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.*	)))))))	11 CVS 16896
NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP *et al.*, *Plaintiffs,* v. THE STATE OF NORTH CAROLINA, *et al.*, *Defendants.*	)))))))))	11 CVS 16940 (*Consolidated*)

<u>*DICKSON* PLAINTIFFS' MEMORANDUM OF LAW</u>
<u>IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS</u>

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DICKSON PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

NOW COME the *Dickson* Plaintiffs in the above-captioned *Dickson v. Rucho* civil action and hereby submit this Memorandum of Law in Opposition to the Defendants' Motion to Dismiss and to the Defendants' December 28, 2011 Memorandum of Law (cited hereinafter "Defendants' Memo"). In this Memorandum, we will establish that Defendants' motion to dismiss has no merit.

INTRODUCTION

The Defendants filed a single memorandum in support of their motion to dismiss the First Amended Complaints of both the *Dickson* Plaintiffs and the *NC NAACP* Plaintiffs. This approach complicated and confused some of the differences between both Complaints. In an

effort to clarify these matters, the *Dickson* Plaintiffs and the *NC NAACP* Plaintiffs are filing separate responses to the Defendants' single Memorandum.

The filing of separate memoranda does not reflect any difference of position among the two set of plaintiffs with regard to the merits of their respective positions. Instead, the *Dickson* Plaintiffs adopt and rely on the positions advocated by the *NC NAACP* Plaintiffs as additional support for their positions.

The *Dickson* Plaintiffs' response is organized as follows:

(1) In Argument I, we refute Defendants' arguments that the courts have a very limited role in the enforcement of the constitutional rights of citizens in the context of redistricting legislation.

(2) In Argument II, we put into context the Defendants' arguments that redistricting legislation is presumed constitutional.

(3) In Argument III, we establish Plaintiffs' standing to bring this suit.

(4) In Argument IV, we outline the elements of a racial gerrymander claim under the state and federal constitutions and explain why and how the First Amended Complaint meets all of those elements as to districts in all three challenged plans.

(5) In Argument V, we refute the Defendants' stunning proposition that compliance with the constitutional requirement that "no county be divided" in the formation of House and Senate districts is measured by the number of groups of counties in the plan and not the number of counties kept whole.

(6) In Argument VI, we explain that the North Carolina constitution requires the Defendants to act for "the good of the whole," and it prohibits the Defendants from infringing the right to vote; from denying the equal protection of the laws; and from enacting

arbitrary and capricious redistricting legislation. We will explain how the Defendants violated those three constitutional provisions in drawing new electoral districts that unnecessarily divided counties, cities, towns, and precincts, and in drawing districts that are not compact.

(7) In Argument VII, the validity of our two statutory claims is established.

STATEMENT OF THE CASE AND ALLEGATIONS OF FACT

The *Dickson* Plaintiffs agree with the Statement of the Case and Statement of Factual Allegations set forth in the *NC NAACP* Plaintiffs' Memorandum of Law. The *Dickson* Plaintiffs further rely upon the Factual Allegations set forth in their own First Amended Complaint and will provide additional discussion of such allegations below, where appropriate.

STANDARD OF REVIEW

The only purpose of a motion to dismiss is to test the legal sufficiency of the pleading against which it is directed. *Tise v. Yates Const. Co., Inc.*, 122 N.C. App. 582, 585, 471 S.E.2d 102, 105 (1996). In analyzing the legal sufficiency of the complaint, the complaint must be liberally construed, *Driver v. Burlington Aviation, Inc.*, 110 N.C. App. 519, 524, 430 S.E.2d 476, 480 (1993), and the plaintiffs' allegations are taken as true. *Smith v. Smith*, 113 N.C. App. 410, 411, 438 S.E.2d 457, 458 (1994). If the plaintiffs' allegations of fact are sufficient to state a claim under *any legal theory*, the complaint should not be dismissed. *Hoke v. Young*, 89 N.C. App. 569, 570, 366 S.E.2d 548, 549 (1988) (emphasis supplied).

ARGUMENT

I. Questions Concerning the Constitutionality of Redistricting Legislation may be Answered with Finality only by the Courts

(Response to Section II of Defendants' Memorandum)

The Defendants assert that redistricting issues are within the "exclusive province" of the General Assembly and that "many of the issues raised by plaintiffs in this case are non-

justiciable political questions." (Defendants' Memo pp. 2-3). The Defendants do not clearly state whether this is an independent ground upon which the Court should (allegedly) dismiss all of the claims, or whether they are merely reciting general principles that the Court should bear in mind when specifically evaluating each of the Plaintiffs' claims.

Regardless of the exact nature of the Defendants' argument, the Defendants have not correctly stated the law as it has existed since the North Carolina Supreme Court's decision in *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) ("*Stephenson I*"), in which the court unequivocally stated that issues relating to redistricting are justiciable. The Court held in relevant part that:

> [W]ithin the context of state redistricting and reapportionment disputes, it is well within the "power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan."

Stephenson I, 355 N.C. at 361, 562 S.E.2d at 384. The Supreme Court left no doubt that it had the power and the duty to decide issues relating to the constitutionality of redistricting maps; it stated that "issues concerning the proper construction and application of the Constitution of North Carolina can be answered with finality only by this Court" and that it is "the duty of this Court, in some instances, to declare such acts unconstitutional." *Id.*

The Supreme Court has demonstrated that it will not hesitate to strike down the General Assembly's redistricting maps. In the *Stephenson* litigation, the Supreme Court declared unconstitutional not just one, but two different sets of maps enacted by the General Assembly. *See also Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) (*"Stephenson II"*). The Supreme Court further enjoined the use of those maps on a statewide basis and required the use of new redistricting maps drawn up by the courts, not the legislature, for certain elections.

Since the *Stephenson I* opinion was handed down, at least two developments have occurred that further demonstrate that the Courts have the duty to adjudicate issues concerning the constitutionality of redistricting legislation. First, the General Assembly enacted legislation to clarify certain jurisdictional issues relating to redistricting cases. In relevant part, that legislation: (i) provided for a three-judge panel to hear redistricting-related disputes, *see* G.S. § 1-267.1; (ii) expressly contemplated that the courts could declare future redistricting plans to be unconstitutional, *see* G.S. § 120-2.4; (iii) allowed the courts to implement judicially-created redistricting plans on an interim basis, in the event that the General Assembly did not first remedy unconstitutional legislation within a brief time frame, *see id.*; and (iv) created a right of direct appeal to the Supreme Court, *see* G.S. § 120-2.5. Thus, not only did the General Assembly recognize the authority of the courts announced in *Stephenson I*, but the General Assembly enacted new legislation to facilitate such judicial review of redistricting plans.

Second, litigation following *Stephenson I* confirms the Court's duty to assure that redistricting plans comply with constitutional requirements. In 2007, four years after *Stephenson I* was handed down, the Supreme Court declared another legislative redistricting map unconstitutional in *Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (2007), thereby invalidating a map drawn by the General Assembly for the third time in a single decade. Two years later, in *Blankenship v. Bartlett*, 363 N.C. 518, 681 S.E.2d 759 (2009), the Court considered the constitutionality of a newly-created judicial district in Wake County. In *Blankenship*, the Supreme Court held the "one person, one vote" rule in the Equal Protection Clause of the North Carolina Constitution applies to judicial districts. Although the Supreme Court did not directly affirm the trial court's original finding of unconstitutionality, the Supreme Court contemplated that, on remand, the trial court's modified judgment would declare for a

second time that the judicial district was unconstitutional. *See Blankenship*, 363 N.C. at 528, 681 S.E.2d at 766 ("In sum, plaintiffs have made the required prima facie showing [of unconstitutionality]. In the event the trial court finds a violation of state equal protection law [on remand], it should defer initially to the General Assembly for resolution.").

Finally, apart from the *Stephenson* opinions, the Court should bear in mind that the *Dickson* Plaintiffs' state constitutional claims are based on the "essential principles of liberty and free government" established in the Declaration of Rights in Article I of the North Carolina Constitution. The courts have an abiding duty to protect these individual rights against infringement by the State and to apply such rights "in favor" of citizens, as the Supreme Court made clear in its unanimous opinion in *Corum v. the University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992). There, the Supreme Court stated:

> The civil rights guaranteed by the Declaration of Rights in Article I of our Constitution are individual and personal rights entitled to protection against state action. The Declaration of Rights was passed by the Constitutional Convention on 17 December 1776, the day before the Constitution itself was adopted, manifesting the primacy of the Declaration in the minds of the framers. The fundamental purpose for its adoption was to provide citizens with protection from the State's encroachment upon these rights. Encroachment by the State is, of course, accomplished by the acts of individuals who are clothed with the authority of the State. The very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State. *State v. Manuel*, 20 N.C. 144 (1838).
>
> It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State. *King v. South Jersey Nat. Bank*, 66 N.J. 161, 330 A.2d 1 (1974). Our Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens. *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E.2d 868 (1983); Chief Justice James G. Exum, Jr., *Dusting Off Our State* Constitution, 33 State Bar Quarterly, No. 2, 6-8 (1986). We give our Constitution a liberal interpretation in favor of its citizens with

> respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property. *State v. Harris,* 216 N.C. 746, 6 S.E.2d 854 (1939).

Corum v. the University of North Carolina, 330 N.C. at 782-83, 413 S.E.2d at 290 (emphasis supplied). The primacy of these rights and the responsibility of the courts to protect them are not muted when the challenge concerns redistricting legislation.

In light of *Stephenson I*, and the additional authorities discussed above, the Defendants' assertion that "responsibility for redistricting is within the exclusive province of the legislature" is simply untenable.

II. The Principle that Legislation is Presumed to be Constitutional Simply Means that the Plaintiffs Bear the Burden to Prove that the Legislation is Unconstitutional. Moreover, for Certain Claims, the Burden of Production Shifts to the Defendants

(Response to Section III of Defendants' Memorandum)

The Defendants correctly, and uncontroversially,[1] assert that "the 2011 Plans challenged are … presumed valid unless it can be shown beyond a reasonable doubt that they exceed an express limitation on legislative power contained in the Constitution." (Defendants' Memo p. 4). The Defendants correctly state the law, but that general principle is merely the starting point for the Court to begin its analysis, *not* a ground upon which to dismiss the case pursuant to Rule 12(b)(6).

Importantly, the presumption of constitutionality to which the Defendants refer, does not mean that courts are somehow prejudiced against considering constitutional claims, or that the courts are more disposed to dismiss such claims. Rather, the presumption means that a party challenging the constitutionality of a statute bears the initial burden of production of evidence, as

[1] Indeed, what other rule could the courts possibly adopt? If the courts did not presume that legislation is constitutional, then the constitutionality of every act by the General Assembly would be an open question, until a court ruled upon the issue. Instead, the rule is that legislation is presumed to be constitutional until a plaintiff challenges the legislation and proves that it is unconstitutional. That presumption simply places the burden of proof upon the plaintiff, and nothing more.

well as the ultimate burden of persuasion (collectively, the "burden of proof"), to prove that the statute is unconstitutional. *See State v. Mello*, 200 N.C. App. 561, 564, 684 S.E.2d 477, 479 (2009) (stating that when "challenging the constitutionality of a statute, the burden of proof is on the challenger," and then proceeding to strike down the law as unconstitutional). For certain constitutional claims, the burden of production will shift to the State to prove that a law is not unconstitutional. For example, when a plaintiff asserts a violation of the Equal Protection Clause of the North Carolina Constitution, alleging that the redistricting legislation unconstitutionally burdens the fundamental right to vote, the courts will apply strict scrutiny, pursuant to which the burden is upon the State to prove that the redistricting legislation "is narrowly tailored to advance a compelling governmental interest." *Stephenson I*, 355 N.C. at 376, 562 S.E.2d at 393. In certain circumstances, the State may even bear the entire *burden of proof* (and not just a shifted burden of production), as the United States Supreme Court held in *Bartlett v. Strickland*, 556 U.S. 1, 129 S. Ct. 1231 (2009):

> Here the [State] defendants raise § 2 [of the Voting Rights Act] as a defense. As a result, the trial court stated, they are "in the unusual position" of bearing the burden of proving that a § 2 violation would have occurred absent splitting Pender County to draw District 18.

Bartlett, 129 S. Ct. at 1240 (affirming the trial court's decision).

With these general points as background, the Plaintiffs now turn to the putative "merits" of the Defendants' argument. As in the preceding section, the Defendants' argument here is really just a statement of general principles that will not significantly aid the Court in making a decision, until those principles are later applied to specific facts or allegations. To the extent the Defendants do make an argument, it is as follows:

> [P]laintiffs must not only point to express constitutional restrictions in challenging the 2011 Plans, but they must also establish that those restrictions were plainly and unmistakably

> violated. Plaintiffs' claims fall woefully short of these requirements.

(Defendants' Memo p. 5). The *Dickson* Plaintiffs have pleaded numerous, clearly-denominated violations of well-established constitutional limitations on the redistricting process. The *Dickson* Plaintiffs will hereinafter establish their standing to pursue these claims and set forth the merits of those claims.

III. Plaintiffs have Standing to Assert these Claims

(Response to Section IV of the Defendants' Memorandum)

Defendants do not appear to dispute that the *Dickson* Plaintiffs have standing to assert claims based on alleged violations of the prohibition against dividing counties (Claims 11-16) and their racial gerrymander claims (Claims 19-24).

They do argue that three plaintiffs are in effect "excess plaintiffs" because "they are not residents of a district that has been challenged." (Defendants' Memo p. 7.) Since their brief was filed, Defendants have acknowledged that Stephen Bowden is a proper plaintiff because he resides in challenged Senate District 26. It is true that Plaintiffs Garrou and Truitt are not residents of a challenged district. They, however, have standing on other grounds. Plaintiff Truitt resides in a divided county (Craven) and Plaintiff Garrou resides in a split precinct.

Defendants' principal standing argument regarding the *Dickson* Plaintiffs seems to be that no plaintiff is alleged to reside in a divided precinct or town, and that there is therefore no standing to pursue their three state constitutional claims based on the formation of districts from split precincts and towns. This argument is meritless.

First, this argument cannot be reconciled with Defendants' concession that Plaintiffs who reside in challenged districts have standing to pursue whole county and racial gerrymander claims. The Complaint establishes that each of the challenged districts contains split precincts

and towns. Why a plaintiff who resides in a district would have standing to pursue a whole county claim or racial gerrymander claim for that district, but not to pursue a claim that his district violated the state constitutional prohibitions against legislating other than for the good of the whole, or arbitrarily and capriciously, is not apparent and is not explained by Defendants.

Second, many *Dickson* Plaintiffs do in fact reside in split precincts. Where one plaintiff has standing, there is no need to determine whether other plaintiffs also have standing. See *Watt v. Energy Action Foundation*, 454 U.S. 151, 160, 102 S. Ct. 205, 317 (1981).

Finally, Defendants' standing approach is untenable, unworkable, and unsupported by any case law. To require plaintiffs to reside in the precincts that are split in order to challenge the drawing of the districts containing split precincts would require a level of precision unprecedented in any standing analysis. The Plaintiffs who reside in neighboring (non-split) precincts are also affected by the split precincts. A decision of the Pennsylvania Supreme Court is instructive here. In *Erfer v. Commonwealth*, 568 Pa. 128, 794 A.2d 325 (2002), the plaintiffs challenged the redrawing of the federal congressional districts. Defendants argued that a litigant can have a direct and immediate interest in only that portion of the plan which drew lines for his particular district. The Pennsylvania Supreme Court disagreed, writing as follows:

> We believe such a narrow interpretation to be discordant with the reality of challenging a reapportionment scheme. In mounting such an attack, a litigant cannot logically confine his challenge to his particular district. A reapportionment plan acts as an interlocking jigsaw puzzle, each piece reliant upon its neighbors to establish a picture of the whole. An allegation that a litigant's district was improperly gerrymandered necessarily involves a critique of the plan beyond the borders of his district. Thus, we decline to find that a litigant challenging a reapportionment scheme must confine his attack to the drawing of the lines of his own district.

Erfer, 568 Pa. at 135, 794 A.2d at 330. Thus, the Pennsylvania Supreme Court recognized the reality of drawing district lines and the impact on residents. Because precinct lines work as an

interlocking jigsaw puzzle and because Defendants' standard would be unreasonable and overly-precise, this court should not require residence in a split precinct in order for a litigant to challenge a district which contains split precincts.

Moreover, it is apparent that voters who reside in districts containing split precincts, but not the split precincts themselves, nonetheless suffer cognizable injuries. The Supreme Court in *United States v. Hays*, 515 U.S. 737, 115 S. Ct. 2431 (1995) recognized that while voters who reside in challenged districts automatically have standing, the voters who reside outside of those districts have standing upon showing a direct injury. The problems suffered by voters residing outside of split precincts (but inside the district) include voter confusion and increased election costs for the County Board of Elections. Plaintiffs have sufficiently alleged these problems in paragraphs 82-86 and 99-106 of the First Amended Complaint.

Plaintiffs have also sufficiently alleged the remaining elements of standing: causation and redressability. Plaintiffs allege throughout their First Amended Complaint that Defendants created the plans that isolate black voters, split counties, and split precincts. There is no question that the injuries the Plaintiffs complain of are fairly traceable to Defendants. Likewise, this Court will be able to redress the Plaintiffs' injuries by declaring the plans unconstitutional. Notably, Defendants have not argued that Plaintiffs fail to meet the causation and redressability elements of standing, and this Court should find that these elements, along with the first element of injury, have been established.

For the foregoing reasons, the *Dickson* Plaintiffs have standing to assert all of their claims.

IV. Plaintiffs State Valid Racial Gerrymander Claims Under the North Carolina and United States Constitutions

(Response to Section VII of the Defendants' Memorandum)

The law regarding racial gerrymander claims is well established. "A racially gerrymandered districting scheme, like all laws that classify citizens on the basis of race, is constitutionally suspect." *Shaw v. Hunt*, 517 U.S. 899, 904, 116 S. Ct. 1894, 1900 (1996). In the context of redistricting, a racial classification exists when race is "the predominant factor motivating the legislature's districting decision." *Easley v. Cromartie*, 532 U.S. 234, 241, 121 S. Ct. 1452, 1471 (2001). "The plaintiff bears the burden of providing the race based motive and may do so either through 'circumstantial evidence of a district's shape and demographics' or through 'more direct evidence going to legislative purpose."' *Shaw*, 517 U.S. at 904, 116 S. Ct. at 1900.

Plaintiffs have alleged that a series of districts in each of the three redistricting plans enacted by the Defendants in 2011 constitute racial clarifications. Defendants have effectively admitted that point, as they must. In support of this claim, Plaintiffs have set forth a series of geographic and demographic factors establishing that race was the dominant factor Defendants used to draw district lines in the challenged plans. This evidence is catalogued in the First Amended Complaint for each challenged district in each plan. The evidence includes the fact that more than one-half of the citizens of voting age assigned to each challenged district are Black; the fact that the lines drawn to form these districts do not follow existing county lines, city lines, and precinct lines; and the fact that the shape of the resulting districts is geographically non-compact and visually bizarre.

The inference that race was the dominant factor used by the Defendants to draw these districts is cemented by the statements made by the Defendant legislators who were the architects

of the plans. Defendants Rucho and Lewis publicly stated that these districts were "drawn at a level equal to 50% plus one" Black voting age population. (First Amended Complaint ¶ 80).

"While racial classifications are antithetical to the Fourteenth Amendment," the Courts have "recognized that under certain circumstances drawing racial distinctions is permissible where a government body is pursuing a 'compelling state interest.' A State, however, is constrained in how it may pursue that end: 'The means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose.'" *Shaw*, 517 U.S. at 908, 116 S. Ct. at 1902.

A redistricting plan is not specifically and narrowly tailored to comply with the Voting Rights Act unless it is "designed as nearly as possible to restore" Black citizens "to the position they would have occupied in the absence" of their inability to elect their candidates of choice. *Shaw*, 517 U.S. at 915, 116 S. Ct. at 1905. In other words, a districting plan is not narrowly tailored if it goes "beyond what was reasonably necessary" to comply with the Voting Rights Act. *Id*.

Here, Plaintiffs have alleged that the challenged districts are not narrowly tailored to comply with the Voting Rights Act because they go well beyond what was reasonably necessary to achieve compliance. Specifically, in their Complaint, Plaintiffs point to numerous instances in which Defendants packed districts with far more Black citizens than necessary to give them the opportunity to elect their candidate of choice. For example, Plaintiffs point to Defendants' decision to increase the Black voting age population in Senate District 14 from 41.62% to 51.27% despite the fact that the Black citizens in that District had elected their candidate of choice over many years by wide margins, typically 65% to 35%. (First Amended Complaint ¶ 136).

Defendants' response is that under the United States Supreme Court's decision in *Bartlett v. Strickland*, when a legislative body has reasonable grounds to conclude that a violation of Section 2 exists, a remedy for that violation is not effective unless that district is drawn at least to include at least a majority of Black citizens, *i.e.*, at the 50% plus one level. Defendants mechanical interpretation of the requirements of the Voting Rights Act flies in the face of established constitutional principles. Rigid and mechanical racial quotas—such as drawing electoral districts so that every district is at "a 50% plus one level"—have been condemned by the Courts. For example, in *Grutter v. Bollinger*, 539 U.S. 306, 123 S. Ct. 2325 (2003), the Court considered the constitutionality of an affirmative action program adopted by the University of Michigan Law School. The Court observed:

> The Law School's interest is not simply 'to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin." That would amount to outright racial balancing, which is patently unconstitutional.

539 U.S. at 329, 123 S. Ct. at 2339 (emphasis supplied). The flaw in Defendants' attempt to justify their unconstitutional actions here was, in fact, identified in Justice Kennedy's majority opinion in *Bartlett*. The districts challenged here are "crossover districts" which Justice Kennedy described as districts where "the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." *Bartlett*, 129 S.Ct. at 1242. Artificially increasing the percentage of Black voters in these crossover districts raises significant constitutional problems. As Justice Kennedy wrote:

> States can—and in proper cases should—defend against alleged Section 2 violations by pointing to crossover voting patterns and to effective crossover districts. And if there were a showing that the State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments.

Id. at 1249. That is precisely what has happened here.

Defendants' argument that the equal protection claims made by Plaintiffs were "rejected by Congress when it amended Section 2 in 1982" is specious. (Defendants' Memo p. 39). None of the *Dickson* Plaintiffs' claims are based on Section 2 of the Voting Rights Act. Instead, their claims are constitutional claims. Whatever Congress may have intended when amending a statute in 1982, it is certain that the constitutional framers of the equal protection clauses contemplated that no racial classification established by any State is valid unless the State can prove that the classification was enacted to meet a compelling interest and the classification is specifically and narrowly tailored to meet that compelling interest. Accordingly, Plaintiffs have sufficiently alleged valid racial gerrymander claims.

V. Plaintiffs State Valid Claims for Relief Based on Violation of the Whole-Counties Provisions in Article II, §§ 3 and 5 of the North Carolina Constitution

(Response to Section V-B of the Defendants' Memorandum)

In approving the Constitution, the people imposed precise and unambiguous limitations on the General Assembly when drawing new Senate and House districts following each census. "No county shall be divided in the formation of a senate district" and "no county shall be divided in the formation of a representative district." N.C. Const. art. II, §§ 3(3) and 5(3).

In *Stephenson I*, 355 N.C. at 371, 382, 562 S.E.2d at 389-90, 396 the Supreme Court observed that these words "demonstrate *a clear intent* to keep county boundaries intact *whenever possible*" and that it is "*the Court's duty* to follow a reasonable, workable and objective interpretation [of the Constitution] that maintains the people's *express wishes* to contain legislative district boundaries within county lines *whenever possible*" (emphasis added). The General Assembly must strictly adhere to this "clear intent" and "the people's express wishes" and may depart from it only to the extent necessary to comply with federal law. *Id.*

Plaintiffs have alleged that the Defendants' Senate plan divides 19 counties and that an alternative plan introduced by Senator Nesbitt would have divided only 14 counties. (First Amended Complaint and Answer, ¶¶ 107 and 108). Similarly, Plaintiffs have alleged that the Defendants' House plan divides 49 counties and that the alternate plan introduced by Representative Grier Martin would have divided only 44 counties. (First Amended Complaint and Answer ¶¶ 212 and 213).

In their motion to dismiss, Defendants advance the stunning proposition that Plaintiffs' Claim for Relief Eleven and Twelve must be dismissed because "the total number of counties divided" is not the measure of compliance with the express requirement of the Constitution that "no county be divided in the formation" of House or Senate districts. (Defendants' Memo p. 16). Instead, Defendants claim that compliance with the Constitution is measured by "the mandatory county grouping requirement." (Defendants' Memo p. 11). In other words, according to Defendants, the constitutionality of a redistricting plan is not measured by the number of counties that are kept whole; it is measured by the number of groups of counties it contains.

The "mandatory county grouping requirement" is not found in the words of the Constitution, nor can it be implied from any express provision of the Constitution. As is clear from the *Stephenson I* opinion, the "county grouping requirement" is merely a part of a "remedial process" that the trial court was to apply on remand in drawing its own district plans or in reviewing any new plans drawn by the legislature. *See* 355 N.C. at 383, 562 S.E.2d at 396 ("Consistent with the legal analysis set forth above, we direct the trial court, during the remedial stage of the instant proceeding, to ensure that redistricting plans for the North Carolina Senate and North Carolina House of Representatives comply with the following requirements, including the 'county grouping requirement.'").

More fundamentally, the county grouping requirement is simply one stop on the road to compliance with the constitutional direction that "no county be divided." Once county groupings are formed, districts still have to be formed within the grouping and the formation of those districts often requires splitting counties. For example, Defendants' House Plan contains one county grouping that includes 20 counties stretching from Dare County to Stanly County. Within this 20 county grouping, the Defendants formed 14 districts, and in the process of forming those 14 districts, they split 16 of the 20 counties contained in the grouping. Measuring compliance with the requirement that "no county be divided" by counting county groupings, is like declaring the winner of a mile-long run at the one-half mile mark.

VI. Plaintiffs State a Series of Valid Claims for Relief Based on the General Assembly's Unprecedented and Unnecessary Splitting of Precincts, Cities, Towns, and Other Communities of Interest

(Response to Sections V-A, V-C, and VI of the Defendants' Memorandum)

As the complaint alleges, the three redistricting plans enacted by the Defendants all reflect a similar pattern: the splitting of a large number of counties, towns and precincts to form electoral districts which are not compact, either visually or mathematically, and that are often bizarrely shaped. This factual pattern, as noted earlier in this Memorandum, is part of the proof that these plans constitute unconstitutional racial gerrymanders and violations of the broad constitutional standards discussed in detail and applied in the *Stephenson* decisions.[2] This pattern of facts, extensively alleged throughout the First Amended Complaint as to districts within each of the three 2011 Plans, also separately establishes violations of three other State

[2] See also the April 17, 2003 decision of the Honorable Knox V. Jenkins, Jr., on remand from *Stephenson I*, which stated that the *Stephenson* criteria "include the requirement that districts should be compact and contiguous. If a given district fails to meet either element of this requirement, the district is non-compliant with *Stephenson*."

constitutional restraints on the General Assembly's discretion in drawing new electoral districts following each census. These constitutional constraints are:

(1) the Good of the Whole Clause in N.C. Const. art. I, § 2;

(2) the fundamental right to vote, as guaranteed by N.C. Const. art. VI, § 1 and as protected by the Equal Protection Clause in N.C. Const. art. I, § 19; and

(3) the arbitrary and capricious legislation prohibition in the Law of the Land Clause in N.C. Const. art. I, § 19.

Below, Plaintiffs will show that they have stated valid claims for relief upon each of these constitutional grounds.

A. Plaintiffs State a Claim for Violations of the Good of the Whole Clause Under Article I, § 2 of the North Carolina Constitution

In their First Amended Complaint, the *Dickson* Plaintiffs allege that one of the limitations imposed by the people on the General Assembly when redrawing legislative and congressional districts is that such legislation must be for "the good of the whole." N.C. Const. art. I, § 2. Defendants claim that the Constitution contains no such enforceable limitation, but that argument is incorrect.

Article I of the Constitution is entitled "Declaration of Rights." It establishes the "essential principles of liberty and free government" that constrain the General Assembly's power to make the law. The second of those essential principles is:

> All power is vested in and derived from the people; all government of right originates from the people, is founded on their will only, and is instituted solely for the good of the whole.

N.C. Const. art. I, § 2. There is nothing ambiguous or uncertain about the meaning of these words. The people of this State approved the Constitution on condition that the General Assembly would exercise its power to make the law for the good of all the people, not just some of the people.

1. The Case Law Clearly Demonstrates that the Good of the Whole Clause is Justiciable

Numerous cases demonstrate that the Good of the Whole Clause contained in Article I, Section 2 does place substantive limitations upon the actions of the government. In *Hinton v. Lacy*, 193 N.C. 496, 137 S.E. 669 (1927), the Supreme Court stated that the Good of the Whole Clause substantively limits the actions of the North Carolina General Assembly. In *Hinton*, the plaintiff challenged the constitutionality of certain bonds issued by the State in order to finance home-loans to World War I veterans. The Supreme Court evaluated the constitutionality of the bonds under several clauses of the North Carolina Constitution, including the Good of the Whole Clause. The Court stated as follows:

> The second section of Article I of the present Constitution (1868) says: "That all political power is vested in, and derived from, the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole."
>
> The present act, we think, is … for the good of the whole, and comes clearly within the limitations and restrictions of the Constitution of this State.
>
> […]
>
> What is … for "good of the whole" has given rise to no little judicial interpretation and consideration. Some courts have taken a liberal view, and to a great extent left it to the determination of the Legislature and referendum of popular vote, but we should ever be mindful that the Constitution to a great extent is the rudder to keep the ship of State from off the rocks and reefs.

Hinton, 193 N.C. 496 at 501, 509, 137 S.E. at 672, 676 (emphasis supplied).

Hinton was decided under the North Carolina Constitution of 1868, as amended.[3] When a new North Carolina Constitution was enacted in 1971, the drafters re-emphasized that the

[3] The Good of the Whole Clause has appeared in its present form unchanged since at least the North Carolina Constitution of 1868.

provisions of Article I of the Constitution are not mere admonitions. That much is made clear by the report of the drafters of the 1971 Constitution, which stated:

> In order to make clear that the rights secured by the declaration of rights <u>are commands and not merely admonitions</u> to proper conduct on the part of the government, the words "ought" and "should" have been changed to shall throughout the declaration.

Report of the North Carolina State Constitution Study Commission (1968) (emphasis supplied). Indeed, it is axiomatic that the provisions set forth in the Declaration of Rights provide for justiciable rights; otherwise, those constitutional provisions would be meaningless.[4] "The civil rights guaranteed by the Declaration of Rights in Article I of our Constitution are individual and personal rights entitled to protection against state action." *Corum*, 330 N.C. at 782, 413 S.E.2d at 289 (1992). "The very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State." *Id.* at 783, 413 S.E.2d at 290. "It is axiomatic under our system of government that the Constitution within its compass is supreme as the established expression of the will and purpose of the people. Its provisions must be observed by all … . It is not in accord with the nature of written constitutions to incorporate nonessential or unimportant details which may be dispensed with." *Advisory Opinion in re House Bill No. 65*, 227 N.C. 708, 713, 43 S.E.2d 73, 76 (1947). If the Good of the Whole Clause is to mean anything, as it must, then

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[4] Many other provisions in the Declaration of Rights are just as abstract, if not more abstract, than the Good of the Whole Clause, yet North Carolina courts have consistently found justiciable issues arising out of these other provisions. *See, e.g., Lowe v. Tarble*, 313 N.C. 360, 329 S.E.2d 648 (1985) (holding that N.C.G.S. § 24-5 did not violate the Law of the Land Clause of Article I, Section 19); *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 515 S.E.2d 675 (1999) (holding that Article I, Section 18 of the North Carolina Constitution, the Open Courts Clause, granted the public a judicially-enforceable, qualified right to attend civil court proceedings); *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940) (treating Article I, Section 1, "enjoyment of the fruits of their own labor," as justiciable); *Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997) (treating Article I, Section 15, the "right to the privilege of education," as justiciable). The abstract language of these other provisions in the Declaration of Rights has not precluded North Carolina's Supreme Court from nonetheless treating them as justiciable and judicially-enforceable.

individuals must be able to rely on it when the legislature institutes a new form of government. And if individuals are entitled to rely on it, then courts must have the power to enforce it.

Additionally, recent court decisions confirm that the Good of the Whole Clause is a source of substantive law and not merely precatory. In 1996, the Court of Appeals, relying upon the Good of the Whole Clause, unanimously held that Division of Motor Vehicles ("DMV") was prohibited from re-litigating the issue of probable cause in a civil license-revocation proceeding, where that issue had been adjudicated in a prior criminal proceeding. *See Brower v. Killens*, 122 N.C. App. 685, 688, 472 S.E.2d 33, 35 (1996). The Court of Appeals followed *Brower* three years later in *State v. Summers*, 132 N.C. App. 636, 513 S.E.2d 575 (1999), and again quoted the Good of the Whole clause to hold unanimously that a district attorney was prohibited from re-litigating certain issues that had been adjudicated by the DMV in a prior civil license-revocation proceeding. The North Carolina Supreme Court affirmed that decision in an opinion by Justice Lake, with no dissent. *See State v. Summers*, 351 N.C. 620, 528 S.E.2d 17 (2000).

Even more recently, in *Stephenson I*, the Supreme Court affirmed in relevant part the trial court's holding that several constitutional provisions (including Article I, Section 2) required the courts to "harmonize" the North Carolina Constitution with federal law, in order to avoid invalidating any constitutional provisions, to the extent possible. (In *Stephenson I*, the specific clauses that conflicted with federal law were the Whole-Counties Provisions.) The trial court held as follows:

> The Court concludes that Article I, Sections 2, 3, and 5, require that the North Carolina Constitution should be harmonized with any applicable provisions of federal law, so as to avoid any conflict between the North Carolina Constitution and federal law.
>
> Under a harmonized interpretation of Article I, Sections 2, 3, and 5 and Article II, Sections 3(3) and 5(3), the North Carolina Constitution prohibits the General Assembly from dividing

> counties into separate Senate and House districts, except to the extent that counties must be divided to comply with federal law.

Stephenson I, 355 N.C. at 359, 562 S.E.2d at 382.

The Supreme Court affirmed this portion of the trial court's holding (which was referred to as the "State Constitutional Analysis").[5] The Supreme Court wrote as follows:

> North Carolina courts should first determine whether provisions of the State Constitution, as interpreted under state law, are inconsistent with federal law before applying a severability analysis. Where, as here, the primary purpose of the WCP can be effected to a large degree without conflict with federal law, it should be adhered to by the General Assembly to the maximum extent possible.

Id. at 374, 562 S.E.2d at 391. The Supreme Court's holding in *Stephenson I* thus confirms that Article I, Section 2 of the North Carolina Constitution is a source of substantive law.

The Supreme Court also emphasized that when courts construe the North Carolina Constitution in the context of redistricting disputes, the courts must consider the public's interest in avoiding "unnecessarily complicated and confusing district lines":

> [O]ur holding accords the fullest effect possible to the stated intentions of the people through their duly adopted State Constitution, the subject provisions of which have remained in place without amendment since 1971. [The] "all-or-nothing" interpretation [which was argued by the appellants, in support of totally invalidating the Whole-Counties Provision] is inordinately mechanical in its application, leaving no room to carry out the spirit or intent of the State Constitution in contravention of time-honored principles of federalism. This construction <u>needlessly burdens millions of citizens with unnecessarily complicated and confusing district lines</u>.

Stephenson I, 355 N.C. at 375, 562 S.E.2d at 392 (emphasis supplied and internal citations omitted). The public interest identified in *Stephenson I* is, of course, the crux of the *Dickson*

[5] *Stephenson I*, 355 N.C. at 361-75, 562 S.E.2d at 383-92. The Supreme Court modified the "Remedial" portion of the trial court's judgment to create new criteria for compliance with the Whole Counties Provision. *See id.* at 375-86, 562 S.E.2d at 392-98 ("Remedial Analysis").

Plaintiffs' "good of the whole" claims, which allege that the Defendants unnecessarily divided precincts, communities of interest, and towns, resulting in unnecessarily "complicated" and "confusing" district lines.

Just four years after issuing its opinion in *Stephenson I*, the North Carolina Supreme Court emphasized that the administration of elections in North Carolina is founded upon the precinct system. As the North Carolina Supreme Court stated in *James v. Bartlett*, 359 N.C. 260, 607 S.E.2d 638 (2005):

> The precinct voting system is woven throughout the fabric of our election laws. *See, e.g.*, N.C.G.S. § 163-128 (2003) (stating that counties shall be divided into precincts for the purpose of voting); N.C.G.S. § 163-82.15 (2003) (requiring that a voter report a move to a new precinct and vote in that precinct); N.C.G.S. § 163-85(c)(3) (2003) (allowing that any voter may be challenged on the basis that he does not live in the precinct where he attempts to vote); N.C.G.S. § 163-87 (2003) (providing that on the day of a primary or election, at the time a registered voter offers to vote, any other registered voter of that precinct may challenge); N.C.G.S. § 163-88 (2003) (requiring that a challenged voter prove his continued residency in the precinct and that the challenge shall be heard by the chief judge and judges of election of the precinct).

James, 359 N.C. at 267, 607 S.E.2d at 642. Indeed, the Supreme Court held in *James* that the precinct system is so important, that if a voter were to mistakenly cast a provisional ballot outside of her correct precinct, the provisional ballot could not be counted for any reason—not even for a statewide race.[6] *Id.* at 271, 607 S.E.2d at 645.

The preceding survey of North Carolina authorities clearly establishes that the Good of the Whole Clause is justiciable, and that the General Assembly must avoid drawing

[6] In response, the General Assembly enacted legislation apparently intended to cure that harsh result, *see* 2005 S.L. 2, s. 3, but the effectiveness of that legislation has not been tested in an appellate court. Additionally, the Board of Elections does not appear to have revised an important regulation that served as a significant basis for the court's ruling. *See* 8 N.C.A.C. 10B.0103.

unnecessarily complicated and confusing district lines, including but not limited to the unnecessary splitting of precincts.

2. Defendants Ignore the Special Limitations Imposed on the General Assembly by the Good of the Whole Clause when Drawing New Electoral Districts Following the Census

The Defendants argue that "vague concerns about the 'good of the whole' plainly do not justify intervention" and that the Courts "have [no] role in second-guessing the Legislature's political decisions." (Defendants' Memo p. 22) (citing *Kornegay v. Goldsboro*, 180 N.C. 441, 105 S.E. 187 (1920)). That particular case is interesting, because it involves a fact pattern similar to *Hinton v. Lacy*, which was the first case that the *Dickson* Plaintiffs discussed at length in support of their Good of the Whole Claims. Both cases involved a challenge to the constitutionality of bonds issued by governmental authorities. *Kornegay*, which was decided in 1920, did not even mention the Good of the Whole Clause. *Hinton*, which was decided in 1927, explicitly cited the Good of the Whole Clause and stated that the Constitution "to a great extent is the rudder to keep the ship of State from off the rocks and reefs."

As *Stephenson I* illustrates, redistricting is plainly one of those types of cases where the courts' role is "to keep the ship of State from off the rocks and reefs." Contained within the concepts reflected in Article I, Section 2 (which was expressly relied upon by the Court in *Stephenson I*) is a limitation on the powers of the General Assembly with regard to redistricting: "All government of right … is instituted only for the good of the whole." The sole form of legislation enacted by the General Assembly by which the government "is instituted" is the decennial legislation redrawing legislative and congressional districts. That is the plain meaning of "to institute," which has been defined as: "to set up; establish: to institute a government."[7] When the General Assembly enacts ordinary laws to protect the public health, welfare or safety,

[7] The Random House Dictionary of the English Language, Unabridged Edition (1981).

it does not "institute" laws, but when the General Assembly redraws legislative and congressional districts every ten years, it "institutes" a new form of government.

Even if the framers of the Constitution conceivably intended to assure that ordinary legislation is for "the good of the whole" by making legislators accountable to the public at elections held every other year, that check does not exist for redistricting legislation. The Constitution itself provides that once "established," legislative districts "shall remain unaltered until the return of another decennial census of population taken by order of Congress." N.C. Const. art. II, §§ 3(4) and 5(4).

Additionally, imposing heightened limitations on the General Assembly when it institutes a new government through the redrawing of electoral districts is entirely consistent with the plan of our Constitution. Just as districts must be drawn "solely for the good of the whole," so too the Constitution itself may not be changed merely upon a majority vote of both the Senate and House. That power is expressly reserved to the people, either through a Convention of the People followed by a vote of the People, or through legislation approved by a three-fifths vote of both the House and Senate, followed by a vote of the People. N.C. Const., art. XIII, §§ 2-4.

Thus, even if the Defendants are correct that "vague concerns about the 'good of the whole' plainly do not justify intervention" in all circumstances, it is clear that redistricting litigation raises heightened concerns, which, in this case, require the Court to hear the *Dickson* Plaintiffs' claims on their merits.

3. Defendants' Legal Authorities are not Controlling, or Even Persuasive

Defendants argue that the Good of the Whole Clause is only an admonition from the people to the General Assembly, and that such admonition is not enforceable by the courts. In support of that argument, Defendants rely upon only two additional authorities to any significant degree, namely: a constitutional treatise[8] by Professor John Orth and a decision by the Western District of North Carolina in *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C. 1992).

Professor Orth has argued that "because of their abstractness" the provisions of Sections 2 (and 3) of Article I of the Constitution "do not give rise to justiciable rights." Orth Treatise p. 40. Professor Orth cites no North Carolina authority[9] for this conclusion, including *Hinton v. Lacy*. Additionally, the treatise cited by the Defendants was written before the courts' recent decisions in *Brower v. Killens*, *State v. Summers*, and *Stephenson v. Bartlett*, all of which expressly discuss and rely upon the Good of the Whole Clause. On this particular issue, therefore, Professor Orth's unsupported assertions must be accorded little weight.

Similarly, the decision in *Pope v. Blue* is neither binding nor persuasive. Notably, the plaintiffs in *Pope v. Blue* asserted only claims arising under federal law, not state law. The federal district court was not called upon to construe the North Carolina Constitution or to even consider, in passing, whether the Good of the Whole Clause is justiciable. Moreover, the *Dickson* Plaintiffs have not asserted a political gerrymandering claim under either state or federal

[8] John V. Orth, *The North Carolina State Constitution: With History and Commentary* (1993) (cited hereinafter as "Orth Treatise").

[9] Professor Orth notes that the "key phrases" of Section 2 of the North Carolina Declaration of Rights "were copied from "a section of the Virginia Declaration of Rights." Orth Treatise p. 40. Professor Orth is probably referring to either Section 2 or Section 3 of the Virginia Declaration of Rights. Notably, the Supreme Court of Virginia has held that Article I, Sections 2 and 3 of the Virginia Declaration of Rights are sources of substantive law. *See, e.g., Commonwealth v. Morris*, 3 Va. 176 (1811) (holding that Article I, Section 2 of the Virginia Constitution required that a special defense be made available in a prosecution for criminal libel).

law. Their position is simply that partisanship is not a defense to any of their state constitutional claims. For example, partisanship is not a defense to the Plaintiffs' claim that splitting precincts and counties is not for the "good of the whole" in violation of Article I, Section 2 of the Constitution. *Pope v. Blue* simply does not apply.[10]

For these reasons, the primary authorities that the Defendants rely upon in opposition to the *Dickson* Plaintiffs' Good of the Whole claims provide little, if any, guidance to the Court.

4. Concluding Remarks about the Good of the Whole Clause and Split Precincts

The *Dickson* Plaintiffs cited numerous cases holding that the Good of the Whole Clause is justiciable and that it is a source of substantive law (particularly in the context of redistricting). The case law also establishes that courts must consider the public's interest in avoiding "unnecessarily complicated and confusing district lines." The *Dickson* Plaintiffs' extensive allegations establish that the General Assembly divided far more precincts and other communities of interest than was necessary. The Defendants have cited no compelling authority in opposition to these claims; indeed, some of the Defendants' arguments are blatantly contradicted by the leading case, *Stephenson I*.

[10] The *Pope* case is interesting for one reason only, in that it strangely foreshadows the facts of this case. The plaintiff in *Pope* wanted the General Assembly to "program a computer" to draw targeted redistricting maps, but his request was rejected. In 2011, that goal was achieved, to disastrous effect. The computer-generated legislation was so complicated that when the General Assembly submitted it to the U.S. Department of Justice for preclearance, the Defendants failed to discover that the legislation failed to assign nearly a half-million voters to a state House, Senate, or Congressional district. If the Defendants and other people in charge of the state bureaucracy were not able to detect an error of that magnitude, surely a substantial risk exists that numerous errors will result when this complicated legislation is implemented 100 different times on the county level. Moreover, it took about three months for the Defendants to announce the error. If even a fraction of the errors were to occur on the county level, and if it takes three months or more to discover such errors (if ever), then the result is going to be an administrative catastrophe.

For the foregoing reasons, the Court should deny the Defendants' Motion to Dismiss as to the Plaintiffs' claims that allege violations of the Good of the Whole Clause (Claims One through Four).

B. Plaintiffs State Valid Claims for Relief under the Right to Vote and Equal Protection Clauses of Article VI, § 1 and Article 1, § 19 of the North Carolina Constitution

Plaintiffs' Ninth and Tenth Claims for Relief assert that the Senate and House Redistricting Plans violate their rights to vote and to equal protection under Article VI, § 1 and Article 1, § 19 of the North Carolina Constitution. The factual predicate for this claim is (1) that the State House and Senate plans create two classes of voters, (a) the approximately 2,000,000 citizens who have been assigned to exercise their right to vote in districts that include split precincts and (b) all remaining citizens who have been assigned to exercise their right to vote in districts comprised of whole precincts; and (2) that the voters in districts containing split precincts are disadvantaged (a) because they are more likely to be confused about where to vote and who to vote for and (b) because the candidates in their district are less likely to know who their constituents are. Based on this factual predicate, Plaintiffs claim that legislation treating citizens differently with regard to their right to vote is unconstitutional, unless the legislature had a compelling reason for treating voters differently, and unless it narrowly tailored the legislation to meet that compelling interest.

Defendants have moved to dismiss these claims but have not advanced any specific arguments in support of their motion. Defendants' silence is understandable. These claims are squarely grounded on the right to vote and equal protection principles recently explained by the North Carolina Supreme Court, particularly in *Stephenson I,* in which the court held: "It is well settled in this State that the right to vote on equal terms is a fundamental right." 355 N.C. at 393, 562 S.E.2d at 393. The Court further held that impermissible classifications of voters

"necessarily implicate the fundamental right to vote on equal terms, and thus strict scrutiny is the applicable standard" for measuring the constitutionality of the challenged classification. *Id.*; *see also Libertarian Party v. State*, 365 N.C. 41, 707 S.E.2d 199 (Mar. 11, 2011) (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986) (recognizing the importance of "avoidance of 'voter confusion'")).

The classification questioned in *Stephenson I* and held to implicate the fundamental right right to vote was the assignment of some voters to multi-member districts and the assignment of others to single member districts. As the Court observed, voters assigned to multi-member districts "invariably suffer the adverse consequences described by the United States Supreme Court: unwieldy, confusing and unreasonably lengthy ballots and minimization of minority voting strength." 355 N.C. at 377, 562 S.E.2d at 393. And so it is with the construction of some electoral districts out of pieces of precincts and other districts out of whole precincts. Those voters residing in districts formed from pieces of precincts are likely to suffer confusion as to where they vote and for whom they may vote; and they are likely to be confronted with unwieldy ballots.

Dividing a few precincts to protect the voting rights of minority citizens constitutes a sufficiently weighty intent to justify the voter confusion resulting from those splits. Consigning 2 million voters to electoral districts made out of pieces of precincts is not justifiable under any measure.

For the foregoing reasons, the Court should deny the Defendants' Motion to Dismiss as to the Plaintiffs' claims that allege violations of the fundamental right to vote, as protected by the Equal Protection Clause (Claims 19 through 21).

C. Plaintiffs State Valid Claims for Relief for Violation of the Law of the Land Clause of Article I, § 19 of the North Carolina Constitution

Plaintiffs' Fifth, Sixth, and Seventh and Eighth Claims for Relief are based on the prohibition in Article I, Section 19 of the North Carolina Constitution against arbitrary and capricious legislation. The Fifth and Sixth Claims for Relief posit that forming legislative districts from pieces of precincts is arbitrary and capricious and in excess of the General Assembly's power. Defendants, again without any focused argument, assert that these claims fail to state claims upon which relief may be granted. They are wrong.

There is no doubt that the General Assembly has broad discretion in adopting redistricting legislation. "But discretion, to be worthy of the name, is not unchanneled judgment, it is judgment guided by reason and kept within bounds." The Law of the land Clause of the North Carolina Constitution defines the limits on the General Assembly's discretion in enacting legislation. Under this Clause, the Courts have the duty "to grant relief against unreasonable and arbitrary state statutes." *Lowe v. Tarble*, 313 N.C. 460, 462, 329 S.E.2d 648, 650 (1983). "Whether a state statute violates the law of the land Clause 'is a question of degree and reasonableness in relation to the public good likely to result from it.'" *Id.* (quoting *In Re Hospital*, 282 N.C. 542, 550, 193 S.E.2d 729, 735 (1973)).

The General Assembly itself has specifically and directly answered this question with regard to split precincts. In G.S. §§ 120-2.2, 163-201.2, and 163-132.1B, the General Assembly declared that precincts should not be split. Those statutes were in full force and effect when the General Assembly enacted the House and Senate plans, but the General Assembly chose not to honor them. When a city acts in excess of its powers its act is arbitrary and capricious. *See Amward Homes, Inc. v Town of Cary*, ___ N. C. App. ___, 698 S.E.2d 404, 422 (2010) (holding that a town acts arbitrarily and capriciously in violation of the Constitution when it acts without

authority), *aff'd* ___ N.C.___, 716 S.E.2d 849 (2011). By the same token, the General Assembly acts arbitrarily and capriciously when it draws legislative districts in contradiction of its own laws.

Plaintiffs' Seventh and Eighth Claims for Relief are also based on the constitutional prohibition protecting citizens against arbitrary and capricious legislation and posit that the General Assembly arbitrarily and capriciously formed several congressional district by stringing together pieces of counties.

Congressional District 4 is one example; it was formed entirely from pieces of counties and contains no whole county. (First Amended Complaint ¶¶ 385-86). Only once in the State's history has the General Assembly formed a congressional district entirely from pieces of counties. That, of course, was the 12th Congressional District, which was formed from pieces of counties in 1992 in response to demands from the U.S. Department of Justice. *See Shaw*, 517 U.S. at 913, 116 S. Ct. at 1904 (1996) (describing the origin of the 12th district in the infamous "black max" policy of the US Department of Justice). The construction of the 4th Congressional District entirely from pieces of counties cannot be explained on VRA grounds. Thus, the question raised here is whether there is any explanation for the construction of District 4 solely from pieces of counties, and whether any such explanation has any relationship to the public good. The Supreme Court has stated that "[c]ounties play a vital role in many areas touching the everyday lives of North Carolinians." *Stephenson I*, 355 N.C. at 365, 562 S.E.2d at 386. "They constitute a distinguishing feature in our free system of government. It is through them, in large degree, that the people enjoy the benefits arising from local self-government and foster and perpetuate that spirit of independence and love of liberty that withers and dies under the baneful influence of centralized systems of government." *Id.* Only Defendants can explain their reasons

for the wholesale rendering of seven counties into separate congressional districts and only after that explanation is provided can this court determine whether that explanation is neither arbitrary nor capricious.

For the foregoing reasons, the Court should deny the Defendants' Motion to Dismiss as to the Plaintiffs' claims that allege violations of Claims 5 through 10, which allege violations of the Law of the Land Clause.

VII. Plaintiffs State Valid Claims for Relief Based on Violations of N.C. Gen. Stat. §§ 120-2.2 and 163-201.2

(Response to Section V-C of the Defendants' Memorandum)

In addition to the foregoing State constitutional restraints on the General Assembly's discretion in drawing new electoral districts, the General Assembly is specifically prohibited by statute from splitting precincts, except to the extent necessary to comply with federal law. *See* G.S. §§ 120-2.2 (State House and Senate) and 163-201.2 (Congressional). Moreover, when splitting precincts to comply with federal law, the General Assembly may split only the minimum number of precincts necessary. *Id.* Those statutes were in full force and effect when the General Assembly enacted the 2011 Plans, but the General Assembly choose not to honor them.

The Plaintiffs argue that these statutes are not enforceable *at all* (even in non-Voting Rights Act counties) because they have not been pre-cleared by the United States Department of Justice. That argument, however, is directly contrary to *Stephenson I*, which stated "that reconciliation is a fundamental goal, be it in constitutional or statutory interpretation, and North Carolina courts should make every effort to determine whether State provisions, as interpreted under State law, are inconsistent with controlling federal law before applying a severability analysis to strike State provisions as wholly unenforceable." 355 N.C. at 370, 562 S.E.2d at 389.

The Plaintiffs also argue that the statutes have been impliedly repealed by the General Assembly, simply by the enacting of the new redistricting maps. However, "[r]epeals of statutes by implication are not favored, and the presumption is always against implied repeal." *McLean v. Durham County Board of Elections*, 222 N.C. 6, 8-9, 21 S.E.2d 842, 844 (1946) (holding that a particular election law did not impliedly repeal a previously-enacted law).

For the foregoing reasons, the Court should deny the Defendants' Motion to Dismiss as to Claims 17 and 18, which allege violations of the statutory prohibition against dividing diving precincts, G.S. §§ 120-2.2 (State House and Senate) and 163-201.2 (Congressional).

CONCLUSION

The Court should deny the Defendants' Motion to Dismiss.

Respectfully submitted this the 4th day of January, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing ***MEMORANDUM IN RESPONSE TO DEFENDANTS' MOTION TO DISMISS*** on counsel for Defendants by depositing a copy thereof in an envelope bearing sufficient postage in the United States mail, addressed to the following persons at the following addresses:

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Additionally, a copy of the foregoing document was served on counsel for Plaintiffs in *NAACP v. State of North Carolina*, Wake County Superior Court Case No. 11-CVS-16940, via e-mail to the following e-mail addresses:

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This the 4th day of January, 2012.

Edwin M. Speas