2016 WL 4709487 (U.S.) (Appellate Brief)
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.

No. 16-166.
September 6, 2016.

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

Motion to Affirm or Dismiss

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*i QUESTIONS PRESENTED

Where the district court held that North Carolina's 2011 First and Twelfth Congressional Districts constituted racial gerrymanders, did the district court properly reject Appellants' objections to new districts enacted in 2016 to comply with the judgment?

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*1 STATEMENT OF THE CASE

I. PROCEEDINGS BELOW

On February 5, 2016, the three-judge district court below held that North Carolina's 2011 First Congressional District ("CD 1") and Twelfth Congressional District ("CD 12") were racial gerrymanders. *Harris v. McCrory,* 13-cv-949, 2016 WL 482052 (M.D.N.C. 2016); Appellants' ("App'ts.")App.13a-87a. The district court gave the North Carolina General Assembly two weeks to enact new districts to remedy the unconstitutional districts. App'ts.App.560. In compliance with this directive, on February 19, 2016, the General Assembly enacted its 2016 Congressional Plan. D.E. 149. [1]

1 "D.E." refers to district court docket entries in *Harris.*

Pursuant to a scheduling order entered by the district court, on March 3, 2016, Appellants David Harris and Christine Bowser (hereafter "plaintiffs") filed objections to the 2016 Congressional Plan. D.E. 157. Appellees (hereafter "defendants") responded to plaintiffs'

objections on March 7, 2016, and plaintiffs filed a reply brief on March 9, 2016. D.E. 159, 163. On June 2, 2016, the district court entered an order denying plaintiffs' objections. App'ts.App.2a, 6a.

In *McCrory v. Harris,* No. 15-1262, on February 8, 2016, defendants below filed a notice of appeal of the district court's judgment of February 5, 2016. D.E. 144. Defendants thereafter filed a Jurisdictional Statement with this Court on April 8, ***2** 2016. On June 27, 2016, this Court noted probable jurisdiction in *McCrory v. Harris.*

On July 5, 2016, in *Harris v. McCrory,* No. 16-166, plaintiffs filed their notice of appeal from the district court's order of June 2, 2016. D.E. 174. The jurisdictional statement by plaintiffs in *Harris v. McCrory* was placed on this Court's docket on August 5, 2016. Pursuant to Supreme Court Rule 18.6, defendants now file this motion to dismiss or affirm. [2]

2 In a related case that is pertinent for purposes of this appeal, on August 5, 2016, Common Cause, the North Carolina Democratic Party and fourteen other plaintiffs filed a civil action in the United States District Court for the Middle District of North Carolina alleging that North Carolina's 2016 Congressional Plan constitutes an unconstitutional political gerrymander. (*See Common Cause v. Rucho,* 1:16-CV-1026 (M.D.N.C. Aug. 5, 2016).

Plaintiffs seek a ruling from this Court that the 2016 Congressional Plan enacted by North Carolina in response to the district court's racial gerrymandering ruling is an unconstitutional "political" gerrymander. For the reasons stated below, this Court should either dismiss this appeal or summarily affirm the district court's decision of June 2, 2016.

***3** II. STATEMENT OF FACTS

A. Appellants never alleged claims for vote dilution or political gerrymandering.

On October 24, 2013, plaintiffs filed a civil action challenging North Carolina's 2011 Congressional District Plan. D.E. 1. In their complaint, plaintiffs alleged a single cause of action: that race was the predominant factor in the creation of 2011 CD 1 and CD 12 and that neither district was narrowly tailored to serve a compelling governmental interest. D.E. 1, ¶¶ 69-73. Plaintiffs' claim was based upon the cause of action first recognized in *Shaw v. Reno,* 509 U.S. 630 (1993) ("*Shaw I*"), and later amplified in *Shaw v. Hunt,* 517 U.S. 889 (1996) ("*Shaw II*"), as well as other cases of this Court dealing with racial gerrymandering. *See Alabama Legislative Black Caucus v. Alabama,* 135 S. Ct. 1257 (2015) ("*Alabama*").

In support of their single cause of action, plaintiffs alleged that CD 1 and CD 12 disregarded political subdivisions and geographical boundaries and other traditional redistricting principles. D.E. 1 ¶¶ 50, 51, 61-63. They complained that CD 1 "weave[d]" through 24

counties and "contain[ed]" only five whole counties. *Id.* at ¶ 51. They also argued that CD 12 was "not compact," connected "chunks" of Charlotte and Greensboro "connected by a thin strip - averaging only a few miles wide - that tracks I-85" and that the district failed "to comply with traditional districting principles." *Id.* at ¶¶ 61, 63. Yet in all instances, plaintiffs alleged that the ***4** sole motivation for these alleged irregularities was race. Appellants *never* alleged that partisan affiliation played any role in the construction of these districts. In fact, at trial, plaintiffs *disputed* defendants' arguments that both CD 1 and CD 12 were the result of political motivations by the General Assembly to draw ten congressional districts that provided voters with an opportunity to elect Republican candidates.

B. The district court's decision.

On February 5, 2016, the three-judge district court issued a decision in which Circuit Judge Gregory and District Judges Cogburn and Osteen held that CD 1 was a racial gerrymander. A two-judge majority of Circuit Judge Gregory and District Judge Cogburn held that CD 12 was also a racial gerrymander. Circuit Judge Gregory authored the opinion of the Court while District Judge Cogburn authored a concurring opinion. District Judge Osteen authored a dissenting opinion as to CD 12. *See* D.E. 142. As explained below, key portions of each opinion provided the framework used by the General Assembly in its construction of the 2016 Congressional Plan.

The district court found that CD 1 was racially gerrymandered largely because of the General Assembly's decision to draw CD 1 with a black voting age population ("BVAP") in excess of 50%. In adopting this criterion, the General Assembly relied upon this Court's decision in *Bartlett v. Strickland,* 556 U.S. 1 (2000). The district court found that this criterion presented "strong ***5** evidence that race was the only non-negotiable criterion … that traditional redistricting principles were subordinated to race," and that "a Congressional district is crafted because of race when a racial quota is the single factor through which all the drawing decisions are made, and traditional redistricting principles are considered, if at all, solely as they did not interfere with this quota." D.E. 142, p. 19. The district court described CD 1 as "a textbook example of racial predominance." *Id.* at 22-28. The Court noted that the State's mapdrawer "split counties and precincts when necessary to achieve a 50 percent-plus-one-person BVAP in CD 1." *Id.* at 29.

The district court concluded that "traditional districting criteria were considered, if at all, solely insofar as they did not interfere with this 50-percent-plus-one person minimum floor" and that "such a racial filter had a discriminatory effect … because it rendered all traditional criteria that otherwise would have been 'race neutral' tainted by and subordinated to race." *Id.* at 32. [3]

3 The district court also rejected defendants' argument that the shape of CD 1 was motivated by the partisan intent to draw 10 Congressional districts as Republican opportunity districts. *Id.* at 30.

Regarding CD 12, the district court rejected testimony by the State's mapdrawer that CD 12 was drawn to be an even stronger Democratic district than the 2001 version so that adjoining districts could be drawn as Republican opportunity districts. *Id.* at 32-48.

***6** The district court then proceeded to examine whether CD 12 and CD 1 could be justified under a strict scrutiny analysis. The district court correctly noted that defendants never contended that CD 12 was drawn to protect the State from liability under Section 2 or that CD 12 could survive a strict scrutiny analysis. *Id.* at 40-50. The district court then rejected defendants' arguments that CD 1 furthered a compelling governmental interest and was narrowly tailored.

The district court concluded that the legislative record did not contain a "strong basis in evidence" for creating CD 1 as a Section 2 majority black district. *Id.* at 50-51. In particular, the district court found that defendants failed to show that the legislature had "a strong basis in evidence of racially polarized voting in CD 1 significant enough that the white majority routinely votes as a bloc to defeat the minority candidate of choice." *Id.* at 53. The district court repeatedly stated (erroneously) that CD 1 was a "majority white" district and that there was no evidence that the "white majority" was voting as a bloc to defeat African Americans' candidates of choice. *Id.* at 8, 9, 55-57. Because defendants had "fail[ed] to meet the third *Gingles* factor," the district court concluded that Section 2 did not require that defendants create CD 1 as a majority black district. *Id.* at 57. For similar reasons, the district court also rejected the argument that CD 1 could be justified under Section 5. *Id.* at 58-61.

In his concurring opinion, Judge Cogburn expressed "concerns about how unfettered gerrymandering is negatively impacting our ***7** republican form of government." *Id.* at 64. Judge Cogburn observed that "political gerrymandering rather than reliance on natural boundaries and communities has become the tool of choice for state legislatures in drawing Congressional boundaries …." *Id.* Judge Cogburn noted that several of the Founding Fathers had engaged in political gerrymandering. *Id.* at 65, 66. Judge Cogburn also noted that CD 12 "runs its circuitous route … thanks in great part to a legislature then controlled by the Democrats." *Id.* at 66, 67; *see also Shaw I; Shaw II.* Judge Cogburn also stated that "redistricting to protect the party that controls the state legislature is constitutionally permitted and lawful" and that "beyond taking offense at the affront to democracy caused by gerrymandering, Courts will not, however, interfere with gerrymandering that is philosophically rather than legally wrong." *Id.* at 67.

In his dissent, written only with regard to CD 12, Judge Osteen agreed with defendants' argument that CD 12 was drawn based upon legitimate political considerations and that race was not the predominant motive. *Id.* at 72-100. Judge Osteen also noted that ordering the State to redraw CD 12 to give it "a more natural shape and compactness score" would require that the State redraw "the surrounding districts (and likely the entire map) …." *Id.* at 94.

C. Remedial legislative proceedings.

The district court gave North Carolina two weeks to enact a new congressional plan that ***8** remedied the constitutional defects it had found in the 2011 Plan. As a result, shortly following the district court's decision, the General Assembly's redistricting committee chairs, Senator Bob Rucho and Representative David Lewis, met with their mapdrawing consultant. Redistricting concepts were discussed with their mapping consultant as the co-chairs made plans to comply with the district court's order. The State's mapdrawer then drew conceptual maps on his personal computer. D.E. 159-8 at 21, 22, 27; D.E. 159-15 at 32, 34-37.

On February 15, 2016, public hearings were held in six different locations. D.E. 159-14. Input was also received from voters who submitted comments through the General Assembly website. *Id.* Partisan statements were given by persons who supported the districts declared illegal by the district court as well as comments from persons who agreed with the district court's decision. Many speakers asked that new districts be based upon whole counties and that precincts not be divided into different districts. Other speakers recommended that the "serpentine" CD 12 be eliminated from any new plan and requested that race not be used as a criterion. *Id.* at 20, 24; 24-26; 37, 40; 41, 42; 46, 49; 49, 50; 79, 81, 82; 91-93; 105, 106; 134, 138; 177, 179-180; 207, 208; 226, 230; App'ts.Jur.St.13 n.3.

The General Assembly received this feedback and incorporated several points made by the public into its mapdrawing process. Thus, on February 16, 2016, the General Assembly's Joint Select Committee on Redistricting ("Joint Committee") met to consider criteria for a new congressional plan. ***9** The Joint Committee consisted of nineteen Senators and nineteen Representatives drawn from both political parties. D.E. 159-9 at 3-6. During the proceedings, the Joint Committee considered and then adopted criteria to be used in drawing a new congressional plan. Five of the seven criterion were adopted with bipartisan support. The criteria included:

• "Equal Population." *Id.* at 12-18. The Joint Committee adopted this criterion with only one dissenting vote. *Id.* at 18.

• "Contiguity." *Id.* at 18-24. The Joint Committee unanimously adopted this criterion. *Id.* at 24.

• "Political data: the only data other than population to be used shall be election results in statewide elections since 2008, not including two presidential contests. Data identifying race of individuals or voters shall not be used in the construction or consideration of districts in the 2016 Contingent Congressional Plan. Voting Districts, referred to as VTDs, should be split only when necessary to comply with the zero deviation population requirement set forth above in order to ensure the integrity of political data." *Id.* at 24-47. The Joint Committee adopted this criterion by a vote of 23 to 11.

• "Partisan Advantage: The partisan makeup of the Congressional delegation ***10** under the [2011] enacted plan is 10 Republicans and 3 Democrats. The committee shall make reasonable efforts to construct districts in the 2016 Contingent Congressional Plan to maintain the current partisan makeup of North Carolina's Congressional delegation." *Id.* at 47-69. The Joint Committee adopted this criterion by a vote of 23 to 11. *Id.* at 69.

• "12th District: The current General Assembly inherited the configuration of the 12th District from past General Assemblies. The configuration was retained … because the district had already been heavily litigated over the past two decades, and ultimately approved by the courts. The *Harris* court has criticized the shape of the 12th District, citing the serpentine nature. In light of this, the Committee shall construct districts in the 2015 [*sic*] Contingent Congressional Plan that eliminate the current configuration of the 12th District." *Id.* at 70-78. The Joint Committee adopted this criterion by a vote of 33 to I. *Id.* at 78.

• "Compactness: In light of the *Harris* court's criticism of the compactness of the 1st and 12th districts, the Committee shall make reasonable efforts to construct districts in the 2016 Contingent Congressional Plan that improve the compactness of current districts and keep ***11** more counties and VTDs whole as compared to the current enacted plan. Division of counties shall be made for reasons of equalizing population, consideration of incumbency, and political impact. Reasonable efforts shall be made not to divide a county into more than two districts." *Id.* at 79-94. The Joint Committee adopted this criterion by a vote of 27-7. *Id.* at 94.

• "Incumbency: Candidates for Congress are not required by law to reside in a district they seek to represent; however, reasonable efforts shall be made to ensure that incumbent members of Congress are not paired with another incumbent in one of the new districts constructed in the 2016 Contingent Congressional Plan." *Id.* at 94-98. The Joint Committee adopted this criterion by a vote of 31-1. *Id.* at 98.

During debate over the criteria, the legislative leaders confirmed several important points. Representative Lewis stated that the criteria would not be ranked in order of importance,

that "drawing maps is largely a balancing act," and "that making reasonable efforts would not include violating any of the other criteria …." *Id.* at 65, 66. On the issue of contiguity, Representative Lewis added that the ***12** concept of "point contiguity" would not be used. *Id.* at 19, 20. [4]

4 *See Shaw v. Hunt,* 861 F. Supp. 408, 468 (E.D.N.C. 1994), *rev'd, Shaw II* (1992 congressional plan created by Democratic-controlled General Assembly made congressional districts contiguous by a single point).

Members of the minority party objected to the proposed criterion that race not be considered in the constructions of the new maps. *Id.* at 27, 28, 29. Representative Lewis responded by stating that because of the finding by the *Harris* court that there was no basis in evidence showing the existence of racially polarized voting, race "should not be considered." *Id.* at 26, 27, 30. In response to a question by Senator Floyd McKissick, Representative Lewis stated that "racially polarized voting" was "the trigger to draw a VRA district" and that because the court had "found that there was not [*sic*] racially polarized voting," "race should not be a consideration in drawing the maps." *Id.* at 30-31.

Following the Joint Committee's meeting on February 16, 2016, the State's mapdrawer downloaded a concept for a new congressional plan from his personal computer to a computer maintained by the General Assembly. He then used the state's computer to complete a congressional map that followed the criteria adopted by the Joint Committee. D.E. 159-8 at 21.

On February 17, 2016, Representative Lewis presented the proposed 2016 Congressional Plan to the Joint Committee. Representative Lewis explained how the proposed map complied with the ***13** criteria adopted by the Joint Committee on February 16, 2016. D.E. 159-10 at 11-12. Representative Lewis stated that race was not considered and that racial statistics were not included in the statistical reports provided to the Joint Committee. Representative Lewis advised that the map was "a weaker map" for Republicans as compared to the 2011 plan but that the 2016 plan gave voters who wanted to vote for Republican candidates the opportunity to elect 10 members of Congress. He stated that the map eliminated the serpentine CD 12 and divided only 13 counties and 13 VTDs (or precincts). [5] Representative Lewis also explained that only two incumbents (Democratic Congressman David Price and Republican Congressman George Holding) were placed in the same district and that all of the other eleven members of Congress were placed in districts by themselves. *Id.* at 12, 31-32. Representative Lewis also noted that Wilson, Pitt, and Durham Counties were divided to take into account the residency of incumbents. *Id.* at 49, 50.

5 The divided precinct report produced by staff indicated that only 12 precincts (or VTDs) are divided by the 2016 Congressional Plan. D.E. 159-1, Ex. 19.

A member of the majority party, Senator Harry Brown, spoke on the issue of competitiveness and noted that in 2008 several Democratic candidates would have won statewide elections in the proposed District 13. *Id.* at 40. Representative Mike Hager, a Republican, observed that the minority party had not offered any alternative maps. *Id.* at 53, 54. Representative Bert Jones, also a Republican, congratulated the redistricting chairs for drawing a new map under "very difficult time ***14** limits" that only divided 13 counties and 13 precincts. *Id.* at 56, 57. Representative Jones also recalled the history of political gerrymandering by Democrat-controlled General Assemblies. He also observed that the Democratic candidate for Attorney General in 2008 won all of the 13 proposed districts, demonstrating the ability of a strong Democratic candidate to win each of the districts. *Id.* at 58, 59. By a party line vote of 24 to 11, the Joint Committee adopted a motion to favorably report the 2016 Congressional Plan to the General Assembly. *Id.* at 66-72.

On Thursday, February 18, 2016, the proposed 2016 Congressional Plan was reviewed and approved by the Senate Redistricting Committee. Senator Rucho advised that the plan was being offered to comply with the district court's judgment in *Harris.* D.E. 159-17 at 7. Representative Lewis was invited by the Senate to appear before the Committee, and he again explained the criteria used to draw the map. *Id.* at 9-11. Senator Brown again noted that under the 2008 election results the Democratic candidate for Attorney General would have won all thirteen proposed districts. *Id.* at 19. Representative Lewis stated that the 2008 presidential race was not used to draw the proposed districts because of criticisms from the district court. *Id.* at 20. Representative Lewis noted that VTDs or precincts were only split to equalize population. *Id.* at 40.

Kara McCraw, an employee of the General Assembly's Legislative Analysis Division, then reported that the 1992 Congressional Plan divided ***15** 44 counties into different congressional districts, that the 1997 plan divided 22 counties, that the 1998 plan divided 21 counties, that the 2001 plan divided 28 counties, that the 2011 plan divided 40 counties, and that the 2016 proposed plan divided only 13 counties. McCraw also stated that the 2001 plan divided 22 precincts and that the 2011 plan divided 68 precincts. McCraw stated that the proposed 2016 plan divided only 12 precincts. *Id.* at 41-42. The Senate Redistricting Committee then approved the 2016 Congressional Plan by a party line vote of 12 to 5. *Id.* at 58-63.

Later, on February 18, 2016, the full Senate met to consider the 2016 Congressional Plan. D.E. 159-15 at 22. All the same issues that had been discussed during the meetings of the Joint Committee were raised again during the floor debate. The President Pro Tempore of

the Senate, Senator Phil Berger, concluded the debate by summarizing the position of the majority party. Senator Berger noted that the district court had held "that race should not be used as a factor." *Id.* at 104-16. Because all of the criteria were used to draw the congressional map, it was not drawn to "maximum political advantage." *Id.* at 107-08 [6] Senator Berger emphasized that the 2016 Congressional map was drawn to "harmonize" all of the criteria adopted by the Joint Committee and to comply with the district court's order. *Id.* at 106-07, 109. Senator Berger also stated that because all of the criteria were used, none of the districts constituted a political ***16** gerrymander. *Id.* at 108-09. After Senator Berger concluded his remarks, the Senate voted to approve the plan by a vote of 32-15. *Id.* at 110.

6 In fact, Senator Berger noted his view that a congressional plan with 11 Republican-leaning districts could be drawn, but had not. D.E. 159-15 at 107-08.

On Friday, February 19, 2016, the House Redistricting Committee met to consider the 2016 Congressional Plan. The Committee provided an opportunity for members of the public to speak on the proposed plan, but only one member of the public appeared for this opportunity. D.E. 159-8 at 2. Representative Lewis again reviewed the criteria used for drawing the plan. *Id.* at 11-12.

The full House then met to consider the 2016 Congressional Plan later on February 19, 2016. Representative Lewis again explained the criteria used to draw the proposed plan. D.E. 159-3 at 3-7. Representative Lewis and Representative Michaux debated the meaning of the Court's decision in *Harris. Id.* at 7-20. Many of the issues already discussed by the Joint Committee and House Redistricting Committee were again discussed and debated. Representative Lewis stated that the maps did not guarantee the election of 10 Republicans and again noted that the Democratic candidate for Attorney General would have won all 13 districts in the 2008 General Election. *Id.* at 79-80. Finally, Representative Lewis stated that all of the criteria for the maps had been approved by the Joint Committee, that all of the criteria were "considered together," and that "every effort had been made to harmonize them." *Id.* The House then approved the 2016 Congressional Plan by a vote of 65 to 43.

***17** D. Characteristics of the 2016 Congressional Plan.

A copy of the 2016 Congressional Plan and the political statistics used to draw the plan were filed with the district court on February 19, 2016. D.E. 149; D.E. 149-1; *see also* D.E. 159-1, Ex. 17.

As explained by the legislative leaders, the 2016 Plan is based upon whole counties with none of the districts drawn to resemble the 2011 version of CD 1 and CD 12. Maps showing the

counties won by Senator Richard Burr in 2010, Governor Pat McCrory in 2012, and Senator Thorn Tillis in 2014 - all three of whom are Republicans - show that Republican voters are more dispersed throughout the state than Democratic voters. As a result, congressional districts based upon whole counties naturally result in a larger number of Republican-leaning congressional districts. D.E. 159-1 ¶¶ 5, 6, 7, Exs. 2, 3, 5, 6, 8, 9. However, Democrats enjoy a registration advantage in 12 of 13 districts in the 2016 plan. Democrats are in the majority of registered voters in the 2016 versions of CD 1 and 12 and a plurality of registered voters in CD 2, CD 3, CD 4, CD 6, CD 7, CD 8, CD 9, CD 10, CD 11 and CD 13. Registered Republicans are not a majority in any district and a bare plurality only in CD 5. In all of the districts, registered Democrats and unaffiliated voters constitute a super majority of all registered voters. D.E. 159-1 ¶¶ 50-64, Ex. 13.

In comparing election results under the 2001, 2011, and 2016 congressional plans, more Democratic candidates for statewide office would ***18** have won more of the congressional districts in the 2016 plan as compared to the 2011 plan. D.E. 159-1 ¶¶ 8-35, Exs. 10, 11. Under the 2001 Congressional Plan, the 2011 Congressional Plan and the 2016 Congressional Plan, Democratic candidates for statewide office won 10 of 10 statewide elections in CDs 1, 4, and 12 based upon the 2008 and 2012 election results. *Id.*, Exs. 10, 11. Based upon the 2008 election results, in the 2016 congressional districts, Democratic candidates would have won 5 of 10 statewide races in CD 3; 2 of 10 statewide races in CD 5; 4 of 10 statewide races in CD 6; 7 of 10 statewide races in CD 7; 4 of 10 statewide races in CD 8; and 3 of 10 statewide races in CD 9. *Id.*, Ex. 10.

III. ARGUMENT

A. The sole issue before the district court was whether the 2016 congressional plan remedied the district court's judgment that the 2011 CD 1 and CD 12 were racial gerrymanders.

Plaintiffs argue that the entire 2016 Congressional Plan should be enjoined because it constitutes an alleged "political" gerrymander. This argument is foreclosed by this Court's decision in *Upham v. Seamon,* 456 U.S. 37 (1982). There the Court considered a three-judge court's rejection and redrawing of a congressional plan enacted by the Texas legislature. The United States Attorney General objected to two districts and refused to preclear them under Section 5 of the Voting Rights ***19** Act. The three-judge court proceeded to draw a remedial plan which resolved the Attorney General's Section 5 objections to those two districts. The three-judge court, however, did not stop there. The three-judge court also redrew several other districts which it perceived did not meet the non-retrogression standard of Section 5. *Upham,* 456 U.S. at 39-40.

This was error. This Court reiterated the principles for judicial review of redistricting plans:

From the beginning, we have recognized that "reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." We have adhered to the view that state legislatures have "primary jurisdiction" over legislative reapportionment …. Just as a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district ***20** court should similarly honor state policies in the context of congressional reapportionment. In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.' "

Id. (citing *White v. Weiser,* 412 U.S. 783, 794-95 (1973) (internal citations and quotations omitted)).

This Court also explained it is error for a lower court to order a remedial plan "that reject[s] state policy choices more than was necessary to meet the *specific constitutional violations involved.*" *Id.* (citing *Whitcomb v. Chavis,* 403 U.S. 124, 160-61 (1971)) (emphasis added). Further, an "appropriate reconciliation of these two goals [meeting Constitutional requirements and State political policy] can only be reached if the district court's modifications of a state plan are *limited to those necessary* to cure any constitutional or statutory defect." *Id.* (emphasis added). Under these established principles, the Court found it was erroneous for the three-judge court to make changes to districts that were not the subject of the original Section 5 objection.

Plaintiffs obtained a judgment that the 2011 versions of CD 1 and CD 12 were racial gerrymanders. The 2016 Congressional Plan remedied these issues. Under *Upham,* the authority of the district court was limited to determining whether the 2016 Congressional Plan remedied the ***21** specific violations determined by its judgment. Plaintiffs should not be allowed to now transform their single cause of action for racial gerrymandering into a new claim for political gerrymandering. Should they wish to challenge the 2016 Congressional Plan as a political gerrymander, they are free to file a new lawsuit making that claim, as has already been done by Common Cause, the North Carolina Democratic Party, and others. *See supra* n.1.

B. The 2016 Congressional Plan is not an illegal "political gerrymander."

Even assuming that the court below had the authority to consider plaintiffs' new claims of political gerrymandering, those claims are meritless. The decision by the district court is consistent with all prior decisions by this Court that no justiciable standard exists to determine whether a districting plan constitutes an illegal political gerrymander. *Vieth v. Jubelirer,* 541 U.S. 267, 281 (2004). There is no conflict between the decision by the court below and any decision by this Court or any other court in cases involving claims of alleged political gerrymandering.

Moreover, regardless of a statement by one of the districting chairs quoted out of context by plaintiffs,[7] the 2016 Congressional Plan is not a "gerrymander" at all. The hallmark of a gerrymander is the subordination of traditional redistricting criteria to some other goal. It is beyond ***22** dispute, however, that the 2016 Congressional Plan follows traditional redistricting criteria better than any congressional map in North Carolina for at least the past 25 years. The 2016 Congressional Plan contains 87 whole counties and splits only 12 VTDs across the entire state. No county is split between more than two congressional districts. The evidence shows that the General Assembly followed all seven of its districting criteria as opposed to following only one criterion regarding political advantage. While plaintiffs may not like the fact that, in North Carolina, following traditional districting criteria results in a plan like the 2016 Congressional Plan their disappointment with the perceived political results of the plan does not transform it into an alleged "political" gerrymander.

7 *See* App.Br.4, 5.

The extent to which the 2016 Congressional Plan follows traditional redistricting criteria is all the more striking when compared to North Carolina's 1992 Congressional Plan. This is significant because this Court summarily affirmed a decision by a lower court rejecting allegations that the 1992 Congressional Plan was an illegal political gerrymander. *Pope v. Blue,* 809 F. Supp. 392 (W.D.N.C.), *aff'd* 906 U.S. 801 (1992). In the 1992 plan, the General Assembly - then controlled by Democrats - unveiled the original "snake-like" version of CD 12. *Shaw I,* 509 U.S. at 635-36. The 1992 CD 12 started in Gaston County, meandered its way into Charlotte in Mecklenburg County, then snaked its way over to Iredell and Rowan counties to pick up (and submerge) Republican voters, then slithered over to Winston-Salem, then Greensboro, and finally Durham, to pick up African American ***23** voters. *Shaw I,* 509 U.S. at 636, 659. To accomplish this contorted path, the 1992 plan divided 44 counties, seven of which were split between three congressional districts. Moreover, that plan split at least 77 VTDs. D.E. 159-1 ¶¶ 97-99.

The odd shapes and locations of the 1992 Congressional districts were the result of the legislature's intent to protect at least four incumbent white Democratic Congressmen. *Shaw*

v. Hunt, 861 F. Supp. 408, 465, 467-68 (E.D.N.C. 1994), *rev'd Shaw II, supra.* The Democratic legislature accomplished its goal by packing Republican voters into a small number of districts, thereby decreasing the influence of Republican voters in other districts. *Pope,* 809 F. Supp. at 394. The 1992 General Assembly's dramatic departure from traditional redistricting principles to achieve its political goals resulted in the most non-compact congressional districts in the history of North Carolina. *Shaw,* 861 F. Supp. at 469.

The 1992 plan also employed the novel concept of "point contiguity." Both CD 1 and CD 3 were contiguous at the same "point," or an area of the map with no geographic space and consisting solely of a mathematical point. This allowed CD 1 to cut through CD 3 (represented at the time by white incumbent Democrat Martin Lancaster) "without destroying the technical contiguity of either district." *Id.* at 468. Similarly, a review of the 1992 map shows that the 1992 version of CD 12 completely dissects the 1992 version of CD 6 running through Forsyth, Guilford, and Alamance Counties. To achieve "contiguity" for CD 6, the General Assembly ***24** used "several 'point contiguities' and 'double crossovers' that exist in the district's design." *Id.* at 469. These facts show the extreme steps taken by a Democratic controlled General Assembly to draw a congressional plan that strongly favored Democratic voters and incumbent Democratic Congressmen.

Significantly, the 1992 plan, unanimously regarded as the product of true gerrymandering, survived a political gerrymandering challenge. *Pope, supra.* Tellingly, appellants here fail to even cite *Pope* even though it was summarily affirmed by this Court, 506 U.S. 801 (1992), and was binding precedent on the district court below. *See Pope,* 809 F. Supp. at 395 n.2 (noting that "a summary affirmance by the Supreme Court, pursuant to the exercise of its appellate jurisdiction, creates precedential authority binding on the lower courts").

In *Pope,* the three-judge court recognized that under *Davis v. Bandemer,* 478 U.S. 109 (1986), a redistricting plan is not unconstitutional merely because it "makes it more difficult for a particular group in a particular district to elect the representatives of its choice." *Pope,* 809 F. Supp. at 396 (quoting *Bandemer,* 478 U.S. at 131). While this Court has never agreed on what evidence, if any, could possibly establish a claim for political gerrymandering, it is clear that at a minimum it would take the results of more than one election under the challenged redistricting plan. *Pope,* 809 F. Supp. at 396 (*citing Bandemer,* 478 U.S. at 135); *see also Vieth,* 541 U.S. at 366 (Breyer, J. dissenting) (plaintiffs should be required to prove that the majority party, as measured by total votes for the ***25** office in question, have twice failed to obtain a majority of the relevant seats). Here, as in *Pope,* "we do not even have a single election to corroborate the plaintiffs' allegations of disproportionate representation" and any political gerrymandering claim would necessarily fail. *Id.* Even if such evidence could be developed, the claim would still fail because "the power to influence the political process is not limited to winning elections." *Id.* at 397 (quoting *Bandemer,* 478 U.S. at 132). Individuals who vote for

a losing candidate are "deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district." *Id.*

More importantly, plaintiffs' allegation that the 2016 Congressional Plan is a "political gerrymander" fails as a matter of fact. Plaintiffs mischaracterize the criteria adopted by defendants to comply with the district court's order. The criterion called "partisan advantage" was one of seven criteria. This criterion did not require maximization of the Republican vote. Instead, it stated that the "committee shall make *reasonable efforts* to construct districts in the 2016 plan to maintain the current partisan makeup of North Carolina's Congressional delegation." Despite plaintiffs' assertions, the General Assembly did not maximize the number of Republican candidates that might be elected under any hypothetical congressional plan or require the construction of ten districts with the highest possible Republican voting margins.

***26** It is far from unusual for a legislature to enact a plan intended to maintain existing partisan balances. Incumbency and political consideration have been recognized as legitimate and traditional redistricting principles. *Alabama,* 135 S. Ct. at 1270; *Gaffney v. Cummings,* 412 U.S. 735, 752-54 (1973). But here, partisan advantage was only one of seven criteria followed by the General Assembly. It was balanced and harmonized with the other criteria such as compactness, contiguity, equal population, use of whole counties, and use of whole precincts. Any visual review of the 2016 Congressional Plan shows that the legislature followed all of its criteria. The Court should reject plaintiffs' attempt to take the legislature's partisan criterion out of context and magnify it to the exclusion of all the others.

Appellants also ignore registration statistics and prior election results within the districts in the 2016 Congressional Plan. For example, the number of registered Democrats exceeds the number of registered Republicans in all but one of the districts. D.E. 159-1, Ex. 13. Plaintiffs also ignore that voters who tend to vote for Republican candidates are more dispersed throughout the state. Voters who tend to vote for Democratic candidates are more concentrated and in fewer counties. D.E. 159-1, Exs. 2, 3, 5, 6, 8, and 9. Thus, as a matter of demography, creating congressional districts with more whole counties and which are more compact results in more districts containing more voters who tend to vote for Republican candidates.

***27** Plaintiffs also ignore that, based on past election results in statewide races, the districts in the 2016 Congressional Plan are weaker for Republican candidates than the 2011 districts. For example, 2008 election data shows that in each district the share of votes for Republican candidates in statewide races is less in the 2016 plan as compared to the 2011 plan. D.E. 159-1, Ex. 10. The same is true when using election results from 2012. *Id.*, Ex. 11.

In comparing election results under the 2001, 2011, and 2016 congressional plans, more Democratic candidates for statewide office would have won more of the congressional districts in the 2016 plan as compared to the 2011 Plan. D.E. 159-1 ¶¶ 8-35, Exs. 10, 11. Under both the 2011 Congressional Plan and the 2016 Congressional Plan, Democratic candidates for statewide office won 10 of 10 statewide elections in CDs 1, 4, and 12 in both the 2008 and 2012 elections. *Id.*, Exs. 10, 11. Based upon the 2008 election results in the 2016 Congressional districts, Democratic candidates also would have won 5 of 10 statewide races in CD 3; 2 of 10 statewide races in CD 5; 4 of 10 statewide races in CD 6; 7 of 10 statewide races in CD 7; 4 of 10 statewide races in CD 8; and 3 of 10 statewide races in CD 9. *Id.*, Ex. 10.

***28** Rather than addressing these facts, plaintiffs seem to argue for a political quota based on the statewide share of votes received by Democratic and Republican Congressional candidates. App'ts.Br.21. [8] Plaintiffs provide no legal support for a rule that would require proportionate representation for political parties. *Vieth,* 541 U.S. at 288; *Bandemer,* 478 U.S. at 130. This Court has also rejected the notion that "majority status in statewide races establishes majority status for district contests." *Vieth,* 541 U.S. at 288. As this Court has made clear, the Constitution "guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups. It nowhere says that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers." *Id.*

8 Presumably, the statewide percentage of votes cast for Republican and Democratic candidates may have some relevance if all of North Carolina's representatives were elected in one 13-person multimember congressional district. Plaintiffs have not argued that North Carolina be reduced to one 13-member multimember district and there is no legal basis for imposing such a remedy.

Finally, as demonstrated by the registration statistics for the 2016 districts, the General Assembly did not attempt to enact a congressional plan "that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Bandemer,* 478 U.S. at 132. If the 2016 Congressional Plan results in the election of ten Republican candidates and three Democratic candidates, it will be because thousands of registered ***29** Democrats and unaffiliated voters have decided to vote for Republican candidates across the State. It is impossible for Republican candidates to win any of the districts in the 2016 Congressional Plan with votes only from registered Republicans.

Why do many voters registered as Democrats vote for Republican congressional candidates? The answer to that question involves a "sea of imponderables" that the Equal Protection Clause does not address and that judges are ill-equipped to decide. *Vieth,* 541 U.S. at 290. Nor does the Constitution "answer the question whether it is better for Democratic voters to have their State's congressional delegation include 10 wishy-washy Democrats (because

Democratic voters are ‘effectively’ distributed so as to constitute bare majorities in many districts), or 5 hardcore Democrats (because Democratic voters are tightly packed in a few districts). Choosing the former ‘dilutes' the vote of the radical Democrat; choosing the latter does the same to the moderate. Neither Article I, § 2, nor the Equal Protection Clause takes sides in this dispute.” *Vieth,* 541 U.S. at 288 n.9.

CONCLUSION

Based on the foregoing, this Court should either dismiss appellants' appeal or summarily affirm the district court's order of June 2, 2016.

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