No. 17-1364

In the
Supreme Court of the United States

STATE OF NORTH CAROLINA, *et al.*,
Appellants,

v.

SANDRA LITTLE COVINGTON, *et al.*,
Appellees.

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

BRIEF OPPOSING MOTION TO AFFIRM

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INTRODUCTION

Plaintiffs cannot explain how the North Carolina General Assembly could have engaged in racial gerrymandering by declining to consider race when enacting the 2017 Plan. Instead, their entire defense of the decision below hinges on the notion that the ordinary procedural and substantive rules of litigation do not apply to their challenges to that duly enacted law because it was evaluated as a part of a "remedial proceeding." According to plaintiffs, courts need not worry about mootness, standing, or sovereign immunity, and courts can invalidate districts as racial gerrymanders even if—or, indeed, precisely because—the legislature did not consider race, so long as they do all of that pursuant to their power to "remedy" an earlier racial gerrymander.

That theory defies law, logic, and the fundamentals of the legislative and judicial processes. While district courts have different obligations when imposing their *own* remedial maps, they do not have some special reservoir of remedial power that allows them to ignore basic Article III requirements or subject duly enacted laws to some ad hoc "preclearance" process in which the normal presumption of constitutionality is reversed. Instead, when a State repeals a judicially invalidated map and replaces it with another duly enacted law, the second law is entitled to the same presumption of constitutionality as any other legislation, and can be invalidated only if a plaintiff with standing proves that it violates the Constitution or the VRA. Whatever else may be said of the complex web of restrictions that those two sources of federal law weave, one thing is for

certain: A legislature cannot engage in racial gerrymandering by declining to district on the basis of race. The district court's contrary conclusion cannot stand.

I. Challenges To Legislatively Enacted "Remedial" Plans Are Not Exempt From The Ordinary Rules Of Adversarial Litigation.

Plaintiffs do not even try to reconcile the district court's decision with the normal procedural and substantive rules that govern challenges to districting legislation. Instead, they argue that those settled rules do not apply here because the court was conducting a "remedial proceeding." *See, e.g.*, Mot.2, 13, 17, 23. In their view, because the district court was reviewing a plan enacted to replace a plan found deficient, the court did not have to abide by racial-gerrymandering jurisprudence, the Eleventh Amendment, or even the constraints of Article III. Plaintiffs are deeply mistaken. They have conflated the judicial role when a federal court must draw districts because the state legislature has failed to act, with the very different judicial role when a state legislature enacts a new plan into law. In the latter circumstance, there is no excuse for deviating from the normal requirements of Article III or the ordinary presumption of constitutionality.

In the rare circumstance when "those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so," the court may be forced to take on the "unwelcome obligation" of designing a districting plan. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (principal opinion). And in that circumstance, the court may

treat an unenacted proposal from the legislature as a mere proposal, because that is all it is. In the absence of a timely enacted new law, the court has no choice but to draw its own map and has an independent obligation to ensure that its map complies with applicable law. *See Perry v. Perez*, 565 U.S. 388, 393-94 (2012).

But where, as here, the State enacts a new plan, the district court cannot treat that duly enacted law as a mere proposal. Nor does the court have the power to subject that duly enacted legislation to a kind of "preclearance," freed from the presumption of constitutionality and unconstrained by the rules of adversarial litigation. Instead, the "new legislative plan" takes immediate effect and becomes "the governing law unless it, too, is challenged and found to violate the Constitution." *Wise*, 437 U.S. at 540. Such a challenge is subject to the ordinary constraints on the Article III process and "the presumption of good faith that must be accorded legislative enactments." *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

That is clear from this Court's cases. This Court has explained, for example, that "state legislatures are free to replace court-mandated remedial plans by enacting redistricting plans of their own." *League of United Latin Am. Citizens v. Perry* ("*LULAC*"), 548 U.S. 399, 416 (2006) (Kennedy, J.). If the new plan is challenged, "no presumption of impropriety" attaches to the new plan, and the court's task is the same as in any racial-gerrymandering case: to determine whether the legislature was predominantly motivated by race. *Id.*; *see, e.g.*, *Hunt v. Cromartie*, 526 U.S. 541 (1999). Indeed, the rule that courts must "afford a

reasonable opportunity for the legislature to … adopt[] a substitute measure," *Wise*, 437 U.S. at 539, would be meaningless if second-round plans were not entitled to the same presumptions of good faith and constitutionality as first-round plans.

Proving the point, this Court has never approved the application of different rules to challenges to *legislatively* enacted "remedial" plans. Instead, this Court has applied distinct "remedial" principles *only* when a court was (or was likely to be) forced to draw its *own* plan. Indeed, the principal case on which plaintiffs rely (at 22) for their remedial-proceedings-are-different theory is one in which the legislature "could not reach agreement" on a second-round plan. *Abrams v. Johnson*, 521 U.S. 74, 78 (1997). Likewise, while plaintiffs contend that this Court "has regularly approved of the district court's retention of jurisdiction" to review remedial plans, Mot.14, the cases they cite all involve legislative default. *See Chapman v. Meier*, 420 U.S. 1, 27 (1975) (instructing court to retain jurisdiction in case legislature "fails" to act); *Scott v. Germano*, 381 U.S. 407, 409 (1965) (instructing court to retain jurisdiction in case legislative plan "is not timely adopted"); *Reynolds v. Sims*, 377 U.S. 533, 586 (1964) (commending court for imposing plan after legislature "failed to act").

Plaintiffs also fail to distinguish cases recognizing that the enactment of a new plan moots challenges to the repealed plan. Plaintiffs note (at 16) that *Growe v. Emison*, 507 U.S. 25 (1993), involved "simultaneous state and federal actions," but that quirk has nothing to do with the relevant point: When the new plan "became the law," challenges to the old plan "became

moot." *Id.* at 35, 39. Plaintiffs do not even try to square their theory with *Hunt v. Cromartie*, instead discussing what a district court in a different case did three years earlier, Mot.17. Whatever that court did, this Court made clear in *Cromartie* that a new (and non-contingent) plan moots challenges to the old one. 526 U.S. at 545 n.1; *see Louisiana v. Hays*, 518 U.S. 1014 (1996); *White v. Regester*, 422 U.S. 935 (1975); *Hainsworth v. Martin*, 382 U.S. 109 (1965).

Plaintiffs insist that requiring them to litigate their challenges to the 2017 Plan the same way they must litigate any other constitutional challenge would "dangle relief beyond the[ir] reach." Mot.14. But that just underscores the basic flaw in their position. Plaintiffs have already gotten complete relief for the only claims they ever proved: The legislature repealed the plan they challenged and enacted a new one. Plaintiffs' belief that repeal of the only law they properly challenged is not a "true remedy" is fundamentally incompatible not only with bedrock mootness principles, but with the equally bedrock rule that *all* legislative enactments—even "remedial" ones—are entitled to a strong presumption of constitutionality. Requiring plaintiffs to overcome that presumption and prove their case in the ordinary course does not make the 2017 Plan "immune from review." Mot.2. It just ensures that duly enacted legislation will be invalidated only if it is actually unconstitutional.

II. The District Court Erred By Invalidating Four Districts As Racial Gerrymanders.

A. The District Court Applied the Wrong Legal Standard.

It is little surprise that plaintiffs adamantly refused to litigate their challenges to the 2017 Plan under the ordinary rules: They did not and cannot prove that the 2017 General Assembly engaged in racial gerrymandering. Indeed, while plaintiffs emphasize the district court's factual findings, that court did not make the one finding essential to a racial gerrymandering claim—namely, that race was the legislature's predominant motive.

Instead of looking for (let alone finding) that presumptively improper motive, the district court disapproved the challenged districts because the legislature purportedly did not "eliminate[] the discriminatory *effects* of the racial gerrymander" in the *2011* Plan. JS.App.38-39 (emphasis added). To state that oxymoronic theory is to refute it. Racial gerrymandering is an *intent*-based claim, grounded in impermissible consideration of race. Accordingly, the best way to "eliminate" the 2011 law's "discriminatory effects" is to repeal it, which is just what the legislature did. Of course, the 2017 law could turn out to be a racial gerrymander too—but that intent-based challenge would turn not on effects, but on whether the 2017 legislature acted with an impermissible racial purpose.

Plaintiffs resist this proposition, warning that if invalidation of a second-round plan requires a new finding of racial purpose, "the General Assembly could have cured its constitutional violations by re-enacting

the exact same plans" for a non-discriminatory reason. Mot.23. But that is not an anomaly; it is just how discriminatory-*intent* claims work: "[A] law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Washington v. Davis*, 426 U.S. 229, 240 (1976). Because the plaintiff's injury flows from the prior legislature's discriminatory intent, the injury is remedied once that law is repealed and a new legislature enacts a new plan without discriminatory intent, as the legislature did here. *See* JS21-23; *Palmer v. Thompson*, 403 U.S. 217, 225 (1971); Br. for United States 32-35, *Abbott v. Perez*, Nos. 17-586 & 17-626 (U.S.).

To be sure, a State cannot "undo the injury of racial gerrymandering simply by *claiming* to ignore racial data while enacting substantially the same plans." Mot.23-24 (emphasis added). A legislature that only *claims* to ignore race, but is predominantly motivated by race, would violate the Constitution if it lacked sufficient justification for using race. But the "ultimate question" in any racial-gerrymandering case—even one challenging a second-round plan—is "whether a discriminatory intent has been proved in [that] given case." *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (plurality opinion). The district court did not even ask that question, let alone find that the General Assembly was predominantly motivated by race. To the contrary, the court acknowledged that the 2017 General Assembly *did not consider race at all*.

That should have ended the matter, as the legislature obviously could not engage in racial gerrymandering by declining to consider race. Yet the court nonetheless faulted the legislature for failing to

examine the racial impact of its *non-racial* districting criteria, JS.App.49-50—in other words, for failing to (re)district on the basis of race. That just highlights the profound dangers of the court's eliminate-the-effects conception of how to cure racial gerrymanders. The district court's "cure" is indistinguishable from the disease. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).[1]

B. There Is No Evidence That the General Assembly Was Motivated by Race.

Instead of meaningfully addressing the fatal *legal* flaws in the district court's analysis, plaintiffs urge this Court to defer to the district court's *factual* findings. But there are no relevant findings, as the district court acknowledged that the legislature did not consider race in drawing the 2017 Plan. In all events, plaintiffs' argument rests on brazen mischaracterizations of the 2017 Plan.

By plaintiffs' telling, the 2017 Plan is a carbon copy of the 2011 Plan, cutting through communities on racial lines and ignoring traditional principles. In reality, the 2017 Plan outscores the 2011 Plan on every districting metric. The four challenged districts in the 2011 Plan divided 88 VTDs and 21 municipal boundaries. Those numbers decreased dramatically in the 2017 Plan to just *seven* VTDs and 14 municipal boundaries. ECF 220 at 24, 29. The Special Master's Plan divides two VTDs and 12 municipal boundaries in those four districts, but "the total number of split

[1] As noted, JS25 n.2, the Court may wish to hold this case pending *Abbott v. Perez*, Nos. 17-586 & 17-626, which also concerns how to remedy intentional discrimination.

precincts in the Special Master's Plan is higher than the Enacted 2017 Plans." *Id.* at 23.

The compactness scores tell a similar story. The challenged districts in the 2011 Plan averaged a 0.29 Reock score and a 0.11 Polsby-Popper score. *Id.* at 26. The 2017 Plan improved those scores materially to 0.37 and 0.21. *See* Richard H. Pildes, *Expressive Harms, "Bizarre Districts," and Voting Rights*, 92 Mich. L. Rev. 483, 564 (1993) (defining "low" scores as 0.15 and 0.05). The Special Master's Plan scored marginally higher, at 0.51 and 0.32, but only at the cost of pairing two incumbents in SD28. ECF 220 at 26, 35.[2]

Indeed, the only significant difference between the 2017 Plan and the Special Master's Plan is the BVAP in each challenged district. In the 2017 Plan—drawn *without* consideration of race—the BVAPs range from 42.3% to 60.8%. In the Special Master's Plan—drawn under a court order expressly allowing the use of "data identifying the race of individuals"—the BVAPs fall within the much tighter range of 38.4% to 43.6%. JS24-25, 34-35.[3] That range just so happens

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[2] Plaintiffs assert that the four districts "closely track" the "exemplar" districts, Mot.21, but a comparison of the maps easily disproves that assertion for SD21, HD21, and HD57. *Compare* ECF 33-26 *with* ECF 220. While the 2017 SD28 overlaps with exemplar SD28, so does the Special Master's version, as all three contain "the center of Guilford County." JS.App.55, 92.

[3] Ironically, by rejecting a race-neutral legislative plan in favor of instructing the Special Master to consider race as necessary to "remedy" the "effects" of past gerrymandering, the court virtually ensured that race would be the predominant factor in the 2017 districts without justification, a result this Court's precedents

to be precisely the range favored by the plaintiffs and by prior Democratic-controlled General Assemblies, as it is the range that creates crossover districts in North Carolina. *See Strickland*, 556 U.S. at 13. Thus, it is not "rank speculation," Mot.26, but a simple matter of math that the court replaced the General Assembly's race-neutral plan with one that was meaningfully different only in that it achieved plaintiffs' race-based districting preferences.

III. The District Court Lacked Jurisdiction Over Plaintiffs' State-Law Challenges.

Plaintiffs' defenses of the district court's state-law rulings are meritless. Plaintiffs concede that they do not live in the challenged districts, but assert that standing is irrelevant because "these … are objections made in the course of a remedial proceeding." Mot.33. But as already explained, Article III standing is not a technicality that becomes optional in proceedings deemed "remedial," and the 2017 Plan is a duly enacted law that must be challenged by a plaintiff with standing, just like any other law. If plaintiffs never brought a legal challenge to the 2017 Plan, then the district court exceeded its Article III authority, as federal courts do not have freestanding power to assess the legality of state legislation. *See* JS27. If plaintiffs *did* bring a legal challenge, they concededly lacked standing to bring their state-law claims. Either way, the court's order cannot stand.

As to the Eleventh Amendment, plaintiffs concede that federal courts may not enjoin state laws on state-

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foreclose. *Miller,* 515 U.S. at 912; *Bartlett v. Strickland*, 556 U.S. 1 (2009) (racial quotas suspect even below 50%).

law grounds, Mot.31-32, but argue that the district court "was not adjudicating any state-law claims," and ruled only that "the General Assembly exceeded the scope of the redrawing authorized by the court." Mot.30. That is wrong at every level. The district court had no authority to limit the General Assembly's power; the legislature was entirely free to repeal and replace the invalidated law, and it would be a revolution in federalism to conclude otherwise. And, in all events, the district court itself observed: "[W]e sustain Plaintiffs' *state-law objections*." JS.App.77 (emphasis added). Even more implausibly, plaintiffs argue that the district court "did not issue any injunction." Mot.32. In reality, the court prohibited North Carolina from conducting elections under the 2017 Plan and ordered it to conduct elections under the Special Master's Plan instead. That is a straightforward injunction, and the district court plainly lacked power to enter it.

IV. The District Court Improperly Prevented The State From Enacting A Remedial Map.

Even assuming there were some defect with the 2017 Plan, the district court independently erred by depriving the General Assembly of the chance to remedy it by enacting a new law. Plaintiffs assert that giving the State that chance would "run[] headlong into established precedent," Mot.18, but they identify no such precedent. They cite *Wise* and *Reynolds*, but *Wise* did not address the question (the second-round plan was not invalidated), and *Reynolds* actually forecloses plaintiffs' one-bite-at-the-remedial-apple rule, *see* JS32. Given this Court's repeated admonishments that a State "should be given the

opportunity to make its own redistricting decisions," *Lawyer v. Dep't of Justice*, 521 U.S. 567, 576 (1997), the burden is on plaintiffs to show that this settled principle evaporates after the first replacement plan. They have not met that burden.

Plaintiffs suggest there was not enough time for the legislature to enact a new plan, Mot.20, but the only reason the election was "fast-approaching" when the district court ruled was because it refused to act expeditiously based on its misconception that the legislature was "not entitled" to another chance. JS.App.106. In other words, the court *intentionally* obstructed the State from performing "one of the most significant acts a State can perform." *LULAC*, 548 U.S. at 416. At a bare minimum, this Court should vacate the Special Master's Plan and restore North Carolina's sovereign right to draw its own districts.

CONCLUSION

This Court should summarily reverse or note probable jurisdiction.

Respectfully submitted,

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