IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
No. 1:15-cv-00399

SANDRA LITTLE COVINGTON, et al., *Plaintiffs,* v. THE STATE OF NORTH CAROLINA, et al., *Defendants*.	**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

INTRODUCTION

When the North Carolina General Assembly undertook redrawing the state's legislative districts in 2011, it did so in a manner that disregarded the decades of electoral success of black voters and candidates across the state in building cross-racial political alliances and electing the candidates of choice of black voters. Rather than acknowledge that progress and draw districts accordingly, the legislature, employing a cynical and patently incorrect reading of the Voting Rights Act of 1965 ("VRA"), made rigid racial considerations the cornerstone of the redistricting process, and placed voters in districts based on the color of their skin.

This decision, to place an unprecedented emphasis on race, has transformed politics and elections in North Carolina in the two cycles under which elections have been conducted with these racially gerrymandered plans. Now, in state legislative elections, there are black districts, and there are white districts. Cross-racial alliances no longer need to play any role in how state senators and representatives are elected. This is

a step backward for the state.

With the 2011 redistricting plans, Defendants turned the VRA on its head and used it as a means to justify the subversion of the constitutional rights of North Carolina's citizens. They used a law designed to protect the voting rights of the country's most vulnerable citizens to segregate them by race and without regard for their proven ability to form cross-racial coalitions. Their explicit goal to increase the number of majority-black Senate and House districts to match the black percentage of the state's population led them to: (a) use race predominantly in the drawing of those districts; (b) divide more counties than necessary; (c) create oddly shaped, non-compact districts; and (d) divide an unprecedented number of precincts, impacting approximately two million voters and disproportionately disadvantaging African-American voters. This litigation seeks to right those wrongs.

The facts relevant to this motion and this case are undisputed and were generated by Defendants themselves. The crux of the matter is the law. Defendants made at least three fundamental errors of law in constructing the districts that comprise their 2011 legislative and congressional redistricting legislation. First, they did not heed the rule that seeking, and achieving, racial proportionality in electoral districts is per se unconstitutional, not a safe harbor from litigation. *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1273-74 (2015); *Fisher v. Univ. of Texas*, 133 S. Ct. 2411, 2418 (2013). Second, they claimed, incorrectly, that the VRA requires the creation of

new, majority-black districts anywhere such a district can be drawn in the state, regardless of whether the candidate of choice of black voters is usually defeated by the white majority voting bloc. *Thornburg v. Gingles*, 478 U.S. 30, 48-49 (1986). Third, they did not apply the rule that narrow tailoring in redistricting requires legislative bodies to minimize, rather than maximize, racial considerations. *Shaw v. Reno*, 509 U.S. 630, 655 (1993).

Time is now of the essence, even more than when this case was first filed. On September 24, 2015, with litigation pending in state and federal court, the General Assembly enacted 2015 N.C. Sess. Laws 258, which moved up the primary elections for state legislative districts from May to March 15, 2015, and the opening of filing for those offices to December 1, 2015. The Governor signed this bill on September 30, 2015. This ploy cannot be allowed to circumvent the ability of this Court to remedy Plaintiffs' constitutional injury. Plaintiffs, with this motion, seek to delay the opening of filing until 30 days after the expedited resolution of the merits of this claim, be it via preliminary injunction or trial. North Carolina voters have been segregated, based on the color of their skin, into unconstitutional state legislative districts—districts under which two of the five election cycles this decade have already been conducted. This is an injury to the fundamental right to vote of each of the citizens living in a segregated district, and it must be corrected immediately.

STATEMENT OF THE CASE

In this action, Plaintiffs have challenged as unconstitutional racial gerrymanders a number of state senate districts and house districts enacted by the North Carolina General Assembly in 2011, and now seek to enjoin further implementation of the nine Senate and sixteen House districts addressed herein.

On March 25, 2015, the United States Supreme Court issued its opinion in *Alabama Legislative Black Caucus v. Alabama*, ordering reconsideration of the plaintiffs' challenge to legislative districts that the Alabama legislature had drawn using "mechanical racial targets." 135 S. Ct. at 1267. Rather than employing "a particular numerical minority percentage," the Court held, legislators must consider "a minority's ability to elect a preferred candidate of choice." *Id.* at 1272. In response to the Supreme Court's ruling, Plaintiffs in this case filed their Complaint in May 2015, alleging that Defendants employed mechanical racial targets in creating the challenged districts in violation of the Constitution and gave no consideration to minority voters' demonstrated ability to elect their preferred candidates of choice in those districts.

In November 2011, a different group of plaintiffs filed a lawsuit in state court, challenging some of the same districts and several congressional districts. That litigation is still pending. *See Dickson v. Rucho*, No. 11-cvs-16896 (N.C. Aug. 31, 2015). In 2013, the trial court found that all legislative districts challenged were subject to strict scrutiny but, as a matter of law, those gerrymandered districts survived strict scrutiny. In late 2014, the North Carolina Supreme Court rejected those plaintiffs' claims, assuming that

strict scrutiny applied and affirming that the challenged districts passed strict scrutiny. On April 20, 2015, the United States Supreme Court granted certiorari, vacated the state supreme court's decision, and remanded for further proceedings in light of the Alabama case. The North Carolina Supreme Court heard arguments on remand on August 31, 2015, and a decision is pending. But time is of the essence. The constitutional rights of Plaintiffs in this case have been violated. They have suffered through two election cycles in unconstitutional election districts, and they are entitled to injunctive relief pending full resolution of this litigation so that their injury does not persist through a third election.

STATEMENT OF THE FACTS

The facts relevant in this case are straightforward, undisputed, and come from documents prepared by Defendants. Following the release of the 2010 decennial Census data, the North Carolina General Assembly enacted new redistricting plans for the North Carolina House of Representatives[1] and North Carolina Senate[2] on July 27 and 28, 2011.

Dr. Thomas Brooks Hofeller was retained in 2010 by the Ogletree law firm, counsel for Defendants Senator Bob Rucho and Representative David Lewis, to design and draw the House and Senate plans for Senator Rucho and Representative Lewis. Ex. A, Hofeller Dep. vol. 1, 1896, 1903. Dr. Hofeller began working for Senator Rucho and Representative Lewis in December 2010 and began drawing plans in March 2011 following receipt of new Census data. *Id.* at 1943. Senator Rucho described Dr. Hofeller

[1] 2011 N.C. Sess. Laws 404, also known as "Lewis-Dollar-Dockham 4" [hereinafter Enacted House Plan].
[2] 2011 N.C. Sess. Laws 402, also known as "Rucho Senate 3" [hereinafter Enacted Senate Plan].

as the "chief architect" of the plans, and Dr. Hofeller described himself the same way. *Id.* at 1895; Ex. B, Rucho Dep. 3068.

Senator Rucho and Representative Lewis were the sole source of instructions to Dr. Hofeller regarding the design and construction of the House and Senate plans. These instructions were all oral. Ex. A, at 1921-22; Ex. B, at 3078-79, 3184-85; Ex. C, Lewis Dep. 2306. Rucho and Lewis directed Hofeller to draw House and Senate plans that provide African-American citizens "with a substantial proportional and equal opportunity to elect their candidates." Ex. D, Hofeller Aff. 1216, Jan. 19, 2012; Ex. C, at 2363-64; Ex. B, at 3087-89, 3167. To accomplish drawing a number of majority-black districts substantially proportional to the black population in the state, they told Dr. Hofeller: "draw a 50% plus one district wherever in the state there is a sufficiently compact black population to do so." Ex. C, at 2451; Ex. B, at 3087-89, 3167.

Dr. Hofeller used the same process and criteria to draw the House and Senate plans. Ex. A, at 1993-94. He began the process by calculating how many majority-black House and Senate districts would need to be drawn to achieve proportionality between the percentage of the state's population that is black and the percentage of districts that would be majority-black. *Id.* at 1945-46; Ex. E, Hofeller Proportionality Chart.

Dr. Hofeller made this calculation as soon as the 2010 Census data were released, *id*. at 1943, long before the General Assembly had compiled any data about the extent to which voting is still racially polarized in the state, and without any knowledge of where

in the state candidates of choice of African-American voters had been elected. Ex. G, Dickson Trial Tr. Vol. II 328-29, 331 (testimony of Hofeller).

Senator Rucho first filed a partial Senate plan and first made that plan public on June 17, 2011. Ex. H, Public Statement 540, June 17, 2011. It was labeled "Rucho Senate VRA Districts" and contained only ten districts.[3] Each of the ten districts had a total black voting age population (hereinafter "BVAP") higher than 50% except Senate District 32 in Forsyth. Nine of these ten districts (3, 4, 5, 13, 14, 20, 28, 38, and 40) were enacted on July 27, 2011, essentially as first filed and made public on June 17, 2011. Senate District 21 as first made public was located entirely in Cumberland County. Ex. I, Stat Pack Rucho Senate VRA Districts. It was modified prior to enactment to include Hoke County as well as part of Cumberland County. That modification increased the number of split precincts from twenty-seven to thirty-three and increased the BVAP from 51.03% to 51.53%. Ex. J, Stat Pack Enacted Senate Plan. District 32 in Forsyth was also modified. That modification increased the number of split precincts from one to forty-three and increased the BVAP from 39.32% to 42.53%. *Id.* As demonstrated in the maps of the challenged Senate "VRA districts" included in Plaintiffs' amended complaint, these districts were visually and mathematically non-compact. *See* Amended Compl, ¶¶ 79 (SD 4), 89 (SD 5), 95 (SD 14), 104 (SD 20), 113 (SD 21), 121 (SD 28), 129 (SD 32), 137 (SD 38 and SD 40), 146 (HD 5), 155 (HD 7), 165 (HD 12), 178 (HD 21), 187 (HD

[3] Defendants used the term "VRA district" to refer to any district drawn with a total black voting age population higher than 50%.

24), 194 (HD 29 and HD 31), 203 (HD 32), 209 (HD 33 and HD 38), 219 (HD 42), 233 (HD 48), 238 (HD 57), 247 (HD 99, HD 102, HD 107).

Following Senator Rucho's example, Representative Lewis first filed and made public a proposed partial House plan on June 17, 2011. Ex. H, at 546. It was labeled "Lewis House VRA Districts" and contained only twenty-seven districts, twenty-four of which had a BVAP higher than 50%. Ex. K, Stat Pack Lewis House VRA Districts. Twenty-one of these twenty-four districts were enacted on July 28, 2011, essentially as first filed and made public on June 21, 2011. Ex. L, Stat Pack Enacted House Plan. As in the Senate plan, the challenged House "VRA" districts were grossly non-compact by any measure.

Senator Rucho and Representative Lewis issued public statements on June 17, June 21, and July 12 describing the factors that had determined the number, location, and shape of the "VRA districts" challenged in these cases. Ex. H, at 540-46; Ex. M, Public Statement 547-562, June 22, 2011; Ex. N, Public Statement 563-68, July 12, 2011.) These public statements reflect the oral instructions Senator Rucho and Representative Lewis had earlier given Dr. Hofeller to apply in drawing the districts. Ex. A, at 1921-22, Ex. C, at 2306; Ex. B, at 3078-79, 3184-85. Those instructions were:

1. Draw each "VRA District" where possible so that African-American citizens constitute at least a majority of the voting age population in the district.
2. Draw "VRA Districts" in numbers equal to the African-American proportion of the state's population.

Id. Senator Rucho and Representative Lewis also publicly stated that any alternative plan that compromised or strayed from strict adherence to these instructions to Dr. Hofeller would be rejected.

Evidence before the legislature at the time was that the candidates of choice of black voters had been regularly elected in the challenged state legislative districts in the last decade, even in districts that were not majority black. Ex. O, Churchill Election Results Tables; Ex. P, Churchill Dep. Exs. 82 and 83. Legislative employee Erika Churchill compiled that data and supplied it to the redistricting committees.

No African-American senator or representative voted in favor of any of the plans proposed by Senator Rucho and Representative Lewis, including the enacted plans. Ex. F, at 30, 114 (testimony of Sen. Blue, Rep. Hall). Additionally, once the VRA maps were introduced, citizens from around the state testified at public hearings that the districts went beyond what was required for compliance with the VRA. On June 23, 2011, well before the final plans were enacted, Defendants were specifically informed in written testimony from the Alliance for Fair Redistricting and Minority Voting Rights ("AFRAM") that the VRA districts they were proposing were premised on a fundamental misunderstanding of constitutional and civil rights law. Ex. Q, AFRAM Letter. The AFRAM report stated that the VRA does not require proportional representation, that Section 5 does not require maximization of the number of majority-black districts, that Section 5 does not require districts to be more than 50% black in voting age population,

and that the districts as drawn "threaten the very principles that the Voting Rights Act exists to promote." *Id.*

Dividing precincts contrary to state law was one of the tools Defendants used to carry out their agenda. Dr. Hofeller stated that "splitting VTD lines is often necessary in order to create TBVAP districts."[4] Dr. Hofeller further acknowledged that he split precincts for the purpose of increasing the black population in a district, in order to achieve Rucho and Lewis' instruction to create majority African-American districts in numbers proportional to the state's African-American population. Ex. R, Hofeller Dep. vol. 2, 2164, 2160-61.

LEGAL STANDARD

The purpose of a preliminary injunction is to "prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court's ability to render a meaningful judgment on the merits." *United States v. South Carolina*, 720 F.3d 518, 524 (4th Cir. 2013) (quotations omitted). A court may enter a preliminary injunction if a plaintiff shows "(1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). In each case, courts must "balance the competing claims of injury and must consider the effect on each party of the granting or

[4] "VTD" is short for voter tabulation district and is usually the same as a precinct.

withholding of the requested relief." *Id*. at 24 (quotations omitted). All four factors of the *Winter* test strongly favor issuing a preliminary injunction.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE LIKELY TO SUCCEED ON THE MERITS

The challenged provisions are unlawful, and Plaintiffs are likely to succeed on the merits for two reasons. First, race predominated in the creation of the challenged districts, which cannot survive strict scrutiny. Second, the Supreme Court's recent decision in *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015), is directly applicable to this case and prohibits Defendants' improper reliance on mechanical racial targets in the 2011 redistricting process.

A. Plaintiffs Are Citizens Harmed by the Unjustified Racial Classifications Created by the 2011 House and Senate Redistricting Plans

Just as in any other civil action, a plaintiff challenging a redistricting plan as a racial gerrymander in violation of the Fourteenth Amendment must have standing to make such a challenge. "Where a plaintiff resides in a racially gerrymandered district, the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria and, therefore, has standing to challenge the legislature's action." *United States v. Hays*, 515 U.S. 737, 744-45 (1995). In the instant case, at least one Plaintiff resides in each of the districts challenged in this litigation. Ex. S, Declaration of Joanna King.

B. The Supreme Court's Decision in *Alabama Legislative Black Caucus v. Alabama* Is Directly Applicable to this Case and Supports Plaintiffs' Claims

Recently, the Supreme Court directly addressed two elements present in this case: how the use of racial mechanical targets and misinterpretation of what the VRA requires fit into the racial predominance and strict scrutiny analysis. In Alabama, the legislature believed that the VRA required it to maintain the BVAP in each of the districts in which black voters had the ability to elect their candidates of choice. *Alabama Legislative Black Caucus*, 135 S. Ct. at 1263. In a similar manner in the instant case, the North Carolina General Assembly grossly misunderstood what the VRA required, and as such, could have had no compelling governmental interest in the excessive focus on race employed.

Additionally, directly applicable here, the Supreme Court rejected the improper use of "mechanical racial targets" in legislative redistricting, holding in *Alabama Legislative Black Caucus v. Alabama* that the proper question for legislators to ask in crafting VRA-compliant and constitutionally sound districts is: "To what extent must we preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?" *Id.* at 1274.

In creating North Carolina's legislative districts in 2011, Defendants expressly employed "mechanical racial targets" in direct contradiction of the Supreme Court's direction in *Alabama Legislative Black Caucus*, ordering creation of a majority-minority

district wherever BVAP was present to do so. Ex. C, at 2451; Ex. B, at 3087-89, 3167. In so doing, Defendants failed to take into account "the minority's present ability to elect the candidate of its choice," as reflected in the challenged districts, all of which had consistently elected black voters' candidate of choice before the 2011 redistricting. Ex. O, Churchill Election Results Tables; Ex. P, Churchill Dep. Exs. 82 and 83. These two "mechanical racial targets" are even more egregious than the one used by the legislature in *Alabama Legislative Black Caucus*—requiring maintenance of the BVAP in each already-existing majority-minority district. 135 S. Ct. at 1263.

Given the direct applicability of the Supreme Court's recent decision in *Alabama Legislative Black Caucus*—holding that Alabama's use of mechanical racial targets in legislative redistricting, like North Carolina's, offends the Fourteenth Amendment—Plaintiffs are even more likely to succeed on the merits of their claims.

C. Race Predominated in the Creation of the Challenged Districts

In *Alabama Legislative Black Caucus*, the Supreme Court reiterated that "the plaintiff's burden in a racial gerrymandering case is 'to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.'" 135 S. Ct. at 1267 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). In cases where, as here, the legislature has prioritized the use of mechanical

racial targets over traditional redistricting criteria, that decision "provides evidence that race motivated the drawing of particular lines." *Id.* at 1267. That is, even though Plaintiffs have a plethora of circumstantial evidence that race predominated, the legislature's own words are sufficient to establish that race predominated in the 2011 redistricting process.

In drawing legislative districts in 2011, the North Carolina General Assembly explicitly explained that it would employ two race-based criteria as "safe harbors" and refused to consider any alternative plan that did not meet those criteria. Ex. A, at 1921-22; Ex. C, at 2306; Ex. B, at 3078-79, 3184-85. The two criteria were a racial proportionality goal for the number of majority-black districts that must be drawn in each plan and a requirement that each such district must have greater than fifty percent BVAP. Ex. A, at 1921-22; Ex. C, at 2306; Ex. B, at 3078-79, 3184-85.

In a public statement on June 22, 2011, Senator Rucho and Representative Lewis said that the VRA required the extensive use of race that they had described would be used in their process, and that they would entertain alternate plans, but only those in which "the total districts proposed provide black voters with a *substantially proportional* state-wide opportunity to elect candidates of their choice," where that opportunity takes the form of individual districts "drawn at a level that constitutes a *true majority* of black voting age population." Ex. M, Public Statement 552, June 22, 2011 (emphasis added). And the legislature accomplished what they publicly said they would do: to meet their

racial targets, the General Assembly enacted nine state Senate districts as majority-black districts where previously none of the state's Senate districts were majority-black, *compare* Ex. J *to* Ex. T, Stat Pack for Benchmark Senate Plan, and twenty-three majority-black state House districts where previously only ten of those were majority-black. *Compare* Ex. L *to* Ex. U, Stat Pack for Benchmark House Plan. Racial proportionality, as precise as the state's demographics would permit, was the only substantive metric that the General Assembly employed to determine how many majority-black districts to create to pursue its goals. Ex. A, at 1921-22, Ex. C, at 2306; Ex. B, at 3078-79, 3184-85. The General Assembly employed an equally rigid racial criterion (a 50%+ black population goal) in creating districts that it described as intended to satisfy the VRA. *Id.* The resulting districts were irregularly shaped, splitting precincts in an often serpentine fashion and using finger-like appendages to reach into minority communities to pull black voters into the districts on the basis of race. *See* Amended Compl, ¶¶ 79 (SD 4), 89 (SD 5), 95 (SD 14), 104 (SD 20), 113 (SD 21), 121 (SD 28), 129 (SD 32), 137 (SD 38 and SD 40), 146 (HD 5), 155 (HD 7), 165 (HD 12), 178 (HD 21), 187 (HD 24), 194 (HD 29 and HD 31), 203 (HD 32), 209 (HD 33 and HD 38), 219 (HD 42), 233 (HD 48), 238 (HD 57), 247 (HD 99, HD 102, HD 107).

Because Defendants prioritized the use of mechanical racial targets over traditional redistricting criteria, as evident from both the resulting districts' shapes and

Defendants' public statements, race predominated in the creation of the challenged districts.

D. Because Race Predominated in the Construction of the Challenged Districts, Strict Scrutiny Must Be Applied to This Court's Analysis of Them

Racial distinctions are "by their very nature odious to a free people[,] . . . contrary to our traditions," and must be "subjected to the most rigid scrutiny." *Fisher v. Univ. of Tex. at Austin*, 570 U.S. __, 133 S. Ct. 2411 (2013). The Supreme Court recently instructed that "judicial review must begin from the position that any official action that treats a person differently on account of his race or ethnic origin is inherently suspect. Strict scrutiny is a searching examination, and it is the government that bears the burden to prove 'that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate.'" *Id.* at 2418-19 (internal citations omitted).

Where strict scrutiny is applied, the government bears the burden of showing that the use of race was motivated by a compelling governmental interest, and that the use of race was narrowly tailored to advancing that interest. Defendants cannot meet their burden in this case—their blunt use of mechanical racial targets was not, in any way, designed to be minimal, and they did not advance compliance with the VRA, properly interpreted.

E. Defendants Had No Compelling Governmental Interest

The Defendants' interpretation of the VRA, as requiring that racial considerations predetermine the number, shape, and demographics of each of the dozens of districts at stake here, is untenable. The Supreme Court has been long been clear that "outright racial balancing . . . is patently unconstitutional." *Fisher*, 133 S. Ct. at 2419. Citing *Regents of the University of California v. Bakke*, *Grutter v. Bollinger*, and *Parents Involved in Community Schools v. Seattle School District No. 1*, the *Fisher* court explained that using "some specified percentage of a particular group merely because of its race or ethnic origin" as a definition of diversity would amount to outright racial balancing and that "[r]acial balancing is not transformed from patently unconstitutional to a compelling state interest simply by relabeling it 'racial diversity'" *Id.* (citing *Bakke*, 438 U.S. 265 (1978); *Grutter*, 539 U.S. 306 (2003); *Parents Involved*, 551 U.S. 701 (2007)). As discussed below, neither Section 2 nor Section 5 of the VRA requires the excessive focus on race or racial balancing employed by Defendants.

1. Section 2

Section 2 does not require a legislature to draw a number of majority-black districts proportional to the BVAP in the state. The text of the VRA itself states that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b). Furthermore, the Supreme Court has stated that neither Section 2 nor Section 5 of the Voting Rights Act requires proportionality between the percentage of African-Americans in the

jurisdiction and the percentage of districts in which African-Americans are a majority of the voting age population. *Johnson v. DeGrandy*, 512 U.S. 997, 1013-14 (1994); *Miller v. Johnson*, 515 U.S. 900, 910 (1995).

The *DeGrandy* court could not have been clearer that proportionality of the sort Defendants assert as a compelling governmental interest is not a safe harbor: "[n]or does the presence of proportionality prove the absence of dilution. Proportionality is not a safe harbor for States; it does not immunize their election schemes from § 2 challenge," *id.* at 1026 (O'Connor, J., concurring); "the presence of proportionality is not a safe harbor for States [and] does not immunize their election schemes from § 2 challenge," *id.* at 1028 (Kennedy, J., concurring).

To prove that Section 2 required each of the VRA districts in their plans, Defendants must prove there is a substantial basis in evidence that minority voters "have less opportunity than other members of the electorate to . . . elect representatives of their choice," 42 U.S.C. § 1973(b), in the area of the state where each district is located. *Shaw v. Hunt*, 517 U.S. 899, 917 (1996). To establish a Section 2 violation, a plaintiff must prove three threshold factors: (1) that the minority group in question is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) that the minority group is "politically cohesive"; and (3) that the majority votes "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. at 50-51. These are necessary preconditions, and the absence of any

one element is fatal to a Section 2 claim, even if other conditions have been met. *Pender County v. Bartlett*, 361 N.C. 491, 499 (2007), *aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1 (2009). Further, when race is the predominant factor in drawing a district, the burden of proving these preconditions falls on the defendants. *Id.* at 496.

To satisfy *Gingles'* third prong, Defendants must present a strong basis in the evidence that there is legally significant racially polarized voting—that is, where the white voting bloc usually defeats minority voters' candidate of choice. *Gingles*, 478 U.S. at 51. If the candidates of choice of minority voters consistently win elections, then the third prong of *Gingles* is not satisfied, and districts do not need to be crafted to increase the minority population in them. *Id.* at 77 (finding that the District Court erred in ignoring the significance of the sustained success black voters had experienced in Durham County). Further, in order to prove that there is legally significant racially polarized voting (hereinafter "RPV"), Defendants must show that it exists in individual districts rather than larger areas that may include the contested district. *See id.* at 59 n.28 (requiring that the RPV inquiry be "district-specific").

Contrary to Defendants' assertions during the 2011 redistricting process, statistically significant RPV is different from legally significant RPV—the former only means that there is a statistically meaningful correlation between a person's race and how that person votes. The latter, required by *Gingles*, requires a showing that the candidate of choice of minority voters is usually defeated. *Gingles*, 478 U.S. at 56. A mere

showing of statistically significant RPV is insufficient to demonstrate a strong basis in evidence for the third prong of *Gingles*. *Abrams v. Johnson*, 521 U.S. 74, 92-93 (1997).

Finally, *Gingles* requires that each Section 2 district be drawn in the particular geographic location where Section 2 liability occurred. *Gingles*, 478 U.S. at 56. Therefore, a statewide proportionality goal or defense, based on statewide evidence, is antithetical to a showing that Defendants had a strong basis in evidence that, based on local voting patterns, a Section 2 district is necessary to protect the State from liability. *See id.*

2. Section 5

Neither did Section 5 compel the challenged districts, for two reasons. First, Defendants erred in conflating the standards for Section 2 and Section 5, asserting in public statements that Section 5 required the legislature to increase to over 50% the BVAP in any district where it was possible to do so. Ex. H, Public Statement 543, June 17, 2011. Section 5 does not require increasing the BVAP in a district. *Page v. Va. State Bd. of Elections*, 58 F. Supp. 3d 533, 552-53, *vacated and remanded for reconsideration in light of* Alabama Legislative Black Caucus *by Cantor v. Personhuballah*, 135 S. Ct. 1699 (2015).

Second, because Section 5 is no longer constitutionally applied to North Carolina, it can no longer function as a compelling governmental interest in a strict scrutiny analysis. Citing the enormous gains in participation rates by African-American voters in

states throughout the South in the decades since the VRA was passed in 1965, on June 25, 2013 the Supreme Court issued an opinion in *Shelby County v. Holder*, holding that the formula that determines which jurisdictions are covered under Section 5 of the VRA, as reauthorized by Congress in 2006, is unconstitutional. *See* 133 S. Ct. 2612. Because the coverage formula contained in Section 4(b) of the VRA was not updated in 2006 when the "extraordinary measures," which are a "drastic departure from basic principles of federalism," were extended for an additional twenty-five years, the Court ruled that the formula cannot be a basis for subjecting certain jurisdictions and not others to the preclearance requirement. *Shelby County*, 133 S. Ct. at 2618, 2631.

Because Section 5's protections are no longer validly applied to North Carolina, the use of racially gerrymandered districts cannot be justified by an interest in complying with Section 5 of the VRA. In evaluating whether the State of Michigan had a compelling governmental interest in enacting a 1980 law that established a state contracting set-aside for minority- and women-owned businesses, the Sixth Circuit faced an analogous situation following the Supreme Court's decision in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). *See Michigan Rd. Builders Ass'n v. Milliken*, 834 F.2d 583 (6th Cir. 1987). Pre-*Wygant*, the Sixth Circuit rule was that contracting set-aside programs needed to be justified by a "significant" governmental interest. *Michigan Rd. Builders Ass'n*, 834 F.2d at 587. Post-*Wygant*, it was clear that the constitutional standard required a "compelling" government interest. The *Michigan Rd. Builders Ass'n*

court held that even though the state program had been enacted at a time when constitutional doctrine required only a "significant" governmental interest for such programs, the Sixth Circuit was clear that "an appellate court must apply the law in effect at the time it renders its decision." *Id.* at 589. Thus, the court did not apply the constitutional rule in effect at the time of the enactment of the challenged statute but rather applied the rule in effect at the time of its ruling. The same logic applies here.

Decades of Supreme Court precedent, as well as the plain language of the VRA itself, belies Defendants' interpretation of the Act. Because Defendants employed such critically-flawed interpretations of both Section 5 and Section 2 of the VRA, they can have no compelling government interest in the race-based actions they took.

F. The Challenged Districts Are Not Narrowly Tailored

Just as racial balancing can never be a compelling governmental interest, drawing districts to meet a proportionality goal cannot meet the requirement that a government's use of race be narrowly tailored. *Bakke*, 438 U.S. at 315-16. What Defendants have done in this case is precisely the kind of blunt, non-narrowly-tailored use of racial quotas that the Supreme Court has rejected in the educational setting. In *Grutter*, the Court clarified further how a racial classification system could avoid falling into a "quota" trap. 539 U.S. at 334. The Court explained that race may only be used, constitutionally, in a "flexible" and "nonmechanical" way because equal protection requires "individualized assessments." *Id.*

In the redistricting context, this same constitutional rejection of quotas in the narrow-tailoring analysis applies. In *Miller v. Johnson*, because the Department of Justice had determined that it was possible to draw three majority-black congressional districts in Georgia following the 1990 Census, the Department set that number as essentially a quota for the number of majority-black districts the state's enacted plan must contain in order to obtain preclearance under Section 5 of the VRA. *Miller*, 515 U.S. at 918. As discussed above, this was a flawed interpretation of the VRA. But beyond that, the Supreme Court noted approvingly the District Court's conclusion that because the VRA "did not require three majority-black districts, . . . Georgia's plan for that reason was not narrowly tailored to the goal of complying with the Act." *Id.* at 910 (internal citations omitted).

In *Miller*, the Supreme Court stated that the non-retrogression standard under Section 5 does not require ostensibly ameliorative goals such as increasing the number of majority-minority districts without regard to local communities' different needs and interests. *See* 515 U.S. at 924-25. Thus, because Defendants admittedly focused on statewide proportionality, Defendants failed to tailor the location of majority-black districts to areas where there was a strong basis in the evidence for the necessity of majority-black districts.

In drafting its redistricting plans, the General Assembly failed to consider the extent to which black voters were currently able to elect the candidates of their choice,

almost uniformly increasing BVAP in the challenged districts despite decades of increased participation by black voters and the repeated success of candidates of choice of black voters, even in election districts that were majority-white in voting age population. *See Alabama Legislative Black Caucus*, 135 S. Ct. at 1274; *Shelby County*, 133 S. Ct. at 2627 ("[A] statute's current burdens must be justified by current needs, and . . . must be sufficiently related to the problem it targets.") (internal quotations omitted). The General Assembly's two race-based criteria were not based on current conditions; the decision to rely on race-based criteria was made at the outset of the redistricting process without any information about the extent to which black voters were able to elect their candidates of choice. Ex. G, Dickson Trial Tr. Vol. II 328-29, 331 (testimony of Hofeller).

In fact, from 2006 to 2011, black candidates won fifty-six election contests for state legislative office in districts that were not majority-black in voting age population. Ex. O, Churchill Election Results Tables; Ex. P, Churchill Dep. Exs. 82 and 83. Likewise, the alleged fear of litigation that led the state to create its so-called "VRA districts" was not based on any recent Section 2 claims involving state legislative districts, since none had been brought since *Thornburg v. Gingles*, 478 U.S. 30 (1986). No black legislators, leaders, or community members were demanding such a dramatic increase in the number of majority-black districts; rather, black legislators, the North

Carolina NAACP, and a number of individual citizens denounced the plan. Ex. F, at 30, 114 (testimony of Sen. Blue, Rep. Hall).

Additionally, the Supreme Court has held that a district that is intentionally created as a majority-black district is not narrowly tailored if it is not compact. *Shaw v. Hunt*, 517 U.S. at 916; *Bush v. Vera*, 517 U.S. 952, 957 (1996). The legislative record in this case included the results of eight separate measures of mathematical compactness for each of the plans filed in the General Assembly. The challenged districts are not compact, either visually or according those these mathematical measures of compactness. See Amended Compl, ¶¶ 79 (SD 4), 89 (SD 5), 95 (SD 14), 104 (SD 20), 113 (SD 21), 121 (SD 28), 129 (SD 32), 137 (SD 38 and SD 40), 146 (HD 5), 155 (HD 7), 165 (HD 12), 178 (HD 21), 187 (HD 24), 194 (HD 29 and HD 31), 203 (HD 32), 209 (HD 33 and HD 38), 219 (HD 42), 233 (HD 48), 238 (HD 57), 247 (HD 99, HD 102, HD 107). Neither Senator Rucho nor Representative Lewis for themselves, nor their expert Dr. Hofeller on their behalf, made any focused or independent effort to evaluate the compactness of their districts using those mathematical measures or to determine whether they could achieve compliance with the VRA with more-compact, less-race-focused districts.

G. Analysis of Challenged Districts, District-by-District

1. Senate District 4

Like each of the districts discussed below, Senate District 4 was one of the districts drawn to meet the rigid requirement that a proportional number of majority black districts be drawn in the state. It is a bizarrely-shaped, non-compact district constructed from all of Vance, Warren, and Halifax Counties and portions of Nash and Wilson Counties. The shape of the district is inexplicable for any reason other than race. The district has a tentacle that reaches down into Nash and Wilson Counties, pulling black voters out of those counties and assigning to the district on the basis of race. The district splits two precincts where the benchmark plan[5] split zero. Thus, race predominated in the drawing of SD 4, and strict scrutiny must be applied.

Defendants incorrectly alleged that SD 4 was compelled by the VRA. The BVAP in SD 4 was drawn in 2011 to be 52.75%, up from 49.70%, even though Defendants knew that the candidate of choice of black voters had been elected in each of the four general elections held under the 2003 Senate Redistricting Plan (’04, ’06, ’08, and ’10). In 2010, the candidate of choice of black voters won with 62.55% of the vote. The analysis of Defendants’ own expert in 2011, Dr. Brunell[6], demonstrated that the candidate of choice of black voters received between 32.4% and 41.2% of the non-black vote in the 2004 State Auditor race, enabling the candidate of choice of black voters to win in all of the counties in this district. Ex. V, Brunell Report 6-7. Thus, because

[5] The term “benchmark plan” refers to the plan in place before the 2011 enactment. The benchmark Senate plan was the 2003 Senate plan, and the benchmark House plan was the 2009 House plan.
[6] Dr. Thomas Brunell was retained by Defendants to conduct racially polarized voting analysis for the 2011 redistricting process. His report was made public prior to the final enactment of the 2011 Senate and House plans.

racially polarized voting was not legally significant, Section 2 did not compel the drawing of this district. Because SD 4 was drawn in a non-compact manner to be above 50% BVAP, without proper consideration of past political performance, it is therefore not narrowly tailored.

2. Senate District 5

Senate District 5 is a bizarrely-shaped, non-compact district constructed from all of Greene County and portions of Wayne, Lenoir, and Pitt Counties. The district contains several abnormally shaped tentacles, pulling black voters in Wayne, Lenoir, and Pitt Counties into the district on the basis of race. The district splits forty precincts where the benchmark plan split eight. Thus, race predominated in the drawing of SD 5, and strict scrutiny must be applied.

The BVAP in SD 5 was drawn in 2011 to be 51.97%, up from 31%, even though the candidate of choice of black voters was elected from the district in 2008. Dr. Brunell's 2011 analysis demonstrated that the candidate of choice of black voters received between 23.8% and 36.2% of the non-black vote in the 2004 State Auditor race, enabling the candidate of choice of black voters to win in three of the four counties in this district. Ex. V, at 6-7. Thus, because racially polarized voting was not legally significant, Section 2 did not compel the drawing of this district. Because SD 5 was drawn in a non-compact manner to be above 50% BVAP, without proper consideration of past political performance, it is therefore not narrowly tailored.

3. Senate District 14

Senate District 14 is a bizarrely-shaped, non-compact district wholly within Wake County. The district contains several abnormally shaped appendages, splitting precincts and pulling black voters into the district on the basis of race. The district splits twenty-nine precincts where the benchmark plan split eleven. Thus, race predominated in the drawing of SD 14, and strict scrutiny must be applied.

The BVAP in SD 14 was drawn in 2011 to be 51.28%, up from 42.62%, even though Defendants knew that the candidate of choice of black voters had been elected in each of the four general elections held under the 2003 Senate Redistricting Plan ('04, '06, '08, and '10). In 2010, the candidate of choice of black voters won with 65.9% of the vote. Dr. Brunell's 2011 analysis demonstrated that the candidate of choice of black voters received 40.3% of the non-black vote in the 2004 State Auditor race, enabling the candidate of choice of black voters to win in Wake County. Ex. V, at 6-7. Thus, because racially polarized voting was not legally significant, Section 2 did not compel the drawing of this district. Moreover, in 2011, Wake County was not covered under Section 5 of the VRA, so compliance with Section 5 could not have been an interest in the design of the district. Because SD 14 was drawn in a non-compact manner to be above 50% BVAP, without proper consideration of past political performance, it is therefore not narrowly tailored.

4. Senate District 20

Senate District 20 is a bizarrely-shaped, non-compact district comprised of Granville County and part of Durham County. The part of the district that extends into Durham County is irregularly shaped, splitting precincts and pulling black voters into the district on the basis of race. The district splits thirty-five precincts where the benchmark plan split four. Thus, race predominated in the drawing of SD 20, and strict scrutiny must be applied.

The BVAP in SD 20 was drawn in 2011 to be 51.04%, up from 44.64%, even though Defendants knew that the candidate of choice of black voters had been elected in each of the four general elections held under the 2003 Senate Redistricting Plan ('04, '06, '08, and '10). In 2010, the candidate of choice of black voters won with 73.11% of the vote. Dr. Brunell's 2011 analysis demonstrated that the candidate of choice of black voters received 59.2% of the non-black vote in Durham County in the 2008 presidential race, enabling the candidate of choice of black voters to win in the county. Ex. V, at 4-5. Thus, because racially polarized voting was not legally significant, Section 2 did not compel the drawing of this district. Because SD 20 was drawn in a non-compact manner to be above 50% BVAP, without proper consideration of past political performance, it is therefore not narrowly tailored.

5. Senate District 21

Senate District 21 is a bizarrely-shaped, non-compact district comprised of Hoke County and part of Cumberland County. The part of the district that extends into Durham

County has at least seven oddly-shaped appendages, splitting precincts and pulling black voters into the district on the basis of race. The district splits thirty-three precincts where the benchmark plan split one. Thus, race predominated in the drawing of SD 21, and strict scrutiny must be applied.

The BVAP in SD 21 was drawn in 2011 to be 51.53%, up from 44.93%, even though Defendants knew that the candidate of choice of black voters had been elected in each of the four general elections held under the 2003 Senate Redistricting Plan ('04, '06, '08, and '10). In 2010, the candidate of choice of black voters won with 67.61% of the vote. Dr. Brunell's 2011 analysis demonstrated that the candidate of choice of black voters received between 24.0% and 25.1% of the non-black vote in Hoke and Cumberland Counties in the 2008 presidential race, enabling the candidate of choice of black voters to win in those counties. Ex. V, at 4-5. Thus, because racially polarized voting was not legally significant, Section 2 did not compel the drawing of this district. Because SD 21 was drawn in a non-compact manner to be above 50% BVAP, without proper consideration of past political performance, it is therefore not narrowly tailored.

6. Senate District 28

Senate District 28 is a bizarrely-shaped, non-compact district located wholly within Guilford County. The district is irregularly shaped, splitting precincts and pulling black voters into the district on the basis of race. The district splits fifteen precincts

where the benchmark plan split six. Thus, race predominated in the drawing of SD 28, and strict scrutiny must be applied.

The BVAP in SD 28 was drawn in 2011 to be 56.49%, up from 47.20%, even though Defendants knew that the candidate of choice of black voters had been elected in each of the four general elections held under the 2003 Senate Redistricting Plan ('04, '06, '08, and '10). In 2010, the candidate of choice of black voters won a 3-way race with 47.84% of the vote. Dr. Brunell's 2011 analysis demonstrated that the candidate of choice of black voters received 37.3% of the non-black vote in Guilford County in the 2008 presidential race, enabling the candidate of choice of black voters to win in the county. Ex. V, at 4-5. Thus, because racially polarized voting was not legally significant, Section 2 did not compel the drawing of this district. Because SD 28 was drawn in a non-compact manner to be above 50% BVAP, without proper consideration of past political performance, it is therefore not narrowly tailored.

7. Senate District 32

Senate District 32 is a bizarrely-shaped, non-compact district wholly contained in Forsyth County. The district's several irregularly shaped appendages split precincts and pull black voters into the district on the basis of race. The district splits forty-three precincts where the benchmark plan split eleven. Visually, the district is grossly non-compact. Thus, race predominated in the drawing of SD 32, and strict scrutiny must be applied.

The BVAP in SD 32 was slightly increased in 2011 to be 42.53%, up from 42.52%, even though Defendants knew that the candidate of choice of black voters had been elected in each of the four general elections held under the 2003 Senate Redistricting Plan ('04, '06, '08, and '10) and to do so, the district would have to be horribly non-compact. In 2010, the candidate of choice of black voters won with 65.37% of the vote. Dr. Brunell's 2011 analysis demonstrated that the candidate of choice of black voters received 36.1% of the non-black vote in Forsyth County in the 2008 presidential race, enabling the candidate of choice of black voters to win in the county. Ex. V, at 4-5. Thus, because racially polarized voting was not legally significant, Section 2 did not compel the drawing of this district. Moreover, in 2011, Forsyth County was not covered under Section 5 of the VRA. Because SD 32 was drawn in a non-compact manner to increase BVAP, without proper consideration of past political performance, it is therefore not narrowly tailored.

8. Senate District 38

Senate District 38 is a bizarrely-shaped, non-compact district contained wholly within Mecklenburg County. The district is irregularly shaped, splitting precincts and pulling black voters into the district on the basis of race. The district splits eight precincts where the benchmark plan split four. Thus, race predominated in the drawing of SD 38, and strict scrutiny must be applied.

The BVAP in SD 38 was drawn in 2011 to be 52.51%, up from 46.97%, even though Defendants knew that the candidate of choice of black voters had been elected in each of the four general elections held under the 2003 Senate Redistricting Plan ('04, '06, '08, and '10). In 2010, the candidate of choice of black voters won with 68.67% of the vote. Dr. Brunell's 2011 analysis demonstrated that the candidate of choice of black voters received 41.9% of the non-black vote in Mecklenburg County in the 2008 presidential race, enabling the candidate of choice of black voters to win in the county. Ex. V, at 4-5. Dr. Brunell characterized this election as marked by a considerable amount of white crossover voting. Thus, because racially polarized voting was not legally significant, Section 2 did not compel the drawing of this district. In 2011, Mecklenburg County was not covered by Section 5 of the VRA. Because SD 38 was drawn in a non-compact manner to be above 50% BVAP, without proper consideration of past political performance, it is therefore not narrowly tailored.

9. Senate District 40

Senate District 40 is a bizarrely-shaped, non-compact district contained wholly within Mecklenburg County. The district is irregularly shaped, splitting precincts and pulling black voters into the district on the basis of race. The district splits sixteen precincts where the benchmark plan split three. Thus, race predominated in the drawing of SD 40, and strict scrutiny must be applied.

The BVAP in SD 40 was drawn in 2011 to be 51.84%, up from 35.43%, even though Defendants knew that the candidate of choice of black voters had been elected in each of the four general elections held under the 2003 Senate Redistricting Plan (’04, ’06, ’08, and ’10). In 2010, the candidate of choice of black voters won with 58.16% of the vote. Dr. Brunell’s 2011 analysis demonstrated that the candidate of choice of black voters received 41.9% of the non-black vote in Mecklenburg County in the 2008 presidential race, enabling the candidate of choice of black voters to win in the county. Ex. V, at 4-5. Thus, because racially polarized voting was not legally significant, Section 2 did not compel the drawing of this district. Again, in 2011, Mecklenburg County was not covered by Section 5 of the VRA. Because SD 38 was drawn in a non-compact manner to be above 50% BVAP, without proper consideration of past political performance, it is therefore not narrowly tailored.

10. House District 5

House District 5 is a bizarrely-shaped, non-compact district constructed from all of Bertie, Hertford, and Gates Counties and a portion of Pasquotank County. The district lines carve apart Elizabeth City in Pasquotank County, pulling black voters into the district on the basis of race. The district splits six precincts where the benchmark plan split zero. Thus, race predominated in the drawing of HD 5, and strict scrutiny must be applied.

The BVAP in HD 5 was drawn in 2011 to be 54.17%, up from 48.87%, even though Defendants knew that the candidate of choice of black voters had been elected in each of the 3 general elections held under the 2003 Senate Redistricting Plan (’04, ’06, and ’08), and that in 2010, the candidate of choice of black voters won with 58.99% of the vote. Dr. Brunell’s 2011 analysis demonstrated that the candidate of choice of black voters received between 34.8% and 42.1% of the non-black vote in the 2004 State Auditor race, enabling the candidate of choice of black voters to win in each of the four counties in this district. Ex. V, at 6-7. Thus, because racially polarized voting was not legally significant, Section 2 did not compel the drawing of this district. Because HD 5 was drawn in a non-compact manner to be above 50% BVAP, without proper consideration of past political performance, it is therefore not narrowly tailored.

11. House District 7

House District 7 is a bizarrely-shaped, non-compact district constructed from pieces of Franklin and Nash Counties. The district weaves through these two counties in a serpentine manner, splitting precincts and pulling black voters into the district on the basis of race. The district splits twenty-two precincts where the benchmark plan split five. Thus, race predominated in the drawing of HD 7, and strict scrutiny must be applied.

The BVAP in HD 7 was drawn in 2011 to be 51.67%, up from 48.87%, even though Defendants knew that the candidate of choice of black voters had been elected in

each of the 3 general elections held under the 2003 House Redistricting Plan (’04, ’06, and ’08), and that in 2010, the candidate of choice of black voters won in an uncontested race. Dr. Brunell’s 2011 analysis demonstrated that the candidate of choice of black voters received between 28.8% and 40.6% of the non-black vote in the 2004 State Auditor race, enabling the candidate of choice of black voters to win in each of the counties in this district. Ex. V, at 6-7. Thus, because racially polarized voting was not legally significant, Section 2 did not compel the drawing of this district. Because HD 7 was drawn in a non-compact manner to be above 50% BVAP, without proper consideration of past political performance, it is therefore not narrowly tailored.

12. House District 12

House District 12 is a bizarrely-shaped, non-compact district constructed from pieces of Craven, Lenoir, and Greene Counties. The district weaves through these three counties in an highly irregular way, splitting precincts and pulling black voters into the district on the basis of race. The district splits thirty-four precincts where the benchmark plan split twenty-five. Thus, race predominated in the drawing of HD 12, and strict scrutiny must be applied.

The BVAP in HD 12 was drawn in 2011 to be 51.9%, up from 46.25%, even though Defendants knew that the candidate of choice of black voters had been elected in each of the 3 general elections held under the 2003 House Redistricting Plan (’04, ’06, and ’08), and that in 2010, the candidate of choice of black voters won with 60.21% of

the vote. Dr. Brunell's 2011 analysis demonstrated that the candidate of choice of black voters received between 23.8% and 28.2% of the non-black vote in the 2004 State Auditor race, enabling the candidate of choice of black voters to win in two of the three counties in this district. Ex. V, at 6-7. Thus, because racially polarized voting was not legally significant, Section 2 did not compel the drawing of this district. Because HD 12 was drawn in a non-compact manner to be above 50% BVAP, without proper consideration of past political performance, it is therefore not narrowly tailored.

13. House District 21

House District 21 is a bizarrely-shaped, non-compact district constructed from pieces of Sampson, Duplin and Wayne Counties. The irregular district lines split precincts and pull black voters into the district on the basis of race. The district splits twenty-five precincts where the benchmark plan split fourteen. Thus, race predominated in the drawing of HD 21, and strict scrutiny must be applied.

The BVAP in HD 21 was drawn in 2011 to be 51.9%, up from 46.25%, even though Defendants knew that the candidate of choice of black voters had been elected in each of the 3 general elections held under the 2003 House Redistricting Plan ('04, '06, and '08), and that in 2010, the candidate of choice of black voters won with 65.59% of the vote. Dr. Brunell's report, submitted during the legislative process, did not contain any analysis of RPV patterns in two out of the three counties in the district. *See* Ex. V, at 4-7. Indeed, candidates of choice of black voters can win and have won elections in

Sampson County without being in majority-black districts. Thus, because racially polarized voting was not legally significant, Section 2 did not compel the drawing of this district. Because HD 21 was drawn in a non-compact manner to be above 50% BVAP, without proper consideration of past political performance, it is therefore not narrowly tailored.

14. House District 24

House District 24 is a bizarrely-shaped, non-compact district constructed from pieces of Wilson and Pitt Counties. The district, nearly point contiguous at one point, splits precincts and pulls black voters into the district on the basis of race. The district splits twelve precincts where the benchmark plan split zero. Thus, race predominated in the drawing of HD 24, and strict scrutiny must be applied.

The BVAP in HD 24 was drawn in 2011 to be 57.33%, up from 56.07%, even though Defendants knew that the candidate of choice of black voters had been elected in each of the 3 general elections held under the 2003 House Redistricting Plan (’04, ’06, and ’08), and that in 2010, the candidate of choice of black voters won with 64.84% of the vote. Dr. Brunell’s 2011 analysis demonstrated that the candidate of choice of black voters received between 32.4% and 36.2% of the non-black vote in the 2004 State Auditor race, enabling the candidate of choice of black voters to win in both of the counties in this district. Ex. V, at 6-7. Thus, because racially polarized voting was not legally significant, Section 2 did not compel the drawing of this district. Because HD 24

was drawn in a non-compact manner to be above 50% BVAP, without proper consideration of past political performance, it is therefore not narrowly tailored.

15. House District 29

House District 29 is a bizarrely-shaped, non-compact district contained wholly within Durham County. The irregular district lines split precincts and pull black voters into the district on the basis of race. The district splits fourteen precincts where the benchmark plan split one. Thus, race predominated in the drawing of HD 29, and strict scrutiny must be applied.

The BVAP in HD 29 was drawn in 2011 to be 51.34%, up from 39.99%, even though Defendants knew that the candidate of choice of black voters had been elected in two of the three general elections held under the 2003 House Redistricting Plan ('06 and '08), and that in 2010, the candidate of choice of black voters won in an uncontested race. Dr. Brunell's 2011 analysis demonstrated that the candidate of choice of black voters received 59.4% of the non-black vote in the 2008 presidential race, enabling the candidate of choice of black voters to win in Durham County. Ex. V, at 4-5. Thus, because racially polarized voting was not legally significant, Section 2 did not compel the drawing of this district. In 2011, Durham County was not covered by Section 5 of the VRA. Because HD 29 was drawn in a non-compact manner to be above 50% BVAP, without proper consideration of past political performance, it is therefore not narrowly tailored.

16. House District 31

House District 31 is a bizarrely-shaped, non-compact district contained wholly within Durham County. The district contains irregularly shaped appendages, splitting precincts and pulling black voters into the district on the basis of race. The district splits thirteen precincts where the benchmark plan split one. Thus, race predominated in the drawing of HD 31, and strict scrutiny must be applied.

The BVAP in HD 31 was drawn in 2011 to be 51.81%, up from 47.23%, even though Defendants knew that the candidate of choice of black voters had been elected in all three general elections held under the 2003 House Redistricting Plan ('04, '06, and '08), and that in 2010, the candidate of choice of black voters won with 75.5% of the vote. Dr. Brunell's 2011 analysis demonstrated that the candidate of choice of black voters received 59.4% of the non-black vote in the 2008 presidential race, enabling the candidate of choice of black voters to win in Durham County. Ex. V, at 4-5. Thus, because racially polarized voting was not legally significant, Section 2 did not compel the drawing of this district. Again, in 2011, Durham County was not covered by Section 5 of the VRA. Because HD 31 was drawn in a non-compact manner to be above 50% BVAP, without proper consideration of past political performance, it is therefore not narrowly tailored.

17. House District 32

House District 32 is a bizarrely-shaped, non-compact district constructed from pieces of Vance, Warren, and Granville Counties. The district's irregularly shaped appendages in Granville County split precincts and pull black voters into the district on the basis of race. The district splits five precincts where the benchmark plan split zero. . Thus, race predominated in the drawing of HD 32, and strict scrutiny must be applied.

The BVAP in HD 32 was drawn in 2011 to be 50.45%, up from 35.88%, even though Defendants knew of no evidence that black voters were unable elect their candidate of choice in the district. Dr. Brunell's 2011 analysis demonstrated that the candidate of choice of black voters received between 34.2% and 41.2% of the non-black vote in the 2004 State Auditor race, enabling the candidate of choice of black voters to win in both Granville and Vance Counties.[7] Ex. V, at 6-7. Thus, because racially polarized voting was not legally significant, Section 2 did not compel the drawing of this district. Because HD 32 was drawn in a non-compact manner to be above 50% BVAP, without proper consideration of past political performance, it is therefore not narrowly tailored.

18. House District 33

House District 33 is a bizarrely-shaped, non-compact district contained wholly within Wake County. The irregularly shaped district lines split precincts and pull black voters into the district on the basis of race. The district splits thirteen precincts where the

[7] Dr. Brunell did not include Warren County in his analysis.

benchmark plan split three. Thus, race predominated in the drawing of HD 33, and strict scrutiny must be applied.

The BVAP in HD 33 was drawn in 2011 to be 51.42%, even though Defendants knew that the candidate of choice of black voters had been elected in all three general elections held under the 2003 House Redistricting Plan (’04, ’06, and ’08), and that in 2010, the candidate of choice of black voters won with 77.79% of the vote. Dr. Brunell’s 2011 analysis demonstrated that the candidate of choice of black voters received 45.8% of the non-black vote in the 2008 presidential race, enabling the candidate of choice of black voters to win in Wake County. Ex. V, at 4-5. Thus, because racially polarized voting was not legally significant, Section 2 did not compel the drawing of this district. In 2011, Wake County was not covered by Section 5 of the VRA. Because HD 33 was drawn in a non-compact manner to be above 50% BVAP, without proper consideration of past political performance, it is therefore not narrowly tailored.

19. House District 38

House District 38 is a bizarrely-shaped, non-compact district contained wholly within Wake County. The district’s irregularly shaped appendages split precincts and pull black voters into the district on the basis of race. The district splits thirteen precincts where the benchmark plan split five. Thus, race predominated in the drawing of HD 38, and strict scrutiny must be applied.

The BVAP in HD 38 was drawn in 2011 to be 51.37%, up from 27.96%, even though Defendants knew of no evidence that the candidate of choice of black voters had been unable to elect their candidate of choice. Dr. Brunell's 2011 analysis demonstrated that the candidate of choice of black voters received 45.8% of the non-black vote in the 2008 presidential race, enabling the candidate of choice of black voters to win in Wake County. Ex. V, at 4-5. Thus, because racially polarized voting was not legally significant, Section 2 did not compel the drawing of this district. Again, in 2011, Mecklenburg County was not covered by Section 5 of the VRA. Because HD 38 was drawn in a non-compact manner to be above 50% BVAP, without proper consideration of past political performance, it is therefore not narrowly tailored.

20. House District 42

House District 42 is a bizarrely-shaped, non-compact district contained wholly within Cumberland County. The district contains irregularly shaped appendages that split precincts and pull black voters into the district on the basis of race. The district splits fifteen precincts where the benchmark plan split five. Thus, race predominated in the drawing of HD 42, and strict scrutiny must be applied.

The BVAP in HD 42 was drawn in 2011 to be 52.56%, up from 47.94%, even though Defendants knew that the candidate of choice of black voters had been elected in all three general elections held under the 2003 House Redistricting Plan ('04, '06, and '08), and that in 2010, the candidate of choice of black voters won in an uncontested race.

Dr. Brunell's 2011 analysis demonstrated that the candidate of choice of black voters received 33.5% of the non-black vote in the 2004 State Auditor race, enabling the candidate of choice of black voters to win in Cumberland County. Ex. V, at 6-7. Thus, because racially polarized voting was not legally significant, Section 2 did not compel the drawing of this district. Because HD 42 was drawn in a non-compact manner to be above 50% BVAP, without proper consideration of past political performance, it is therefore not narrowly tailored.

21. House District 48

House District 48 is a bizarrely-shaped, non-compact district constructed from pieces of Richmond, Scotland, Hoke, and Robeson Counties. The irregularly shaped district weaves through Scotland and Hoke Counties, with misshapen tentacles that extend into Richmond and Robeson Counties, splitting precincts and pulling black voters into the district on the basis of race. The district splits thirty-one precincts where the benchmark plan split nine. Thus, race predominated in the drawing of HD 48, and strict scrutiny must be applied.

The BVAP in HD 48 was drawn in 2011 to be 51.27%, up from 45.56%, even though Defendants knew that the candidate of choice of black voters had been elected in all three general elections held under the 2003 House Redistricting Plan ('04, '06, and '08), and that in 2010, the candidate of choice of black voters won with 74.8% of the vote. Dr. Brunell's 2011 analysis demonstrated that the candidate of choice of black

voters received between 30.5% and 61.7% of the non-black vote in the 2004 State Auditor race, enabling the candidate of choice of black voters to win in Hoke, Richmond, and Scotland Counties.[8] Ex. V, at 6-7. Thus, because racially polarized voting was not legally significant, Section 2 did not compel the drawing of this district. Because HD 48 was drawn in a non-compact manner to be above 50% BVAP, without proper consideration of past political performance, it is therefore not narrowly tailored.

22. House District 57

House District 57 is a bizarrely-shaped, non-compact district wholly contained within Guilford County. The district's irregularly shaped appendage splits precincts and pulls black voters into the district on the basis of race. The district splits fifteen precincts where the benchmark plan split six. Thus, race predominated in the drawing of HD 57, and strict scrutiny must be applied.

The BVAP in HD 57 was drawn in 2011 to be 50.69%, up from 29.93%, even though Defendants knew that the candidate of choice of black voters had been elected in two of the three general elections held under the 2003 House Redistricting Plan ('06 and '08), and that in 2010, the candidate of choice of black voters won with 55.69% of the vote. Dr. Brunell's 2011 analysis demonstrated that the candidate of choice of black voters received 37.3% of the non-black vote in the 2008 presidential race, enabling the candidate of choice of black voters to win in Guilford County. Ex. V, at 4-5. Thus,

[8] Dr. Brunell did not include Richmond County in his analysis.

because racially polarized voting was not legally significant, Section 2 did not compel the drawing of this district. Because HD 57 was drawn in a non-compact manner to be above 50% BVAP, without proper consideration of past political performance, it is therefore not narrowly tailored.

23. House District 99

House District 99 is a bizarrely-shaped, non-compact district contained wholly within Mecklenburg County. The district contains irregularly shaped appendages, splitting precincts and pulling black voters into the district on the basis of race. Thus, race predominated in the drawing of HD 99, and strict scrutiny must be applied.

The BVAP in HD 99 was drawn in 2011 to be 54.65%, up from 41.26%, even though Defendants knew that the candidate of choice of black voters had been elected in 2008 and that in 2010, the candidate of choice of black voters won with 72.01% of the vote. Dr. Brunell's 2011 analysis demonstrated that the candidate of choice of black voters received 41.9% of the non-black vote in the 2008 presidential race, enabling the candidate of choice of black voters to win in Mecklenburg County. Ex. V, at 4-5. Thus, because racially polarized voting was not legally significant, Section 2 did not compel the drawing of this district. In 2011, Mecklenburg County was not covered by Section 5 of the VRA. Because HD 99 was drawn in a non-compact manner to be above 50% BVAP, without proper consideration of past political performance, it is therefore not narrowly tailored.

24. House District 102

House District 102 is a bizarrely-shaped, non-compact district contained wholly within Mecklenburg County. The district weaves through the county with irregularly shaped appendages that split precincts and pull black voters into the district on the basis of race. The district splits thirteen precincts where the benchmark plan split fourThus, race predominated in the drawing of HD 102, and strict scrutiny must be applied.

The BVAP in HD 102 was drawn in 2011 to be 53.53%, up from 42.74%, even though Defendants knew that the candidate of choice of black voters had been elected in 2008 and that in 2010, the candidate of choice of black voters won in an uncontested race. Dr. Brunell's 2011 analysis demonstrated that the candidate of choice of black voters received 41.9% of the non-black vote in the 2008 presidential race, enabling the candidate of choice of black voters to win in Mecklenburg County. Ex. V, at 4-5. Thus, because racially polarized voting was not legally significant, Section 2 did not compel the drawing of this district. Again, in 2011, Mecklenburg County was not covered by Section 5 of the VRA. Because HD 102 was drawn in a non-compact manner to be above 50% BVAP, without proper consideration of past political performance, it is therefore not narrowly tailored.

25. House District 107

House District 107 is a bizarrely-shaped, non-compact district contained wholly within Mecklenburg County. The district weaves through the county in a serpentine

manner, splitting precincts and pulling black voters into the district on the basis of race. The district splits nine precincts where the benchmark plan split five. Thus, race predominated in the drawing of HD 107, and strict scrutiny must be applied.

The BVAP in HD 107 was drawn in 2011 to be 52.52%, up from 47.14%, even though Defendants knew that the candidate of choice of black voters had been elected in all three general elections held under the 2003 House Redistricting Plan (’04, ’06, and ’08), and that in 2010, the candidate of choice of black voters won with 67.26% of the vote. Dr. Brunell’s 2011 analysis demonstrated that the candidate of choice of black voters received 41.9% of the non-black vote in the 2008 presidential race, enabling the candidate of choice of black voters to win in both of the counties in this district. Ex. V, at 4-5. Thus, because racially polarized voting was not legally significant, Section 2 did not compel the drawing of this district. In 2011, Mecklenburg County was not covered by Section 5 of the VRA. Because HD 107 was drawn in a non-compact manner to be above 50% BVAP, without proper consideration of past political performance, it is therefore not narrowly tailored.

II. PLAINTIFFS WILL SUFFER IRREPARABLE INJURY IF PRELIMINARY RELIEF IS NOT GRANTED

Plaintiffs and thousands of other North Carolina citizens will continue to suffer irreparable injury absent a preliminary injunction from this Court. The Supreme Court has held that the deprivation of a constitutional right, even for a brief period of time, amounts to irreparable injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality

opinion). Courts routinely find that restrictions on the fundamental right to vote constitute irreparable injury. *See, e.g.*, *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (the denial of the fundamental right to vote is unquestionably "irreparable harm"); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (same). In particular, discriminatory voting laws are "the kind of serious violation of the Constitution and the Voting Rights Act for which courts have granted immediate relief." *United States v. City of Cambridge*, 799 F.2d 137, 140 (4th Cir. 1986).

Legislative efforts to "to classify and separate voters by race" through redistricting plans injure voters by "reinforc[ing] racial stereotypes and threaten[ing] to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole." *Shaw*, 509 U.S. at 650. Indeed, "[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters." *Id.* at 657. This is precisely the sort of harm from which Plaintiffs seek immediate relief.

Finally, of particular note in this case, North Carolina district courts have found irreparable harm from and enjoined redistricting schemes found likely to violate Section 2 of the Voting Rights Act and state laws requiring unduly burdensome election methods. *See, e.g.*, *NAACP-Greensboro Branch v. Guilford County Bd. of Elections*, 858 F. Supp. 2d 516 (M.D.N.C. 2012) (granting preliminary injunction because, *inter alia*, plaintiffs

would be irreparably harmed if redistricting law were allowed to take effect); *Republican Party of N.C. v. Hunt*, 841 F. Supp. 722, 728 (E.D.N.C. 1994) (granting preliminary injunction because, *inter alia*, plaintiffs would be irreparably harmed if existing method for electing superior court judges were followed). Because the challenged districts unconstitutionally group voters into political districts based on the color of their skin, they plainly give rise to irreparable harm.

III. THE EQUITIES STRONGLY FAVOR GRANTING PRELIMINARY RELIEF

Likewise, the balance of equities strongly favors a preliminary injunction, for the following reasons: (1) the potential harm to Defendants is minimal, particularly in comparison to the potential harm to Plaintiffs; (2) there is sufficient time to remedy the constitutional violations in an orderly fashion; and (3) Plaintiffs promptly acted after the Supreme Court's decision in *Alabama Legislative Black Caucus*.

While Defendants might incur some administrative and financial costs should this Court enjoin further use of the challenged districts, the burden to Defendants of redrawing and conducting elections under non-race-based districts would be far outweighed by the injury that Plaintiffs and others in North Carolina will suffer—the odious segregation in districts solely and unjustifiably on the basis of race—absent an injunction. *See, e.g.*, *Taylor v. Louisiana*, 419 U.S. 522 (1975) ("administrative convenience" cannot justify a practice that impinges upon a fundamental right); *Johnson v. Halifax County*, 594 F. Supp. 161, 171 (E.D.N.C. 1984) (finding "administrative and

financial burdens on the defendant are not . . . undue in view of the otherwise irreparable harm to be incurred by plaintiffs"); *see also Pashby v. Delia*, 709 F.3d 307, 329 (4th Cir. 2013) (the harm caused to plaintiffs' health outweighed the burden placed on North Carolina's budget).

Moreover, Defendants have exacerbated their burden by moving the primary elections up two months, now requiring the candidate filing period for the 2016 legislative primary to open in December 2015. Indeed, given the last minute flux in filing deadlines and primary dates, moving the primary date in 2016 back to June, if necessary, would not be any more disruptive to voters or candidates than what the General Assembly has just done. A primary date in June 2016 would still enable the November 2016 election to be conducted as planned, and would give this Court more time if it needed to resolve this case on the merits. But regardless, this Court should enjoin the opening of filing until it can make a merits ruling on this case, and commencing filing 30 days after that merits resolution would provide ample time for the orderly conduct of primaries and the November 2016 general election.

Finally, Plaintiffs acted promptly after the Supreme Court's decision in *Alabama Legislative Black Caucus*. The Court issued its opinion at the end of March 2015. *See* 135 S. Ct. 1257. Plaintiffs filed their Complaint in mid-May 2015. Because Plaintiffs acted promptly in the wake of the Alabama decision, the balance of equities is in Plaintiffs' favor.

Therefore, because the potential harm to Defendants is minimal or only exacerbated because of their own actions, there is sufficient time to remedy the violation, and because Plaintiffs acted promptly after the Supreme Court issued its Alabama decision, the balance of equities strongly favors a preliminary injunction.

IV. GRANTING PRELIMINARY RELIEF IS IN THE PUBLIC INTEREST

Finally, enjoining the implementation of the challenged provisions will serve the public interest. There is extraordinary public interest in ensuring that elections are conducted under constitutional voting laws or redistricting plans. *See, e.g.*, *NAACP-Greensboro Branch*, 858 F. Supp. 2d at 529 ("[T]he public interest in an election . . . that complies with the constitutional requirements of the Equal Protection Clause is served by granting a preliminary injunction."); *see also McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1440-41 (2014); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' motion to enjoin use of the challenged state legislative districts because they violate the Equal Protection Clause, and to delay the opening of filing until a remedial plan can be designed and implemented—no later than 30 days after a ruling from this Court.

Respectfully submitted, this the 7th day of October, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the foregoing Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction, with service to be made by electronic filing with the Clerk of the Court using the CM/ECF System, which will send a Notice of Electronic Filing to all parties with an e-mail address of record, who have appeared and consent to electronic service in this action.

This the 7th day of October, 2015.

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