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*)

PLAINTIFFS' JOINT MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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NOW COME Plaintiffs Margaret Dickson, *et al.,* and North Carolina State Conference of Branches of the NAACP, *et al.,* and submit this memorandum of law in support of their joint motion for a preliminary injunction.

STATEMENT OF CASE

Individual citizens throughout the state of North Carolina and four non-profit, non-partisan organizations initially filed these consolidated cases on November 3rd and 4th, 2011, seeking declaratory and injunctive relief to prevent the implementation of legislative and

congressional redistricting plans enacted by the North Carolina General Assembly that violate the United States and North Carolina constitutions. After new legislation was passed in November, Amended Complaints were filed on December 9th and 12th.

Defendants filed Answers on December 19th, and filed a motion to dismiss all claims in their entirety. Eleven business days after receiving the Answers, on January 6, 2012, Plaintiffs jointly filed a motion for a preliminary injunction, pursuant to Rule 65 of the North Carolina Rules of Civil Procedure, supported by twenty-six affidavits and various materials from the legislative record. Service of the motion was made in compliance with the terms of paragraph 8 of the Court's Order and Case Management Scheduling Order herein dated December 19, 2011. Pursuant to N.C. R. Civ. P., Rule 6(d), Plaintiffs noticed a hearing on the preliminary injunction motion for five business days after filing the motion, January 13, 2012.

STATEMENT OF FACTS

I. The Legislative Process

The General Assembly's Senate plan, "Rucho Senate 2"and Congressional plan, "Rucho-Lewis 3" were passed on July 27, 2011. The House plan, "Lewis-Dollar-Dockham 4" passed on July 28, 2011. Defs' Answer to First Am. Compl. in Case No. 11 CVS 16940 (hereinafter "Defs' Answer to NAACP") ¶¶ 62-65. All three redistricting plans were drawn by individuals other than the legislative staff. Defs' Answer to Dickson ¶ 77. No African-American Representatives or Senators voted for any of the three enacted plans. Defs' Answer to NAACP ¶ 66.

The North Carolina Attorney General submitted the 2011 House, Senate and Congressional Plans to the United States Department of Justice for preclearance under Section 5 of the Voting Rights Act on September 2, 2011. Defs' Answer to NAACP ¶ 67. Problems caused by the excessive number of split precincts began to arise before the plans were even

implemented. On November 1, 2011, the three plans as intended to be adopted by the General Assembly were precleared by the United States Department of Justice. Defs' Answer to NAACP ¶ 69. Earlier that day, counsel for the Defendants alerted the Department of Justice that there was an error in the software code used to translate the maps in Maptitude into language for insertion into a bill draft that resulted in the omission of scores of Census blocks. Defs' Answer to NAACP ¶ 70. The error affected only Census blocks where the Census block was in a block group or tract that was wholly contained within one segment of a voting tabulation district split between two or more districts. Defs' Answer to NAACP ¶ 71.

On November 7, 2011, the General Assembly passed curative legislation to assign all the areas left unassigned by the House Redistricting Plan, 2011 S.L. 402. Defs' Answer to NAACP ¶ 72. The revised Plan was enacted into law as 2011 S.L. 416. *Id*. The same day, the General Assembly passed curative legislation to assign all the areas left unassigned by the Senate Redistricting Plan, 2011 S.L. 404. *Id.* ¶ 73. The revised Plan was enacted into law as 2011 S.L. 413. *Id*. The Department of Justice precleared the legislation on December 8, 2011. *Id.* ¶ 74.

II. Plaintiffs' Evidence of Irreparable Injury in the Absence of an Injunction

Numerous election officials document the difficulties of trying to conduct elections using split precincts. Gilbert Aff. ¶ 11, 13-14; Fedrowitz Aff. ¶¶ 17, 21-24; King Aff. ¶¶ 4-5; Hopkins Aff. ¶¶ 9-13. Most notably, problems with voters not receiving the correct ballots have led to contested elections, and new elections being ordered. Hall Aff. ¶ 31; King Aff. ¶¶ 6-10; Hopkins Aff. ¶ 10. Additionally, split precincts may result in election returns that are reported in a way that allows an individual voters' vote to be determined from the public record. Hall Aff. ¶¶ 35-36; Hopkins Aff. ¶¶ 7-8.

Individual voters testified in their affidavits to the difficulties of providing information about elections when district boundaries are irregular and precincts are divided. Stohler Aff. ¶¶ 11-14; Albert Brown Aff. ¶¶ 8-9; Staten Aff. ¶ 9; Patterson Aff. ¶ 9; Rainey Aff. ¶ 5; Waddle Aff. ¶ 6. The organizational plaintiffs documented the ways in which non-compact election districts and divided precincts make it more difficult for them to engage in voter education and civic engagement activities. Barber Aff. ¶ 10; Nicholas Aff. ¶¶ 9-15; Hall Aff. ¶ 14; Montford Aff. ¶¶ 14-19. Individuals testified about the insult to their dignity from having to participate in an election process tainted by discrimination based on race. Staten Aff. ¶ 10; Lester Aff. ¶ 12; White Aff. ¶ 10.

III. Plaintiffs' Evidence Showing Likelihood of Success on the Merits

Defendants admit in their Answer to the Dickson complaint that African-American candidates have previously and repeatedly been elected in six Senate districts, eight House districts and in Congressional Districts 1 and 12, all of which, at the time of their election, were under 50 percent black in voting age population. Plaintiffs' expert Dr. Theodore S. Arrington, Ph.D., confirms that based on his racially polarized voting studies, the level of concentration of Black VAP necessary for African Americans to elect their candidates of choice to be approximately 42%. Arrington Aff. ¶ 24.

Numerous affidavits explain why segregating black voters into more highly concentrated majority-black districts defeats the progress already made towards eliminating harmful racial stereotypes, racial isolation and racially divisive politics in North Carolina. Barber Aff. ¶¶ 14-16; Hall Aff. ¶¶ 14, 25-27; Garrou Aff., attached letter, 1-5; Staten Aff. ¶ 10; Lester Aff. ¶ 12; White Aff. ¶ 10. Indeed, during the redistricting process, citizens from around the state overwhelmingly objected to the packing of black voters in the "voting rights districts" first proposed by the

redistricting committee chairs. Transcript of North Carolina General Assembly Public Hearing on Redistricting, June 23, 2011, at 12, 19, 23, 27, 33, 35, 42, 88, 183. There are no facts in the record to support the notion that packing black voters was necessary in any of these redistricting plans to prevent a finding of Section 2 liability for vote dilution.

During the redistricting process the redistricting committees issued statements along with the release of their redistricting plans, admitting that racial considerations predominated over all other criteria in the drawing of the majority-black House and Senate districts and in Congressional Districts 1 and 12. Joint Statement of Sen. Rucho and Rep. Lewis, July 12, 2011. Defendants further admitted that they intentionally drew more districts than ever before with a black voting age population greater than 50 percent in all three plans. Defs' Mem. of Law in Supp. of Mot. to Dismiss (hereinafter "Defs'. Mem.") 34; Joint Statement of Sen. Rucho and Rep. Lewis, May 17, 2011. Further evidence showing that Congressional District 12 was based on racial considerations is demonstrated by the analysis of Dr. David Peterson, Ph.D. He analyzed the boundary segments of North Carolina's 12th Congressional District and found that race, not partisan considerations, explained the district lines. Second Aff. of Dr. Peterson ¶ 3.

Plaintiffs' expert Anthony Fairfax computed the geographic compactness measures on the enacted plans, the previous redistricting plans, and the "Fair and Legal" plans introduced during the redistricting process. His data showed that the 2011 enacted plans were all less compact than the baseline plans and less compact than the "Fair and Legal" plans. Fairfax Aff. 14. This evidence supports Plaintiffs' claims of racial gerrymandering as well as demonstrates that the 2011 enacted plans contain highly non-compact districts that violate the state constitution.

Plaintiffs' also offer evidence demonstrating that the 2011 House and Senate plans fail to comply with the North Carolina Constitution's whole county provision. Dr. Peterson conducted an analysis of the best methods to take account of county boundaries in the redistricting process. Applying that analysis to the enacted plans, he found that neither the House nor Senate 2011 enacted plans followed a process that best makes use of county boundaries and results in the smallest number of divided counties. Peterson Aff. ¶ 3. The maps demonstrate that the newly enacted State Senate plan split 19 counties and the State House plan split 49 counties. The proposed "Fair and Legal" plans split 14 counties in the State Senate and 44 counties for the State House.

Finally, Defendants admit that the 2011 House and Senate Plans divide hundreds of precincts, more than any alternative plan submitted during the redistricting process. Defs' Answer to NAACP ¶ 78. Plaintiffs' expert Dr. Theodore Arrington examined the location of the split precincts and concluded that statistically, the primary purpose of precinct splitting was to segregate the races into separate districts. Arrington Aff. ¶ 41. He also documented the voter confusion and potential impacts on turnout that will result from split precincts. Arrington Aff. ¶ 40. Plaintiffs also demonstrate that African-American voters are over 50 percent more likely than white voters to live in a split precinct. Hall Aff. ¶ 20.

ARGUMENT

I. A Preliminary Injunction Is Warranted Where the Plaintiffs Are Likely to Succeed on the Merits and Will Suffer Irreparable Injury if an Injunction Is Not Granted

Under North Carolina law, a preliminary injunction will be issued by the court "(1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court,

issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 701 (1977). When these two conditions are met, a plaintiff is entitled to injunctive relief. *Vest v. Easley*, 145 N.C. App. 70, 76 (2001).

This same standard applies even for federal claims heard in North Carolina state court, as "states may establish the rules of procedure governing litigation in their own courts." *Felder v. Casey*, 487 U.S. 131, 138 (1988). *See Capital Outdoor Adver. Inc. v. City of Raleigh*, 337 N.C. 150, 153 (1994) (applying the North Carolina Rules of Civil Procedure to a claim brought in state court under 42 U.S.C. § 1983). Here, the plaintiffs' showing of their likelihood of success and their irreparable injury if the injunction is not granted entitles them to a preliminary injunction.

II. The Plaintiffs Will Incur Irreparable Injury if Elections Proceed Under These Redistricting Plans

A. Voting Is a Fundamental Right, the Violation of Which Constitutes an Irreparable Injury

Plaintiffs will suffer irreparable harm that money damages cannot remedy if elections proceed under the enacted plans. *See Faulkner v. N. Carolina Dept. of Corr.*, 428 F.Supp. 100, 103 (W.D.N.C. 1977) (to establish irreparable harm plaintiff must simply show that "there can be no adequate compensation later."). In North Carolina, it is "well settled" that the right to vote is a fundamental right. *Stephenson v. Bartlett*, 355 N.C. 354, 378 (2002). Any violation of this fundamental, constitutional right is irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976).

The 2011 House, Senate, and Congressional redistricting plans divide 563 of the state's 2,692 precincts into more than 1,400 sections. Hall Aff. ¶ 16. Under these plans, existing communities, neighborhoods, and streets are ignored. In at least one case, residents of one-and-a-half blocks of a small neighborhood street will receive three different ballot styles for the general

election. Fedrowitz Aff. ¶ 19. These excessive precinct splits and disregard for communities of interest will lead to a high incidence of voter and election official confusion in the affected areas, preventing voters from exercising their right to vote and having those votes counted accurately. At every step of the voting process, from voter registration to educating voters to casting a ballot, new hurdles are introduced which restrict the right to vote.

These new precinct splits make the voter registration process more onerous, for voters, election officials, and civic organizations dedicated to preserving the right to vote. The confusion and frustration generated by an intimidating system of districts, and excessive precinct and neighborhood splitting, leads to voter apathy and disillusionment. Barber Aff. ¶ 17. Voter registration drives will be hampered since potential voters will not know which district they reside in, nor will those conducting drives be able to quickly inform voters of their districts or representatives. Albert Brown Aff. ¶ 9. Even once a voter successfully registers, their right to vote may still be violated as complex precinct splits, such as those in the enacted plans, increase the risk of election officials inadvertently assigning a voter to the wrong district. Gilbert Aff. ¶ 11; Hall Aff. ¶ 33.

Voters who are already registered to vote will face new hurdles in exercising their right to vote and voter education and engagement will be a more difficult task for candidates, civic organizations, and election officials. Voters in split precincts will be confronted by confusion about their political representatives, the districts they reside in, candidates they are eligible to vote for, why their neighbors have a different ballot, and information presented outside the polling place about candidates who are not on their ballot. *Id.* ¶¶ 14-15. Splitting precincts adds to the public's confusion about redistricting and who represents them. Hopkins Aff. ¶ 11. Voters will be exposed to information about various candidates running in different parts of their

neighborhood and may not know which race they will vote in until they enter the voting booth. Waddle Aff. ¶ 9. For many voters, this voting process is something they do only every four years, and complicated precinct splits and procedures leads to long lines, confusion, and errors. Arrington Aff. ¶ 17. Research shows that small increases in the "costs" of voting, such as added confusion and changing voting places, reduces voter participation, especially among the poor, who are in large part racial minorities. *Id.* ¶¶ 18-19. Since the enacted plans concentrate the splits in precincts in Black communities, the reduction in voter participation will affect Black voters more than white voters. *Id.* ¶ 18, 40.

These problems of voter confusion and depressed voter turnout will be difficult for candidates, election officials, and civic organizations to rectify. Candidates campaigning outside a precinct will be unable to identify which voters are in their district and which are not, and the presence and activities of these candidates will generate additional confusion and distrust in the system among voters who are ineligible to vote for such candidates. Gilbert Aff. ¶ 15.

Similarly, civic organizations will face greater difficulties in educating voters about where to vote and what districts they will vote in. Montford Aff. ¶¶ 15-16. Waddle Aff. ¶ 6. Media efforts by civic organizations to encourage voter participation will be hamstrung, as they become more costly and complicated when existing neighborhoods are carved into different districts. Nicholas Aff. ¶ 13. It will be more difficult to distribute nonpartisan materials about candidates to voters and voting guides must be printed in many different versions, at greater cost that could be prohibitive, in order to contain accurate information about each combination of candidates on different ballots. *Id.* ¶¶ 10-13. The microtargeting required of those seeking to educate voters given the prevalence of split precincts will likely result in less information for potential voters and a higher prevalence of inaccuracies. Yard signs, door to door canvassing,

and community candidate forums will be less effective and more difficult with split precincts that do not respect neighborhoods or traditional communities of interest. Waddle Aff. ¶ 9.

The requirement of several different ballot styles within each split precinct has the potential to infringe on Plaintiffs' right to vote as there is a greater chance of error in how the ballots are distributed and tabulated. Fedrowitz Aff. ¶ 26. Up to 18 ballot styles could be required on a single election day in a split precinct, creating a definite hazard that a voter's right to vote will be violated by receiving the wrong ballot. *Id.* ¶ 16-17. In one North Carolina split precinct in 2011, election officials accidently failed to deliver the proper election materials that were required for nearly thirty registered voters. Hall Aff. ¶ 35. This failure, caused by the confusion of the split precinct, forced a voter for endure a long delay while the materials were delivered, presenting a high risk of disenfranchisement and denial of his right to vote. *Id.*

When precinct officials must determine which of several ballots voters should receive, there is confusion both as ballots are handed out and as they are counted. Arrington Aff. ¶ 15. As many poll workers are retired senior citizens asked to work an eighteen-hour day and voters themselves may be confused about which candidates they are eligible to vote for, the likelihood of an error that would infringe on the voter's rights is significant. *Id.* ¶ 17. In fact, there are several instances in recent North Carolina elections where the wrong ballots were distributed in split precincts. King Aff. ¶¶ 6-10 (number of voters who received wrong ballots in Lenoir County precincts was sufficient to change the outcome of the election); Hopkins Aff. ¶ 10 (220 voters in a Beaufort County precinct given wrong ballots); Hall Aff. ¶ 31 (446 voters in a Mecklenberg County precinct given the wrong ballot). With a tripling of the cases of split precincts under the enacted plans, the risk of a voter receiving the wrong ballot increases. Hall Aff. ¶ 16-17; Gilbert Aff. ¶ 13.

Voters' right to the secret ballot, guaranteed by the North Carolina Constitution, is threatened by excessive use of split precincts. N.C. Const. art. VI, § 5. ("All elections by the people shall be by ballot, and all elections by the General Assembly shall be viva voce."); *Withers v. Bd. of Com'rs of Harnett County*, 196 N.C. 535, 146 S.E. 225 (1929) ("The overwhelming weight of judicial authority is to the effect that a vote by ballot implies a secret ballot."); *Jenkins v. State Bd. of Elections of N. Carolina*, 180 N.C. 169, 104 S.E. 346 (1920) ("voting by ballot, as distinguished from viva voce voting, means a secret voting."). In the 2011 municipal election, a Richmond County voter was the only voter in his precinct to vote in a particular district. Hall Aff. ¶ 35. Since election results are reported by precinct, as required by state law, the candidates this voter chose to vote for is now public record. *Id.*

New precinct splits which are even more severe under the enacted plans could isolate voters to the point that, factoring in party affiliation and low voter turnout, additional voters could have their right to a secret ballot violated. Hopkins Aff. ¶¶ 7-8. One split precinct in Beaufort County has just 123 people live in the area assigned to House District 6 under the enacted plan, with the number of registered voters even less. *Id.* In fact, in 59 of the 563 precincts split by the enacted plans, there are 50 adults or less in one section of a split precinct. Hall Aff. ¶ 36. With low voter turnout, and particularly in primary election, it is highly likely that the plans will compromise voters' constitutional right to a secret ballot in upcoming elections. *Id.*

Contrary to Defendants' contentions, the harms of split precincts have been recognized by the courts. The U.S. Supreme Court noted the harm of precinct splitting, explaining that "cutting across pre-existing precinct lines . . . 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. 952, 980-81 (1996). The likelihood of split precincts endangering the right to a

secret ballot was noted forcefully in *Johnson v. Miller*, 922 F. Supp. 1552, 1554 n.3 (S.D. Ga. 1995), "[g]iven the small number of ballots showing the specific combination of candidates, the persons later counting the few ballots of that kind actually cast might well know which ballot a particular voter cast."

The administrative difficulties for election officials and confusion for voters generated by splitting precincts, leading to infringements of the right to vote, similarly have received frequent attention by the courts. *Libertarian Party of N. Carolina v. State*, 365 N.C. 41, 51 (2011) ("the avoidance of voter confusion . . . is an important regulatory interest.") (internal quotation marks omitted); *Smith v. Clark*, 189 F. Supp. 2d 529, 539 n.5 (S.D. Miss. 2002) ("splitting precincts would cause administrative problems for election officials and confusion and frustration for voters."); *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 680 (M.D. Pa. 2002) ("splitting precincts . . . increases the potential for voter confusion and candidate confusion."); *Sullivan v. Crowell*, 444 F. Supp. 606, 614 (W.D. Tenn. 1978) ("split precincts result in confusion among voters, delays and long lines at polling places"); *Erfer v. Com.*, 568 Pa. 128, 172 (2002) ("Splitting election precincts will cause problems for ballot tabulation, counting and casting.") (internal quotation marks omitted); *State ex rel. Lockert v. Crowell*, 631 S.W.2d 702, 713 (Tenn. 1982) ("split precincts cause confusion, delays, long lines, and expenses for additional voting machines."). In *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994), the court found:

> "The effect of splitting dozens of VTD's to create Districts 18 and 29 was an electoral nightmare. . . . Polling places, ballot forms, and the number of election employees correspondingly multiplied. Voters were thrust into new and unfamiliar precinct alignments, a few with populations as low as 20 voters. In such micro-precincts, a voter might perceive that the secrecy of his or her ballot was jeopardized by the new precinct lines, especially if turnout was 50% or below."

861 F.Supp. at 1325. The harms that Plaintiffs would incur if the enacted plans were put into effect are these same harms already recognized by the courts.

These harms are irreparable since once elections are conducted under an unconstitutional system, Plaintiffs, elected officials, and other citizens cannot be restored to where they would have been if those elections had not occurred. *See Doe v. Walker*, 746 F.Supp.2d 667, 682 (D. Md. 2010). Policy choices are made that cannot be rescinded and the legitimacy of holding office and participating in elections cannot be fully restored.

B. Plaintiffs Would Suffer Irreparable Harm of Participating in an Electoral Process Tainted by Discrimination on the Basis of Race

The enacted redistricting plans divided voters into districts based on race. Data on partisan affiliation is available only at the precinct level, not at the sub-precinct level of a Census block, yet information about the racial make-up of each block was available to the redistricting map drafters. Hall Aff. ¶ 18. District lines were drawn using this racial data, splitting precincts and moving blocks with African-American voters between districts. *Id.* These precinct splits were targeted at African-American voters, who were over 50 percent more likely than white voters to be in a split precinct. *Id.* ¶¶ 19-20. The splits have the effect of segregating voters by race, as more than half of the splits result in a split precinct where the black voting age population (BVAP) in one section is at least twenty percentage points higher than the BVAP in the other section. *Id.* ¶ 21. These splits are more prevalent in racially-diverse precincts, effectively re-segregating these areas between voting districts. *Id.* ¶ 22-23. While only 3.3 percent of precincts where the voting age population is 90 percent or more white are split, and only 11.8 percent of precincts where the voting age population is 80 percent or more black, 39.9 percent of the precincts where the voting age population is between 15 and 45 percent black are split. *Id.* ¶ 23.

As the U.S. Supreme Court has said, "Classifications of citizens based solely on race are by their nature odious to a free people whose institutions are founded upon the doctrine of

equality, because they threaten to stigmatize persons by reason of their membership in a racial group and to incite racial hostility." *Shaw v. Reno*, 509 U.S. 630, 631 (1993). The enacted plans would subject Plaintiffs to the harm of being stigmatized because of their race and facing racial hostility. This harm is irreparable as once Plaintiffs are made to participate in a racially discriminatory electoral process, the harm cannot be undone by the Court.

The precinct-splitting imposed on Plaintiffs by the enacted plans also infringes on voters' right to vote and right to a secret ballot, as outlined above. *See, supra* pp. 8-13. Since African-American voters are 50 percent more likely than white voters to be in a split district, African Americans are more likely to be subjected to this infringement on their voting rights. Hall Aff. ¶ 20. This disparate impact on minority citizens similarly cannot be remedied and constitutes an irreparable harm.

The new plans pack minority voters into a smaller number of less racially-diverse districts. While the 2009 House Plan had ten districts with a BVAP over 50 percent and eleven districts with a BVAP between 39.99 and 50 percent, the 2011 House plan has 23 districts with a BVAP greater than 50 percent and just three districts with a BVAP between 30 and 50 percent. Def's Answer to NAACP ¶¶ 107-110. Similarly, the 2003 Senate plan had no districts with a BVAP greater than 50 percent and fifteen districts with a BVAP between 30 and 50 percent, while the Rucho Senate 2 Plan creates nine districts with a BVAP greater than 50 percent and just one district with a BVAP between 30 and 50 percent. Defs' Answer to NAACP ¶¶ 289-290. A similar pattern of racial segregation occurred in the drawing of Congressional Districts 1 and 12, where a majority of the voting age population is now black. Defs' Answer to NAACP ¶¶ 391, 396. Plaintiff's expert Dr. David Peterson used a technique called "segment analysis" which showed that race dominated over party affiliations in drawing District 12. Second Aff. of David

Peterson ¶¶ 3, 6, 17. This racial segregation in the redistricting plans harms Plaintiffs' not only by undermining African-American voting power, Barber Aff. ¶ 9, but also through being placed in a district based on race that disregards traditional communities of interest. Lester Aff. ¶ 12.

Plaintiffs are further harmed through the impact of being assigned to voting districts based on their race. Albert Brown Aff. ¶ 11. Drawing district boundaries that segregate black voters from their traditional communities of interest is upsetting, offensive, and insulting to those who have been treated in this discriminatory manner. Staten Aff. ¶ 10; Lester Aff. ¶ 12; White Aff. ¶ 10. Race-based districts send the message that black people can only be represented by black people, unraveling racial progress and pitting black voters against white voters. Rainey Aff. ¶ 10.

III. Plaintiffs Are Likely to Succeed on Their Claims that the Plans Are a Racial Gerrymander and Not Justified by a Compelling Governmental Interest

A. The Legal Standard to Prove an Unconstitutional Racial Gerrymander

The elements and order of proof of a racial gerrymander claim are well established. The plaintiffs must first prove that race was the dominant factor that determined the location of the lines drawn to form the challenged district. *Shaw v. Reno*, 509 U.S. 630, 643 (1990). If the plaintiff carries that burden, the *defendants* must then prove that (a) the district lines were drawn to meet some compelling interest and (b) the lines were narrowly drawn to meet that compelling interest. *Id.* If the defendants cannot meet that burden, the district is unconstitutional in violation of the equal protection clauses of the North Carolina and United States Constitutions.

Plaintiffs are likely to succeed on the merits of these claims with respect to a series of districts in all three challenged plans. The defendants have admitted that race was the dominant factor used to determine the path of the line separating ten Senate Districts, 25 House Districts and two Congressional Districts from their adjoining districts. Joint Statement of Sen. Rucho and

Rep. Lewis, July 12, 2011. That admission was compelled by the facts set out in more detail in the section that follows. The defendants can present no evidence that these admittedly race-based districts were narrowly tailored to serve a compelling state interest. Blatant misconstruction of the Voting Rights Act that goes against well-established U.S. Supreme Court precedent does not show a compelling government interest nor narrowing tailoring sufficient to survive strict scrutiny.

Neither Section 2 nor Section 5 of the Voting Rights Act requires the creation of majority black districts everywhere in the state. The U.S. Supreme Court had stated definitively that Section 5 does not require either the maximization of the number of majority-minority districts or the maximization of the number of minority voters in those districts. *Miller v. Johnson,* 515 U.S. 900, 927 (1995). Instead, "the purpose of [Section] 5 has always been to insure that no voting-procedure changes would be made that would lead to a *retrogression* in the position of racial minorities with respect to their effective exercise of the electoral franchise. *Beer v. U. S.*, 425 U.S. 130, 141 (1976) (emphasis added). Defendants' plans, which added twenty percentage points or more to the black voting age population in some districts, failed to meet the requirement that any effort to comply with this non-retrogression mandate be narrowly tailored.

Section 2 of the Voting Rights Act 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). To succeed in a Section 2 challenge, a plaintiff must show that white voters vote sufficiently as a bloc usually to defeat the minority group's preferred candidate. *Thornburg v. Gingles,* 478 U.S. 30, 48-49 (1986). This showing is a necessary precondition that must be met before a challenge can proceed, and its absence is fatal to a Section 2 claim, even if other conditions have been met. *Pender County v. Bartlett*, 361 N.C.

491, 499 (2007) *aff'd sub nom. Bartlett v. Strickland,* 556 U.S. 1 (2009). Further, in a suit alleging a racial gerrymander without a compelling government interest, the burden of proving that this precondition of a Section 2 violation is met falls on the defendants. *Id.* at 496. Far from proving that racially-polarized bloc voting existed in each of the racially-gerrymandered districts, Defendants have admitted that in **15 districts** drawn to be majority-black under the 2011 plans, African Americans were already electing African-American representatives when African-American voters comprised substantially less than 50% of the electorate. No Section 2 liability exists in these districts.

It has been over twenty-five years since any plaintiff has brought a Section 2 challenge to North Carolina's legislative districts, and no such claim has ever been brought challenging North Carolina's Congressional districts. *See* Keech and Sistrom, *North Carolina,* in Quiet Revolution in the South, Davidson and Grofman, eds. 155-190 (1994). Since 1998, there has been only one Section 2 lawsuit brought against a local jurisdiction in North Carolina, which was voluntarily dismissed by the plaintiffs. *See White v. Franklin County,* 5:03-cv-481 (E.D. N.C. 2004); Earls, Wynes and Quatrucci, *Voting Rights in North Carolina: 1982-2006*, 17 S. Cal. Rev. of Law & Social J. 577 (2008). The Defendants had no reasonable basis for believing that they would be subject to Section 2 liability for failing to draw districts with greater than 50 percent black voting age population everywhere in the state, and nothing in the *Strickland* case suggests otherwise. Indeed, the court there explained:

> '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.' If § 2 were interpreted to require crossover districts throughout the Nation, 'it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.' That interpretation would result in a substantial increase

> in the number of mandatory districts drawn with race as 'the predominant factor motivating the legislature's decision.' It would be an irony, however, if § 2 were interpreted to entrench racial differences by expanding a 'statute meant to hasten the waning of racism in American politics.'

Bartlett v. Strickland, 566 U.S. at 39 (citations omitted). Section 2 of the Voting Rights Act does not require mandatory majority-minority districts drawn with race as the predominant factor except where all the requirements of a Section 2 violation are present. While the state must retain some discretion and flexibility, "[s]trict scrutiny remains, nonetheless, strict. The State must have a 'strong basis in evidence' for finding that the threshold conditions for [Section] 2 liability are present." *Bush v. Vera*, 517 U.S. 952, 978 (1996).

As the U.S. Supreme Court has said, "It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids." *Miller v. Johnson*, 515 U.S. 900, 927-28 (1995). The racially gerrymandered maps drawn by Defendants were not required to comply with either Section 5 or Section 2 of the Voting Rights Act. Therefore, there is no compelling state interest in drawing these race-based districts or the adjacent districts from which black voters were deliberately removed.

B. The Evidence in this Case Demonstrating a Racial Gerrymander

In determining whether race was the dominant factor in determining the location of the lines of a challenged district, the courts look at:

1. Statements by the legislature and legislators and the race of the legislators voting for and against the plans.

2. The racial characteristics of the citizens in the challenged district as compared to neighboring districts.

3. The extent to which the boundaries of the district vary from existing political boundaries like county lines, city and town lines and precinct lines.

4. The shape of the districts. A plaintiff may prove race-based motive "through circumstantial evidence of a district's shape."

Bush v. Vera, 517 U.S. 971-73 (1996); *Shaw v. Hunt*, 517 U.S. 899, 905 (1996); *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

The maps, demographic data, legislative votes and legislative statements addressing these factual issues and establishing that race was the dominate factor in the design of challenged districts are catalogued in the complaint and largely have been admitted by the Defendants. The numbers demonstrating this new racial segregation across plans are uncontested by the Defendants. Twenty-three of the 120 House districts have a BVAP greater than 50 percent. Two districts have a BVAP between 45 percent and 50 percent. Defs' Answer to NAACP ¶ 107. Only three districts have a BVAP between 30 and 50 percent. Defs' Answer to NAACP ¶ 109. In comparison, the 2009 House Plan had only 10 districts with a BVAP over 50 percent. Defs' Answer to NAACP ¶ 108. Eleven districts had BVAP percentages between 39.99 percent and 50 percent. Defs' Answer to NAACP ¶110. 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 African-American Senators 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 Plan, only one 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. Defs' Answer to NAACP ¶¶ 289-290.

The same pattern of racial segregation determined the racial composition of Congressional Districts 1 and 12. The current BVAP of District 1 is 52.65 percent. Defs' Answer to NAACP ¶ 391. Under the previous plan, the BVAP of District 1 was 48.63 percent. N.C.G.A. Redistricting Website.[1] The current BVAP of District 12 is 50.66 percent. Under the previous plan, the BVAP of District 12 was 43.77 percent. N.C.G.A. Redistricting Website.[2] Defs' Answer to NAACP ¶ 396. The Redistricting Chairs admitted in a public statement that District 1 and 12 were drawn to increase the number of African Americans in the district. In a Joint Statement by Sen. Rucho and Rep Lewis, the legislators wrote: "the State is now obligated to draw majority black districts with true majority black voting age population" for Section 2 and identified District 1 as a Section 2 district. Joint Statement by Sen. Rucho and Rep Lewis Regarding the Release of Rucho-Lewis Congress 2, 3-4. Of District 12, the legislators wrote "we have drawn our proposed Twelfth District at a black voting age level that is above the percentage of black voting age population found in the current Twelfth District. We believe that this measure will ensure preclearance of the plan." *Id.* at 5.

Additionally, statistical analysis of Congressional District 12 by Plaintiff's expert Dr. David Peterson shows that racial considerations dominated over party affiliation in drawing the district. Second Aff. of David Peterson ¶ 3. Using a technique called "segment analysis," Peterson broke down the border of District 12 into segments and examined, whether, based on race and political behavior of residents just inside and outside each segment, the overall pattern suggests that race or political affiliation dominated the other in deciding where to draw the district lines. *Id.* ¶ 6. The analysis showed that race predominated. *Id.* ¶ 17.

[1]http://www.ncga.state.nc.us/gis/randr07/District_Plans/DB_2011/Congress/Congress_ZeroDeviation/Reports/DistrictStats/SingleDistAdobe/rptDistrictStats-1.pdf

[2]http://www.ncga.state.nc.us/gis/randr07/District_Plans/DB_2011/Congress/Congress_ZeroDeviation/Reports/DistrictStats/SingleDistAdobe/rptDistrictStats-12.pdf

Defendants' admissions show that African Americans have an equal opportunity to elect candidates of their choice in districts under 50 percent BVAP. A total of 15 newly majority-black districts in the 2011 plans were already electing the black candidate of choice with BVAPs under 50%. Defendants admit that seven African-American Senators were elected from eight of the districts with a BVAP between 42.52 percent and 49.70 percent in the past four election cycles. Defs' Answer to NAACP ¶ 290; Defs' Answer to Dickson ¶¶ 136, 149, 157, 173, 188, 195. In two of the newly majority black House districts, African Americans were elected in each of the four previous election cycles from districts with BVAPs between 39.99 and 45.46 percent. Defs' Answer to Dickson ¶¶ 265, 316. In District 99, an African American has won the past two election cycles with a BVAP of only 41.26 percent. *Id.* ¶ 356. In four additional House districts, African Americans were elected from BVAPs between 46.25 and 47.23 percent in the each of the last four elections. *Id.* ¶¶ 240, 248, 272, 316. Finally, two African-American Congressmen were elected from Districts 1 and 12, which have less than 49 percent BVAP. *Id.* ¶ 383, 401. Defendants now ask the Court to embrace the illogical assertion that the fact that African Americans repeatedly elect their candidate of choice does not in fact mean that they have the opportunity to elect that representative.

Ignoring the abundant evidence that African Americans are already electing their candidate of choice, Defendants admit that they intentionally drew more districts than ever before with a black voting age population greater than 50 percent in all three plans. Defs' Mem. of Law in Supp. of Mot. to Dismiss 34; Joint Statement of Sen. Rucho and Rep. Lewis, May 17, 2011. As a result, there are dramatically fewer racially diverse districts with a BVAP between 30 and 50 percent. In the name of creating an "opportunity" that African Americans already enjoy, Defendants have segregated more black and white voters behind color lines than ever before.

Plaintiffs are thus likely to succeed in their claims that districts in all three of the 2011 enacted plans were drawn in such a way that race predominated over all other redistricting criteria, but that such districts were not justified by a compelling government interest because they were not required by Section 2 or Section 5 of the Voting Rights Act.

IV. Plaintiffs Are Likely to Succeed in Proving that the Redistricting Plans Were Drawn with Unconstitutional Intent to Discriminate on the Basis of Race

Under *Arlington Heights*¸ plaintiffs must show that a governmental action neutral on its face was nonetheless made with the intent to discriminate on the basis of race. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). The *Arlington Heights* factors appropriate to examine include:

1) The impact of the challenged decision, whether it disproportionately impacted one race;
2) The historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes;
3) The specific sequence of events leading up to the challenged decision, particularly if there are departures from normal procedures; and
4) the legislative or administrative history where there are contemporaneous statements made by the decision-makers

Id. at 267-68. Here, there is evidence relating to each of these factors. Most significantly, Plaintiffs demonstrate the disparate racial impact of decisions about where to split precincts, as black voters are over 50 percent more likely than white voters to live in a split precinct. Arrington Aff. ¶¶ 13, 41; Hall Aff. ¶¶ 19-21. Race is the only factor that explains the disproportionate assignment of African-American voters to split precincts. Arrington Aff. ¶ 13. Defendants' admit that party affiliation statistics are gathered only at the precinct level, and therefore must concede that party affiliation was not the motivating factor for removing certain blocks of a precinct from a district. Defs' Answer to NAACP ¶ 92. When the map drawers

removed certain census blocks of a precinct from a district, these moves were not random, but had a statistically significant racial pattern. Arrington Aff. ¶ 13.

The removal of white state Senator Linda Garrou from District 32 in Forsyth County also illustrates intentional racial discrimination by the General Assembly. Garrou has won two primary elections against African-American candidates by margins greater than four to one, showing that Garrou is the candidate of choice for African Americans. Garrou Aff., attached Letter 3. Despite this evidence, the Redistricting Chairs "recommend[ed] that the current white incumbent for the Forsyth County Senate district not be included in the proposed Senate District 32." Joint Statement of Sen. Rucho and Rep. Lewis, May 17, 2011, 8. Their explanation was that because she is white, they did not think she was the candidate of choice of black voters: "we wanted to make sure that the people in that district have an opportunity to choose a candidate of their choice that are of the population in that district." [sic] Garrou Aff., attached Letter 4 (quoting Senator Rucho). The decisions about where to draw district lines in these plans were infected with racially discriminatory assumptions and motivations that have no justification in the law.

V. The County Splits, Precinct Splits, and Non-Compact Shape of Districts in the State's Enacted Plans Violate the Federal and State Constitutions

A. The Challenged Districts Impermissibly Split Counties in Violation of the North Carolina Whole County Provisions

North Carolina's Whole County Provisions ("WCP"), state: "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). The North Carolina Supreme Court first interpreted these provisions in *Stephenson v. Bartlett*, 355 N.C. 354 (2002) (*Stephenson I*), and further cemented that interpretation in *Stephenson v. Bartlett*, 357 N.C. 301 (2003)

(*Stephenson II*) and *Pender County v. Bartlett*, 361 N.C. 491 (2007). In *Stephenson I*, the Supreme Court found that the "intent underlying the WCP must be enforced to the maximum extent possible; thus, only the smallest number of counties necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard shall be combined, and communities of interest should be considered in the formation of compact and contiguous electoral districts." 355 N.C. at 384. Thus, the highest court in this jurisdiction interpreted these constitutional provisions to encompass more than just the number of counties split. Furthermore, the Supreme Court noted that the Whole County Provision could be applied in harmony with federal law and is enforceable to the extent that it does not conflict with the federal constitution or statutes. *Id.* at 381. Where compliance with the one-person, one-vote requirement or the Voting Rights Act do not render it impossible, the State must respect county lines.

These constitutional provisions, on their face and as interpreted by the state supreme court, represent a significant limitation on the political discretion of the state legislature in developing redistricting plans. While the provisions specifically relate to state legislative redistricting, the intent behind the provisions, as interpreted by the North Carolina Supreme Court, are more universal, and include a respect for political subdivisions and the communities of interest those political subdivisions represent. *Id.* at 384. Thus, there is nothing inherently different between the respect that should be afforded those communities and political subdivisions in a Congressional redistricting plan when compared to the respect afforded in state legislative plans. Moreover, such a reading of the *Stephenson* decisions would be in line with another area in which the *Stephenson* court read expansive restrictions into the Whole County Provision—the area of population variations amongst districts. The *Stephenson I* Court found that the WCP required population deviations between districts of no more than plus-or-minus

five percent. *Id.* at 383. Federal law only requires that the deviation for state legislative plans be within an overall range of ten percent. Thus, the *Stephenson I* Court found the Whole County Provisions, in their proper historical context, provided even more protections for voters (and restrictions on the General Assembly) than an uncontextualized reading of the provisions might indicate. And, again, the *Stephenson* Court found that these expansive protections against legislative overstepping could only be compromised in situations where strict compliance with federal law required it.

Specifically on the number of split counties, the legislative record makes clear that the State could have complied with federal law and split fewer counties in the process. The 2011 Senate Plan divides 19 counties, but an alternative introduced by Senator Nesbitt would have divided only 14 counties. As discussed above, Defendants' blatantly misconstrue the requirements of the Voting Rights Act despite countless decisions from the United States Supreme Court instructing states on the proper interpretation of that law. *Bartlett v. Strickland*, 556 U.S. 1, 43 (2009). This misconstruction of the law does not justify needless county splits.

In the 2011 House Plan, a similar result occurs. The state's enacted plan divides 49 counties, while the alternate "House Fair and Legal" plan introduced by Representative Grier Martin would have divided only 44 counties and complied with all applicable federal law. The State violated the North Carolina Constitution when it rejected plans that split fewer counties. The North Carolina Supreme Court has been clear—county splits must be compelled by compliance with the federal constitution or federal law. *Stephenson v. Bartlett*, 355 N.C. 354, 384 (2002). Moreover, *Pender County* stands for the proposition that unjustified county splits within a county grouping, and even just one such split, renders a plan unconstitutional. 361 N.C. at 493.

By showing it is possible to divide fewer counties while still complying with federal law, Plaintiffs have demonstrated a likelihood of success on the merits of their Whole County Provision claim.

B. The Number of Split Precincts in the Challenged Districts, and the Resulting Burden on Voters, Violates the Federal Equal Protection Clause and the State Constitutional Whole County Provision as Interpreted in Stephenson

The number of precincts split in the state's enacted plans, and the manner in which those precincts were split, creates a number of constitutional infirmities. First, the number of split precincts, an embodiment of a complete respect for political subdivisions, violates the North Carolina Constitution as interpreted by the *Stephenson* Court. *See Stephenson* II, 357 N.C. at 309. Second, the vast number of precincts split is not for the good of the whole and creates an invidious classification scheme—voters 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. This classification denies the fundamental right to vote on equal terms, in violation of the federal and state equal protection guarantees. Finally, the hundreds of split precincts flaunt state law and public policy. Recognizing the heightened risks and certain confusion created by split precincts, the General Assembly enacted laws—laws which remain in effect today—which prohibit the splitting of precincts in the state legislative and Congressional redistricting plans. N.C. GEN. STAT. § 120-2.2; N.C. GEN. STAT. § 163-261.2.

The pleadings and affidavits before the Court establish the number of precincts divided by the challenged plans, the number of citizens residing in those precincts, the electoral districts formed from these split precincts and the impact of splitting these precincts on voters, candidates, taxpayers and the integrity of the electoral process. These facts are:

- The House plan divides 397 precincts and the Senate plan 257 precincts.
- No other plan has ever divided so many precincts
- More than 2 million citizens reside in those precincts.
- The split precincts are located in districts the Defendants drew to create districts that had at least 50% minority population and the districts that adjoin those districts.
- Black citizens have been disproportionately assigned to split precincts and Black and white citizens have effectively been segregated into the different pieces of the split precincts.
- Splitting precincts confuses voters in the exercise of their right to vote. This confusion falls disproportionately on Black citizens.
- Splitting precincts increases the risk of errors in the voting process and thus potentially compromises the confidence of citizens in the results of elections.
- These risks and dangers to our state are the reason the General Assembly has enacted laws against splitting precincts.

These facts all demonstrate the wide ranging consequences of split precincts, and can be causally linked to those constitutional infirmities identified.

The splitting of a vast number of precincts—far beyond that which is necessary to equalize population amongst the districts and comply with federal voting rights protections—runs afoul of the *Stephenson* Court's interpretation of the Whole County Provision and its mandate for districting that respects counties (political subdivisions) and communities of interest. Defendants admit that the 2011 House and Senate Plans divide hundreds of precincts, more than any alternative plan submitted during the redistricting process. Defs' Answer to NAACP ¶ 78. The Lewis-Dollar-Dockham 4 plan divides 395 precincts and the State Senate plan divides 257 precincts. *Id.* Overall, 563 of the state's 2,692 precincts (or VTDs) were divided into more than 1,400 sections by the 720 cases of split precincts in the three plans. More than one-fourth (27.2%) of the state's voting-age population lives in these split precincts. Hall Aff. ¶ 16.

The enacted plans are more than twice as extensive as the previous plan in the number of precincts divided, number of sections created by divisions, total number of cases of split precincts in the three plans, and percent of affected population. *Id.* Data for those earlier plans showed that 253 precincts were divided into about 550 sections by 278 cases of split precincts. Using the 2000 Census data, 12.1 percent of the voting-age population lived in these splits precincts. *Id.* ¶ 17.

Voting precincts represent a distinct type of political subdivision and community of interest. Professor Arrington describes the special role that the precinct plays in minority communities—these voting districts are central to political organization, and the polling places themselves become celebrated community gathering spots. Arrington Aff. ¶¶ 20-21. Disruption of these entities have huge detrimental impacts on voter education and participation. *Id.*; Rainey Aff. ¶ 7. Complete disrespect for these tightly-knit communities of interest and political subdivisions is not in line with how the *Stephenson* court interpreted the North Carolina Constitution.

Second, the problematic scheme created by these precinct splits—voters who live in districts with large numbers of precinct splits and voters who live in district with no or few precinct splits—creates an uneven ability to exercise the right to vote, which is a violation of both the state and federal equal protection guarantees. Testimony of experts, Board of Elections staff and Plaintiffs show that these split precincts will cause certain confusion for the nearly two million voters whose neighborhoods and political communities are splintered by district lines. Arrington Aff. ¶ 40; Hall Aff. ¶ 38; Gilbert Aff. ¶¶ 14-15; Hopkins Aff. ¶ 11; Fedrowitz Aff. ¶¶ 27-28; Waddle Aff. ¶ 9; McNair Aff. ¶ 7; Davis Aff. ¶ 10; Rainey Aff. ¶ 9. Thus, voters in the first category—voters who live in districts with large numbers of precinct splits—will

undoubtedly encounter confusion at the polling place and an increased risk of their ballot being uncounted. Voters in the second category—voters who live in districts with few or no precinct splits—will face no such challenges. The United States Supreme Court, in *Bush v. Gore*, 531 U.S. 98 (2000), found an equal protection violation where a different standard was applied across the state of Florida for counting votes, saying that this "later arbitrary and disparate treatment" devalued the votes of some voters. 531 U.S. at 104-05. This is a completely analogous situation. The classification scheme created by the state's redistricting plans has established two distinct paths to the ballot box—one straightforward and one plagued by hurdles and confusion. The equal protection guarantees in the state and federal constitution clearly encompass the fundamental right to voting on equal terms for all citizens, *Id.*, and by impeding equal access to the electoral franchise, the state's redistricting plans are constitutionally flawed.

The final infirmity relating to the splitting of precincts involves the contradiction of this practice with other existing North Carolina state law. The General Assembly previously enacted laws intended to minimize the number of split precincts in statewide redistricting plans. N.C. GEN. STAT. § 120-2.2; N.C. GEN. STAT. § 163-261.2. These laws are still applicable today in counties not covered by Section 5 of the Voting Rights Act. *Stephenson v. Bartlett*, 355 N.C. 354, 369 (2002). The General Assembly passed these laws in recognition that split precincts multiply the risks of discounted and revealed ballots that cannot be tolerated for one voter let alone thousands. Based on facts and pleadings before this court, Plaintiffs have demonstrated a substantial likelihood that they will succeed in their claims that the unprecedented number of split precincts in the 2011 state legislative and congressional redistricting plans violates the state and federal constitutions.

C. *The Challenged Districts Are Unjustifiably Non-Compact, in Violation of the State Constitutional Whole County Provision as Interpreted by the North Carolina Supreme Court in* Stephenson

The North Carolina Whole County Provisions contain a mandate that the State shall draw compact districts that respect communities of interest except to the extent necessary to comply with federal law. *Stephenson v. Bartlett*, 355 N.C. 354, 383 (2002). The North Carolina Supreme Court was clear that "new redistricting plans . . . shall depart from *strict* compliance with the legal requirements set forth herein *only to the extent necessary* to comply with federal law." *Id.* (emphasis added). The evidence demonstrates a likelihood of success on the claim that the challenged House, Senate and Congressional districts are unjustifiably non-compact and disrespectful of communities of interest, in violation of the state constitution. The North Carolina Supreme Court unequivocally stated that, "non-VRA districts shall be compact" and "communities of interest should be considered in the formation of compact and contiguous electoral districts." *Id.* at 383, 385. That is, compactness can give way to compliance with the Voting Rights Act, but no further than that.

Compactness was identified as a requirement of the North Carolina Constitution in the 2011 General Assembly's "Legislator's Guide to North Carolina Legislative and Congressional Redistricting. *See* Research Division, N.C. General Assembly, "Legislator's Guide to North Carolina Legislative and Congressional Redistricting", March 2011, at 8, available at http://www.ncleg.net/gis/randr07/Maps_Reports/2011RedistrictingGuide.pdf and attached hereto as Exhibit 1. Citing the *Stephenson I* and *Stephenson II* decisions, the Guide informed legislators that "non-VRA districts shall be compact" when two or more districts may be created within a single county, and, when creating a district that combines more than one county "communities of interest should be considered in the formation of compact and contiguous electoral districts." *Id.*

Again, Defendants' egregious misconstruction of the Voting Rights Act does not justify departures from the North Carolina Supreme Court's instruction that the state constitution demands compact districts. The State has violated the WCP where more compact districts that fully complied with federal law could be drawn.

Plaintiffs have challenged a number of districts in the 2011 enacted plan as being non-compact districts with highly irregular shapes.[3] Expert analysis submitted in support of Plaintiffs' Motion for a Preliminary Injunction shows that, based on standard measures of compactness, these challenged districts in the state's enacted plans are less compact than districts proposed by the alternative plans. Plaintiffs' expert Anthony Fairfax analyzed the compactness of each of these districts being challenged, as well as the compactness of districts in the prior plan and districts in alternative plans submitted during the redistricting process. He found that the challenged plans were less compact than prior plans and less compact than those alternative plans. Fairfax Aff. 14. Where more compact options that still complied with federal law existed, the state violated the North Carolina Constitution.

Analysis of compactness can involve a methodological, scientific process. Compactness need not be measured solely by simple visual examination—it is also possible to quantify the geographical dispersion of a district's area (i.e., a district's non-compactness) using various mathematical measures. *Id.* ¶ 8. Most compactness ratios use the value of 1 to represent a perfectly compact district, and have values between 0 and 1, such that the closer the district compactness measurement computes to the value of one, the more compact the district. *Id.* ¶ 9. Using three compactness measurements combined, nine of the thirteen districts in the 2011

[3] Defendants' Answer and Dickson Complaint ¶¶ 111, 118, 125, 130, 138, 143, 151, 159, 163, 168, 175, 179, 183, 190, 197, 216, 222, 229, 233, 242, 250, 256, 261, 267, 274, 280, 284, 290, 296, 302, 307, 310, 318, 324, 330, 336, 341, 345, 348, 356, 362, 3778, 385, 390, and 397; Defendants' Answer and NAACP Complaint ¶¶ 127, 138, 149, 160, 174, 187, 201, 215, 229, 245, 267, 276, 303, 315, 326, 340, 349, 360, and 371.

enacted congressional redistricting plan are less compact than the districts in the prior plan, and eleven of the thirteen districts in the 2011 enacted plan were less compact than the "Congressional Fair and Legal" plan introduced during the redistricting process. *Id.* ¶ 18.

The 2011 enacted House redistricting plan included 91 districts that were less compact than the enacted plan for all three compactness measures. When compared to the "House Fair and Legal" plan introduced during redistricting, 78 of the districts in the 2011 enacted plan were less compact. *Id.* ¶ 30. In the 2011 enacted Senate redistricting plan, 41 of 50 districts were less compact than the same numbered districts in the prior redistricting plan and 25 districts were less compact when compared to the Senate Fair and Legal plan. *Id.* ¶ 24. Thus, these unbiased, mathematical measures confirm that all three 2011 enacted redistricting plans were overall less compact than prior redistricting plans and less compact that other redistricting plans introduced during the 2011 redistricting process.

Based on the statistical analysis of compactness, and a showing that more compact yet legal districts were squarely before the State during the redistricting process, Plaintiffs demonstrate a likelihood of success in their claim the challenged non-compact districts violate the state constitutional Whole County Provision.

VI. An Injunction Is in the Public Interest in this Case Where There Is Time to Litigate Plaintiffs' Claims and Draw New Plans Before the November Elections.

There is enough time before the November election for a trial, decision on the merits, and appellate review of the present case. Courts have been hesitant to issue injunctions delaying elections when the elections are imminent, but that concern is not present here as there are still ten months before the scheduled November election. *See Banks v. Bd. of Educ. of City of Peoria, Sch. Dist. No. 150*, 659 F. Supp. 394, 395 (C.D. Ill. 1987) (holding that a motion for preliminary injunction filed less than one month prior to the election was not timely filed); *Dillard v.*

Crenshaw County, 640 F. Supp. 1347, 1362 (M.D. Ala. 1986) (rejecting a request for a preliminary injunction when evidence was not presented in support of the motion until less than three months before the scheduled election). As one court explained:

> If the plaintiffs in this lawsuit had delayed seeking relief so that an injunction would impose an inequitable burden on the city, the voters, or the candidates, we would not hesitate to refuse to enjoin the election. This, however, is not the case. The plaintiffs filed this action on February 1, 1979, nearly four weeks before the deadline for candidates to file their nominating petitions. The election is scheduled for April 7, 1979. This is clearly not an election-eve lawsuit. Candidates have not yet expended time and money in their campaigns; indeed, it is likely that even at this date many potential candidates have only begun to explore the possibility of running for office.

Heggins v. City of Dallas, Tex., 469 F. Supp. 739, 742 (N.D. Tex. 1979). In the present case, the plaintiffs filed their action over three months before the candidate filing period closed, greater even than the four weeks in *Heggins*. Similarly, candidates have yet to file for office and there is no threat of candidates having already expended significant time and money in their campaigns.

By filing their complaints within two business days of the redistricting plans becoming legally enforceable, Plaintiffs acted to ensure that the election calendar would be minimally impacted. This prompt action should be viewed by the court as sufficient to permit an injunction to be granted. *See, e.g., Herron v. Koch*, 523 F. Supp. 167, 174 (E.D.N.Y. 1981) (holding that plaintiffs had "expeditiously done all that is required of them to seek adequate protection of their rights" by filing suit within two weeks of a challenged election law's enactment).

Other courts have enjoined elections later in the election cycle than Plaintiffs' request in this case. On April 11, 1980, a May 3 primary election in Texas was ordered enjoined. *Watson v. Commissioners Court of Harrison County*, 616 F.2d 105, 106-07 (5th Cir. 1980). On June 10, 1983, Alabama elections scheduled for October 11 were enjoined. *Buskey v. Oliver*, 574 F. Supp. 41, 41-42 (M.D. Ala. 1983). In 1996, Florida's congressional elections were enjoined on April

17 and a new map was still passed by the legislature in time for orderly primary elections. *Johnson v. Mortham*, 926 F. Supp. 1460, 1493 (N.D. Fla. 1996). Also in 1996, a court ordered a new election calendar on August 6 for upcoming Texas congressional elections. *Vera v. Bush*, 933 F. Supp. 1341, 1352-3 (S.D. Tex. 1996).

Moreover, the schedule proposed by the Plaintiffs in this case is not as delayed as the schedule imposed by the Court in *Stephenson v. Bartlett*. Here, the Plaintiffs propose that the State Board of Elections should open the filing period for candidates on April 27, 2012; close the filing period on May 7, 2012; and conduct the primary on July 10, 2012 (if the 2011 Plans are not declared unconstitutional before those dates). In contrast, the delayed filing period for candidates while the *Stephenson* litigation was ongoing did not even *open* until July 19, 2002 (i.e., later in the year than the Plaintiffs' proposed primary date in this case). The filing period closed on July 26, 2002, and the primary was held on September 10, 2002. The Plaintiffs' proposed schedule in this case is substantially less delayed, and falls much earlier in the year, than the schedule that was ultimately adopted by the General Assembly and successfully implemented by the State Board of Elections while the *Stephenson* litigation was ongoing.

Plaintiffs' motion for a preliminary injunction requests a postponement only of those elections affected by the challenged maps. Even if legislative and congressional primaries are delayed, such changes would not be fatal to the upcoming presidential primary. In 2004, the North Carolina State Board of Elections delayed the presidential primary such that it conflicted with the Democratic National Convention, however the North Carolina Democratic Party was able to implement a statewide nominating process in just two months. Allen Aff. ¶¶ 7-10.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request this Court to grant a preliminary injunction preserving the status quo, enjoining the Defendants from conducting elections under the 2011 enacted legislative and congressional redistricting plans until a final judgment on the merits of Plaintiffs claims has been rendered, and directing the Defendants to revise the 2012 election schedule as outlined in Plaintiffs motion.

This 13th 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:

[ ] 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;

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

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This the 13th day of January, 2012.

Anita S. Earls

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