UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

COMMON CAUSE, et al.	)	
v.	)	1:16-CV1026
ROBERT A. RUCHO, et al.	)	
_____	)	
LEAGUE OF WOMEN VOTERS	)	
OF NORTH CAROLINA, et al.	)	1:16-CV1164
v.	)	
ROBERT A. RUCHO, et al.	)	
_____		

MOTION HEARING
TUESDAY, AUGUST 29, 2017

BEFORE THE HONORABLE:

W. EARL BRITT
SENIOR U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF N.C.

JAMES A. WYNN, JR.
CIRCUIT JUDGE OF THE U.S. COURT OF APPEALS FOR THE 4TH CIRCUIT

WILLIAM L. OSTEEN, JR.
CHIEF U.S. DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF N.C.
(Appearing via telephone.)

APPEARANCES:

On Behalf of Common Cause, et al:

EDWIN M. SPEAS, Jr., ESQ.
STEVEN P. EPSTEIN, ESQ.
Poyner Spruill, LLP
301 Fayetteville Street, Suite 1900
Raleigh, North Carolina 27602

EMMET J. BONDURANT, ESQ.
Bondurant Mixson & Elmore, LLP
1201 W. Peachtree Street, N.W., Suite 3900
Atlanta, Georgia 30309

On Behalf of League of Women Voters of North Carolina, et al:

ANNABELLE E. HARLESS
Campaign Legal Center
73 W. Monroe Street, Suite 322
Chicago, Illinois 60603

ANITA S. EARLS
Southern Coalition for Social Justice
1415 W. Highway 54, Suite 101
Durham, North Carolina 27707

On Behalf of the Legislative Defendants:

MICHAEL DOUGLAS McKNIGHT, ESQ.
PHILLIP JOHN STRACH, ESQ.
Ogletree Deakins Nash Smoak & Stewart, P.C.
4208 Six Forks Road, Suite 1100
Raleigh, North Carolina 27609

On Behalf of the State and State Board of Elections:

ALEXANDER M. PETERS
JAMES BERNIER, Jr.
N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602

AMY M. CONDON, CSR, RPR
Official Court Reporter
United States District Court
Raleigh, North Carolina
Stenotype with computer-aided transcription

(TUESDAY, AUGUST 29, 2017, commencing at 11:30 a.m.)

P R O C E E D I N G S

JUDGE BRITT: Good morning, everyone.

Let me test things out and see if Judge Osteen is with us and can be heard.

JUDGE OSTEEN: I'm here, Judge. Thank you.

JUDGE BRITT: Good. You're coming in loud and clear.

Let me welcome all of you to our courtroom.

When we scheduled the hearing in this matter, it became apparent that Judge Osteen, whose case this is, was originally assigned this case, had to be out of town on the most convenient day for us to have our hearing. That being the case, we decided to have it here in Raleigh, since both Judge Wynn and I live here in Raleigh and have our chambers here in Raleigh, and since a good many of the lawyers, to the best of our knowledge, are here in Raleigh. So that's the reason we're here today.

Couple of items. We have a -- I have -- this is my usual courtroom and through the ad min of technology, I've been able to assist myself in hearing you and others in the courtroom with what's going on by means of bluetooth technology. That means that the voices, the sounds that I hear coming through my hearing aids are directly tied in with the sound system in the courtroom.

That has two results: One good and one bad. The

good one is that I'm able to hear you. The bad one is, is that if you happen to brush a piece of paper or something like that across that mic, it doesn't sound very good. So I would ask your cooperation in that respect.

Now, Judge Osteen, we did not get a chance to talk to you about this beforehand, but Judge Wynn and I have agreed to give the parties 15 minutes for direct argument and five minutes for rebuttal. And I also told Judge Wynn it's my custom to hear everybody out. So if you have something at the end you want to say, I'll try to accommodate you.

JUDGE OSTEEN: That sounds good.

JUDGE BRITT: All right. Let's start with --

MR. SPEAS: Your Honor, may I make an inquiry please? When you say 15 minutes, do you mean 15 minutes per case or 15 minutes total for the plaintiffs?

JUDGE BRITT: Total.

MR. SPEAS: Thank you.

JUDGE BRITT: This is a straightforward motion here and the same argument applies in both. So Mr. Speas, you and the League of Women Voters attorneys will just have to agree on a division, however you agree is all right with me. But as I told you, I'm not going to leave the courtroom without giving all of you an opportunity to be heard.

So with that said, we'll be glad to hear from the movements and -- first, I guess I should have everybody note

their presence. If you'll do that, counsel, before you start your argument.

MR. STRACH: Good morning, Your Honor. Phil Strach, Ogletree Deakins, counsel for the legislative defendants.

MR. McKNIGHT: Good morning, Your Honor. Michael McKnight. Also counsel for the legislative defendants.

MR. BONDURANT: Your Honor, I'm Emmet Bondurant and I represent Common Cause and the Common Cause plaintiffs.

MR. SPEAS: Edwin Speas representing Common Cause plaintiffs.

MS. EARLS: Good morning, Your Honor. Anita Earls for the League of Women Voters, plaintiffs, and with me here is Annabelle Harless of the Campaign Legal Center with the League of Women Voters, plaintiffs.

MR. PETERS: Good morning, Your Honors. I'm Alex Peters with the Attorney General's Office on behalf of the State and the State Board of Elections, defendants. We have not taking a position on this motion, but I did want to put on the record that I'm here.

JUDGE BRITT: Thank you, sir.

MR. BERNIER: Your Honor, James Bernier with the Attorney General's Office on behalf of the State. I'm here with Alexander.

JUDGE BRITT: Mr. Steven Epstein.

MR. EPSTEIN: Your Honor, Steven Epstein with Mr.

Speas on behalf of Common Cause clients.

JUDGE BRITT: All right. Mr. Strach, we'll be glad to hear from you.

MR. STRACH: Thank you, Your Honor. May it please the Court. Bill Strach for the legislative defendants.

Your Honor, this motion has been fully briefed, briefed, reply, et cetera. I'm not going to repeat what was put in the briefs.

What I did want to do is focus the Court on some developments since the motion has been filed, and kind of the way we see the circumstances and the content of this motion that may not necessarily be in the briefs.

The first thing that I would point out, Your Honor, is that the *Whitford* case, which is the case we're asking the Court to stay with this matter pending, is scheduled to be argued in the U.S. Supreme Court October 3rd. Here, we are almost in September, of course, in this case.

There was an argument that the plaintiffs made in the briefs that, well, we can try this case and then the Court might be able to issue an opinion in time for the Supreme Court to have the benefit of your ruling before it issues its *Whitford* decision.

We would suggest at this point in time, it's probably not possible. Even if this Court scheduled this matter for trial in September, it's very unlikely that this Court would

get a ruling out certainly before October 3rd. And after October 3rd, the U.S. Supreme Court is probably going to have made their decision and somebody is going to be writing an opinion.

JUDGE BRITT: When do you expect that opinion to come down, counsel? You're talking about the date of the hearing. And you're correct that it's going to be early and that's going to in some way affect a date on which we set our hearing, but surely you don't expect a decision by the Supreme Court before or around the first of the year, do you?

MR. STRACH: Your Honor, it can come any time. I don't think anybody knows. I certainly wouldn't want to get in the business of trying to predict something like that.

I have looked at prior years. Many times when cases are argued this early in the term, the opinions come out in December; some even come out in November. Sometimes they do come out in January.

But I guess what I'm suggesting, Your Honor, is after the oral argument and the judges meet and conference and decide how they want to vote on this case, somebody is going to be writing an opinion and this Court's opinion, if it comes out in the meantime, may not have the same persuasive effect it would have if it had come out before --

JUDGE WYNN: I'm going to suggest to you if we decided this issue with regard to the stay, it's unlikely we're

going to make this decision based on the basis that we think our decision will have some influence on the Supreme Court.

More than likely, the Supreme Court will issue its opinion, the considerations that we are looking at today go to the other factors here, less so than that.

Even though, perhaps, as you know, these cases are appealed as a matter of right even when they go to certiorari. Typically, the Supreme Court itself likes to have a balancing of different opinions from different circuits; but in these cases, they don't get that benefit.

Nonetheless, I just don't see this as being one of those cases where -- at least from my perspective -- where I don't think this is going to turn on whether we think the Supreme Court is going to be looking at our opinion.

MR. STRACH: Thank you, Your Honor. I simply wanted to address that argument in light of where we are in the calendar today.

Another point that I'd like to raise is it's becoming very clear, Your Honors, that if this case does move forward, we think there's going to be additional discovery that's going to be needed on the efficiency gap.

Efficiency gap is an essential part of the plaintiffs' case and even since we have filed our motion in this matter, there are articles coming out almost weekly, certainly monthly, by scholars criticizing the efficient gap,

some supporting the efficient gap. And the fact of the matter is, we think it'll be a tremendous value to this Court that some additional expert discovery take place on that issue so the Court has the benefit of expert opinions on all this new research. I have no doubt this research is occurring because of the *Whitford* case pending at the U.S. Supreme Court.

And what *Whitford* has apparently done is spawn a lot of research on the efficiency gap we think this Court should have the benefit of, so...

JUDGE WYNN: How would the Supreme Court itself deal with that additional evidence in the *Whitford* case if there is a so-called evolving movement on efficiency gap? It's Appellate Court. We a trial court. We're in a position if that is -- and this goes back to your first argument, if there is some benefit, that might be the benefit that would come to the Supreme Court as having had expert testimony coming from a trial court that's on a case of this sort.

MR. STRACH: Correct. I don't know how the Supreme Court will deal with that, but what I'm suggesting is the parties here would need additional time --

JUDGE WYNN: In other words, my question, I know this is a different argument, my question goes to: Doesn't that seem to go against the first point you made; that is, wouldn't you want to have a trial to allow this evolving evidence to be put in some form where if the Supreme Court wanted to look at

it, it would be there?

MR. STRACH: What I'm suggesting, Your Honor, it's a matter of time. The parties would need time to engage --

JUDGE WYNN: Well, I got that point. I got that.

I'm dealing more in terms of -- seems to me what you're now arguing goes back against the first thing you said; that is, the benefit to the Supreme Court.

I said generally, we're not going to try to write opinions that benefit the Supreme Court. But the expert aspect of it could be a tremendous benefit, from what you just said, to the Supreme Court because it may be the only forum in which that is developed on a judicial level.

MR. STRACH: I don't disagree with that, Your Honor.

What I'm suggesting is there would not be enough time to have the kind of expert discovery that we think necessary, have a trial and this Court issue an opinion that would be of any benefit to the Supreme Court, unless the Supreme Court holds their opinion until late next year or late into the term of next year.

What I'm suggesting, Your Honor, is that my arguments on one and two are consistent because the discovery that's needed is going -- if it's granted by the Court, would amount to a stay pending the *Whitford* decision because we think it would take additional time to do it right and make sure that this Court's analysis is fully informed by the new scholarship

coming out, and we believe that the Court would want to take its time to do that.

JUDGE WYNN: Do you think if we proceeded with the trial you wouldn't have an opportunity to present that new evidence because you haven't deposed these experts and you can't do it in some form of cross-examination or rebuttal?

MR. STRACH: Well, a lot of these scholars that are writing these articles are not involved in this case. We might want to get them involved in the case and that would require additional expert witness discovery period. So that's just the reality. So to do that, we would need time.

Your Honor, I also just want to point out, given the fact that the Supreme Court's decision in *Whitford*, there are many possible outcomes obviously. There are many of those outcomes, though, that will result either in political gerrymandering claim going away or certainly looking different than it does today.

Assuming that's the case, there is a risk here to both parties that if we try this case before *Whitford* is announced, that the parties will put on evidence that would actually be prejudicial to a post-*Whitford* standard. And we think that the Court should give that some consideration.

It's been suggested by the plaintiffs that, well, let's just try the case now and then supplement the trial later post-*Whitford*.

What I'm suggesting is, if we try the case now, the parties could end up putting on prejudicial evidence or evidence that becomes prejudicial to them after the *Whitford* standard is announced.

JUDGE BRITT: Can you give us an example of that?

MR. STRACH: Well, Your Honor, certainly the efficiency gap, all the simulation exercises. All this -- there's a lot of math involved in the plaintiffs' theories and the Supreme Court may tweak those theories in a way that you could have an expert testify one way about the mathematical theory, it turns out that the Supreme Court changes it in a way and it comes back to bite you.

I can't -- I can't think of all the possibilities, but I've litigated long enough to know that given just how uncertain the political gerrymandering claim is and the fact that we have no idea what the Court is going to do with it, I think the risk here is greater than any normal case of that happening.

JUDGE BRITT: Let me ask you this, counsel: Can you imagine any circumstances, regardless of what happens in *Whitford*, that the Supreme Court of the United States is going to approve plans such as are in existence in North Carolina and Maryland, as clearly set out in your supplemental filing yesterday, that in which the creators of the plans fully admit that they did what they did with the purpose and having the

effect of depriving voters of the other party -- and I would point out to you and remind that you that in North Carolina and Maryland, they're different -- has been prejudiced by the redistricting effort that took place?

MR. STRACH: Your Honor, I'd answer that this way: Regardless of what a legislator said or didn't say that would at most go to any intent prong of whatever the Supreme Court standard is assuming that the claims become even justiciable.

However, we would respectfully disagree certainly on the effect side. It's going to be very disputed, even that evidence on intent is going to be very disputed because I will remind the Court, that that redistricting was done in the context of responding to racial -- a judgment finding the plan to be a racial gerrymander. So some emphasis on another motivation was certainly to be expected to ensure that the plan would not be deemed a racial gerrymander. So the context of this case is very different from Maryland and Wisconsin and many other cases.

But aside from the dispute that we will have over intent, whether or not the plans are effective as a political -- quote, "political gerrymander" under the theories that the plaintiffs have brought will be very vigorously disputed, Your Honor, and there will be a lot of expert testimony and other testimony that would go to the heart of this issue.

So this case is not cut and dry. It's going to be complicated. There are two sides to every story, and we will present that side. So that's how I answer that, Your Honor.

The other thing I would mention is, we did file the Maryland decision yesterday in which that court, three-judge District Court of the Maryland --

JUDGE WYNN: Did you read Judge Niemeyer's dissent in that decision?

MR. STRACH: I didn't need to because the first part of the decision was what was relevant to me.

JUDGE WYNN: Try reading his dissent in that case. It's a very strong dissent, I would say.

MR. STRACH: There are often strong dissents on many sides.

JUDGE WYNN: That's never been Judge Niemeyer. That's a different ballgame there.

MR. STRACH: We would point out that the majority in that case sua sponte, no request of the parties, issued a stay and I just wanted to identify for the Court that that case is in a very similar posture as our case. So we think that --

JUDGE WYNN: How so?

MR. STRACH: Well, for one, there were pending motions for summary judgment and the Court could have gone ahead and decided those and had a trial but the Court decided to put those summary judgment motions off and not even hear

summary judgment, much less have the trial. That's essentially where we are minus the summary judgment motions.

That Court decided, you know what, we're not going to put the State and the parties through the time and expense of a summary judgment hearing, much less a trial in light of what's going on with *Whitford*.

JUDGE WYNN: The issue on the First Amendment being similar to the one presented by Common Cause?

MR. STRACH: There is a First Amendment claim in this case. And Your Honor, what we would argue is at the end of the day, no matter what theory the plaintiffs have, they all kind of boil down to how much partisanship is too much, so --

JUDGE WYNN: I want to make sure we deal with that because Justice Kennedy seems to think that it's a separate claim than from the Equal Protection. Wisconsin three-judge panel perhaps subsumed within the Equal Protection. Judge Niemeyer clearly thinks it's a separate claim, First Amendment. He even thinks that the review of it is somewhat different. And don't you think that's informative?

It's not in the Wisconsin case. In the Wisconsin case, the panel basically just said, well, Equal Protection and the First Amendment are the same. I don't think that's correct, but we'll see.

But Judge Niemeyer has a different view and there's a position here that it's a separate claim.

MR. STRACH: I understand Judge Niemeyer's position. We will certainly be taking a position closer to what happened in Wisconsin; that at the end of day the proof in the analysis is going to look very similar, and we think that will be the case here.

As Justice Kennedy has identified, the issue in cases like this is how much partisanship is too much. And the Supreme Court has never been able to draw that line; that the Holy Grail has not yet been found, at least by Justice Kennedy, and no matter what theory of gerrymandering it rests on, that's going to be the issue.

JUDGE WYNN: You're looking at the right from an individualized perspective. How does that -- partisanship too much argument with the First Amendment seems to be totally different.

MR. STRACH: Your Honor, if a single individual was bringing a claim that I was personally retaliated or discriminated against because of my party, that might be true, but that's not the claim.

JUDGE WYNN: You have 13 different plaintiffs here.

MR. STRACH: Right, but they are bringing their claims essentially on a statewide basis on behalf of them and other voters like them. That's not an individual claim, in our opinion.

JUDGE WYNN: I thought the First Amendment is more

individualized.

MR. STRACH: Not the way we read it, Your Honor. We believe the First Amendment theory is just another way of expressing the Equal Protection theory. It's just dressed up in different language.

JUDGE BRITT: Counsel, motions to stay deals with practicalities. Let's talk about practicalities at this time.

There's been elections in 2014 -- 2012 and 2014 and 2016 under this plan.

Now, if the Court were to allow your motion to stay today, doesn't that mean that effectively nothing will be done until 2020 when the next decennial census comes around?

MR. STRACH: Thank you, Your Honor. That was going to be my point. I would like to correct one thing that Your Honor said. Only one election has been held under the current congressional plan, that's 2016.

JUDGE BRITT: I stand corrected on that.

MR. STRACH: That's going to be very relevant to the efficiency gap analysis, as the Court will see down the road.

But the way I would answer that, Your Honor, is my understanding of reading the briefs that have been filed in the *Whitford* case is that the Supreme Court likely set that case to be heard so early in the term, in fact, it may be the first one, I don't know, first or second one they're going to hear, because the parties were arguing, Supreme Court, we need you to

do that so that there's time for the 2018 elections to do something if you announce a new standard.

I don't see anything in North Carolina that puts us in any worse position than the Wisconsin plaintiffs are in *Whitford*. And clearly, the Supreme Court is of the mindset that we're going to do something as quick as possible to not foreclose relief for 2018.

So the practicalities that the Court is talking about, I think this Court can stay the case, wait for *Whitford*. I think the Supreme Court is probably going to move expeditiously given what they've done and what the parties argued. And I would remind the Court that in 2016, the *Harris* decision was issued in February of that year, the legislature redrew the districts and new elections were held in 2016.

And I would further state that that was in a year where the primary was in March, okay? So the decision came down in February; the primary was in March. Now, the primary for -- the congressional elections had to be moved because of the decision. However, next year the primaries were in May.

So if the Supreme Court issues a decision expeditiously in *Whitford*, then we're certainly in no worse position than the Wisconsin plaintiffs are from that practical perspective.

JUDGE WYNN: Of course, it is dependent on when the Supreme Court acts, whether it will be expeditious or not, I'm

not sure we can speculate on that. I mean, typically this can happen next June, for all we know.

Even if it comes earlier, even when an opinion is issued, you can't do anything until the mandate comes from that opinion, which takes another period of time; and then even then, more likely going to be another trial or at least another hearing by the Court there, which is going to take another period of time.

In reality, as Judge Britt has indicated practicality of it is this is actually going back to the 2010 census and what we are dealing with, the elections that have occurred, the first racial gerrymandering, now we're dealing with allegations of partisan gerrymandering.

If the plaintiffs prevail on this case, you win either way. I mean, you win because by the time something's done, you're looking at the 2020 census.

And I just wonder, what is the disincentive for an entity, a government to not do this; and in this instance, if the issue of intent is clear -- and it does seem somewhat clearer in this case than it has been in the Wisconsin case -- to intentionally do something and then go through what you say you going to need two cycles of elections for the efficiency-type gap to be done, then go through the other procedures; and ultimately, basically, you spent the whole 10 years in a system that ultimately could be held to be

unconstitutional and then you start a new one.

MR. STRACH: Your Honor, the way I respond to that is -- well, first of all, we respectfully disagree the case is going to be as clear-cut as --

JUDGE WYNN: I'm clear in terms it can go either way. But I pose the hypothesis or at least the possibility, more than possibility perhaps, that if the plaintiffs prevail, essentially that results in an unconstitutional redistricting plan that has been existing for the entire period and then you start all over again. And what is the disincentive in 2020 for finding another basis to do something unconstitutional and then move on until it be 2030?

MR. STRACH: Your Honor, I respectfully disagree with that in this sense: The 2011 plans that were in existence in 2011 were there, they were never challenged as political gerrymandering.

JUDGE WYNN: Started as a racial gerrymandering, which has clearly been held to be unconstitutional at this point. We all agree, don't we?

MR. STRACH: Of course it has.

JUDGE WYNN: So those plans have been in existence and now we're in 2017 and we're talking about the possibility of having maybe a change of plan in '18. If it doesn't happen in '18, we're looking at '20.

MR. STRACH: Your Honor, I understand that. That's

not the State's fault.

The plans could have been challenged in 2011 on the political gerrymandering theory which would have teed this issue up a long time ago.

The plans that we're dealing with now have only been in place for one election, 2016, and they've just been recently challenged.

So the way this is playing out is, frankly, a matter of litigation strategy, not due to the State or the legislature.

JUDGE WYNN: It's a very good strategy from the perspective of wanting to keep plans in place if they are unconstitutional, they are unconstitutional.

The first part, as you say, these just came in but they came in as unconstitutional plans. But then if you bring in another one that is being challenged -- I didn't say they were for that purposes -- the potentiality you would go another four years or so and you've had an unconstitutional plan for the entire 10 years for which, at some point in time, I don't know -- it's not your fault. I'm just dealing from a judicial perspective. The courts are just not handling these things in a way that reflect the interest of the voters. It makes no sense to me.

No where else do you allow an enterprise to continue on until you make a decision like this and then says, okay, we

going to let you continue doing this the whole time in the illegal -- constitution illegal fashion; and then at the end of the time period say, okay, now, it's been a legal time now, let's draw some new plans under the new census.

MR. STRACH: Your Honor, I understand that perspective completely, but I'd simply say that part of the difficulty here that the Court is going to have to struggle with is this is -- the political gerrymandering claim is obviously not well-established. In fact, one could argue it's not established. And you've got the issue of even if there's such a claim, how many elections does it take to really prove that the claim has been proven.

So we're dealing here, Your Honor, with a claim that it's not the Court's fault, it's not the State's fault, but it is a claim that is inherently takes a lot of time to play out.

This could have been done in 2011 --

JUDGE WYNN: But it nonetheless is a claim. I mean, even in the Maryland case, 12(b)(6) survived that.

There is a claim, whether you prove it or not to the satisfaction of saying you're entitled to a remedy is another thing. There's definitely a claim for partisan gerrymandering. Whatever legal standards that you say have to be established by the Supreme Court, we don't know. Wish they had done it earlier and we wouldn't be sitting here now, at least on this issue, but they are claims. It's not like this is something

that's out of the blue.

MR. STRACH: To that I would just say if the tree falls in the forest and no one's there to hear it, did the tree fall? To the extent it's a claim, it's a very strange claim that is a claim that doesn't have a legal standard.

JUDGE WYNN: Well, it survived 12(b)(6).

MR. STRACH: That is correct.

JUDGE WYNN: So it's a claim.

MR. STRACH: Well, it's a very difficult claim for the parties in the Court given the lack of guidance from the Supreme Court so --

JUDGE WYNN: I'm not arguing the proof of the matter that it's not difficult; but nonetheless, the claim exists.

JUDGE OSTEEN: May I ask a question?

JUDGE BRITT: Go ahead.

JUDGE OSTEEN: I'm sorry. I can't see anyone so it's kind of hard to tell when to interject.

Mr. Strach, the question when to enter a stay is somewhat discretionary. In addition to the approach of stopping everything, there is a middle-ground approach that's saying, okay, we're going to set this for trial, hold the trial, and then either take the matter under advisement or stay the opinion until we get the guidance from the Supreme Court with an opportunity for the parties to reopen the evidence should something unusual develop from the Supreme Court that no

one had anticipated, which is certainly a possibility.

I know you talked about the efficiency gap and the research that's coming down could delay things, but I'd like to hear your response to that middle-ground type of approach.

MR. STRACH: Thank you, Your Honor.

I don't know -- given some of the points I made already, I don't know that that would turn out to be a middle-ground approach.

If the goal here is to have a ruling in time for the 2018 elections, if the Court has a trial now, after *Whitford*, it's going to likely have to be reopened, there's going to likely have to be new discovery taken. You're simply going to have delay on the back end that I'm suggesting that you should have now while we wait for *Whitford*.

So Your Honor, I would respectfully say that that sort of an approach will pose the same problems, time problems that we have now, plus if we go ahead and try the case and one or more of the parties puts on evidence now that does turn out to be prejudicial post-*Whitford*, that result can be avoided if we put the trial off until after *Whitford*.

JUDGE BRITT: Anything else?

JUDGE OSTEEN: What do you mean by waiting to anticipate the terms of the evidence being prejudicial?

MR. STRACH: Well, Your Honor, that's what I was responding to Judge Britt earlier. I can't give you a list

right now, but I know that these claims are very mathematically based, there's a lot of formulas, very technical kind of evidence, that once put in the record and if the Supreme Court does something weird with the standard, that evidence might actually come back to haunt somebody. I can't give you a list right now, but I think there's a substantial chance of that here given the technicality and complexity of the evidence with which we're dealing.

JUDGE OSTEEN: Give me one example. Prejudicial is a term of art. And in my mind, you're saying there would be permitted to introduce something that is unfair to us maybe down the road. So I'm not exactly sure what that can be.

MR. STRACH: Well, Your Honor, the plaintiffs could very well put some evidence in of efficiency gap calculations under what they think the standard will be from the U.S. Supreme Court. The Supreme Court could set a higher standard or some other different standard and that efficiency gap calculation, they might decide we wouldn't have put that in the evidence had we known what the standard was. I could see something like that happening, and I certainly see something similar on the defense side.

JUDGE OSTEEN: All right.

JUDGE BRITT: Anything else, Judge Osteen?

JUDGE OSTEEN: No. That's it for now.

JUDGE BRITT: Mr. Strach, you have been peppered with

quite a few questions since you've been here and due to no fault of yours, you have already exceeded greatly your time, but I'm going to give you another five minutes, if you want to summarize.

MR. STRACH: I don't, Your Honor. I made all the points. Your good questions have elicited all my points, so I'll sit down unless there are any other questions.

JUDGE BRITT: You may have a seat. Thank you.

Ms. Earls and Mr. Speas, in view of the fact that this has gone on and he's taken 25 minutes, if you want to divide your time and take 12-and-a-half each, we'll be glad to have you.

MR. SPEAS: Thank you, Your Honor.

We would like to do that, and I appreciate the opportunity to appear in front of you today on this issue. I'm delighted to have Mr. Bondurant here with me. There's some chance I will make a mistake during the course of the proceedings and Mr. Bondurant will correct me.

But Your Honor, I think this comes down to a simple proposition. What kind of harm will Mr. Strach's clients suffer if this case is not stayed; and what kind of harm will the plaintiffs suffer if it is stayed?

And let me begin with the harm that the State will suffer if this case is not stayed. In their brief they say time and resources will be wasted because these cases are

identical to *Whitford*, the Wisconsin case. They are not. They are different in a number of very important respects.

Whitford is a statewide case. The Common Cause claim is both statewide and by district. We have 14 individual plaintiffs. They reside in all the districts in the State. So that's a big difference.

Whitford is primarily an Equal Protection case. The Common Cause case is primarily a First Amendment case.

JUDGE WYNN: When did it become that?

MR. SPEAS: From the beginning.

JUDGE WYNN: Did it come after the Maryland case?

MR. SPEAS: No, Your Honor. This has been a First Amendment case, from our perspective, from the very beginning. Judge Niemeyer, I think, eloquently explained that theory, the best that I've seen it explained in a decision, but that is our theory from day one. There are standing --

JUDGE WYNN: Let me make sure I'm clear on that because I think that's important, at least to hear your point of view on it.

Mr. Strach indicated essentially they view that Wisconsin three-judge panel really subsumed within the Equal Protection argument, that it's not separate. How do you respond?

MR. SPEAS: I think Judge Niemeyer's decision points out there's a different analysis of these claims, whether

you're looking at it as an Equal Protection issue or whether you are looking at it as a First Amendment issue.

JUDGE WYNN: Judge Niemeyer's decision, of course, is not binding on us. The dissenting opinion wouldn't be binding if it was a majority.

MR. SPEAS: It is certainly not. But Justice Kennedy, of course, in *Vieth*, suggested some years ago that the First Amendment was the best way to look at these issues, and we believe that's true. And from the beginning, the Common Cause plaintiffs have viewed this principally as a First Amendment case to be analyzed under First Amendment principles rather than under Equal Protection principles.

JUDGE WYNN: Do you rest that you have made these claims individualized, individualized First Amendment claim or is it statewide?

MR. SPEAS: It is both. We are making a statewide claim and a district-by-district claim on behalf of the people who reside in each of those districts.

We think, Your Honors, that the legislature in its own words used political data, the expression of the political beliefs of citizens to assign them to districts for the purpose of penalizing, and we think that is a fundamental basic First Amendment issue.

JUDGE WYNN: State your First Amendment claim. Why is the First Amendment implicated differently than the Equal

Protection?

MR. SPEAS: Because the General Assembly said in this case we are going to use the way in which people voted for office as the means for assigning them to districts.

I can think of no more basic First Amendment expression than the expression of political views through the manner in which the vote is cast.

The question then becomes does the state -- let me add this: They assigned Democrats to districts for the purpose of penalizing them for the views they expressed. The question under First Amendment jurisprudence becomes is there some justification for that decision by the legislature or would it have reached the same result under the Mt. Healthy analysis. We think it's straightforward.

Mr. Strach tells us or suggests you can't ever have a violation until you have multiple elections. Under the First Amendment, Your Honor, we think that is plainly incorrect.

JUDGE WYNN: I thought he was referring to the efficiency gap determination with regard to the multiple elections.

MR. SPEAS: I understood him to be saying you can't have a claim after just one set of elections.

With regard to the efficiency gap, Your Honor, is a difference. The efficiency gap is, in our view, one means of proving our case but we have multiple means of proving our case

and will present them at the trial. One is the partisan symmetry evidence, which we will present. In addition, we have the simulated maps prepared by our experts, Dr. Chen and Dr. Mattingly (phonetic) which also address those questions. So the cases are different.

There's another difference. Wisconsin is a state legislative challenge; this is a congressional challenge. There is no Article I issue with respect to a state legislative challenge; there is with respect to congressional challenges, and we have one of those in our complaint. We have alleged that this plan and the enactment of this plan violated Article I, Section 4 of the United States Constitution.

So Your Honor, there are multiple differences.

Let me talk just a minute about the harm.

JUDGE BRITT: Before you talk a lot about whatever you want to talk about here, Mr. Speas, I think you need to get down to the practical aspects of a delay in the case, which I tried to talk to Mr. Strach about.

Now, in view of that, wouldn't you agree that whatever the Supreme Court decision is in *Whitford* it's going to have some effect on this case? If they affirm it outright, if they modify it, if they reverse it completely, it's going to have some effect on this case, is it not?

MR. SPEAS: It likely could have some effect, there is no question about that, Your Honor. But --

JUDGE BRITT: Well, that being the case, if you agree with that proposition, then won't that mean that there's going to have to be something further done in this case; that both the parties are going to need time to go into further discovery and other matters before we can get to a final result in the case?

MR. SPEAS: Maybe, maybe not, Your Honor.

I think one of the interesting points about this case is there is essentially no dispute about the facts. The facts were laid out by the legislature in a legislative record in a public setting. There is demographic data, there is political result data, but that's all public record. There is essentially no dispute about the underlying facts of this case.

The General Assembly candidly expressed in the public record explained what it was doing. To the extent there is dispute, it concerns, I think, the expert testimony.

But your Honor, I don't think there's any likelihood of any need for any additional evidence following the *Whitford* decision, whatever it might be.

And let me point out a possibility with regard to the *Whitford* decision. What if the Court stays this matter, and what if the Supreme Court says no standing, all of our time has been wasted, we have learned essentially nothing, another election cycle will have passed and North Carolina citizens for four elections would have been denied the opportunity to cast

their ballots under a redistricting plan that was valid and lawful. And that flaw exists not only, Your Honor, with the congressional plan; it exists with the legislative plans. So there's a strong public interest reason for addressing these issues here and now.

I can't think of any more eloquent expression of the harm that results from a delay in the trial of this case than the expressions of all the judges in the Maryland case.

Judge Niemeyer in his dissent describes gerrymandering as a cancerous growth on the tenets of our democracy. The two just judges and the majority said in their opinion that gerrymandering is noxious and damaging to the society.

So Your Honors, there is significant, wide-spread harm that will result if the trial of this matter is delayed.

JUDGE WYNN: I suppose the Supreme Court could hold that political gerrymandering cases claims are simply nonjusticiable in the courts.

MR. SPEAS: It would have to overrule *Vieth*, it would have to overrule *Davis*, it would have to overrule *LULAC*.

JUDGE WYNN: Let's accept they could do that.

MR. SPEAS: They can do it.

JUDGE WYNN: If they did it, then it really would be a case that's gone.

MR. SPEAS: And to risk continuing damage and harm to

every North Carolina citizen on the prospect that the U.S. Supreme Court might overrule four prior decisions I suggest, Your Honor, is a risk that we ought not take.

JUDGE BRITT: Your time is up, Mr. Speas. Thank you.

Ms. Earls?

Excuse me. Judge Osteen, do you want to ask Mr. Speas any questions?

JUDGE OSTEEN: Let me hear from Ms. Earls and I may have a question, may go back to Mr. Speas, but let's go on to Ms. Earls for the moment.

JUDGE BRITT: Ms. Earls.

MS. EARLS: Thank you, Your Honors.

There is a three-part standard that's applicable to this motion. The interest of judicial economy, hardship and equity to the moving party if the action is not stayed and potential prejudice to the nonmoving party. Most of the defendants' arguments go to that first part, the interest of judicial economy.

I would suggest to you that the only time that that makes sense here is if a trial could be avoided altogether. And I think that the last question that was asked, is it possible the Supreme Court would say under no circumstances, under no legal theory could we ever decide whether partisan gerrymandering is unconstitutional. That is the only time in which a trial in this case could be avoided.

And I do think there are possible outcomes in the *Whitford* case that would not change the legal standard that the plaintiffs here are arguing is applicable, particularly if the *Whitford* case were to be decided on standing, we may have very different facts on standing in this case.

So the fact that we ultimately -- the plaintiffs in this case have stated a claim for relief that ultimately will be tried means that the interest of judicial economy, while important, don't override the strong interest that the plaintiffs have in having a timely resolution of their claims.

JUDGE BRITT: Mr. Strach, on behalf of the defendants, was able to come up with some things in response to a question that I asked and Judge Osteen asked that seemed to be trying to help you. Can you think of any evidence that you would be required to put on if we go to trial now that you think might come back to haunt you later?

MS. EARLS: No, Your Honor. Absolutely not.

And the reason is the math is what it is. The numbers are what they are. The election returns that we based our efficiency gap analysis on are in the past. They will not change. Our expert has done his calculations; those will not change. And if there are additional academic articles that either support or don't support our particular expert's views, those could be explored on cross-examination.

At the most, there could be a need for a supplemental

expert deposition, but that can be done -- handled very expeditiously.

In essence, they've tried to turn this into a motion to reopen discovery and a motion for additional discovery and that's not the -- the facts don't justify that in this case.

The redistricting process that occurred, the statements and motivations that happened during that process, are in the past and that's actually a reason why plaintiff should be entitled to go to trial now.

We point out in our brief that over time memories and evidence get stale, and what people remember about what they said and did is subject to revision. That's actually a harm to the plaintiffs in delaying the trial in this case.

But I also want to address -- both on the question of whether there's need for new expert discovery, which we contend there is not, and the notion that the math might change if the legal standards change, we disagree with that entirely.

We believe that our expert has done his analysis, he's been fully deposed, we were one week away from trial and we're ready to go to trial now.

I want to illustrate for Your Honors the interplay that can happen between a case at a lower court level considering the issue and the case to the Supreme Court because this is not uncommon. When the Supreme Court takes a case, there is often numerous cases in the lower courts deciding the

same issue. We're not suggesting that there should be a race to decision, but what we are suggesting is proceeding now on plaintiffs' claims in this case do not prejudice the plaintiffs in the future or the defendants.

I did prepare, if I may -- and Judge Osteen, I apologize that you will not be able to see this -- but all this is, is a chart that shows the timeline of a case reported, two reported opinions. This is a timeline of the interplay between the *Raleigh Wake Citizens Association* case which was tried in the Eastern District and the Supreme Court decision with *Harris versus Arizona Independent Redistricting Commission*.

Both of those cases involved legal question of whether the one-person, one-vote criteria can be violated with a purpose to part -- have a partisan advantage or favor one parties' voters over another.

The *Raleigh Wake Citizens* case was remanded after a decision on a motion to dismiss in May of 2015. In June, the next month, the Supreme Court granted -- noted probable jurisdiction in the *Harris v Arizona* case, which raised the same issue. The *Harris* case was argued in December. The *Raleigh Wake Citizens* case went to trial a week later. The trial Court issues its decision, the Supreme Court issued its decision after that and the Fourth Circuit ultimately ruled.

The point here is just that this happens frequently. There is an Appellate process. If this Court hears our

evidence, makes a ruling, there is an Appellate process if there's any tension or any misapplication of the applicable legal standards.

So this case here, like the *Raleigh Wake Citizens* cases, should proceed to trial even though there is a Supreme Court case pending that deals with similar issues.

JUDGE WYNN: That's an interesting analogy. This case was filed almost a year ago and this panel was put together in October of 2016 and then -- when was the *Gill* case handed down or at least the decision by the Wisconsin three-judge panel?

MS. EARLS: November 21st, 2016.

JUDGE WYNN: You so you got the *Gill* case decision coming, you got an appeal of right going to the Supreme Court on that case that we maintain is the same case. And what happened in this case? What was the period of discovery?

MS. EARLS: Well, Your Honor, there was a -- there was approximately, I think, a four- or five-month period of discovery from the time we had a status conference on discovery until discovery.

JUDGE WYNN: How much discovery was done? We know the *Gill* case in November, the decision comes from the three-judge panel, it goes on appeal, got to be accepted because the appeal of right, same issue, the Supreme Court then accepts it. So we know what's going to happen, but you go on

with this discovery for three or four months?

MS. EARLS: That's correct, Your Honor.

JUDGE WYNN: What are you doing? I mean, what was involved? Because that sounds like a waste of judicial resources to me if the stay should be given.

MS. EARLS: All of the plaintiffs were deposed by the defendants. Expert witnesses were identified. I believe I'm correct that collectively the plaintiffs have five expert witnesses and the defendants have four. So I think I'm right that there were nine expert witness depositions.

JUDGE WYNN: What kind of time are we talking about here, just ballpark, in terms of the amount of time put in preparing this for trial?

MS. EARLS: I couldn't give you off the top of my head hours, but extensive time, Your Honor. We were one week away from trial. We had done trial briefs, we have done motions in limine, we had done everything except deliver our exhibit notebooks to the courthouse. That is how close we came and how prepared we are for trial.

JUDGE BRITT: I feel compelled to make -- take a point in person and privilege here to state what may not be obvious to the general public; and that is, that the delay in this case was necessitated by a medical emergency on my part. On the 19th of June, I was admitted to the hospital with some heart problems and this case had been scheduled to go to trial

on the next Monday. My colleagues agreed that the matter should be continued. But I'm happy to say that my recovery has gone well; and as far as my health is concerned, we're ready to go at any time.

MS. EARLS: Your Honor, I know I speak for all counsel in the case that we are pleased that that is true and we're glad that you're here with us.

I just want to finish my remarks by pointing out the prejudice to the plaintiffs if we are unable to proceed.

We would not likely have time for relief in 2018 if we don't proceed to trial now; and if the Court were interested, I could go into greater detail about the timelines that the Board of Elections needs to schedule elections and how -- when the Court would need to rule in order to make that happen, but I'll just point out that in the *Harris* case, when the ruling didn't come until February of that year, it required special elections. So the concept that there could be a Supreme Court decision in *Whitford* and then a trial in this case and then a ruling by this Court and still have elections in 2018 just doesn't sound realistic right now.

I wanted to say a bit about why the denial of rights is irreparable. All of our briefs cite the general language that the denial of constitutional rights is irreparable injury. But when you have a congressional delegation that doesn't fairly represent the full views of the voters of North

Carolina, which is what our claim is based on. You have policies being made and decisions being taken that are irreparable, can't be reversed, the harm truly does -- is irreparable here.

JUDGE OSTEEN: Let me interject and ask a question that I was thinking about when Mr. Speas was arguing about also and that's this: If the matter of some significance when any court declares a legislative act, either constitutional or unconstitutional, we are in a circumstance now where several courts, Supreme Court cases, have recognized the fact that partisan gerrymandering may very well be justiciable but the courts have either -- have been unable to fashion a remedy.

Now, the truth of the matter is that, in my mind, splitting a pretty fine hair to say that a matter is justiciable that we cannot conceive of remedies for the problem. Non-justiciability requires some ability of a court to fix the problem.

So even if the Court should, again, say we think partisan gerrymandering is not consistent with the Constitution but it's unable to fix some standard by which a remedy can be fashioned, that's another problem that may develop. And in terms of the relationship of various branches of the government and the district court and the federal courts to those branches of government, it does give me some concern to potentially enter an order or a judgment signing a legislative act

unconstitutional, by the way, is of some concern, only to have shortly thereafter a Supreme Court decision which may or may not be consistent with the finding of the lower court.

I have significant concern about the judiciary and the consistency as well as the predictability of the Court's actions in many respects. So it's not a judicial economy concern, but it is a concern about race -- not racing. We'll just say working to get a decision, making a decision of some significant import and then turn it around and having to redo it because shortly thereafter the Supreme Court had given the final word on what's appropriate and what's not under these particular circumstances.

You may say that's not a valid concern. You may say it's a concern but here's why you don't need to worry about it, but I'm curious as to your thoughts.

MS. EARLS: Thank you, Your Honor.

My response to that would be that I understand the concern, but there are mechanisms within our judicial process to address that.

So if there is a ruling granting a remedy in this case, there is a procedure for an emergency stay that can be pursued to the U.S. Supreme Court. And in these redistricting cases, we have seen the Court sometimes grant those stays and sometimes not grant those stays, and I would be happy to give examples of both of those.

JUDGE OSTEEN: Well, to put it bluntly, suppose we enter an order or judgment saying this is unconstitutional and the Supreme Court says this is a nonjusticiable issue, we're reversing our prior decisions to the contrary, where does that leave the court system in there?

MS. EARLS: Again, sort of depends on the timing. And I think on the timing question, all the Court can do is proceed currently given all the conditions that are knowable at the moment. So we don't know when and how and whether the Supreme Court might rule in *Whitford*. They could decide to set it for reargument if they don't reach a consensus based on the cases that's presented to them in October. So we just don't know.

So this Court's duty is to consider the circumstances apparent to it at this time and trust that the mechanisms in place to address the situation, Judge Osteen, that you raise are there and adequate to protect the interests that are implicated.

The only other thing I was going to address is the difference between the Maryland case and this case, including the fact that they were in a different procedural posture. There, the Court was considering a preliminary injunction motion and wasn't on the eave of trial as we were here.

I think this is really important. The plaintiffs in that case conceded that a remedy in 2018 was not possible.

Again, this is probably due to the differences in election machinery and how Maryland runs its elections, but I think that is the reason why there were two judges voting for a stay because the plaintiff said, as of now, there isn't a possible remedy for us in Maryland in 2018, and so that really changes the calculus for the harm to the plaintiffs in those circumstances.

I would also point out that the Maryland case is about a single district instead of an entire plan, which implicates sort of how many voters are harmed and the nature of the harm.

And finally, I think to the extent that the Court relied on its lack of confidence that causation was possible to be proved, that's actually not the standard here. That on a stay, you are looking at the harm to the various parties and weighing those equities.

JUDGE WYNN: Now, Common Cause action looks like to me it raises the First Amendment. What about the League of Women Voters? Is that part of your claim?

MS. EARLS: So our claim is both a First Amendment and an Equal Protection claim but it is a single standard under both constitutional guarantees.

JUDGE WYNN: You're more like the Wisconsin panel as opposed to a separate-type plan?

MS. EARLS: That's correct, Your Honor. I agree with

the Common Cause counsel that there are some significant theoretical differences between the two claims. But I further note that the facts, the facts we intend to prove are the same for both cases and what would be different is which legal standard you apply.

JUDGE WYNN: You agree if you follow Judge Niemeyer's dissent, if his dissent is correct, that would be a stronger case than Equal Protection to go on the First Amendment alone.

MS. EARLS: I would agree that that was his view of the nature of the harm and the constitutional guarantee that should apply, that's correct.

JUDGE WYNN: I understand that in terms of his view. I'm seeking your view in terms of the efficacy of the types of claims here and how to bring these kinds of cases.

The First Amendment approach seems to be rather novel but they granted the 12(b)(6) on it so recognizing the claim, at least in the Maryland case, and Justice Kennedy has postured it somewhat in the *Vieth* case. So the question is the First Amendment type claim. Common Cause then files it after this, which seems a little fresher than yours, I guess, more of an aftermath, who knew it existed, so to speak, until it comes up, but now that it is, it seems like, at least in terms of viability, that seems to be a clearer path.

MS. EARLS: Your Honor, I think the question is how do you measure whether a plan is fair or not fair. And my

clients, League of Women Voters and the individuals that filed this case, believed that the way that the efficiency gap establishes a measure for whether or not the partisan considerations were unfair is akin actually to the one-person, one-vote standard; that it's a measurable standard that legislatures can use, it's a standard that has been developed using the computer technology that's now available that wasn't available back when *Vieth* was decided. So we think there's real merit in pursuing that as a measure of when taking partisan considerations into effect goes too far.

JUDGE WYNN: I'm just trying to get your perspective on the two different types of claims. Equal Protection, the standard review for that, as opposed to First Amendment dealing with a core right, speech or expression, and when you view -- you know, First Amendment right cases have been pretty strong with the Supreme Court over a number of years and that's the differentiation that I'm trying to determine your views on there.

I recognize you may be Equal Protection clause that subsumes it more, but that puts -- Equal Protection, I think the defendant is probably right on that, if that's the way you bring it. Like the Wisconsin case is more Equal Protection than First Amendment but one that arises as opposed to a separate one.

MS. EARLS: I can talk about the different

implications of the different claims. One is about a single district; one is about the State as a whole. But I think I would say that both are strong claims, but they are different approaches to how we address the problem.

JUDGE WYNN: Thank you.

JUDGE BRITT: Judge Osteen, do you have any further questions for either Mr. Speas or Ms. Earls?

JUDGE OSTEEN: I'm good at this point. Thank you, Judge.

JUDGE BRITT: All right.

Mr. Strach, would you like to respond?

MR. STRACH: Just very briefly, Your Honor.

I would just point out -- I would actually agree with Ms. Earls, her characterization of the First Amendment claim in that it does -- the question that it boils down to is when does a plan cross from being fair to unfair, how much partisanship is too much. This goes to the Justice Kennedy question and that's why we think these cases, at the end of the day, is all about the same question, and that's why we think they are similar to *Whitford*, and we think that's what the case is going to boil down to and what the Court will have to struggle with.

I will also say that unlike the *Harris* case and *Raleigh Wake* case, I think everyone here would agree that political gerrymandering is an unusual, legal animal, right, there is very few other, quote, "claims" that are like that

where the courts have been unable to figure out how to adopt legal standard for it.

So unlike the normal situation where Supreme Court takes a case that might affect a pending case and the Court is trying to decide whether that case is going to actually affect it or not, this is in a whole new ballgame. This is a whole new situation where the Court could literally wipe out the existence of the claim itself or significantly alter it, and I think in most cases, what I might call run-of-the-mill cases, that's not generally true.

So I would just simply ask the Court to take that into consideration.

And then, finally, I would point out, as the Maryland majority did, that there is some significance, we think, and that Court certainly thought there was some significance to the fact that the U.S. Supreme Court stayed the *Whitford* decision, also postponed its consideration of jurisdiction to the merits hearing, as well as taking the case all at the same time. And we're certainly not saying that that prejudges the case. We don't know what's going to happen, but even the Maryland court saw that as some potential signaling by the U.S. Supreme Court which they relied on because I read their opinion fairly heavily to enter the stay.

JUDGE BRITT: I didn't read the Maryland case as closely as Ms. Earls did, and she just told me something I

didn't know; and that is, that the plaintiffs conceded that they could not get any relief in 2018.

Now, your motion to stay is talking about time. That's basically what it is.

Do you agree?

MR. STRACH: Your Honor, I'm sorry. I don't think I understand the question.

JUDGE BRITT: Well, that we're talking about time of when a decision is going to be made and when relief can be had.

If Ms. Earls is correct -- and I assume you don't dispute that the plaintiffs in the Maryland case stipulated that they could not get any relief for 2018. You don't disagree with that, do you?

MR. STRACH: Your Honor, to be honest with you, I don't remember that. I won't dispute it. Ms. Earls said it's true. What I don't remember is the Court particularly relying on that too much.

I made notes about the decision here in my notes, and I don't remember that stipulation being a big part of their decision. I could stand to be corrected.

JUDGE BRITT: Mr. Bondurant?

MR. BONDURANT: Your Honor, let me address the last question first.

You know, I represent Common Cause. We were an amicus in the Supreme Court in *Whitford* and Maryland and in the

District Court's remand opinion. I attended the arguments. The plaintiffs have not stipulated that they couldn't get relief. What they said was under current procedures in Maryland, you would need a -- redistricting must be enacted no later than December 19, 2017, for that having special elections. That is page 22 of the opinion.

The whole idea of the preliminary injunction was that if the Court then moved more rapidly, that it will be too late to get relief by 2018, which is why they moved for the preliminary injunction.

JUDGE BRITT: I understand.

MR. BONDURANT: Let me -- if you'll give me an indulgence. Let me make two other points quickly.

JUDGE BRITT: Yes, sir. Go ahead.

MR. BONDURANT: We have a fundamental disagreement in this case. The question under First Amendment is not whether something is fair or unfair or whether the burden is heavy or light or durable or undurable. It's a question of viewpoint discrimination. And when you discriminate on the basis of viewpoint, that is the violation and establishes under established Supreme Court law invokes strict scrutiny, shifts the burden to the other side.

There are a lot of cases to that effect but my favorite is the one that is the *Reed* case that the Supreme Court decided only a year ago with the signs for a little

church in Nebraska of having different sized signs for different kinds of meetings and their come to meeting signs were not as big as political signs, were not as big as commercial signs. The Supreme Court does not ask anything other than was this based on content? And if it was, the church didn't have to show the people couldn't find their way to church, they didn't have to show that revenues were down, that contributions to the church were down or anything of the sort. It was pure content based.

But viewpoint based, which under a vast amount of Supreme Court law, says you can't do that. That's an easily administered admitted standard.

The difference between *Whitford* and our case and the difference that Justice Kennedy drew in *Vieth* himself in which he says in an Equal Protection case, you're focusing on the classifications; in a First Amendment case, you're focusing on the burden on First Amendment rights. And that is what makes this case unique and utterly different from *Whitford*.

There is also another difference, Your Honor --

JUDGE WYNN: Before you go, I really appreciate that differentiation in terms of First Amendment and the interplay of the separation from the Equal Protection.

The Wisconsin three-judge panel essentially said it was subsumed or a part of the Equal Protection of the First Amendment, so First Amendment claim, not viewpoint, can arise

under the Equal Protection. Talk to that, if you will, in terms of how that happened separately from the First Amendment viewpoint type.

MR. BONDURANT: There are two claims. You violate the Constitution either way. Under Equal Protection law, under *Romer* -- there's a series of cases we cite in our pretrial brief, the Supreme Court says the essence of Equal Protection law is, among other things, a paramount duty of government to govern neutrally. And when you take sides, political question, you're not governing neutrally; and therefore, that's an Equal Protection violation.

The First Amendment violation is a bit different but it's also very similar. The First Amendment also presupposes a duty to govern neutrally; that is, government's job is not to establish religion, it's not to favor one political party over another. But when you go in and disadvantage one group of people based on their political beliefs and advantage the other, that is clear viewpoint discrimination that would invoke scrutiny under the First Amendment. It's also an Equal Protection violation.

And then the question is what level of scrutiny applies? Do we have to prove predominance to invoke scrutiny? That is the only test under racial cases. If you don't prove predominance, it doesn't mean there's not a First Amendment violation; it just means you don't get strict scrutiny. If you

go to their meaning of scrutiny under *Anderson v. Celebrezze* in which you weigh everything, but that presupposes a nondiscriminatory election rule. If it's discriminatory, you go back under strict scrutiny.

We have another distinction here which will never be decided in *Whitford*. This is a congressional election. It's governed by Article I, Section 2 and Article I, Section 4.

And Article I, Section 4 claim has never been litigated in this context, but it has in the context of term limits, and more specifically in *Cook v. Gralike* in which Missouri put on the ballot truthful information about how a candidate stood on term limits. And the Supreme Court holds that to be unconstitutional in Article I, Section 4, which they hold to be a grant of the power to adopt procedural regulations only, to not include the power to, quote, dictate electoral outcomes or to favor or disfavor a class of candidates or to evade constitutional limitations. That's three prohibitions.

Could you articulate if you were trying your best a standard that would govern congressional elections that would outlaw parts of gerrymandering more clear than saying though shall not dictate electoral outcomes; and that's what you do when you cross voters among districts based on political beliefs; you're dictating whether a Democrat or Republican is going to be elected in District 4, or District 13 or District 1.

But more clearly, favoring one class of candidates over another, that's an immeasurable standard, that's a bright-line standard, just as viewpoint discrimination is a bright-line standard.

The courts have had no difficulty with it, so no matter what the Court does in *Whitford*, it cannot possibly deal with any of the claims that deal with congressional redistricting which are governed not only by the First Amendment but by Article I, Section 4.

So I apologize for indulgence.

JUDGE BRITT: Judge Osteen, do you have any more questions of any of the lawyers?

JUDGE OSTEEN: No further questions.

JUDGE BRITT: Judge Osteen, thank you very much for participating by means of this telephone hookup, and Judge Wynn and I will try to hook up with you shortly after the adjournment of this hearing, which I'm now directing that the clerk do, and we will come down and speak to counsel.

(The proceedings concluded at 12:53 p.m.)

UNITED STATE DISTRICT COURT

EASTERN DISTRICT OF NORTH CAROLINA

CERTIFICATE OF OFFICIAL REPORTER

I, Amy M. Condon, RPR, CSR, Federal Official Court Reporter, in and for the United States District Court for the Eastern District of North Carolina, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 31st day of August, 2017.

/s/ Amy M. Condon
Amy M. Condon, CSR, RPR
U.S. Official Court Reporter