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 *AMICUS CURIAE* FOR ONEVIRGINIA2021: VIRGINIANS FOR FAIR REDISTRICTING IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE

OneVirginia2021: Virginians for Fair Redistricting ("OneVirginia2021"), is a nonprofit corporation formed under the laws of the Commonwealth of Virginia and granted exempt status under Sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code.[1]

OneVirginia2021 was organized to initiate a comprehensive effort to remove gerrymandering from the redistricting process in Virginia through public education, participation in litigation, and by seeking an amendment to the Constitution of Virginia establishing an impartial Redistricting Commission to draw legislative and congressional district lines. OneVirginia2021 is interested in this case because it presents an opportunity to address the destructive impact of invidious partisan gerrymandering on the fundamental process of determining congressional and legislative representation through redistricting.

STATEMENT OF THE CASE

This case is about the North Carolina General Assembly's open disregard for the constitutional rights of its citizens and the clear dictates of Supreme Court precedent.

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[1] This brief is filed with the written consent of all parties. *See* concurrently-filed emails granting consent pursuant to Supreme Court Rule 37. Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than pro bono counsel made any monetary contribution to the preparation or submission of the brief.

On February 5, 2016, a three-judge court of the United States District Court for the Middle District of North Carolina struck down the State's 2011 Congressional Redistricting Plan ("2011 Plan") as an unconstitutional racial gerrymander in violation of the Fourteenth Amendment to the United States Constitution. *Harris v. McCrory* (*Harris I*), ___ F. Supp. 3d ___, 2016 WL 482052, at *21 (M.D.N.C. Feb. 5, 2016). Over the next two weeks, the General Assembly prepared a replacement plan (the "2016 Plan").

To design this plan, the General Assembly's Joint Select Committee on Congressional Redistricting (the "Committee") adopted districting criteria that expressly gave one party a decided electoral advantage. One requirement, entitled "Political [D]ata," stated that "[t]he only data other than population data to be used . . . shall be election results [data]." Dkt No. 155 at 145. Next, in a provision entitled "Partisan Advantage," the Committee stated that it "shall make reasonable efforts to construct districts" that result in a congressional delegation of "10 Republicans and 3 Democrats." *Id.* Finally, the Committee subordinated traditional, neutral districting principles, such as respecting political subdivisions, to this use of "political data" for "partisan advantage." *See id.* at 146 ("Division of counties shall only be made for reasons of equalizing population, consideration of incumbency and political impact.").

On February 19, 2016, the General Assembly enacted the resulting 2016 Plan into law. The plaintiffs challenged the new plan as a partisan

gerrymander. Dkt. No. 157 at 30-39. In response, the district court noted that it was "very troubled" by the plaintiffs' representations, including, *inter alia*, the statement by one Committee co-chair "making clear that [the Committee's] intent is to use . . . the political data we have to our partisan advantage." *Harris v. McCrory* (*Harris II*), No. 1:13-CV-949, 2016 WL 3129213, at *2 (M.D.N.C. June 2, 2016).

Yet, despite the legislature's brazen behavior, the district court rejected the plaintiffs' challenge. *Id.* The court reasoned that "it may be possible to challenge redistricting plans when partisan considerations go 'too far'" but held that "the plaintiffs ha[d] not provided . . . a 'suitable standard'" to demonstrate that partisan considerations had gone "too far" in this case. *Id.* (citing *Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting) and *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015)).

This Court should note probable jurisdiction in this case for two reasons. First, this case presents a narrow, simple, and vitally important question of law that stands separate from the Supreme Court's political gerrymandering jurisprudence; namely, whether partisan advantage is a legitimate state interest. Because the State relied upon a facial political classification in its official, written criteria for the express purpose of partisan advantage, the question of whether the State went "too far" is irrelevant. It is black-letter equal protection law to apply rational-basis review in such circumstances. *See Romer v. Evans*, 517 U.S. 620, 633 (1996).

The legislature's explicit attempt to provide a "partisan advantage" to one party fails rational-basis review because the *State* cannot claim a legitimate interest in which party ascends to power in a democratic election. An interest in "partisan advantage" is equivalent to an interest in "partisan suppression," and the state *qua* state has no cognizable interest in suppressing certain voters based on their political beliefs for the raw purpose of assigning more power to one party. Bare harm to a group of citizens is not a legitimate state interest. *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

For example, this Court has upheld the use of racial data in redistricting to prevent discrimination but condemned the use of racial data for purposes of "maximization" of majority-minority districts. *Compare City of Rome v. United States*, 446 U.S. 156, 177 (1980), *abrogated in part by Shelby Cty., Ala. v. Holder*, 133 S. Ct. 2612 (2013), *with Barlett v. Strickland*, 556 U.S. 1, 20 (2009) (noting that federal antidiscrimination law "does not guarantee minority voters an electoral advantage") *and id.* at 29 (Souter, J., dissenting) (agreeing that the Court had "conclusively rejected" a policy of maximizing voting strength and that "the [Voting Rights Act] was passed to guarantee minority voters a fair game, not a killing"). So too can the Court easily resolve this case by clarifying that "partisan advantage" is not a legitimate state interest and overturn the plan derived from these constitutionally offensive criteria. *See Vieth v. Jubelirer*, 541 U.S. 267, 312 (2004) (Kennedy, J., concurring).

In fact, this case was foreshadowed over a decade ago. In *Vieth v. Jubelirer*, Justice Kennedy noted that "[i]f a State passed an enactment that declared 'All future [redistricting plans] shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles,' we would surely conclude the Constitution had been violated." 541 U.S. at 312 (Kennedy, J., concurring). Here, the Committee did just that – formally adopting criteria with explicit political classifications and declaring that the resulting plan should provide a "partisan advantage" by seating "10 Republicans and 3 Democrats." Dkt No. 155 at 145. This figure was chosen because the plan's architect did not believe it mathematically possible to provide Republicans any greater political advantage. *Id.* at 104-05. In such circumstances, "surely . . . the Constitution ha[s] been violated," *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring), and the Court should note probable jurisdiction to say so.

Moreover, rejecting partisan advantage as a legitimate state interest in redistricting cases would be consistent with the Court's broader election law jurisprudence. In voting rights and ballot access cases, the federal courts typically conduct an "*Anderson-Burdick*" analysis. *See generally Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). In such cases, "the State's asserted regulatory interests need only be 'sufficiently weighty to justify the limitation' imposed on the party's rights." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997) (quoting *Norman v. Reed*, 502 U.S. 279, 288–89 (1992)). This entire line of cases is patently incompatible with a

purported interest in "partisan advantage." The whole purpose of the *Anderson-Burdick* framework is to suss out this illegitimate basis for electoral rules and regulations.

Second, the Court should note probable jurisdiction in this case to close a loophole that has riddled racial gerrymandering cases, including two appeals in which the Court has already noted probable jurisdiction: *Bethune-Hill v. Va. State. Bd. of Elections*, 136 S. Ct. 2406 (2016), and the appeal of North Carolina's 2011 Plan, *McCrory v. Harris*, 136 S. Ct. 2512 (2016). In such cases, legislators frequently defend against claims of racial gerrymandering by alleging that district boundaries are attributable to "partisan advantage" instead. *Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505, 542 (E.D. Va. 2015) (noting that "[t]he Intervenors . . . raised the argument that some of the Challenged Districts have political, rather than racial, justifications"); *Harris I*, 2016 WL 482052, at *11-12 (noting that defendants contended the districts were drawn "for partisan advantage"). Holding that "partisan advantage" is an illegitimate justification would foreclose this defense in racial gerrymandering cases, reaffirm the justiciability of partisan gerrymandering cases, and take a significant step towards simplifying and harmonizing the Court's gerrymandering jurisprudence.

Accordingly, *amicus* respectfully requests that this Court note probable jurisdiction.

REASONS FOR NOTING PROBABLE JURISDICTION

I. PARTISAN ADVANTAGE CANNOT BE A LEGITIMATE STATE INTEREST.

A. Allowing Partisan Advantage To Be A Legitimate State Interest Is Inimical To Democratic Principles.

"[Our constitutional] rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). In the appeal at bar, the North Carolina General Assembly enacted a redistricting plan built using facial political classifications for the avowed purpose of partisan advantage. Dkt. No. 155 at 145-46. This presents a narrow legal question that stands wholly apart from the Supreme Court's troubled history with political gerrymandering: Is "Partisan Advantage" a legitimate state interest? The Court should note probable jurisdiction to issue a simple answer: No.

Political gerrymandering—or the practice of drawing district lines based on political data, such as the political affiliation of voters—is permissible in some cases and impermissible in others. When the legislature's goal has been to advance "political fairness" or "partisan balance" through political gerrymandering, this Court has sanctioned the practice. *Bush v. Vera*, 517 U.S. 952, 964-65 (1996) (citing *Gaffney v. Cummings*, 412 U.S. 735, 757-59 (1973), for the proposition that legislatures "may draw irregular district lines in order to allocate seats proportionately to major political parties"); Michael Parsons, *Clearing the Political Thicket: Why Political Gerrymandering for Partisan Advantage is*

Unconstitutional, 24 Wm. & Mary Bill Rts. J. 1107, 1139-42 (2016) ("Parsons") (citing *Gaffney*, 412 U.S. at 736-38, 752-54, and *Easley v. Cromartie* (*Cromartie II*), 532 U.S. 234, 246-47, 253 (2001)). When the legislature's goal has been to advance "partisan advantage" through political gerrymandering, this Court has been more circumspect. *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1310 (2016) ("assuming, without deciding, that partisanship is an illegitimate redistricting factor"); *League of United Latin Am. Citizens v. Perry* (*LULAC*), 548 U.S. 399, 423 (2006) (noting that the Court had not "'resolve[d] the issue of whether or when partisan advantage alone may justify deviations in population'" (quoting *Larios v. Cox*, 300 F. Supp. 2d 1320, 1352 (N.D. Ga. 2004)).

This Court's concerns about embracing partisan advantage in the political gerrymandering context are well-founded. That is because "partisan advantage" cannot be asserted as a legitimate state interest in *any* context. "Partisan advantage" is not a cognizable constitutional interest for two reasons.

First, "partisan advantage" is not a *state* interest at all. The state *qua* state represents the entire body politic and cannot claim an interest in which party wins a democratic election and ascends to power. *Ariz. State Legis.*, 135 S. Ct. at 2658, 2675 ("[P]artisan gerrymanders . . . [are incompatible] with democratic principles. . . . [T]he true principle of a republic is, that the people should choose whom they please to govern them."); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (noting that, "while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the

people, by whom and for whom all government exists and acts"); Parsons, *supra*, at 1135-38. Indeed, claiming an interest in "partisan advantage" is the same as claiming an interest in "partisan suppression." One cannot exist without the other, and suppression of one's political opponents cannot possibly be a legitimate *state* interest.

Unlike individual Republican or Democratic legislators, the State of North Carolina itself has no cognizable interest in suppressing the rights of a subset of its citizens because it fears how they will vote. "That is what distinguishes a vibrant, functioning democracy that respects the will of the voters from a corrupt shell of a republic where partisans openly rig elections in order to retain their grip on power with the blessing of a complicit judiciary." Parsons, *supra*, at 1136. Holding that "partisan advantage"—and, thus, partisan suppression—is a legitimate *state* interest would be contrary to fundamental constitutional principles and the very meaning of republican government.

Second, legislation passed for the purpose of disadvantaging a group of citizens is not *legitimate*. *Romer*, 517 U.S. at 632 (noting that when legislation is "inexplicable by anything but animus toward the class it affects[,] it lacks a rational relationship to legitimate state interests"). "[A] status-based enactment divorced from any factual context from which [the courts can] discern a relationship to legitimate state interests . . . is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Id.* at 635. As this Court has pointed out, "[a] law declaring that in general it shall be more difficult for one group of

citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Id.* at 633.

Of course, the State is likely to contend that partisan advantage *is* a legitimate state interest so long as it does not go "too far." *See, e.g.*, *Cox*, 542 U.S. at 952 (Scalia, J., dissenting). The district court rejected the appellants' challenge below for precisely this reason. *Harris II*, 2016 WL 3129213, at *2 ("[I]t is presently obscure what 'too far' means. Moreover, the plaintiffs have not provided the Court with a 'suitable standard' - that is, one that is clear and manageable - to evaluate the partisan-gerrymander claim." (quoting *Ariz. State Legis.*, 135 S. Ct. at 2658)).

A certain degree of vote dilution is inevitable in a system based on geographic representation (as opposed to proportional representation). The consistent application of traditional, geographic criteria (such as compactness, contiguity, and respect for political subdivisions) for legitimate, neutral purposes (such as responsiveness, accountability, and ease of administration) will necessarily result in some level of dilution.

Similarly, the consistent application of individualized criteria (such as race, incumbency, or political affiliation) for legitimate, neutral purposes (such as preventing discrimination, preventing incumbent-pairing, promoting competitiveness, or promoting rough proportionality) may result in some degree of dilution and/or deviations from traditional, neutral districting principles. *City of Rome*, 446 U.S. at 177 (upholding the use of racial considerations to prevent discrimination); *Bush*, 517 U.S. at 964-65

(plurality opinion) (noting that the Court has recognized "incumbency protection, at least in the limited form of 'avoiding contests between incumbent[s],' as a legitimate state goal" (quoting *Karcher v. Daggett*, 462 U.S. 725, 740 (1983))); *Gaffney*, 412 U.S. at 752-53 (noting that "[i]t would be idle . . . to contend that *any* political consideration . . . is sufficient to invalidate [a plan] . . . [because] [t]he very essence of districting is to produce a different—*a more 'politically fair'*—result") (emphasis added); *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring) (citing *Gaffney* for the proposition that politics is a permissible consideration); *LULAC*, 548 U.S. at 440-41 (noting that incumbency "can be a legitimate factor in districting" when "in the interests of the constituents").

Thus, political gerrymandering is constitutionally permissible if the legislature "purport[s] fairly to allocate political power . . . and, within quite tolerable limits, succeed[s] in doing so." *Gaffney*, 412 U.S. at 754. For example, the Equal Protection Clause does not "take sides" in a dispute over "whether it is better for Democratic voters to have their [representatives] 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)." *Vieth*, 541 U.S. at 288 n.9 (plurality opinion). In either scenario, the legislature purports to allocate power based on a legitimate theory of fair representation: "competitiveness" in the first versus "proportionality" in the second. Parsons, *supra*, at 1143-44.

But none of this means that the application of individualized criteria (such as race or party) for *discriminatory* purposes (such as racial or partisan advantage) is legitimate so long as it does not go "too far." *Strickland*, 556 U.S. at 20 (noting that the Voting Rights Act (VRA) "does not guarantee minority voters an electoral advantage"); *id.* at 29 (Souter, J., dissenting) (agreeing that "the VRA was passed to guarantee minority voters a fair game, not a killing"); *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring) ("A determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications . . . were applied in . . . a way unrelated to any legitimate legislative objective."). In short, the question is not "how much" political gerrymandering is permissible, but rather "what type" of political gerrymandering is permissible. Parsons, *supra*, at 1138-47.

Consider, for example, a law expressly requiring voters in precincts that voted Democratic in the preceding election to present photo identification but permitting voters in precincts that voted Republican in the preceding election to vote without presenting photo identification. Moreover, imagine this law was defended in court on the basis that it would provide a "partisan advantage" to Republicans. Such a law would be struck down without any inquiry into its burden or effect. That is because it employs a facial classification for an illegitimate purpose. *Romer*, 517 U.S. at 633 (noting that classifications must at least "bear a rational relationship to an independent and legitimate legislative end").

In reaching this conclusion, the judiciary need not articulate or endorse any particular theory of political fairness. Prohibiting political gerrymandering for partisan advantage "do[es] not impose a particular version of 'fairness' upon the state; instead, [it] prevent[s] unequal treatment under the law on the basis of political affiliation" without any legitimate justification. Parsons, *supra*, at 1162-63. Political criteria can be used by legislatures in each state to advance whatever theory of "fair and effective representation" they deem appropriate, so long as the criteria are deployed in a consistent fashion to that end. *See Vieth*, 541 U.S. at 307 (Kennedy, J., concurring) (noting that "[t]he object of districting is to establish 'fair and effective representation for all citizens,'" but that there is a lack of agreement upon any one "model of fair and effective representation" (quoting *Reynolds v. Sims*, 377 U.S. 533, 565-68 (1964))). Indeed, requiring legislators to justify their decisions in court based on neutral, legitimate grounds serves a vital constraining function and helps reign in constitutionally abusive practices.

Legislators who openly proffer "partisan advantage" as a justification are not even attempting to articulate a plausible theory of "fair and effective representation." When the State suppresses certain voters based on their political beliefs and cannot offer any rational theory to justify its behavior, the Equal Protection Clause does indeed "take sides." Thus, where, as here, a plan is based on facial political classifications for the purpose of partisan

advantage, that plan must fail. *See Vieth*, 541 U.S. at 312 (Kennedy, J., concurring).[2]

By enacting the 2016 Plan, the General Assembly has lobbed this Court a softball in the form of a narrow and cleanly presented legal question: Is partisan voter suppression a legitimate state interest under the Constitution? This question has a simple answer: No.

B. As Justice Kennedy Recognized In *Vieth*, Redistricting Designed To Provide A Partisan Advantage Cannot Survive Constitutional Muster.

With respect to redistricting law, reversal in this case would follow through on a hypothetical set out by Justice Kennedy in *Vieth v. Jubelirer* more than a decade ago. 541 U.S. at 312 (Kennedy, J., concurring). There, Justice Kennedy contended that

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[2] There are other questions of degree raised in political gerrymandering claims, but these are identical to those raised (and ably managed) in racial gerrymandering claims. Parsons, *supra*, at 1147 n.294. For example, racial and political vote-dilution plaintiffs proceeding under the Fourteenth Amendment must muster sufficient evidence of intentional suppression. However, holding that plaintiffs must meet a certain degree of proof is different than holding that the state may claim an interest in a certain degree of racial or political suppression for its own sake.

In this case, however, the quantum of evidence is irrelevant. Where there is a facial classification, the Court uses the applicable standard of review. That may be strict scrutiny for racial gerrymandering, *Shaw v. Reno*, 509 U.S. 630, 650 (1993), or another standard for political gerrymandering, *id.* (stating that racial and political gerrymanders may not be "subject to precisely the same constitutional scrutiny"), but the Court must at least apply rational-basis review, *Romer*, 517 U.S. at 633.

partisan gerrymandering claims should remain justiciable and explained why:

> If a State passed an enactment that declared "All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles," we would *surely* conclude the Constitution had been violated. If that is so, we should admit the possibility remains that a legislature *might attempt to reach the same result without that express directive.*

Id. (emphasis added).

The irony of the case before the Court is that raises a situation (expressly drawing districts to favor one party) considered so preposterous and constitutionally offensive that it was relied upon to make the point that *less* explicit laws might be constitutionally offensive as well. It is black-letter equal protection law that facial classifications must at least pass rational-basis review, even if the class described in the law is not a "suspect" class. *Romer*, 517 U.S. at 633 (noting that facial classifications must at least "bear a rational relationship to an independent and legitimate legislative end" so that the Court can "ensure[] that [the] classification[] [is] not drawn for the purpose of disadvantaging the group burdened by the law").

In this case, the Court does not need to explain what to do when a legislature attempts to "reach the same result [as an explicit classification] without [such an] express directive," *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring), because the plan at issue actually used *an express directive*. Thus, the Court

can simply hold that a facial political classification for the express purpose of partisan advantage is unconstitutional.

Noting probable jurisdiction in this case and rejecting partisan advantage as a legitimate state justification would take an important step towards establishing a political gerrymandering standard with teeth. At present, states evade liability for classifying and burdening citizens differently based on their political beliefs, associations, and voting patterns. *Id.* at 317 ("Whether spoken with concern or pride, it is unfortunate that our legislators have reached the point of declaring that, when it comes to apportionment: 'We are in the business of rigging elections.'" (quoting J. Hoeffel, *Six Incumbents Are a Week Away from Easy Election*, Winston-Salem J., Jan. 27, 1998, at B1)). Legislators openly and unabashedly enact partisan gerrymanders knowing that the federal courts will do nothing to stop them despite the fact that political gerrymandering claims are justiciable.

This case offers a chance to fire a shot across the bow and reaffirm that gerrymanders enacted for partisan advantage are unconstitutional. Holding that "surely . . . the Constitution ha[s] been violated" in this case would follow through on Justice Kennedy's warning, *id.* at 312, and confirm this important principle without delving into the question of which less-explicit redistricting laws might be constitutionally offensive as well.

C. Rejecting Partisan Advantage Is Consistent With Other Election Law Standards.

With respect to burdens on voting, the Supreme Court has repeatedly indicated that "partisan advantage" is not a legitimate state interest under the *Anderson-Burdick* framework. *See generally Anderson*, 460 U.S. 780; *Burdick*, 504 U.S. 428. That framework is "based . . . directly on the First and Fourteenth Amendments," *Anderson*, 460 U.S. at 787 n.7, and applies to challenges to election laws, such as voting regulations and ballot access restrictions, *Burdick*, 504 U.S. at 438.

In such cases, courts must "consider the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate," "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule," and, "after weighing all these factors[,] . . . decide whether the challenged provision is unconstitutional." *Anderson*, 460 U.S. at 789. When the restrictions are severe, "the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Burdick*, 504 U.S. at 434 (quoting *Norman*, 502 U.S. at 289). However, "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (quoting *Anderson*, 460 U.S. at 788).

Normally, the interest proffered by the state is plausibly neutral and nonpartisan. *See, e.g.*, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181,

194 (2008) (proffering an interest in preventing voter fraud) (plurality opinion). That is because a purported interest in "partisan advantage" is irreconcilable with the very purposes of the *Anderson-Burdick* framework. As Justice O'Connor noted in *Clingman v. Beaver*:

> Although the State has a legitimate—and indeed critical—role to play in regulating elections, it must be recognized that it is not a wholly independent or neutral arbiter. Rather, the State is itself controlled by the political party or parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefit. . . . [A]pplying [the *Anderson-Burdick* framework] helps to ensure that [electoral rules] are truly justified and that the State's asserted interests are not merely a pretext for exclusionary or anticompetitive restrictions.

544 U.S. 581, 603 (2005) (O'Connor, J., concurring).

There is no reason why the State should be able to claim an interest in partisan advantage in redistricting cases when such an interest is incompatible with voting rights cases. *Crawford*, 553 U.S. at 204 (plurality opinion) (upholding a voter identification statute because it was "a nondiscriminatory law . . . supported by valid neutral justifications"); *id.* at 205, 208 (Scalia, J., concurring) (contending that the law should be upheld because it "draws no classifications, let alone discriminatory ones," and the legislature's judgment should prevail unless the law "is intended to disadvantage a particular class"). Indeed, the Court's reticence in the gerrymandering context has led some to believe that partisan advantage is a

legitimate justification for limiting access to the franchise altogether.[3]

If the decision below stands, and partisan suppression is held to be a legitimate state interest, the ramifications for our republic are likely to be profound, immediate, and difficult to cure through traditional democratic processes. Legislators' abuse of such a holding will soon extend well beyond redistricting law. Instead, the Court should note probable jurisdiction, reverse the decision below, and reaffirm that partisan advantage is not a legitimate state interest.

II. REJECTING PARTISAN ADVANTAGE AS A LEGITIMATE STATE INTEREST IS CRITICAL TO REDISTRICTING LAW.

This case also presents the Court an opportunity to close a loophole that has riddled gerrymandering cases throughout the country, including *Bethune-Hill* and *McCrory*, two cases in which the Court has already noted probable jurisdiction for the coming term. By noting probable jurisdiction in this case and holding that partisan advantage is not a legitimate state interest, this Court would prevent legislators from asserting partisan advantage to mask unconstitutional racial gerrymandering.

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[3] *See* Zachary Roth, *Voting Fight Shifts to Local Level in North Carolina*, NBC NEWS (Aug. 8, 2016), http://www.nbcnews.com/politics/elections/voting-fight-shifts-local-level-north-carolina-n625751 (noting that the "head of a leading conservative think tank" in North Carolina is "publicly urging" county election officials to "impose new schemes to limit access to the polls" because "making voting harder is just 'partisan politics'—and that's fair game").

In *Hunt v. Cromartie* (*Cromartie I*), this Court noted that there was conflicting evidence regarding whether North Carolina had districted predominantly on the basis of race or political affiliation. 526 U.S. 541, 553-54 (1999). Because there was some evidence that the State had a political motive, *id.* at 549, the case was returned to the district court to determine which criterion predominated. The Court pointed out that "a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if [the State were] *conscious* of that fact." *Id.* at 551. However, the Court also pointed out that "political gerrymandering claims are justiciable under the Equal Protection Clause" despite the Court "not [being] in agreement as to the standards that would govern such a claim." *Id.* at 551 n.7 (citing *Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (plurality opinion)).

The *Cromartie* rule is straightforward and turns on the basis upon which voters were sorted into districts: gerrymandering based on political data is political gerrymandering; gerrymandering based on racial data is racial gerrymandering.[4] However, "a jurisdiction may engage in" political gerrymandering but only if it is "*constitutional* political gerrymandering." *Id.* at 551 (emphasis added).

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[4] A racial gerrymander for political purposes is still a racial gerrymander. *Bethune-Hill*, 141 F. Supp. 3d at 544 (noting that "[a] political objective . . . does not immunize the use of race as a basis for classification" (citing *Bush*, 517 U.S. at 968 (plurality opinion))).

Unfortunately, legislators have misconstrued this rule. Now, whenever legislators are faced with racial gerrymandering claims, they simply contend that their lines are partisan instead. *See, e.g.*, *Page v. Va. State Bd. of Elections*, No. 3:13-CV-678, 2015 WL 3604029, at *13 (E.D. Va. June 5, 2015) (noting that defendants attempted to justify district based on "partisan politics"); *Bethune-Hill*, 141 F. Supp. 3d at 542 (noting that "[t]he Intervenors . . . raised the argument that some of the Challenged Districts have political, rather than racial, justifications"), *prob. juris. noted*, 136 S. Ct. 2406; *Harris I*, 2016 WL 482052, at *11-12 (noting that defendants contended the districts were drawn "for partisan advantage"), *prob. juris. noted*, 136 S. Ct. 2512.

But Supreme Court precedent offers no cover for districting based on partisan advantage. In *Gaffney*, the board responsible for redistricting "consciously and overtly adopted and followed a policy of 'political fairness,' which aimed at a rough scheme of proportional representation of the two major political parties." 412 U.S. at 738. The Supreme Court wisely stayed its hand, pointing out that when the State "purport[s] fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeed[s] in doing so," the judicial interest in intervention is "at its lowest ebb." *Id.* at 754. Because the State was not attempting "to minimize or eliminate the political strength of any group or party," but rather was attempting "to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State," there was no constitutional violation to be found. *Id.*

Similarly, in *Cromartie*, legislators were attempting to preserve the "partisan balance" in the State between "six Republicans and six Democrats." *Cromartie I*, 526 U.S. at 549. And, as in *Gaffney*, 412 U.S. at 738, North Carolina's "partisan balance" in *Cromartie* approximated statewide voter preferences, Parsons, *supra*, at 1142 n.276.[5]

Because political gerrymandering for partisan advantage is not "*constitutional* political gerrymandering," it does not fall within the protections of the *Cromartie* rule. *Cromartie I*, 526 U.S. at 551 (emphasis added). The Court can—and should—close this loophole and preclude the defense of "partisan advantage" in racial gerrymandering cases.[6] This point of clarification is important for

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[5] Unlike in *Cromartie* and *Gaffney*, the targeted congressional delegation split in this case (10-3) does not come close to—or even pretend to approximate—statewide voter preferences (49%-51% in 2012; 56%-44% in 2014). Dkt. No. 157 at 18-19. Because this distinction was not at issue in *Cromartie*, the Court would face a question of first impression. Parsons, *supra*, at 1142 n.276. That question is easily answered for the reasons articulated herein. An interest in electing a particular delegation *regardless* of underlying voter preferences is irrational and constitutionally illegitimate.

[6] If partisan advantage were held to be an illegitimate justification for deviating from traditional, neutral districting principles, for example, counsel in *Harris I* and *Bethune-Hill* could have challenged the use of that argument at trial. Unfortunately, the contention that "gerrymandering purely for the purpose of achieving or maintaining partisan advantage is unconstitutional" only arose after the district court in *Personhuballah v. Alcorn* was itself faced with the argument that it was obligated to enact a partisan gerrymander in its remedial plan. No. 3:13-CV-678, 2016 WL 93849, at *10 (E.D. Va. Jan. 7, 2016) (Payne, J., concurring in part) (citing Michael Parsons, *Clearing the Political Thicket: Why Political*

navigating the constitutional terrain in two of the Court's upcoming racial gerrymandering cases—*Bethune-Hill* and *McCrory*—and does not require the Court to articulate any comprehensive political gerrymandering framework.

Finally, to the extent the Court is concerned about questions that might be raised in a later appeal—such as the particular test (or tests)[7] to apply to

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Gerrymandering for Partisan Advantage Is Unconstitutional, Unpublished Draft (Dec. 15, 2015), http://ssrn.com/author=2449663); *see also id.* ("Neither . . . in this case nor in *Bethune–Hill* did the Plaintiffs contend that gerrymandering for political purposes was unconstitutional. . . . Now, however, the Intervenors have said that, in fashioning a remedy, this Court is obligated to maintain the 8-3 partisan split in the Enacted Plan. To decide that contention, the Court necessarily must confront whether to effect a political gerrymander.").

[7] The Court could recognize two distinct political gerrymandering claims rather than searching for one, singular claim. Parsons, *supra*, at 1147-50. Political and racial gerrymandering claims share a common judicial genesis in *Fortson v. Dorsey*, 379 U.S. 433, 438-39 (1965), and were considered offenses of the same species for over twenty years, *see Gaffney*, 412 U.S. at 751; *Abate v. Mundt*, 403 U.S. 182, 184 n.2 (1971); *Whitcomb v. Chavis*, 403 U.S. 124, 143 (1970); *Burns v. Richardson*, 384 U.S. 73, 88 (1966). The doctrinal confusion surrounding political gerrymandering stems from the perceived divorce between these claims in *Bandemer*, 478 U.S. 109.

Given the eventual development of the racial sorting claim, *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (noting that sorting claims are "analytically distinct" from vote dilution claims), the *Bandemer* opinion might be viewed as more prescient than problematic. Parsons, *supra*, at 1148. Just as the Court came to recognize two distinct racial gerrymandering claims, the Court could recognize two political gerrymandering claims: dilution and sorting. *Id.* at 1147-50. This would "rehabilitate[]

partisan gerrymandering—the Court will remain free to answer those questions in a future case. Such cases are percolating below,[8] and the Court will have an opportunity to address the theories presented in those cases on fully developed factual records.[9]

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the precedential force of *Bandemer* by combining the principal opinion and Justice Powell's opinion into an effective 'majority' holding." *Id.* at 1148. The *Bandemer* plurality proposed the intent-plus-effects test used in dilution claims, while Justices Powell and Stevens proposed a test similar to the modern sorting claim. *Id*.

8 *See, e.g.*, *Shapiro v. McManus*, No. 1:13-CV-3233 (D. Md.) (Democratic gerrymander); *Whitford v. Gill*, No. 3:15-CV-421 (W.D. Wisc.) (Republican gerrymander).

9 If the Court feels compelled to articulate a framework from the outset, there are options available. *See, e.g.*, Parsons, *supra*, at 1150-59.

CONCLUSION

For the foregoing reasons, the Supreme Court should note probable jurisdiction in this case.

Respectfully submitted,

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