No. 16-649

In the
Supreme Court of the United States

STATE OF NORTH CAROLINA, et al.,
Appellants,

v.

SANDRA LITTLE COVINGTON, et al.,
Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

BRIEF OPPOSING MOTION TO AFFIRM

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BRIEF OPPOSING MOTION TO AFFIRM

The district court held that the North Carolina legislature lacked a strong basis in evidence to draw majority-minority *or* coalition districts *anywhere* in the State. According to the decision below, the North Carolina legislature should not have considered race at all in drawing its district lines. Unsurprisingly, Appellees decline to defend that holding on its own terms. The last thing they want is for the legislature to have a green light to redistrict without any consideration of race or VRA compliance. Appellees, in fact, *want* the legislature to consider race—but only to the extent that it maximizes their partisan advantage without limiting their ability to file a vote-dilution claim if the next few elections do not go their way. Appellees' cynical approach to redistricting confirms that the legislature acted lawfully and appropriately by drawing majority-minority districts to protect against the vote-dilution claims that Appellees remain keen to preserve.

As wrong as the district court was on the merits, the remedy it has since ordered is even more inexplicable. After the State filed its notice of appeal and jurisdictional statement, the district court declared that the state legislators who were elected to constitutionally-prescribed two-year terms in November will instead serve only one-year terms, and it ordered the State to hold special primary and general elections in 2017. Not only did the court lack jurisdiction to issue that order, it also exceeded the bounds of its equitable discretion by ordering an extreme and intrusive remedy that is patently out of proportion to the alleged harms at issue.

In short, the district court's merits and remedial decisions are both extreme outliers that cannot stand. Appellees' suggestion that this Court should summarily affirm those extreme decisions in the face of the state supreme court's two decisions expressly rejecting the exact same claims on nearly identical facts is a non-starter. This Court should note probable jurisdiction or, in the alternative, summarily reverse.

I. The Decision Below Squarely Conflicts With the State Court's Decision Rejecting The Same Claims.

The decision below directly conflicts with the state court's decision in *Dickson v. Rucho*, 781 S.E.2d 404 (N.C. 2015), *petition for cert. filed*, No. 16-24 (U.S. June 30, 2016). Appellees make no effort to explain how, in light of that square conflict, this Court could summarily affirm the decision below, much less how this Court would then dispose of the pending petition in *Dickson*. The clear split between two co-equal courts applying the same law to the same facts is reason enough for this Court to note probable jurisdiction and reconcile the two conflicting cases.[1]

Appellees attempt to downplay the conflict by claiming that *Dickson* addressed a "somewhat different set of legislative districts" during a "limited two-day trial on discrete issues." Mot.12 n.3.

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[1] Alternatively, the Court could hold this case pending resolution of *McCrory v. Harris*, No. 15-1262, and *Bethune-Hill v. Virginia State Board of Elections*, No. 15-680, as it has done with *Dickson*, and then vacate and remand either or both in light of those decisions. *Cf. Dickson v. Rucho*, 135 S. Ct. 1843 (2015).

Neither distinction is meaningful. The overwhelming majority of districts challenged here—all nine Senate districts and 16 of 19 House districts—also were challenged (and upheld) in *Dickson*. *Compare* JS.App.13 *with Dickson*, 781 S.E.2d at 415 n.8, 418 n.11. Appellees identify nothing unique about the three House districts not challenged in *Dickson* that would explain the divergent results for the 25 districts challenged in both.

As for the "limited" trial on "discrete issues," one of those issues was the exact one at the heart of this appeal: whether each challenged district was "drawn in a place where a remedy or potential remedy for racially polarized voting was reasonable for purposes of preclearance or protection of the State from vote dilution claims." *Dickson*, 781 S.E.2d at 414-15 n.7. Appellees acknowledge, moreover, that most of the relevant evidence in both cases is documentary, including "written statements," "census data," "election returns," and "stipulations," Mot.12, and most was presented in both cases.

Appellees fare no better in denying that the conflict matters. They argue that claim preclusion and collateral estoppel cannot apply because the *Dickson* judgment is still on petition to this Court, Mot.36 n.7, but "a judgment's preclusive effect is generally immediate, notwithstanding any appeal." *Coleman v. Tollefson*, 135 S. Ct. 1759, 1764 (2015); *see State v. Summers*, 528 S.E.2d 17, 20 (N.C. 2000). Appellees also note that this Court rejected a "virtual representation" theory in *Taylor v. Sturgell*, 553 U.S. 880 (2008), but neither that case nor the state court case they cite involve a situation like this one, where

an association unsuccessfully litigated on behalf of its members, and those members then tried to get a second bite at the apple. *See* Mot.38 (conceding that Appellees "are members of organizations that were plaintiffs in *Dickson*"). Finally, Appellees claim that Scott Falmlen denied financing both *Dickson* and this case. Mot.38 n.8. In fact, Falmlen admitted at trial that his organization solicited funds and paid "legal fees associated with redistricting litigation" in both "*Dickson v. Rucho* and *Covington*." Tr.Vol.V at 135; *see also id.* at 139.

Given the near-perfect overlap between this case and *Dickson*, the district court should have dismissed this suit or, at a minimum, granted significant deference to the state court. Instead, the district court did neither, treating the first-in-time and directly on-point findings of a co-equal state court as worthy of neither deference nor respect.

II. The District Court Erred In Finding That Race Predominated In The Design Of The Challenged Districts.

Appellees' defense of the district court's erroneous predominance holding rests largely on a distortion of the facts. In a transparent effort to exaggerate the differences between the benchmark plan and the challenged plan, Appellees ignore the coalition districts that have long appeared in North Carolina's state legislative maps. They note, for example, that the number of "majority-black" districts increased from "nine to twenty-three" in the House plan and from "zero to nine" in the Senate plan. Mot.3. They fail to mention, however, that the benchmark plan contained *34 coalition districts* (24

in the House and ten in the Senate) in which the percentage of non-Hispanic white voters was below 50%. *See* Def.Exhs.3018-34, 3018-39. In other words, the number of districts drawn with racial considerations in mind was essentially *unchanged*, with the only difference being the *type* of ability-to-elect district the legislature utilized. The challenged plan thus did not randomly inject race into a previously colorblind process; rather, state districting plans in North Carolina have long included ability-to-elect districts in the same counties and regions in part to avoid VRA liability.

Appellees' repeated claim that the Chairmen subordinated all traditional districting principles in drawing those districts also ignores that the legislature created majority-minority districts *only* where doing so was consistent with those traditional principles. Indeed, the district court's assumption that the Chairmen satisfied the first two *Gingles* factors—which include geographic compactness and political cohesiveness—should have precluded a finding of racial predominance, as should have its assumption that the districts complied with the Whole County Provision (WCP), which effectively forced the Chairmen to prioritize traditional districting principles at every turn. JS.17-20. Rather than try to demonstrate otherwise, Appellees wrongly claim that the district court *did not* assume that the districts complied with the WCP. Mot.21-22. In fact, it is clear beyond cavil that the court did exactly that. *See, e.g.*, JS.App.22, 24 n.12. Moreover, if the district court had not assumed compliance with the WCP, that would only *increase* the need for review: A "State's highest court is unquestionably

the ultimate expositor of state law," *Riley v. Kennedy*, 553 U.S. 406, 425 (2008), and the North Carolina Supreme Court has twice rejected claims that these same districts violate the state constitution's WCP, *Dickson*, 781 S.E.2d at 438-441.

Appellees next accuse the State of claiming that *Johnson v. De Grandy*, 512 U.S. 997 (1994), creates a "safe harbor from Section 2 liability" when the number of majority-black districts is proportional to the BVAP percentage in the State as a whole. Mot.1, 29. The State's jurisdictional statement says no such thing. It notes only that the district court should not have treated the legislature's proportionality goal as proof of racial predominance, *see* JS.19—because *De Grandy* explicitly says that, far from being constitutionally suspect, proportionality is "an indication that minority voters have an equal opportunity ... to elect representatives of their choice." 512 U.S. at 1020. Appellees also are wrong to claim that the legislature's proportionality goal "could not be compromised." Mot.2, 16. In fact, the legislature did not achieve a proportional number of majority-minority districts in the final plan—precisely because it subordinated that goal to traditional districting principles. JS.19-20. Indeed, even the district court grudgingly accepted that the Chairmen ultimately "fell one majority-black district short in each chamber of the targets they set." JS.App.27 n.15. Simply put, a proportional number of majority-minority districts cannot have been a goal that "could not be compromised" when the legislature *in fact* compromised in failing to achieve the goal.

III. The District Court Erred In Holding That The Challenged Districts Did Not Satisfy Strict Scrutiny.

The district court invalidated the districting plan at the first step of the narrow-tailoring inquiry, holding that the legislature lacked a strong basis in evidence to believe that white voters could vote as a bloc to defeat minority-preferred candidates in any of the challenged districts. *See* JS.App.117. Because the court believed that the third *Gingles* factor was not satisfied, it held that the legislature should not have considered race *at all*—even in districts that have consciously been drawn as ability-to-elect districts for decades. *See, e.g.*, JS.App.2.

Unsurprisingly, Appellees make no effort to defend that extraordinary holding on its own terms. Indeed, they never requested such a holding, as the last thing they wanted was to free up the Republican-controlled legislature to redistrict entirely unconstrained by the VRA. Their position always has been that the legislature was correct to consider race, but that it should have drawn coalition instead of majority-minority districts—which would just so happen to maximize Democratic partisan advantage. In other words, they seek more use of race in more minute detail.

Perhaps for that reason, Appellees offer no response to any of the evidence on which the legislature relied in deciding to draw ability-to-elect districts. *See* JS.23-29. They do not dispute any of the public testimony about the continuing need for ability-to-elect districts. *See* JS.27-28. They implicitly concede that all three alternative plans

included ability-to-elect districts in the same regions as the challenged plan. *See* JS.28-29. They do not deny that minority-preferred candidates have seldom had success in majority-white districts. *See* JS.28. And they do not disavow their counsel's legislative testimony that "to have a fair redistricting plan that does not dilute the voting strength of minority voters in the state, we still need to have majority-minority districts." Def.Exh.3013-6 at 9-10.

Given that Appellees do not dispute any of that evidence, their claim that the legislature "did not even take into account the extent to which white bloc voting defeats the candidates of choice of black voters," Mot.26, rings hollow. All of the evidence before the legislature was germane to that very question, and it confirmed that racially polarized voting has real, tangible effects on election results throughout North Carolina (in 50 of the 51 counties for which data existed)—and, more importantly, that districts drawn without regard to race likely would violate Section 2 of the VRA. Indeed, Appellees nowhere deny that if Dr. Hofeller had drawn districts to comply *only* with the WCP, the resulting plan likely would have led to vote dilution in violation of Section 2, with minority-preferred candidates underrepresented in both chambers of the state legislature. JS.32.[2]

The only aspect of the analysis below that Appellees even try to defend is the discussion of past election results. According to Appellees and the

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[2] This undisputed evidence also supported the conclusion that several districts had to be drawn as majority-minority districts to avoid a Section 5 violation. JS.29 n.5.

district court, the legislature did not need to consider race because minority-preferred candidates already were winning elections under the benchmark plan. JS.App.130-131; Mot.26-27. But *every single district* they identify was consciously drawn as a coalition district. Not a single one was majority-white, and the average BVAP in each was over 45%. *See* Def.Exhs.3018-34, 3018-39. The success of those districts is a reason to *continue* using race in redistricting, not to assume the problem is solved for all of time.

Appellees alternatively suggest that the district court actually did address the second prong of the narrow-tailoring inquiry and held that the legislature's only mistake was in "increasing the BVAP in the challenged districts to more than 50%." Mot.10. In fact, the court expressly declined to reach that issue, reserving the question of whether legislatures retain the flexibility to choose majority-minority districts rather than crossover districts as prophylactic remedies for potential VRA problems. JS.App.18 n.10. Instead, the only question the court purported to resolve was whether the legislature had a reasonable fear of a "potential Section 2 violation" in the first place. *Id.*

Appellees also emphasize that the district court held open the possibility that the State actually *was* required to draw the challenged districts as majority-minority or collation districts, but just failed to amass a sufficient record to defend its decision to do so. *See* JS.App.146. Far from rehabilitating the court's decision, that only confirms the problems it creates. By the district court's own telling—and,

apparently, Appellees' as well—the State violated the Equal Protection Clause by taking race into account *at all*, yet would just as likely would have violated the VRA had it *declined* to consider race. So long as that is the law, States will be left in precisely the damned-if-they-do-damned-if-they-don't position that this Court has repeatedly warned against, and federal courts will be left with no choice but to resolve an endless cycle of disputes about whether a State's inevitable consideration of race was too little, too much, or just right.

IV. The District Court's Extraordinary Remedial Order Was Improper.

Shortly after the State filed its jurisdictional statement, the district court entered an order requiring the legislature to draw new maps by March 15, 2017, and hold a special election the following fall, thus cutting the majority of the State's newly elected legislators' constitutionally-prescribed two-year terms in half. App.5-7. That remedial order, which the State has separately appealed, *see* Sup. Ct. R. 18.2, is so patently out of proportion to the purported harms it seeks to remedy that it should not survive regardless of how this Court resolves this case on the merits.

As explained in more detail in the stay application filed simultaneously with this reply, the district court lacked jurisdiction to enter that order because the State already had filed its notice of appeal. Even if the court had jurisdiction, moreover, it vastly exceeded the bounds of its equitable discretion. If special elections ever are appropriate to remedy *Shaw* violations, it is only after a court

conducts a careful balancing of the equities. *See Bowes v. Ind. Sec'y of State*, 837 F.3d 813, 818 (7th Cir. 2016); *Gjersten v. Bd. of Election Comm'rs for City of Chicago*, 791 F.2d 472, 479 (7th Cir. 1986). The district court failed to weigh *any* equitable considerations here, instead just asserting: "While special elections have costs, those costs pale in comparison to the injury caused by allowing citizens to continue to be represented by legislators elected pursuant to a racial gerrymander." App.3.

That wholly unsatisfactory explanation is itself grounds for reversal, *see Gjersten*, 791 F.2d at 479, but in all events, the relevant equities weigh strongly against a special election. The underlying constitutional violation is highly debatable, as evidenced by the state supreme court's two decisions upholding the challenged districts against the same constitutional attack. If a federal district court is not going to defer to a co-equal state court, it should at least limit the scope of its remedy to reflect the possible fallibility of its own contrary conclusion. The alleged constitutional violation, moreover, had no significant impact on election results in the challenged districts. Indeed, candidates in 20 of the 28 challenged districts ran *unopposed*, and the races in the other eight districts were not even close. *See Official General Election Results*, North Carolina State Board of Elections (last visited Dec. 28, 2016), http://bit.ly/2h3an2V. Nor is this a promising case for such an extraordinary and urgent remedy when Appellees waited four years and two election cycles before bringing their challenge. The alternative of waiting for this Court to issue its merits decisions in *Harris*, *Bethune-Hill*, and here, and then conducting

redistricting, if any is needed, based on this Court's decisions, has everything to recommend it.

Moreover, whatever benefits a special election might bring do not outweigh "the state's significant interest in getting on with the process of governing once an electoral cycle is complete." *Bowes*, 837 F.3d at 818. Instead of acting for their constituents, newly elected legislators must spend the critical first weeks of their abbreviated terms enacting a new districting plan, and the next several months campaigning for special primary and general elections. Meanwhile, the elections board must spend months of time and millions of dollars preparing for the special election, using resources necessary for the State to conduct other essential governmental business. And the voters themselves are partially disenfranchised, as they voted on the understanding that their legislators would serve two-year terms (an understanding they had because the district court declined to order a pre-election remedy), only to find that their voting power has retroactively been halved.

The district court failed to give any consideration to those weighty countervailing equities and instead imposed an extreme remedy without justification. This Court thus should note probable jurisdiction and vacate the remedial order regardless of how it resolves the underlying merits.

CONCLUSION

This Court should summarily reverse or note probable jurisdiction.

Respectfully submitted,

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