No. 15-1262

In The
Supreme Court of the United States

PATRICK MCCRORY, in his capacity as Governor of North Carolina, NORTH CAROLINA STATE BOARD OF ELECTIONS, and A. GRANT WHITNEY, JR., in his capacity as Chairman of the North Carolina State Board of Elections,
Appellants,

v.

DAVID HARRIS and CHRISTINE BOWSER,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM

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STATEMENT

In addition to the arguments in Appellants' Jurisdictional Statement, Appellees' motion to affirm should be denied for the following reasons.

First, the decision by the district court below is in direct conflict with two decisions by the North Carolina Supreme Court affirming the constitutionality of Congressional District 1 ("CD 1") and Congressional District 12 ("CD 12"). *Dickson v. Rucho*, 367 N.C. 542, 76 S.E.2d 238 (2014) ("*Dickson I*"); *Dickson v. Rucho*, 781 S.E.2d 404 (2015) ("*Dickson II*").[1] This Court should deny Appellee's motion to affirm and instead note probable jurisdiction to resolve this split between the district court and the North Carolina Supreme Court. *See Martin v. Hunter's Lessee*, 14 U.S. 304, 348 (1816) (noting that only the Court can "harmonize…into uniformity"… "jarring and discordant judgments"); *Plumbers, Steamfitters, Refrigeration, Petroleum Fitters And Apprentices of Local 298, A.F.of L. v. Door Cnty.*, 359 U.S. 354 (1959) (granting review to resolve conflict between state and federal tribunals).

Second, regarding CD 1, the district court ignored this Court's decision in *Bartlett v. Strickland*, 556 U.S. 1 (2009), misapplied the legal standards a state legislature must meet to show a strong basis in evidence as explained by this Court

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[1] This Court granted *certiorari* in *Dickson I* and then vacated the decision and remanded the matter for additional consideration in light of *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015) ("*Alabama*").

in *Alabama*, and based its decision on clearly erroneous findings.[2]

Finally, regarding CD 12, a two-judge majority of the district court ignored this Court's admonitions from *Easley v. Cromartie*, 532 U.S. 234 (2001) ("*Cromartie II*") regarding proof that race rather than politics was the predominate motive for a district. In *Cromartie II*, this Court affirmed the constitutionality of the irregularly shaped CD 12 drawn by a Democratic-controlled General Assembly to create a strong Democratic congressional district. In 2011, a Republican-controlled General Assembly enacted a similarly shaped version of CD 12 (with much of the same area and population of the constitutional version) but put more Democratic-voting voters into CD 12. This was done so that adjoining districts would become more competitive for Republican candidates. The district court below rejected this Court's "race rather than politics" jurisprudence by relying on registration statistics instead of actual voting patterns and elevating statements regarding black population to dispositive weight on the predominance issue. The Court should deny the motion to affirm.

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[2] Specifically, the district court relied on an erroneous contention that the 2001 version of CD 1 was a "majority white" district.

ARGUMENT

1. The Court should deny appellees' motion to affirm and resolve the split between the court below and the North Carolina Supreme Court.

In *Dickson I*, the North Carolina Supreme Court affirmed a unanimous decision by a three-judge panel of the superior court, which rejected plaintiffs' claims that the 2001 CD 1 and CD 12 were unconstitutional racial gerrymanders. *Dickson v. Rucho*, Nos. 11CVS16896 & 11CVS16940, 2013 WL 3376658, at *1 (N.C. Super. July 8, 2013); (D.E. 30-2). The three-judge state panel made extensive findings of fact that a strong basis in evidence supported the legislature's decisions to enact CD 1 as a Voting Rights Act ("VRA") district with a black voting age population ("VAP") in excess of 50%, and that the district was narrowly tailored. The three-judge state panel also found that race was not the predominant motive for CD 12 and that, like the 1997 version of this district, the 2011 version was predominantly based upon politics. *Dickson II*, _ N.C. at _, 781 S.E.2d at 436-437. The three-judge state panel made extensive factual findings based upon evidence before the General Assembly that was ignored by the three-judge district court below. (*Id.*) After affirming the state three-judge state panel in *Dickson I*, the North Carolina Supreme Court, in *Dickson II*, applied the standards set by this Court in *Alabama* and again affirmed the constitutionality of both districts. *Id.* The evidence in *Dickson* and the evidence before the district court below was essentially identical. But unlike the district court

below, the three-judge state panel and the North Carolina Supreme Court actually reviewed and discussed the evidence in the legislative record which more than shows that North Carolina had "good reasons" to enact CD 1 with a majority black VAP. *Dickson II*, 781 S.E.2d at 427-430, 434-35. Moreover, the three-judge state panel and the North Carolina Supreme Court considered the testimony of the State's map drawer as well as all of the statements by the General Assembly's redistricting chairs – as opposed to only a few selected statements – and found that CD 12 was predominantly based upon politics. Principles of comity warrants full review by this Court so that the split between the North Carolina Supreme Court and the district court below can be resolved.

The Court should also allow full briefing because the two persons recruited to be plaintiffs in this case are also members of the losing organizational plaintiffs in *Dickson*. Because the organizational plaintiffs in *Dickson* asserted standing by claiming to represent the rights of their members, plaintiffs here should not be allowed to assert the same claims in a different forum. Appellants' Jurisdictional Statement, p. 35, n. 11.

2. In its ruling on CD 1, the court below ignored this Court's holding in *Strickland*, misapplied *Alabama*, and relied upon clearly erroneous findings of fact regarding the racial composition of CD 1.

The court below ignored evidence whenever it did not support its conclusion that CD 1 and CD 12 are unconstitutional. As we have explained, the district court ignored the substantial evidence before the General Assembly establishing that CD 1 should be drawn as a VRA district with a black VAP in excess of 50%. Appellants' Jurisdictional Statement, pp. 13-17. This included a particularized study of elections in CD 1 submitted by an expert for the North Carolina NAACP that found significant racially polarized voting in the area encompassed by CD 1. Counsel for the NAACP also informed the legislature that based upon the report submitted by the NC NAACP's expert, "majority minority districts are still needed." (D.X. 5.6, p. 10)

Also ignored by the court below was the fact that the 2001 CD 1 was the most underpopulated congressional district in the 2001 plan (-97,000 persons). *See Harris v. McCrory*, _ F. Supp. 3d _, 2016 WL 482052, at *9 (M.D.N.C. Feb. 5, 2016). Prior versions of CD 1 had also been underpopulated during prior redistrictings because of the slow population growth in eastern North Carolina. In order to remedy this pattern of under population experienced in this district, the redistricting co-chairs decided to move the district into Durham County, which is part of North Carolina's high

growth area known as the Research Triangle. (DX 5.11 "7/1/2011 Statement," pp. 3-4; "7/19/2011 Statement," pp. 2-4; Trial Tr., Day 2, pp. 489-93) Residents of Durham County were assigned to CD 1 to remedy the chronically underpopulated nature of the congressional district. ("7/19/2011 Statement," pp. 2-4)

While supporting its decision by citing the percentage of votes received by black incumbents in CD 1, the district court ignored that black incumbents won these elections with actual voting margins that were substantially below the amount of population by which the district was underpopulated. (D.E. 30-2, pp. 82-83) Thus, the court below ignored the judicially manageable standard for Section 2 districts set by this Court in *Strickland*. Neither state legislatures nor "experts" can answer "speculative" and "elusive" questions, such as the "right" types of white voters that need to be added or subtracted from underpopulated or overpopulated districts to create an ability to elect district with less than 50% black VAP. Nor can state legislatures or experts effectively analyze the impact of a strong black incumbent on crossover voters. *Strickland*, 556 U.S. at 17-18. On the day their counsel stated that majority minority districts were still needed, the NC NAACP proposed a version of CD 1 with an Any Part Black ("APB") VAP of 47.44%. (DX 126, Tab 7, p. 4) Neither the NC NAACP nor its expert ever explained the voting patterns of the 97,000 voters they added to the NC NAACP's proposed CD 1 or how it determined that their proposed district gave black voters an ability to elect with an APB VAP of 47.44%. The NC NAACP

agreed that statistically significant racially polarized voting remained in North Carolina and it did not propose that CD 1 be created with a black VAP anywhere close to the statewide percentage of 21 to 22%. (DX 5.6, pp. 9-10; DX 126, Tab 7; DX 5.7, p. 2; DX 5.8) The evidence before the legislature easily provided it with "good reasons" to enact CD 1 with a majority black VAP as opposed to hiring experts to debate upon the "right" percentage of black VAP below 50%. *Alabama*, 135 S. Ct. at 1274.

Further, the district court, as well as the plaintiffs, continuously and erroneously compared the single race black VAP under the 2000 census of the 2001 CD 1 (47.76%) to the APB VAP of the 2011 CD 1 under the 2010 Census (52.65%). (DX 126, Tab 5, p. 3; *cf.* Tab 12, p. 4) In truth, the APB VAP of the 2001 CD 1 under the 2010 census was 48.63%, a fact completely ignored by the court below. (*Id.* Tab 6, p. 5) Because the state was obligated to add 97,000 voters to remedy the under population of the 2001 CD 1, given the decision in *Strickland*, the state surely had "good reasons" to increase the APB VAP of CD 1 from 48.63% to slightly above 50%. *Alabama*, 135 S. Ct. at 1274.

Finally, the district court erroneously relied upon its finding that racially polarized voting was not present in the 2001 CD 1 because of that district's "majority white" population. *See Harris v. McCrory*, 2016 WL 482052, at *3, 18-20. Under both the 2000 and 2010 Census the total population of CD 1 was majority black. (Trial Tp. Day 2, pp. 372-374, 383, 410, 440-43; DX 126, Tabs 5 & 6) Non-Hispanic whites were a minority of the total population and

the voting age population. (*Id*.) More significantly, by the time of the 2010 Census, blacks were a majority of all registered voters. (*Id*. Tab 6, p. 6) The district was never majority non-Hispanic white, and whites were always a minority of the registered voters. Based upon the racial composition of registered voters, CD 1 was in fact a majority black district. CD 1 was never a "majority white" district no matter how that term might be defined. The court's decision below that racially polarized voting did not exist because the "white majority" did not vote as a bloc to defeat the minority preferred candidate is clearly erroneous.

The district court's error in this regard was more than just a fact-finding error. The error contributed to the district court's erroneous legal analysis of whether the State had a strong basis in evidence to draw CD 1 as a VRA district. Because CD 1 was never a majority white district, it was difficult to know whether black candidates who won in that district did so because of white crossover voting. It was also impossible for any so-called white majority to defeat any black candidate because white voters were never a majority of the district. Appellees never made any attempt at trial to demonstrate the actual levels of so-called white crossover voting, if any, in CD 1. The State, on the other hand, relied during the legislative process on the fact that CD 1 was never majority white and that significant levels of racially polarized voting continued to exist. Under these circumstances, there were certainly "good reasons" for the State's belief that CD 1 should therefore be drawn as a VRA district under the *Strickland* standard.

3. In its ruling on CD 12, the majority below misapplied the legal standard established by *Cromartie II* and made factual findings that are clearly erroneous.

The majority below ignored this Court's decision in *Cromartie II* and improperly relied upon registration statistics in support of its holding that CD 12 was an illegal racial gerrymander. *Cromartie II*, 532 U.S. at 235, 244-246. This alone warrants the reversal of the decision below. However, the two-judge majority also relied upon an irrational and clearly erroneous analysis of other evidence in its quest to find that race was the predominant motive for CD 12. In so doing, the two-judge majority ignored this Court's rulings on the effect of such evidence in the racial predominance analysis.

The majority relied on an alleged statement by redistricting co-chair Senator Bob Rucho to Congressman Mel Watt that Rucho had "ramped up" the black VAP in CD 12.[3] To rely upon this statement to find racial predominance is irrational and contravenes the legal standard from *Cromartie II*. Because CD 12 had been ruled insufficiently compact in *Shaw II*, no rational legislature would attempt to recreate this uncompact and contorted district as a VRA district – particularly in light of

[3] Congressman Watt gave this same testimony in *Dickson*. Senator Rucho testified in *Dickson* and denied making this statement to Congressman Watt. This testimony was admitted into evidence in the case below by stipulation. Senator Rucho did not testify in this case. The state court in *Dickson* did not find as fact that Senator Rucho made this statement to Congressman Watt.

Cromartie II, where this Court approved the unusual and non-compact shape of this district because politics was the predominant motive. It defies rational fact-finding that Senator Rucho would characterize CD 12 as a VRA district given the district's unusual shape and the Court's past rulings in *Shaw II* and *Cromartie II*.

To successfully turn the alleged Rucho-Watt interaction on its head, the majority below ignored *contemporaneous* statements by Senator Rucho admitting that he intended to create CD 1 as a VRA district but stating that "CD 12, represented by Congressman Watt, is not a Section 2 majority black district." (DX 5.11, "7/1/2011 Statement," p.5) In this statement, both redistricting chairs cited *Cromartie II* as authority supporting their intention to create CD 12 as "a very strong Democratic District." (*Id.*) And on July 19, 2011, the redistricting chairs again stated that they intended to draw CD 12 "as a very strong Democratic district" and that in doing so they intended to enact "districts adjoining the Twelfth District that will be more competitive for Republican candidates." (*Id.*, "7/19/2011 Statement," pp. 4-5) The majority below did not address either of these contemporaneous statements. *See Harris*, 2016 WL 482052.

The majority below relied upon an innocuous memo from legislative counsel, written on June 30, 2001, stating that "11 of 13 districts" in the legislature's proposed congressional plan, were created with "a Democratic registration advantage" and that "registration advantage is the best aspect to focus on to emphasize competitive races." (PX 13).

This email mentions nothing about CD 12 or the criteria used to draw CD 12. Instead, it only provides commentary on the overall registration advantage Democrats enjoyed in 11 of the 13 districts.[4]

The majority below ignored that the 2011 CD 12 is located in the same six counties as the 2001 version and that 67.4 percent of the population in the 2011 CD 12 came from the 2001 version. (DX 2.31) The majority below also ignored undisputed evidence that the State accomplished its political goals for CD 12 and adjoining districts by removing voters who voted for John McCain in the 2008 Presidential Election from CD 12 and placing them in adjoining districts. (Trial Tr., Day 2, pp. 389-39, 557-60, 563) To compensate for the removal of these voters from CD 12, the State replaced them with voters who supported President Obama in 2008 who were removed from adjoining districts and placed in the 2011 CD 12. (*Id.*)

Further still, the majority below ignored that the percentage of voters added to CD 12 who supported President Obama was higher than the percentage of black voters added to the district. The majority below also ignored that Democratic voting strength increased in the 2011 CD 12 during the

[4] The majority below ignored that in their statement issued two days later, the redistricting chairs repeated nearly verbatim the June 30, 2011 opinion expressed by legislative counsel on the advantages of voters registered as Democrats and stated that CD 12 was not a VRA district but was instead drawn to be a strong Democratic district.

2012 and 2014 elections. (DX 25.8, ¶¶ 39, 62-63; DX 26.1, ¶¶ 26)

Finally, the majority below ignored undisputed evidence that Democratic candidates were elected in 2010 in districts that adjoined the 2001 CD 12, and that Republican candidates were elected in both of those districts (CDs 8 and 13) in 2012 and 2014. (Trial Tr., Day 1, pp. 151-152) This evidence proves that the redistricting chairs accomplished the goals they stated in their public statements of July 1 and July 17, 2011.

It is not disputed that the redistricting chairs were conscious of race in drawing the 2001 CD 12 and that they needed to be conscious of race. Guilford County has always been included in all prior versions of CD 12 and it was a covered jurisdiction under Section 5 of the Voting Rights Act. But the redistricting chairs' consideration of race in 2011 was no more pronounced than the use of race by the redistricting chair in 1997 when the General Assembly adopted the 1997 version of CD 12. *Cromartie II*, 133 F.Supp. 2d 407, 418-421, *reversed*, 532 U.S. at 247-49. In *Cromartie II*, this Court refused to find racial predominance simply because some voters were intentionally added to the 1997 version of CD 12 because of their race. *Id.* at 249. It was error for the majority below to find the 2011 version unconstitutional simply because the redistricting chairs had to be conscious of race to obtain preclearance under Section 5.

CONCLUSION

For the foregoing reasons, the Court should deny appellees' motion to affirm and summarily reverse the court below, or note probable jurisdiction.

Respectfully submitted,

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