IN THE

SUPREME COURT OF THE UNITED STATES

No. 17A790

STATE OF NORTH CAROLINA, et al.,

Applicants,

v.

SANDRA LITTLE COVINGTON, et al.,

Respondents.

REPLY 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:

Plaintiffs do not and cannot deny that the decision below concludes that the North Carolina General Assembly engaged in racial gerrymandering by declining to consider race and resolves state-law challenges to districts in which no plaintiff resides. Instead, they contend that the ordinary constitutional standards—even bedrock Article III requirements like standing and mootness—are inapplicable here because the district court was "fashioning a remedy" for the 2011 Plan. But that understanding of the proceedings below just underscores the problem. This is not a case in which the 2011 Plan was invalidated, the legislature was deadlocked, and a federal court reluctantly had to impose its own districting plan. This is a case where the 2017 General Assembly repealed the defective 2011 law and enacted new districting legislation: the 2017 Plan. That legislation was not a mere "proposal" that the district court was free to choose or reject on the way to adopting a court-imposed plan. The 2017 Plan is a duly enacted law of North Carolina entitled to take immediate effect (absent an injunction by a court with jurisdiction), and entitled to the same deference and presumption of constitutionality accorded to all state legislation. The district court did not have the power to subject that duly enacted legislation to some sort of *ad hoc* "preclearance" process unconstrained by standing, mootness, sovereign immunity, the presumption of good faith, or other bedrock principles. Instead, as with all state legislation, the 2017 Plan must be challenged in a procedurally valid lawsuit identifying a substantive defect.

Plaintiffs do not defend the decision below on those terms because there is no way to do so. Indeed, that is essentially undisputed with respect to the five districts invalidated on state-law grounds, as plaintiffs concede that they do not even live in those districts, and they offer no theory as to how a federal court could enjoin a state statute on state-law grounds without contravening the Eleventh Amendment. Plaintiffs' non-racial racial gerrymandering challenges are equally flawed, as the district court did not (and could not) find that the legislature considered race in designing the 2017 Plan, or used race-neutral criteria as a pretext for improper racial sorting. Without making either of those findings, the district court had no basis to invalidate the 2017 Plan. The court did so only because it fundamentally misunderstood its role, acting as if it had a receivership over North Carolina's redistricting process and could modify or disapprove the 2017 Plan at its will.

In sum, plaintiffs did not properly challenge the 2017 law, they lacked standing to press their state-law objections, and their federal-law objections rest on the Orwellian claim that the legislature engaged in racial gerrymandering by *not* considering race. The district court's decision to invalidate duly enacted state legislation without identifying any violation of established constitutional standards is indefensible as a matter of procedure or substance, and is exceedingly likely to be reversed on appeal. Because North Carolina should not be forced to conduct its 2018 elections under a map that the district court lacked the power to impose, this Court should enter a stay and either dispose of the appeal in light of *Abbott v. Perez* or set this case for full briefing and argument.

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

A. The District Court Lacked Jurisdiction.

The first fatal problem with the decision below is that the case became moot when the General Assembly repealed the 2011 Plan and enacted the 2017 Plan and plaintiffs did not amend their complaint to challenge the 2017 law. *See* Appl.18-22; *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 366 F. Supp. 2d 887, 901 (D. Ariz. 2005) (controversy moot because the challenged districting plan was off the books and plaintiffs thus "faced no actual or imminent threat of injury with respect to those districts"). Plaintiffs do not dispute that a lawsuit challenging a statute typically becomes moot when that statute is repealed, and plaintiffs do not argue that this case falls into any of the established exceptions to that rule. *See generally Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189-91 (2000). Indeed, plaintiffs do not cite a single case discussing mootness or Article III's case-or-controversy requirement, and they do not identify any case in which a federal court retained jurisdiction after a statute's repeal to invalidate a *different* statute that had not been challenged in an amended complaint.

Instead, plaintiffs dramatically exaggerate the consequences of adhering to the strictures of Article III. They suggest that dismissing this lawsuit as moot would render the 2017 Plan "immune from court review," and would be akin to holding that "judicial relief becomes inappropriate … because a legislature enacts a new districting plan." Opp.22-23. But no one is arguing that the 2017 Plan is unreviewable. Applicants have readily acknowledged that the 2017 Plan can be

reviewed by a federal court in the same manner as any other duly enacted legislation: by plaintiffs who have standing and "file a new lawsuit challenging the newly enacted law" or "amend their complaint to add challenges to the 2017 law." Appl.19. That is hardly an insurmountable hurdle; it is the bare minimum necessary to satisfy Article III's case-or-controversy requirement.[1] Plaintiffs' steadfast refusal to take even the minimal step of amending their complaint can be explained only by the reality that even they recognize that their challenges cannot succeed if they are bound by the constraints of Article III (or this Court's racial gerrymandering jurisprudence, or the Eleventh Amendment, for that matter).

This Court's decisions acknowledging that a district court may impose a remedial plan if the legislature fails to enact a "constitutionally acceptable" plan do not suggest otherwise. Opp.23 (citing *Reynolds v. Sims*, 377 U.S. 533, 586 (1964), and *Chapman v. Meier*, 420 U.S. 1, 27 (1975)). Those cases have nothing to do with whether the ordinary Article III rules continue to apply when a plaintiff seeks to challenge new districting legislation enacted to address the invalidation of an earlier map. Instead, both cases were simply making the point that a district court may have to craft its *own* remedy if the legislature *enacts no map at all*, which is a common phenomenon when the state house and Governor's mansion are politically divided.

[1] Of course, if a state were to game the system by repeatedly repealing a challenged law and then replacing it with an identical law, Opp.22-23, one of the exceptions to mootness would likely apply. *See, e.g.*, *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000). Here, however, plaintiffs do not argue that the General Assembly acted in bad faith by enacting the 2017 Plan, or that it enacted the law in an attempt to evade review. To the contrary, the General Assembly enacted a new plan because the district court *invalidated* the 2011 Plan.

In *Reynolds*, the legislature had not enacted *any* districting plan to govern the 1962 elections. 377 U.S. at 543. And in *Chapman*, while the Court reiterated that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court," and expressed its "hope[] that the 1975 North Dakota Legislative Assembly [would] perform that duty" before the next election, it also noted that "the responsibility [would] fall[] on the District Court" if the legislature "fail[ed] in that task." *Chapman*, 420 U.S. at 27. That a district court may be forced to impose its own remedy if a legislature *fails* to act says nothing about how a court should proceed when the legislature *does* enact a new plan. Neither *Reynolds* nor *Chapman* disturbs the settled rule that whether a legislatively enacted plan is "constitutionally acceptable" must be determined in the context of a lawsuit brought by plaintiffs with standing and decided under ordinary substantive rules.

Finally, plaintiffs' appeal to the district court's "inherent powers" gets them nowhere. Opp.25. Whatever the "inherent powers" of a federal court with jurisdiction may be, invoking "inherent powers" is no substitute for satisfying the Article III minima. District courts undoubtedly have the power under this Court's precedents to enjoin states from holding elections under unconstitutional plans, and district courts undoubtedly have the power enforce those injunctions if a state refuses to comply. But where, as here, the legislature complies with the court's injunction and enacts a new districting plan into law, the district court's inherent powers over the initial, now-moot litigation does not extend to engaging in an *ad hoc* evaluation of the

constitutionality of the new legislation unconstrained by the requirements of Article III. That new legislation must be challenged through a new lawsuit or an amended complaint, brought by plaintiffs who are actually injured by whatever aspects of the new legislation they are trying to challenge. Nothing in the district court's inherent powers allows it to entertain brand new constitutional challenges to a brand new law as a continuation of a moot lawsuit about a repealed law no longer on the books.[2] In fact, as long as the normal requirements of Article III are satisfied, court have ample statutorily conferred powers to resolve the litigation without invoking their "inherent powers."

In all events, even assuming a district court had the power to conduct "remedial" review of new districting legislation for the limited purpose of ensuring that it remedies the specific constitutional violations that led the court to invalidate the first map, that power certainly does not extend to evaluating entirely distinct state-law challenges to districts that were not even at issue in the underlying litigation—let alone to do so at the behest of plaintiffs who admittedly lack standing to challenge those districts. Simply put, a federal court does not acquire the power to conduct freewheeling "preclearance" of duly enacted districting legislation just

[2] Plaintiffs contend that Applicants made an "admission" in a prior case that district courts have the inherent power to evaluate duly enacted remedial legislation, Opp.25 n.5, but the cited discussion is about a court's power to impose a remedy when the legislature *fails to act*. Specifically, the discussion is about *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016), where the district court imposed a remedial plan after "the Virginia Legislature failed" to enact one of its own. *Id.* at 1735. Nothing in *Wittman* or Applicants' prior briefing supports the district court's exercise of jurisdiction after the challenged law has been repealed and replaced by duly enacted legislation.

because it found fault with a different map drawn by a different legislature in a lawsuit by plaintiffs with standing. The 2017 Plan became the law of North Carolina when the General Assembly enacted it, not if and when it secured the approval of a federal district court. And once it became law, it could be challenged in the same manner as any law: by plaintiffs pleading actual claims that they have standing to press.

B. The District Court's Non-Racial Racial Gerrymandering Holding Is Likely to Be Reversed.

The decision below is also likely to be reversed on the merits, as the district court defied law and logic when it invalidated four districts as racial gerrymanders because the General Assembly did not consider race. The *sine qua non* of a racial gerrymander is a decision to district on the basis of race. It should therefore go without saying that the legislature cannot engage in racial gerrymandering *by declining to consider race*. After all, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007). Yet the district court nonetheless reached the head-scratching conclusion that the General Assembly engaged in racial gerrymandering *by declining to consider race*. Indeed, plaintiffs do not deny that the court invalidated SD21, SD28, HD21, and HD57 without ever finding that those districts were predominantly motivated by race or that the legislature's race-neutral criteria were used as a pretext for racial discrimination. Instead, the district court found racial gerrymandering because the General Assembly purportedly failed to

"eliminate the discriminatory effects of the racial gerrymander" that the court found infected the 2011 Plan. App. A at 35.

That reasoning is doubly wrong. First, the question the district court should have been asking was whether SD21, SD28, HD21, and HD57 were themselves racial gerrymanders—*i.e.*, districts drawn on the basis of race—not whether their composition sufficiently "eliminate[d] the discriminatory effects of the racial gerrymander" in the 2011 Plan. App. A at 35. As this case aptly illustrates, asking the district court's question is bound to lead to the untenable answer that the only "remedy" for a racial gerrymander is more racial gerrymandering. But even assuming the district court asked the right question, it still reached the wrong answer. Because the injury caused by racial gerrymandering flows from the legislature's discriminatory intent, the "effects of the racial gerrymander" are eliminated as soon as the legislature enacts a new districting plan without discriminatory intent—as it did with the 2017 Plan. *See* Appl. at 23-24.

Plaintiffs resist this proposition by arguing that a "State cannot undo the injury of racial gerrymandering simply by *claiming to* ignore race and then re-enacting substantially the same plan." Opp.33 (emphasis added). Applicants wholeheartedly agree. A legislature that merely *claims to* ignore race, but in fact is predominantly motivated by race, would violate this Court's racial gerrymandering doctrine if it lacked a sufficient justification for districting on the basis of race.[3] But

[3] Likewise, Applicants agree with plaintiffs that "[d]eclaring that a remedy was enacted without consideration of race does not insulate that remedy from scrutiny." Opp.33. But unless that scrutiny results in a finding that the legislature's declaration

plaintiffs have not alleged, let alone proved, any such thing. To the contrary, it is undisputed that the legislature *actually* ignored race in designing the 2017 Plan. That undisputed fact is dispositive of plaintiffs' racial gerrymandering objections.

Plaintiffs try to analogize this case to *Abrams v. Johnson*, 521 U.S. 74 (1997), contending that *Abrams* proves that a court may enjoin a remedial plan for looking too much like a previous racial gerrymander. Opp.32. At the outset, it is revealing that plaintiffs invoke a case from the preclearance era—and one that, like most of their cases, involves judicially imposed districts rather than legislatively enacted ones. But setting that aside, *Abrams* actually undermines plaintiffs' argument. In *Abrams*, after the "legislature could not reach agreement" on a new districting plan, the court was forced to impose its own remedy. 521 U.S. at 77-78. Among the plans submitted for the court's consideration was a prior plan passed by the legislature but never precleared. *Id.* at 87-88. The court declined to defer to that plan—not, as plaintiffs suggest, because it "closely resembled" the invalidated plan, but because it concluded that the legislature had designed that plan "based on an overriding concern with race." *Id.* at 90. In other words, the court rejected the proposed remedial districts because the court actually made the finding that is lacking here—*i.e.*, that race was the predominant factor in the design of the proposed districts.

The district court did not and could not make any equivalent finding here. Instead, by plaintiffs' own telling, the court invalidated the 2017 Plan because the

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of race-neutrality was dishonest, a district court cannot invalidate duly enacted legislation on the basis of improper legislative intent.

districts "maintain the core shapes they had under the 2011 Plans" and "continue to perform poorly on compactness measures." Opp.30. But there is no federal constitutional rule forbidding States from retaining the cores of previous districts—even districts that were invalidated—or requiring States to draw the most compact districts possible. *Gaffney v. Cummings*, 412 U.S. 735, 752 n.18 (1973) ("[C]ompactness or attractiveness has never been held to constitute an independent federal constitutional requirement for state legislative districts."). And while a plaintiff could theoretically point to core retention or non-compactness as *evidence* in a lawsuit alleging that the legislature's race-neutral criteria were pretextual, *see, e.g.*, *Hays v. Louisiana*, 839 F. Supp. 1188, 1201 (W.D. La. 1993), plaintiffs have made no such allegation, and the district court made no such finding. The district court did not rule that the legislature's predominant motive was race, but rather declared that the legislature violated the Equal Protection Clause by failing to examine the racial "effects" of its *race-neutral* criteria, and abandon any criteria that would result in districts with the "wrong" racial makeup. In other words, the district court concluded that the legislature violated the Equal Protection Clause by failing to district on the basis of race.

To state the obvious, that is not a cognizable constitutional violation, whether in the "remedial" context or otherwise. The district court therefore altered a legislatively enacted plan without finding that the legislative plan actually violated any constitutional constraint—which is precisely what *Perry v. Perez*, 565 U.S. 388 (2012), holds that courts cannot do. In *Perry*, the district court went beyond altering

districts that were constitutionally infirm and made changes to other districts in pursuit of "neutral principles that advance the interest of the collective public good." *Id.* at 396. This Court reversed, holding that unless the district court found that a particular district actually (or likely) violated the Constitution, it "had no basis" to impose a district of its own design. *Id.* at 398; *see also Milliken v. Bradley*, 433 U.S. 267, 282 (1977) ("[F]ederal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation."). Yet that is exactly what happened in SD21, SD28, HD21, and HD57, which the district court *did not* find were drawn with an improper motive but nevertheless replaced with districts that, in the court's view, "improve on … compactness" and "no longer retain[] the core shape" of past versions. App. A at 82-83. By replacing duly enacted districts with ones of its own design, the district court exceeded the scope of any remedial authority it had.

As noted in the Application, the closest thing to a precedent for finding racial gerrymandering in a map drawn without considering race is the decision of the three-judge district court in Texas to invalidate the Texas Legislature's adoption of a judicially crafted remedial map—a decision that this Court promptly stayed pending appeal and will consider on the merits this Term. *See Abbott v. Perez*, Nos. 17A225 & 17A245 (U.S.). Plaintiffs insist that nothing this Court decides in *Abbott* could bear on this case, Opp.38, but both cases involve the same basic question of what a legislature must do to "remedy" a prior finding of intentional discrimination on the basis of race. And in both cases the district court proceeded from the "fundamentally

flawed premise that a Legislature must 'cleanse' past legislation of the 'taint' of a previous Legislature's 'discriminatory intent' before adopting it." Jurisdictional Statement at 11, *Abbott v. Perez*, No. 17-586 (U.S. Oct. 17, 2017). That premise, which effectively amounts to a presumption of *unconstitutionality* for "remedial" districting legislation, is impossible to reconcile with this Court's repeated admonitions that "reapportionment is primarily the duty and responsibility of the State" even when the legislature's first effort has been found constitutionally deficient. *Chapman*, 420 U.S. at 27; *see also infra* Part I.D. There is thus no question that this Court's disposition of *Abbott* could require reversal or vacatur in this case, which only underscores the propriety of granting a stay here, just as the Court did in *Abbott*.

C. The District Court's State-Law Holding Is Likely to Be Reversed.

There is essentially no prospect that the district court's state-law rulings will survive this Court's review, as plaintiffs concede that they do not live in any of the five challenged districts, meaning they did not even have standing to challenge them. Opp.28 n.6; *see Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015) (plaintiffs lack standing to challenge districts in which they do not reside). Plaintiffs address that fatal flaw only in a footnote, and only in the most implausible way—they contend that there is "no standing issue" because they did not actually challenge the five districts, but instead "did nothing more than bring these issues to the district court's attention." Opp.28 n.6. The district court, they insist, was merely

exercising its "independent duty" to assess the legality of the 2017 Plan, and thus was not constrained by standing at all. *Id.*[4]

That argument once again confuses judicially imposed districting plans with legislatively enacted ones. While courts put in the unusual position of being forced to impose their *own* plans have an "independent duty" to ensure those plans do not violate the law, *see Perry*, 565 U.S. at 396, federal courts decidedly do not have any "independent duty" or free-standing power to assess the legality of districting laws duly enacted by a state legislature. Instead, federal courts are empowered to adjudicate challenges to state laws only if a plaintiff with standing files a lawsuit alleging that the challenged statute is constitutionally infirm. *See, e.g.*, *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947) ("For adjudication of constitutional issues 'concrete legal issues, presented in actual cases, not abstractions' are requisite."). Plaintiffs' argument thus collapses on itself—if they were not challenging the districts that the district court invalidated, then nobody was, and the district court's *ad hoc* review of duly enacted state legislation suffers from Article III problems even more glaring than the standing problem that plaintiffs strain to avoid.

Plaintiffs make the same mistake in responding to Applicants' Eleventh Amendment argument. Plaintiffs do not dispute that they could not have challenged

[4] Notably, plaintiffs do not embrace the district court's suggestion that they actually *did* have standing to challenge those districts. *See* Resp. App. at 12-13. That is presumably because, contrary to the district court's suggestions, those challenges involve neither districts in which plaintiffs live now *nor* districts in which they lived under the 2011 Plan; instead, they are just districts that plaintiffs wish the General Assembly had not chosen to alter.

any districts on state-law grounds outside of the so-called "remedial" posture, as "a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 117 (1984). That alone dooms the decision below, as a district court cannot abrogate the Eleventh Amendment merely by labeling its proceedings "remedial." Plaintiffs nonetheless contend that the Eleventh Amendment is no obstacle because, when "fashioning a remedy," district courts must avoid drawing districts that violate state law. Opp.27-28. But whatever rules may apply when a district court is forced to fashion its *own* remedy for a redistricting plan because the state legislature was unwilling or unable to act, that is not what the district court was doing here. The district court here was asked to invalidate duly enacted state legislation, on the ground that it purportedly violated state law. There is a world of difference between a rule that federal district courts cannot *themselves* violate state law and the rule that plaintiffs need to salvage the decision below—*i.e.*, that district courts can adjudicate state-law challenges to state legislation brought against state officers. The latter proposition, of course, is squarely foreclosed by *Pennhurst*.

Any state-law challenge to HD36, HD37, HD40, HD41, and HD105 thus must be filed in state court, where state judges familiar with the state constitution can address the unsettled question of how N.C. Const. art. II, §5(4) applies when a federal court invalidates a duly enacted map. While plaintiffs insist that the text of the relevant constitutional provision is clear, Opp.26, textual clarity alone cannot resolve this question because the provision read literally would prohibit a legislature from

altering districts even in response to a court order. No one claims that is the case, so there must be some play in the joints when the General Assembly is enacting a mid-decade districting map only because a court invalidated the initial legislatively drawn maps, and the question of how much is not one that a federal court should be answering in the first instance. Indeed, underscoring that §5(4) is not so clear after all, plaintiffs and the district court do not even agree on its interpretation: The district court held that districts may be altered mid-decade if doing so is "necessary to remedy" a violation, Appl.29, while plaintiffs contend that districts may be altered mid-decade only if they "touch" districts that were invalidated, Opp.25. Plaintiffs themselves, moreover, did not even follow their own interpretation—their proposed remedial plan would have altered districts in Onslow County even though none of those districts "touched" a previously invalidated one. *See* Resp. to Pls.' Objs., ECF 192 at 53. In all events, whatever the proper interpretation of the state constitution, it was not for a federal district court facing multiple jurisdictional deficiencies to provide it.

In short, plaintiffs lack standing to challenge these five districts; the Eleventh Amendment prohibited the court from adjudicating plaintiffs' challenges to these districts; and the court improperly interpreted the state constitution in invalidating these districts. To say that there is a fair prospect that this Court will reverse the district court's state-law holding is a considerable understatement.

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

Even if some or all of the district court's merits ruling were to survive, this Court still would be likely to reverse or vacate the court's imposition of the Special Master's Plan because the district court deprived North Carolina of its sovereign right to draw its own districts in response to the invalidation of the 2017 Plan. Repeatedly since October, when the district court first expressed its concerns about the 2017 Plan, Applicants have made clear that the General Assembly was ready and willing to exercise its sovereign right to remedy any adjudicated infirmities. *See* Opp. to Appointment, ECF 204 at 7 ("fully prepared"); Resp. to Special Master's Draft Report, ECF 215 at 11 ("ready and willing"); Resp. to Special Master's Recommended Plan & Report, ECF 224 at 3 ("legislature … stands ready"); Br. in Supp. of Mot. to Expedite, ECF 227 at 3 ("legislature stands ready"). Indeed, Applicants had already proven their commitment to correcting adjudicated violations, as even plaintiffs did not challenge 24 of the districts in the 2017 Plan that were drawn to replace the 28 majority-minority districts that district court concluded the General Assembly lacked a strong basis in evidence to draw in 2011. The situation here thus bears no resemblance to the cases plaintiffs cite, in which legislatures "doggedly [clung] to … obviously unconstitutional plan[s]" and refused to cooperate with federal-court orders. *Hays v. Louisiana*, 936 F. Supp. 360, 372 (W.D. La. 1996); *see* Opp.28-29.

In fact, plaintiffs cite no authority for applying a one-bite-at-the-apple rule to a non-recalcitrant state legislature with ample time to enact a new districting plan. The cases plaintiffs cite instead confirm that a court may impose its own map only

when the State is unwilling or unable to do so itself. In *Hays* and *Terrazas*, the legislature was unwilling to enact a new districting plan. *See Hays*, 936 F. Supp. at 372 ("Legislature persists in defending the indefensible"); *Terrazas v. Slagle*, 789 F. Supp. 828, 838 (W.D. Tex. 1991) ("[legislative] inaction is a central reason for the need of federal judicial action at this time"). In *LULAC* and *Miller*, there was no window for the legislature to enact a new districting plan. *See League of United Latin Am. Citizens v. Perry*, 457 F. Supp. 2d 716, 718 (E.D. Tex. 2006) ("With the election looming, we … make changes necessary to discharge the Supreme Court's mandate."); *Johnson v. Miller*, 929 F. Supp. 1529, 1541 n.30 (S.D. Ga. 1996) ("The time constraints of this case, because of the impending elections … can hardly be overstated."). Here, in contrast, the General Assembly has made clear for months that it was willing and able to enact a remedial plan, but the district court refused to give the legislature the option, preferring instead to consider the input of a court-appointed special master. In short, there is no support for the one-bite-at-the-apple approach that pervaded the proceedings below and denied the legislature its primacy in remedying adjudicated defects in a legislatively enacted map.

Conspicuously absent from plaintiffs' procedural discussion is *Growe v. Emison*, 507 U.S. 25 (1993), the one case addressing a federal court's comparable refusal to allow a state to enact its own remedial districting plan. *Id.* at 34 ("[A] federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it."). Plaintiffs certainly could not have missed it in the Stay Application, where discussion of *Growe* spanned three pages and

explained in detail how that case is "virtually indistinguishable" from this case. Appl.31-33. Plaintiffs apparently agree, as they make no effort at all to distinguish it, effectively conceding that the district court's run-out-the-clock strategy was just as improper as the *Growe* court's "race to beat the Minnesota Special Redistricting Panel to the finish line." 507 U.S. at 37. Just as in *Growe*, the district court's refusal to allow the General Assembly to remedy deficiencies in the 2017 Plan is impossible to reconcile with this Court's repeated admonishments that "reapportionment is primarily the duty and responsibility of the State." *Chapman*, 420 U.S. at 27.

II. The Remaining Factors Favor A Stay.

Plaintiffs open their discussion of the equitable stay factors with the baffling contention that Applicants have not alleged irreparable harm because all harm will fall upon the State of North Carolina. That claim is wrong on its own terms, as the General Assembly itself is certainly injured by the invalidation of duly enacted state legislation. But plaintiffs are equally wrong to claim that the General Assembly cannot speak for the State. This Court regularly grants stay applications filed by individual state officials where, as here, they are authorized to represent the State in litigation. *See, e.g.*, *Gill v. Whitford*, 137 S. Ct. 2289 (2017); *Miller v. Johnson*, 512 U.S. 1283 (1994); *Karcher v. Daggett*, 455 U.S. 1303 (1982) (Brennan, J., in chambers). Indeed, precisely because state legislators suffer harm from the invalidation of state statutes, they "have standing to contest a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State's interests." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997).

North Carolina law does exactly that, authorizing the General Assembly to act on the State's behalf when "the validity or constitutionality of an act of the General Assembly" is challenged. N.C. Gen. Stat. §120-32.6(b); *see also* N.C. Gen. Stat. §114-2(10), *as amended by* 2017 N.C. Sess. Law 57, §6.7(m). North Carolina law also provides that in cases challenging the constitutionality of a state law, the "State" includes both the executive branch and the legislative branch. N.C. Gen. Stat. §1-72.2(a). Applicants thus have both the right and the duty to assert the injuries that occur "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). And in all events, this Court's stay jurisprudence requires consideration of that undeniable injury and critical equity no matter which party may be invoking it.

Plaintiffs attempt to shrug off the disruption that the district court's order will produce, but their assertions ignore the realities of election administration and campaigning. The legislature enacted the 2017 Plan more than five months ago. Since then, incumbents and candidates have relied on those legislatively enacted districts while making decisions about when and where to run, and members of the public have volunteered time and donated money to support the candidates they had every reason to believe would be running in their home districts. The special master's plan alters the lines of 24 separate districts on the eve of the filing period, shuffling voters, incumbents, and potential candidates in and out of districts across the state. *See* Special Master's Recommended Plan & Report, ECF 220 at 12. Those changes

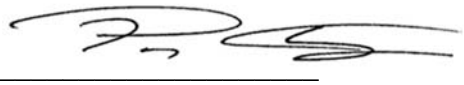
will nullify past campaign expenditures and delay candidates' future efforts to raise funds, seek endorsements, and campaign in the communities they seek to represent. Those irreparable injuries and resulting disruption are real and support a stay.

Finally, plaintiffs' arguments about "six years" of a racial gerrymanders and Applicants' supposed "tactics of delay," Opp.37, are revisionist history of the worst kind. The reason the 2011 Plan was in effect for most of the decade is because plaintiffs did not get around to challenging the 2011 Plan *until May 2015*. In fact, the only timely challenge to the 2011 Plan was unsuccessful, with the state supreme court upholding the 2011 Plan. *See Dickson v. Rucho*, 781 S.E.2d 404, 412 (N.C. 2015), *cert. granted, judgment vacated*, 137 S. Ct. 2186 (2017). Plaintiffs' suggestion that the legislature has been anything less than diligent is nothing short of preposterous, as the legislature has complied with every deadline the district court set and repeatedly urged that court to expedite its proceedings so that the legislature itself could timely remedy any adjudicated violation. That plaintiffs waited four years to file a lawsuit and the district court waited three months to reduce to a final decision the conclusions that it had plainly already reached back in October are no reasons to deprive the State of sovereign control over its own elections.

CONCLUSION

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

Respectfully submitted,



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