IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-1270 (L)
(5:15-cv-00156-D)

RALEIGH WAKE CITIZENS ASSOCIATION; JANNET B. BARNES; BEVERLEY S. CLARK; WILLIAM B. CLIFFORD; BRIAN FITZSIMMONS; GREG FLYNN; DUSTIN MATTHEW INGALLS; AMY T. LEE; ERVIN PORTMAN; SUSAN PORTMAN; JANE C. ROGERS; BARBARA D. VANDENBERGH; JOHN G. VANDENBERGH; AMY WOMBLE; PERRY WOODS,

Plaintiffs-Appellants,

v.

WAKE COUNTY BOARD OF ELECTIONS,

Defendant-Appellee.

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

PETITION OF DEFENDANT-APPELLEE WAKE COUNTY BOARD OF ELECTIONS FOR REHEARING *EN BANC*

Charles F. Marshall
Matthew B. Tynan
Jessica Thaller-Moran
BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.
1600 Wells Fargo Capitol Center
150 Fayetteville Street
Raleigh, North Carolina 27601
Telephone: (919) 839-0300

STATEMENT OF PURPOSE

The Wake County Board of Elections respectfully submits this petition for rehearing *en banc* from a 2-1 decision of a panel of this Court reversing the findings of fact and conclusions of law entered by the District Court after a bench trial. The District Court rejected the plaintiffs' constitutional challenges to the electoral districts enacted by the North Carolina General Assembly for the Wake County Board of Education and the Wake County Board of County Commissioners.

Rehearing *en banc* is necessary because the panel majority's decision involves a question of exceptional importance—whether politics can be an "illegitimate" factor to consider in drawing electoral plans that contain maximum population deviations of less than 10 percent—and the panel majority's decision conflicts with the decisions of the United States Supreme Court regarding the use of political considerations of redistricting plans.

The panel majority opinion holds that the North Carolina General Assembly's use of political considerations in creating the redistricting plans at issue was an illegitimate factor that violated the "one person, one vote" requirement under the Fourteenth Amendment. That holding is odds with Supreme Court decisions recognizing that politics is a legitimate and inevitable factor in redistricting. *See Ala. Legis. Black Caucus v. Alabama*, __ U.S. __, __, 135 S. Ct. 1257, 1270 (2015) (listing "political affiliation" among "traditional race-neutral districting principles");

Hunt v. Cromartie, 526 U.S. 541, 551 (1999) ("Our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering . . . ."); *Gaffney v. Cummings*, 412 U.S. 735, 752–53 (1973) ("The reality is that districting inevitably has and is intended to have substantial political consequences.").

Although the panel majority's opinion holds that political considerations went too far in this case, the Supreme Court has not identified, adopted or defined a workable or justiciable standard for evaluating when political considerations in districting may be unlawful—and it has specifically declined or rejected efforts to do so. *See, e.g.*, *Harris v. Ariz. Indep. Redistricting Comm'n*, 578 U.S. __, __, 136 S. Ct. 1301, 1310 (2016) (declining to consider whether partisanship constitutes an "illegitimate redistricting factor"); *Vieth v. Jubeliler*, 541 U.S. 267 (2004) (plurality opinion) (rejecting political gerrymandering claim). Given that the panel majority opinion would break new ground in this regard—and the impact such a holding would have on redistricting jurisprudence as a whole—this appeal presents questions of exceptional importance that warrants rehearing by this Court *en banc*.

PETITION FOR REHEARING *EN BANC*

The opinion of Judge Motz dissenting from the panel majority's opinion in this case presents a compelling basis for why this Court should rehear this appeal *en banc*.

First, the dissenting opinion correctly asserts that the Supreme Court has "expressly recognized" that a redistricting plan can legitimately account for political considerations and that it has never stated what degree of partisanship, if any, could rise to the level of an "illegitimate" factor. Op. at 48–50 (Motz, J., dissenting). In fact, the Supreme Court has declined or rejected efforts to evaluate when the use of political considerations may go too far—leaving open the question whether any such standard could ever be identified and applied. *See Harris*, 578 U.S. at __, 136 S. Ct. at 1310; *Vieth*, 541 U.S. 267 (plurality opinion).

Second, assuming claims of abusive partisanship are justiciable, the dissenting opinion also correctly notes that the Supreme Court just recently counseled in *Harris* that "attacks on deviations under 10% will succeed only rarely, in unusual cases." Op. at 47 (Motz, J., dissenting) (quoting *Harris v. Ariz. Indep. Redistricting Comm'n*, 578 U.S. at __, 136 S. Ct. at 1307). The only such case that the panel majority references is *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (per curiam), *summarily aff'd*, 542 U.S. 947 (2004). But as the dissenting opinion points out (Op. at 49, Motz, J., dissenting), *Larios* involved direct evidence of legislative intent not present here, and the Supreme Court has since acknowledged that *Larios* "does not give clear guidance" in "addressing political motivation as a justification for an equal-protection violation." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 423 (2006) (plurality opinion). Indeed, the district court in *Larios* did

not base its decision squarely on partisanship, *see* 300 F. Supp. 2d at 1352, as the panel majority opinion does here.

Third, the dissenting opinion correctly reasons that, even if claims of abusive partisanship are justiciable and provide the basis for a one person, one vote claim, the Plaintiffs' evidence of political considerations was not sufficient to show that the General Assembly relied on such considerations or that any such reliance predominated over other legitimate criteria as required by *Harris*. (Op. at 52-59, Motz, J., dissenting). Contrary to the Supreme Court's clear "refus[al] to require States to justify deviations" of less than 10 percent, *see Harris*, __ U.S. at __, 136 S. Ct. at 1307, and its indication that one person, one vote claims will only rarely succeed, *id.*, the panel majority's opinion will encourage partisan-based challenges to redistricting plans that include any population deviations, a result that will burden the ability of elections boards to plan for and administer elections.

In sum, the panel majority's opinion sets a new standard for adjudicating claims of "abusive" or "illegitimate" partisanship in redistricting cases that would have an immediate and far-ranging impact on both redistricting plans and jurisprudence. Because the Supreme Court has not expressly approved a standard to evaluate when political considerations in redistricting may go too far—and because it is still unclear whether such claims are justiciable at all—it is appropriate

for the Court to rehear this case *en banc* and, upon rehearing, to affirm the decision of the District Court.

Consistent with its previous requests in this matter, the Wake County Board of Elections respectively requests that (i) the Court expedite consideration of this Petition, (ii) no further briefing be required, and (iii) the case be scheduled for argument before the Court *en banc* as soon as practicable.

CONCLUSION

For the foregoing reasons, the Wake County Board of Elections respectfully requests that the Court grant the Petition for Rehearing *en banc* on an expedited basis.

Respectfully submitted this 14th day of July, 2016.

/s/ Charles F. Marshall
Charles F. Marshall
N.C. State Bar No. 23297
cmarshall@brookspierce.com

/s/ Matthew B. Tynan
Matthew B. Tynan
N.C. State Bar No. 47181
mtynan@brookspierce.com

/s/ Jessica Thaller-Moran
Jessica Thaller-Moran
N.C. State Bar No. 46444
jthaller-moran@brookspierce.com

Brooks, Pierce, McLendon,
Humphrey, & Leonard, L.L.P.
1600 Wells Fargo Capitol Center
150 Fayetteville Street
Raleigh, NC 27601
Telephone: (919) 839-0300
Fax: (919) 839-0304

Attorneys for Defendant-Appellee
Wake County Board of Elections

CERTIFICATE OF COMPLIANCE WITH RULES 35(b)(2) and 32(a)

1. This Petition complies with the page limitation of Fed. R. App. P. 35(b)(2) and 32(a)(7)(A) because it contains 6 pages, excluding material exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This Petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Petition has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Respectfully submitted this 14th day of July, 2016.

/s/ Charles F. Marshall
Charles F. Marshall

REQUEST FOR ORAL ARGUMENT

In the event that the Petition is granted, the Wake County Board of Elections requests oral argument, which it believes will aid the Court in addressing (i) the relevant jurisprudence relating to the use of political considerations in redistricting, and (ii) the impact of the decision on local election boards in other possible redistricting challenges.

CERTIFICATE OF SERVICE

I hereby certify that, on the date below, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

Anita S. Earls
Allison Jean Riggs
Southern Coalition for Social Justice
1415 West Highway 54, Suite 101
Durham, NC 27707
919-323-3380 x115
Fax: 919-323-3942
anita@southerncoalition.org
allison@southerncoalition.org
Counsel for Plaintiffs-Appellants

Respectfully submitted this 14th day of July, 2016.

/s/ Charles F. Marshall
Charles F. Marshall