IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
NO. 1:15-cv-00399

SANDRA LITTLE COVINGTON, *et al*., Plaintiffs, v. THE STATE OF NORTH CAROLINA, *et al*., Defendants.	**PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' EMERGENCY MOTION TO STAY REMEDIAL ORDER PENDING DISPOSITION OF JURISDICTIONAL STATEMENT**

Pursuant to Local Rule 7.2 the Plaintiffs, by and through their undersigned counsel, submit the following response brief in opposition to Defendants' Emergency Motion to Stay Remedial Order Pending Disposition of Jurisdictional Statement, Dec. 12, 2016, Doc. 141 (hereinafter "Defs' Emerg. Mot.").

INTRODUCTION

The U.S. Supreme Court has held that "once a State's . . . apportionment scheme has been 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). Following a week-long trial on the merits, this Court held that "there is copious statewide evidence that race-based criteria predominated – and that race-neutral criteria were subordinated – in the creation" of the districts challenged in this case. Mem. Op. 49, Aug. 11, 2016, Doc. 123. Moreover, "Defendants have not carried their burden to show that each of the challenged districts was supported by a strong basis in evidence and narrowly tailored to comply with either Section 2 or Section 5 [of the Voting Rights

Act]." *Id.* at 160. The essence of unconstitutional racial gerrymanders is that the twenty-eight districts challenged here rationally can only be understood as "an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification." *Shaw v. Reno,* 509 U.S. 630, 642 (1993).

"Classifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.' They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Shaw,* 509 U.S. at 643 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)) (citations omitted). In these circumstances, the harm experienced by the Plaintiffs who live in those districts is quintessentially irreparable harm. *See Elrod v. Burns,* 427 U.S. 347, 373 (1975) (any impediment or abridgment of the right to vote is an irreparable injury); *see also Larios v. Cox*, 305 F. Supp. 2d 1335, 1344 (N.D. Ga. 2004) ("If the court permits a stay, thereby allowing the 2004 elections also to proceed pursuant to unconstitutional plans, the plaintiffs and many other citizens in Georgia will have been denied their constitutional rights. . . . Accordingly, we find that the plaintiffs will be injured if a stay is granted because they will be subject to one more election cycle under unconstitutional plans.").

Defendants are not entitled to the extraordinary remedy of a stay pending appeal because they have not demonstrated that they meet any of the four factors they must show to justify delaying further relief. Having failed to identify any clear error of fact or misapplication of law in the three-judge court's unanimous opinion, they are not likely to succeed on the merits of their appeal. Defendants have not identified any irreparable

injury they will experience absent a stay. Their arguments concerning the representational rights of voters whose elected officials will have shortened terms under the Court's remedial order fail to balance those harms with public interest in having constitutional districts fairly drawn without undue reliance on race. The balance of harms and public interest lie with proceeding to implement remedial districts in 2017 rather than waiting for another year for relief, and Defendants can point to no case holding otherwise.

STATEMENT OF FACTS

In the 2011 redistricting process, Dr. Hofeller and the Redistricting Chairmen, Senator Rucho and Representative Lewis, set out to draw a racially-proportionate number of majority-black voting age population (BVAP) districts for the state house and senate, each at greater than 50% BVAP. They mechanically applied these two racial targets without regard to whether candidates of choice of black voters had been usually successful in winning in the prior districts with less than 50% BVAP. Plaintiffs filed this action following the U.S. Supreme Court's decision in *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015) (hereinafter "*ALBC*"), which clarified that the state's use of mechanical racial targets in redistricting is strong evidence that race was the predominant factor in drawing majority-black districts.

The Complaint was filed on May 19, 2015 (Doc. 1) and on October 7, 2015 Plaintiffs filed a motion for a preliminary injunction (Doc. 23), seeking to avoid the continuing use of unconstitutional racially gerrymandered districts, which was denied. (Doc. 39) Following the trial held on April 11-15, 2016, Plaintiffs requested an order

requiring the North Carolina General Assembly to immediately redraw the unconstitutional districts. (Doc. 115.) In this Court's Order and Judgment entered August 15, 2016 (Doc. 125), holding that the twenty-eight districts challenged in this case are unconstitutional, Plaintiffs' request for immediate relief was denied, and the 2016 elections proceeded using the 2011 districts.

Plaintiffs then sought additional relief, including an order requiring Defendants to remedy the constitutional violations in the twenty-eight districts[1] at issue in this case by redrawing those districts within two weeks of the General Assembly reconvening in January 2017, and directing Defendants to conduct special elections in those districts in 2017. On November 29, 2016 the Court issued a remedial order imposing a March 15, 2017 deadline for enacting remedial legislative districts and requiring Defendants to set a schedule for special elections in those districts in the fall of 2017. (Doc. 140.) The Defendants now seek an emergency stay of the Court's remedial order pending resolution of their appeal.

ARGUMENT

I. Defendants Have a High Hurdle to Demonstrate They are Entitled to a Stay in these Circumstances

A stay is an exercise of judicial discretion. *See Williford v. Armstrong World Indus., Inc*., 715 F.2d 124, 125 (4th Cir. 1983) ("[F]ederal district courts possess the

[1] Only the twenty-eight districts (out of 170 state legislative districts) found unconstitutional need to be redrawn. While neighboring districts and county clusters in some areas of the state will be impacted, other areas of the state, and most notably districts in the western region of the state, do not need to be redrawn to remedy the unconstitutional districts.

ability to, under their discretion, stay proceedings before them when the interests of equity so require."). The granting of a stay pending appeal is "extraordinary relief," and the party requesting a stay bears a "heavy burden." *Winston–Salem/Forsyth Cnty. Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971) (Burger, Circuit Justice); *see also Personhuballah v. Alcorn,* 155 F. Supp. 3d 552, 558 (E.D. Va. 2016) ("[A] stay is considered extraordinary relief for which the moving party bears a heavy burden.") (citation omitted).

It is well-settled that whether to stay a district court's remedial order pending appeal turns on four factors: (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, 434 (2009); *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (citations omitted); *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970). "The first two factors of the traditional standard are the most critical. It is not enough that the chance of success on the merits be 'better than negligible.'" *Nken*, 556 U.S. at 434 (quoting *Sofinet v. INS*, 188 F.3d 703, 707 (7th Cir. 1999)). A party seeking a stay pending appeal "will have greater difficulty demonstrating a likelihood of success on the merits" than one seeking a preliminary injunction because there is "a reduced probability of error" in a decision of the district court based upon complete factual findings and legal research. *Mich. Coal. of Radioactive Material Users, Inc. v. Greipentrog*, 945 F.2d 150, 153 (6th Cir. 1991).

The moving party, moreover, is required to show something more than "a mere possibility" of success on the merits; more than speculation and the hope of success is required. *Nken*, 556 U.S. at 434; *see also Mich. Coal.*, 945 F.2d at 153. By the same token, "simply showing some 'possibility of irreparable injury,' . . . fails to satisfy the second factor." *Nken*, 556 U.S. at 434 (quoting *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998)).

Defendants argue they are entitled to a stay because a special election is an extraordinary remedy and because the North Carolina Supreme Court upheld some of the same districts in separate litigation brought raising numerous state and federal constitutional claims, which was resolved primarily on summary judgment at the trial court level and is still on appeal. *See Dickson v. Rucho*, 368 N.C. 481, 492-93 n.7, 781 S.E.2d 404, 414-15 n.7, *petition for cert. filed*, No. 16-24 (U.S. June 30, 2016). Those facts hardly merit a stay. In these circumstances, applying the well-established standards as articulated above, Defendants cannot begin to meet their burden of showing a stay is appropriate.

II. Defendants Cannot Establish Likelihood of Success on the Merits

Defendants cannot satisfy the two most important elements they must establish in order to justify the extraordinary relief of an emergency stay pending appeal of a final judgment on the merits: they are not likely to prevail on the merits of their appeal, and the absence of a stay will not cause them irreparable harm. *See Nken*, 556 U.S. at 434. At the heart of their appeal on the merits is the fundamentally wrong view that Section 2 of the Voting Rights Act requires that a state draw as many majority-black districts as

possible to provide a safe harbor from potential liability. The precedent they rely on to establish that proposition explicitly disclaims it. *See Bartlett v. Strickland*, 556 U.S. 1, 23-24 (2009) ("Our holding also should not be interpreted to entrench majority-minority districts by statutory command, for that, too, could pose constitutional concerns."); *Johnson v. De Grandy*, 512 U.S. 997 (1994) (proportionality is not to be considered a "safe harbor" from Section 2 litigation).

Defendants cannot erase the record in this case, which demonstrates, by direct evidence, that race was the predominant factor in determining "which voters the legislature decide[d] to choose" to move into and out of the districts challenged in this case. *ALBC*, 135 S. Ct. at 1271. This Court's opinion correctly concluded that the districts at issue are not narrowly tailored to comply with either Section 2 or Section 5 of the Voting Rights Act. Defendants are not likely to prevail on the merits of their appeal.

Moreover, special elections are not as "overreaching" as Defendants suggest. Federal courts repeatedly have taken aggressive action to ensure that voters already constitutionally harmed by illegal redistricting plans do not further suffer irreparable harm. *See, e.g., Keller v. Gilliam*, 454 F.2d 55, 57-58 (5th Cir. 1972) (approving the shortening of terms of office as a remedy for a voting rights violation); *Vera v. Bush*, 933 F. Supp. 1341, 1352-53 (S.D. Tex. 1996) (ordering a remedial plan on August 6, 1996, for November 1996 elections); *Johnson v. Mortham*, 926 F. Supp. 1540, 1542 (N.D. Fla. 1996) (denying motion to stay a May 22, 1996, deadline for the legislature to enact a remedial plan for the November 1996 congressional election); *Busbee v. Smith*, 549 F.

Supp. 494, 518-19 (D.D.C. 1982) (ordering a court-drawn remedial plan on August 24, 1982, for two congressional districts), *aff'd* 459 U.S. 1166 (1983).

It is clear that a district court has power to void and order new elections for violations of the Voting Rights Act and the Constitution. *See Pope v. County of Albany*, 687 F.3d 565, 569-70 (2nd Cir. 2012) (citing *Bell v. Southwell*, 376 F.2d 659, 665 (5th Cir. 1967)); *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 357 F.3d 260, 263 (2d Cir. 2004) (citing *Bell*, 376 F.2d at 665); *see also Hadnott v. Amos,* 394 U.S. 358 (1969) (federal courts have the power to invalidate elections held under constitutionally infirm conditions); *Stewart v. Taylor*, 104 F.3d 965, 970 (7th Cir. 1997) (stating that, despite holding of challenged election, court could order new election if plaintiff's motion for preliminary injunction has merit); *Hamer v. Campbell*, 358 F.2d 215, 222 (5th Cir. 1966) ("[H]aving concluded that the . . . election should have been enjoined, we now must set it aside in order to grant appellants full relief in the same manner as if the said election had been enjoined.") (internal quotation marks omitted). Indeed, the fact that the Plaintiffs here sought a preliminary injunction to preserve the status quo until their claims could be heard should weigh in their favor in the balance of equities. *Cf. Gjersten v. Bd. of Election Comm'rs,* 791 F.2d 472, 479 (7th Cir. 1986) (whether plaintiffs sought pre-election request for relief relevant to determination of whether, after decision on merits in their favor, an election should be set aside).

Defendants argue that the Court's remedial order is not well-supported by law. Defs' Emerg. Mot. 3. The two cases cited by this Court in its Order, *Smith v. Beasley*, 946 F. Supp. 1174 (D.S.C. 1996), and *Butterworth v. Dempsey,* 237 F.Supp. 302, 306 (D.

Conn. 1965), are not the only cases which demonstrate the proposition that "[f]ederal courts have often ordered special elections to remedy violations of voting rights." *Ketchum v. City Council of Chicago,* 630 F. Supp. 551, 565 (N.D. Ill. 1985); *see also Cousins v. City Council,* 503 F. 2d 912, 914 (7th Cir. 1974) (in resolving challenge to Chicago City Council redistricting, district court ordered special elections in the affected wards); *United States v. Osceola County*, 474 F. Supp. 2d 1254, 1255 (M.D. Fla. 2006) (ordering special elections and shortening terms to implement remedial districting plan in Section 2 vote dilution case).

Indeed, "[p]articularly where 'voters are represented by unconstitutionally elected officials . . . [courts have] had no difficulty in determining that the terms of the officials elected' should be shortened and special elections held." *Ketchum,* 630 F. Supp. at 565 (quoting *Tucker v. Burford*, 603 F. Supp. 276, 279 (N.D. Miss.1985) (redistricting case)); *see also Keller*, 454 F.2d at 57-58 (approving the shortening of terms of office as a remedy for a voting rights violation). Plaintiffs' request for a special election in 2017 also is bolstered by the fact that Plaintiffs sought relief in the form of a preliminary injunction in advance of the challenged election. *See Smith v. Cherry,* 489 F. 2d 1098, 1103 (7th Cir. 1973), *cert. denied,* 417 U.S. 910 (1974).

The relief is similar to that ordered in Virginia, where a district court found that the legislature's state house and senate districts violated the equal protection clause on one-person, one-vote grounds. *See Cosner v. Dalton,* 552 F. Supp. 350 (E.D. Va. 1981) (three-judge court). The court there held that "[b]ecause Virginia's citizens are entitled to vote as soon as possible for their representatives under a constitutional apportionment

plan, we will limit the terms of members of the House of Delegates elected in 1981 to one year." *Id.* at 364. North Carolina's citizens living in unconstitutional racially gerrymandered districts deserve no less. This court has the authority and the duty to protect Plaintiffs' rights to equal protection in their exercise of the most fundamental right to vote. *See Reynolds,* 377 U.S. at 554-55; *Wesberry v. Sanders,* 376 U.S. 1, 17 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined.").

Finally, Defendants appear to suggest that they meet this prong of the test for a stay because this is a decision of a three-judge court and since the Supreme Court has direct appellate jurisdiction, there is a "fair prospect" that the Court will note probable jurisdiction and reverse. Defs' Emerg. Mot. 2. There is simply no such per se rule that in redistricting cases an automatic stay is warranted because of the direct appeal to the U.S. Supreme Court. The case Defendants cite as authority, *Hollingsworth v. Perry,* 558 U.S. 183 (2010), was not a redistricting case involving a three-judge panel, and, most importantly, in *Hollingsworth,* the Supreme Court granted the stay because of a clear indication that the ruling of the court below was wrong, and failing to stay it would cause the irreparable harm of widely broadcasting a trial that could not later be "un-broadcast." *See* 558 U.S. at 184 ("We instead determine that the broadcast in this case should be stayed because it appears the courts below did not follow the appropriate procedures set forth in federal law before changing their rules to allow such broadcasting. Courts enforce the requirement of procedural regularity on others, and must follow those requirements themselves.").

Instead, the precedent indicates that courts routinely deny motions to stay the implementation of remedial redistricting plans.[2] *See, e.g., Travia v. Lomenzo*, 381 U.S. 431, 431 (1965) (denying motion to stay district court order requiring New York to use court-approved remedial redistricting plan); *Personhuballah,* 115 F. Supp. 3d at 558 (order denying motion to stay order during pendency of Supreme Court review); *see also Larios*, 305 F. Supp. 2d at 1336-37, 1344-45 (N.D. Ga. 2004) (same, and collecting cases).

Personhuballah, decided by a fellow court in the Fourth Circuit, is highly instructive. There, after a three-judge panel struck down a congressional districting plan as an unconstitutional racial gerrymander, the losing party (intervenors) moved the court to stay its decision. *See Personhuballah*, 115 F. Supp. 3d at 558-59. The intervenors argued that stays are granted as a matter of course in redistricting cases where a court has struck down an apportionment plan. The *Personhuballah* court denied the stay motion and rejected these arguments in no uncertain terms, noting that "[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." 115 F. Supp. 3d at 558 (citation omitted).

[2] District courts evaluating redistricting challenges have generally denied motions for a stay pending appeal. *See United States v. Hays*, 515 U.S. 737, 742 (1995); *McDaniel v. Sanchez*, 452 U.S. 130, 136 (1981); *Roman v. Sincock*, 377 U.S. 695, 703 (1964); *Lodge v. Buxton*, 639 F.2d 1358, 1362 (5th Cir. 1981); *Seals v. Quarterly Cnty. Court*, 562 F.2d 390, 392 (6th Cir. 1977); *Cousin v. McWherter*, 845 F. Supp. 525, 528 (E.D. Tenn. 1994); *Latino Political Action Comm., Inc. v. City of Boston*, 568 F. Supp. 1012, 1020 (D. Mass. 1983); *see also Wilson v. Minor*, 220 F.3d 1297, 1301 n.8 (11th Cir. 2000) (denying motion to stay district court's order implementing new plan pending appeal).

Thereafter, the intervenors made a direct application for a stay to Circuit Justice Roberts, contending that implementation of a remedial plan for 2016 would cause "electoral chaos." *See* Intervenor-Defs.' Mem. Supp. Mot. Suspend Further Proceedings & Modify Inj. Pending S. Ct. Review 9, *Personhuballah v. Alcorn*, No. 3:13-cv-678 (E.D. Va. Nov. 16, 2015), Doc. 271. Circuit Justice Roberts referred the application to the full Supreme Court, which denied the application. Order in Pending Case, *Wittman v. Personhuballah*, 577 U.S. __, No. 15A724 (Feb. 1, 2016), *available at* https://www.supremecourt.gov/orders/courtorders/020116zr_3dq3.pdf. Precisely the same result should obtain here and for the same reasons. As *Personhuballah* well illustrates, none of the cases Defendants cite establishes any rule relaxing standards for granting the "extraordinary relief" of a stay in the redistricting context. Defendants have made no showing that they are likely to succeed on the merits of their appeal.

III. Defendants Will Not Suffer Irreparable Harm Absent a Stay

Defendants' contention that they will be harmed by the remedial order is unavailing. Defendants made similar arguments in *Harris v. McCrory*, 1:13-cv-949 (M.D.N.C. 2016) (three-judge court) (striking down 2011 North Carolina congressional districts as racial gerrymanders). There, like here, Defendants argued the judgment would likely be reversed by the U.S. Supreme Court and that drawing and implementing new districts would irreparably harm North Carolina voters. Defs' Emergency Mot. Stay, 1:13-cv-949, Feb. 8, 2016 (Doc. 145). The court rejected those arguments the very next day. Order, 1:13-cv-949, Feb. 9, 2016 (Doc. 148). It noted the Supreme Court's review would be limited to the clear error standard and that the defendants' vague suggestion of

irreparable injury was insufficient in comparison to the irreparable injury that resulted from the defendants' deprivation of the fundamental right to vote in a manner that violated the Equal Protection Clause. *Id.* at 3 (quoting *Johnson v. Mortham*, 926 F. Supp. 1540, 1543 (N.D. Fla. 1996)). In fact, the panel observed, "[t]o force the plaintiffs to vote again under the unconstitutional plan . . . constitutes irreparable harm to them, and to the other voters in CD 1 and 12." *Id.*

Defendants make no argument that the Court's order requiring the legislature to promptly redraw the invalid house and senate districts to remedy the violations of Plaintiffs' federal constitutional rights should be stayed. Their sole concern is with that part of the order requiring special elections to be held in the remedial districts in the fall of 2017 at times set by the General Assembly. Three forms of "harm" are advanced for staying this part of the order: (1) "sovereign harms on the State itself"; (2) harm to "the legislators who were elected to serve two-year terms"; and (3) harm to "the State's residents as well" because voter turnout in 2017 may be lower than in 2018. Defs.' Emerg. Mot. 2, 4.

Advancing "sovereign harm" to the State of North Carolina as grounds for delaying a remedy for constitutional harms it has inflicted on millions of its citizens makes a mockery of the oath each legislator takes "to support the Constitution of the United States." N.C. Gen. Stat. § 11-7. Interposing the personal interests in serving two-year terms of those legislators whose districts will be redrawn as a barrier to curing

violations of the constitutional rights of their constituents rings hollow.[3] Moreover, one-year terms for legislators have roots in the State's history. North Carolina's first Constitution set the terms of legislators at one year. 1776 N.C. Const. Art. II, III.

Speculation that voter turnout in 2017 might be low is not a rational basis for denying North Carolinians their first opportunity in six years to have a legislature elected from constitutionally-drawn districts enact laws on their behalf. First, the special election will occur when a regularly-scheduled election is already set to be conducted—the 2017 municipal elections. Millions of voters across the state will have already been planning to vote in November 2017. Indeed, when citizens vote in the fall of 2017, the actions of the just completed session of the legislature may inspire citizens to vote in large numbers.

Second, Defendants speculate that turnout in a 2017 special election in November would be lower than in 2018, but such mere speculation is not grounds for extending the constitutional injury that millions of North Carolina voters have been suffering since 2012. Indeed, a former Executive Director of the State Board of Elections who, in his twenty-year tenure, oversaw numerous special or delayed elections (including where special elections were scheduled to coincide with municipal elections), explained that turnout is a multi-causal phenomenon, that turnout in special elections can vary widely, and that what would most increase turnout in this special election would be to conduct it with the 2017 municipal elections. (Decl. of Gary Bartlett ¶¶ 12-13, Doc. 139-2.)

[3] The terms of legislators whose districts are not required to be redrawn to cure the defects in the challenged districts will not be shortened under the Court's Order.

Third, if this Court were to stay the remedial order, and the Supreme Court affirms this Court's ruling, as Plaintiffs have requested, it likely would be too late for this Court to then ensure that the state legislative special election is conducted with the November 2017 municipal elections. Having to conduct that election separately after the municipal elections would result in additional costs and even lower turnout.[4] Parties appealing a remedial order in *Personhuballah* also sought a stay until the 2018 election cycle while direct appeal to the U.S. Supreme Court was pending. There, the court pointed out that staying its order would be to "give the Intervenors the fruits of victory for another election cycle, even if they lose in the Supreme Court. This we decline to do." *Personhuballah*, 155 F. Supp. 3d at 560. This court should likewise decline to award Defendants the fruits of victory for another two full years.

Defendants ask this court to order the stay of special elections that will not happen until the fall of 2017 because the U.S. Supreme Court may issue an opinion in other pending cases before then that "significantly impacts" this case. Defs' Emerg. Mot. 3. Nothing decided in any other case changes the final judgment in this case without further proceedings here. The possibility of court opinions in another case does not create irreparable harm to Defendants. While they may prefer to drag out the remedial process

[4] In fact, numerous courts' imposition of special elections to remedy constitutional violations, even where elections had to be conducted outside the regular schedule of elections, certainly implies that there is no constitutional harm wrought by having voters participate in a special election. *See, e.g.*, *Smith*, 946 F. Supp. at 1212-13 (D.S.C. 1996) (ordering 1997 special elections for state legislative seats); *see also Osceola County*, 474 F. Supp. 2d at 1255 (ordering a 2007 special election); *Ketchum,* 630 F. Supp. at 565 (ordering a 1986 special election); *Tucker v. Burford*, 603 F. Supp. 276 (N.D. Miss. 1985) (ordering a 1985 special election).

as long as possible and delay implementation of new districts until 2018 or later, Defendants' arguments about potential rulings in other cases do not meet the rigorous standard they must meet. *See, e.g., Graves v. Barnes,* 405 U.S. 1201, 1203-04 (1972) (denying stay of court orders implementing new redistricting plans pending direct appeal to the U.S. Supreme Court because there is no irreparable harm from enforcing the trial court's judgment).

IV. Issuing a Stay Will Cause Irreparable Harm to Plaintiffs

Plaintiffs have proven that twenty-eight districts used to elect North Carolina's state legislators were racially gerrymandered. "Deprivation of a fundamental right, such as limiting the right to vote in a manner that violates the Equal Protection Clause, constitutes irreparable harm." *Johnson v. Mortham*, 926 F. Supp. at 1543 (citations omitted) (citing *Elrod*, 427 U.S. at 373-74). Defendants do not argue otherwise. To deny Plaintiffs the ability to elect representatives from districts that are not tainted by racially discriminatory intent for another two years by delaying the special elections as ordered by the Court constitutes irreparable harm. *Cf. Personhuballah*, 155 F. Supp. 3d at 560 (denying stay of remedial redistricting plan where plaintiffs would suffer irreparable harm). To allow racially discriminatory districts to remain in use means that policies enacted, as well as problems and issues not addressed, by that legislature continue to impact the lives of voters who have reason to suspect the legitimacy of their representatives. This Court should not permit further delay in righting the fundamental and significant constitutional wrongs Plaintiffs here have experienced.

V. The Public Interest Is Best Served by Moving Forward To Implement Constitutional Districts

The harm to the public has already been addressed by another three-judge court in this district, and by a three-judge court in Virginia. The *Harris* court found that the harms to plaintiffs were harms to every voter in the affected districts and were "public harms" to the state of North Carolina as a whole. Order on Mot. Stay 4, *Harris v. McCrory*, 1:13-cv-949, Doc. 148. "The public has an interest in having . . . representatives elected in accordance with the Constitution." *Id.* The *Personhuballah* court found the same and declined to stay the implementation of remedial districts. *See id.*; 155 F. Supp. 3d at 560-61. In the redistricting context, as in others, "[s]tate sponsored segregation . . . provides no useful benefits to our society. And to issue a stay in this matter would mean that the segregative effects . . . would be allowed to continue full stead for several additional years; a proposition contrary to public welfare." *United States v. Louisiana*, 815 F. Supp. 947, 955 (E.D. La. 1993). The public interest consideration weighs heavily against granting a stay in this case.

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court deny Defendant's Emergency Motion to Stay the Remedial Order Pending Disposition of Jurisdictional Statement.

This the 23rd day of December, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I filed a copy of the foregoing with the Clerk using the CM/ECF system, which sent electronic notification to the following:

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