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.	)
	)
STATE OF NORTH CAROLINA, *et al.*	)
	)
Defendants.	)
	)

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

Plaintiffs request unprecedented relief from this Court. No court has ever preliminarily enjoined a redistricting plan in a case involving claims of racial gerrymandering – much less where the challenged districts have already been used in two prior general elections. Plaintiffs invite this Court to ignore a prior ruling by the North Carolina Supreme Court that the districts they contest comply with North Carolina's state constitutional formula for grouping counties in the formation of legislative districts. Because the state constitutional criteria caused the location and shape of the challenged districts, and plaintiffs produce no evidence to the contrary, race cannot be the predominant motive for any of them.

Plaintiffs also ignore the strong basis in the legislative record for all the challenged districts. This includes alternative maps and expert testimony submitted to the General Assembly by plaintiffs' counsel and the North Carolina NAACP. This evidence, and a

decision by the Supreme Court setting a benchmark for black voting age population in districts drawn to protect the state from liability under the Voting Rights Act ("VRA"), show that the challenged districts further a compelling governmental interest and are narrowly tailored.

In truth, plaintiffs oppose the creation of any new majority black districts in the 2011 plans – as compared to the 2003 legislative plans – even in the same regions or counties where the NC NAACP, Democratic leaders, and the Legislative Black Caucus ("LBC") recommended one or more majority black districts. This is because the real dispute in this case is purely political. While plaintiffs have failed to provide legal criteria that this Court should order the State to follow, they have supported plans similar in composition to plans enacted by prior General Assemblies controlled by Democratic majorities and designed to re-elect Democratic majorities.

In short, plaintiffs are asking this Court to order North Carolina to adopt plans that arbitrarily limit the number of majority minority districts, crack majority black populations out of districts that would allow them to elect their preferred candidates of choice, and disperse these black populations into surrounding influence districts that will elect white Democrats and ensure Democratic majorities in the General Assembly.

There is no precedent for this type of court ordered political relief. For these and other reasons, plaintiffs' motion should be denied.

II. FACTUAL BACKGROUND

A. History of Voting Rights Litigation and Districts prior to the 2011 Redistricting Process

In *Thornburg v. Gingles*, 478 U.S. 30, 46 n. 12 (1984) ("*Gingles*"), the Supreme Court declined to consider "whether § 2 [of the Voting Rights Act] permits, and if it does, what standards should pertain to a claim brought by a minority group that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to *influence* elections." (emphasis in the original). Since then, courts have defined four different types of districts that have been described as "voting rights districts" or "VRA districts": (a) "majority minority districts," in which a specific minority group constitutes an actual majority of the voting age population ("VAP"); (b) minority "coalition" districts, in which two minority groups constitute a majority of the VAP and form a coalition to elect the coalition's candidate of choice; (c) majority white "crossover" districts, in which minority voters make up less than a majority of the VAP but are potentially large enough to elect their candidate of choice with the help of some white "crossover" voters; and (d) "influence" districts, in which the minority group is a minority of the VAP but sufficiently large enough to influence the outcome of an election even if the preferred candidate of choice cannot be elected. *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) ("*Strickland*").

In addition to these types of districts, at least two justices of the Supreme Court have endorsed a theory that a VRA district could be established where the "minority

voters in a reconstituted or putative district constitute a majority of those voting in a primary of the dominant party, that is the party tending to win in the general election." *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 485-86 (2006) (Souter and Ginsburg J.J., concurring in part and dissenting in part) ("*LULAC*").

In *Gingles*, North Carolina was ordered to create majority black legislative districts as a remedy for violations of Section 2 in the following counties: Bertie, Chowan, Edgecombe, Forsyth, Gates, Halifax, Martin, Mecklenburg, Nash, Northampton, Wake, Washington, and Wilson. *Gingles v. Edmisten*, 590 F. Supp. 345, 365-66 (E.D.N.C. 1984), *aff'd Thornburg*, 478 U.S. at 80; Judgment and Memorandum Opinion, App. A, p. 77, F.F. No. 1, *Dickson v. Rucho*, Nos. 11 CVS 16896 and 11 CVS 16940 (consolidated) (July 8, 2013)[1] (filed with the Court in this case as an attachment at D.E. 32-1[2]). In 1991, the General Assembly preserved all of the 1984 majority black House districts enacted because of *Gingles* and added four new majority black districts. (Ex. 2 (1991 Section 5 Submission, Section H 27 N, "Effect of Change on Minority Voters"); Ex. 25 (Historical House Map Notebook, Tab 1); Ex. 27) Similarly, the 1991 General Assembly preserved all of the majority black Senate districts established because of *Gingles*, and created two new Senate districts in which blacks were the majority of all registered voters. This resulted in five Senate districts in which African Americans

[1] The Judgment and Memorandum Opinion without appendix is available on Westlaw at 2013 WL 3376658. Because the electronic version does not contain the appendix, for consistency citations in the memorandum in this memorandum will correspond to the page numbers as they appear in the record with the two appendices and not the online version.

[2] Citations to the *Dickson v. Rucho* Judgment and Memorandum Opinion and appendices will be made to the referenced docket entry in this case, D.E. 32-1.

represented a majority of registered voters. (Ex. 2 (1991 Section 5 Submission, Section S-27 N "Effect of Plan on Racial Minorities"); Ex. 26 (Historical Senate Map Notebook, Tab 16); Ex. 27) Following a Section 5 objection from the Attorney General to the 1991 House and Senate plans, the General Assembly modified the 1991 House plan to create three new minority House districts, including one in Guilford County and two in Southeastern North Carolina. (Ex. 3 (1992 Submission, Section 2 H 127 C, "Explanation of Changes in House Plan"); Ex. 25 (Historical House Map Notebook, Tab 2); Ex. 27)

Because the Supreme Court in *Gingles* and subsequent cases declined to address the percentage of black population that must be included in a voting rights district, prior to 2009, states used two different strategies for creating VRA districts. *See Georgia v. Ashcroft*, 539 U.S. 461 (2003). Under one option, states could create "a certain number of 'safe districts' in which it is highly likely that minority voters will be able to elect their candidate of choice." *Ashcroft*, 539 U.S. at 480. Under an alternative strategy, states could choose to make a political decision to enact a combination of districts, including majority minority, coalition, and influence districts, in the place of a plan based upon safe majority minority districts. *Id.* at 480-83.

At the time of the 2001 redistricting, the General Assembly adopted the political strategy explained in *Ashcroft* and enacted a plan with a combination of majority black, coalition, and influence districts. Following the theory articulated by Justices Souter and Ginsburg in *LULAC*, the State explained that it had "preserve[d] black voting strength" by creating strong majority Democratic districts in which blacks constituted a majority of registered Democrats. The State further explained that this was accomplished by making

districts that adjoin minority districts stronger for Democratic candidates by moving white Democratic precincts out of the minority districts and replacing them with Republican voters who would be submerged in strong majority black or coalition Democratic districts and unable to vote in the Democratic primary. (Ex. 4 (2001 Submission, Section H-27N "Effect of Sutton 3 on Minority Voters"; S-27N "Effect of Adoption of Senate Plan on Minority Voters"))

In the 2001 House Plan, the State enacted 10 majority black House districts located in Section 5 counties and increased the number of majority black districts in non-covered counties from four to five to protect the State from liability under Section 2. The State also enacted an additional House district in Cumberland County that was majority black in the number of registered voters (House District 48). The State also argued that the plan should be precleared because it enacted four more House districts in non-covered counties, including Durham, with black majorities in the number of registered Democrats. (Ex. 4 (2001 Submission H-27N, "Effect on Minority Districts"); Ex. 25 (Historical House Map Notebook, Tab 3); Ex. 27)[3]

The State advocated that the 2001 Senate plan be precleared because it included two majority black districts in Section 5 counties and four districts with a black

[3] In *Gingles*, the Supreme Court held that significant racially polarized voting was not present in a 1984 multimember district in Durham County. As explained by the Court in *Gingles*, the absence of polarized voting in a multimember district with single shot voting does not mean racially polarized voting is not present in single member districts that might be drawn in that county. (D.E. 32-1, App. A, pp. 100-01, F.F. No. 40(b)) The finding in *Gingles* did not prevent the State from proposing and enacting majority black congressional districts and enacting legislative coalition districts in Durham in 1991, 1992, 2001, and 2003. (Exs. 2-5)

population between 40% and 50% in counties (Wake, Mecklenburg, and Forsyth) where the State was subject to liability under Section 2. The State described these districts as "effective black voting districts." Once again, the State emphasized that African Americans represented the majority of registered Democrats in these districts. (Ex. 4 (2001 Submission, Section S-27 N, "Effect on Minority Districts"))

The legislative plans enacted in 2001 were never used in a general election because they were declared unlawful under the provisions of the North Carolina Constitution that prohibit the division of counties into separate legislative districts (known as the "Whole County Provision" or "WCP"). *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) ("*Stephenson I*"); N.C. Const. art. II, §§ 3(3) and 5(3). In 2002, a superior court judge found that a second set of plans enacted by the General Assembly also violated the WCP and the court implemented its own interim plan for the 2002 General Election. (Ex. 25 (Historical House Map Notebook, Tabs 4, 5); Ex. 26 (Historical Senate Map Notebook, Tabs 19, 20); Ex. 27) In 2003, the North Carolina Supreme Court affirmed these rulings by the superior court. *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) ("*Stephenson II*"). A third set of legislative plans were enacted in 2003 and used in every general election from 2004 through 2010. (Ex. 25 (Historical House Map Notebook, Tab 6); Ex. 26 (Historical Senate Map Notebook, Tab 21); Ex. 27) The only district from the 2003 plans that was ever subject to constitutional review (House District 18 or "HD 18") was found to be in violation of the WCP. *Pender Cnty. v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (2007) ("*Pender County*"), *aff'd*, *Strickland*, supra. The 2003 House plan was slightly modified in 2009 to correct the

violations associated with the 2003 HD 18. (Ex. 25 (Historical House Map Notebook, Tab 7); Ex. 27)

The 2003 legislative plans followed the same political strategy reflected in the 2001 plans and included a mixture of majority black, coalition, and influence districts. (Ex. 5 (2003 Submission Sections 3H-27N, "Effect of Enactment of 2003 House Redistricting Plan on Minority Voters"; 3S-27N, "Effect of Adoption of 2003 Senate Redistricting Plan on Minority Voters")) By the time of the 2010 Census, the 2003 House plan contained 23 districts with an any part black voting age population above 40%.[4] Nine of these districts were majority black. The other 14 districts were coalition districts with non-Hispanic whites representing a minority of the voting age population. In all 23 House districts, Democrats were a majority of the registered voters and African Americans were a supermajority of registered Democrats. The 2003 House plan also included nine influence districts with majority white population but with black voting age populations between 30.15% and 36.90%. The influence districts almost always elected white Democrats with the exception of House District 39 in which a black Democrat was elected in 2006 and 2008. (D.E. 32-1, p. 25; Ex. 6 (First Frey Aff. Ex. 11); Ex. 7 (Second Frey Aff. Exs. 39, 49, 59); Ex. 25 (Historical House Map Notebook, Tab 8); Ex. 27)

[4] The census categories of "white," "black," "Hispanic," "total black" (or "any part black"), and "non-Hispanic white" were all reported by the General Assembly in its statistical reports published with each redistricting map for the first time in 2011. (See Exs. 25, 26 (Historical House Map Notebook and Historical Senate Map Notebook)) The "white" category is without regard to ethnicity and includes people who are Hispanic or Latino. The category "Non-Hispanic white" excludes that portion of the population. (D.E. 32-1, p. 4, F.F. No. 3; Ex. 7 (Second Frey Aff. Ex. 34, Notes))

An identical political strategy for VRA compliance was followed by the General Assembly in the 2003 Senate plan. It included eight districts with a black voting age population between 40% and 50%. Nine districts were created as coalition districts with African Americans representing a very high plurality of the voting age population. Non-Hispanic whites were a minority group in all of these districts. In all nine districts, registered Democrats were a majority of the registered voters and African Americans were a majority of registered Democrats. The 2003 Senate plan also included six influence districts, with black voting age populations between 30.11% and 37.36% which typically elected white Democrats. A black Democrat was elected in one of the influence districts in 2008 (Senate District 5) but was defeated by a white Republican in 2010. (D.E. 32-1, p. 25; Ex. 6 (First Frey Aff. Ex. 10); Ex. 7 (Second Frey Aff. Exs. 34, 44, 56); Ex. 26 (Historical Senate Map Notebook, Tab 22); Ex. 27)

The legal landscape in support of the VRA districts enacted by the State in its 2001 and 2003 legislative plans changed dramatically after the 2003 plans were enacted. First, in 2006, the Supreme Court issued its decision in *LULAC*. The Supreme Court rejected the argument that Section 2 requires influence districts because "the opportunity 'to elect representatives of their choice' . . . requires more than the ability to influence the outcome between some candidates, none of whom is [the minority group's] candidate of choice." 548 U.S. at 445-46; *see also Strickland*, 556 U.S. at 13.

Another significant legal development occurred when Congress reauthorized Section 5. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, P.L. 109-246, 120 Stat. 577 (2006).

Section 5 was amended to prohibit "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the *purpose* of or will have the *effect* of diminishing the ability of any citizens of the United States on account of race or color . . . *to elect their preferred candidates of choice*." *Id.* (emphasis added). One of the purposes of these amendments was to reverse any portion of *Ashcroft* which gave states the option of selecting coalition or influence districts over districts that allow the minority group to elect their preferred candidates of choice. *See* S. REP. NO. 109-295, at 18-21 (2006) ("Preferred Candidate of Choice"); H.R. REP. NO. 109-478, at 65-72 (2006).

The final significant legal change occurred in *Pender County*. Under the 2003 House plan, North Carolina divided Pender County into different districts to create a majority white crossover district (House District 18). The plaintiffs contended that dividing Pender County into different districts violated the WCP. North Carolina defended the division of Pender County on the ground that majority white crossover districts served as a defense to vote dilution claims under Section 2. *Pender County*, 361 N.C. at 493-98, 649 S.E.2d at 366-68. The North Carolina Supreme Court held that Section 2 did not authorize the creation of coalition districts, crossover districts, or influence districts, and that any district enacted to protect the State from Section 2 liability would need to be established with a true majority minority population. *Id.* at 503-07, 649 S.E.2d at 372-74.

On appeal, the Supreme Court affirmed that crossover districts could not be required under Section 2 because districts designed to protect a state from Section 2

liability must be numerically majority minority. *Strickland*, 556 U.S. at 12-20. While the Court did not squarely address whether coalition districts could be required by Section 2, it stated that such districts had never been ordered as a remedy for a Section 2 violation by any of the circuit courts. *Id.* at 13, 19.

B. Election Results and Census Developments Under the 2003 Legislative Plans

In 2010, 18 African American candidates were elected to the State House and seven African American candidates were elected to the State Senate. (D.E. 32-1, p. 4, F.F. No. 3; Ex. 6 (First Frey Aff. Exs. 10, 11); Ex. 7 (Second Frey Aff. Exs. 34, 39, 44, 49); Ex. 8 (Churchill Aff. Exs. 6, 7)) Two African American candidates were elected to Congress in 2010. (D.E. 32-1, p. 4, F.F. No. 3; Ex. 6 (First Frey Aff. Ex. 12); Ex. 7 (Second Frey Aff. Exs. 60, 64)) All African American incumbents elected to the General Assembly or Congress in 2010 were elected in districts that were either majority black VAP or coalition districts in which non-Hispanic whites were a minority of the VAP. (D.E. 32-1, p. 4, F.F. No. 3; Ex. 7 (Second Frey Aff. Exs. 34, 44))

No African American candidate elected in 2010 was elected from a majority white crossover district. (D.E. 32-1, p. 4, F.F. No. 4; Ex. 7 (Second Frey Aff. Exs. 34, 39, 60); Ex. 8 (Churchill Aff. Exs. 6, 7)) In fact, two African American incumbent senators were defeated in the 2010 General Election, running in majority white districts. (D.E. 32-1, p. 4, F.F. No. 4; Ex. 7 (Second Frey Aff. Ex. 56); Ex. 8 (Churchill Aff. Ex. 7) (SD 24)) From 2006 through 2010, no African American candidate was elected to more than two consecutive terms to the legislature in a majority white district. (D.E. 32-1, p. 4, F.F. No.

4; Ex. 7 (Second Frey Aff. Ex. 59) (HD 39); Ex. 8 (Churchill Aff. Ex. 7) (SD 24)) From 1992 through 2010, no African American candidate for Congress was elected from a Congressional district other than Congressional District 1 ("CD 1") or Congressional District 12 ("CD 12"). (D.E. 32-1, p. 4, F.F. No. 4; Ex. 7 (Second Frey Aff. Ex. 60, 64))

From 2004 through 2010, no African American candidate was elected to state office in North Carolina in a statewide partisan election. In 2000, an African American candidate, Ralph Campbell, was elected State Auditor in a partisan election. In 2004, Campbell was defeated by a white Republican, Les Merritt, in a partisan election for state auditor. (D.E. 32-1, p. 5, F.F. No. 5; *see also Gingles v. Edmiston*, 590 F. Supp. at 364-65 (lack of success by African American candidates in statewide elections is relevant evidence of legally significant racially polarized voting))

Under the North Carolina Constitution, to satisfy the one person, one vote requirement, legislative districts must be drawn with a total population that is plus or minus 5% from the ideal population. *Stephenson I*, 355 N.C. at 383-84, 562 S.E.2d at 396-98. Legislative districts also must be drawn within a single county if the county has enough population to support one or more whole legislative districts. For all other counties, they must be grouped in the smallest combinations possible to establish a population pool that will support one or more whole legislative districts to be drawn within each county group. *Dickson v. Rucho*, 367 N.C. 542, 571-72, 766 S.E.2d 238, 257-59 (2014). The county grouping formulas in the 2003 House plan and the 2003 Senate plan are based upon the 2000 Census. Under the 2010 Census, most of the majority black or coalition districts and other non-VRA districts were either

underpopulated or overpopulated by more than 5%. (Ex. 6 (First Frey Aff. Exs. 10, 11)). This meant that almost all of the 2003 VRA districts would need to be redrawn and that the 2011 legislative plans would need to be based upon new county groups. Further, in most of the majority black or coalition districts that had elected African American candidates, the margin of victory for each African American candidate was less than the amount by which the district was underpopulated or overpopulated by more than 5%. (D.E. 32-1, F.F. 63, 80, 88, 95, 104, 112, 121, 128, 136, 145, 154, 162; Ex. 8 (Churchill Aff. Exs. 1, 2, 3)) In almost all of these elections the black candidate was often unopposed or enjoyed the advantage of incumbency and raised substantially more money than his or her opponent. (D.E. 32-1, F.F. 64, 72, 81, 89, 96, 105, 113, 122, 129, 137, 146, 155, 163; Ex. 8 (Churchill Aff. Exs. 1-7))

C. 2011 Legislative Proceedings

Early in the 2011 redistricting process, the co-chairs of the Joint Senate and House Redistricting Committee (Senator Bob Rucho and Representative David Lewis) released a Legislator's Guide to Redistricting. ("Legislator's Guide") (attached as Exhibit 9) The Legislator's Guide explained numerous cases that would govern redistricting in 2011, including, for example, *Stephenson I and II*; *Thornburg*; *Pender County*; *Strickland*; *Shaw v. Reno*, 509 U.S. 630 (1993) ("*Shaw I*"); *Shaw v. Hunt*, 517 U.S. 899 (1996) ("*Shaw II*"); *Hunt v. Cromartie*, 526 U.S. 541 (1999) ("*Cromartie I*"); *Easley v. Cromartie*, 532 U.S. 234 (2001) ("*Cromartie II*"), and other cases. (Ex. 9, pp. 51-53) The Guide also reported the decision by Congress to amend Section 5 because of the decision in *Ashcroft*.

The Legislator's Guide also contained sections on politics and redistricting and political gerrymandering. The Legislator's Guide states that politics always plays a role in redistricting, and that the North Carolina Supreme Court has held that the General Assembly may consider partisan advantage in its redistricting decisions. (Ex. 9, pp. 10, 11)

On March 24, 2011, the co-chairs advised legislators that in their opinion the General Assembly was obligated to comply with *Strickland* in forming VRA districts, that "political considerations" would play a role in redistricting, that the General Assembly would "consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions," "that race cannot be the predominant factor in redistricting so that traditional redistricting principles are subordinated to race," and that any new plans could not be "retrogressive." (Ex. 10 (First Rucho Aff. Ex. 3))

On March 31, 2011, the co-chairs mailed a letter to the General Assembly's "minority contact" list, which included the NC NAACP and its counsel. In their letter, the co-chairs solicited input on whether the State was still experiencing racially polarized voting in statewide, legislative, congressional or other elections particularly in counties covered by Section 5 and areas that had been or may be subject to claims under Section 2. The letter also sought input on the meaning of *Strickland*, the continuing presence of the "*Gingles* factors," and any matters related to VRA compliance. All members of the Legislative Black Caucus were copied on this letter. (Ex. 10 (First Rucho Aff. Ex. 4))

During the 2011 legislative proceedings, the General Assembly conducted an unprecedented number of public hearings. (Ex. 10 (First Rucho Aff. ¶ 6, Exs. 1, 2)) During a public hearing on May 9, 2011, representatives of a coalition called "Alliance for Fair Redistricting and Minority Voting Rights" ("AFRAM") presented a proposed Congressional plan. The NC NAACP was a member of AFRAM and AFRAM was represented by attorneys from the Southern Coalition for Social Justice ("SCSJ"). Thus, the plan was designated by General Assembly Staff as "Southern Coalition for Social Justice – Congress." (Ex. 10 (First Rucho Aff. ¶¶ 9-14))

During the public hearing, counsel for the SCSJ stated that AFRAM was responding to the letter from the co-chairs dated March 31, 2011. Counsel for the SCSJ argued that both CD 1 and CD 12 were covered by the nonretrogression principle of Section 5 and that the General Assembly was obligated to consider race in drawing both districts. Like the 2001 version of CD 1, the SCSJ proposed that the 2011 version be created as a majority minority coalition district with an any part black VAP of 47.44% and a non-Hispanic white voting age population of 46.47%. African Americans constituted 49.2% of all registered voters while whites (including Hispanic whites) constituted 47.40% of registered voters. Democrats constituted 66.89% of all registered voters with African Americans constituting 65.73% of all registered Democrats. (Ex. 10 (First Rucho Aff. ¶ 11, Exs. 6, 7); Ex. 7 (Second Frey Aff. Exs. 62, 66))

Under the 2010 Census, the any part black VAP of North Carolina was 21.18% with African Americans representing 21.63% of all registered voters. (See, e.g., Ex. 26 (Historical Senate Maps Notebook, Tab 8, pp. 8, 11) (charts for district and statewide

voting age population and registration by race)) Neither the NC NAACP, nor the SCSJ or its counsel, proposed that CD 1 should be reduced in black VAP or in the percentage of registered black voters to levels even remotely approaching the statewide black percentages. Instead, counsel for the NC NAACP advised that North Carolina continues to "have very high levels of racially polarized voting in the state." (Ex. 10 (First Rucho Aff. Ex. 6, pp. 8-9)) In support of this opinion, counsel for the NC NAACP offered an expert report by Dr. Ray Block. (Ex. 10 (First Rucho Aff. Ex. 8)) Dr. Block examined legislative and congressional election results for 54 elections involving a white candidate and an African American candidate in 2006, 2008, and 2010. The districts examined included most of the counties encompassed by majority black legislative districts ultimately enacted by the 2011 General Assembly. Dr. Block stated that this report was "evidence that non-blacks consistently vote against African American candidates and that blacks demonstrate high rates of racial bloc voting in favor of co-ethnic candidates." (*Id*., p. 1) Dr. Block stated that racially polarized voting, as that term was defined by Justice Brennan in *Thornburg*, was present because there was a "consistent relationship between the race of a voter and the way in which s/he votes." (*Id*., p. 3) Dr. Block stated that "in all elections examined here, such a consistent pattern emerges" and that "the evidence . . . suggests that majority-minority districts facilitate the election of African American candidates." (*Id*.)

In a letter provided to the Committee, counsel for the NC NAACP stated that Dr. Block had analyzed "54 elections and [found] significant levels of racially polarized voting." (Ex. 10 (First Rucho Aff. Ex. 7, p. 2)) Counsel for the NC NAACP also stated

that Dr. Block's report found "significant levels of racially polarized voting," that "the number of elections won by Black candidates in majority-minority districts is much higher than in other districts" and that "this data demonstrates the continued need for majority-minority districts." (*Id.*) She also stated that the "totality of the circumstances" test, applicable to claims under Section 2, were still present in North Carolina as demonstrated by a law review article she had co-authored. (*Id.*; Ex. 10 (First Rucho Aff. Ex. 9))

Dr. Block's report is highly informative in demonstrating "significant" racially polarized voting in many areas of the State. To a limited extent, it leaves a few questions in some areas. First, Dr. Block only assessed 54 elections in the State of North Carolina in 2006, 2008, and 2010 to determine the degree to which African American candidates for political office failed to win the support of "non-blacks" in the event they were the preferred candidate among black voters. In Dr. Block's analysis, the non-black vote for the black candidate includes whites and minorities other than blacks who voted for the black candidate. Thus, any assessment of the "non-black" vote for the black candidates in an election held in a majority black or a majority minority coalition district does not represent the exact percentage of non-Hispanic white voters who voted for the candidate of choice of African American voters. This can be a significant issue in areas with higher percentages of Hispanic population. (Ex. 24 (Declaration of Dr. Thomas Brunell) ¶ 2, 3; Ex. 11 (Affidavit of Dr. Thomas Brunell); D.E. 32-1, pp. 9-10, F.F. No. 14; Ex. 10 (First Rucho Aff. Ex. 8, p. 1, n.1); Ex. 7 (Second Frey Aff. Exs. 34, 39, 60))

Second, Dr. Block's report likely overstates the percentage of non-black voters who would vote for an African American candidate in an election with genuine opposition. This is because most of the African American candidates were incumbents or faced token opposition in the general election. (Ex. 24 (Brunell Declaration) ¶ 4, 27; D.E. 32-1, p. 10, F.F. No. 15; Ex. 8 (Churchill Aff. Exs. 1, 2, 3))

Third, Dr. Block could not analyze a congressional or legislative election where the African American candidate had no opposition. Many of the legislative elections from 2006-2010 involved races where the African American candidate was unopposed. (D.E. 32-1, p. 10, F.F. No. 16; Ex. 10 (First Rucho Aff. Ex. 8, pp. 1-7); Ex. 8 (Churchill Aff. Exs. 1, 2, 3))

Finally, because Dr. Block only looked at contested legislative or congressional elections, his report provided no information regarding counties in eastern North Carolina that have never before been included in a majority black or majority minority district. (D.E. 32-1, p. 10, F.F. No. 17; Ex. 10 (First Rucho Aff. Ex. 8))

Because of these limitations, the General Assembly engaged Dr. Thomas Brunell to prepare a report that would supplement the report provided by Dr. Block. (D.E. 32-1, p. 10, F.F. No. 18; Ex. 10 (First Rucho Aff. ¶ 15, Ex. 10))

Dr. Brunell was asked to assess the extent to which racially polarized voting was present in recent elections in 51 counties in North Carolina. These counties included the 40 North Carolina counties covered by Section 5 of the VRA as well as Columbus, Duplin, Durham, Forsyth, Jones, Mecklenburg, Richmond, Sampson, Tyrell, Wake, and Warren counties. Elections analyzed by Dr. Brunell included the 2008 Democratic

Presidential primary, the 2008 Presidential General Election, the 2004 General Election for State Auditor (the only statewide partisan election for a North Carolina office between African American and white candidates), local elections in Durham County, local elections in Wake County, the 2010 General Election for Senate District 5, the 2006 General Election for House District 60, local elections in Mecklenburg County, local elections in Robeson County, and the 2010 Democratic primary for Senate District 3. (D.E. 32-1, pp. 10-11, F.F. No. 19; Ex. 10 (First Rucho Aff. Ex. 10, pp. 3-25))

Based upon his analysis, Dr. Brunell found "statistically significant racially polarized voting in 50 of the 51 counties." Dr. Brunell could not conclude whether statistically significant racially polarized voting had occurred in Camden County because of the small sample size. All of the counties located in the VRA districts ultimately enacted by the 2011 Senate plan, and the 2011 House plan are included in Dr. Brunell's analysis. (D.E. 32-1, p. 11, F.F. No. 20; Ex. 10 (First Rucho Aff. Ex. 10, p. 3))

At no time during the public hearing or legislative process did any legislator, witness, or expert question the findings by Dr. Block or Dr. Brunell. In fact, the NC NAACP and other alternative redistricting plans offered by the General Assembly's Democratic leadership and LBC, proposed majority black or coalition districts in every region or county in which Dr. Block or Dr. Brunell found racially polarized voting. (D.E. 32-1, p. 11, F.F. No. 21; Ex. 25 (Historical House Map Notebook, Tabs 9, 12, 13); Ex. 26 (Historical Senate Map Notebook, Tabs 23, 26, 27); Ex. 27)[5]

[5] Plaintiffs selectively quote findings from a preliminary draft of Dr. Brunell's report that was not even filed with the General Assembly. (D.E. 27, pp. 25-48) Dr. Brunell has

During the public hearing process many other witnesses testified about the continuing presence of racially polarized voting, the continuing need for majority minority districts, and the continuing existence of the "*Gingles* factors" used to judge "the totality of the circumstances." Not a single witness testified that North Carolina's long and established history of racial polarization had vanished either statewide or in areas in which the General Assembly had enacted past VRA districts or 2011 VRA districts.[6]

On April 13, 2011, several members of the Rocky Mount City Council testified, asking for majority minority districts and noting inequality in housing, elections, transportation, and economic development. (D.E. 32-1, pp. 12-13, F.F. No. 24; Ex. 12, pp. 2-4, 5-8, 10-13) AFRAM representative Jessica Holmes stated that social science would confirm that racially polarized voting continues to occur in many areas of North Carolina and that any redistricting plan should not have the purpose or effect of making African American voters worse off. (D.E. 32-1, pp. 12-13, F.F. No. 24; Ex. 12, p. 9)

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explained how plaintiffs have misstated the findings in his final report and how his report added to the strong basis in evidence for the enacted VRA districts. (Ex. 24 (Brunell Declaration) ¶¶ 2-26)

[6] *See Thornburg*, 478 U.S. at 52, 56 (court noted that district court had relied on lay-witness testimony in addition to statistical evidence presented by experts); *McDaniels v. Mehfoud*, 702 F. Supp. 588, 593 (E.D. Va. 1988) (racially polarized voting can be established through both expert analysis and anecdotal evidence); *Sanchez v. Bond*, 875 F.2d 1488 (10th Cir. 1989) (finding "nothing in *Gingles* to suggest that a trial court is prohibited from considering lay testimony in deciding whether" racially polarized voting exists); *see also Carrollton Branch of the NAACP v. Stallings*, 829 F.2d 1547, 1558 (11th Cir. 1987) (plaintiffs established existence of racially polarized voting through regression analysis and the testimony of lay witnesses).

On April 20, 2011, Bob Hall, Executive Director of Democracy NC testified that race must be taken into consideration in the redistricting process, that discrimination still exists in North Carolina, and that racially polarized voting continues in some parts of the State. (D.E. 32-1, pp. 13-14, F.F. No. 25; Ex. 12, pp. 13-15) Similar testimony was received from an AFRAM representative, a Vance County Commissioner, and the Chair of the Durham Committee on the Affairs of Black People. (D.E. 32-1, pp.13-14, F.F. No. 25; Ex. 12, pp. 16-20, 21-24, 25-28) The Chair of the Durham Committee on the Affairs of Black People also drew attention to the fact that African Americans represent 22% of the total population of North Carolina and that fair representation would reflect that with proportional numbers of representatives in the General Assembly. (Ex. 12, pp. 25-28)

On April 28, 2011, witnesses warned that redistricting plans should not undermine minority voting strength, that the legislature was "obligated by law" to create districts that provide an opportunity for minorities to elect candidates of choice, and requested that current minority districts be maintained and that other districts be created to fairly reflect minority voting strength. (D.E. 32-1, p. 14, F.F. No. 26; Ex. 12, pp. 29-32, 33-35)

On April 30, 2011, June Kimmel, a member of the League of Women Voters, told the committee that race should be considered when drawing districts and that the legislature must not "weaken" the minority vote to avoid a court challenge. (D.E. 32-1, pp. 14-15, F.F. No. 27; Ex. 12, pp. 36-39) Other witnesses stated that the legislature was legally obligated to consider race and urged that any new plan fairly reflect minority voting strength. (D.E. 32-1, pp. 14-15, F.F. No. 27; Ex. 12, pp. 44-46, 50-53)

On May 7, 2011, Mary Perkins-Williams, a resident of Pitt County, testified that that Pitt County African Americans had faced disenfranchisement and that it remained hard for African Americans to be elected in her county. (D.E. 32-1, p. 15, F.F. No. 28; Ex. 12, pp. 54-57) Taro Knight, a member of the Tarboro Town Council, expressed his opinion that wards for the Town Council drawn with 55% to 65% African American population properly strengthened the ability of minorities to be elected. (D.E. 32-1, p. 15, F.F. No. 28; Ex. 12, pp. 58-61)

On May 7, 2011, Keith Rivers, President of the Pasquotank County NAACP, stated that race must be considered, that current majority minority districts should be preserved, and that additional majority minority districts should be drawn where possible. (D.E. 32-1, p. 15, F.F. No. 29; Ex. 12, pp. 61-63) Other witnesses similarly testified to the obstacles minorities have faced in the electoral process as well as high poverty rates, disparities in employment, education, housing, health care, recreation and youth development. (D.E. 32-1, p. 15, F.F. Nos. 29-30; Ex. 12, pp. 64-66, 67-69, 70-71, 72-75)

The redistricting co-chairs published five different statements outlining the criteria they would follow in the construction of legislative and congressional districts. (Ex. 13 (Joint Statements)) On June 17, 2011, the co-chairs stated that legislative plans must comply with the state constitutional criteria established in *Stephenson I* and *II, Pender County* and *Strickland* to determine the appropriate "VRA districts." The co-chairs had also sought advice during the redistricting process on the number of Section 2 districts to create, citing *Johnson v. De Grandy*, 512 U.S. 997 (1994). The co-chairs stated that they would "consider, where possible" plans that included "a sufficient number of majority

African-American districts to provide North Carolina's African-American citizens with a substantially proportional and equal opportunity to elect their preferred candidates of choice." The co-chairs also explained that based upon statewide demographic figures, proportionality for African American citizens "would roughly equal" 24 majority black House districts and 10 majority black Senate districts. (Ex. 13, pp. 1-8 (6/17/11 Joint Statement) [7]

The co-chairs made it clear that proportionality was not an inflexible criterion and that majority black districts would only be created "where possible." The Senate co-chair proposed only nine majority black districts (instead of the proportional number of 10) because he was "unable to identify a reasonably compact majority African-American population to create a tenth majority African-American District." (*Id*., pp. 3-4) While the House plan published on June 23, 2011 had 24 majority black House districts, based upon public opposition expressed during a public hearing, a majority black district

[7] Plaintiffs conflate the concepts of proportionality and proportional representation. Proportionality links the number of majority minority voting districts to the minority group's share of the relevant population. The concept is distinct from the concept of proportional representation, which cannot be required of a state under the express terms of Section 2. Proportional representation speaks to the success of minority candidates while proportionality only concerns equal opportunity. *De Grandy*, 512 U.S. at 1013 n. 11. The only "circumstance" listed in the statute that may be considered under the "totality of the circumstances" test is "the extent to which members of a protected class have been elected to office in the State or political subdivision." 52 U.S.C. § 10301. To prove a Section 2 claim plaintiffs must show that one or more majority black districts could be created as compared to an enacted plan. But they cannot meet that burden of proof if the enacted plan already provides proportionality. *LULAC*, 548 U.S. at 477. As a result, proportionality is an issue in every Section 2 case. Consideration of proportionality is not proof that race was the predominant motive for any particular district. *De Grandy*, *supra*; *LULAC*, *supra.*

proposed for southeastern North Carolina (House District 18) was eliminated in the final House plan. (*Id*., pp. 4-8)[8]

On May 17, 2011, the co-chairs once again sought input from the LBC and other interested parties and experts. (Ex. 14 (5/17/11 letter from co-chairs to the Honorable Floyd B. McKissick and others)) One response was a letter from Professors Michael Crowell and Bob Joyce of the University of North Carolina School of Government. (Ex. 15) In relevant part, Professors Crowell and Joyce advised that North Carolina remained bound by the judgment in *Gingles* and that majority minority districts should still be established in the counties at issue in *Gingles.* (Ex. 15)

On June 22, 2011, the co-chairs released a joint statement to respond to criticism by Democratic elected officials to proposed legislative VRA districts released by the co-chairs on June 21, 2011. (Ex. 13, pp. 9-15 (6/22/11 Joint Statement)) In that statement, the co-chairs stated that compliance with the VRA would make adjoining districts more competitive for Republican candidates. The co-chairs also noted that the 2001 CD 1 had been found to be "based upon a reasonably compact black population" by a federal court. (Ex. 13, pp. 9-15 (6/22/11 Joint Statement)) Using the federal court's decision regarding CD 1 as an example, the co-chairs stated their opinion that all of the proposed VRA districts were based upon reasonably compact black populations.

On June 23, 2011, counsel for the SCSJ and AFRAM provided an additional submission to the Joint Redistricting Committee. (Ex. 10 (First Rucho Aff. ¶ 18, Ex. 12))

[8] Plaintiffs do not cite evidence or testimony offered during the public hearing process challenging the location or percentage of any part black VAP in any of the other specific proposed legislative districts.

It included a written statement by counsel for the SCSJ and proposed North Carolina Senate and North Carolina House maps. (Ex. 25 (Historical House Map Notebook, Tab 9); Ex. 26 (Historical Senate Map Notebook, Tab 23); Ex. 27) In her statement, counsel for the SCSJ stated that the two SCSJ legislative plans should be considered because they "compl[ied] with the Voting Rights Act." (Ex. 10 (First Rucho Aff. Ex. 12, p. 1)) More specifically, counsel stated that the SCSJ Senate and House plans complied "with the non-retrogression criteria for districts in counties covered by Section 5 of the Voting Rights Act" and "Section 2 of the Voting Rights Act in Mecklenburg, Forsyth, and Wake Counties." (*Id.*)

On July 18, 2011, Professor Irving Joyner, representing the NC NAACP, affirmed that racially polarized voting continues to exist in North Carolina. (D.E. 32-1, p. 16, F.F. No. 32; Ex. 12, pp. 76-82) The legislative plans submitted by the SCSJ were the only legislative plans offered by any group of persons before the General Assembly convened on July 25, 2011 to enact redistricting plans.

The General Assembly convened on Monday, July 25, 2011 for purposes of enacting redistricting plans. On that same date, and, for the first time, Democratic leaders published their two legislative redistricting plans: Senate Fair and Legal; and House Fair and Legal. (D.E. 32-1, p. 17, F.F. No. 34) On that same date, the LBC published, for the first time, their Possible Senate Plan and Possible House Plan. (D.E. 32-1, p. 17, F.F. No. 34; Ex. 25 (Historical House Map Notebook, Tabs 12, 13); Ex. 26 (Historical Senate Map Notebook, Tabs 26, 27); Ex. 27)

Except for districts drawn in single counties, all of the alternative plans used different county groups than the county groups in the enacted plans. (Ex. 6 (First Frey Aff. Ex. 2); Ex. 7 (Second Frey Aff. Exs. 14, 15)) The Democratic leadership plans and the LBC plans mirrored the plans proposed by the SCSJ to the extent that they recommended the creation of majority black or coalition districts in all the same regions and counties. Neither the Democratic leadership nor the LBC Senate plans proposed any majority black districts but did recommend that the State enact nine coalition districts. Like the 2001 and 2003 legislative plans and the SCSJ plans, the coalition districts in the Democratic leadership and LBC plans were all constructed so that black voters represented either a majority or a very high plurality of registered voters in each district. Further, in all the coalition districts proposed by the Democratic leadership or the LBC, Democrats represented very high majorities of all registered voters and African Americans represented supermajorities of registered Democrats. (Ex. 6 (First Frey Aff. Exs. 2, 10, 11); Ex. 7 (Second Frey Aff. Exs. 14, 15, 34, 36, 37, 38, 41-44, 46-49, 51-53))

On July 27, 2011, the General Assembly passed the 2011 Senate redistricting plan, S.L. 2011-404 (Rucho Senate 2) and the 2011 Congressional plan, S.L. 2011-403 (Rucho-Lewis Congress 3). (D.E. 32-1, pp. 17-18, F.F. No. 35; Ex. 16, p. 16, ¶ 65) On July 28, 2011, the General Assembly enacted the 2011 House redistricting plan, S.L. 2011-402 (Lewis-Dollar-Dockham 4). (*Id.*)

The redistricting co-chairs had advised all of the members of the General Assembly that politics and incumbency protection were criteria that would be considered in the construction of legislative districts. Political considerations played a significant

role in the enacted plans and all alternatives. The uncontested evidence shows that the enacted legislative plans were constructed so that Republicans would retain their majorities.[9] The uncontested evidence also shows that all of the alternative districts were constructed to elect Democratic majorities in the Senate and House. This evidence was not disputed in *Dickson*. (Ex. 17 (Affidavit of Sean Trende))

The leaders also explained that they would be governed by the county grouping formula required by *Stephenson I*. Under that formula the State is obligated to first create VRA districts and the shape and location of VRA districts must comply with the county grouping formula to the greatest extent practicable. (Ex. 13, pp. 1-2 (6/17/11 Joint Statement, pp. 1, 2)) More geographically compact majority black districts could have been proposed, but such districts could not be drawn following the *Stephenson I* formula nor could they have addressed issues related to the residences of several incumbents. (Ex. 18 (Third Frey Aff. ¶¶ 2-13); Ex. 19 (Third Hofeller Aff. ¶¶ 23-68, Exs. 1-11)) Regardless, the enacted House and Senate plans are similar to the plans proposed by the SCSJ, the Democratic leaders and the LBC to the extent that majority black districts were enacted in all of the same regions or counties for which the SCSJ, the Democratic leadership or the LBC proposed districts that were majority black in voting age population or in which African Americans were a majority in the number of registered voters, coalition districts, or districts in which African Americans constituted a supermajority of registered Democrats. (Ex. 25 (Historical House Map Notebook, Tabs

[9] The Court can take judicial notice that under the enacted plans Republicans have retained their majorities in 2012 and 2014.

10, 12, 13); Ex. 26 (Historical Senate Map Notebook, Tabs 23, 26, 26); Ex. 7 (Second Frey Aff. Exs. 34, 36-38, 41-44, 46-53)) In some cases, the alternative plans proposed districts with higher black VAP than the enacted districts. In any case, the difference in black VAP between enacted districts and the alternative districts is insignificant. (Ex. 18 (Third Frey Aff. Exs. 77, 78))

For example, in the northeastern region, the Senate plan contained three majority black VAP districts (SDs 3, 4, 5) while the SCSJ proposed two majority black districts (SDs 3 and 4). The enacted Senate plan includes a third majority black district in this area (SD 5). Under the 2003 Senate plan, SD 5 was less than majority black. In 2010, black Democratic incumbent Senator, Don Davis, was defeated in the 2003 version of SD 5 because of racially polarized voting. (Ex. 10 (Rucho Aff. Ex. 10, pp. 18-19)) Both the enacted Senate plan and the SCSJ plan have one majority black Senate district in Guilford County (SD 28) and two majority black Senate districts in Mecklenburg (SDs 38 and 40). The enacted plan established a majority black SD 14 in Wake County as opposed to the SCSJ version which was established with a majority black voting age population of 48.05% and in which African Americans represented a majority of all registered voters. In Durham County, the SCSJ proposed that SD 20 be crafted as a majority minority coalition district in which Democrats represented a supermajority of registered voters and African Americans represented a majority of registered Democrats. In contrast, enacted SD 20 is located in a different county group and includes portions of Durham and Granville Counties (the latter being a covered county under Section 5) but has a majority black VAP. Similarly, the SCSJ proposed that SD 21 be located only in

Cumberland County with African Americans representing a majority of all registered voters. Enacted SD 21 is located in a different county group and includes portions of Cumberland and Hoke County (the latter being a covered county under Section 5) and was established with a majority black voting age population. In two instances, the SCSJ proposed Senate districts with a higher percentage of any part black voting age population (SCSJ SDs 4 and 40) than the enacted versions of those districts. (Ex. 6 (First Frey Aff. Ex. 10); Ex. 7 (Second Frey Aff. Exs. 35, 36, 45, 46); Ex. 26 (Historical Senate Map Notebook, Tabs 23, 25); Ex. 27)

Similar comparisons exist between the enacted House plan and the SCSJ House plan. The SCSJ proposed four majority black House districts for northeastern North Carolina (HDs 7, 8, 24, 27) and one coalition district with an any part black VAP of 49.63% (HD 5). In contrast, the enacted House plan established six majority black districts in this area (HDs 5, 7, 23, 24, 27, 32). The any part black VAP for SCSJ HD 7 (58.19%) was higher than the percentage of any part black VAP established by all six of the enacted House districts. (Ex. 6 (First Frey Aff. Ex. 11); Ex. 7 (Second Frey Aff. Exs. 40, 41, 50, 51); Ex. 25 (Historical House Map Notebook, Tabs 9, 15); Ex. 27)

In central to southeastern North Carolina, the 2003 House plan established three coalition districts each of which divided several counties (2003 HDs 12, 21, 48). Based upon the state constitutional criteria established in *Pender County*, these three districts could not be re-enacted as coalition VRA districts but instead needed to be drawn with a black VAP of over 50% or be eliminated as VRA districts. The enacted 2011 House plan established all three of these districts at levels of black VAP slightly above 50% while the

SCSJ plan proposed that all three be re-created as coalition districts with supermajorities of registered Democrats and with African Americans constituting supermajorities of registered Democrats. (*Id.*)

In Cumberland County, the SCSJ proposed one majority black House district (HD 43) and a second district in which African Americans constituted a majority of all registered voters (HD 42). In contrast, both of these districts were created with a majority any part black voting age population in the enacted 2011 House plan.[10] (*Id.*)

In Wake County, the SCSJ proposed one majority black district (HD 33) while the enacted plan established two majority black districts (HDs 33 and 38). The SCSJ proposed that HD 33 be established with an any part black VAP of 56.45% which was higher than the black VAP in the enacted HDs 33 and 38. In Durham County, the SCSJ proposed one majority black House district (HD 31) and one coalition district in which Democrats were a supermajority of all voters and African Americans a majority of registered Democrats (HD 29). In contrast, the enacted House plan established two majority black House districts in Durham County (HDs 29 and 30). (*Id.*)

In Guilford County, the SCSJ plan proposed two majority black VAP House districts (HDs 58 and 60) compared to three majority black districts in the enacted House plan (HDs 57, 58, and 60). SCSJ HDs 58 and 60 were proposed to be established at higher levels of any part black VAP (53.47% and 54.41%) than the three majority black enacted House districts. (*Id.*)

[10] SCSJ proposed that HD 43 be created with an any part black VAP of 54.70%. This was higher than the VAP in the enacted HD 43.

In Mecklenburg County, the SCSJ plan proposed two majority black VAP House districts (HDs 101 and 107) and three coalition districts in which the percentage of registered black voters was higher than the percentage of registered white voters (SCSJ HDs 99, 100, and 102). In contrast, the enacted House plan has five majority black House districts in Mecklenburg County.[11] The two majority black Mecklenburg districts proposed by the SCSJ, HDs 101 and 107, have a higher percentage of any part black VAP (57.28% and 56.43%) than any of the enacted majority black Mecklenburg House districts. (*Id*.)

Finally, none of the supporters of the alternative legislative plans argued during the legislative process that statistically or "legally" significant racial polarization had disappeared in any of the areas in which they proposed majority black or coalition districts or where the state enacted majority black legislative districts. To the contrary, all of the alternative plans used race as a factor to create different types of VRA districts that had once been considered acceptable for protecting the State from Section 2 liability including majority black districts, coalition districts, districts controlled by Democrats in which blacks constituted a majority of registered Democrats, and influence districts.

[11] Based on the ideal population for House and Senate districts, the population needed to create two Senate districts is nearly equivalent to five House districts. The SCSJ's proposal to create two majority black Senate districts in Mecklenburg County therefore provides a strong basis for the five majority black enacted House districts in that county. (Ex. 22 (Lewis Aff. ¶ 26))

III. ARGUMENT

A. Preliminary Injunction Standard

To obtain preliminary injunctive relief, plaintiffs must make a "clear showing" that: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary injunctive relief; (3) the balance of equities tip in their favor; and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 12 (2008). All four elements must be satisfied. *Id.* Under this standard, plaintiffs have a demanding burden of "clearly showing" that they are likely to succeed on the merits. Plaintiffs' motion for a preliminary injunction must be denied because plaintiffs have failed to make a clear showing that all four of these elements are present.

B. Plaintiffs Seek Extraordinary and Unprecedented Relief.

Plaintiffs request that this Court provide extraordinary, unprecedented preliminary relief, but then cite *no precedent* for the action they propose in this racial gerrymandering case.[12] The reason plaintiffs cannot cite any case law to the Court supporting their

[12] Plaintiffs cite only two cases for support, neither of which is relevant. (D.E. 27, pp. 49-50) (citing *NAACP-Greensboro Branch v. Guilford County Board of Elections*, 858 F. Supp. 2d 516 (M.D.N.C. 2012) and *Republican Party of N.C. v. Hunt*, 841 F. Supp. 722 (E.D.N.C. 1994) ("*RPNC*")). Significantly, neither case involved claims of racial gerrymandering. The court in *NAACP-Greensboro Branch* entered a limited preliminary injunction to correct an "anomaly" created by a drafting error in a law revising county commissioner districts. 858 F. Supp. 2d at 522 n.8. The court refused to enter a broader injunction precisely because redistricting is "'primarily a matter for legislative consideration and determination.'" *Id.* at 531 (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)). *RPNC* did not involve redistricting at all, but rather a method of electing judges of North Carolina's Superior Court. After more than six years of litigation involving appeals to the Fourth Circuit and the Supreme Court, the district court in *RPNC*

request is not surprising. It is unprecedented for courts to inject themselves into partisan redistricting battles best left to the legislative branch of the government, particularly in racial gerrymandering cases which require proof of racially motivated intent – and that cannot be determined adversely to the State without a full trial on the merits.[13] Moreover, as discussed in detail below, this is no abstract legal issue – the consequences of enjoining elections are real, immediate, and irreparable. Millions of voters will be adversely affected by injunctive relief which disrupts the primary and general elections in this State.

In fact, it is far more likely for the Supreme Court to issue orders reigning in lower courts which improvidently interfere with a state's election machinery this close to an election. For example, in *Cromartie II*, the Supreme Court in short order issued a stay of the district court's judgment enjoining the State from conducting the 2000 elections under the 1997 version of CD 12. *See Hunt v. Cromartie*, 529 U.S. 1014, 120 S. Ct. 1415 (2000) (Mem.). There are several other cases in which the Supreme Court has stayed orders of three-judge courts invalidating election plans and enjoining elections. *See Voinovich v. Quilter*, 503 U.S. 979, 112 S. Ct. 1663 (1992) (Mem.); *Wetherall v. De*

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issued a preliminary injunction limited to "only alter[ing] the method of calculating election winners by selecting an alternative provided for in the State Constitution" which the court found was not unduly burdensome for the State to implement. *RPNC*, 841 F. Supp. at 733. Even then the Fourth Circuit ultimately vacated part of the relief ordered by the district court. *Republican Party of N.C. v. N.C. State Board of Elections*, 27 F.3d 563 (4th Cir. 1994).

[13] The Supreme Court has noted that summary judgment is almost never granted in favor of the plaintiffs in race discrimination cases. *Cromartie I*, 526 U.S. at 553 n. 9. In contrast, defendants are often granted summary judgment in cases under Title VII or other employment statutes where plaintiffs must prove intentional discrimination. *See, e.g., Vance v. Ball State Univ.,* 133 S. Ct. 2434 (2013).

Grandy, 505 U.S. 1231 (1992); *Louisiana v. Hays*, 512 U.S. 1273, 115 S. Ct. 31 (1994) (Mem.); *Miller v. Johnson*, 512 U.S. 1283, 1155 S. Ct. 36 (1994) (Mem.).

In other instances, the Supreme Court has affirmed the lower courts' decisions to permit elections under invalid plans because these plans were not invalidated until late in the election process. *See, e.g., Watkins v. Mabus*, 502 U.S. 954 (1991) (summarily affirming in relevant part *Watkins v. Mabus*, 771 F. Supp. 789, 801, 802-05 (S.D. Miss 1991) (three-judge court)); *Republican Party of Shelby County v. Dixon*, 429 U.S. 934, 975 S. Ct. 346 (1976) (Mem.) (summarily affirming *Dixon v. Hassler*, 412 F. Supp. 1036, 1038 (W.D. Tenn. 1976) (three-judge court)). *See also Growe v. Emison*, 507 U.S. 25 (1993) (noting that elections must often be held under a legislatively-enacted plan prior to any appellate review of that plan).

C. Plaintiffs Are Not Likely to Succeed on the Merits.

1. The North Carolina Supreme Court has conclusively decided that the 2011 enacted plans comply with all requirements of state law, and that decision is binding on this Court.

In *Dickson v. Rucho*, the North Carolina Supreme Court held that the 2011 enacted plans complied with the North Carolina Constitution in all respects, including the WCP. *Dickson*, 367 N.C. at 565-66, 766 S.E.2d at 254-55. When the Supreme Court remanded *Dickson* for further consideration in light of *Alabama Leg. Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015) ("*Alabama*"), its order did not vacate the ruling of the North Carolina Supreme Court on the state-law issues. *See, e.g., Madison v. IBP, Inc.*, 330 F.3d 1051 (8th Cir. 2003). In *Madison*, plaintiff sued in federal court alleging claims under both Title VII and the Iowa Civil Rights Act ("ICRA"). On a petition for writ of *certiorari*,

the Supreme Court granted the petition, vacated the lower ruling, and remanded for further consideration in light of an intervening decision affecting damages calculations under Title VII. *Madison v. IBP, Inc.*, 536 U.S. 919, 122 S. Ct. 2583 (2002) (Mem.). This procedure is known as a "GVR". On remand, the circuit court only dealt with the extent to which the intervening Supreme Court decision addressed the recovery period for Title VII claims. The circuit court held, however, that the recovery under plaintiff's ICRA claims could not be altered: "[s]ince the GVR was not issued on a question of state law and since [the intervening Supreme Court decision] did not change Iowa law, Madison is entitled to reinstatement of her awards under ICRA." *Madison*, 330 F.3d at 1059.

Similarly, in *Dickson*, the GVR was not issued on a question of state law. Moreover, this Court may not disturb the holdings of the North Carolina Supreme Court on issues of state law. *See Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624, 629-30 n. 3 (1998) (federal court not at liberty to depart from a state appellate court's resolution of issues of purely state law). Thus, this Court is bound by the holding in *Dickson* that the 2011 enacted plans complied with all state redistricting criteria, including the WCP of the North Carolina Constitution. This Court is also bound by the *Dickson* court's holding that the alternative plans submitted to the legislature did not comply with state law, including the WCP.

2. The standard of review is too "demanding" for plaintiffs to overcome.

The Supreme Court has developed a specific standard for reviewing redistricting plans against a claim of racial gerrymandering. The Court has made "clear" that "the underlying districting decision is one that ordinarily falls within a legislature's sphere of competence." *Cromartie II*, 532 U.S. at 242 (citing *Miller v. Johnson*, 515 U.S. 900, 915 (1995)). Therefore, the "legislature 'must have discretion to exercise the political judgment necessary to balance competing interests.'" *Id.* Because redistricting is ultimately based upon political judgment, "courts must exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Cromartie II*, 532 U.S. at 242 (quoting *Miller*, 515 U.S. at 916).

Based upon these general principles, strict scrutiny does not apply to redistricting plans simply because the drafters prepared them with a "consciousness of race . . . nor does it apply to all cases of intentional creation of majority-minority districts." *Bush v. Vera*, 517 U.S. 952, 958 (1996) (citing *Shaw I*, 509 U.S. at 646 (internal citations omitted)). Strict scrutiny does not automatically apply where race was "a motivation for the drawing of a majority-minority district." *Cromartie II*, 532 U.S. at 242 (citing *Vera*, 517 U.S. at 959). Instead, plaintiffs alleging an illegal racial gerrymander must show that "all other legislative districting principles were subordinated to race . . . and that race was the predominant factor motivating the legislature's redistricting decision." *Vera*, 517 U.S. at 559 (citing *Miller*, 515 U.S. at 916); *Cromartie II*, 532 U.S. at 241-42. This burden of proof is a "demanding one." *Cromartie II*, 532 U.S. at 241 (citing *Miller*, 515 U.S. at

909). Moreover, plaintiffs must show that a challenged district "is unexplainable on grounds other than race." *Cromartie II*, 532 U.S. at 242 (citing *Cromartie I*, 526 U.S. at 546 (quoting *Shaw I*, 509 U.S. at 644 *in turn quoting Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977))). Thus, to prove that race was the predominant factor, plaintiffs must establish, at a minimum, that the State "substantially neglected traditional districting criteria." *Vera*, 517 U.S. at 962. Indeed, states can avoid strict scrutiny altogether by respecting their own traditional districting principles, and nothing limits a state's discretion to apply those principles in the creation of majority minority districts. *Id.* at 978.

Traditional redistricting criteria include "compactness, contiguity, and respect for political subdivisions." *Stephenson I*, 355 N.C. at 371, 562 S.E.2d at 389 (quoting *Shaw I*, 509 U.S. at 647). Other traditional redistricting criteria include "partisan advantage and incumbency protection." *Stephenson I*, 355 N.C. at 371, 562 S.E.2d at 390 (citing *Gaffney v. Cummings*, 412 U.S. 735 (1973)). Jurisdictions are perfectly free to "engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact." *Cromartie I*, 526 U.S. at 551 (citing *Vera*, 517 U.S. at 968; *Shaw II*, 517 U.S. at 905; *Shaw I*, 509 U.S. at 646).

Consistent with these principles, "[e]vidence that blacks constitute even a supermajority in one congressional district while amounting to less than a plurality in a neighboring district will not, by itself, suffice to prove that a jurisdiction was motivated by race in drawing its district lines when the evidence also shows a high correlation

between race and party preference." *Cromartie I*, 526 U.S. at 551-52. Courts must exercise "caution" where "the State has articulated a legitimate political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated." *Cromartie II,* 532 U.S. at 242. Therefore, to prove that race was the predominant motive, "in a case . . . where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation," plaintiffs must also establish: (1) "that . . . the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles;" and (2) that "those districting alternatives would have brought about significantly greater racial balance." *Id.* at 234, 258.

Even assuming plaintiffs prove that race was the predominant motive for the drawing of district lines, a state may still defend any challenged district where the district furthers a compelling governmental interest and is "narrowly tailored." *Alabama*, 135 S. Ct. at 1262; *Shaw II*, 517 U.S. at 908 (citing *Miller*, 515 U.S. at 920). A challenged district furthers a compelling interest if it was "reasonably necessary" to obtain preclearance of the plan under Section 5 of the VRA. *Shaw I*, 509 U.S. at 655; *see also Alabama* 135 S. Ct. at 1274. A challenged district also survives strict scrutiny when it was reasonably established to avoid liability under Section 2 of the VRA. *Vera*, 517 U.S. at 977 (citing *Growe*, 507 U.S. at 37-42; *Shaw II*, 517 U.S. at 915; and *Miller*, 515 U.S. at 920-21).

To make this showing, a state need only articulate a "strong basis in evidence" that challenged districts were enacted to avoid preclearance objections or liability for vote dilution under Section 2. *Alabama*, 135 S. Ct. at 1274; *Shaw II*, 517 U.S. at 910 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986)). Whether a state had a "strong basis" for drawing districts predominantly based upon race depends upon the evidence before the legislature when the plans were enacted. *Id.* (expert testimony prepared after the lawsuit was filed and which, therefore, could not have been considered by the legislature when it enacted the redistricting plan, is irrelevant); *Cromartie v. Hunt*, 133 F. Supp. 2d 407, 422-23 (E.D.N.C. 2000), *rev'd on other grounds sub nom*, *Cromartie II* (finding by district court that the legislature had a strong basis in the legislative record to conclude that the 1997 version of CD 1 was reasonably necessary to avoid Section 2 liability).

Legislatures "may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have *good reasons to believe such use is required, even if a court does not find that the actions were necessary for statutory compliance.*" *Alabama*, 135 S. Ct. at 1274 (emphasis added). The General Assembly is not required to have proof of a certain Section 2 violation before drawing districts to avoid Section 2 liability. Instead, "deference is due to [states'] reasonable fears of, and to their reasonable efforts to avoid, § 2 liability." *Vera*, 517 U.S. at 978. Indeed, the General Assembly retains "flexibility" that courts enforcing the VRA lack, "both insofar as they may avoid strict scrutiny altogether by respecting their own traditional districting

principles, and insofar as deference is due to their reasonable fears of, and to their reasonable efforts to avoid, § 2 liability." *Id.*

The "narrow tailoring" requirement of strict scrutiny allows a state a limited degree of "leeway." *Vera*, 517 U.S. at 977; *Alabama*, 135 S. Ct. at 1273-74. Narrow tailoring does not require that North Carolina pick just the right percentage of African American population for a majority black district. *Alabama*, 135 S. Ct. at 1274.[14] Nor does narrow tailoring require that "a district" have the "least possible amount of irregularity in shape, making allowances for traditional districting criteria." *Vera*, 517 U.S. at 977 (quoting *Wygant*, 476 U.S. at 291 (O'Connor, concurring in part and concurring in judgment) (state actors should not be "trapped between the competing hazards of liability" by the imposition of unattainable requirements under the rubric of strict scrutiny)). Thus, a Section 2 majority black district that is based on a reasonably compact majority minority population, "may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts in endless 'beauty contests.'" *Vera*, 517 U.S. at 977.

The burden of proving the unconstitutionality of any challenged district remains at all times with the plaintiff. The burden of proof formula adopted in *Shaw I*, 509 U.S. at 656, and *Shaw II*, 517 U.S. at 909, comes from the Supreme Court's decision in *Wygant*.

[14] As we have shown, in some cases the alternative plans proposed majority black districts with higher black VAP than the black VAP in the 2003 districts and the 2011 enacted districts. In any case, the differences were insignificant. (Ex. 18 (Third Frey Aff. Exs. 77, 78)) The legislature had "good reasons" to draw VRA districts slightly above 50%, instead of the coalition districts proposed by plaintiffs, given the Supreme Court decision in *Strickland*.

Under these standards, once the government articulates a strong basis in evidence, "[t]he ultimate burden remains with the [plaintiff] to demonstrate the unconstitutionality of an affirmative-action program." *Wygant*, 476 U.S. at 277-78. Mere allegations by the plaintiffs of reverse discrimination do "not automatically impose upon" the legislature "the burden of convincing the court" that its decision to adopt race-based measures had a strong basis in evidence. *Id.* at 292 (O'Connor, J., concurring). In "reverse discrimination suits . . . it is the plaintiffs who must bear the burden of demonstrating that their rights have been violated." *Id.*

Neither *Alabama* nor the decision in *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013), altered the standard burden of proof which rests upon every plaintiff in a case under the Fourteenth Amendment. The burden of proof does not shift to the defendants even assuming plaintiffs have established a *prima facie* case that race was the predominant motive for the lines of a specific district. *Johnson v. Miller*, 864 F. Supp. 1354, 1378-79 (S.D. Ga. 1994), *aff'd, Miller*, 515 U.S. 900 (1995); *Shaw*, 861 F. Supp. at 436, *rev'd on other grounds*, *Shaw II*, 517 U.S. at 909-910 (citing *Wygant*, 476 U.S. at 277). Plaintiffs in *Shaw II* prevailed not because the Supreme Court changed the traditional standards for burden of proof from plaintiffs to defendants but instead because plaintiffs carried their burden of proof that the 1992 version of CD 12 was not supported by a strong basis in evidence or narrowly tailored. *Shaw II*, 517 U.S. at 910, 916-18. The decision in *Fisher*, an affirmative action case, did not overrule *Wygant*, another affirmative action case, regarding the plaintiffs' burden of proof in all cases alleging violations of the Fourteenth Amendment.

Thus, as applied to a case involving alleged racial gerrymandering, plaintiffs must carry their "heavy burden" of proving that race was the predominant motive. If plaintiffs carry this burden, a state can respond by showing a strong basis in the legislative record to support its conclusions that the challenged plans or districts were reasonably necessary to avoid an objection under Section 5 or liability under Section 2. Once a state makes this showing, plaintiffs must prove that the legislature lacked an evidentiary basis for the plans and that the districts were not reasonably tailored to avoid an objection under Section 5 or potential Section 2 liability. At all times, the burden of proof remains on plaintiffs to demonstrate the unconstitutionality of any plan or specific district. *Shaw II*, 517 U.S. at 910 (citing *Wygant*, 476 U.S. at 277).

3. The WCP and other legitimate state criteria, not race, predominantly determined the shape and location of the enacted districts.

Compliance with the WCP and adherence to other legitimate state criteria predominantly explain the location of district lines for all the legislative districts, including the VRA districts. The 2011 General Assembly was obligated to create legislative districts in accordance with the multistep formula articulated in *Stephenson I*. *See Dickson*, 367 N.C. at 571-72, 766 S.E.2d at 258. This formula for compliance with the WCP also applies to VRA districts. Thus, "to the maximum extent practicable," VRA districts must also "comply with the legal requirements of the WCP, as herein established for all redistricting plans and districts throughout the State." *Stephenson I*, 355 N.C. at 383, 562 S.E.2d at 397.

As conclusively established by *Dickson*, the 2011 legislative plans comply with the *Stephenson* formula for creating districts in single counties and creating districts in county combinations. *Dickson*, 367 N.C. at 573-74, 766 S.E.2d at 259-60. VRA districts drawn within a single county comply with the *Stephenson* requirement that districts must be drawn within a county where the population within one county would support one or a whole number of districts. To the extent plaintiffs contest the shape of districts drawn within a county, they have not offered any judicially manageable standard that would explain why their proposed alternative districts are compact while the enacted districts are not.[15] In fact, several alternative VRA districts located within single counties score lower in compactness tests than enacted districts. (D.E. 32-1, pp. 68-69; Ex. 7)[16] Plaintiffs have also never offered any plans using the enacted county grouping formulas (or another county grouping formula that complies with the WCP) showing how majority black districts could be drawn more compactly than the enacted VRA districts. These facts demonstrate that the district lines for the challenged districts are not "unexplainable on grounds other than race." *Cromartie II*, 532 U.S. at 242.

Plaintiffs mechanically describe every challenged district as "bizarrely" shaped. However, a simple review of the SCSJ proposed maps, as well as the maps proposed by

[15] The three-judge panel in *Dickson* found that there are no judicially manageable standards to evaluate compactness, a conclusion that is supported by plaintiffs' expert. (D.E. 32-1, pp. 62-69)

[16] For example, the Democratic leadership House plan proposed five House districts drawn within single counties (House Districts 29 (Durham), 33 (Wake), 42 (Cumberland) and 101 (Mecklenburg)) that were the least compact districts under the Reock compactness test, as compared to the corresponding enacted House districts and all alternatives. (D.E. 32-1, pp. 68-69)

the Democratic leadership or the LBC, will show that districts in these plans are no more picturesque. In any event, visual comparison between districts in the enacted plans and the alternative plans is misleading because neither the SCSJ plans, nor the Democratic leadership or LBC plans comply with the state's constitutional formula for grouping counties. *Dickson*, 367 N.C. at 573-75, 766 S.E.2d at 259-61.

Significantly, an expert for plaintiffs in a related case recently testified that under a mathematical test for measuring compactness (the Reock test), any district with a score above 0.2 would not be considered non-compact. *Harris v. McCrory* Trial Tr. 354-55 (testimony of Dr. Stephen Ansolabehere) (attached as Exhibit 20). All of the enacted Senate VRA districts have a Reock score above 0.2. Only two of the enacted VRA House districts (HD 12 and 21) have a Reock score below 0.2. Both of these districts were based upon similarly shaped prior versions enacted in 2001 and 2003. Enacted HD 12 has a Reock score of 0.12 which is slightly below the SCSJ version (0.17) and the Democratic leadership's version (0.14) but higher than the version proposed by the LBC (0.10). Similarly, the Reock score for the enacted CD 21 (0.19) is slightly below the Reock score for the SCSJ version (0.27) and the Democratic leadership version (0.21) but higher than the proposed LBC version (0.13). (Ex. 7 (Second Frey Aff. Ex. 33))

In addition, both the SCSJ and the enacted Senate plans divide precincts in the formation of Senate VRA districts. While the Senate plans prepared by the Democratic leadership and the LBC divide fewer precincts, none of the alternative plans comply with the state criteria for grouping counties and neither the Democratic leadership nor the LBC Senate plans suggested any districts that have a majority black VAP. All of the 2011

House plans divide precincts in the formation of VRA districts. (Ex. 6 (First Frey Aff. Exs. 7, 8); Ex. 7 (Second Frey Aff. Exs. 16-26))[17]

The fact that the WCP formula, and not race, predominated in the construction of the enacted VRA districts is further demonstrated by exemplar districts considered by the General Assembly's map drawer, Dr. Thomas Hofeller. (Ex. 18 (Third Frey Aff. ¶¶ 2-9, Exs. 68A-72); Ex. 19 (Third Hofeller Aff. ¶ 30, Exs. 1-6) (House exemplar districts); Ex. 18 (Third Frey Aff. ¶¶ 10-13, Exs. 73B-76); Ex. 19 (Third Hofeller Aff. ¶¶ 55, 56, Exs. 7-11) (Senate exemplar districts)) The exemplar districts demonstrate the presence of geographically compact minority populations of sufficient size to be majorities in single member districts. The enacted VRA districts are narrowly tailored because they are all substantially based upon the minority population found in the exemplar districts. (Ex. 21 (Hofeller Declaration ¶¶ 17-23, 29-32))

While the exemplar districts provide evidence of the first *Gingles* precondition, they do not satisfy the *Stephenson* criterion[18] that VRA districts comply with the WCP to the maximum extent practicable. For example, exemplar House districts 5, 7, 12, 23, 24, 27, 31, 32 are drawn into multiple enacted county groups. (Ex. 18 (Third Frey Aff. ¶¶ 2-9, Exs. 68A-72)) Similarly, exemplar Senate districts 3, 4, 5, 20, 21, and 32 are drawn

[17] Precinct lines are created by county election boards. There are no statewide criteria for the creation of precincts and they are not reviewed every ten years following the Census. Precincts often divide communities and neighborhoods and there is no requirement that they be compact. (D.E. 32-1, pp. 69-74)

[18] The Alabama legislature cited no similar constitutional formula for the creation of legislative districts. In fact, as to the only district fully discussed by the *Alabama* parties and the Supreme Court (Alabama Senate District 26), the evidence showed that the Alabama legislature did not follow any non-racial criteria other than the legislature's committee's policy on equal population. *Alabama*, 135 S. Ct. at 1271-72.

into multiple county groups. (Ex. 18 (Third Frey Aff. ¶¶ 10-13, Exs. 73B-76))[19] Thus, had the General Assembly enacted the exemplar districts, the number of counties in the county group required to encompass a particular exemplar district and all adjoining non-VRA districts would have been much larger. The General Assembly would have been unable to comply with its obligation to maximize the number of two-county groups, three-county groups, etc. *Dickson*, 367 N.C. at 572-73, 766 S.E.2d at 259-60. This evidence alone demonstrates that the predominant reason for the shape and location of the enacted VRA districts, as well as the adjoining non-VRA districts, was the State's application of the WCP formula.[20]

Moreover, the undisputed evidence shows that the enacted plans were designed to ensure Republican majorities in the House and Senate and that all of the alternative plans were designed to return Democratic majorities in both chambers. (Ex. 17 (Trende Aff.)) It is undisputed that African American voters in North Carolina support Democratic candidates in very high percentages. *Cromartie I*, 526 U.S. at 550-51. Evidence that African Americans "constitute even a super-majority" in a district while "amounting to less than a plurality in a neighboring district will not, by itself, suffice to prove that a

[19] All of the coalition districts proposed in the alternative plans (such as House Districts 12, 21, and 48) that are located in multiple counties are similar to House District 18 under the 2003 House plan. They are not majority any part black VAP and therefore violate the WCP. *Pender County*, *supra.*

[20] Incumbency protection is another race-neutral districting principle that can be used by a state to defeat claims that race was the predominant motive. *Alabama*, 135 S. Ct. at 1270. The exemplar maps show that the protection of incumbents played a significant role in the location of House and Senate VRA district lines. (Ex. 18 (Third Frey Aff. ¶¶ 10-13, Exs. 68A-72)) (exemplar House districts); Ex. 18 (Third Frey Aff. ¶¶ 10-13, Exs. 73B-76)) (exemplar Senate districts))

jurisdiction was motivated by race in drawing district lines when the evidence also proves a high correlation between race and party preference." *Id.* at 551-52. The evidence shows that the 2011 redistricting plans were drawn to maintain Republican majorities in the General Assembly.[21]

Plaintiffs contend that race was the predominant motive for the lines of the challenged districts because of: (1) statements by the redistricting co-chairs that they would consider plans that provided rough proportionality; and (2) the decision by the redistricting co-chairs that districts designed to protect the State from liability under Section 2 should be established with an any part black VAP in excess of 50%. As repeatedly explained by the Supreme Court, this type of evidence does not demonstrate racial predominance.

Statewide criteria cannot be used to prove that a particular district was racially gerrymandered. *Alabama*, 135 S. Ct. at 1265. Moreover, the Supreme Court has held that proportionality is part of the totality of the circumstances test applicable to claims for vote dilution under Section 2. *See LULAC*, 548 U.S. 427; *Strickland*, 556 U.S. at 30 (Souter, J. dissenting). In order to prove a case for vote dilution, plaintiffs must show an alternative plan that creates one or more majority black districts than the number found in the enacted plan. *De Grandy*, 512 U.S. at 1008. Vote dilution plaintiffs cannot meet this standard of proof when a particular minority group has achieved proportionality in a redistricting plan. *Id.* at 1015-16. Plaintiffs' argument that a defense established by the Supreme Court also can constitute evidence that districts were racially gerrymandered is

[21] No such political motivation was argued by the State in *Alabama*.

illogical. In any case, proportionality was not a hard rule for the North Carolina legislative leaders and neither legislative plan enacted a proportional number of majority black districts.

Plaintiffs' contention that North Carolina used the same type of "mechanical" racial formula rejected by the Supreme Court in *Alabama* is groundless. Alabama's decision to retain supermajority black districts was based upon the state's interpretation of preclearance requirements under Section 5. If the Supreme Court had agreed with Alabama's interpretation of Section 5, then it is highly unlikely that the Supreme Court would have remanded the case for further proceedings. But of course, in *Alabama*, the Supreme Court found that the Alabama legislature's interpretation of Section 5 was wrong. In contrast, the North Carolina leaders followed a decision by the Supreme Court on the percentage of minority voting age population that must be included in a district designed to protect a state from liability under Section 2.[22] It is hard to fathom how compliance with a decision by the Supreme Court could be construed as evidence of an illegal motive. The "benchmark" followed by the Alabama legislature was something it unilaterally adopted based upon its incorrect interpretation of Section 5. The benchmark followed by North Carolina is the judicial standard for VRA districts.

[22] In *Strickland*, the Supreme Court stated that legislatures and courts need a "workable standard" supplied by the 50% plus one rule for VRA districts and that the rule relieves the states from deciding imponderable questions such as the impact of incumbency and the types of white voters that would need to be added or subtracted from districts that were underpopulated or overpopulated as was the case with many of the 2003 VRA districts. *Strickland*, 556 U.S. at 17-18.

It is also significant that there was no strong basis in evidence to support Alabama's policy on racial percentages for VRA districts. The only district fully discussed by the parties and the Supreme Court (Alabama Senate District 26) was reestablished in 2012 with a supermajority black VAP in excess of 70%. As noted by the Supreme Court, nothing in the legislative record indicated why the ability of African Americans to elect their preferred candidate of choice would be diminished if Alabama had created Senate District 26 with a black VAP of 65%. *Alabama*, 135 S. Ct. at 1273.

Additionally, the average black VAP in Alabama's 2012 legislative districts exceeded 60%. In contrast, the average any part black VAP for the challenged North Carolina VRA districts was in the low 50% range. *Dickson*, 367 N.C. at 564, 766 S.E.2d at 254. The average percentage of North Carolina's districts as compared to Alabama's districts is proof that compliance with the *Strickland* benchmark was the criterion followed by the General Assembly, as opposed to Alabama's strategy of packing districts with supermajorities of African American voters.

Finally, in cases where there is a high correlation between race and politics, plaintiffs must offer plans that follow the applicable redistricting criteria, achieve the legislature's political goals, and bring better racial balance. *Cromartie II*, 532 U.S. at 258. Plaintiffs have failed to meet this burden in several respects.

Plaintiffs have not offered plans that comply with the WCP or that establish VRA districts with any part black VAP in excess of 50%. Therefore, plaintiffs have not offered alternative plans based on the applicable criteria established by the North Carolina Constitution and the Supreme Court. *Id*. Regardless, it is undisputed that all

alternative plans were drawn to result in Democratic majorities. The drafters of these plans achieved their political goals by arbitrarily limiting the number of majority black districts. Instead of creating any new majority black districts, the alternative plans cracked majority black populations into coalition, crossover, or influence districts to maximize the Democratic vote. These are not the legislative goals of a Republican-controlled General Assembly.

Nor would the alternative plans result in greater racial balance. None of the alternative plans are designed to provide equal opportunity for African Americans to elect their preferred candidates of choice. The plans enacted in 2011 have resulted in a larger number of elected African Americans in the General Assembly as compared to the number elected under the 2003 legislative plans. (Ex. 8 (Churchill Aff. Exs. 6, 7)) All of the alternative plans mirror the 2003 legislative plans and would decrease the number of districts that provide African American voters an equal opportunity to elect their candidates of choice. Based upon the historical record, implementation of any of the alternative plans would result in the defeat of African American incumbents whose districts would be transformed by the alternative plans into influence districts. The alternative plans would therefore create greater racial imbalance in the membership of the General Assembly.

4. The challenged districts would survive strict scrutiny regardless of racial predominance.

As noted by the Court in *Alabama*, there is no obligation to get the percentage of black VAP for a VRA district precisely right. Narrow tailoring under Section 2 also

focuses on whether the remedy of a potential vote dilution claim is substantially provided to the minority group that is a victim of vote dilution. *Shaw II*, 517 U.S. at 917. A comparison of the exemplar maps with the enacted VRA districts shows that the enacted districts substantially encompass the geographically compact African American populations who are the subjects of potential claims for vote dilution. (Ex. 21 (Hofeller Decl. ¶ 18-32))

Plaintiffs rely upon the proposed alternative plans as evidence that the enacted districts were not narrowly tailored. The alternative plans suffer from the same defects plaintiffs claim to exist under the enacted plans. The alternative plans proposed 2011 districts with higher African American percentages than the 2003 districts. (Ex. 6 (First Frey Aff. Exs. 10, 11); Ex. 18 (Third Frey Aff. Exs. 77, 78)) They also assign a disproportionate number of African American voters to divided precincts. (*See* Ex. 6 (First Frey Aff. Exs. 7, 8, 9); Ex. 7 (Second Frey Aff. Exs. 16-26)) They also divide counties in the formation of VRA districts. In these divided counties, the percentage of black VAP located in the VRA district is higher than the black VAP in the county outside of the VRA district. (Ex. 1 (Second Frey Decl.)) But unlike the enacted plans, the alternative plans do not uniformly create VRA districts with an any part black VAP in excess of 50%. They instead use coalition, crossover, and influence districts in violation of the WCP and *Strickland*.

The alternative plans also treat African American voters in the same counties or areas unequally. (Ex. 10 (Rucho Aff. ¶¶ 19-23); Ex. 22 (Lewis Aff. ¶¶ 9-27)) For example, all of the alternative House plans propose one majority black House district for

Wake County but do not propose a second majority black district that can be established in an area of Wake County that adjoins their proposed majority black district. The exemplar maps and the enacted House plan show that six majority black House districts can be created in northeastern North Carolina. But all of the alternative plans propose only five majority black or coalition districts in that part of the State. Similar discrepancies may be found in the number of exemplar and enacted majority black House districts in Cumberland, Guilford, and Mecklenburg counties versus a lower number of majority black districts proposed for each of these counties by the alternative plans. (Ex. 6 (First Frey Aff. Ex. 11)) The same comparisons can be drawn between the exemplar and enacted Senate districts versus the alternative Senate plans. (Ex. 6 (First Frey Aff. Ex. 10); Ex. 18 (Third Frey Aff. Exs. 68A-76); Ex. 19 (Third Hofeller Aff. Exs. 1-11))

D. Plaintiffs Have Failed to Make a Clear Showing That They Will Suffer Irreparable Harm, That the Balance of Equities Tips in Their Favor, or That a Preliminary Injunction is in the Public Interest.

In order to receive preliminary injunctive relief, plaintiffs must not only establish that they are likely to succeed on the merits; they must also establish that they are likely to suffer irreparable harm in the absence of preliminary injunctive relief. *Winter*, 555 U.S. at 12. Plaintiffs cannot do this. The claims they have raised were thoroughly litigated by the same lawyers who represented the plaintiffs in the *Dickson* case. It is hard to understand how plaintiffs, who waited almost four years to challenge North Carolina's legislative redistricting plans, could be irreparably harmed should the State hold legislative elections under plans that were used in the 2012 and 2014 general elections, and that have already been found to be constitutional in a well-reasoned

opinion by a three-judge panel of the Wake County Superior Court and affirmed by the North Carolina Supreme Court.

Even if plaintiffs had demonstrated any concrete rather than speculative harm in the 2011 legislative plans, such harm would be due largely to their own lack of diligence in pursuing their claims. North Carolina's current legislative plans were enacted in July of 2011. Elections were held under this plan in 2012 and in 2014. Plaintiffs waited until May 19, 2015, to file this action. They then waited over four more months, until October 7, 2015, to file their motion for a preliminary injunction. Plaintiffs have simply waited too long to interfere with the 2016 electoral process. Equity demands that those who would seek to enjoin the use of duly-enacted legislative redistricting plans, whether permanently or preliminarily, do so with sufficient dispatch and haste as to avoid unnecessary disruption of the electoral process. *See Quince Orchard Valley Citizens Ass'n v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989) (approving the district court's denial of a preliminary injunction on the ground that any potential harm to the plaintiff was a result of its own delay in seeking injunctive relief). Here, as in *Quince Orchard Valley Citizens Ass'n*, responsibility for any harm plaintiffs may suffer lies with the plaintiffs, who waited until the eve of the 2016 election cycle to request preliminary injunctive relief that would derail the schedule for the election cycle.

Plaintiffs assert in their memorandum in support of their motion that "[t]ime is now of the essence, even more than when this case was filed." (D.E. 27, p. 3) Plaintiffs' unexplained delay in seeking any relief—injunctive or otherwise—while allowing two

legislative elections to proceed undermines the claims of urgency that they now make. Equity demands that plaintiffs' lack of dispatch in seeking preliminary injunctive relief result in a denial of preliminary injunctive relief.

In contrast to the speculative harm facing plaintiffs, defendants would be subjected to irreparable harm should a preliminary injunction be issued. "[A]ny time a state is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977). Undue judicial interference with the redistricting process has been recognized as a form of irreparable injury. *Karcher v. Daggett*, 455 U.S. 1303, 1306-07 (1982).[23]

Further, under the *Winter* test, whether an injunction is in the public interest plays a much higher role in plaintiffs' burden of proof. *Real Truth About Obama, Inc. v. Federal Elections Comm'n*, 575 F.3d 342, 346-47 (2009). As illustrated by the declaration provided by the Executive Director of the North Carolina State Board of Elections, Kim Westbrook Strach (attached as Exhibit 23), delaying the March 2016 legislative primary to another date is not in the public interest. Delaying the March 2016

[23] Along these lines, *Pender County* is instructive though certainly not binding. In *Pender County*, the court made a final adjudication that District 18 in the 2003 House plan violated the WCP. But rather than order the General Assembly to immediately correct the deficiencies in District 18 as well as "other legislative districts directly and indirectly affected" by the court's opinion, the court stayed its remedy until after the next election even though the filing period was not set to begin until February 2008 – nearly six months after the court's August 24, 2007 opinion – and the primary was not until May 2008. In refusing to disrupt the elections process, the court explained that it "realize[s] that candidates have been preparing for the 2008 election in reliance upon the districts as presently drawn." Using the example set by *Pender County*, plaintiffs have plainly missed their window of opportunity to disrupt the 2016 elections.

legislative primary to another date will cost the State millions of dollars, create confusion among voters, and substantially reduce turnout for the legislative primary. (Ex. 23)

CONCLUSION

For the foregoing reasons, plaintiffs' motion for preliminary injunction should be denied.

This the 10th day of November, 2015.

NORTH CAROLINA DEPARTMENT OF JUSTICE

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CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day served the foregoing **Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction** to the following:

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This the 10th day of November, 2015.

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