No. 14-839

In The
Supreme Court of the United States

MARGARET DICKSON, *et al.*,

Petitioners,

v.

ROBERT RUCHO, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

PETITIONER'S REPLY BRIEF

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Dated: March 31, 2015

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

RULE

OTHER AUTHORITIES

North Carolina asserts that this Court's voting rights doctrine demands the racially inflated and geographically bizarre election districts contained in its redistricting plans, a claim that is clearly wrong. Certiorari must be granted in this case to end the use of irregularly shaped race-based election districts in North Carolina because "[r]acial gerrymandering strikes at the heart of our democratic process, undermining the electorate's confidence in its government as representative of a cohesive body politic in which all citizens are equal before the law." *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. __, __ (2015) (slip op., at 2) (Scalia, J., dissenting). Petitioners originally advanced three reasons why the petition in this case should be granted: 1) because the novel and unprecedented "safe harbor" doctrine created by the North Carolina Supreme Court will lead to unchecked race-based redistricting; 2) to enforce the equal protection clause's requirement of strict scrutiny when the government uses race-based criteria; and 3) because the resulting bizarrely-shaped districts are manifestly unjust and cause genuine harm to the people of North Carolina. In light of the arguments made by Respondents and new developments since the petition was filed, each of these reasons is now even more compelling.

I. STRICT SCRUTINY APPLIES TO NORTH CAROLINA'S USE OF MECHANICAL RACIAL TARGETS IN DRAWING VRA DISTRICTS.

The North Carolina Supreme Court ruled that the practice of using an explicit racial

proportionality requirement and racial percentage targets as safe harbors to comply with the Voting Rights Act, along with the resulting bizarrely shaped districts, was not sufficient to show that race predominated in the redistricting process. Pet. Writ Cert. 17a. This Court has just held to the contrary in ruling "[t]hat Alabama expressly adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote) provides evidence that race motivated the drawing of particular lines in multiple districts in the State." *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. at __ (slip op., at 10) (majority opinion). Thus, the *Alabama Legislative Black Caucus* decision reinforces the accuracy of the trial court finding here that race predominated in the drawing of certain districts.

The North Carolina General Assembly's policy that prioritized "mechanical racial targets," *id.*, caused districts even more bizarrely shaped than Alabama's Senate District 26 examined by the Court in its recent opinions. *Id.* (slip op., at 26) (appendix C to Opinion of Court). The alternative plans that were introduced as amendments during the legislative process in North Carolina, but were defeated, did not use those mechanical goals and did not produce bizarre districts, as illustrated by comparing the maps of these districts with the enacted districts.[1]

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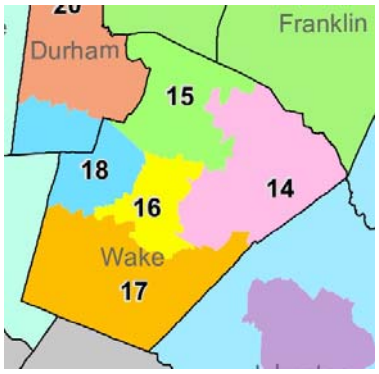
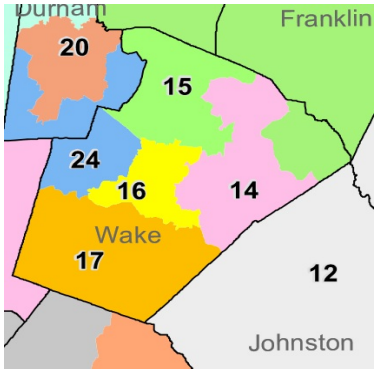
[1] *See* Pet. Writ Cert. 321a & 324a. The maps referenced here are also available on the North Carolina General Assembly's website, http://www.ncleg.net/representation/Content/Process 2011.aspx.

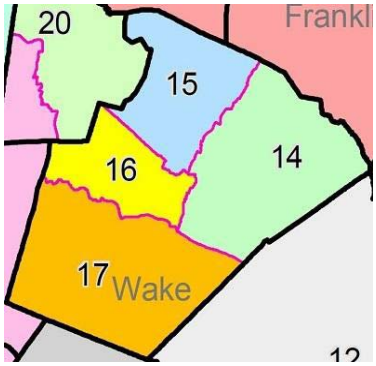
SD 14 – Nesbitt Plan



SD 14 – McKissick Plan



SD 14 – 2003 Plan



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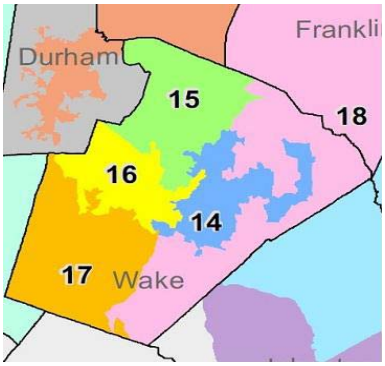

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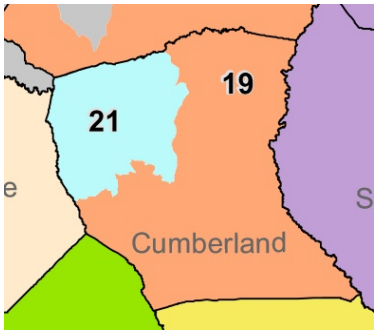

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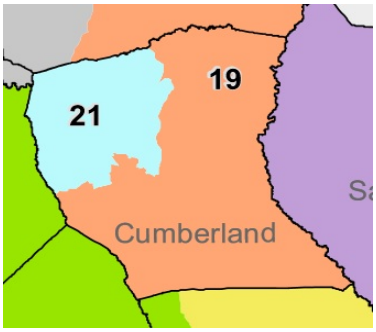

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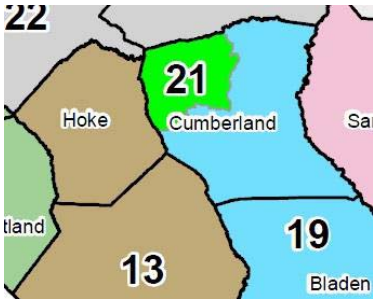
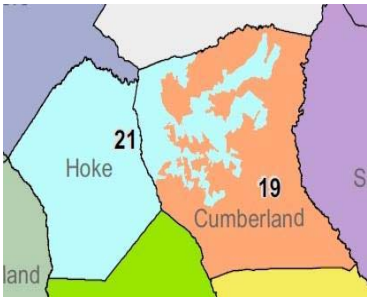


SD 21 – Enacted Plan



The contrast between the geographic compactness of districts in the alternative proposed plans and the lack of compactness in the enacted districts demonstrates (1) the predominance of race in the General Assembly's decision making and the driving impact of those racial considerations on the shape of the districts, and (2) the absence of any effort to narrowly tailor these districts.

The two goals that the State put above all others in deciding which voters to include in the districts challenged in this case were the two race-based criteria it employed as purported safe harbors:

namely to achieve a certain number of majority-black districts in the plan as a whole and to ensure that each majority-black district had a certain percentage of black population. Regardless of whether mechanical numerical racial targets are employed to satisfy Section 5 or Section 2 of the Voting Rights Act, they are "strong, perhaps overwhelming evidence that race did predominate as a factor when the legislature drew the boundaries" of the district in question. *Ala. Legislative Black Caucus*, 575 U.S. at __ (slip op., at 17). If explicit race-based targets to satisfy Section 5 subject a majority-black district to strict scrutiny, then so too do race-based targets employed to satisfy Section 2 because the government's mechanical use of race is the same in each instance.

Certiorari must therefore be granted in this case to reverse the opinion of the North Carolina Supreme Court because that ruling cannot stand consistent with the principles of law reaffirmed in *Alabama Legislative Black Caucus*. In North Carolina, highly irregular districts with vastly increased black population percentages were enacted, dividing thousands of precincts along racial lines with the justification that such extremely race-conscious districts would inoculate the State from potential litigation. Pet. Writ Cert. 42a. Such an arbitrary, explicit, and extensive use of race by the State must be subject to strict scrutiny.

The State argues that the legal standards applied by the North Carolina Supreme Court are completely in line with this Court's precedents.

Resp't's Br. in Opp'n to Pet. Writ Cert. 27. The opposite is true. For example:

- In *Johnson v. DeGrandy*, this Court held that "we reject the safe harbor rule because of a tendency the State would itself certainly condemn, a tendency to promote and perpetuate efforts to devise majority-minority districts even in circumstances where they may not be necessary to achieve equal political and electoral opportunity." 512 U.S. 997, 1019-20 (1994). Notwithstanding that finding, the North Carolina Supreme Court held that the State was completely free to employ a racial proportionality requirement as a safe harbor to avoid any possible Section 2 liability. Pet. Writ Cert. 39a-43a.

- In *Fisher v. Univ. of Texas at Austin*, this Court reaffirmed the long-standing proposition that "outright racial balancing . . . is patently unconstitutional." 133 S. Ct. 2411, 2419 (2013). However, the North Carolina Supreme Court held that the General Assembly's use of a racial proportionality criterion in redistricting was permissible "as a means of inoculating the redistricting plans against potential legal challenges." Pet. Writ Cert. 42a.

- In *Thornburg v. Gingles*, this Court held that racially polarized voting must be ***legally*** significant to impose liability for vote dilution. 478 U.S. 30, 54-58 (1986). To be legally significant, white bloc voting must usually defeat the candidate of choice of black voters over

> several election cycles. *Id.* However, the North Carolina Supreme Court held that the presence of merely "statistically significant" racially polarized voting was sufficient to raise vote dilution concerns, even though the candidate of choice of black voters had consistently won election time and again. Pet. Writ Cert. 27a, 329a-344a.

The State also argues that summary judgment was not appropriate on the question of whether race predominated in the redistricting process, citing *Hunt v. Cromartie*, 526 U.S. 541 (1999). However, *Cromartie* dealt with circumstantial evidence of racial motivation, whereas the explicit racial targets used by the State to craft its districts in this case, and most particularly the racial proportionality criterion, are direct evidence of the use of race. Furthermore, the Court emphasized in *Cromartie:*

> That is not to say that summary judgment in a plaintiff's favor will never be appropriate in a racial gerrymandering case sought to be proved exclusively by circumstantial evidence. We can imagine an instance where the uncontroverted evidence and the reasonable inferences to be drawn in the nonmoving party's favor would not be 'significantly probative' so as to create a genuine issue of fact for trial.

526 U.S. at 553. This is just such a case. Here there is both circumstantial and direct evidence of the predominance of racial considerations in drawing certain majority-black "VRA" districts.

This petition must be granted not because there is a split in the circuits on an issue of first impression; this is a case that demands review because of the fundamental nature of the rights at stake, the damaging and long-term impact for redistricting that this precedent creates, because neither the trial court nor the state supreme court correctly applied strict scrutiny to the facts here, and because the legal standards applied by the court below are so completely at odds with this Court's equal protection jurisprudence, including the most recent decision in the Alabama redistricting case.

II. FACTS AND ARGUMENTS ASSERTED BY THE STATE IN ITS RESPONSE ARE LARGELY OF NO CONSEQUENCE TO THE EQUAL PROTECTION ANALYSIS OF A RACIAL GERRYMANDER CLAIM.

The State's attempt to justify the highly irregular district lines of the illustrative challenged districts highlighted in Plaintiffs' Petition relies on irrelevant matters and is self-contradictory. The State argues that Senate District 14 needed to be increased from 42.62% BVAP to 51.28% because despite the past electoral success of candidates of choice of black voters, the district "was overpopulated by 41,804 persons," and "the black candidate raised and expended substantially more campaign funds than the losing Republican challenger." Resp't's Br. in Opp'n to Pet. Writ Cert. 17-18. The State then argues that Senate District 21 also had to be increased in BVAP from 44.93% to 51.53% because it was underpopulated by 26,593 persons and the successful black candidate in that

district from 2004 through 2010 had raised more money than the white challenger. *Id.* at 20-21. Apparently in the State's view both underpopulation and overpopulation conveniently justify packing black voters in the newly drawn district. None of the State's pretextual arguments about the individual districts adequately addresses why the district lines are explainable on any basis other than race.

The State attempts to distinguish the facts of the Virginia redistricting case, *Page v. Virginia State Bd. of Elections*, No. 3:13cv678, 2014 U.S. Dist. LEXIS 142981 (E.D. Va. Oct. 7, 2014), *vacated and remanded sub nom. Cantor v. Personhuballah*, No. 14-518, 2015 U.S. LEXIS 2204 (Mar. 30, 2015). *See* Resp't's Br. in Opp'n to Pet. Writ. Cert. 27 n.22. However, the matters the State identifies have no significance because the conflict between the holding in *Page* and the North Carolina Supreme Court's ruling in this case is one of fundamental legal reasoning. In keeping with this Court's direction in *Miller v. Johnson*, the three-judge panel of the district court in *Page* noted that "the good faith of the legislature does not excuse or cure the constitutional violation of separating voters according to race," and therefore applied strict scrutiny to determine whether race predominated in the redistricting process. *Page*, 2014 U.S. Dist. LEXIS 142981, at *19 (citing *Smith v. Beasley*, 946 F. Supp. 1174, 1208 (D.S.C. 1996) (three-judge court)); *see also Miller v. Johnson*, 515 U.S. 900, 922 (1995) (the "presumptive skepticism of all racial classifications" prohibits a court from accepting at face value the government's choices – whether or not they were born of a good faith judgment). The North

Carolina Supreme Court, on the other hand, apparently to provide the legislature with "leeway," accepted the good faith of the legislature on the question of Section 5 compliance and failed to properly apply strict scrutiny. Pet. Writ Cert. 34a-35a (quoting *Bush v. Vera*, 517 U.S. 952, 977 (1996)).

Unlike in *Page*, no narrow tailoring analysis was ever undertaken by the North Carolina courts in this case on the question of whether compliance with Section 5 of the Voting Rights Act mandated the drawing of the challenged districts. Indeed, the percentage black voting age population in the enacted majority-black districts challenged here exceeded the prior districts by more than 20% in numerous instances, Pet. Writ Cert. 327a-328a, and the recent and robust pattern of the electoral success of African-American candidates supported by black voters, many of whom ran in districts without black majorities, was before the General Assembly at the time they enacted the plans. Pet. Writ Cert. 329a-344a.[2] The North Carolina Supreme Court failed to assess whether the newly drawn districts were

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[2] The State now raises numerous arguments that seek to cast doubt on the data that was in the legislative record demonstrating the repeated success of black candidates, and denies the legal significance of, for example, Ty Harrell's successful elections in 2006 and 2008 in House District 41 that was 82.85% white in voting age population, Rodney Moore's 2010 election in House District 99 that was 62.20% white VAP, or Malcolm Graham's 2006, 2008 and 2010 elections in Senate District 40 that was 59.89% white VAP. *See* Pet. Writ Cert. 329a-331a; Resp't's Br. in Opp'n to Pet. Writ Cert. 5, n.6. This is the data that was before the General Assembly at the time the plans were enacted, and this is the data relevant to whether those plans are narrowly tailored. *See Shaw v. Hunt*, 517 U.S. 899, 910 (1996).

narrowly tailored to the Section 5 non-retrogression interest. Moreover, the trial court simply accepted and adopted wholesale as its own the State's proposed findings of fact, without any independent analysis of whether those findings were legally sufficient to justify the legislature's race-based actions. R. p. 1165-1255.[3]

The new arguments raised by the State further illustrate the second reason why this petition must be granted: that it is manifestly unjust to leave in place a pernicious districting scheme that is based upon the legally flawed and socially odious proposition that only whites can represent whites and only blacks can represent blacks, which is "altogether antithetical to our system of representative democracy." *See Shaw v. Reno*, 509 U.S. 630, 648 (1993).

III. THE "SAFE HARBOR" PRINCIPLES ANNOUNCED IN THE NORTH CAROLINA SUPREME COURT'S RULING HAVE LED TO THE INCREASED USE OF RACE-BASED DISTRICTS.

Finally, the "safe harbor" rules endorsed by the North Carolina Supreme Court have already led to the unbridled use of race in redistricting for local governmental bodies in North Carolina. This

[3] Pursuant to Rule 9(a)(1) of the North Carolina Rules of Appellate Procedure, the Record on Appeal in the North Carolina Supreme Court contained "papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all issues presented on appeal," including the parties' proposed findings of fact and conclusions of law. This is a reference to that Record.

Petition must be granted to prevent the North Carolina Supreme Court's misinterpretation of voting rights jurisprudence from governing all redistricting in the state and from being a template for other states.[4]

In the three months since the North Carolina Supreme Court issued its opinion in this case in December 2014, Defendants have taken advantage of the "safe harbor" rule to introduce legislation restructuring the Wake County Board of County Commissioners to create a new single-member majority-black district. *See* Wake Co. Comm'r Districts, S.B. 181, 2015 Gen. Assemb., Reg. Sess. (N.C. 2015). This proposal, which has passed the State Senate and is pending in the House,[5] would replace the current at-large election system for the Board of County Commissioners with a nine-member Board elected from a combination of single-member districts, one of which is majority-black in voting age population. *See id.* Currently there are two African-Americans serving on this seven-member Board, elected at-large, such that African-Americans make up 28% of the Board while African-Americans are

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[4] *See* Justin Levitt, Quick and Dirty: The Racist New Misreading of the Voting Rights Act (Jan. 1, 2015) (unpublished legal studies paper, Loyla Law School Los Angeles), *available at* SSRN: http://ssrn.com/abstract=2487426 (identifying states that substituted blunt numerical demographic targets for the searching examination of local political conditions that the VRA requires).

[5] The bill status is available on the General Assembly website, http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2015&BillID=sb181.

only 21% of the county's total population.[6] Thus, Plaintiffs' prediction that the opinion in this case will lead to more race-based redistricting at the local level is already borne out. Not only is the opinion of the court below serving to "entrench majority-minority districts by statutory command," *Bartlett v. Strickland*, 556 U.S. 1, 23 (2009), it is actually creating the incentive to impose more majority-minority districts than ever before at both the state and local levels, with the "safe harbor" justification inoculating those districts from any meaningful further review. This Petition must be granted in order to correct the North Carolina Supreme Court's misstatements of federal law and to prevent the rampant use of racial criteria in redistricting plans.

CONCLUSION

The undisputed facts, when the proper legal standards are applied, show unequivocally that race predominated in fashioning the districts challenged in this case and that they cannot withstand strict scrutiny. Those facts are not based on credibility determinations or on expert witness testimony. The statements of the redistricting chairs concerning their requirements for districts speak for themselves and were repeated often during the redistricting process. Pet. Writ Cert. 10-13. There is no dispute over whether the General Assembly used two race-

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[6] *Compare* Board of County Commissioners, Wake County Government, http://www.wakegov.com/commissioners (last visited Mar. 27, 2015) *with* Wake County, North Carolina, State & County QuickFacts, U.S. Census Bureau, http://quickfacts.census.gov/qfd/states/37/37183.html (last visited Mar. 27, 2015).

based criteria as safe harbors; the only disagreement is over whether those criteria are constitutionally permissible. The shapes and racial percentages of the enacted districts are known and in the record. Nothing that could be elicited in a trial will alter the overwhelming number of split precincts contained in the plan or the undeniable history of electoral success of black elected officials absent black majority districts that was known to the General Assembly at the time the redistricting plans were drawn.

The voters of North Carolina, and Plaintiffs in this case, are now facing the third election cycle in these unconstitutional districts that exist for only five elections. Plaintiffs filed this lawsuit within days of those plans becoming legally enforceable. They are entitled to a determination that their rights have been violated, and a prompt, definite order that calls for non-discriminatory, more race-neutral, and geographically compact districts to be implemented in time for the 2016 elections. Redistricting maps, with a shelf life of only ten years, make this a case where justice delayed is indeed justice denied. Petitioners respectfully request this Court move swiftly to grant this petition, reverse the decision of the North Carolina Supreme Court, and remand to the trial court for implementation of a remedial redistricting plan.

Respectfully submitted,

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