No. 17A790

In the Supreme Court of the United States

STATE OF NORTH CAROLINA, et al.,
Applicants,

v.

SANDRA LITTLE COVINGTON, et al.,
Respondents.

MOTION FOR LEAVE TO FILE AMICUS BRIEF, MOTION FOR LEAVE TO FILE BRIEF ON 8 ½ BY 11 INCH PAPER, AMICUS BRIEF FOR AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF EMERGENCY APPLICATION FOR STAY

To the Honorable John G. Roberts, Jr.
Chief Justice of the United States and
Circuit Justice for the Fourth Circuit

Scott E. Gessler
Counsel of Record
Steven A. Klenda
KLENDA GESSLER & BLUE LLC
1624 Market St., Suite 202
Denver, CO 80202
(720) 432-5705
sgessler@klendagesslerblue.com
sklenda@klendagesslerblue.com

Attorneys for Amicus Curiae
The American Civil Rights Union

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

No. 17A790

In the Supreme Court of the United States

STATE OF NORTH CAROLINA, et al.,
Applicants,

v.

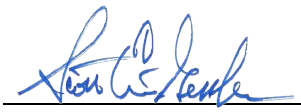
SANDRA LITTLE COVINGTON, et al.,
Respondents.

MOTION OF THE AMERICAN CIVIL RIGHTS UNION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR STAY

The American Civil Rights Union (the "ACRU") moves the Court for leave to file the accompanying amicus brief in support of North Carolina's Emergency Application for Stay.

ACRU submits that this Amicus Brief will assist the Court by discussing (1) the unique remedy imposed by the district court for racial gerrymandering, (2) the final result that imposed a racial quota already rejected by this Court, and (3) the erosion of the federal judiciary's credibility when federal courts embrace the role of redistricting mapmaker. Because the District Court's tests are novel and highly suspect, this court should stay the decision until those standards can be properly reviewed.

Respectfully moved and submitted on this 2nd day of February, 2018.



Scott E. Gessler
Counsel of Record
Steven A. Klenda
KLENDA GESSLER & BLUE LLC
1624 Market St., Suite 202
Denver, CO 80202
(720) 432-5705
sgessler@klendagesslerblue.com
sklenda@klendagesslerblue.com

Attorneys for Amicus Curiae
The American Civil Rights Union

No. 17A790

In the Supreme Court of the United States

STATE OF NORTH CAROLINA, et al.,
Applicants,

v.

SANDRA LITTLE COVINGTON, et al.,
Respondents.

MOTION OF THE AMERICAN CIVIL RIGHTS UNION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR STAY ON 81/2 X 11 PAPER

The American Civil Rights Union (the "ACRU") moves the Court for leave to file their amicus brief in support of North Carolina's Emergency Application for Stay on 8 ½ by 11-inch paper. The extremely compressed time frame in which the ACRU had to draft and file its brief prevented the ACRU from having it finalized in sufficient time to allow it to be printed and filed in booklet form. North Carolina filed its Emergency Application for Stay on January 24, 2018, only nine days before ACRU seeks to file its amicus brief. Requiring ACRU to file its brief in booklet form will prevent the ACRU from being heard in this matter.

Respectfully moved and submitted on this 2nd day of February 2018,

Scott E. Gessler
Counsel of Record
Steven A. Klenda
KLENDA GESSLER & BLUE LLC
1624 Market St., Suite 202
Denver, CO 80202
(720) 432-5705
sgessler@klendagesslerblue.com
sklenda@klendagesslerblue.com

Attorneys for Amicus Curiae
The American Civil Rights Union

No. 17A790

In the Supreme Court of the United States

STATE OF NORTH CAROLINA, et al.,
Applicants,

v.

SANDRA LITTLE COVINGTON, et al.,
Respondents.

AMICUS BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR STAY FOR THE AMERICAN CIVIL RIGHTS UNION

INTEREST OF AMICUS CURIAE

Amicus Curiae American Civil Rights Union (ACRU) is a non-partisan 501(c)(3) tax-exempt organization dedicated to protecting the civil rights of all Americans by publicly advancing a Constitutional understanding of our essential rights and freedoms. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed amicus curiae briefs on various constitutional and election issues in cases nationwide, including redistricting cases.

The ACRU's Policy Board sets the ACRU's priorities. The Board's members include some of the nation's most distinguished statesmen and practitioners on matters of election law. The Board's members are former U.S. Attorney General Edwin Meese III; former Assistant Attorney General for Civil Rights William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel Charles J. Cooper, John M. Olin Distinguished Professor of Economics at George Mason University; Walter E. Williams, former Ambassador to Costa Rica; Curtin Winsor, Jr.; former Ohio Secretary of State J. Kenneth Blackwell; former Voting Rights Section attorney, U.S. Department of Justice, J. Christian Adams; former Counsel to the Assistant Attorney General for Civil Rights and former member of the Federal Election Commission Hans von Spakovsky; Chris Coates is a member of the Policy Board as is Doug Bandow, former Special Assistant for Policy Development in the Reagan Administration.[1]

ARGUMENT

North Carolina clearly punches above its weight when it comes to setting redistricting precedent. Without repeating portions of the procedural history contained in the *Application for Emergency Stay*, this amicus brief focuses on (1) the novel standard that the district court adopted to assess a remedial map for racial gerrymandering, (2) the district court's de facto imposition of a racial quota that this Court has previously rejected, and (3) the erosion of the federal judiciary's credibility when federal courts too eagerly displaces legislatures as a mapmaker.

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae made a monetary contribution to its preparation or submission.

I. THE DISTRICT COURT IMPROPERLY ADOPTED A VOTE-DILUTION REMEDY TO REMEDY A RACIAL GERRYMANDER WITHOUT A SPECIFIC FINDING THAT RACIAL CRITERIA DOMINATED NORTH CAROLINA'S MAP.

Even though it imposed a map to remedy racial gerrymandering, the district court imported its "complete remedy" standard and map-drawing criteria from vote-dilution cases under the Voting Rights Act, *not* racial gerrymandering cases. To justify this approach, the District Court first distinguished the "remedial context" in which it evaluated the General Assembly's remedial map, compared to a non-remedial, clean-slate evaluation. It then posited that a remedial map must "completely remedy" the effects of a racially-tainted map. Mem. Opinion and Order, 35-36, 40 n. 4, and 41.

The District Court imported its "complete remedy" standard from section two vote-dilution cases under the Voting Rights Act. *Id.* at 23 (citing *Williams v. City of Texarkana, Ark.*, 32 F.3d 1265, 1268 (8th Cir. 1994); *Ketchum v. Byrne*, 740 F.2d 1398, 1411–12 (7th Cir. 1984); and *United States v. Osceola Cty., Fla.*, 474 F. Supp. 2d 1254, 1258 (M.D. Fla. 2006). It further supported this standard with long-ago cases involving egregious, intentional discrimination. *Id.* at 22 (*citing Louisiana v. United States*, 380 U.S. 145, 154 (1965) and *Lane v. Wilson*, 307 U.S. 268, 269-71 (1939)) and 41-42 (*citing Lane* and *Guinn v. United States*, 238 U.S. 347, 367 (1915)). And it cited one racial gerrymandering case that did *not* challenge a remedial plan on grounds that it failed to correct a racial gerrymander. *Id.* at 23 (citing *Harris v. McCrory*, No. 1:13-cv-949, 2016 WL 3129213, at *2 (M.D.N.C. June 2, 2016) (rejecting plaintiffs' "remarkably vague" first objection and non-justiciable

partisan gerrymander objection).

But these cases are wholly inapplicable, because vote dilution and egregious, race-based discrimination differ from "racial gerrymandering." It is possible to "completely remedy" vote-dilution or egregious, intentional discrimination because those violations stem from directly observable, objective criteria that a remedy can verifiably change. For example, Black Voting Age Population is an objective percentage calculated with basic math; invidiously discriminatory schemes are apparent from statutory text. Simply changing a BVAP that violates the constitution logically eliminates that violation. Similarly, voiding a racially discriminatory statute observably (and swiftly) eliminates constitutionally offensive text.

Racial gerrymandering differs. "'[T]the constitutional violation' in racial gerrymandering cases stems from the 'racial purpose of state action, not its stark manifestation.'" *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S.Ct. 788, (2017), quoting *Miller v. Johnson*, 515 U.S. 900, 916, (1995). Thus, the "complete remedy" for a racial gerrymandering case is not to tweak any derivative effects, but to avoid a process in which voters are predominantly classified by race in the first place.

The District Court's opinion shows that trying to remedy the derivative effects of racially gerrymandering entangles courts in a task that is both impossible and politically charged. To completely remedy the effects of predominately racial redistricting criteria, rather than the process that led to these effects, a court must

ensure that new criteria in a remedial mapmaking process are not predominately racial. Doing this might require, for example, prohibiting the use of partisan affiliation, which is closely correlated with race, or barring the use of other traditional, non-racial redistricting criteria that are a rough proxy for race.

Either of these options, though, would requires a court to make careful factual findings, not import a "completely remedy" standard from the Voting Rights Act. Barring the use of traditional redistricting criteria prevents the co-equal branch of government best suited to redistrict—legislatures—from using the most basic considerations required to perform an inherently political task. Accordingly, a court cannot simply assume that race pervades a facially race-neutral redistricting process. Establishing that a legislature was predominately motivated by race should be difficult, rather than easy, and require proof, rather than assumptions, however well intended. Racial predominance "concerns the *actual considerations* that provided the essential basis for the lines drawn, not *post hoc* justifications the legislature in theory could have used but in reality did not." *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S.Ct. 788, 799 (2017) (emphasis added).

For strict scrutiny to apply in a racial gerrymandering case, a court must carefully find—rather than assume—that a map-maker used otherwise race-neutral factors as a proxy for race, and that race was a predominant factor in drawing the map. Absent such findings, courts give legislature the benefit of the doubt, even in a remedial context, because "[a] purpose to discriminate on the basis of race receives the strictest scrutiny under the Equal Protection Clause, while a similar purpose to

discriminate on the basis of politics does not." *Veith v. Jubelirer*, 541 U.S. 267, 293 (2004). Thus, the district court erred by presuming that race predominated over other factors in North Carolina's remedial map without making a factual finding that race actually predominated.

II. WHAT'S OLD IS NEW AGAIN; THE DISTRICT COURT IMPOSED A RACIAL QUOTA THAT HAS BEEN REJECTED BY THIS COURT.

Following this Court's one-person, one-vote jurisprudence of the 1960s, North Carolina amended its constitution to create a drawing formula for redistricting. *Stephenson v. Bartlett*, 562 S.E.2d 377, 387 (NC 2002). This formula, which removed most of the discretionary political decisions from the legislature, required that: (1) each senator and representative represent an equal number of inhabitants; (2) each district must be contiguous; (3) no county could be split to create a district; and (4) districts must remain as drawn until the next census. *Id.* at 384.

Through a series of cases from 1971 to 2002, North Carolina's Supreme Court attempted to harmonize a version of North Carolina's constitution-drawing formula with the Voting Rights Act. *Id.* at 387-88. It finally succeeded, and in 2004, North Carolina's redistricting formula finally went into effect. This greatly limited legislative discretion.

Regardless of this formula, North Carolina remained subject to Section 2 of the Voting Rights Act. In 2003, the North Carolina General Assembly passed its third redistricting map after the North Carolina Supreme Court struck down its first two maps. *Pender Cty. v. Bartlett*, 649 S.E.2d 364, 366 (N.C. 2007), *aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1 (2009). To comply with Section 2, the

General Assembly drew District 18 to create an "effective black voting district." *Id.* Relying on past election results that showed that an African-American voting age population percentage of 38.37% would "create[] an opportunity to elect African-American candidates," the General Assembly created District 18 with a 42.89% African-American population and a 39.36% African-American voting age population. *Id.* at 506-07.

But District 18 split Pender County, which sued. It asserted that Section 2 of the Voting Rights Act could not justify the 42% African-American district because the Voting Rights Act requires any remedial district to have a minority population greater than 50%. And unless the Voting Rights Act required Pender County to be split, District 18 violated the North Carolina Constitutional requirement that districts should not split counties. The North Carolina Supreme Court agreed. It held that to satisfy the remedial requirements of Section 2 of the Voting Rights Act, District 18 required a majority of voting age African-Americans. *Id.* District 18 did not meet this requirement. *Id.*

This Court affirmed the North Carolina Supreme Court's holding that Section 2 requires majority-minority districts, i.e., the African-American voting age population must be more than 50% of the total voting age adults in a remedial district. *Bartlett v. Strickland*, 556 U.S. 1, 20 (2009).[2] Thus, a state may not draw a 42% African-American district to remedy vote dilution under the Voting Rights Act. *Bartlett* at 20.

The plaintiffs in this case seek to avoid the natural consequences of *Bartlett*—

[2] Applying the first requirement set forth in *Thornburg v. Gingles*, 478 U.S. 30, 48-52 (1986).

that if North Carolina uses racial criteria as a remedy, it must draw African-American districts that have more than 50% African-American voters.

For the post-2010 redistricting process, the General Assembly first drew remedial Voting Rights Act districts, then strictly applied North Carolina's drawing formula. Because a Voting Rights Act district requires the existence of racially-polarized voting in sufficiently compact minority communities that allows a white majority to defeat a minority candidate, *Thornburg v. Gingles*, 478 U.S. 30, 48-49 (1986), the General Assembly sought public regarding input regarding polarized voting and compact minority communities.

In response, the plaintiffs below argued that polarized voting did *not* exist in North Carolina, and, therefore, the General Assembly had no authority to create majority-minority districts. The district court found that the General Assembly:

> failed to demonstrate that, for any challenged district, they had a strong basis in evidence for the third Gingles factor—racial bloc voting that, absent some remedy, would enable the majority usually to defeat the minority group's candidate of choice.

Covington v. North Carolina, 316 F.R.D. 117, 167 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211, 198 L. Ed. 2d 655 (U.S. 2017) *citing Gingles*, 478 U.S. at 51, 106 S.Ct. 2752. In other words, the district court held that, although in 2007 there *was* racial polarized voting, in 2016, there *wasn't*. This Court upheld that determination. *Covington*, 137 S.Ct. 2211, 198 L.Ed. 2d 655.

So, the General Assembly went back to the drawing board. It again strictly applied North Carolina's drawing formula. The new map, however, was dramatically different, because the General Assembly could not draw remedial

Voting Rights Act districts. Indeed, the General Assembly removed *all* racial data from its map-drawing system, because racial data was no longer required by the Voting Rights Act. It relied only on population, political data, and incumbent residency.

While North Carolina's drawing criteria eliminate most political discretion from the map-drawing process, the General Assembly did exercise political discretion in limited areas. It did this in order to (1) allow incumbents of both parties to maintain relationships with existing constituencies, (2) ensure appropriate political representation for various communities of interest, and (3) allow continued majority party representation in very specific and limited county groupings. *See Covington v. North Carolina*, No. 1:15CV399, 2018 WL 505109.

Once again, a court has struck down North Carolina's redistricting map. But despite this Court's rejection of minority-minority districts last decade, the District Court has now re-imposed districts with a minority of African-American voting age population. Furthermore, it has done this by relying on cases that remedy vote dilution under the Voting Rights Act! Whereas the Pender County case invalidated one district, the district court has now drawn four districts with less than 50% African-American voting age population. The court drew Senate Districts 21 and 28, and House Districts 21 and 57, with less than a majority of African-American voting age populations, giving them Black Voting Age Population (BVAP) percentages ranging from 38 percent to 44 percent. *Covington* at *31. These numbers are very close to the 38% BVAP district rejected by this Court last decade.

In short, following a series of suspect factual and legal rulings, the district court has re-imposed nearly the exact same racial quota that this Court rejected as a remedy under the Voting Rights Act.

III. THIS CASE DRAMATICALLY ERODES JUDICIAL CREDIBILITY IN REDISTRICTING.

This Court has properly expressed concerns that courts are ill-suited for the political give and take of district mapmaking. *Miller*, 515 U.S. at 915; *see also, e.g., Id.* at 934-35 (Ginsburg, J., dissenting) ("federalism and the slim judicial competence to draw district lines weigh heavily against judicial intervention in apportionment decisions"). Already, national commentators have ridiculed the Middle District of North Carolina's congressional redistricting decision, stating that "[a] liberal three-judge panel also trolled the Justices by striking down North Carolina's Congressional map this month." Wall Street Journal, "The Wisconsin Gerrymander Lesson" January 18, 2018, available at https://www.wsj.com/articles/the-wisconsin-gerrymander-lesson-1516319651?mod=searchresults&page=1&pos=11.

The district court further undermined judicial credibility by imposing a last-minute legislative map on North Carolina, using a series of highly novel factual findings and legal theories:

First, the district court placed the General Assembly in a heads-I-win-tails-you-lose situation with respect to race. When North Carolina used racial data to create districts that sought to comply with the Voting Rights Act, the court struck that map down, reasoning that the Voting Rights Act did not apply. *Covington v.*

North Carolina, 316 F.R.D. 117, 167 (M.D.N.C. 2017). When the North Carolina General Assembly removed all racial data, the District Court again struck down North Carolina's map, reasoning that it perpetuated a racial gerrymander from the earlier map. *Covington*, No. 1:15CV399, 2018 WL 505109, at *20-25 (M.D. North Carolina, 2018). North Carolina used racial data, and the court struck down its map. North Carolina removed racial data, and the court struck down its map.

Second, the district court employed a novel "complete remedy" theory, to find a violation of a map drawn without racial considerations. *See, Id.*, at *18 – 19.

Third, the district court refused to defer to the General Assembly's map or consider that it might be constitutional. *Id.* at *16.

Fourth, the district court issued a wholly new interpretation of North Carolina state law to prohibit the General Assembly from engaging in "mid decade" redistricting. *Id.* at *25-27. Rather than presume the General Assembly's actions met the North Carolina constitution, it instead held them unconstitutional.

Fifth, the district court refused to allow the General Assembly an opportunity to draw a new map that remedied the perceived violations. *Id.* at *29.

Sixth, after taking months to consider the case and allowing a special master to draw a map, the district court issued its decision on January 21, 2018, giving the General Assembly no opportunity to fully appeal its decision.

Seventh, the district court imposed racial quotas that had been specifically rejected by this Court as a Voting Rights Act remedy last decade. *See* Section II, *supra*.

In short, the district court has now taken over primary responsibility from the General Assembly for redistricting. It has fully plunged into the political thicket.

It is no secret that the nation has seen a sudden surge in redistricting decisions just before the 2018 elections. These court contests are highly partisan affairs, pitting political parties and political coalitions against one another, and placing federal district courts in the middle of some of the most contentious political battles in the nation. Some courts – such as the Middle District of North Carolina – have embraced this role, plunging into the business of mapmaking. The danger of courts being viewed as solely political is particularly pronounced when a court develops maps involving racial line-drawing. "There is a final, often-unstated danger where race and politics correlate: that the federal courts will be transformed into weapons of political warfare. Unless courts 'exercise extraordinary caution' in distinguishing race-based redistricting from politics-based redistricting, they will invite the losers in the redistricting process to seek to obtain in court what they could not achieve in the political arena." *Cooper v. Harris*, 137 S.Ct. 1455, 1490 (2017).

Because federal district court decisions are appealed directly to this Court, this Court faces a stream of appeals and applications for stay. To some extent, this Court has become a political referee in these battles.

The way to ensure the federal judiciary's nonpartisan reputation is straightforward. Federal courts should not embrace the map-making role, and

instead limit themselves to consistent, well-established standards. This will avoid accusations of "trolling" and partisanship. Accordingly, this Court should stay the matter and review the district court's decision to ensure it relied on well-established standards.

Respectfully submitted this 2nd day of February, 2018.

Scott E. Gessler
Counsel of Record
Steven A. Klenda
KLENDA GESSLER & BLUE LLC
1624 Market St., Suite 202
Denver, CO 80202
(720) 432-5705
sgessler@klendagesslerblue.com
sklenda@klendagesslerblue.com

Attorneys for Amicus Curiae
The American Civil Rights Union