No. 16-24

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

REPLY BRIEF OF PETITIONERS

Edwin M. Speas, Jr.
John W. O'Hale
Caroline P. Mackie
POYNER SPRUILL LLP
Post Office Box 1801
Raleigh, North Carolina 27602
(919) 783-6400
espeas@poynerspruill.com
johale@poynerspruill.com
cmackie@poynerspruill.com

Counsel for Petitioners Dickson, et al.

Anita S. Earls
Counsel of Record
Allison J. Riggs
SOUTHERN COALITION FOR SOCIAL JUSTICE
1415 Highway 54, Suite 101
Durham, North Carolina 27707
(919) 794-4198
anita@scsj.org
allison@scsj.org

Counsel for Petitioners NAACP, et al.

Dated: August 18, 2016

(Counsel Continued Inside Cover)

THE LEX GROUP[DC] ♦ 1825 K Street, N.W. ♦ Suite 103 ♦ Washington, D.C. 20006
(202) 955-0001 ♦ (800) 856-4419 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

Adam Stein
TIN FULTON WALKER & OWEN, PLLC
312 West Franklin Street
Chapel Hill, North Carolina 27516
(919) 240-7089
astein@tinfulton.com

Counsel for Petitioners
NAACP, et al.

THE LEX GROUP[DC] ♦ 1825 K Street, N.W. ♦ Suite 103 ♦ Washington, D.C. 20006
(202) 955-0001 ♦ (800) 856-4419 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISION

OTHER AUTHORITY

Respondents seek to uphold decisions by the North Carolina Supreme Court that would permit, and even at times demand, electoral districts that segregate voters by race, even where voters have made substantial progress in building cross-racial coalitions. 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. ___, 135 S. Ct. 1257, 1275 (2015), this Court should grant certiorari in order to correct North Carolina's legal errors, to ensure that in the future race is used only narrowly to ensure Voting Rights Act compliance, and to remedy the harm inflicted on all North Carolinians by Respondents' actions.

I. THIS PETITION SHOULD BE GRANTED TO RESOLVE AN IRRECONCILABLE CONFLICT BETWEEN THE NORTH CAROLINA AND FEDERAL COURTS' INTERPRETATION OF THE VOTING RIGHTS ACT AND FOURTEENTH AMENDMENT AFFECTING REDISTRICTING

In their Brief in Opposition, filed on August 4, 2011, Respondents urged the Court to deny review in this case because the 2015 decision by the North Carolina Supreme Court is consistent with decisions of this Court. They asserted that the race-based congressional and legislative districts challenged here are the valid product of a decision by the North Carolina General Assembly in 2011 to take

advantage of an option made available to it when Congress reauthorized Section 5 of the Voting Rights Act in 2006, and when this Court decided *Bartlett v. Strickland*, 556 U.S. 1 (2009). Resp'ts' Br. in Opp. 2-9. In any event, Respondents asserted that their quest for proportionality for African-American citizens in seats in the legislature was authorized by this Court's decision in *Johnson v. DeGrandy*, 512 U.S. 997 (1994). Br. in Opp. 19-20.

A week after Respondents filed their Brief in Opposition, a three-judge federal court in North Carolina issued an opinion in *Covington v. North Carolina* unanimously rejecting North Carolina's flawed interpretations of the Voting Rights Act and the Fourteenth Amendment and declaring unconstitutional largely the same legislative districts upheld by the North Carolina Supreme Court in this case. No. 1:15-cv-399, 2016 U.S. Dist. LEXIS 106162 (M.D.N.C. Aug. 11, 2016) (striking down the state senate and state house districts challenged in this case as racial gerrymanders). Based on essentially the same evidence as was before the state courts, the federal court found that the plaintiffs had proved that race was the predominant factor motivating the drawing of all the challenged districts because "the overriding priority of the redistricting plan was to draw a predetermined race-based number of districts, each defined by race." *Id.*, at *41. Applying strict scrutiny, the district court concluded that those race-based legislative districts were not narrowly tailored to comply with Section 2 of the Voting Rights Act because "no analysis was conducted" to determine whether the challenged districts were "reasonably

necessary to cure a potential section 2 violation." *Id.*, at *158-*159. That is, the *Covington* court concluded that no "challenged district was drawn with a strong basis in evidence that the 'majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.*, at *4. With respect to Respondents' attempt to use *DeGrandy* to justify their quest for racial proportionality in districts, the federal court simply and correctly held: "This was not a proper interpretation of the law." *Id.*, at *33.

The federal court's analysis and conclusion in *Covington* that North Carolina's 2011 legislative districts are unconstitutional tracks the federal court's analysis and conclusion in *Harris v. McCrory* that two of North Carolina's 2011 congressional districts are also unconstitutional. No. 1:13-cv-949, 2016 U.S. Dist. LEXIS 14581 (M.D.N.C. Feb. 5, 2016) (striking down the two congressional districts challenged as racial gerrymanders in this case). This Court has already accepted *Harris* for full briefing and oral argument, and Respondents fail to meaningfully address why it was appropriate for the Court to note probable jurisdiction in that case and yet not grant certiorari in this case. In fact, in North Carolina's jurisdictional statement in *Harris*, Respondents urged the irreconcilable conflict between the federal court's decision in *Harris* with regard to congressional districts and the North Carolina Supreme Court's decision in this case with regard to those same congressional districts as grounds for this Court to intervene. *McCrory v. Harris*, No. 15-1262, Jurisdictional Statement at ii-iii (U.S. Apr. 8, 2016) (asking the Court to note

probable jurisdiction because of "the split between the [District Court] and the North Carolina Supreme Court which reached the opposite result in a case raising identical claims"); *see also id.*, Appellants' Br. in Opp. to Appellees' Mot. to Affirm at 3-4 (U.S. May 24, 2016) (making the same argument). That same irreconcilable conflict now exists between the federal court's decision in *Covington* with regard to legislative districts and the North Carolina Supreme Court's decision in this case with regard to those legislative districts. The Court should grant certiorari here to resolve this conflict.

II. RACE WAS CLEARLY THE PREDOMINANT FACTOR RESPONDENTS USED TO DRAW THE CHALLENGED DISTRICTS

The federal court in *Covington*, like the state trial court in this case, found that race was the predominant factor Respondents used to draw each of the challenged districts. These findings were based on a broad array of direct and circumstantial evidence for the plans as a whole and each district individually, including express race-based statements by Respondents and their mapmaker, and the absence of any explanation for the odd boundaries of the challenged districts other than race. In their Brief in Opposition, Respondents proffer no credible arguments for rejecting the separate findings of predominance by both state and federal courts in favor of the North Carolina Supreme Court's untenable holding to the contrary.

The sole argument Respondents make is that their racial goals could not have predominated

because they did not meet them. Br. in Opp. 18-19. This odd and irrelevant argument relies on the fact that the racial proportionality table their expert prepared listed ten majority-black state senate districts and twenty-five majority-black state house districts as equating to precise proportionality in the distribution of seats between races, whereas only nine majority-black state senate districts and twenty-three majority-black state house districts were included in the final 2011 plan. *Id.* Thus, they argue, because fewer majority-black districts were created, the plans did not create exact proportionality and could not have been motivated predominantly by race. *Id.*

It is true that Respondents missed exact proportionality in majority-black districts by one seat in the Senate and by two in the House, but when it was not possible for them to draw 50% plus one BVAP districts, they acknowledged that districts below 50% could still provide black voters with the opportunity to elect their candidates of choice, and counted those districts toward their proportionality goal. This point is expressly made in public statements issued by the architects of the plans, Senator Rucho and Representative Lewis. With regard to proportionality in the House plan, they said: "The remaining 23 districts with a majority of black voting age population ('BVAP') combined with two over 40% BVAP districts, continue to provide black voters with a substantially proportional and equal opportunity to elect candidates of their choice." *Id. at 35a; see also id. at 7a-8a* (referring to the two House districts in Forsyth County that could not each be drawn to over 50% BVAP so were

maintained as 45% BVAP districts). With regard to proportionality in the Senate plan, Senator Rucho and Representative Lewis stated: "we have disagreement with the SCSJ regarding the number of majority black districts that should be drawn in each map. SCSJ has proposed nine districts it contends are 'VRA' senate districts as compared to the ten districts in our proposed senate plan." *Id.* at 38a; *see also id*. at 8a-9a, 14a. (including Senate District 32 in Forsyth County as a VRA Senate district, despite being unable to draw the district as majority black).

III. THE STATE'S OPPOSITION TO THE PETITION CONFIRMS THE LEGALLY ERRONEOUS INTERPRETATIONS OF THE VOTING RIGHTS ACT AND FOURTEENTH AMENDMENT THAT DROVE THE 2011 REDISTRICTING PROCESS

Respondents' Brief in Opposition emphasizes the state's dangerous misreading of *DeGrandy*—one that would endorse an excessive preemptive use of race in redistricting, binding on every jurisdiction in the state, that per se fails the narrow tailoring requirement. In defense of their racial proportionality goal, Respondents state: "Even assuming North Carolina had adopted an 'inflexible' rule requiring exact proportionality in the number of legislative districts, a state cannot possibly be guilty of racial gerrymandering any specific districts simply because it has considered or adopted a defense recognized by this Court." Br. in Opp. 19-20. This is plainly incorrect.

North Carolina tried to avail itself of a safe harbor in the redistricting process that this Court explicitly rejected in *DeGrandy*, when the state of Florida sought the same. In doing so, the Court noted the most important reason for rejecting this invitation to create a safe harbor was "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." *DeGrandy*, 512 U.S. at 1019-20. The Court reminded states that such race-based districts are intended to be remedial only, and that the drawing of districts where minority voters "are able to form coalitions with voters from other racial and ethnic groups" would, in keeping with the purpose of the VRA, "hasten the waning of racism in American politics." *Id*. at 1020. If the Court does not intervene, the state supreme court's decision perpetuates those very problems that motivated the ruling in *DeGrandy*.

Finally, it is clear that North Carolina's interpretation of the role of proportionality in redistricting is flatly inconsistent with the narrow tailoring requirement when race is used in a predominant fashion. If statewide racial proportionality provides a safe harbor from Section 2 liability, as found by the lower court, the decision below incentivizes jurisdictions to (1) draw a proportional number of districts in the state regardless of whether the districts are actually located in a region where there is potential vote dilution and the districts are compact; and (2) use race more than is necessary to create equal

opportunity for minority voters to elect their candidates of choice. This effectively eviscerates the strict scrutiny of governmental classifications by race and thus cannot be allowed.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari. Furthermore, given the related cases now or soon to be before this Court, Petitioners respectfully request that this Court:

1. Expedite briefing on the merits and consider this case with *Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505 (E.D. Va. 2015), *prob. juris. noted*, No. 15-680, 2016 U.S. LEXIS 3653 (U.S. June 6, 2016); and *Harris v. McCrory*, No. 1:13-cv-949, 2016 U.S. Dist. LEXIS 14581 (M.D.N.C. Feb. 5, 2016), *prob. juris. noted*, No. 15-1262, 2016 U.S. LEXIS 4112 (U.S. June 27, 2016); or

2. Consolidate this case for consideration with *Covington v. North Carolina*, No. 1:15-cv-399, 2016 U.S. Dist. LEXIS 106162 (M.D.N.C. Aug. 11, 2016), when the expected jurisdictional statement in that case is filed in November, and order expedited briefing in *Covington*.

Respectfully submitted this 18th day of August, 2016.

Anita S. Earls
Counsel of Record
Allison J. Riggs
SOUTHERN COALITION
FOR SOCIAL JUSTICE
1415 Highway 54, Suite 101
Durham, North Carolina 27707
(919) 794-4198
anita@scsj.org
allison@scsj.org

Counsel for Petitioners
NAACP, et al.

Edwin M. Speas, Jr.
John W. O'Hale
Caroline P. Mackie
POYNER SPRUILL LLP
Post Office Box 1801
Raleigh, North Carolina 27602
(919) 783-6400
espeas@poynerspruill.com
johale@poynerspruill.com
cmackie@poynerspruill.com

Counsel for Petitioners
Dickson, et al.

Adam Stein
TIN FULTON WALKER & OWEN, PLLC
312 West Franklin Street
Chapel Hill, North Carolina 27516
(919) 240-7089
astein@tinfulton.com

Counsel for Petitioners
NAACP, et al.