Nos. 16-649, 16-1023

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

RESPONSE TO APPELLANTS' SUPPLEMENTAL BRIEF

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This Court's decision in *Cooper v. Harris*, No. 15-1262, 2017 WL 2216930 (U.S. May 22, 2017), and its subsequent vacatur of the North Carolina Supreme Court's decision in *Dickson v. Rucho*, No. 16-24, 2017 WL 2322831 (May 30, 2017), squarely answer the merits questions presented in *Covington v. North Carolina*, No. 16-649, and therefore the three-judge court's unanimous decision in that case should be summarily affirmed. The only issue left for this Court is the proper remedy for the rampant constitutional violations in North Carolina's state legislative districting plans. As explained in Appellees' motion to affirm in *Covington v. North Carolina*, No. 16-1023, the court below had jurisdiction and acted well within its equitable discretion in ordering that the proper remedy was a special election under a newly drawn remedial map in November 2017.

Appellants—who asked for and received a stay of any remedial proceedings while these appeals were pending—now argue that because of their stay request, it would be "exceedingly difficult (if not entirely unrealistic)" to plan and execute a special election by November 2017. Supp. Br. 7 n.4. Setting aside that this is a problem entirely of their own making, whether or not elections can now take place in November 2017 is a matter for the court below to decide in the first instance. Thus, if this Court does not summarily affirm the remedial order, it should remand for an expeditious determination of whether elections in November 2017 are still possible, and, if not, how to ensure that the voters of North Carolina do not have to live and vote in

unconstitutional districts for any longer than is absolutely necessary.

I. This Court's Decision In *Cooper* And The Subsequent Vacatur In *Dickson* Squarely Answer The Merits Questions Here.

Contrary to Appellants' argument, *Cooper* squarely resolves the merits questions in this case. The *Cooper* decision's fundamental holding regarding Congressional District 1 ("CD1")—a district the Appellants defended as compelled by the State's interest in complying with Section 2 of the Voting Rights Act—is directly relevant to the trial court's ruling in *Covington* and is controlling here. Moreover, both the decision in *Cooper* and the Court's subsequent vacatur of the North Carolina Supreme Court's decision in *Dickson* resolve any remaining questions of preclusion.

In *Cooper*, this Court explained that for the State "[t]o have a strong basis in evidence to conclude that §2 demands … race-based steps [to deliberately augment a district's black voting age population], the State must carefully evaluate whether a plaintiff could establish the *Gingles* preconditions—including effective white bloc-voting—in a new district created without those measures." *Cooper*, 2017 WL 2216930, at *13. This Court saw "nothing in the legislative record that fits that description." *Id.* The court below in this case similarly unanimously found, after an exhaustive review of the evidence demonstrating that race predominated in the drawing of the twenty-eight districts at issue, that Appellants "failed to demonstrate that, for any challenged district, they had a strong basis in evidence for the third *Gingles* factor –

racial bloc voting that, absent some remedy, would enable the majority usually to defeat the minority group's candidate of choice…. This failure is fatal to their Section 2 defense." No. 16-1023 App. 117. In short, for CD1 and for each of the twenty-eight legislative districts challenged in this case, the exact same Appellants offered the exact same defense. And this Court found that Appellants' defense "rested not on a 'strong basis in evidence,' but instead on a pure error of law." *Cooper*, 2017 WL 2216930, at *14.

Appellants' extraordinary argument that the holding in *Cooper* "has no bearing on this appeal" because here the district court "prohibited" the legislature from maintaining any ability-to-elect legislative districts in North Carolina, Supp. Br. at 4, rests on a complete mischaracterization of both the facts and the opinion of the court below. The court below explicitly stated that "[o]ur decision today should in no way be read to imply that majority-black districts are no longer needed in the state of North Carolina. Nor do we suggest that majority-black districts could not be drawn – lawfully and constitutionally – in some of the same locations as the districts challenged in this case." No. 16-1023 App. 145. Appellants completely ignore this, as well as the entire basis of the trial court's opinion, choosing instead to continue quoting a single phrase from the opinion out of context.

Appellants' remaining argument about preclusion is answered both by *Cooper* and by the Court's vacatur of the North Carolina Supreme Court's opinion in *Dickson*. It is axiomatic that this Court's order vacating and remanding, for a second time, the *Dickson* decision, does not amount to a final determination on

the merits, *see, e.g.*, *Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001); *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964), and therefore cannot have preclusive effect. Indeed, in another context, it has been noted that "a vacated judgment, by definition, cannot have any preclusive effect in subsequent litigation." *Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP, Inc.*, 468 U.S. 1206 (1984) (Blackmun, J., dissenting). Yet Appellants seek to bar the suit below on the basis of a now-vacated ruling in a different case, involving different districts, which will almost certainly need to be overturned upon reconsideration by the North Carolina Supreme Court in light of this Court's decision in *Cooper*. That attempt should be rejected.

In any event, Appellants fail to mention the actual findings of the court below on preclusion. Just as in *Cooper*, the court below found a factual flaw in Appellants' attempt to assert a *res judicata* defense based on the earlier state court proceedings in *Dickson*. After hearing evidence at trial concerning the alleged privity between plaintiffs in the two cases, and after at least two rounds of briefing on the legal question, (which is clearly governed by state law, *see Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985)*; Johnson v. DeGrandy*, 512 U.S. 997, 1005 (1994)), the court below held: "Recognizing none of the Plaintiffs in this action was either a plaintiff in the *Dickson* litigation or in privity with one, Defendants argue that the exception to privity recognized in *Thompson v. Lassiter*, 97 S.E.2d 492 (N.C. 1957), applies. However, Defendants have not produced sufficient evidence to prove the elements of the *Lassiter* exception." No. 16-1023 App. 13-14, n.9 (citation omitted). Thus, this Court need not decide

whether the facts necessary to establish a *Lassiter* exception under North Carolina law would have supported preclusion if they had been proved. Just as in *Cooper*, "[i]t is enough that the District Court reasonably thought they had not." *Cooper*, 2017 WL 2216930, at *10.

Finally on the merits, Appellants' suggestion that the opinion of the court below will have "dire consequences" for minority representation, Supp. Br. at 4, and that they—unlike the court below—have the best interests of minority groups at heart is risible. Every African-American legislator in the legislature in 2011 voted against these districts and groups such as the NAACP and the A. Philip Randolph Institute in the *Dickson* litigation, and the individual African-American plaintiffs in this case, then mounted challenges to these districts. If the State were truly concerned about minority representation, it would have undertaken an actual Section 2 analysis when it engaged in redistricting—including evaluating *all* of the *Gingles* prongs—rather than using the pretext of the Voting Rights Act to racially gerrymander. Appellants' newfound concern for minority representation rings remarkably hollow.

Cooper squarely controls the merits questions here and summary affirmance of the court below in appeal No. 16-649 is warranted.

II. Appellees Are Entitled To A Swift Remedy.

As to the remedy for Appellants' constitutional violations, at Appellants' request, this Court stayed the three-judge court's remedial order requiring special elections in November 2017 pending resolution of these

appeals. *See North Carolina v. Covington*, No. 16A646, 2017 WL 81538 (U.S. Jan. 10, 2017). Appellants now claim that because of the very delay they requested with their stay application, "forcing the State to hold special elections on what would now be an extraordinarily expedited schedule would impose massive costs on the state fisc," and would be "exceedingly difficult (if not entirely unrealistic)." Supp. Br. 6-7 & n.4.

This Court should not rely on the unsupported assertions of Appellants' counsel. Whether or not a special election in November 2017 is still possible is a matter for the court below to address in the first instance. North Carolina law expressly provides that two weeks is sufficient for the legislature to remedy defects in a redistricting plan. *See* N.C. Gen. Stat. § 120-2.4 (granting legislature two week period to remedy defects in redistricting plans before courts may impose new maps). The court below is in a much better position than this Court to evaluate the relevant timelines. Thus, if this Court does not summarily affirm the remedial order, it should remand with instructions that the court below should quickly determine the feasibility of holding special elections in November 2017, and, if that is no longer possible, to implement a remedy such that the voters of North Carolina do not have to live and vote in unconstitutional districts any longer than is absolutely necessary.

Appellants' contention that "neither the merits nor the remedial issues would be moot" if this Court were to note probable jurisdiction and order this case briefed and argued in the normal course is disingenuous at best. Supp. Br. 7 n.4. In reality, this appears to be yet

another tactical ploy for still further delay such that Appellants might even be excused from implementing a remedy in time for the regularly scheduled 2018 elections. As Appellants are well aware, if this Court notes probable jurisdiction "and orders this case briefed and argued in the normal course" as they urge, Supp. Br. 7 n.4, this case would not be briefed and argued until late 2017 or early 2018, and it is quite possible a decision may not issue until the end of June of 2018. At that point, Appellants would no doubt once again claim it would be "exceedingly difficult" and impose "massive costs" on them to put a remedy in place in time for the 2018 elections, just as they did in successfully opposing a remedy in time for the 2016 elections. Appellants hope to simply run out the clock and win by default.

Thus, while Appellants encourage this Court to note probable jurisdiction so as to "provide substantial guidance on recurring issues," Supp. Br. 7 n.4, that is not the job of this Court. This Court has a case before it in which special elections have been ordered for November 2017 and that case will most certainly become moot if the Court does not act to dispose of the case by the end of this Term. For the reasons explained in Appellees' motion to affirm, this Court should summarily affirm the remedial order below. If it does not summarily affirm, this Court should remand and direct the court below to quickly determine the feasibility of holding elections in November 2017, and if that is no longer possible, to implement a swift remedy to cure the "severe constitutional harms," including "substantial stigmatic and representational injuries," not just for Appellees, but for "thousands of other North Carolina citizens." No. 16-1023 App. 142, 144.

CONCLUSION

The Court should summarily affirm the three-judge court's decisions in both of these appeals. As to appeal No. 16-1023, if the Court does not summarily affirm, it should remand with instructions to the Court below to quickly determine the feasibility of holding a special election in November 2017 and, if a November 2017 election is no longer feasible, to implement a swift remedy for the constitutional harms to North Carolina's voters.

Respectfully submitted,

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