STATE OF NORTH CAROLINA COUNTY OF WAKE		IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
MARGARET DICKSON, *et al*., *Plaintiffs* v. ROBERT RUCHO, *et al*., *Defendants*.	)	Civil Action No. 11 CVS 16896
NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP, *et al*., *Plaintiffs,* v. THE STATE OF NORTH CAROLINA, *et al*., *Defendants*.	)	Civil Action No. 11 CVS 16940 (*Consolidated*)

NAACP, ET AL., PLAINTIFFS' MEMORANDUM OF LAW

IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

(OTHR)

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NOW COME Plaintiffs North Carolina State Conference of Branches of the NAACP, *et. al.*, (hereinafter "NAACP") and submit this memorandum of law opposing Defendants' Motion to Dismiss, filed pursuant to this Court's Order and Case Management Scheduling Order herein dated 19 December 2011. In addition to the specific cross-references below, Plaintiffs adopt all

arguments made in the *Dickson* Plaintiffs memorandum of law opposing Defendants' motion to dismiss and while there is some overlap, do not repeat those arguments here.[1]

INTRODUCTION

This is an action for declaratory and injunctive relief to prevent the State of North Carolina from conducting elections using redistricting plans that create racial classifications of voters without legal justification thereby denying thousands of voters the equal protection of the laws, plans that violate the North Carolina State Constitution's limitations on the power of the General Assembly to re-draw election districts, and plans that unnecessarily split precincts in violation of equal protection and binding state law.

With respect to the state legislative redistricting plans, the NAACP Plaintiffs have specifically and sufficiently alleged that the General Assembly:

1. Intentionally packed black voters in certain districts in concentrations not authorized or compelled by either Section 2 or Section 5 of the Voting Rights Act, 42 U.S.C. §1973 et. seq., thereby violating state and federal equal protection guarantees. Claims I, II, IX and X.

2. Created non-compact districts, and divided precincts in much greater numbers than was necessary to comply with any state or federal law, with a disparate impact on black voters, in violation of *Stephenson v. Bartlett*, the North Carolina Constitution's equal protection clause, the whole county provisions, the good of the whole clause, as well as state statutes in effect in non-Section 5 covered counties. Claims IV, V, VI, VII and XII.

[1] In particular, the NAACP Plaintiffs adopt and incorporate herein Dickson Plaintiffs' arguments concerning justiciability and the "good of the whole" clause of the North Carolina Constitution.

With respect to the congressional redistricting plan Plaintiffs claim that the North Carolina General Assembly's 2011 enacted plan:

1. Intentionally packed black voters in Congressional Districts 1 and 12 in concentrations not authorized or compelled by either Section 2 or Section 5 of the Voting Rights Act, 42 U.S.C. §1973 et. seq., thereby violating state and federal equal protection guarantees. Claims III and XI.

2. Disregarded communities of interest and created non-compact districts in drawing Districts 4 and 10 in violation of the North Carolina Constitution's equal protection guarantees, and the good of the whole clause; and divided precincts in greater numbers than necessary to comply with state or federal law in eight counties not covered by Section 5 of the Voting Rights Act, 42 U.S.C. §1973(c) and in violation of state law. Claims VIII and XIII.

Defendants wrongly assert that Plaintiffs are making claims of partisan gerrymandering. Plaintiffs do contend that purely partisan considerations do not justify departures from state or federal law. *See Cox v. Larios*, 542 U.S. 947, 949 (2004) (holding that lines drawn to provide partisan advantages "did not justify the conceded deviations from the principle of one person, one vote").

Defendants also wrongly assert that Plaintiffs are making a vote dilution claim. Instead Plaintiffs show that Defendants' use of *Bartlett v. Strickland*, 556 U.S. 1 (2009), and Section 2 of the Voting Rights Act to justify segregating election districts is without merit. Indeed, the *Strickland* Court directly cautioned: "Our holding also should not be interpreted to entrench majority-minority districts by statutory command, for that, too, could pose constitutional concerns." 556 U.S. at 43 (citations omitted).

The Defendants' Motion to Dismiss presents two basic legal questions, taking all the facts as alleged by Plaintiffs in the light most favorable to Plaintiffs. First, does Section 2 of the Voting Rights Act require the State of North Carolina to draw districts that are greater than 50% black in voting age population (hereinafter "VAP") even where candidates of choice of black voters have been consistently elected in districts less than 50% black in VAP. Second, what are the legal requirements for redistricting contained in the North Carolina Constitution, as interpreted by the North Carolina Supreme Court in the *Stephenson I* and *Stephenson II* cases. *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (*Stephenson I*); *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) (*Stephenson II*).

As explained below, (1) because the Voting Rights Act does not require the creation of majority black districts where black voters are able to elect candidates of their choice in majority-white districts, the Plaintiffs have stated claims of racial discrimination; and (2) because the legal requirements in *Stephenson I* and *II* do require compactness, respect for communities of interest and traditional political subdivisions, Plaintiffs have stated claims for relief under numerous provisions of the North Carolina Constitution. Because the standing requirements for these claims have some differences, Plaintiffs will discuss standing for each claim separately.

STATEMENT OF CASE

On July 27, 2011, the General Assembly passed the State Senate Redistricting Plan, 2011 S.L. 404, known as the "Rucho Senate 2" Plan, and the 2011 Congressional Redistricting Plan, 2011 S.L. 403, "Rucho-Lewis Congress 3." On July 28, 2011, the General Assembly passed the State House Redistricting Plan, 2011 S.L. 402, the "Lewis-Dollar-Dockham 4" Plan. On November 1, 2011, the redistricting legislation was precleared by the Department of Justice On

November 3, 2011, Dickson Plaintiffs filed suit in Wake County Superior Court. The next day, NAACP Plaintiffs filed suit. On December 8, 2011, amended redistricting legislation was precleared by the Department of Justice. The next day, December 9, 2011, the NAACP Plaintiffs filed an amended complaint incorporating claims against the new legislation. On December 19, 2011, the two suits were consolidated for discovery and trial. On December 19, 2011, Defendants filed Motions to Dismiss both cases and served a brief in support of the motions on December 28, 2011. Plaintiffs now respond.

STATEMENT OF FACTS

The 2011 redistricting plans rely on unconstitutional racial classifications to segregate black and white voters more than any previous redistricting plans, without regard to the core redistricting principles of compactness, respect for political subdivisions and communities of interest. Defendants admit that, in all three plans, they intentionally drew more districts than ever before with a black voting age population (hereinafter "BVAP") greater than 50 percent. Defs' Mem. of Law in Supp. of Mot. to Dismiss (hereinafter "Defs'. Mem.") 34. As a result, there are dramatically fewer racially diverse districts with a BVAP between 30 and 50 percent.

This new racial segregation of voters is found across the House and Senate redistricting plans. The Lewis-Dollar-Dockham 4 plan now places most voters into districts with a BVAP less than 30 percent or greater than 50 percent. Twenty-three of the 120 districts have a BVAP greater than 50 percent. Two districts have a BVAP between 40 percent and 50 percent. In comparison, the 2009 House Plan had only 10 districts with a BVAP over 50 percent. Eleven districts had BVAP percentages between 39.99 percent and 50 percent. Am. Compl. ¶¶105-111.

The 2011 Senate Plan also features radically altered racial populations within districts. In the Rucho Senate 2 Plan, ten districts have a BVAP greater than 40 percent and nine of these districts have a BVAP over 50 percent. By stark comparison, in the 2003 Senate Plan, no district had a BVAP greater than 50 percent. Eight districts had a BVAP greater than 40 percent, ranging from 42.52 percent to 49.7 percent. From these eight districts, at least seven candidates of choice of black voters were elected. The Rucho Senate 2 Plan segregates many black voters into districts with greater than 50 percent BVAP or less than 30 percent BVAP. In the Rucho Senate 2, only 1 district has a BVAP between 30 and 50 percent. In comparison, the 2003 Plan had 15 districts with a BVAP between 30 and 50 percent. Am. Compl. ¶¶289-293.

Defendants contend that these new majority-black districts were required to comply with the Voting Rights Act. *See* Defs' Answer to First Am. Compl. in Case No. 11 cvs 16940 (hereinafter "Defs' Answer") 8-9; Defs' Mem. 37. Plaintiffs challenge a number of districts in the House plan, and in six of the seven new majority-black House districts challenged in this case, candidates of choice of black voters are already serving. Similarly, Plaintiffs challenge seven newly created majority-black districts in the Senate plan, six of which were districts that existed in the previous plan with black voting age populations under 50 percent. In all six of the new majority-black Senate districts challenged in this case, candidates of choice of black voters were already serving. The fact that not a single African-American representative or senator voted for the 2011 plans exposes the emptiness of any assertion that these plans benefit African-American voters. *See* Am. Compl. ¶66.

Defendants admitted at the time they were drawn that certain House, Senate, and Congressional districts were drawn on the basis of race. Plaintiffs allege that these districts are less compact and disregard political subdivisions as well as communities of interest. Am. Compl.

¶¶117-122, 294-299. Plaintiffs illustrate how the 2011 districts are less compact relative to the alternative plans throughout the Amended Complaint.

The unprecedented number of split precincts in the House and Senate Plans show how the plans' disregard for political subdivisions burdens hundreds of thousands of individual voters. The State House Plan split 395 precincts, almost twice as many as any of the alternative Plans submitted to the House Redistricting Committee. A voting age population of more than 1,400,000 adults, or nearly twenty percent (20%) of the State's voting age population, resides within these divided precincts. Am. Compl. ¶¶113-114. The State Senate Plan split 257 precincts, again more than any alternative Plan submitted to the Senate Redistricting Committee. The voting age population within these divided precincts is approximately one million people. Am. Compl. ¶¶295-296. By admission of North Carolina election officials, splitting precincts increases the risk of voters receiving the wrong ballots, creates suspicion when neighbors are given different ballots, requires additional training and additional paid personnel at the polls, and creates significant risks in staff properly assigning voters to the wrong districts. Am. Compl. ¶85.

Splitting precincts harms voters by diminishing efficiency and efficacy in both elections and political representation. Split precincts divide communities of interest and diminish the local community's ability to effect change through the electoral process. It also makes it harder for voters to identify their elected representatives. By creating confusion about who represents what part of the neighborhood, these split precincts are stumbling blocks for voters who want to petition their elected representatives and hold them accountable. Am. Compl. ¶¶79-85.

These split precincts burden voters in violation of the Equal Protection Clauses of the State and Federal Constitutions by both discriminating on the basis of race and impinging on the fundamental right to vote on equal terms. The methodology of creating the maps as well as the

population data for split precincts show that the split precincts create unconstitutional racial classifications. The General Assembly repeatedly split precincts to intentionally place black voters in a different district than the rest of the precinct. 36.34 percent of the black voting age population in North Carolina lives in one of the 563 split precincts. Am. Compl. ¶88. In contrast, 23.24 percent of the non-Hispanic white voting age population in North Carolina lives in one of the 563 split precincts. Therefore, black voters are 56.37 percent more likely than white voters to live in a split precinct. Am. Compl. ¶90. The General Assembly had information regarding the race of people living within the pieces of the precincts that it moved from one precinct to another. It did not have access to accurate data regarding partisan affiliation of registered voters within those pieces. Race therefore drove the decisions to split precincts containing African American voters. Am. Compl. ¶92.

ARGUMENT

VII. On a Motion to Dismiss, Plaintiffs are Entitled to All Reasonable Inferences from the Facts as Alleged

In considering a motion to dismiss under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure, the court must "view the allegations as true and the supporting record in the light most favorable to the non-moving party." *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008) (reversing trial court's dismissal on standing grounds where plaintiffs allege special damages as adjacent property owners). The court must construe the claim liberally and only grant the motion if it appears certain that plaintiffs could prove no set of facts which would entitle them to relief under some legal theory. *Id.* North Carolina is a notice pleading jurisdiction and fundamental fairness requires that decisions on the merits should not be "avoided on the basis of mere technicalities." *Id.*

Similarly, in ruling on a motion under N.C. R. Civ. P. 12(b)(6), all material factual allegations of the complaint are taken as true or deemed admitted. *Isenhour v. Hutto,* 350 N.C. 601, 604-05, 517 S.E.2d 121, 124 (1999); *Stanback v. Stanback,* 297 N.C. 181, 254 S.E.2d 611, 615 (1979). It does not even matter that is a claim is mislabeled or described under the wrong legal theory, so long as the facts alleged give rise to a cause of action under some valid legal theory. *Isenhour,* 350 N.C. at 604, 517 S.E.2d at 124. The NAACP Plaintiffs' Complaint allege facts which, if true, entitle them to relief on each of their claims.

VIII. The Complaint States a Cause of Action for Intentional Race Discrimination under the State and Federal Constitutions

A. The Plaintiffs have Standing to Bring an Intentional Discrimination Claim under the Fourteenth Amendment to the United States Constitution

1. Individual Plaintiffs meet the Hays requirement for each district challenged as intentionally discriminatory on the basis of race.

The NAACP Complaint challenges twenty-five House Districts in the 2011 redistricting plan as unconstitutionally based on race in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Am. Compl. ¶¶467-468. The individual plaintiffs in the case include individuals who live in each of those districts. Am. Compl. ¶¶13-57 and Exhibit 1 hereto (table of districts challenged and Plaintiffs residing in each district). Similarly, the Complaint challenges fifteen Senate Districts and two Congressional Districts on the same grounds, Am. Compl. ¶¶475-476 and 485, and individual plaintiffs live in each of these districts. Am. Compl. ¶¶13-57 and Exhibit 1. The individual Plaintiffs alleged with specificity their street addresses and the districts they live in, as well as the harm they suffer from these redistricting plans. Thus, under the standing requirement for this type of claim established by the Supreme Court in *United States v. Hays,* 515 U.S. 737 (1995), the individual Plaintiffs have standing. *See Hays,* 515 U.S. at 744-745 ("Where a plaintiff resides in a racially

gerrymandered district, however, the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action.").

It is true that, as Defendants point out, no individual plaintiff resides in House Districts 43 and 44. Defs'. Mem. 7. However, it is also true that Plaintiffs are not bringing a racial discrimination claim concerning those districts. *See* Am. Compl. ¶¶467-468. The standing requirements for the North Carolina Constitutional and *Stephenson* claims are discussed *infra* pp. 11-15.

2. The Organizational Plaintiffs Have Standing to Bring Federal Constitutional Claims

As an initial matter, it is well established in federal law that if one plaintiff has standing, the court need not determine whether any additional plaintiffs have standing. *See, e.g., Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981) ("Because we find California has standing, we do not consider the standing of the other plaintiffs."); *LaRoque v. Holder*, 650 F.3d 777, 792 (D.C. Cir. 2011) (declining to rule on standing issues for organizational plaintiffs in a voting rights case where individual plaintiff has standing); *Comcast Corp. v. FCC*, 579 F.3d 1, 6 (D.C. Cir. 2009) ("if one party has standing in an action, a court need not reach the issue of the standing of other parties … "); *Am. Civil Liberties Union of Ga. v. Rabun County Chamber of Commerce*, 698 F.2d 1098, 1108-09 (11th Cir. 1982) ("Because we have determined that at least these two individuals have met the requirements of Article III, it is unnecessary for us to consider the standing of the other plaintiffs in this action."). Here, all the parties are raising the same claims, the individual Plaintiffs have standing to challenge the districts that are being challenged, and the court does not need to reach the issue of whether the organizational Plaintiffs also have standing.

Moreover, the organizational Plaintiffs allege facts sufficient to establish organizational standing under federal law by alleging that their members live throughout the state and would be harmed by the use of redistricting plans unjustifiably based on race. As the U.S. Supreme Court has explained:

> Even in the absence of injury to itself, an association may have standing solely as the representative of its members. … The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

Warth v. Seldin, 422 U.S. 490, 511 (1975) (citations omitted). Here, each of the organizational plaintiffs in this case alleged facts sufficient to meet this standard. *See* Am. Compl. ¶¶9-12, 471, 479, and 486. Thus, independently of the individual Plaintiffs, the organizational Plaintiffs have standing to bring the federal race discrimination claims alleged in this complaint. If any particular individual Plaintiff was found to not live at the address alleged in the complaint, or if they are not assigned to the districts as alleged in the Complaint, the organizational Plaintiffs have alleged facts sufficient to establish standing to challenge these districts.

B. <u>The Individual and Organizational Plaintiffs Have Standing to Challenge the Redistricting Plans under State Law</u>

Under North Carolina law, in response to a motion challenging standing, Plaintiffs must show that they have been injured or threatened by injury or have a statutory right to institute an action. *Peninsula Prop. Owners Ass'n v. Crescent Res., LLC,* 171 N.C. App. 89, 93, 614 S.E.2d 351, 354 (2005). The individual Plaintiffs in this case and the *NAACP* Plaintiff organizations, through their members, have sufficiently alleged how they are injured by the racial

discrimination and the other state constitutional and statutory violations occurring in the challenged redistricting plans.

An association, like an individual, may have standing in its own right. *Warth,* 422 U.S. at 511. Under North Carolina law, an association has standing when:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

River Birch Assoc. v. Raleigh, 326 N.C. 100, 130, 388 S.E.2d 538, 555 (1990).

For the first prong, the Plaintiff organizations all have members who would otherwise have standing to sue in their own right. All four organizational Plaintiffs have alleged that they have members throughout the state. Am. Compl. ¶¶9-12. It is a reasonable inference from this allegation that all Plaintiff organizations have members who reside in each challenged district. Under the 2011 plans, both voters residing in districts that unconstitutionally pack black voters as well as voters in the adjacent districts "bleached" of minority voters share the "special representational harms racial classifications can cause in the voting context." *Hays,* 515 U.S. at 744. Thus all the Plaintiff organizations show injury sufficient to establish standing on their racial discrimination claims even under the somewhat narrower federal standard.

However, to establish standing for the state law claims, this court is not bound by the standard articulated in *Hays*. The North Carolina Supreme Court has made clear that: "While federal standing doctrine can be instructive as to general principles…and for comparative analysis, the nuts and bolts of North Carolina standing doctrine *are not coincident with federal standing doctrine*." *Goldston v. State*, 361 N.C. 26, 35, 637 S.E.2d 876, 882 (2006) (emphasis added). Rather, the North Carolina Constitution provides that "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law." N.C.

Const. art. I, § 18. This right is embodied in the state statute granting that: "[a]ny person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder." N.C. Gen. Stat. § 1-254; *Goldston*, 361 N.C. at 33, 637 S.E.2d at 881.

The *NAACP* Plaintiffs' contend that individuals do not need to reside in a racially gerrymandered district to have standing to challenge the redistricting plans on equal protection grounds or on any other grounds under the State Constitution. It is significant that in *Stephenson*, the Plaintiffs challenging the constitutionality of North Carolina's 2001 redistricting plans did not reside in each of the districts that ultimately were found by the court to be non-compact and therefore unconstitutional. *See Stephenson I*, 355 N.C. at 354, 562 S.E.2d at 377; *Stephenson II*, 357 N.C. at 309, 542 S.E.2d at 252.

Moreover, the *NAACP* Plaintiffs adopt *Dickson* Plaintiffs' argument that redistricting plans are "interlocking" and that the boundary of each district creates consequences for those residing outside of it. *See* Dickson Pls. Mem. 10-11. For the Plaintiff organizations in particular, whose members are unified in their mission of increasing voter participation and advancing equal franchise, the harm of one member's capacity to fulfill this mission flows to each member. The stigma of race-based classifications undermines equal franchise and reduces all members' capacities to increase voter participation and equal franchise throughout the state. Thus Plaintiff organizations' members will suffer actual injury from excessively race-based redistricting plans regardless of whether they reside in a challenged district.

Defendants do not contest the second and third prong of Plaintiffs' associational standing under North Carolina law. Each Plaintiff organization has alleged with specificity why civic

engagement, voter participation, and equal franchise is germane – even central – to its purpose to satisfy the second prong. Am. Compl. ¶¶9-12. The Plaintiff organizations satisfy the third prong because "it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." *River Birch Assoc.*, 326 N.C. at 130, 388 S.E.2d at 555.

C. Plaintiffs Do Not Need to Live in A Split Precinct to Demonstrate their Harms from the Excessive Number of Split Precincts in these Plans.

There is no rule in North Carolina law that plaintiffs bringing a claim under *Stephenson* and the North Carolina Constitution must live in any particular legislative district, and no reason to require that plaintiffs must live in a divided precinct in order to bring this claim, so long as a plaintiff can articulate how they are injured by the law being challenged. The individual and organizational plaintiffs have standing to bring this claim because the excessive number of split precincts in the plans will make it harder for them to participate in elections, harder for them to educate voters about who they will be voting for, and cause greater confusion on election day for everyone voting in counties or districts with large numbers of divided precincts. *See* Am. Compl. ¶¶81-84. Plaintiffs, allege, for example, that along a six block stretch of one street in a Durham neighborhood, there will be four different ballot styles in the general election. Am. Compl. ¶94.

To be sure, twenty-four of the individual plaintiffs in this action are, in fact, among the nearly two million voters statewide who reside in split precincts, and sufficiently alleged this fact by indentifying in the complaint not only their residence address, from which their precinct assignment can be ascertained by reference to public records, but also, the specific VTD in which they live. *See* Am. Compl. ¶¶13-57 and Exhibit 2 hereto (chart of individual plaintiffs in split precincts). Of the twenty-four plaintiffs in this case residing in split precincts, twenty live

in a precinct that has been split in more than one redistricting plan. *Id.* Plaintiffs' claims of injury from living in a divided precinct or living in a county with numerous divided precincts are also supported by the fact that the North Carolina General Assembly sought to establish as a matter of state law in 1995 that precincts should not be divided in a legislative or congressional map unless required to be divided in order to comply with the Voting Rights Act, *see* N.C. Gen. Stat. 120-2.2 and 163-201.2.

Finally, as the *Dickson* Plaintiffs point out, a rule that would require plaintiffs challenging the constitutionally of excessive numbers of split precincts in a redistricting plan to add as a plaintiff a resident of each precinct is unworkable. *See* Dickson Pls. Mem. at 10. In this case that would require approximately 563 plaintiffs. *See* Am. Compl. ¶88. Such a rule is not only unworkable but also makes no logical sense. Plaintiffs argument is not that they are harmed by one single precinct being divided, it is the excessive and completely unprecedented number of divided precincts, more than twice than has ever before been used, and the number of precincts divided in more than one redistricting plan, which causes the constitutional equal protection violations and constitutes a violation of the redistricting principles articulated in *Stephenson*. Thus, the NAACP Plaintiffs have sufficiently alleged facts to demonstrate their injury and have standing to bring this claim.

III. The Complaint States a Cause of Action for Intentional Race Discrimination under the U.S. Constitution

Defendants' miscast the available claims for racial discrimination in a redistricting plan and argue against claims the Plaintiffs do not make. Defs. Mem. at 26. *Shaw* claims and vote dilution claims are recognized racial discrimination claims in the redistricting context, as the Defendants contend. But those are not the only claims of racial discrimination that may be

made. Additionally, intentional racial discrimination is a third claim arising from the Equal Protection Clause of the Fourteenth Amendment that can be made, and that Plaintiffs allege, *see infra* part II.B. Defendants ignore this third claim in their motion to dismiss.

Packing black voters is intentional race discrimination that harms their interests and the General Assembly was well aware of this governing legal standard when drawing their redistricting maps. *See Voinovich v. Quilter*, 507 U.S. 146, 154-55 (1993). In *Voinovich*, the Supreme Court acknowledged that creating majority-black districts may lessen the influence of black voters in neighboring districts, and concluded that the overall effect depends on the facts and circumstances of each case. *Id.* Defendants suggest that packing is legally cognizable only under Section 2 of the Voting Rights Act and cite to *Voinovich* for the very limited view that packing occurs only when it is at such high percentages that other majority-black districts are thereby precluded. Defs. Mem. at 30. This ignores the part of the *Voinovich* opinion in which the Court explicitly acknowledges that creating majority-black districts can *minimize* minority voting strength:

> The practice challenged here, the creation of majority minority districts, does not invariably minimize or maximize minority voting strength. Instead, it can have either effect or neither. On the one hand, creating majority black districts necessarily leaves fewer black voters and therefore diminishes black voter influence in predominantly white districts. On the other hand, the creation of majority black districts can enhance the influence of black voters. Placing black voters in a district in which they constitute a sizeable and therefore "safe" majority ensures that they are able to elect their candidate of choice. Which effect the practice has, if any at all, depends entirely on the facts and circumstances of each case.

Voinovich¸ 507 U.S. at 154-55.

In other cases the U.S. Supreme Court has embraced a broader definition of "packing" than acknowledged by Defendants. In *Vieth v. Jubelirer*, 541 U.S. 267 (2004), the Court noted that, "'[p]acking' refers to the practice of filling a district with a supermajority of a given group

or party. 'Cracking' involves the splitting of a group or party among several districts to deny that group or party a majority in any of those districts." *Id*. at 287. *See also, Page v. Bartels,* 248 F.3d 175, 181 (3d. Cir, 2001) (finding that plaintiffs' proposed plan "packs" black voters "preventing them from exerting an electoral influence in other parts of the state"). Defendants' definition of packing is only one way the term is used. However, no matter what the practice is called, the NAACP Plaintiffs allege that districts in all three redistricting plans concentrate black voters beyond what is required for them to elect their candidates of choice and therefore create an excessive majority. This allegation states a claim for relief for intentional racial discrimination.

Plaintiffs have not alleged that the plans violate Section 2 of the Voting Rights Act by splitting geographically compact black populations in areas of the state where racially polarized voting operates to defeat the candidate of choice of black voters. Defendants' attempt to transform a claim of intentional racial discrimination into a Section 2 vote dilution claim sets up a straw man whose defeat on factual grounds has no relevance for this case. Plaintiffs have stated claims for relief on two grounds well-recognized as federal equal protection violations, a racial gerrymandering claim under *Shaw* and an intentional discrimination claim under *Arlington Heights*. *See Village of Arlington Heights v. Metro Hous. Dev. Corp.* 429 U.S. 252 (1977).

A. The 2011 Redistricting Plans do not meet strict scrutiny as required by *Shaw v. Reno*

Throughout the line of *Shaw* cases, the Supreme Court upheld a simple principle: any redistricting plan where race predominates is subject to strict scrutiny. *Shaw v. Reno*, 509 U.S. 630, 643, (1993). To survive strict scrutiny, any district in which race predominates must be justified by a compelling state interest and narrowly tailored to further that interest. *Id.* Plaintiffs now address each element of the *Shaw* claim in turn.

1. Race Was the Predominant Factor in the Challenged Districts

To establish a *Shaw* violation, Plaintiffs must show that race predominated when the legislature drew a district. *Bush v. Vera*, 517 U.S. 952, 959 (1996). Plaintiffs "may do so either through circumstantial evidence of a district's shape and demographics or through more direct evidence going to legislative purpose." *Shaw v. Hunt*, 517 U.S. 899, 905 (1996) (citations omitted). In this case, Plaintiffs allege both forms of evidence. The Defendants have repeatedly and publicly admitted that race predominated in their decision to draw certain House, Senate, and Congressional districts. Am. Compl. ¶¶415, 427, 439. The admitted in the Answer that they intentionally drew as majority-minority districts those districts challenged by Plaintiffs. Defs' Answer 8. Even beyond Defendants' direct admissions, Defendants correctly state that race predominates in a redistricting plan when it can be shown that the General Assembly subordinated traditional race neutral redistricting principle to race to traditional principles. *Shaw v. Hunt*, 517 U.S. at 907.

Plaintiffs allege plentiful facts that show that the plans disregard traditional principles of compactness, respect for political subdivisions and maintaining communities of interest. Plaintiffs show how the 2011 districts are less compact relative to the alternative plans throughout the Complaint. In addition, Plaintiffs highlight certain regions such as Chatham County where the racial composition of bizarrely shaped pieces of districts shows that certain parts were drawn to include only African American voters. *See* Am. Compl. ¶¶268-272. Far from creating a "beauty contest" between possible plans, Plaintiffs' analysis of the plans shows that the maps are so "dramatically irregular" and "bizarre" on their face as to only be viewed as an effort to segregate the races. *Shaw I*, 509 U.S. at 642.

Additionally, Plaintiffs allege that precincts were frequently divided on the basis of race. Am. Compl. ¶¶92. The methodology of splitting precincts shows that race predominated in assigning voters within a precinct to a district. The General Assembly had access to the racial composition of the pieces of precincts that it moved from one district to another, but did not have access to reliable or accurate data of the partisan affiliation of the voters in the pieces that were moved. *Id.* Race thus predominated in the decisions about where and how to split precincts in all three plans. This is analogous to the Supreme Court's finding that race predominated in *Bush v. Vera,* 517 U.S. at 966. Defendants' race-based assignment of voters to districts results in the startling statistic that black voters are 56.37 percent more likely than white voters to live in a split precinct. Am. Compl. ¶90.

2. The Challenged Districts Are Not Justified by a Compelling Governmental Interest

Having alleged with specificity that race predominated in the drawing of certain districts in the 2011 redistricting legislation, Plaintiffs next allege that these districts fail to survive strict scrutiny because they are not drawn to further a compelling governmental interest. *Miller v. Johnson,* 515 U.S. 900, 920 (1995). The districts challenged in this case do not further a compelling state interest because they are not required by Section 2 or Section 5 of the Voting Rights Act. "Compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws." *Miller*, 515 U.S. at 921; *see also Shaw I*, 507 U.S. at 653 ("[R]acial bloc voting and minority-group political cohesion never can be assumed, but specifically must be proved in each case in order to establish that a redistricting plan dilutes minority voting strength in violation of § 2."); *Growe v. Emison,* 507 U.S. 25, 40-41, (1993) ("Unless these points are established, there neither has been a wrong nor can be a remedy").

The packing of black voters into districts that were already electing the candidates of choice of African American voters is not compelled by Section 2 of the Voting Rights Act. Well-established law makes this clear. Section 2 is violated only upon a showing that minority voters "have less opportunity than other members of the electorate to…elect representatives of their choice." 42 U.S.C. § 1973(b). This part of the Act "was designed as a means of eradicating voting practices that minimize or cancel out the voting strength and political effectiveness of minority groups." *Reno v. Bossier Parish School Bd.* (*Bossier I*), 520 U.S. 471, 479 (1997). In short, the Act is directed at providing a remedy only where minority voters do not already have an equal opportunity to elect their candidates of choice.

In their memorandum, Defendants correctly outlined the three preconditions that Plaintiffs must demonstrate as present in order to successfully allege a violation of Section 2. Defs. Mem. at 27-28; *Thornburg v. Gingles*, 478 U.S. 30 (1986). After satisfying those three preconditions, Plaintiffs must then show that, under a totality of circumstances, minority voters did not have an equal opportunity to participate in the electoral process and elect candidates of their choice. *Gingles,* 478 U.S. at 37-38. One of those totality of the circumstances factors that the *Gingles* Court identified as relevant was the record of election of minority candidates. *Id.* If Defendants wish to successful use compliance with Section 2 as a defense against the claims brought in these consolidated actions, they must prove all the elements that a plaintiff would normally be required to prove in a Section 2 case, and they cannot do so.

As the Complaint alleges, if black voters are able to elect their candidate of choice in a district that is less than 50% black in voting age population, then in that district, racially polarized voting is not operating "usually to defeat" the candidate of choice of black voters and no Section 2 remedy is authorized. In *Gingles*, the State of North Carolina was not required to

provide a Section 2 remedy in Durham County, because black voters there consistently had been electing their candidate of choice, Representative Mickey Michaux, in a multi-member district. *Gingles*, 478 U.S. at 77. Numerous cases have since found no Section 2 violation where candidates of choice of minority voters win election without majority-minority districts. *See, e.g., Johnson v. Hamrick*, 296 F.3d 1065, 1077 (11th Cir. 2002) (finding that plaintiffs failed to establish a violation of Section 2 because white bloc voting did not usually defeat the candidate of choice of black voters in at-large elections in the city of Gainesville, Georgia); *Vecinos de Barrio Uno v. City of Holyoke,* 960 F. Supp. 515, 526 (D. Mass. 1997) (holding that plaintiffs failed to establish Section 2 violation because Hispanic candidates consistently won election in two city wards that were not majority-Hispanic);

The United States Supreme Court has held unequivocally that a correct reading of Section 2 does not require maximization in the number of majority-black districts. *Johnson v. DeGrandy*, 512 U.S. 997, 1022 (1994) (rejecting "the rule of thumb apparently adopted by the District Court, that anything short of the maximum number of majority-minority districts consistent with the *Gingles* conditions would violate § 2"). The District Court in *DeGrandy* made a similar assumption to the one under which the North Carolina General Assembly apparently operated—that if additional majority-minority districts could be drawn, than under Section 2, they must be drawn. The Supreme Court flatly rejected this interpretation, holding that the District Court's "finding of dilution did not address the statutory standard of unequal political and electoral opportunity, and reflected instead a misconstruction of § 2 that equated dilution with failure to maximize the number of reasonably compact majority-minority districts." *Id.* at 1022. The lower court in *DeGrandy* was even presented with evidence on the *Gingles* preconditions, but the Court held that the lower court had failed to examine whether the prior

plan had, under a totality of the circumstances, failed to offer minority voters equal opportunity to elect candidate of their choice. *Id.* at 1013-14.

Most significantly, the U.S. Supreme Court recently reaffirmed that majority black districts are not compelled where a Section 2 violation cannot be established in the very case that Defendants rely on to justify packing black voters. *See* Defs. Mem. at 40. In *Strickland,* the Court explained that majority-minority districts are only required where all three prongs of the *Gingles* threshold test and the totality of the circumstances demonstrate that minority voters do not have an equal opportunity to participate in the electoral process:

> Majority-minority districts are only required if all three *Gingles* factors are met and if § 2 applies based on a totality of the circumstances. In areas with substantial crossover voting it is unlikely that the plaintiffs would be able to establish the third *Gingles* precondition--bloc voting by majority voters. In those areas majority-minority districts would not be required in the first place.

Strickland, 556 U.S. at 44. The Court goes on to admonish that:

> States can--and in proper cases should--defend against alleged § 2 violations by pointing to crossover voting patterns and to effective crossover districts. Those can be evidence, for example, of diminished bloc voting under the third *Gingles* factor or of equal political opportunity under the § 2 totality-of-the-circumstances analysis.

Id. There is simply nothing in the *Strickland* opinion to give any support to the Defendants' assertion that Section 2 of the Voting Rights Act requires 50% black districts in areas where, with crossover voting, black voters have already been electing their candidates of choice in districts that are less than 50% black.

Moreover, the Defendants' admit this when they state in their twenty-third defense that "[i]f minorities can elect their preferred candidates in a district that is less than majority minority, then racially polarized voting does not exist as a matter of law," Defs' Answer at 8, and in their memorandum they write "where the evidence shows that blacks are able to elect their preferred

candidates in a district with less than 50% TBVAP, racially polarized voting no longer exists ….. and the State is not required and cannot be ordered to draw districts with any specific percentage of African-American populations." Defs. Mem. at 33.

The mere existence of racially polarized voting is not enough to demonstrate a violation of Section 2 of the Voting Rights Act. The racial polarization must be at a level usually to defeat the candidate of choice of black voters. That determination depends on the facts of voter behavior in prior elections in each area of the state. The fact that an additional district can be drawn at 50% BVAP is not enough to demonstrate a violation of Section 2 of the Voting Rights Act. There must also be a showing that black voters lacked the opportunity to elect the candidate of their choice. Thus, Section 2 did not compel the packing of districts in the state's enacted plans. Accordingly, compliance with Section 2 does not provide a compelling interest for the racial classifications that Defendants have created.

Additionally, the maximization of the number of black voters in a district is not required by Section 5 of the Voting Rights Act. In the 1990's, the Supreme Court rejected the Department of Justice's interpretation that the Section 5 non-retrogression mandate required both the maximization of the number of majority-minority districts and the maximization of the number of minority voters in those districts. *Miller v. Johnson*, 515 U.S. 900, 927, (1995) ("And the Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting brings the Act, once upheld as a proper exercise of Congress' authority under § 2 of the Fifteenth Amendment, into tension with the Fourteenth Amendment") (citations omitted); *Abrams v. Johnson*, 521 U.S. 74, 85-86 (1997) (Justice Department's "max-black" policy was unconstitutionally "race-focused"). In *Miller*, the Department of Justice had been clear that its interpretation of Section 5 required the maximization of the number of black voters

in Georgia's 11th Congressional District, and the Court squarely rejected that interpretation. 515 U.S. at 918. Furthermore, Plaintiffs also allege that the districts at issue are not narrowly tailored. The Supreme Court noted that "a reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw I*, 509 U.S. at 655. Thus, for the purposes of this motion, Plaintiffs have sufficiently alleged that the challenged districts were not required by Section 2 or Section 5 of the Voting Rights Act.

Defendants appear to contend that if the non-retrogression requirement of Section 5 of the Voting Rights Act requires drawing a district that is 45 percent black in voting age population, then there is nothing wrong with drawing that district as 51 percent in black voting age population. Defs. Mem. at 39. This ignores clear precedent. The Constitution will not tolerate racial discrimination against one individual, let alone thousands. In every instance where Defendants drew districts based on race that were not narrowly tailored to a compelling state interest, they "threaten to stigmatize individuals by reason of their membership in a racial group," *Shaw v. Reno*, 509 U.S. at 603. Such a stigmatic classification is "antithetical to the Fourteenth Amendment." *Shaw v. Hunt*, 517 U.S. at 907. Plaintiffs alleged in the complaint the representational harms, and the injury to their dignity that occurs when redistricting plans are drawn on the basis of race without justification. As the Supreme Court held in *Shaw*,

> Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters -- a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny.

509 U.S. at 657.

Finally, Defendants suggest that Plaintiffs have failed to state a claim for racial discrimination in the drawing of Congressional Districts 1 and 12 because those Districts are merely "updated" versions of districts that were found constitutional in *Easley v. Cromartie*, 532 U.S. 234 (2001). Defs. Mem. at 41-42. This argument is completely counterfactual and certainly is not based on the facts as alleged in the plaintiffs' Amended Complaints. Congressional District 1 was, in the 1997 plan, only 46.54 percent African-American in voting age population. *Cromartie v. Hunt,* 133 F. Supp. 2d 407, 415 n.6. Nevertheless, the trial court upheld the district as narrowly tailored to meet the state's obligation to comply with Section 2 of the Voting Rights Act, *Cromartie v. Hunt,* 133 F. Supp. 2d at 422-423. This holding was not appealed and not at issue in *Easley v. Cromartie. See Id.,* 532 U.S. at 237. The lower court found that Congressional District 1, composed of rural northeastern counties, was relatively geographically compact, *Cromartie v. Hunt,* 133 F. Supp. 2d 407, 416. The district did not include parts of Durham or Wake Counties. In contrast, in the 2011 enacted plan, Congressional District 1 has a black voting age population of 52.65 percent, over six percentage points higher than the 1997. Am. Compl. ¶391. Thus, far from seeking to "relitigate" claims brought in *Cromartie¸* plaintiffs here assert state and federal constitutional claims about a significantly different congressional district that does extend into the urban areas of Durham and Wake Counties and combines geographically disparate and politically distinct populations based.

Plaintiffs further allege that District 12, which was only 43 percent black in voting age population in the 1997 plan, *Cromartie,* 133 F. Supp. 2d at 413 n.2, is drawn in the 2011 plan to be 50.66 percent black in voting age population, and that, in order to get to that level of black VAP, unlike in the 1997, race predominated over all other redistricting criteria. Am. Compl.

¶¶395-398. Again, the new district is over six percentage points higher in black voting age population than the 1997 district. Defendants' certainly cannot be right that the *Cromartie* cases bar as a matter of law any claim of racial gerrymandering against a new District 12 drawn thirteen years later when the *Cromartie* case itself was a constitutional claim against a district that had been recently modified after *Shaw II*. *See Cromartie*, 532 U.S. at 237. Plaintiffs have alleged facts sufficient to state a legally valid claim challenging Congressional Districts 1 and 12 that is not barred by the *Cromartie* cases.

3. Section 5 Preclearance Does Not Preclude Plaintiffs' Intentional Discrimination Claims

At several points Defendants' argue that Plaintiffs "cannot" prove that the 2011 plans were intentionally drawn on the basis of race. *See, e.g.,* Defs. Mem. at 34. Apart from the fact that what Plaintiffs can prove is an argument for summary judgment or at trial, Defendants' argument that the Section 5 preclearance of these plans forecloses further constitutional scrutiny is completely without merit. Most fundamentally, the U.S. Supreme Court has explicitly held that this is not the case. In *Shaw*, which involved a constitutional claim brought after the Department of Justice had precleared North Carolina's Congressional redistricting plans, the Court explained:

> Although the Court concluded that the redistricting scheme at issue in *Beer* was non-retrogressive, it did not hold that the plan, for that reason, was immune from constitutional challenge. … Indeed, the Voting Rights Act and our case law make clear that a reapportionment plan that satisfies § 5 still may be enjoined as unconstitutional. *See* 42 U.S.C. § 1973c (neither a declaratory judgment by the District Court for the District of Columbia nor preclearance by the Attorney General "shall bar a subsequent action to enjoin enforcement" of new voting practice); *Allen*, 393 U.S. at 549-550 (after preclearance, "private parties may enjoin the enforcement of the new enactment . . . in traditional suits attacking its constitutionality"). Thus, we do not read *Beer* or any of our other § 5 cases to give covered jurisdictions carte blanche to engage in racial gerrymandering in the name of nonretrogression.

Shaw I, 509 U.S. at 654-655 (*citing Beer v. United States*, 425 U.S. 130 (1976) and *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969)).

The Department of Justice has clearly indicated in regulations governing the application of Section 5 that jurisdictions "should not regard a determination of compliance with Section 5 as preventing subsequent legal challenges to that plan under other statutes by the Department of Justice or by private plaintiffs. 28 C.F.R. 51.49; *Dept. of Justice Guidance Concerning Redistricting under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 470 at 7470 (Feb. 9, 2011). The Department of Justice's letter granting preclearance also states very clearly that the failure to object to the plans does not bar "subsequent litigation to enjoin the enforcement of these changes" under Section 5 or any other claim. Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice to Alexander McC. Peters, Special Deputy Att'y Gen., N.C. Dep't of Justice (Dec. 8, 2011). Indeed, all of the cases which say that a Court must defer consideration of a redistricting plan's constitutionality until after the plan has been precleared would make no sense whatsoever if the preclearance were any sort of bar to asserting those claims. *See, e.g., Connor v. Waller*, 421 U.S. 656, 656 (1975); *Clark v. Roemer*, 500 U.S. 646, 652-53 (1991). Thus, it is a complete red herring to suggest that, as a matter of law, Plaintiffs cannot allege an intentional racial discrimination claim in this case because the Department of Justice has precleared the redistricting plans at issue here.

B. Defendants Intentionally Discriminated Against African-American Voters Under the *Arlington Heights* Standard

The 2011 Redistricting Plans were enacted with an impermissible, discriminatory purpose, in violation of the Fourteenth Amendment. While the Defendants devote several pages to arguing what outcomes a plaintiff must show in a vote dilution claim, Defs'. Mem. at 27-30, that precedent is inapposite to the discriminatory purpose claim actually presented by Plaintiffs.

The claim in this case is that in certain instances the Defendants drew district lines and split voting precincts with a racial motivation and a discriminatory impact that is not permitted by the Fourteenth Amendment. Am. Compl. ¶¶ 466, 478, 483. Vote dilution by dividing geographically compact minority populations is not the only discriminatory impact in the voting rights context. *See, e.g., Hunter v. Underwood,* 471 U.S. 222, 233 (1985) (invalidating, Alabama's felon disenfranchisement law under *Arlington Heights*, because the law was enacted with the intent to discriminate against African-American voters on account of their race); *cf. Gingles*, 478 U.S. at 45 n.10 ("Section 2 prohibits all forms of voting discrimination, not just vote dilution.").

To determine whether a legislative body acted with a discriminatory purpose in the voting rights context, the Supreme Court has instructed lower courts to review the factors for finding discriminatory purpose laid out in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), a case in which the court evaluated discriminatory purpose in a rezoning action. *See, e.g., Reno v. Bossier Parish School Bd.* (*Bossier I*), 520 U.S. 471, 477-78 (1997) (applying *Arlington Heights* to discriminatory purpose inquiry); *see also, Texas v. United States*, No. 11-1303, 2011 U.S. Dist. LEXIS 147586, at *20-22 (D.D.C. Dec. 22, 2011) (*Arlington Heights* is appropriate framework to assess whether a jurisdiction's voting changes are motivated by a discriminatory purpose); *Arizona v. Reno*, 887 F. Supp. 318, 322 (D.D.C. 1995); *Busbee v. Smith*, 549 F. Supp. 494, 516-17 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983). [other cases of racial discrimination]. In *Arlington Heights*, the Court found the following to be evidence of discriminatory purpose, even when the law on its face does not contain an explicit racial classification:

> The historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes"; "[t]he specific sequence of events

> leading up [to] the challenged decision [which] also may shed some light on the decisionmaker's purposes"; and "[t]he legislative or administrative history," which can be "highly relevant . . . where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.

Id. at 267-68.

Here, Plaintiffs allege that the Joint Redistricting Committee Chairs issued public memoranda stating that districts in the House, Senate, and Congressional plans were drawn to increase the number of African Americans in the district. Am. Compl. ¶¶415, 427, and 439. The memoranda misstate the standard for compliance under Sections 2 and 5 of the Voting Rights Act, despite soliciting input that stated the correct standard.

Plaintiffs repeatedly, and with specificity, allege intentional discrimination in their Amended Complaint. Plaintiffs allege that the House, Senate, and Congressional Plans intentionally carve black voters out of adjacent districts to "bleach" the adjacent districts and weaken African-Americans overall ability to vote equally in the legislative Taken in the light most favorable to the Plaintiffs, these allegations state a claim for relief under the equal protection clause of the 14th Amendment under the *Arlington Heights* framework for such claims.

IV. Plaintiffs Allege Facts Sufficient to State a Racial Discrimination Claim Under the Equal Protection Clause of the North Carolina Constitution

The evidence enumerated above for the federal equal protection claims provides strong evidence of unconstitutional racial discrimination under the Equal Protection Clause of the North Carolina Constitution. N.C. Const. Article I, Section 19 guarantees that no person shall "be denied the equal protection of the laws; nor … be subjected to discrimination by the State because of race, color, religion, or national origin." N.C. Const. art. I, § 19. Plaintiffs allege that these plans fail strict scrutiny under the State Constitution as they do under federal law.

However, the state court is free to hold its state actors to a higher standard when applying strict scrutiny. Indeed, the North Carolina Supreme Court has recently held that equal protection provided by Art. I § 19 applies to the election of judges even though under federal equal protection doctrine, it does not. *Blankenship v. Bartlett*, 363 N.C. 518, 681 S.E.2d 759 (2009).

Under the North Carolina Constitution, the court applies strict scrutiny to actions involving a suspect class that has been subjected to "purposeful unequal treatment, or relegated to such a position of political powerlessness" or actions that impinge on a fundamental right. *Texfi Indus., Inc. v. Fayetteville*, 301 N.C. 1, 11-12, 269 S.E.2d 142 (1980) Under the State Equal Protection Clause, race is such a class. Further, "[t]he right to vote on equal terms is a fundamental right" where strict scrutiny applies. *Northampton County Drainage Dist. Number One v. Bailey*, 326 N.C. 742, 747, 392 S.E.2d 352, 356 (1990). Thus, the 2011 Redistricting Plans, which create racial classifications and undermine the ability to vote on equal terms must be subjected to strict scrutiny.

To survive strict scrutiny, these plans must be narrowly tailored to serve a compelling state interest. *Stephenson v. Bartlett*, 355 N.C. 354, 377, 562 S.E.2d 377, 393 (2002). While the federal standard is helpful in this case, North Carolina courts are not bound by federal courts when construing the State Constitution, even if those provisions mirror "identical provisions in the Constitution of the United States." *State v. Petersilie*, 334 N.C. 169, 184, 432 S.E.2d 832 (1993). The North Carolina Supreme Court retains the ultimate authority to interpret the rights afforded by the State Constitution. The Court has observed:

> [I]n the construction of the provision of the State Constitution, the meaning given by the Supreme Court of the United States to even an identical term in the Constitution of the United States is, though highly persuasive, not binding upon this Court… In addressing the question of whether the statute…violates the Equal Protection Clause of the Constitution of North Carolina, we undertake to review prior decisions of the Supreme Court of the United States and lower Federal Courts as well as the prior decisions of this

> Court. We emphasize, however, that our decision and holding are based upon our interpretation of the Equal Protection Clause of Article I, § 19 of the Constitution of North Carolina.

White v. Pate, 308 N.C. 759, 766, 304 S.E.2d 199, 203-204 (1983).

Our state courts therefore have the freedom to require a higher standard for state actors than the standard mandated by the federal equal protection clause. State courts "have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby afforded no lesser rights than they are guaranteed by the parallel federal provision." *State v. Carter*, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988). Thus, only North Carolina courts can determine "[w]hether rights guaranteed by the Constitution of North Carolina have been provided and the proper tests to be used in resolving such issues." *State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260 (1984).

V. Non-Compact Districts and Divided Precincts in the Enacted Plan, Disproportionately Impacting Black Voters, Violate *Stephenson v. Bartlett*, and the North Carolina Constitution's Equal Protection Clause

A. Non-Compact Districts Violate *Stephenson*

Plaintiffs allege throughout the *Amended Complaint* that districts in the House, Senate and Congressional districts are non-compact in violation of *Stephenson*. Repeatedly, the Plaintiffs allege that the districts are less compact than any district proposed by the alternative plans based on standard measures of compactness. Further, these districts have bizarre, meandering lines that completely disregard communities of interest.

In *Stephenson I*, the Court held, as part of the requirement of the North Carolina Constitution, that "[s]uch non-VRA districts shall be compact" and "communities of interest

should be considered in the formation of compact and contiguous electoral districts." 355 N.C. at 383, 385. The *Stephenson* Court observed that "the State Constitution's limitations upon redistricting and apportionment uphold what the United States Supreme Court has termed the traditional districting principles of compactness, contiguity, and respect for political subdivisions" as cited in *Shaw v. Reno*. *Id.* at 371. (citations omitted). Although the *Shaw* Court did not hold these principles as constitutionally required under the federal constitution, *Shaw* at 647, *Stephenson I* and *II* make clear that those factors *are requirements* under our State Constitution.

That requirements to form compact and contiguous electoral districts in consideration of communities of interest are part of the eight "requirements of the State Constitution, including the WCP and the Equal Protection Clause" listed by *Stephenson I and II*. *Stephenson I*, 355 N.C. at 384, 562 S.E.2d at 397; *Stephenson II*, 357 N.C. at 305-07, 582 S.E.2d at 250-251 Compactness was in no way denoted as less important than any of the other preceding requirements. Crucially, *Stephenson I* held that "we direct that any new redistricting plans, including any proposed on remand in this case, shall depart from strict compliance with the *legal requirements set forth herein* only to the extent necessary to comply with federal law." 355 N.C. at 384, 562 S.E.2d at 397 (emphasis added).

Defendant's argument that "compactness" is not a constitutional requirement under the WCP and Equal Protection Clause ignores the plain language of *Stephenson I* and *II*, and ignores the entire substance of the Court's findings in *Stephenson II*. In addition to the language of *Stephenson I* discussed above, *Stephenson II* explicitly numbers the "requirements of the WCP", of which compact and contiguous districts are the seventh, numbered requirement. 357 N.C. at 305-307, 562 S.E.2d at 250-251. The decision by Defendants to treat the requirement of Number

6 (Dividing the minimum number of counties) as mandatory and Number 7 as guidance is an arbitrary, self-serving reading with no basis in law. *Stephenson II* goes on to make the finding that:

> The 2002 House and Senate plans enacted by the General Assembly contain districts that *are not sufficiently compact to meet the requirements of the equal protection clause in that the requirements of keeping local governmental subdivisions or geographically based communities of interest* were not consistently applied throughout the General Assembly's plan producing districts which were a crazy quilt of districts unrelated to a legitimate governmental interest.

357 N.C. at 308, 562 S.E.2d at 251. (emphasis added).

Any argument by Defendants that the "requirement" of compactness is actually not required by the State Constitution flies in the face of this plain language and holding in *Stephenson II*. Further, the *Stephenson* court held that Senate Districts 6, 10, 11, 14, 16, 21, 21, 36, 44 were not compact, in violation of the State Constitution. *Stephenson II*, 357 N.C. at 311, 562 S.E.2d at 253. Additionally, "Districts 18, 41, 51, 52, 57, 58, 59, 60, 61, 62, 63, 64, 76, 77, 95, 96 and 118 [were] not compact and [failed] to strictly comply with *Stephenson*." *Id.* at 313.

Defendant's assertion that compactness is somehow a "standardless" principle that "usurps the discretion of the General Assembly" rejects the binding authority of *Stephenson* and mischaracterizes the standard. *See* Defs' Mem at 15. In finding districts non-compact, the Court repeatedly described the districts' shapes and disregard for communities of interest. *Stephenson I*'s holding that non-compact legislative districts are unconstitutional was affirmed in *Stephenson II*. *Stephenson II*, 357 N.C. at 309, 562 S.E.2d at 252.

The methodology used in *Stephenson* to determine compactness is similar to the approach used in *Bush v. Vera*, 517 U.S. 952 (1996) the case which Defendants wrongly put forth as rejecting compactness as a workable, judicial standard. In *Vera*, the Court struck down three Texas districts largely because they were "bizarre" in shape and "far from compact." *Id.* at 995.

The court's visual examination of districts was supplemented by the trial court with various formulas that evaluated compactness in "objective, numerical terms." *Id.* at 960. Far from suggesting that using compactness as a standard equates to a "beauty contest," the United Supreme Court embraced available, objective measures of whether a district was compact enough to comply with the Equal Protection Clause. In *Vera*, the Court stated:

> *District shape is not irrelevant to the narrow tailoring inquiry*. … Significant deviations from traditional districting principles, such as the *bizarre shape and noncompactness demonstrated by the districts here*, *cause constitutional harm* insofar as they convey the message that political identity is, or should be, predominantly racial. For example, the bizarre shaping of Districts 18 and 29, *cutting across pre-existing precinct lines and other natural or traditional divisions, is not merely evidentially significant; it is part of the constitutional problem insofar as it disrupts nonracial bases of political identity and thus intensifies the emphasis on race.*

Bush v. Vera, 517 U.S. at 980-981 (emphasis added). Compactness remains a key restraint on the General Assembly's self-serving assignment of voters. As a traditional redistricting principle and a requirement of our State Constitution, compactness assures that voters will be able to influence the electoral process from within communities of interest and retain the right to vote on equal terms with all other voters in North Carolina.

B. Excessive and Unjustified Splitting of Precincts Violates the Equal Protection Clause of the North Carolina Constitution

In addition to the drawing of non-compact districts, the redistricting plans at issue divide an unprecedented number of precincts, a core political subdivision, hundreds of times throughout the state. The State House Plan split 395 precincts, almost twice as many as any of the alternative Plans submitted to the House Redistricting Committee. The State Senate Plan split 257 precincts, again more than any alternative plan submitted to the Senate Redistricting Committee. Am. Compl. ¶78. Nearly two million people of voting age currently live in precincts split by the 2011 plans. Am. Compl. ¶113, 295. The blatant disregard for keeping precincts

whole is further evidence of the non-compact nature of the challenged districts and demonstrates that the plan contains "substantial failures in compactness, contiguity, and communities of interest" that violate *Stephenson*. *See*, *Stephenson II*, 357 N.C. at 309, 562 S.E.2d at 252.

1. Voters in Split Precincts are Denied the Right to Vote on Equal Terms With Voters Whose Precincts are Whole

The number of split precincts also violates North Carolina Constitution's Equal Protection Clause by creating two classes of voters – those who must vote in split precincts and live in counties or districts with numerous split precincts, and those who vote in whole precincts and live in counties and districts with no or very few split precincts–a classification that works to deny the fundamental right to vote on equal terms.

The right to vote on equal terms is a fundamental right. *Northampton County Drainage Dist. v. Bailey*, 326 N.C. 742, 747, 392 S.E.2d 352, 356 (1990). Voters in a split precinct will vote in polling locations that must administer twice or three times the number of ballot styles as polling locations in a whole precinct. Voters who have a heightened risk of receiving the wrong ballot of having their vote discounted, of dealing with confusion over which candidates to vote for and which elected representatives to reach out to, in no way vote on equal terms with voters who suffer none of these harms. In *Stephenson I*, the court expressly recognized that "unwieldy, confusing, and unreasonably lengthy ballots" were a violation of the Equal Protection Clause. *Stephenson I*, 355 N.C. at 377. It follows that the ballot and candidate confusion created by split precincts also deprives voters of the right to vote on equal terms. Plaintiffs allege that not only confusion on election day, but the entire process of educating voters about who they will vote for is immensely complicated by numerous overlapping split precincts. Just as "[t]he precinct voting system is woven throughout the fabric of our election laws", *James v. Bartlett*, 359 N.C. 260, 267, 607 S.E.2d 638 (2005), it is also true that the precinct system is woven throughout the

political process. Voters are disadvantaged when they cannot figure out which candidates are contesting for their votes and candidates are disadvantaged when divided precincts make it more difficult for them to reach out to and communicate with the right voters.

2. Defendants' Splitting of Precincts Amounted to Racial Discrimination

In addition to creating two classes of voters, the 2011 redistricting plans' use of split precincts disproportionately affects black voters. The General Assembly repeatedly split precincts to intentionally place black voters in a different district than the rest of the precinct. 36.34 percent of the black voting age population in North Carolina lives in one of the 563 split precincts. Am. Compl. ¶88. In contrast, 23.24 percent of the non-Hispanic white voting age population in North Carolina lives in one of the 563 split precincts. Therefore, black voters are 56.37 percent more likely than white voters to live in a split precinct. Am. Compl. ¶90. Splitting precincts on the basis of race was specifically rejected as violating the federal Equal Protection Clause by the United States Supreme Court. In *Bush v. Vera*, the Court said specifically that "cutting across preexisting precinct lines" poses constitutional harms "*as it disrupts nonracial bases of political identity." Vera*, 517 U.S. at 981.

The court must apply strict scrutiny to the legislation which deprives some voters of this fundamental right to vote on equal terms. *Northampton County Drainage*, 326 N.C. at 747. To survive strict scrutiny, the legislation must be narrowly tailored to further a compelling state interest. *Stephenson,* 355 N.C. at 377. Defendants have not and cannot offer a compelling state interest that justifies depriving voters living in split precincts of the fundamental right to vote on equal terms. Partisan politics are not a compelling state interest. *See Cox v. Larios*, 542 U.S. 947, 952 (2004) (J. Stevens, concurring).

C. <u>The North Carolina Constitutional Provisions Interpreted in *Stephenson* Also Apply to Congressional Districts.</u>

Plaintiffs claim that Congressional Districts 4 and 10 are so irregular and non-compact, that they violate the North Carolina Constitution's good of the whole provision, as interpreted by *Stephenson.* Am. Compl. ¶¶463. Plaintiffs adopt and incorporate all of the *Dickson* Plaintiffs arguments concerning this clause of the Constitution and its applicability to the redistricting authority of the General Assembly. *See* Dickson Pls. Mem. at 18-27.

The defendants argue that "[t]here are no State constitutional restrictions on the authority of the General Assembly to draw congressional districts. The only restrictions on the General Assembly's authority come from federal law." Defs. Mem. at 23, note 12. However, no state court decision has held that. While the whole county provisions only apply to legislative districts, other state constitutional provisions, most notably the equal protection clause, apply to everything the legislature does, including drawing congressional districts. Congressional districts simply were not part of the *Stephenson* litigation. However, there is no principled reason why the Court's rationale for requiring compact districts that recognize communities of interest in *Stephenson I* and *II* does not apply with equal force to the legislature's redrawing of Congressional districts.

VI. Prohibitions Against Unnecessary Precinct Splitting Are Enforceable in Non-Section 5 Counties

Plaintiffs claim that the 2011 House redistricting plan divides 171 precincts in 16 counties not covered by Section 5 of the Voting Rights Act; the Senate plan divides 164 precincts in six non-covered counties, and the Congressional plan divides 17 precincts in eight non-covered counties, all in violation of state statutes prohibiting the division of precincts unless required by the Voting Rights Act. Am. Compl. ¶¶489, 496. These two state statutes were the

subject of an objection under Section 5 of the Voting Rights Act in 1996. However, just as *Stephenson* involved a reconciliation of the previously objected-to application of the whole county provision to areas of the state covered by the Voting Rights Act, the statutory prohibition on split precincts should be harmonized with Voting Rights Act compliance.

Defendants' contention that these statutes are not enforceable anywhere in the state is directly contradicted by the express language of the Voting Rights Act, by the federal regulations governing its implementation, and by United States Supreme Court cases interpreting Section 5. In its own words, Section 5 prohibits enforcement of voting changes only in "covered" jurisdictions – those jurisdictions identified in Section 4(b) of the Voting Rights Act – pending preclearance. 42 U.S.C. § 1973c(a) (requiring preclearance prior to implementation in "a political subdivision with respect to which…determinations made under…section 1973b (b) of this title are in effect"). In line with that language, the Code of Federal Regulations likewise explains that Section 5 only "prohibits…enforcement in…jurisdiction[s] covered by Section 4(b)…" (28 C.F.R. § 51.1(a)) and that "[t]he requirement of Section 5 takes effect upon publication in the Federal Register of the requisite determinations…under section 4(b)" (28 C.F.R. § 51.4(a)). *See* 28 C.F.R. Part 51, Appendix (listing the "jurisdictions covered under Section 4(b)).

The U.S. Supreme Court has definitively stated that while Section 5 "subjects covered jurisdictions to special restrictions," Section 5, "as we interpret it today, burdens state law only to the extent that that law affects voting in jurisdictions properly designated for coverage." *Lopez v. Monterey County*, 525 U.S. 266, 269, 284 (1999) (emphasis added); *see also, Holder v. Hall,* 512 U.S. 874, 883, 114 S. Ct. 2581 (1994) (plurality) ("Section 5 applies only in certain jurisdictions specified by Congress…" and citing Section 4(b) as "specifying jurisdictions where § 5 applies")

(emphasis added); *LaRouche v. Fowler*, 77 F. Supp. 2d 80, 86 (D. D.C. 1999) (three-judge court), *aff'd w/o opinion,* 529 U.S. 1035 (2000) (relying upon "the statute itself" defining its coverage in terms of geography). The three-judge panel in *LaRouche* further explained that, "[t]here has never been a suggestion in *Lopez* or any other decision that any state with covered political subdivisions must preclear all changes; instead, only covered jurisdictions must apply in order to implement changes." *LaRouche*, 77 F. Supp. 2d at 86. Moreover, a federal court in Florida recently rejected arguments that changes in voting practices in Florida, a state in which only five counties are covered under Section 5 of the Voting Rights Act, should be enjoined statewide because the state had not yet obtained preclearance for the changes in the state's five covered counties. *Sullivan v. Scott*, No. 11-civ-10047 (S.D. Fla.), 2011 WL 4954261 (October 18, 2011). Thus, Defendants' argument that the statutes in question were unenforceable in non-covered portions of the state because the changes were not precleared for the covered portions of the state is completely without merit.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that this Court deny Defendants' motion to dismiss in its entirety.

Respectfully submitted this 4th day of January, 2012.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing NAME OF PLEADING in the above titled action upon all other parties in this consolidated cause by either:

[X] Hand delivering a copy hereof to each said party or to the attorney thereof;

[ ] Transmitting a copy hereof to each said party via facsimile transmittal;

[X] By email transmittal to the email addresses indicated below; or

[ ] Depositing a copy hereof, first class postage pre-paid in the United States mail, properly addressed to:

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Counsel for Dickson Plaintiffs

This the 4th day of January, 2012.

Anita S. Earls

Anita S. Earls

Exhibit 1 to NAACP Plaintiffs Mem. In Opp. To Defs' Mot. To Dismiss, January 4, 2012

NAACP, *et al.,* v. State of North Carolina, *et al.,* No. 11 cvs 16940
Individual Plaintiffs by District in 2011 Enacted Plans

HOUSE - LDD4

District	Plaintiff(s)
H1	VAUGHN
H2	LESTER
H4	LEWIS
H5	RIVERS/WHITE
H7	BRODIE
H8	ALBERT JR
H21	BROWN
H24	MUCHITENI
H25	HOBBS
H29	TAYLOR/BAILEY
H30	HAWKINS
H32	BULLOCK
H34	SARA & HUGH STOHLER
H38	RAINEY
H42	STATEN/DAVIS
H45	WADDLE
H48	DAVIS-McCOY
H49	WILLIAMS
H51	SPEED
H54	BROOKS
H57	BRANDON/WELLS
H59	ALLEN
H66	ROGERS SR.
H99	MEACHEM
H102	BONAPARTE
H103	NEWMAN/DAWKINS
H106	LOVE

SENATE - Rucho Senate 2

District	Plaintiffs(s)
S5	LEWIS/MUCHITENI
S7	PATTERSON
S14	RAINEY
S18	HODGE/SINCLAIR
S19	WADDLE
S20	TAYLOR/BAILEY
S21	MCNAIR/DAVIS/STATEN
S22	HAWKINS/LESTER
S27	BROWN JR.
S28	HIGHTOWER/BRANDON/WELLS
S31	STEPHENS
S32	WILSON
S38	BONAPARTE
S40	STAFFORD/MEACHEM/LOVE
S41	DAWKINS

CONGRESSIONAL - Rucho-Lewis Congress 3

	Plaintiff(s)
C1	TAYLOR/LANIER/LANIER/WHITE/RIVERS/MUCHETI NI/BULLOCK/LEWIS
C4	MCNAIR/DAVIS/BAILEY/HAWKINS/STOHLERS/RAI NEY/HARDY
C10	GARDENHEIGHT
C12	HIGHTOWER/BRANDON/WELLS/STAFFORD/MEAC HEM/ BONAPARTE/LOVE

Exhibit 2 to NAACP Plaintiffs Mem. In Opp. To Defs' Mot. To Dismiss, January 4, 2012

NAACP, *et al.,* v. State of North Carolina, *et al.,* No. 11 cvs 16940
Individual Plaintiffs in Split Precincts

Plaintiffs Residing in Precincts Split in One Plan

Plaintiff	**Precinct**
Albert Brown	**CHAR**
Sharon Hightower	**G71**
Dr. Theodore Muchiter	**0701**

Plaintiffs Residing in Precincts Split in More than One Plan

Plaintiff	**Precinct**
Ben Taylor	**34**
Evester Bailey	**39**
Anne Wilson	**601**
Gray Newman	**235**
Yvonne Stafford	**014**
Robert Dawkins	**201**
Rosa Brodie	**0037**
William Hobbs	**0037**
Sara & Hugh Stohler	**01-14**
Charles Hodge	**17-04**
Marshall Hardy	**01-27**
Matthew Davis	**CC32**
Tressie Staten	**G11**
Jimmie Ray Hawkins	**39**
Courtney Patterson	**N**
Keith Rivers	**1-B**
Willie O. Sinclair	**16-05**
Herman Lewis	**07**
Clarence Albert Jr.	**PRWM**