IN THE

SUPREME COURT OF THE UNITED STATES

No. 17A745

ROBERT A. RUCHO, ET AL.

Applicants,

v.

COMMON CAUSE, ET AL.,

Respondents.

ROBERT A. RUCHO, ET AL.

Applicants,

v.

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ET AL.

Respondents.

REPLY BRIEF IN SUPPORT OF 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:

Respondents do not and cannot identify any legitimate justification for forcing the General Assembly to rush to draw a new congressional map in two weeks, when this Court is presently considering whether the partisan gerrymandering claims that gave rise to the district court's extraordinary demand are even justiciable. Nor can Respondents identify any legitimate justification for denying a stay to the North Carolina General Assembly after having already granted one to the Wisconsin Legislature. Instead, Respondents insist that a stay is inappropriate because they are confident that they will prevail under any standard for adjudicating partisan gerrymandering claims. But that, of course, ignores that the threshold question in both *Gill v. Whitford*, No. 16-1161 (U.S.), and *Benisek v. Lamone*, No. 17-333 (U.S.), is whether there is *any* justiciable standard for partisan gerrymandering claims, and that the last time the Court considered the matter, it concluded that there was none. There is certainly a fair prospect that a majority of this Court will once again conclude that such claims are non-justiciable, and an almost certain prospect that if the Court announces a first-in-our-history standard, that the proper result here would be vacatur in light of that watershed decision, rather than affirmance.

Equally important, if this Court deviates from the path that it marked out in *Gill* and denies a stay here, it will fuel speculation that the Court has already decided the threshold issue in *Gill* and *Benisek* before the latter is even argued. The clear correct answer here is the one this Court already arrived at in *Gill*. A sovereign State

should not have to draw maps to comply with a constitutional standard that may not exist or have been identified. If this Court reaffirms the non-justiciability of partisan gerrymandering claims later this year, the tumult of drawing a new map now will have proven completely unnecessary. And if the Court announces a new justiciable standard, there is no reason to treat North Carolina any different from Wisconsin or Maryland. Either way, the correct course at this juncture is for the Court to follow the same course that it followed in *Gill* and grant a stay pending resolution of Applicants' direct appeal.

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

Respondents make the remarkable claim that Applicants have not made "*any* showing whatsoever" that they may succeed on their direct appeal because Respondents' partisan gerrymandering purportedly should prevail "under *any* standard this Court might plausibly adopt in the pending *Gill* and *Benisek* cases." Common Cause ("CC") Resp. 19; *see also* League Resp. 15. The first and fatal problem with that claim is that it assumes the answer to the threshold question that is *sub judice* in both *Gill* and *Benisek* — *i.e.*, it assumes that the Court will actually *identify and adopt* a standard for adjudicating partisan gerrymandering claims in one or both of those cases. That threshold question is expressly presented in both cases and occupied the bulk of the discussion at oral argument in *Gill*. *See* Jurisdictional Statement i, *Gill v. Whitford*, No. 16-1161 (U.S. Mar. 24, 2017) ("Are partisan-gerrymandering claims justiciable?"); Motion to Affirm i, *Benisek v. Lamone*, No. 17-333 (U.S. Oct. 31, 2017) ("Is the legal claim articulated by the three-judge district

court unmanageable and therefore non-justiciable?"). Respondents' contention that "no party in *Gill* or *Benisek* has asked the Court" to hold "that partisan-gerrymandering claims are universally nonjusticiable," CC Resp. 19, therefore blinks reality. The question whether anyone has identified a judicially manageable standard for adjudicating partisan gerrymandering claims is the proverbial $64,000 question in both cases.

Respondents alternatively suggest that this Court's decision to hear argument in *Benisek* compels the conclusion that the Court has already resolved the justiciability question in their favor. But there are at least three fundamental problems with that speculative claim. First, one could just as easily draw the opposite conclusion from the Court's decision to hear argument in *Benisek*; if the Court has already discovered the answer in *Gill*, then why re-ask the same threshold question in *Benisek*? Second, and more concretely, it is telling that this Court did not follow its ordinary practice of noting "probable jurisdiction" in *Benisek*; rather, just as in *Gill*, the Court "postponed" "the question of jurisdiction … to the hearing of the case on the merits." Order, *Benisek v. Lamone*, No. 17-333 (U.S. Dec. 8, 2017). That is doubly significant, as it underscores both that this Court is actively considering the justiciability of partisan gerrymandering claims in both cases and that this Court is careful to act in ways that do not presume the answer to the question under review. Respondents' oppositions, by contrast, depend on just such presumption. Third, and most important, all this speculation and tea-leaf reading about what the Court has decided or will decide is problematic and should not be encouraged. The way to end

such speculation and make clear that the threshold questions remain *sub judice* is to treat this case just like *Gill* and grant a stay.

Respondents fare no better with their claim that "the 'manageable standards' debate presented in *Gill* and *Benisek* is largely beside the point here." CC Resp. 20. In essence, Respondents contend that the district court embraced such a wide variety of theories of partisan gerrymandering that surely one of them must hit the mark. *See* League Resp. 16-20. But the fact that the district court identified no fewer than four different amorphous "standards"—two of them based on the Elections Clauses, which *no* other court has found (and few have ever even suggested) is a viable source of a constitutional constraint in this context—only underscores that the decision is unlikely to survive appellate review no matter what this Court holds in *Gill* and *Benisek*.[1]

Respondents try to escape that conclusion by emphasizing that the General Assembly admitted that partisan advantage was one of the criteria it considered when drawing the challenged map. *See, e.g.*, CC Resp. 20-21. In doing so, just like the district court, Applicants embrace the notion that intent alone—and not even sole or predominant intent, but *any* intent—is enough to prove unconstitutional partisan gerrymandering.[2] But that contention is impossible to reconcile with this Court's

[1] Indeed, the League does not even embrace any of the tests that the district court espoused, but rather claims that it is likely to prevail because it "advocated" the same test that the district court in *Gill* embraced. League Resp. 16. But the League conveniently ignores the fact that the district court in this case did not accept the League's (or *Gill*'s) proposed test; it instead embraced the novel, and even looser, test proposed by Common Cause. *See* Appl. App. A at 118-20.

[2] The League disputes this characterization of the district court's holding, League Resp. 18, but in doing so it tellingly discusses only *one* of the four different tests that the district court embraced. And even as to that test (the Equal Protection Clause), the League is mistaken, as the district court made no effort to distinguish "an intent to *subordinate* the opposing party's backers and to *entrench*

cases, as even the Members of this Court who are open to the notion that partisan gerrymandering claims are justiciable have squarely rejected the notion that intent alone is enough.

For instance, in *Bandemer*, the plurality *accepted* the district court's finding that the legislature engaged in "intentional discrimination against an identifiable political group," but nonetheless found that the plaintiffs had not made out a partisan gerrymandering claim. *Davis v. Bandemer*, 478 U.S. 109, 127 (1986). In his concurrence in *Vieth*, moreover, Justice Kennedy posited that a partisan gerrymander that has "the purpose *and effect* of imposing burdens on a disfavored party and its voters" may violate the First Amendment—not that intent to district for partisan advantage alone is enough violate Constitution. *Vieth v. Jubelirer*, 541 U.S. 267, 315 (2004) (Kennedy, J., concurring) (emphasis added). And in *LULAC*, Justice Kennedy reiterated that "a successful claim attempting to identify unconstitutional acts of partisan gerrymandering must do what appellants' sole-motivation theory explicitly disavows: *show a burden, as measured by a reliable standard, on the complainants' representational rights*." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 418 (2006) (opinion of Kennedy, J.) (emphasis added).

Members of this Court have rejected the proposition that intent alone is enough to prove a partisan gerrymandering claim for very good reason: because "[t]he reality is that districting inevitably has and is intended to have substantial political

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the mapmaking party in office" from "garden-variety partisan motivation." *Id.* Instead, the court went out of its way to make clear that, in its view, there is never "*any* legitimate" basis for districting for partisan advantage. Appl. App. A at 84 n.16.

consequences." *Bandemer*, 478 U.S. at 129. A test that prohibited *any* intent to district for partisan advantage thus would be flatly inconsistent with the Framers' decision to entrust districting to the legislature, because "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." *Id.* Respondents cannot avoid that problem by recasting districting for partisan advantage as "invidious discrimination," as the intent test that the *Bandemer* plurality found "should not be very difficult to" satisfy was one that required "intentional *discrimination* against *an identifiable political group*." *Id.* at 127 (emphasis added). Respondents' pejorative labels and ad hominem attacks on the General Assembly thus do not advance the legal ball at all.

Nor do their repeated efforts to analogize this case to Justice Kennedy's hypothetical of a state law that expressly "declared" that districts "shall be drawn so as most to burden Party X's rights to fair and effective representation." CC Resp. 21 (quoting *Vieth*, 541 U.S. at 312). At the outset, this case involves only committee criteria for drawing a single map, not a state statute or constitutional provision attempting to enshrine into law a permanent map-drawing preference in favor of one political party. Moreover, the committee did not instruct the mapdrawer to draw a map "so as most to burden the Democratic Party's right to fair and effective representation." It adopted as one of several districting criteria that "reasonable efforts" shall be made "to maintain the current partisan makeup of North Carolina's congressional delegation." Appl. App. A at 14. Making reasonable efforts to preserve

the existing partisan makeup of a map while also complying with traditional criteria such as contiguity, compactness, and minimal population deviation is a far cry from declaring that maps must be drawn "so as most to burden" explicitly identified voters' "rights to fair and effective representation."

Respondents echo the district court's remarkable claim that preserving the existing partisan makeup must have been code for drawing the most aggressive partisan gerrymander possible because the General Assembly defended its first attempt to draw a congressional map against a racial gerrymandering charge by arguing that one particular district (CD12) was motivated principally by partisan considerations, not race. *See* Common Cause Resp. 7-8; Appl. App. A at 108. But Respondents seem to forget that the General Assembly *lost* that case because the district court *rejected* that explanation of the General Assembly's motives, concluding that CD12 was drawn on the basis of race, *not politics*. *See Harris v. McCrory* (*Harris I*), 159 F. Supp. 3d 600, 612 (M.D.N.C. 2016), *aff'd sub nom. Cooper v. Harris* (*Harris II*), 137 S. Ct. 1455 (2017). The district court can hardly conclude that the 2011 map was *not* animated by partisan interests for purposes of sustaining a *racial* gerrymandering claim, then turn around and use the exact same record to claim that the exact same map *was* animated by partisan interests for purposes of sustaining a partisan gerrymandering claim.

In the end, Respondents' efforts to resist the conclusion that there is the requisite "fair prospect that a majority of the Court will vote to reverse the judgment below," *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010), succeed only in confirming

that the district court in this case came no closer than any court before it to identifying a "limited and precise rationale" for distinguishing permissible districting for partisan advantage from unconstitutional partisan gerrymandering. *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring). There is thus certainly a fair prospect that this Court will reverse the decision below. At a bare minimum, there is more than a fair prospect that if the Court identifies a novel, first-in-our-history standard for evaluating partisan gerrymandering claims, that will necessitate vacatur of the decision below and a remand in light of *Gill* and *Benisek*. Either way, the first stay factor is amply satisfied.

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

Respondents have no coherent explanation for why the same irreparable injuries and equities that warranted a stay in *Gill* do not warrant a stay here too. Respondents claim that granting a stay in *Gill* did not necessarily preclude a remedy for the 2018 elections because the stay was granted when the 2018 elections were still a distant prospect. But setting aside the fact that the *Gill* stay remains in place today, that argument just assumes that a remedy will be necessary, which is precisely the question this Court has yet to resolve. Respondents also assume that Applicants' appeal is unlikely to be resolved until next Term, but that ignores the obvious possibility that it will be resolved by a reversal or vacatur in light of *Gill* and *Benisek*. If this Court concludes that partisan gerrymandering claims are not justiciable, then forcing the General Assembly to enact and implement a new map will have been for naught. Alternatively, if the Court decides that such claims are justiciable, the Court

presumably not only will adopt a legal standard for lower courts to employ, but also will give some guidance as to whether States and courts must rush to put in place new maps and test them against that newly announced standard in time for the 2018 elections, or whether they will have a full election cycle to adjust. Either way, there is no good reason to treat North Carolina any differently from Wisconsin and Maryland.

That a stay is appropriate no matter how the Court resolves the threshold issue is presumably why this Court issued a stay in *Gill* even though the district court's order did nothing more than require the legislature to draw a map to be used if and only if this Court affirmed its decision. In other words, the Court concluded that the Wisconsin Legislature should not be required to draw a new map *at all*—even on ten months' notice, and more than a year before the 2018 elections—unless and until this Court has actually concluded both that partisan gerrymandering claims are justiciable and that the challenge to Wisconsin's map succeeded. Surely the North Carolina General Assembly is entitled to the same protection against the same irreparable injury. Indeed, if anything, the irreparable injury is all the more acute here because the General Assembly has been given a mere two weeks to enact a new map, and was ordered to do so barely a month before the filing period for the 2018 elections is set to open.[3]

[3] Respondents' suggestion that the General Assembly has "*specifically invit*[*ed*]" district courts to put it in that untenable position is pure fiction. CC Resp. 29. The General Assembly enacted a law *constraining* the power of the state courts to order redistricting on short notice, stating that the "period of time" to enact a new map if a court finds a duly enacted one deficient "shall not be *less* than two weeks." N.C. Gen. Stat. §120-2.4(a) (emphasis added). That hardly amounts to an open invitation to delay issuing decisions on the validity of maps until the eve of an election, then give the General Assembly the absolute minimum permissible amount of time to enact a new map. Nor does the fact

With no answer to *Gill*, Respondents change the subject, insisting that this Court should deny a stay here because it denied a stay of an equally disruptive order in *McCrory v. Harris*, No. 15A809 (Feb. 19, 2016). While the fact that two three-judge panels in a span of two years have ordered the General Assembly to draw maps on the eve of an election cycle (and a third is poised to do the same thing any day now, *see* Appl. 21 n.3) is a troubling testament to how little regard three-judge panels of the Middle District of North Carolina apparently have for the serious sovereign interests at stake in redistricting cases, *Harris* was a very different case from this one. Most fundamentally, *Harris* did not involve a partisan gerrymandering claim. It involved only a racial gerrymandering claim—a claim that this Court held justiciable decades ago. *See Shaw v. Reno*, 509 U.S. 630 (1993). Moreover, there was no claim in *Harris* that the ultimate disposition of the appeal would be controlled by a case presently pending before this Court; instead, the case turned largely on application of settled law to case-specific facts. Particularly given that this Court ultimately affirmed, *see Cooper v. Harris*, 137 S. Ct. 1455 (2017), the Court's denial of a stay pending appeal likely had more to do with its view of the merits of long-justiciable claims than with its view of the injuries or the equities.[4]

Respondents are therefore reduced to embracing the district court's remarkable eleventh-hour suggestion—raised for the first time in the history of this

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that the General Assembly has complied with such unreasonable demands when forced to do so, *see* CC Resp. 29-30, deprive it of the right to challenge them when they are imposed.

[4] The same can be said of *Wittman v. Personhuballah*, No. 15A724 (U.S.), which was also a racial, not a partisan, gerrymandering case, and which ultimately produced a unanimous opinion dismissing the applicants' appeal for lack of standing. *See Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016).

litigation in the court's January 16 order denying a stay pending appeal—that Applicants cannot claim *any* injury from, and do not even have any *interest* in, the district court's decision because they are legislators, rather than the State itself. Indeed, Respondents even go so far as to chide Applicants for failing to address this purportedly "threshold issue" in their Application. CC Resp. 24 n.4; *see also* CC App. 8.

If anyone should be chided here, it is Respondents, who have never once suggested in the entirety of this litigation that Applicants—four legislators sued *by Respondents* in their official capacities as the co-chairs of the Joint Select Committee on Congressional Redistricting, the Speaker of the North Carolina House of Representatives, and the President Pro Tempore of the North Carolina Senate—do not even have an interest in the constitutionality of the map duly enacted by the General Assembly. That Respondents have never raised a question about Applicants' concrete interest in this dispute is understandable; after all, *Respondents* named Applicants as defendants to their lawsuits, and spent more than a year litigating this case against them.

The fact that the three-judge court raised this issue *sua sponte* is just one more reversible error by that panel. Applicants' concrete interest in this suit is what allowed it to proceed, and their concrete injury from the decision below is self-evident; after all, the district court itself ordered *the General Assembly*, not the State or the State Board of Elections, to enact new maps by January 24. Appl. App. A at 189-90. Surely Applicants have an interest in challenging an order that runs directly against

the institution that they represent; indeed, that is presumably why Respondents named them as defendants in the first place. And if there is any concern that the General Assembly itself, rather than four legislators, should have been named as a defendant, that is a deficiency that would run to the entire litigation, including the order under review.

In all events, Applicants have an obvious interest in protecting the sovereign prerogatives of the General Assembly to draw districting maps. As this Court has reiterated time and again, the "primary responsibility" for redistricting "rests" not just with the State in the abstract, but "with the legislature" in particular. *Md. Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 676 (1964). Indeed, this Court has long emphasized the primacy of the legislature in redistricting—not just because the legislature is the body to which that task is constitutionally committed, but because "a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework." *Connor v. Finch*, 431 U.S. 407, 414-15 (1977); *see also, e.g.*, *McDaniel v. Sanchez*, 452 U.S. 130, 150 n.30 (1981) ("[R]edistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt."); *Gaffney v. Cummings*, 412 U.S. 735, 749, 753 (1973) (observing that redistricting is "primarily a political and legislative process"). The General Assembly itself thus suffers a distinct injury any time its duly enacted maps are enjoined—regardless of whether those maps were drawn by a Republican-

led General Assembly or Democratically-led one. *Cf. Az. State Legislature v. Az. Ind. Redistricting Comm.*, 135 S. Ct. 2652, 2663-64 (2015).[5]

Moreover, the decision below injures not the just the General Assembly, but the State and its people—interests that, contrary to Respondents' (and the district court's) suggestions, North Carolina law plainly gives the General Assembly the power and the duty to advance. Indeed, state law was recently clarified to make crystal clear that, in cases challenging the validity of a North Carolina statute, it is the Attorney General that must "abide by and defer to the final decision-making authority exercised by the Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly," not the other way around. N.C. Gen. Stat. §114-2(10), *as amended by* 2017 N.C. Sess. Law 57, §6.7(m). That the Attorney General's office has not taken a position on behalf of the State in this litigation thus confirms nothing more than that (unlike the district court, *see* CC Resp. 8) the Attorney General recognizes the validity of N.C. Gen. Stat. §114-2(10). And it certainly does not suggest that the State shares Respondents' extraordinary views that the principle that a State "suffers a form of irreparable injury" whenever it "is enjoined by a court from effectuating statutes," *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J.), is a minority view that should be ignored,

[5] The district court's suggestion that Applicants have elsewhere disclaimed authority "to represent the interests of the General Assembly as a whole," CC Resp. 9, is disingenuous. As the very document the court quoted makes clear, Applicants simply made the obvious point that they "are not authorized to state how the entire legislature would vote on" proposed legislation. Legislative Defs.' Resp. to Special Master's Draft Report 5, *Covington v. North Carolina*, No. 15-cv-399, (M.D.N.C. Nov. 17, 2017), ECF No. 215. That hardly amounts to a concession that the Speaker of the House and the President of the Senate cannot speak for the institutional interests of the bodies that they head.

or that States do not have any sovereign interest in their duly enacted congressional maps because their power to enact them comes from the Constitution. CC Resp. 25.

In all events, this Court's equitable analysis turns not just on the interests of the parties, or those whose interests the parties are empowered to represent, but also on the interests of the public. And the public has an obvious interest in seeing the laws that their legislators enact enforced, and in preserving the same maps that governed the most recent election cycle when the opening of the next election cycle is mere weeks away. *See* Amicus Brief For George Holding, *et al.* Respondents insist that the public's "familiarity" with a challenged law "has never been grounds for perpetuating it," CC Resp. 26, but that flies in the face of this Court's admonishment that courts should be reluctant to disrupt settled law on the eve of an election even when a lower court has found that law unconstitutional because doing so may "result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). Indeed, that concern is presumably part of what animated the Court's decision to grant stays in *Gill* and other recent redistricting cases. *See, e.g.*, *Abbott v. Perez*, Nos. 17A225 & 17A245 (U.S.); *Covington v. North Carolina*, No. 16A646 (U.S.). Respondents alternatively claim that there is no prospect of electoral disruption here because the General Assembly (or the district court) could just alter the election schedule. CC Resp. 27. But the notion that the inevitable disruption that the decision below will cause could be countered by more disruption hardly advances Respondents' cause.

Finally, Respondents' contention that the General Assembly "has only itself to blame" for the untenable position in which it now finds itself has no grounding in reality. League Resp. 22. Contrary to the district court's contention, Applicants did not "wait[] until the eve of the trial to file their … motion" to stay the trial in light of this Court's actions in *Gill*. Memorandum Opinion Denying Mot. to Stay at 16, ECF No. 87. They filed that motion on June 26, 2017—a mere seven days after this Court granted a stay in *Gill* and set the case for argument, and after the district court had already postponed the trial "indefinitely." *See* Legislative Defs.' Mot. to Stay, ECF No. 74; 6/19/17 Minute Entry; *Gill v. Whitford*, No. 16-1161 (U.S.). It is *the district court* that then waited *more than two months* to rule on that motion, and did not even explain its reasons for doing so for another week and half. Order Denying Mot. to Stay, ECF No. 85; Memorandum Opinion Denying Mot. to Stay, ECF No. 87. It is also *the district court* that *sua sponte* (and on only one week's notice) pushed the original June 2017 trial date back *four months*, then took another three months after the October 2017 trial to issue its opinion invalidating the congressional map. *See* 6/19/17 Minute Entry; Notice of Hearing, ECF No. 88; Notice of Trial Calendar, ECF No. 89. If anyone has "chutzpah" here, League Resp. 22, it is the district court, which not only demanded that the General Assembly enact a new map in only 14 days after having taken months to resolve Respondents' claims, but then gave Respondents more than a third of the time it gave the General Assembly to enact a new map just to respond to a stay motion. Appl. App. B at 2. Of course, all of these disputes over who is responsible for delay are largely beside the point since even if this stay request

arrived at the Court seven months ago, it still would have been appropriate to issue a stay, just as this Court did in *Gill* seven months ago.

Ultimately, Respondents' only real response to Applicants' request for a stay is to repeat the refrain of every respondent—namely, that this case is different because they are confident they will prevail. But that just underscores the confusion and uncertainty that will result should this Court deny a stay in this case after having granted one in *Gill*, as lower courts will (at plaintiffs' urging) take that as a sign that this Court has already resolved the justiciability question pending in *Gill* and *Benisek*, and as an invitation that they, too, should rush to adjudicate partisan gerrymandering claims in advance of the rapidly approaching 2018 election cycle. Indeed, the bare fact that *Gill* is pending before this Court has already ushered in a flood of partisan gerrymandering litigation, and along with it a flood of efforts by state and federal courts to rush to decide those claims on the eve of the 2018 elections. *See, e.g.*, Amicus Brief in Support of Emergency Application for Stay for the States of Louisiana, Texas, Michigan, and South Carolina 8-10. Accordingly, the best way to ensure that *all* of these cases are resolved in a fair and orderly manner is to follow the same course here that the Court followed in *Gill*, and make clear that state legislatures should not be forced to draw new maps based on novel theories of unconstitutional partisan gerrymandering unless and until this Court concludes that such claims are actually justiciable and identifies a standard for adjudicating them.[6]

[6] Respondents urge this Court to set this case for expedited briefing and argument if it is inclined to grant a stay. *See* CC Resp. 3, 33. While Applicants continue to believe that holding this case for resolution of *Gill* and *Benisek* is the more logical way to proceed given the high likelihood of reversal or vacatur in light of one of those cases, if this Court really wants to add yet another partisan

CONCLUSION

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

Respectfully submitted,

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gerrymandering case to its merits docket this Term, Applicants will certainly oblige. That said, Respondents' suggestion that the Court should force the General Assembly to draw a new "contingent" map in the meantime even if it follows that course should be rejected out of hand, as it would result in different treatment of this case and *Gill* and magnify the uncertainty and confusion that the decision below creates.