No. 16-166

IN THE

Supreme Court of the United States

DAVID HARRIS & CHRISTINE BOWSER,
Appellants,

v.

PATRICK MCCRORY, Governor of North Carolina, NORTH CAROLINA STATE BOARD OF ELECTIONS, AND A. GRANT WHITNEY, JR., Chairman of the North Carolina Board of Elections,
Appellees.

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

BRIEF OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM

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INTRODUCTION

Appellees' Motion to Dismiss or Affirm is a masterwork in avoidance. In drawing the original unconstitutional plan, the General Assembly packed African-American (Democratic-leaning) voters into a handful of districts to whitewash the surrounding districts, resulting in extreme advantage for the Republican Party. When the three-judge district court (the "Panel") rejected that effort as an unconstitutional racial gerrymander, the General Assembly was undeterred. The plan's architects explicitly constructed the "remedial" plan (the "New Plan") to achieve the same result—election of 10 Republicans and 3 Democrats. The plan's architects freely acknowledged that result was a "political gerrymander."

Unable to justify these undisputed facts, Appellees ignore them, premising their Motion on statements made by legislators who did not draw the New Plan and data the mapdrawer did not utilize. Appellees' efforts at distraction fall flat. A state has no legitimate—let alone compelling—interest in advantaging one political party's electoral chances at the expense of another's. A plan openly drawn to achieve maximum "partisan advantage" violates the First and Fourteenth Amendments. The Court should summarily reverse the opinion below or, at a minimum, note probable jurisdiction.

A. The New Plan Is A Partisan Gerrymander

1. The Plan Architects Confirmed That They Drew a Political Gerrymander

Appellees claim that the New Plan is "not a 'gerrymander' at all," chiding Appellants for supposedly premising their claim on a single "statement by one of the districting chairs quoted out of context." Mot. 21.

It is unclear what "statement" Appellees refer to, because they could not bring themselves to include it in their Motion. Nor do Appellants explain the "context" from which this statement was taken.

Appellants are happy to supply that "context." Among other things, the plan architects stated:

> As we are allowed to consider political data in the drawing of the maps, I would propose that – to the extent possible, the map drawers create a map which is perhaps likely to elect ten Republicans and three Democrats. I acknowledge freely that this would be a political gerrymander, which is not against the law.

Dkt. 155 at 103 (Tr. 46:8-14) (Lewis).

> [W]e . . . are going to use political data in drawing this map. It is to gain partisan advantage on the map. I want that criteria to be clearly stated and understood. I have the utmost respect for those that do not agree with this particular balance. . . . I will say that during the public comment yesterday, more than one speaker referred to, Can't we just draw them where there's five this way or six that way? That is partisan gerrymandering. . . . I'm making clear that our intent . . . is to use the political data we have to our partisan advantage.

Id. at 106-07 (Tr. 51:16-52:5) (Lewis).

> [W]e are proposing that the maps that are drawn now under this criteria [Partisan Advantage]. . . . One of the goals in drawing the map will be to preserve the ten-

> three. . . . So this is saying that one of the goals will be to elect – to speak directly to your point, the goal is to elect ten Republicans and three Democrats.

Id. at 110-11 (Tr. 58:24-59:13) (Lewis).

> What we were doing is saying, okay, political gerrymandering is not illegal, despite what Senator Stein says, and CD 12 is a political gerrymandering that was approved by the Supreme Court. So there is nothing wrong with political gerrymandering. I won't accept that as being criticism.

Id. at 205 (Tr. 83:9-15) (Rucho).

> [T]he committee adopted criteria, one of which was to seek partisan advantage for the Republicans. Now, if you ask me personally if I think that's a good thing, I'll tell you I do. . . . I think electing Republicans is better than electing Democrats. So I drew this map in a way to help foster what I think is better for the country.

Id. at 161 (Tr. 43:10-19) (Lewis).

> I propose that we draw the maps to give a partisan advantage to ten Republicans and three Democrats because I do not believe it's possible to draw a map with 11 Republicans and two Democrats.

Id. at 105 (Tr. 48:9-14) (Lewis).

"Context" is indeed compelling but perhaps not in the way Appellees intend. After the Panel found that the enacted plan had used race as the predominant factor to draw certain districts, the plan architects baldly admitted that they had used race as a proxy to

advance their goal of partisan advantage, and that they drew the New Plan to ensure that the Panel's Order had no practical effect by locking in the partisan advantage achieved through the unconstitutional enacted plan:

> [W]e wanted to achieve the same goals that were available – or that were achieved on the previous map on this new map so that – and to clearly achieve – we had 13 – excuse me – 10-3, and we said 10-3 would be the appropriate way to go on this one too.

Id. at 205-06 (Tr. 83:16-84:7) (Rucho); *see also id.* at 207-08 (Tr. 85:25-86:3) ("[W]e did the . . . 10-3 because that was what the previous map said.").

The undisputed legislative record—and Appellees' desperate post-hoc litigation efforts to avoid it—speaks volumes. *See Page v. Virginia State Bd. of Elections*, No. 3:13cv678 2015 WL 3604029, at *10 (E.D. Va. June 5, 2015), *appeal dismissed sub nom. Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016) ("[W]e deem it appropriate to accept the explanation of the legislation's author as to its purpose.").

2. Appellees Cannot Explain Away the Architects' Admissions of Partisan Gerrymandering

Unable to justify the record, Appellees attempt to obfuscate it, devoting much of their Motion to a largely irrelevant and misleading recitation of the New Plan's legislative history. Mot. 7-16.

Appellees first seem to suggest that the New Plan cannot be a partisan gerrymander because the General Assembly "incorporated" feedback from the public to the extent possible. Mot. 8. But Appellees do not dispute that the General Assembly flatly ignored the

public feedback decrying partisan gerrymandering. J.S. 13 n.3. Indeed, the plan architects could scarcely have drawn the New Plan based on public feedback because it had largely *already been drawn*.[1]

Appellees next argue that Appellants "mischaracterize the criteria adopted by defendants to comply with the district court's order," because "partisan advantage" is just "one of seven criteria." Mot. 25. But the other criteria were expressly designed to give way to the overarching goal of "Partisan Advantage." *See* Dkt. 155 at 145 ("Voting districts ('VTDs') should be split only when necessary to comply with the zero deviation population requirements set forth above in order to ensure the integrity of political data."); *id.* at 146 ("Division of counties shall only be made for reasons of equalizing population, consideration of incumbency and political impact.").

Indeed, Appellees' contention that any Republican advantage is a "natural" result of preserving whole counties, Mot. 17, 26, ignores that county splits were permitted in service of partisan advantage. The New Plan's architect admitted, for instance, that "political concerns" necessitated a county split in CD 1. Dkt. 155 at 153; *see also id.* at 114 (Tr. 78:13-19) (discussing county splits: "[I]t would be dishonest of me to say that political impact can't be considered."). And given the utter disregard for the boundaries of major (Democrat- and African-American-heavy) cities, it is unsurprising that the plan architects rejected a proposed criterion that would have avoided those splits. *Id.* at 133-36.

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[1] Senator Rucho and Representative Lewis initially refused to answer whether the New Plan had been drawn in advance of the public hearings and adoption of criteria. Dkt. 155 at 167-68 (Tr. 57:23-58:2). Eventually, they admitted that the core of it had. *Id.* at 222-23 (Tr. 24:14-25:24).

Indeed, if it were "natural" for Republicans to win 10 congressional races notwithstanding the near-even share of votes cast in elections under the prior plan (Dkt. 157 at 15-16), there would be no need for criteria ensuring a 10-3 split.

Next, Appellees contend that the General Assembly "did not maximize the number of Republicans candidates that might be elected." Mot. 25. This would surprise Representative Lewis, who engineered the New Plan to achieve a 10-3 Republican advantage "because [he] d[id] not believe it's possible to draw a map with 11 Republicans and two Democrats." Dkt. 155 at 105.

Appellees also argue that the New Plan is not a political gerrymander because Senator Berger said so. Mot. 15-16.[2] But the record does not reflect that Senator Berger drew the map, directed the mapdrawer, or developed the governing criteria. The man who *did* "acknowledge[d] freely" that the New Plan *was* a "political gerrymander." Dkt. 155 at 103 (Tr. 46:8-14). Indeed, Appellees' lengthy recitation of various legislators' statements, *see* Mot. 7-16, implicitly concedes that statements of legislative intent are relevant to a partisan gerrymandering claim. Appellees simply prefer to rely on the statements of outsiders to the redistricting process because the plan architects' statements are so damning.

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[2] Senator Berger opined that the New Plan is not a gerrymander because it does not have "a bunch of squiggly lines and look[] like a salamander" and it is a map's "visual aspect" that is "the problem." Dkt. 159-15 at 28 (Tr. 108:6-25). And while Senator Berger "noted his view that a congressional plan with 11 Republican-leaning districts could be drawn," Mot. 15 n.6, he provided no evidence to that effect.

Appellees' discussion of registration data is similarly irrelevant. The General Assembly *did not* consider registration data when drawing the New Plan. Dkt. 155 at 145 ("The only data other than population data to be used to construct congressional districts shall be election results in [certain] statewide contests").[3] Reading Appellees' motion, one might conclude the New Plan is nothing short of a Democratic gerrymander. *See* Mot. 17 ("Democrats enjoy a registration advantage in 12 of 13 districts."). But the objective of the New Plan was to elect ten Republicans—not 12 Democrats—and data released alongside the New Plan show that the mapdrawers accomplished their avowedly partisan goal. *See* Dkt. 163 at 16 (citing N.C.G.A. 2016 Stat Packs and N.C.G.A. 2016 Report) (ten out of 13 districts drawn as majority-Republican, as measured by the percentage of two-party votes cast in 2004-2010 elections).

In short, registration data simply show how skilled the General Assembly is at gerrymandering, as does the fact that Democratic candidates can win statewide elections but Republicans control 10 of 13 congressional seats. In drawing the unconstitutional enacted plan, the General Assembly packed African-American, largely Democratic voters into CDs 1 and 12. In drawing the New Plan, it moved thousands of African-

[3] Indeed, Representative Lewis "believe[s] that election results/election outcome are much better predictors of how the people actually vote than partisan registration is," Dkt. 155 at 160 (39:1-4), and Appellees vigorously oppose the use of registration figures as predictors of electoral outcomes, *see* Brief for Appellants at 38, *McCrory v. Harris*, No. 15-1262 (U.S. Sept. 12, 2016), undermining their reliance on registration data to justify the New Plan.

American voters *out* of those districts, and yet submerged their influence across the state. This is the power of modern redistricting software: It allows "gerrymandering on steroids," J.S. App. 59a (Cogburn, J., concurring), with districts carefully constructed to maintain the precise partisan composition necessary to maximize electoral success.

B. The Conceded Partisan Gerrymander Is Unconstitutional

Consistent with the plan architects' misguided belief that political gerrymandering is perfectly lawful, Appellees scarcely bother to offer a legal defense of the map. They instead seek sanctuary in the fact that the Court has not yet adopted a single standard to guide resolution of all partisan gerrymandering claims. *See* Mot. 21.

Appellees do not even address Appellants' argument that the New Plan fails under the First Amendment. *See* J.S. 30-32. The Court recently noted the viability of this theory, *Shapiro v. McManus*, 577 U.S. __, 136 S. Ct. 450, 456 (2015), which the lower courts are implementing, *Shapiro v. McManus*, No. 1:13-CV-03233-JKB, 2016 WL 4445320 (D. Md. Aug. 24, 2016) (finding partisan gerrymandering claim justiciable, and articulating elements of intent, injury, and causation). Here, in pursuit of "partisan advantage," and in violation of the First Amendment, the General Assembly targeted Democratic voters using "political data" (i.e., voting history) to burden their right to cast their votes effectively.

Nor do Appellees offer any meaningful Fourteenth Amendment defense. The New Plan's explicit, overarching purpose to advantage Republicans and disadvantage Democrats constitutes a denial of equal

protection in the most basic sense. *See Vieth v. Jubelirer*, 541 U.S. 267 (2004) (Kennedy, J., concurring); *see also United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) ("The Constitution's guarantee of equality must at the very least mean that a bare [legislative] desire to harm a politically unpopular group cannot justify disparate treatment of that group.") (citation and quotation marks omitted).

Rather than reasoned legal argument, Appellees offer a schoolyard rejoinder: "They started it." *See* Mot. 21-25. To that end, Appellees point to *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C. 1992), arguing that if the 1992 plan was not a partisan gerrymander, nothing, not even the 2016 plan, is. But the record in *Pope* is nowhere near as stark as it is here. While the 1992 plan was motivated by incumbency protection, *Bush v. Vera*, 517 U.S. 952, 964 (1996) ("incumbency protection" may be a legitimate state interest in redistricting), the New Plan was expressly motivated by a separate "Partisan Advantage" criterion. Moreover, at the time of the alleged Democratic gerrymander in *Pope*, "[r]egistered Democrats outnumber[ed] registered Republicans by a two-to-one ratio." 809 F. Supp. at 394, 397.[4] Regardless, *Pope* was premised on the *Davis v. Bandemer* standard that this Court has since rejected. *Veith*, 541 U.S. 267. Resolution of one redistricting case 24 years ago hardly means that no political gerrymandering claim could ever arise out of North Carolina.

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[4] The alleged gerrymander resulted in election of eight Democrats and four Republicans, mirroring the parties' relative share of registered voters. Federal Elections 1992, Federal Elections Commission 82-83 (June 1993), *available at* http://www.fec.gov/pubrec/fe1992/federalelections92.pdf.

Moreover, Appellees' selective reliance upon North Carolina history ignores the current General Assembly's brazen use of every available lever of power to entrench the Republican majority. The General Assembly drew local jurisdictions using the same nakedly partisan approach. *See Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, No. 16-1270, 2016 WL 3568147, at *9 (4th Cir. July 1, 2016) (redistricting reflected General Assembly's "attempt to guarant[ee] Republican victory through the intentional packing of Democratic districts"). It has sought not just to draw maps creating a favorable battleground, but to win the game before it is played by preventing its political opponents from voting. *See N.C. State Conference of NAACP v. McCrory*, No. 16-1468, 2016 WL 4053033, at *17 (4th Cir. July 29, 2016) (record "unmistakably reveal[s] that the General Assembly used [a bill imposing burdens on African Americans' right to vote] to entrench itself" in power).

Contrary to Appellees' belief that to the victor go the spoils, partisan gerrymandering is a "problem" of constitutional proportions. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015). The General Assembly's bald and unbridled partisan animus is plainly unconstitutional. *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring) (partisan gerrymander exists where political classifications "were applied in an invidious manner or in a way unrelated to any legitimate legislative objective").

C. Courts Have Authority to Review the Constitutionality of Remedial Redistricting Plans

Finally, the Court plainly has the authority to review the constitutionality of the "remedial" plan.

After striking down CDs 1 and 12, the Panel enjoined the State from conducting congressional elections "until a new redistricting plan is in place." Dkt. 143 at 1. It gave the General Assembly "the first opportunity to create a new *constitutional* redistricting plan." J.S. App. at 56a (emphasis added).

Citing *Upham v. Seamon*, 456 U.S. 37 (1982), Appellees contend that "the authority of the district court was limited to determining whether the 2016 Congressional Plan remedied the specific violations determined by its judgment." Mot. 20-21. Appellees thus assert that the Panel had no authority to do anything other than assess whether CDs 1 and 12, as redrawn, constituted unlawful racial gerrymanders.

But *Upham* held only that when a court undertakes the task of drawing a remedial plan *itself*, it should not "intrude upon state policy any more than necessary" by redrawing districts unaffected by the constitutional violation. *Id.* at 42 (citation omitted). That is, "in the *absence* of a finding that [a] reapportionment plan offended either the Constitution or the Voting Rights Act," a court should not disregard a legislature's legitimate policy choices. *Id.* at 43 (emphasis added). Nothing in *Upham* bars a court from reviewing a legislature's remedial plan to determine *whether* it is lawful. *Id.* (remedial plans are necessarily limited by the "substantive constitutional and statutory standards to which such state plans are subject"). In other words, while a court must not overreach when fashioning its own remedy, it must determine whether the legislative remedy enacted at its behest is a lawful substitute for the original unconstitutional plan. *See Wilson v. Jones*, 130 F. Supp. 2d 1315, 1322 (S.D. Ala. 2000), *aff'd sub nom*. *Wilson v. Minor*, 220 F.3d 1297 (11th Cir. 2000) ("When . . . the districting plan is

offered as a replacement for one invalidated by the court . . . , the court has an independent duty to assess its constitutionality[.]").

According to Appellees, the General Assembly could, for instance, racially gerrymander CD 4, grossly malapportion population in CDs 2 through 11, and openly declare an intent to discriminate against minorities statewide—and the Panel would have no choice but to sign off on these blatant constitutional violations. That is not the law and it never has been. Appellees' position would invite state legislatures to adopt patently unlawful remedial plans with confidence that they are inoculated from judicial review for at least another election cycle.

CONCLUSION

Appellants respectfully request that this Court summarily reverse the opinion below or, at a minimum, note probable jurisdiction.

Respectfully submitted,

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