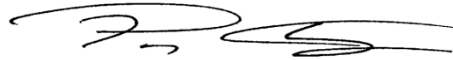
To the contrary, plaintiffs continue to maintain that the General Assembly actually *was* required to draw ability-to-elect districts, but just needed to adduce a stronger record in defense of its decision to do so—a view that the district court also appeared to share. App.146. That only underscores that the court's merits decision

is just as much of an outlier as its remedial decision, as a legislature simply cannot be faulted for taking steps to avoid a Section 2 claim that neither plaintiffs nor the district court can bring themselves to deny would have been filed had the legislature declined to take race into consideration at all. Yet the district court concluded that the State violated the Constitution merely by *trying* to remedy that potential Section 2 violation, and then imposed the most extreme remedy possible for good measure. Thus, the only thing egregious in this case is the decisions below. At a minimum, those decisions are certainly sufficiently questionable that there is a reasonable prospect this Court will reverse one or both of them. Accordingly, this Court should stay the district court's remedial order so the State and its residents are not made to suffer untold irreparable injuries before this Court can even review those extraordinary decisions.

CONCLUSION

For the foregoing reasons, Applicants respectfully request that this Court grant the emergency application for a stay of the remedial order pending resolution of any and all direct appeals to this Court in this case.

Respectfully submitted,



PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
MICHAEL D. LIEBERMAN
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

THOMAS A. FARR
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MICHAEL D. MCKNIGHT
OGLETREE, DEAKINS,
NASH SMOAK &
STEWART, P.C.
4208 SIX FORKS ROAD
SUITE 1100
RALEIGH, NC 27609

Counsel for Applicants

January 10, 2017

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CERTIFICATE OF SERVICE

I, Paul D. Clement, a member of the Supreme Court Bar, hereby certify that three copies of the attached Emergency Application for Stay of Remedial Order Pending Resolution Of Direct Appeal In This Court, filed by hand-delivery to the United States Supreme Court, were served via Next-Day Service on the following parties listed below on this 10th day of January, 2017:

ANITA S. EARLS
ALLISON J. RIGGS
EMILY SEAWELL
JACQUELINE MAFFETORE
Southern Coalition for Social Justice
1415 West Hwy. 54, Suite 101
Durham, NC 27707

EDWIN M. SPEAS, JR.
CAROLINE P. MACKIE
Poyner Spruill LLP
P.O. Box 1801
Raleigh, NC 27602

Counsel for Respondents

PAUL D. CLEMENT
Counsel of Record
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com