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

COMMON CAUSE, *et al.*, PLAINTIFFS, v. ROBERT A. RUCHO, in his official capacity as Chairman of the North Carolina Senate Redistricting Committee for the 2016 Extra Session and Co-Chairman of the Joint Select Committee on Congressional Redistricting, *et al.*, DEFENDANTS.	CIVIL ACTION NO. 1:16-CV-1026-WO-JEP THREE-JUDGE PANEL
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *et al.,* PLAINTIFFS, v. ROBERT A. RUCHO, in his official capacity as Chairman of the North Carolina Senate Redistricting Committee for the 2016 Extra Session and Co-Chairman of the 2016 Joint Select Committee on Congressional Redistricting, *et al.,* DEFENDANTS.	CIVIL ACTION NO. 1:16-CV-1164-WO-JEP THREE JUDGE PANEL

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA PLAINTIFFS' BRIEF IN OPPOSITION TO LEGISLATIVE DEFENDANTS' MOTION TO STAY

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INTRODUCTION

The right to vote is "a fundamental matter in a free and democratic society . . . preservative of other basic civil and political rights." *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964). Yet, in every congressional election held this decade, North Carolina voters have not been able to fully and fairly exercise this fundamental right. In 2011, the North Carolina state legislature enacted a new congressional redistricting plan ("2011 Plan"). The 2011 Plan, in place for the 2012 and 2014 elections, was painstakingly designed to unconstitutionally sort voters into districts based on race.[1] *See Cooper v. Harris*, 137 S. Ct. 1455 (2017). The defendants' defense in *Harris* was not that the 2011 Plan was fair or in the best interest of voters, but rather that the Plan was only a *partisan* gerrymander, not a racial one.[2] *See* Appellants' Br., *McCrory v. Harris*, No. 15-1262 at 24, 28-30; Expert Report of Thomas Hofeller (Dkt. 33-2), *McCrory v. Harris*, 1:13:cv-00949 at ¶¶ 23, 40, 68; Second Expert Report of Thomas Hofeller, *McCrory v. Harris*, 1:13:cv-00949 at ¶¶ 8-10.

[1] In addition to the 2011 Plan's illegal districts, 28 North Carolina state legislative districts drawn by the defendants were found to be unconstitutional racial gerrymanders. *See* Covington v. North Carolina, 316 F.R.D. 117 (M.D.N.C. Aug. 11, 2016). Moreover, in 2013 the defendants enacted the so-called "monster" bill, which was designed to restrict voting rights by creating stringent voter ID requirements, cutting early voting, and eliminating other voting practices. The "monster" bill was permanently enjoined by the Fourth Circuit in 2016, who found that it violated the Fourteenth Amendment and Section 2 of the Voting Rights Act because it was designed with discriminatory intent to "target African Americans with almost surgical precision." N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 215 (4th Cir. 2016), *cert. denied sub nom.* North Carolina v. N.C. State Conference of NAACP, 137 S. Ct. 1399 (2017).

[2] Throughout the brief, "defendants" will refer only to legislative defendants, and "plaintiffs" to the League of Women Voters of North Carolina plaintiffs.

In light of the constitutional violations found in *Harris,* and clinging to gerrymandering as its weapon of choice, the state legislature hired the same map drawer, Dr. Hofeller, to design a new congressional plan before the 2016 election ("2016 Plan"). Just like its predecessor, the 2016 Plan was methodically crafted with discriminatory intent, sorting voters into districts based on their past voting histories to ensure pro-Republican partisan advantage for the entire decade, regardless of the will of the electorate. The defendants explicitly admitted the partisan purpose behind their plan, with Representative Lewis stating "to the extent [we] are going to use political data in drawing this map, it is to gain partisan advantage," and "acknowledg[ing] freely" that a map drawn according to the Adopted Criteria "would be a political gerrymander." Feb. 16, 2016 Joint Comm. Cong. Redist. Transcript at 54, 48. The 2016 Plan performed exactly as intended, electing 10 Republicans and 3 Democrats to North Carolina's congressional seats.[3]

Despite these egregious facts, the defendants are now asking the Court to stay the trial proceedings in this case. The defendants base their last-minute stay request solely on the fact that the U.S. Supreme Court recently decided to hear the partisan gerrymandering case *Gill v. Whitford* on the merits. This is remarkable, since the defendants have known for months that the Supreme Court would likely take *Whitford* before its summer recess. Moreover, to the extent the defendants' motion is based on an assumption that the

[3] The 2016 Plan had an efficiency gap of -19% (the largest of any plan for the 2016 election) and a partisan bias score of -27% (the second largest partisan bias score *ever* on record). *See* Amended Expert Report of Simon Jackman at 3; Rebuttal Report of Simon Jackman at 4.

Whitford appellants will be successful, it is based on pure conjecture. All parties to this case are ready and able to proceed with trial, as discovery is complete and pretrial disclosures, trial briefs, proposed findings of fact, conclusions of law, and motions in limine have been filed with the Court. And *Whitford* has no bearing on the *facts* in this case, which are all well-established.

Furthermore, the balance of the equities weighs heavily against staying this trial. The defendants cannot point to any clear hardship justifying a stay. In addition, the consequences that the defendants argue would result from proceeding with trial in fact would be exacerbated by delaying the trial. On the other side of the balance, substantial harms would be experienced by plaintiffs, North Carolina voters who have already experienced one election under an extreme partisan gerrymander. In addition, a stay of trial could have the result that plaintiffs will be subject to yet another election where their votes are diluted because of their political beliefs, and would also result in stale evidence when a trial is held. The Court should instead hold a trial as soon as possible, perform fact-finding, and apply the legal theories presented by plaintiffs' briefing. A decision in *Whitford* that implicates the legal theory adopted by the Court in this case can be taken account of in the appellate process.

For the reasons that follow, plaintiffs respectfully request that this Court deny the defendants' motion to stay proceedings in the above-captioned matter.

STANDARD OF REVIEW

The decision whether to grant a stay is discretionary, and within "the inherent power in courts under their general equity powers and in the efficient management of their dockets." *Williford v. Armstrong World Indus., Inc.,* 715 F.2d 124, 127 (4th Cir. 1983). "It is not, however, without limitation." *Id*. The "proper use of this [discretion] 'calls for the exercise of judgment which must weigh competing interests and maintain an even balance.'" *Id.* (quoting *Landis v. N. Am. Co.,* 299 U.S. 248, 254-55 (1936)). "The party seeking a stay must justify it by clear and convincing circumstances outweighing potential harm to the party against whom it is operative." *Williford,* 715 F.2d at 127. In other words, the court should consider whether the movant has demonstrated "a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay…will work damage to someone else." *Landis*, 299 U.S. at 255.

ARGUMENT

I. Defendants' Attempts to Read the *Whitford* Tea Leaves Are Meritless.

The defendants spend a large portion of their memorandum trying to read meaning into the Supreme Court's initial actions upon taking *Whitford*. However, the defendants' interpretations are pure speculation, offering no firm ground to support staying a trial here. How the Supreme Court will eventually rule in *Whitford* simply cannot be predicted by overanalyzing the Court's first steps alone. Thus, proceeding to trial in this case is not, as the defendants claim, "futile no matter what," but rather a sensible course of action given the facts on the ground.

To start, the defendants argue that "the Supreme Court's decision to hear *Whitford* on the merits alone warrants a stay" and "if the Supreme Court agreed with the *Whitford* court's standard for [partisan gerrymandering] claims, it could have summarily affirmed the decision, but it did not." Defs. Stay Mem. (Dkt. 74) at 7, 10 n.4. However, the defendants jump from the Court deciding to hear the case on the merits to assuming the worst-case-scenario for appellees, an assumption which is clearly hyperbole.[4] The fact that the Supreme Court decided to hear *Whitford* on the merits does not mean that the justices will rule in favor of the appellants, or that appellees' standard is deficient. It simply means the Court thinks partisan gerrymandering is an important issue that it wants to address head on after full briefing and argument.[5]

Next, the defendants argue that the Supreme Court's stay of the lower court's remedial order in *Whitford* means that *Whitford* will likely fail on the merits. To the contrary, whether the Supreme Court stays a lower court's decision initially does not necessarily indicate what it will later do on the merits. There are numerous examples of

[4] In addition to being hyperbolic, the defendants' claims about the *Whitford* case on the merits are simply wrong. First, the lower court's standard in *Whitford* is clearly not the same as the *Bandemer* standard. Most obviously, the partisan symmetry concept and metrics that the lower court in *Whitford* adopted and plaintiffs in this case propose as part of the discriminatory effect prong were not even in existence until after *Bandemer*. *See* Appellees' Mot. to Affirm, Gill v. Whitford, No. 16-1161, at 32-35. Second, the claim that the *Whitford* court "divined" a legal standard that was a surprise to appellants after the trial is laughable. The *Whitford* panel adopted the same three-prong test that appellees proposed in their pretrial briefing, and an emphasis on entrenchment that the panel itself foreshadowed in its summary judgment opinion. *Id*. at 35-36.

[5] The defendants' actions in this case, brazenly designing a partisan gerrymander to advantage one political party regardless of the will of the voters, provide a prime example of why the Court may want to hear *Whitford* on the merits and finally curb extreme partisan gerrymandering.

the Supreme Court granting a stay of a lower court's decision striking down district maps, and then later *affirming* the lower court's ruling.[6] *See*, *e.g., North Carolina v. Covington*, 137 S. Ct. 1624 (2017); *Miller v. Johnson*, 515 U.S. 900 (1995); *Karcher v. Daggett*, 462 U.S. 725 (1983); and *White v. Weiser*, 412 U.S. 783 (1973). The Court has also denied a stay where it went on to *reverse* the lower court's decision. *Mahan v. Howell,* 410 U.S. 315 (1973). Further, the Supreme Court has denied a stay and then later *affirmed* the lower court's decision in favor of plaintiffs, *Cox v. Larios*, 542 U.S. 947 (2004), and has granted a stay where it went on to *reverse* the lower court's decision, *Tennant v. Jefferson Cnty. Comm'n*, 567 U.S. 758 (2012). Similarly, there are many cases where the Supreme Court postponed consideration of jurisdiction, but later ruled in favor of plaintiffs on the merits. *See, e.g., Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016); *Brown v. Plata*, 563 U.S. 493, 510-16 (2011); *Davis v. FEC*, 554 U.S. 724, 732-34 (2008); and *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 461-64 (2007).

Continuing in their attempt to read the tea leaves, the defendants further argue that if *this* Court holds for the plaintiffs, it is more likely that the Supreme Court would stay a remedial order here than in *Whitford*. Def. Stay Mem. at 10. But this case has not even proceeded to *trial*, let alone the remedy phase. Any remedial order, not in existence currently, is not at issue now. Furthermore, the timing of any remedial order may make a

[6] In their briefing on remedies in the lower court, appellants in *Whitford* argued that there would be time for the legislature to draw a new map if necessary after a Supreme Court ruling on the merits. *See* Defs. Response Br. on Remedies, *Whitford v. Gill*, 3:15-cv-421 (Dkt. 173) at 2. Perhaps acknowledging this possibility, the Supreme Court expedited the hearing of the *Whitford* case on the merits by a month or two, scheduling it for the first week the Court is back after summer recess.

stay from the Supreme Court unlikely, or irrelevant, as the order could come well after a decision in *Whitford*. Lastly, the nine months the *Whitford* panel gave the Wisconsin legislature to draw a plan has no bearing on the facts in this case, as it is well-established that the North Carolina legislature does not need nine months to draw a district map. Indeed, in *Harris*, a three-judge panel gave the legislature two weeks. *Harris v. McCrory*, 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016). Given that two weeks was enough time for the defendants to utilize complex formulas to draw a partisan gerrymander, they surely could also come up with a fair plan in the same time.[7]

In sum, the defendants' attempts to read into the Supreme Court's actions in *Whitford* to make any kind of meaningful argument to stay this trial are one-sided and hollow, and provide no persuasive reason why the parties here should not proceed to trial.

[7] The defendants also cite an order in *Harris*, which continued the trial, to support their stay motion. However, the *Harris* order is easily distinguished from this case. First, the *Harris* panel found the continuance appropriate "in light of the parties' agreement." Harris v. McCrory*,* 1:13-cv-949, Order (Dkt. 85) at 2. But here, both sets of plaintiffs oppose the stay motion, and the other set of defendants take no position. Def. Stay Mot. (Dkt. 74). Second, there was no chance the plaintiffs in *Harris* would get relief before the 2014 election, even if the trial had not been continued, meaning a delay still allowed them to get relief for the 2016 election. A delay in this case could jeopardize the plaintiffs' chance of a remedy prior to the 2018 election. Third, pretrial deadlines had not been set in *Harris* when the trial was continued. Harris v. McCrory, No. 1:13-CV-949, Text Order (July 14, 2014). But they have already passed here. Finally, the procedural posture for plaintiffs in Ala. Legis. Black Caucus v. Alabama, 989 F. Supp. 2d 1277 (2013), the case the court was waiting for in *Harris*, was different than *Whitford*. The plaintiffs in *Alabama*, arguing a similar theory to the plaintiffs in *Harris*, had lost in lower court. However, the lower court in *Whitford* accepted the plaintiffs' theory, Whitford v. Gill, 218 F. Supp. 3d 837 (W.D. Wis. 2016), which is the same advocated by the plaintiffs here.

II. Defendants' Request for a Stay is Another Exercise in Delay

Despite defendants' claims to the contrary, the Supreme Court's decision to take *Whitford* was hardly a "game-changer" for this case. Def. Stay Mem. (Dkt. 74) at 5. Far from a surprise, all parties involved knew *months* ago that *Whitford* had been appealed to the Supreme Court and that the Court could decide to hear the case on the merits before its summer recess.[8] Further, this Court set the trial date for June 26, 2017 knowing that *Whitford* and the *Harris* partisan gerrymandering case would be pending before the Supreme Court, and that the Court would likely decide to hear either or both cases on the merits in the coming months.

In addition to knowing for some time about the *Whitford* appeal yet sitting idly by, the defendants also exaggerate how quickly this case is likely to move through the judicial system. The trial in this case has been continued at the Court's motion until further notice and a new trial date has not yet been set. But, if a trial is held expeditiously, this Court would have the opportunity to announce its judgment before the Supreme Court decides *Whitford*. As noted above, the Supreme Court expedited the oral argument in *Whitford* to be held the first week the Court is back in session, the first week of October 2017, which means that a decision in *Whitford* will likely come between January and June of 2018. This sequence of events supports this Court holding a trial, performing

[8] The *Whitford* panel entered its final judgment in the case on January 27, 2017. The appellants then filed their notice of appeal on February 24, 2017, later filing an amended notice of appeal on March 20, 2017. *See* Defs. Amended Notice of Appeal, Dkt. 193, Whitford v. Gill, 3:15-cv-421-bbc (Mar. 20, 2017).

fact-finding, and providing judgment on the validity of the plaintiffs' proposed test. *See infra* Section III at 13.

Furthermore, if the trial had not been continued at no fault of the parties or the Court, all the parties in this case were prepared to hold trial on June 26, 2017. Without the continuance, despite the Supreme Court taking *Whitford* on the merits, it seems clear that the trial would have otherwise proceeded on the 26th as planned. Discovery in this case was completed in early May, and depositions have been held. All parties filed their pretrial disclosures with the Court at the end of May, and all objections to the pretrial filings have been filed. In addition, all parties have filed trial briefs, proposed findings of facts, conclusions of law, and motions in limine and were preparing witnesses for trial.

Instead, the defendants' request for a stay of the trial proceedings in this case is yet another tactic to delay implementation of a fair plan for 2018, motivated by partisan purposes. Filing a stay motion asking a court to wait for an action in another redistricting case before proceeding is the defendants' favorite tactic, or modus operandi. The same defendants filed for a stay twice in *Harris*, once in *Covington*, and now here. In both *Harris* and *Covington*, the redistricting plans in question were later ruled unconstitutional, and there is strong reason to believe the 2016 Plan at issue in this case will be as well. The defendants' request for a stay of the trial here is merely another

example of their effort to maintain partisan advantage by whatever means possible, and should be treated as such.[9]

III. Any Burden on Defendants Does Not Outweigh the Interests of Judicial Economy and Clear Harm to Plaintiffs if Trial Proceedings Are Stayed

The defendants do not cite any clear hardship that would result if the trial proceeded, instead only referring to vague concepts or speculating on what might happen in *Whitford*. For example, the defendants refer to "irreparable confusion" on behalf of the public as a reason why holding trial would be "futile." Def. Stay Mem. at 2, 3, 12. But the defendants provide no specific examples of any such confusion. Moreover, delaying the trial certainly would not solve any public confusion problem that may exist; in fact, it could only make it *worse*. A large part of any public confusion likely results from the fact that the State's 2011 congressional redistricting plan was struck down as unconstitutional and then replaced with a partisan gerrymander. Delaying a decision on the merits causes greater confusion for the public than having the controversy decided by the trial court.

The defendants also argue that proceeding with trial in the wake of the Supreme Court's decision to hear *Whitford* will be a waste of taxpayer resources. Def. Stay Mem. at 2, 6, 12. However, the cost of trial pales in comparison to the taxpayer resources that have already been expended by the defendants drawing and defending unconstitutional

[9] Another example of the defendants' extreme stonewalling comes from their own stay memorandum. The defendants claim that, unlike *Whitford*, "there is no such evidence or indication that any such alternate [draft] maps exist" in this case. Def. Stay Mem. at 10. But the plan in this case was drawn in two weeks. In addition, the defendants' own consultant, Dr. Hofeller, produced a series of draft maps during discovery (titled DEF000042-000064).

redistricting plans in court and the resources needed to remedy those constitutional violations. *See Cooper v. Harris*, 137 S. Ct. 1455; *North Carolina v. Covington*, 137 S. Ct. 1624 (2017). Further, courts in redistricting cases have held that "mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Conkright v. Frommert*, 556 U.S. 1401, 1403 (2009) (Ginsburg, J. in chambers) (quotation marks omitted); *see also Cane v. Worcester Cty.,* 874 F. Supp. 695, 698 (D. Md. 1995); *Johnson v. Mortham*, 926 F. Supp. 1540, 1542 (N.D. Fla. 1996). The same logic applies here. Resources expended challenging a redistricting plan that sorts voters based on their political beliefs can hardly be considered an "enormous waste of time and money," or a hardship for the defendants, particularly when the map drawers openly flaunted their discriminatory conduct.

Moreover, the defendants exaggerate the magnitude of changes that would need to be made if the Supreme Court later reversed this Court's decision, or reversed the lower court's decision in *Whitford*. If a finding of a constitutional violation is later overturned on appeal, the defendants could simply revert to the 2016 Plan for the next election. And it is unlikely that there would be a need for new discovery if the Supreme Court adopted a standard for measuring partisan gerrymandering that is different than the standard proposed by the plaintiffs here. The timeline and facts in this case are well-established, with most of the events taking place in February 2016, and will not change regardless of what happens in *Whitford*. Rather, the more imminent harm from delaying trial is the quality of the evidence already gathered in discovery. The further a trial in this case is

from these events, the more stale the evidence will be, as the memories of witnesses fade over time.[10]

Despite the lack of clear harm to defendants that would result from proceeding with trial, delaying trial would be a substantial inequity for the plaintiffs. The defendants are asking this court to set aside its responsibility to enforce plaintiffs' federal constitutional rights solely because the Supreme Court has decided to hear a similar case on the merits. But protecting federal constitutional rights is one of the primary responsibilities of federal courts. *Miller*, 515 U.S. at 922-23; *United States v. Jefferson Cnty. Bd. of Educ.*, 372 F.2d 836, 873 (5th Cir. 1966). Given the serious issues and rights at stake, defendants have shown no reason other than speculation to stay the trial proceedings in this case.

Most importantly, delay of the trial until after a decision in *Whitford* might well condemn the plaintiffs to another election under the 2016 Plan. As noted above, a

[10] Witnesses' memories are already beginning to fade. A key witness in this case, Dr. Hofeller, noted at his deposition on February 10, 2017 that remembering something from nine months ago was difficult. Hofeller Dep. at 290:15-16. Further, during his two depositions in January and February 2017 (merely a year after he drew the 2016 Plan) Dr. Hofeller explained on at least eight occasions that he could not remember key details as to the timing and sequence of events, or whether he had seen certain documents. Hofeller Dep. at 165:4-166:5 (does not remember whether a plan called "Proposed 10-3 Map" came from his computer); 171:15-20 (does not remember which month the Harris trial was in 2015); 172:6-15 (does not remember which day he first communicated with Sen. Rucho and Rep. Lewis after the Harris decision as released); 176:18-21 (does not recall if he saw the adopted written criteria); 191:22-192:6 (does not remember which district he drew first); 195:13-18 (does not remember if he ran a compactness report or not); 233:11-15 (does not remember if draft plan "Congress 16C" was prepared before he spoke with the Chairman); and 298:3-14 (does not recall why he included some elections but not others in the formula he used for assessing partisanship of the districts).

decision in *Whitford* will likely come between January and June 2018. If this court waits that long to *even hold a trial*, the legislative defendants would certainly argue that there was insufficient time to put a new plan in place before the 2018 election if the plaintiffs are successful.[11] But if the 2016 Plan is used for the 2018 election, and is ultimately judged unconstitutional, that would mean *four out of the five* congressional elections held in North Carolina this decade will have been under unconstitutional lines. *See Cooper v. Harris*, 137 S. Ct. 1455. Thus, granting the stay request would only result in giving the defendants "the fruits of victory for another election cycle" and "prolong the harm that plaintiffs have [already] suffered" under the defendants' redistricting scheme. *Larios v. Cox*, 305 F. Supp. 2d 1335, 1344 (N.D. Ga. 2004); *Cousins v. McWherter*, 845 F. Supp. 525, 528 (E.D. Tenn. 1994).

However, if the trial proceeds as planned, the parties would have a fair chance to present evidence and examine opposing witnesses, which all parties are ready and able to do. This court could then perform fact-finding and issue a decision when ready. Holding a trial in this case would leave open the possibility that, if the 2016 Plan is held unconstitutional, the Court could "insure that no further elections are conducted under the invalid plan." *Reynolds*, 377 U.S. at 583.[12]

[11] Since this case involves a three-judge panel, it may also be hard to schedule a trial time that works for all three judges on short notice after a decision in *Whitford*, thus adding additional time before a trial could be held in this case.

[12] This would also ensure that, if the Supreme Court affirmed the lower court's ruling in *Whitford*, or issued a standard that was not meaningfully different than that proposed by the plaintiffs here, the plaintiffs in this case would have a timely remedy.

In denying the defendants' motion to dismiss, this Court found that partisan gerrymandering claims are justiciable. MTD Op. (Dkt. 50) at 21, 25. This Court's evaluation of the plaintiffs' proposed test, in addition to the *Whitford* lower court's finding that the test is workable, would go a long way towards establishing that plaintiffs' proposed test is a judicially manageable standard for measuring extreme partisan gerrymandering while *Whitford* is pending at the Supreme Court.[13] Such a conclusion would assist the Supreme Court as it considers *Whitford* by providing the Court with a second independent judgment about the test's merits.[14] As this Court stated in its opinion and order, "the Supreme Court's declaration that '[p]artisan gerrymanders . . . are incompatible with democratic principles,' *Ariz. State Legislature*, 135 S. Ct. at 2658 (alteration in original) (internal quotation marks omitted), and the need for courts to 'err on the side of caution' in adjudicating claims '[w]here important rights are involved,' such as '[a]llegations of unconstitutional bias in apportionment,' *Vieth*, 541 U.S. at 311

[13] At least one three-judge panel has noted that the burden of devising a judicially discernible and manageable test is a "responsibility" that courts "share[]" with plaintiffs in this area. *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 853 (E.D. Wis. 2012).

[14] The Supreme Court has also recognized the value of litigation proceeding at lower courts when a difficult question is involved. *See, e.g., United States v. Mendoza,* 464 U.S. 154, 160 (1984) ("Allowing only one final adjudication [by a lower court] would deprive this Court of the benefit it receives from permitting several [lower courts] to explore a difficult question"); *McCray v. New York*, 461 U.S. 961, 963 (1983) (lower courts "serve as laboratories in which [important] issues receive[] further study"); *Arizona v. Evans*, 514 U.S. 1, 24 n.1 (1995) (Ginsburg, J., dissenting) (when "frontier legal problems are presented," "diverse opinions from…federal [] courts" "may yield a better informed and more enduring final pronouncement"); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597, App'x A (2015) (citing several pre- and post-certiorari lower court opinions and stating that they "help[ed] to explain and formulate the underlying principles this Court must now consider.")

(Kennedy, J., concurring), require that we afford Plaintiffs an opportunity to develop evidence establishing the viability of their proposed—and 'uncontradicted'—discriminatory effects test." MTD Op. (Dkt. 50) at 29. This reasoning also supports holding a trial to determine the factual issues in contention and to assess the viability of the plaintiffs' proposed test.

CONCLUSION

For all of these reasons, plaintiffs respectfully request that this Court deny defendants' motion to stay trial proceedings in this case.

Respectfully submitted, this 17th day of July, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel and parties of record.

This the 17th day of July, 2017.

/s/ Annabelle E. Harless
Annabelle E. Harless

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I hereby certify that this brief complies with L.R. 7.3(d) because the total word count for the body of the brief including headings and footnotes is 5,920.

This the 17th day of July, 2017.

/s/ Annabelle E. Harless
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