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*)

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

NOW COME defendants in the above-captioned actions and submit their memorandum of law in support of their Motion for Summary Judgment.

INTRODUCTION

Redistricting is inherently a political process. The North Carolina Constitution empowers the people of North Carolina, acting through their representatives in the General Assembly, to decide on the political balance found in redistricting plans, provided these plans also comply with federal and State law. For over one hundred years, the people of North Carolina elected Democratic majorities to the North Carolina Senate and, with only one exception, the North Carolina House of

Representatives. For decades, the plans adopted by the General Assembly largely favored members of the Democratic Party.

In 2011, for the first time since the reconstruction era, the people of North Carolina elected Republican majorities in both houses of the General Assembly. Not surprisingly, the redistricting plans enacted by that General Assembly are more favorable to Republican candidates than prior plans enacted by Democratic majorities of the General Assembly. The enacted plans tend to preserve the current political balance in the General Assembly. (Trende Aff. ¶¶ 61-68, 79-86, and Tables 6-10) Not surprisingly, organizations that support policy positions consistent with those advocated by the Democratic Party (the Southern Coalition for Judicial Justice, the NC NAACP, Democracy North Carolina) and Democratic members of the General Assembly, offered redistricting plans that would have resulted in Democratic majorities in the State Senate and State House. (Trende Aff. ¶¶ 69-77, 87-94, and Tables 6-10) Because Republicans enjoy a majority of members in both the State Senate and the State House, the General Assembly as a whole made the political judgment to enact the plans offered by the Republican leaders while rejecting the plans offered by the NAACP and Democratic leaders.

Under North Carolina law, the enacted plans are presumptively constitutional. If there is any reasonable interpretation of the statutes that would render the plans constitutional, then this Court must uphold them. In this regard, defendants freely admit three principles followed by them in drawing the enacted legislative plans:

1. that legislative districts would be governed by the requirements set forth by the North Carolina Supreme Court in *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) ("*Stephenson I*"), and *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247

(2003) ("*Stephenson II*"), for compliance with the Whole County Provisions ("WCP") of the North Carolina Constitution[1];

2. that any Voting Rights Act ("VRA") district established in legislative or congressional plans would be established with a Total Black Voting Age Population ("TBVAP") in excess of 50%, pursuant to the decisions by the North Carolina and United States Supreme Courts in *Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364, *aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1, 13 (2009); and

3. that the General Assembly would explore the possibility of establishing a sufficient number of VRA legislative districts to provide African-American voters with rough proportionality in the number of VRA districts in which they have a reasonable opportunity to elect their candidates of choice.

Defendants followed these criteria in enacting the 2011 plans.

In contrast, the proposed alternative plans do not comply with *Stephenson I*, *Stephenson II* or *Strickland*. Plaintiffs' own expert has condemned the county combination formula established in *Stephenson I* and confirmed in *Stephenson II*. (Peterson 5th Aff.¶ 12; Peterson Dep. pp. 144-45, 153-54) Plaintiffs argue that instead of combining counties in the smallest combinations possible, redistricting plans should be evaluated based upon the total number of divided counties. This argument was made to the North Carolina Supreme Court and rejected in *Stephenson II*. Alternatively, plaintiffs' expert argues that the *Stephenson* formula should be rejected in favor of his personal theory that combining counties in a manner that results in one representative per county combination is superior to the requirements set forth by the North Carolina Supreme Court.

---

[1] N.C. CONST., art. II, §§ 3(3) and 5(3).

(Peterson 5th Aff. ¶¶ 12-13; Peterson Dep. pp. 144-45, 153-54) Thus, plaintiffs' claims with regard to the WCP are based on theories already rejected by the North Carolina Supreme Court.

Plaintiffs' voting rights theories likewise ask this Court to reverse or ignore decisions already made by the North Carolina and United States Supreme Courts. First, plaintiffs ask this Court to reject the "bright-line," "safe harbor" rule established in *Strickland* that districts drawn to protect the State from litigation under § 2 of the VRA must have a minority population above 50%. Instead, they advocate a legal standard that would require the State to employ experts to determine the "right" or minimum percentage of minority population less than 50% to include in a district, a standard already rejected by the North Carolina and United States Supreme Courts.

Plaintiffs also accuse the State of racial discrimination because the General Assembly increased the number of VRA districts to provide African American voters with rough proportionality in the number of districts in which they can elect candidates of choice. Plaintiffs contend that this criteria discriminated against black voters, eseentially because the end result is fewer districts that are likely to elect Democrats. There is no case recognizing a claim of racial discrimination against minority voters because a jurisdiction increased the number of districts in which minorities can elect their preferred candidate of choice. Further, the United States Supreme Court and Congress have rejected the argument that racial discrimination can be caused by a districting plan that results in a political realignment, even if that realignment works to the disadvantage of the political party favored by minorities.

In short, the enacted plans follow criteria adopted by the North Carolina and United States Supreme Courts. Plaintiffs' plans, and their theories concerning the enacted plans, would require this Court to reverse or ignore established precedent and recognize novel or already rejected claims.

Plaintiffs' real complaint with the enacted plans is their political outcomes, not their compliance with State and federal law. For these and other reasons outlined below, defendants are entitled to summary judgment in all claims alleged by the plaintiffs.

STATEMENT OF THE CASE

On 3 November 2011, plaintiffs Margaret Dickson *et al*. ("the *Dickson* plaintiffs") filed their complaint challenging the legislative and congressional redistricting plans enacted by the 2011 General Assembly of North Carolina. On 12 December 2011, the *Dickson* plaintiffs filed their First Amended Complaint, by which they asserted 24 claims for relief alleging that the redistricting plans violated various provisions of the North Carolina and United States Constitutions, as well as various North Carolina statutes.

On 4 November 2011, the North Carolina State Conference of Branches of the NAACP ("NC NAACP") *et al*., ("the *NAACP* plaintiffs") filed their complaint challenging the 2011 redistricting plans. On 9 December 2011, the *NAACP* plaintiffs filed their First Amended Complaint, by which they, like the *Dickson* plaintiffs, stated 13 claims for relief alleging that the redistricting plans violated various provisions of the North Carolina and United States Constitutions, as well as various North Carolina statutes.

On 14 November 2011, the Chief Justice of North Carolina, pursuant to N.C. GEN. STAT. § 1-267.1, designated this three-judge panel to hear these two cases. By order of this Court dated 19 December 2011, these two cases were consolidated for all purposes, including discovery and trial, pursuant to N.C. GEN. STAT. § 1A-1, Rule 42(a).

On 6 February 2012, this Court issued its order granting in part and denying in part defendants' Motion to Dismiss. Following that order, the following claims remain in the case:

- Violation of the "Whole County Provisions" of the North Carolina Constitution (NC CONST. art. II, §§ 3 and 5) and of other "traditional redistricting principles" with regard to the House and the Senate plans (*Dickson* Claims for Relief 11-16; NAACP Claims for Relief 4 and 5);

- Violation of the "right to vote" guarantees of Article I, § 19, and Article VI, § 1, of the North Carolina Constitution and of the equal protection guarantees of the Fourteenth Amendment to the United States Constitution as a result of split precincts in the House and Senate plans (*Dickson* Claims for Relief 9 and 10; NAACP Claims for Relief 9 and 10); and

- Violation of the equal protection guarantees of the Fourteenth Amendment to the United States Constitution and of Article I, § 19, of the North Carolina Constitution in the form of improper racial classifications with regard to the House, Senate and Congressional plans (*Dickson* Claims for Relief 19-24; *NAACP* Claims for Relief 1-3 and 9-11).

Discovery is now complete and these cases are ripe for summary judgment.

STATEMENT OF THE UNDISPUTED FACTS

Article II, §§ 3 and 5, of the North Carolina Constitution require the General Assembly, "at the first regular session convening after the return of every decennial census taken by order of Congress," to revise districts for senators and representatives and to apportion senators and representatives among those districts. Article I, §§ 2 and 4, of the United States Constitution and 2 U.S.C. §§ 2a and 2c impose a similar responsibility on the General Assembly with regard to districts for the United States House of Representatives. Pursuant to 13 U.S.C. § 141, the 2010 Census was conducted with a decennial census date of 1 April 2010.

The first Regular Session of the 2011-2012 General Assembly convened on 26 January 2011. On 27 January 2011, the President Pro Tempore of the Senate, Senator Phil Berger, appointed the Senate Redistricting Committee and named Senator Bob Rucho of Mecklenburg County as Chairman of that committee. On 15 February 2011, the Speaker of the House of Representatives,

Representative Thom Tillis, appointed the House Redistricting Committee and named Representatives David Lewis of Harnett County, Jerry Dockham of Davidson County and Nelson Dollar of Wake County as Chairmen. Representative David Lewis was designated Senior Chairman. Each redistricting committee was responsible for considering redistricting plans for its chamber, and the committees jointly were responsible for considering a congressional redistricting plan.

On 2 March 2011, the General Assembly received the 2010 Census P.L. 94-171 data[2] from the United States Department of Commerce. The Information Services Division of the General Assembly loaded the census data and political data into the General Assembly's "Maptitude" software so that the information would be available for developing district plans.

The redistricting committees sought advice on redistricting from all members of the General Assembly as well as from North Carolina's congressional delegation. On 17 March 2011, Senator Rucho and Representative Lewis wrote a letter to Legislative Black Caucus Chairmen Senator Floyd McKissick and Representative Larry Womble asking them for their advice on redistricting-related matters, including: the content of notices for public hearings, the locations of public hearings, contact information for groups and individuals who should receive public notice, areas of testimony that may be important to redistricting, and any other redistricting suggestions or ideas. The Chairmen copied all members of the Legislative Black Caucus on this letter. On 22 March 2011, Senator Rucho and Representative Lewis sent a letter to all member of North Carolina's Congressional delegation asking for their input on redistricting and requesting the opportunity to sit down with each member

---

[2] Pursuant to 94 P.L. 171, codified as 13 U.S.C. § 141 (c), the Secretary of Commerce is required to complete, report and transmit the official results of the decennial census to the states within one year after the decennial census date, or in this case, one year after 1 April 2010. This data is often referred the "P.L. 94-171 data."

and discuss their areas of the State. On 24 March 2011, Senator Rucho and Representative Lewis sent an email to all members of the General Assembly advising them of public hearings, asking for their advice on the areas they represent, and inviting each member to sit down with one of the chairmen to discuss their districts and the overall process. This letter also included information concerning a policy for access to redistricting assistance.

The redistricting committees also sought advice from the public and interested parties outside the General Assembly. On 29 March 2011, Senator Rucho and Representative Lewis sent a letter to the Rev. Dr. William Barber II, President of the NC NAACP, asking him to share his opinions and ideas on redistricting with them and inviting him to attend public hearings once they began. On 31 March, the Chairmen followed up with a letter inviting Dr. Barber to attend the 13 April hearing to be held in Raleigh. On 31 March 2011, Senator Rucho and Representative Lewis sent a letter to a list of over 300 minority contacts and other important constituencies across the State. The Chairmen asked for opinions and advice regarding: proposed legislative and congressional districts or plans, the continued presence of racially polarized voting in North Carolina, the impact of the decisions of the North Carolina Supreme Court and United States Supreme Court in *Pender County*, 361 N.C. at 501-02, 649 S.E.2d at 371, on the redistricting process, the importance of determining citizen voting age population in drawing districts, the continued presence of *Gingles* factors[3] in North Carolina counties, and any other information regarding compliance with the VRA. The Chairmen also sent a copy of the letter to Senator McKissick and Representative Womble along with all other members of the Legislative Black Caucus.

Between 13 April and 18 July 2011, the House and Senate redistricting committees held a

---

[3] *See Thornburg v. Gingles*, 478 U.S. 30 (1986).

total of seventeen public hearings across the State of North Carolina. At all but two of these hearings, from two to eight additional sites were interactively connected with the main site *via* teleconferencing technology, for a total of 63 opportunities for members of the public to attend. Some of these public hearings were held before any plans were published in order to give members of the public the opportunity to put forward any ideas they might have about how districts could or should be drawn, while other hearings were held after plans had been published by the Chairmen so that members of the public could offer reactions and suggestions.

At hearings held on 9 May and 23 June, the Alliance For Fair Redistricting and Minority Voting Rights ("AFRAM") – an informal network of organizations that included three of the *NAACP* organizational plaintiffs (Democracy NC, the NC NAACP, and the League of Women Voters) as well as the *NAACP* plaintiffs' counsel, the Southern Coalition for Social Justice – presented to the committees possible Senate, House and congressional redistricting maps. While noting that these maps should not necessarily be considered "final products," AFRAM's representatives stated to the committees that the maps complied with all relevant state and federal laws. These three maps were the only statewide redistricting maps submitted to the redistricting committees prior to the committees' recommendation of maps to the full House and Senate. Statements by AFRAM representatives indicated that racially polarized voting is still pervasive in North Carolina and that majority-minority districts are needed. Indeed, the legislative plans proposed by AFRAM recommended the creation of majority-TBVAP districts in every area of the State in which majority-TBVAP districts are established by the enacted plans, with the exception of House Districts 12, 21 and 48.

On 17 June 2011, the Senate Redistricting Committee released a map showing Senate

districts proposed to comply with the VRA. On 21 June 2011, the House Redistricting Committee released a map showing House districts proposed to comply with the VRA. On 1 July 2012, the committees released a proposed congressional plan, and on 12 July, proposed redistricting plans for the House and Senate were released. All of these plans were amended during the committee process, in part because of suggestions made to the Chairmen.

The General Assembly convened on 25 July 2011 to consider the redistricting plans. During floor debates in the House and Senate on that date, various alternative plans were offered as amendments, none of which had been introduced, shared with the Chairmen or redistricting committees or made public at any earlier time. These were:

- "Congressional Fair and Legal," offered by Senator Josh Stein;
- "Senate Fair and Legal," offered by Senator Martin Nesbitt;
- "Possible Senate Districts," offered by Senator Floyd McKissick;
- "House Fair and Legal," offered by Representative Grier Martin; and
- "Possible House Districts," offered by Representative Kelly Alexander.[4]

All of these proposed amendments failed.

On 27 July 2011, Senate Bill 455 ("Rucho Senate 2") was ratified, signed by the Lieutenant Governor and the Speaker of the House, and chaptered into session law as S.L. 2011-402. On 28 July 2011, Senate Bill 453 ("Rucho Lewis Congress 3") and House Bill 937, 3rd edition ("Lewis-Dollar-Dockham 4"), were ratified, signed by the Lieutenant Governor and the Speaker of the House, and chaptered into session laws as S.L. 2011-403 and -404. Pursuant to Article II, § 22(5), these bills

[4] All of these alternative plans, along with the AFRAM plans, are contained in a notebook provided to the Court on 12 January 2012.

did not require the signature of the Governor to become law.

On 2 September 2011, all three redistricting plans were submitted to the United States Department of Justice ("USDOJ") for preclearance under § 5 of the VRA; on that same date, an action seeking preclearance was filed in the United States District Court for the District of Columbia. *State of North Carolina v. Holder*, No. 1:11-cv-01592-RWR (D.D.C., filed 2 September 2011). Preclearance was received on 1 November 2011.[5] The action filed in the District Court for the District of Columbia was dismissed by the court on 8 November 2011.

Additional relevant facts will be discussed *infra*.

[5] In late October 2011, it was discovered that a software error had resulted in omissions in the texts of S.L. 2011-402, -403 and -404. As a result, while all voters were assigned to districts in the enacted plans, the statutory texts did not fully reflect how all voters were assigned. (Churchill Dep. pp. 68-73, Ex. 54; First Frey Aff. ¶¶ 29-31, Ex. 13) On 7 November 2011, the General Assembly enacted curative statutes to correct this error. *See* S.L. 2011-413, -414 and -416. These curative statutes were precleared by USDOJ on 8 December 2011.

ARGUMENT

GUIDE TO ARGUMENT

Defendants recognize that this memorandum, like the one already filed by plaintiffs, is very long. The numerous and complex issues presented by this case, the large body of law applicable to those claims, the amount of discovery conducted and the importance of these cases to the people of North Carolina make a lengthy memorandum necessary.

Given the length of the memorandum and in an effort to make it more useful, defendants have departed from the standard format, where the law relevant to each argument is presented with that argument and then applied to the relevant facts. Instead, the argument is structured as follows:

- The first section of the argument (Argument I) deals with the standards applicable to the motion for summary judgment.
- The second section of the argument (Argument II) details the history and development of relevant legal principles and requirements – *e.g.*, the VRA, the WCP and the *Stephenson* and *Strickland* decisions – which apply to multiple claims. *No substantive arguments directly addressing plaintiffs' claims are made in this section*. This will allow for easy reference at later times.
- Substantive arguments addressing plaintiffs' claims are contained in Arguments III-VI, which begin on page 37.

Defendants hope that this arrangement of the arguments will assist the Court in understanding in full the law regarding redistricting, and how various requirements must fit together, when examining plaintiffs' claims.

I. STANDARDS TO BE APPLIED

A. The Standard for Review of Redistricting Cases

In order for plaintiffs to prevail in these actions, they must meet a heavy burden that encompasses a number of presumptions favoring the validity of the statutes they challenge. It is well established that "legislative reapportionment is primarily a matter for legislative consideration and determination." *Reynolds v. Sims*, 377 U.S. 533, 586 (1964). Redistricting is a "legislative task" that the courts should "make every effort not to pre-empt." *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978). A court is not entitled to substitute its judgment for the legislative redistricting determinations made by a legislature. *See McGhee v. Granville County*, 860 F.2d 110, 115 (4th Cir. 1988).

In North Carolina, the responsibility for redistricting has been entrusted unequivocally to the General Assembly. N.C. Const. art. II, §§ 3, 5. This responsibility may not be usurped by the courts, as plaintiffs desire. The "separation of powers doctrine is well established under North Carolina law." *Bacon v. Lee*, 353 N.C. 696, 716, 549 S.E.2d 840, 854 (2001). In fact, "each of our [three] constitutions has explicitly embraced the doctrine of separation of powers." *State ex rel. Wallace v. Bone*, 304 N.C. 591, 595, 286 S.E.2d 79, 81 (1982); *accord Bacon*, 353 N.C. at 716, 549 S.E.2d at 854. Moreover, because of the separation of powers doctrine, many questions, like many of the issues raised by plaintiffs in this case, are non-justiciable political questions. The "political question doctrine controls, essentially, when a question becomes 'not justiciable . . . because of the separation of powers provided by the Constitution.'" *Bacon*, 353 N.C. at 717, 549 S.E.2d at 854 (quoting *Powell v. McCormack*, 395 U.S. 486, 517 (1969)). If these principles are to be disturbed, only the North Carolina Supreme Court may do so. *See Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888

(1985) (striking down Court of Appeals' attempt to abolish torts of criminal conversation and alienation of affection).

It cannot be doubted that the contours of North Carolina's legislative and congressional districts are within the exclusive province of the General Assembly.[6] It is equally clear that the 2011 Plans may not be disturbed in the absence of clear constitutional restrictions prohibiting the General Assembly's actions. *Plemmer v. Matthewson*, 281 N.C. 722, 726, 190 S.E.2d 204, 207 (1972). "An act of the General Assembly is legal unless the Constitution contains a prohibition against it." *Id.* (citing *McIntyre v. Clarkson*, 254 N.C. 510, 119 S.E.2d 888 (1961)); *accord Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 41, 175 S.E.2d 665, 671 (1970) (explaining that the General Assembly "is possessed of full legislative powers unless restrained by express constitutional provision or necessary implication therefrom"). Accordingly, plaintiffs' challenges to the 2011 Plans must rely on express restrictions on the General Assembly's power to redistrict contained in the North Carolina Constitution or a necessary implication from an express restriction.[7] Otherwise, their claims must fail.

The North Carolina Supreme Court has often said that "[e]very presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt." *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991) (quoting *Gardner v. Reidsville*, 269 N.C. 581, 595, 153 S.E.2d 139, 150 (1967)). This is so because the acts of the legislature are effectively the acts of the people. *State ex rel. Martin v. Preston*, 325

[6] A court can, of course, adopt interim or temporary plans when necessary. *See Stephenson I*, 355 N.C. at 385, 562 S.E.2d at 398. But such plans are for one election cycle only, and it remains within the General Assembly's responsibility to adopt permanent plans.

[7] Such restrictions, of course, include any imposed by federal law pursuant to the Supremacy Clauses of the United States and North Carolina Constitutions. *See* U.S. CONST. art. VI, cl. 2; N.C. CONST. art. I, § 3.

N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989). *See also Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (The legislative power rests "with the people and is exercised through the General Assembly, which functions as the arm of the electorate. An act of the people's elected representatives is thus an act of the people and is presumed valid *unless it conflicts with the Constitution.*" (citation omitted; emphasis added)). "[I]f there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action." *Baker*, 330 N.C. at 338, 410 S.E.2d at 891 (citations omitted). The 2011 Plans challenged are, therefore, presumed valid unless plaintiffs prove beyond a reasonable doubt that they exceed an express limitation on legislative power contained in the Constitution.

It is also well established that "[a] court will not adjudge an act of the Legislature invalid, unless its violation of the Constitution is . . . *clear, complete, and unmistakable.*" *Kornegay v. City of Goldsboro*, 180 N.C. 441, 445, 105 S.E. 187, 189 (1920) (citations omitted; emphasis added). And as between two permissible interpretations, that should always be adopted which will uphold the law. *Id.* This is because the "propriety, wisdom, and expediency of legislation is exclusively a legislative question" and there is no ground for judicial interference "unless the act is *unmistakably* in excess of legislative power." *Id.* at 445, 446 (citations omitted; emphasis added).

B. The Standard for Summary Judgment

Summary judgment must be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. GEN. STAT. § 1A-1, Rule 56(c). "The purpose of summary judgment 'is to foreclose the need for a trial when, based upon the pleadings and supporting materials, the trial court determines that

only questions of law, not fact, are to be decided.'" *Slavin v. Town of Oak Island*,160 N.C. App. 57, 59, 584 S.E.2d 100, 101 (2003) (quoting *Robertson v. Hartman*, 90 N.C. App. 250, 252, 368 S.E.2d 199, 200 (1988)). *See also Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 578-79, 573 S.E.2d 118, 123-24 (2002). In this case, "the only issues contested are questions of law." *Brumley v. Mallard*, 154 N.C. App. 563, 565, 575 S.E.2d 35, 37 (2002). As this brief will demonstrate, plaintiffs' claims fail to assert and the facts developed fail to support any valid legal basis for relief. Consequently, defendants are entitled to summary judgment in their favor.

II. HISTORICAL OVERVIEW OF THE LEGAL REQUIREMENTS OF REDISTRICTING

Before examining the specific claims brought by plaintiffs, it is helpful to review the general requirements of redistricting and the limitations imposed by state or federal law on redistricting, for this provides the framework within which the 2011 Plans were drafted, considered and enacted. This argument provides an overview of those requirements, particularly as they have developed over the last 50 years. The succeeding arguments consider plaintiffs' claims in light of those requirements.

A. The Effect of Federal Law – The One Person, One Vote Rule and the VRA.

It is well established that apportionment of legislative districts is a matter primarily reserved to the states. *Growe v. Emison*, 507 U.S. 25, 34 (1993) (stating that "the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts"). However, two developments in federal law in the 1960s had a direct and profound impact on redistricting throughout the nation, including North Carolina. The first of these was the recognition of what has become known as the "one person, one vote" rule. In *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds*, 377 U.S. 533, and their progeny, the United States Supreme Court

ruled that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires that districts for the United States House of Representatives and for state legislatures must achieve "some measure of population equality." *Stephenson I*, 355 N.C. at 363, 562 S.E.2d at 384.

The other federal development prominent in legislative districting was the passage of the VRA in 1965 (79 Stat. 437), which has been described by the United States Supreme Court as "an important step in the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote." *Strickland*, 556 U.S. at 10. The two most relevant provisions of the VRA for redistricting in North Carolina are § 2, codified at 42 U.S.C. § 1973, and § 5, codified at 42 U.S.C. § 1973c. As described by the North Carolina Supreme Court, § 2 of the VRA

> generally provides that states or their political subdivisions may not impose any voting qualification or prerequisite that impairs or dilutes, on account of race or color, a citizen's opportunity to participate in the political process and to elect representatives of his or her choice . . . [while t]he primary purpose underlying section 5 of the VRA is to avoid retrogression, *i.e.*, a change in voting procedures which would place the members of a racial or language minority group in a less favorable position than they had occupied before the change with respect to the opportunity to vote effectively.

Stephenson I, 355 N.C. at 363-64, 562 S.E.2d at 385. Section 5 prohibits "covered" jurisdictions from implementing or enforcing any changes in voting practices or procedures unless those provisions have first been "precleared." The process of preclearance "requires the covered jurisdiction to demonstrate that its proposed change 'neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color.'" *Perry v. Perez*, 132 S. Ct. 934, 939-40 (2012). Preclearance may be obtained only by approval of USDOJ or from the United

States District Court for the District of Columbia. *Id.* While North Carolina itself is not a covered jurisdiction under § 5, 40 of North Carolina's 100 counties are currently subject to § 5's preclearance requirements.[8] A new electoral map cannot be used to conduct an election until it has been precleared. *Clark v. Roemer*, 500 U.S. 646, 652 (1991).

B. The Adoption and Implementation of the "Whole County Provisions"

In 1966, North Carolina's legislative districts for the State House and Senate were held unconstitutional based on federal one person, one vote requirements, as were the state constitutional provisions then governing the drawing of State House districts.[9] *See Drum v. Seawell*, 249 F. Supp. 877 (M.D.N.C. 1965), *aff'd*, 383 U.S. 831 (1966). As a result, in 1967 the General Assembly enacted proposed constitutional amendments to redefine the manner in which the General Assembly should proceed each decade to draw new legislative districts based on the decennial census. Those proposed amendments provided that "[n]o county shall be divided in the formation of a" district for either House or Senate. 1967 N.C. Sess. Laws 640. The amendments were submitted to the voters in 1968, on ballots reading as follows: "FOR constitutional amendments continuing present system of representation in the General Assembly" and "AGAINST constitutional amendments continuing present system of representation in the General Assembly." 1967 N.C. Sess. Laws 640 §§ 7, 8. Having been ratified by the voters, they ostensibly became part of the North Carolina Constitution and were carried over without substantive changes into the 1971 Constitution. *See* Report of the

[8] Those counties are Anson, Beaufort, Bertie, Bladen, Camden, Caswell, Chowan, Cleveland, Craven, Cumberland, Edgecombe, Franklin, Gaston, Gates, Granville, Greene, Guilford, Halifax, Harnett, Hertford, Hoke, Jackson, Lee, Lenoir, Martin, Nash, Northampton, Onslow, Pasquotank, Perquimans, Person, Pitt, Robeson, Rockingham, Scotland, Union, Vance, Washington, Wayne, and Wilson. 28 C.F.R. § 51.4 and pt. 51 App. at 96-97(2002) (App. 1-3).

[9] At the time, each of the 100 counties had at least one representative, with the remaining 20 representatives apportioned among the more populous counties. N.C. CONST. OF 1868 art. II, §§ 5 and 6 (as amended in 1962).

North Carolina State Constitution Study Commission (1968), p. 30.

The 1968 constitutional amendments were not initially submitted to USDOJ for preclearance under § 5 of the VRA. Nor were they precleared by virtue of litigation in the United States District Court for the District of Columbia. The 1971 Constitution, on the other hand, was promptly submitted to USDOJ after its ratification by the voters, and it was precleared. However, the prohibitions on dividing counties in drawing legislative districts were not highlighted as changes at that time.[10] This was consistent with the Commentary to the Report of the North Carolina State Constitution Study Commission of 1968, which specifically referred to the legislative districting provisions as ones in which no changes were made. "The provisions governing the apportionment of the two houses, adopted by the people in November, 1968, have been brought forward in the proposed text with no substantive change." State Constitution Study Commission Report, p. 30.

As a result of the enactment of the 1971 Constitution, and its ratification by the voters, the 1968 amendments' prohibitions on dividing counties, the "Whole County Provisions" ("WCP") were treated as part of the new Constitution, now numbered as Article II, §§ 3(3) and 5(3). Consequently, they were followed in the 1971 and 1981 redrawing of state legislative districts. Late in 1981, however, North Carolina was sued, with one of the claims being that the State had failed to obtain preclearance of the 1968 amendments' prohibition against dividing counties in drawing legislative districts. *See Gingles v. Edmisten*, 590 F. Supp. 345, 350 (E.D.N.C. 1984) (three-judge court) (hereafter "*Gingles*"), *aff'd in part and rev'd in part on other grounds*, *Thornburg v. Gingles*, 478 U.S. 30 (1986) (hereafter "*Thornburg*"). Faced with that litigation, the State submitted the 1968 amendments, seeking their preclearance, and in fact amended the State House plan while the

[10] Highlighting a change is required if the change is not apparent on the face of the enactment. 28 C.F.R. § 51.27(c) (2012) (App. 4-5).

preclearance request was pending, still not dividing counties in the creation of the House districts. *Id.* Nevertheless, USDOJ objected to the language against dividing counties and refused to give preclearance to the 1968 amendments or to districting plans enacted in reliance on those amendments, thereby forcing the State to redraw its legislative districts. The objection highlighted the Department's concern that application of the 1968 amendments would result in large, multi-member districts, which then would submerge minority voters into larger white electorates. *See Stephenson I*, 355 N.C. at 368, 562 S.E.2d at 388. Ultimately, the State drew new legislative plans that were precleared, but remained the subject of litigation under § 2 of the VRA. *Gingles*, 590 F. Supp. at 351.

Once North Carolina enacted its new plans in 1982, the State was sued yet again. This suit was brought by Forsyth County residents who complained about the splitting of Forsyth County in the newly-drawn legislative districts. Specifically, they claimed that the State could not divide Forsyth County because it is not among the 40 "covered" counties for purposes of § 5 preclearance. Their claim was rejected by a unanimous panel of North Carolina federal judges, Judges Phillips, Britt and Dupree, in *Cavanagh v. Brock*, 577 F. Supp. 176, 182 (E.D.N.C. 1983) (three-judge court). The three-judge court held that the denial of preclearance to the 1968 constitutional amendments meant that the amendments were not effective at all, insofar as they prohibited the division of counties in the drawing of legislative districts. The court reached its conclusion by applying its understanding of North Carolina state law principles of severability, concluding that the unenforceability of the prohibition on dividing counties as to some districts involving 40 counties was necessarily inconsistent with applying them to the remaining districts. *Id*. at 181-82. As a result of the decision in *Cavanaugh*, later redistricting enactments of the General Assembly were done

without regard to the WCP.

C. The *Stephenson* Litigation

After the 2000 Census, the General Assembly's 2001 legislative and congressional redistricting plans all received § 5 preclearance on the first try. Soon after the enactment of those plans, however, a group of plaintiffs filed suit challenging the plans on the basis that they violated the WCP because they divided counties in the creation of House and Senate districts. *See Stephenson I*, 355 N.C. 354, 562 S.E.2d 377. In enjoining the use of the 2001 Plans, the North Carolina Supreme Court rejected the decision of the *Cavanagh* court and instead ruled that the WCP must be harmonized with the requirements of federal law. In order to achieve this harmonization of State and federal requirements, the Court announced nine criteria that must be present in any constitutionally valid redistricting plan:

> 1. To ensure full compliance with federal law, legislative districts required by the VRA shall be formed prior to creation of non-VRA districts, and to the maximum extent practicable, such VRA districts shall also comply with the legal requirements of the WCP;
>
> 2 In forming new legislative districts, any deviation from the ideal population for a legislative district shall be at or within plus or minus five percent for purposes of compliance with federal "one person, one vote" requirements;
>
> 3. In counties having a census population sufficient to support the formation of one non-VRA legislative district, the WCP requires that the physical boundaries of any such non-VRA legislative district not cross or traverse the exterior geographic line of any such county;
>
> 4. When two or more non-VRA legislative districts may be created within a single county, compact single-member non-VRA districts shall be formed wholly within said county;
>
> 5. In counties having a non-VRA population pool that cannot support at least one legislative district or, alternatively, counties having a non-VRA population pool that, if divided into districts, would not comply with the "one person, one vote"

> standard, the requirements of the WCP are met by combining or grouping the minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent "one-person, one- vote" standard;
>
> 6. The intent underlying the WCP must be enforced to the maximum extent possible;
>
> 7. Communities of interest should be considered in the formation of compact and contiguous electoral districts;
>
> 8. Multi-member districts shall not be used in the formation of legislative districts unless it is established that such districts are necessary to advance a compelling governmental interest; and
>
> 9. Any 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.

Stephenson v. Bartlett, 357 N.C. 301, 305-07, 582 S.E.2d 247, 250-51 (2003) ("*Stephenson II*") (quoting *Stephenson I*, 355 N.C. at 383-84, 562 S.E.2d at 396-98). Following the decision in *Stephenson I*, the General Assembly enacted new plans, but these plans were also rejected as not compliant with the WCP by the superior court, which imposed its own interim plans for the 2002 elections. The Supreme Court affirmed the decision of the superior court, *see Stephenson II*, and the *Stephenson I* and *Stephenson II* decisions, along with the interim plans for 2002, were submitted to USDOJ for preclearance, which they received on 12 July 2002. *See* "Attachment A." At the same time and on the basis of the Supreme Court's harmonization of the WCP with the requirements of the VRA, USDOJ precleared the WCP. *Id.*

D. The Reauthorization of the Voting Rights Act in 1982 and Subsequent Litigation and Interpretation

1. Interpretation and Application of § 2

In *Gingles*, 590 F. Supp. at 353, *rev. in part sub. nom*, *Thornburg*, 478 U.S. at 30, the Court largely affirmed the decision by a three-judge court that certain multi-member districts in North Carolina's 1982 legislative redistricting plans unlawfully diluted the voting rights of African Americans.[11] The Court's decision was based upon the 1982 amendments to § 2 of the VRA.

Congress had amended § 2 in "response" to the Supreme Court's opinion in *Mobile v. Bolden*, 446 U.S. 55, 63 (1980), "which had declared that, in order to establish a violation either of § 2 or of the Fourteenth or Fifteenth Amendments, minority voters must prove that a contested electoral mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose." *Thornburg*, 478 U.S. at 35. Congress "substantially revised § 2 to make clear that a statutory violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the 'results test'" from *White v. Regester*, 412 U.S. 755 (1973), and *Zimmer v. McKeithen*, 485 F.2d 1297 (1973), as the relevant legal standard under § 2. *Thornburg,* 478 U.S. at 35 and 36 n.4. As amended in 1982, § 2 provides in pertinent part:

> (a) No voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color;
>
> (b) A violation of subsection (a) is established if, based upon the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by

[11] The district court agreed with plaintiffs' contentions and found that the 1982 plans violated the rights of African American voters in 15 North Carolina Counties. The Supreme Court affirmed the district court with one exception. The Supreme Court disagreed with the district court's holding that plaintiffs had presented sufficient evidence of racially polarized voting in Durham County. *Thornburg*, 478 U.S. at 80.

> members of a class of citizens protected by subdivision (a) *in that members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice***.** The extent to which members of a protected class have been elected to office in the State . . . is one circumstance which may be considered. Provided nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.[12]

42 U.S.C. § 1973 (emphasis added); *Thornburg*, 478 U.S. at 36.

In *Gingles*, the question was whether certain North Carolina multi-member districts violated § 2. The Court set forth a three-pronged test for determining whether there has been a § 2 violation: First, that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district." *Thornburg*, 478 U.S. at 50. Absent this proof, the "form of the district cannot be responsible for minority voters inability to elect its candidates." *Id.* Second, "the minority group must be able to show that it is politically cohesive." *Id.* at 51. If the group is not cohesive, it cannot be said that a multi-member district "thwarts distinctive minority group interests." *Id.* at 50. Third, "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed – usually to defeat the minority's preferred candidate." *Id*. (citations omitted).[13] In establishing the third circumstance, "the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives." *Id.* at 51.

Once these threshold conditions are met, a court must then consider the "totality of

---

[12] The highlighted section of amended § 2 essentially quotes the standard stated in *White*, 412 U.S. at 766.

[13] "[R]acially polarized voting" is synonymous with the term "racial bloc voting." *Thornburg*, 478 U.S. at 52 n.18.

circumstances." *Thornburg*, 478 U.S. at 37, 38, 80.[14] The district court in *Gingles* applied the "totality of circumstances test" and held that North Carolina's "redistricting scheme" violated § 2.

The United States Supreme Court has subsequently found that the principles used to determine whether a redistricting plan with multi-member districts violates § 2, also apply to plans based upon single-member districts. *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Growe v. Emison*, 507 U.S. 25, 40-42 (1993); *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993). In a plan involving only single-member districts, "the usual device for diluting minority voting power is the manipulation of district lines." *Voinovich*, 507 U.S. at 153.

In *Gingles*, and in numerous other cases, the Supreme Court has ruled that a court has the authority under § 2 to compel the creation of majority-minority districts. *See Voinovich*, 507 U.S. at 154 ("Placing black voters in a district in which they constitute a sizeable and therefore 'safe' majority ensures that they are able to elect their candidate of choice."). The *Gingles* Court declined to decide whether a minority group could establish a violation of § 2 by challenging a jurisdiction's failure to create an influence district.[15] *Thornburg*, 478 U.S. at 46 n.12. In several other cases, the

---

[14] The circumstances that a court must consider are largely based upon the factors catalogued in *Zimmer* and include: (1) the extent of any history of official discrimination that touched the rights of members of a minority group to register, vote or participate in the political process; (2) the extent to which the State has used large election districts, majority vote requirements, anti-single shot provisions or other prior voting practices that may enhance the opportunity for discrimination; (3) the use of candidate slating and whether minorities have been denied access to that process; (4) the extent to which minorities bear the effects of discrimination in such areas as education, employment and health, which hinders their ability to participate effectively in the political process; (5) whether campaigns have been characterized by overt or subtle racial appeals; and (6) the extent to which members of the minority party have been elected to public office. *Thornburg*, 478 U.S. at 37-38; S. Rep. at 28-29, U.S. Code Cong. & Admin. News 1982, pp. 206-07.

[15] In voting rights jurisprudence, courts have come to recognize three or four types of districts. In "majority-minority" districts, a minority group comprises a numerical majority. "Crossover" districts are districts in which the minority population is less than a majority, but potentially large enough to elect its candidate of choice with the help of white voters who might "cross over" to support the minority's preferred candidate. Finally, influence districts are districts in which the minority can allegedly influence the outcome of an election even if its preferred candidate cannot be elected. *Pender County*, 361 N.C. at 501-02, 649

Court declined to decide whether the failure to create a crossover district stated a claim under § 2. *See Voinovich*, 507 U.S. at 154; *De Grandy*, 512 U.S. at 1009; *LULAC*, 548 U.S. at 343.

In *LULAC*, the Court clarified that § 2 does not and cannot require a jurisdiction to create influence districts. 548 U.S. at 445. The Court stated that the "opportunity to elect representatives of choice" under § 2 "requires more than the ability to influence the outcome between some candidates, none of whom is [the minority group's] candidate of choice." *Id.* at 445-46. The Court explained that "[i]f § 2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *Id.* at 446 (citing *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring) ("Ashcroft")). The Court left unresolved the question of whether § 2 could require crossover districts.

2. Interpretation and Application of § 5

Until the decision in *Ashcroft*, the Court's holding in *Beer v. United States,* 425 U.S. 130, 140-41 (1976), served as the leading decision on the § 5 "effect" clause. In *Beer*, a city council filed a declaratory judgment action seeking preclearance of its redistricting plan. Under the benchmark plan, African Americans constituted a majority of the population in only one of five districts. In that single district, African Americans represented only half of the registered voters. In the other four districts, whites constituted the majority group in both population and registered voters. *Beer*, 425 U.S. at 135. After receipt of the 1970 census, the city eventually adopted a new redistricting plan in which African Americans constituted a majority of the population in two districts and a majority

S.E.2d at 371, *aff'd sub nom. Strickland*, 556 U.S. at 13. The Supreme Court has noted that crossover districts are sometimes referred to as "coalition districts" "in recognition of the necessary coalition between minority and crossover majority voters," but has cautioned that such usage "risks confusion with coalition-district claims in which two minority groups form a coalition to elect the candidate of the coalition's choice." *Strickland*, 556 U.S. at 13.

of the voters in one district. *Id.* Both the benchmark plan and the city's new plan provided for the election of two at-large candidates. *Id*. at 134.

The district court denied preclearance of the city's plan on the grounds that it had a discriminatory effect on African Americans. *Id*. at 136-37.[16] The district court concluded that under the city's plan, it was likely that African Americans could only elect one candidate. In the district court's view, this would cause African Americans to be underrepresented because they constituted 35% of the city's registered voters. *Id*. at 134.

The Supreme Court reversed the decision of the district court and ordered the preclearance of the city's plan. The Court noted that the "effect" clause of § 5 was designed to prevent "retrogression" in the position of racial minorities with respect to their effective exercise of the electoral franchise. *Beer*, 425 U.S. at 141. The city's new redistricting plan improved the voting opportunities for African Americans because it increased the number of districts in which African Americans constituted a majority. Based upon these facts, the Court ruled "that a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the 'effect' of diluting or abridging the right to vote on account of race." *Id.*

The next two important § 5 decisions are *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471 (1997) ("*Bossier Parish I"*) and *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000) ("*Bossier Parish II*"). The Bossier Parish School Board had adopted a new redistricting plan after its receipt of the 1990 census. The Board consisted of 12 members elected from single-member districts. Under the benchmark plan, none of the 12 districts contained a majority of black residents. During

[16] The district court did not address whether the plan had a discriminatory purpose. As a result, that issue was not before the Supreme Court. *Beer*, 425 U.S. at 136 n.7.

public hearings, the President of the local NAACP urged the Board to adopt his proposed plan which would establish two districts, each with a majority black voting age population. The Board rejected this proposal and instead adopted a redistricting plan previously implemented by the Bossier Parish Police Jury and precleared by the United States Department of Justice. Under this plan, none of the school board districts were established with a majority of black voting age population. *Bossier Parish I*, 520 U.S. at 474-75.

In *Bossier Parish I*, the United States Attorney General objected to the Board's plan on the ground that it violated § 2 of the VRA. The Attorney General relied upon the Justice Department's regulation that an objection should be made when "necessary to prevent a clear violation of amended Section 2." *Bossier Parish I*, 520 U.S. at 475-76 (citing 28 C.F.R. § 51.55(b)(2) (1996)). The school board then filed an action for a declaratory judgment in the United States District Court for the District of Columbia. The district court agreed with the board that an alleged failure to satisfy § 2 did not provide a basis for the Attorney General to object to a plan under § 5. *Bossier Parish I*, 520 U.S. at 476. On appeal, the Supreme Court agreed that none of the standards established by § 2 had been incorporated by Congress into § 5. Based upon that conclusion, the Court ruled that the failure to create two new majority black districts could not support an objection under § 5 for an alleged discriminatory effect. The Court remanded the case to the district court to consider whether the failure to create the two majority districts was relevant to whether the new plan had a discriminatory purpose. *Bossier Parish I*, 520 U.S. at 476-90.

Following remand to the district court, in *Bossier Parish II*, the Supreme Court held that § 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but non-retrogressive purpose. *Bossier Parish II*, 528 U.S. at 326-41. The Court therefore limited the scope

of any § 5 discriminatory purpose objection to cases in which there was shown to be a discriminatory intent to reduce minority voting strength. *Id.* Even under this interpretation of § 5, plans that passed the retrogression test could still be challenged in separate proceedings on constitutional grounds or pursuant to § 2. *Bossier Parish I*, 520 U.S. at 484; *Bossier Parish II*, 528 U.S. at 338-39.

The final significant holding regarding § 5, prior to its reauthorization in 2006, is the decision in *Ashcroft*. In *Ashcroft*, the benchmark plan contained 56 Senate districts. Under the 2000 Census, 13 districts had a majority black population with 12 of the districts enjoying a majority black voting age population. *Ashcroft*, 539 U.S. at 469. In drafting the new Senate plan, the Democratic leader of the Georgia Senate adopted two goals: (1) maintaining at least as many majority-minority districts as the benchmark plan; and (2) increasing the number of Democratic-leaning Senate districts. The Senate leadership claimed to have accomplished this goal by "unpack[ing] the most heavily concentrated majority-minority districts in the benchmark plan, and creat[ing] a number of new *influence* districts." *Ashcroft*, 539 U.S. at 470 (emphasis added). For example, District 2's voting age population was reduced from 60.58% under the benchmark plan to 50.31%. Under the new plan, District 12 was reduced form 55.43% to 50.66% and District 26 was reduced from 62.45% to 50.80%. *Id.* at 472-73.

With these reductions, the Democratic Senate leadership was able to create a new Senate plan with 13 districts with a majority black voting age population ("VAP"), 13 additional districts with black VAP between 30% and 50%, and 4 districts with a black VAP of between 25% and 30%. As compared to the benchmark plan, the new plan reduced by five the number of districts with a black VAP in excess of 60%, increased the number of majority black VAP districts by one, and increased by four the number of districts with a black VAP between 25% and 50%. *Ashcroft*, 539 U.S. at 470-

71.

The Democratic majority leader of Georgia explained his rationale for creating more "influence" districts as follows:

> [I]n the past, you know, what we would end up doing was packing. You put all blacks in one district and all whites in one district, so what you end up with is [a] black Democratic district and [a] white Republican district. That's not a good strategy. That does not bring the people together, it divides the population. But if you put people together on voting precincts it brings people together.

Ashcroft, 539 U.S. at 470.

The Georgia Senate and the Georgia House passed the Senate leadership's proposed plan largely along party lines. Ten of the 11 black senators voted for the plan while 33 of 34 black representatives voted for the plan. No Republican members voted for the new Senate Plan. *Ashcroft*, 539 U.S. at 471.

USDOJ objected to the new plan, noting the reductions in black VAP in Districts 2, 12, and 26 as a basis for this objection. A three-judge panel of the United States District Court for the District of Columbia agreed with USDOJ and denied preclearance. Circuit Judge Edwards rejected the testimony of the black senators and representatives who supported the plan because "the testimony of the black Georgia politicians . . . did not address whether racial polarization was occurring in Senate Districts 2, 12, and 26." *Ashcroft*, 539 U.S. at 475.

The Supreme Court in *Ashcroft* reversed the ruling of the three-judge court and concluded that the Georgia Senate Plan should be precleared. Justice O'Connor, writing for the Court majority, stated that § 5 allowed a state to choose between two preclearance strategies. First, § 5 permitted a jurisdiction to create a certain number of "safe" districts "in which it is highly likely that minority voters will be able to elect the candidate of their choice." *Ashcroft*, 539 U.S. at 480. However, in

the alternative, states also had the discretion to substitute "coalition" and "influence" districts for majority-black districts. *Ashcroft*, 539 U.S. at 480-83. Justice O'Connor defined coalition districts as districts with lower black populations than safe black districts but in which minorities could create "coalitions of voters who together will help to achieve the electoral aspirations of the minority group." *Id*. at 481.[17] Justice O'Connor defined influence districts as districts in which "minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process." *Id*. at 482.[18]

In dissent, Justice Souter disputed the proposition that § 5 permitted the substitution of influence districts for districts that provide minorities with an equal opportunity to elect candidates of choice. *Ashcroft*, 539 U.S. at 493-94. Justice Souter criticized the notion that "decisive minority voting power" could be replaced based upon allegations that "elected politicians can be expected to give some consideration to minority interests." *Id.* at 494-95. According to Justice Souter, the Court's majority had "forgotten" the "power to elect a candidate of choice" and that nothing was "left of the standard of nonretrogression." *Id*. at 495. Justice Souter then explained how the majority's test provided no judicially manageable standard for legislatures or courts:

> Indeed, to see the trouble ahead, one need only ask how on the Court's new understanding, state legislators or federal preclearance reviewers under § 5 are supposed to identify or measure the degree of influence necessary to avoid the retrogression the Court nominally retains as the § 5 touchstone. Is the test purely ad

[17] Justice O'Connor acknowledged that coalition districts "creates the risk that the minority group's preferred candidate may lose." *Id.* at 481.

[18] Justice O'Connor also stated that another method "of assessing the minority group's opportunity to participate in the political process" is to "examine the comparative position of legislative leadership, influence, and power for representatives of the benchmark majority0-minority districts." *Ashcroft*, 539 U.S. at 483. Justice O'Connor continued that "a legislator with more legislative influence has more potential to set the agenda, to participate in closed-door meetings, to negotiate from a stronger position, and to shake hands on a deal." *Id*. at 483-85. Along those same lines, Justice O'Connor found it "significant" that almost all of the black representatives elected from the benchmark plan voted in favor of the new one. *Id.* at 484.

> hominem, looking merely to the apparent sentiments of incumbents who might run in the new districts? Would it be enough for a State to show that an incumbent had previously promised to consider minority interests before voting on legislative measures? Whatever one looks to, however, how does one put a value on influence that falls short of decisive influence through coalition? Nondecisive influence is worth less than majority-minority control, but how much less? Would two influence districts offset the loss of one majority-minority district? Would it take three? Or four? The Court gives no guidance for measuring influence that falls short of the voting strength of a coalition member, let alone a majority of minority voters. Nor do I see how the Court could possibly give any such guidance. The Court's "influence" is simply not functional in the political and judicial worlds.

Ashcroft, 539 U.S. at 495 (Souter, J., dissenting).

In summary, prior to its reauthorization in 2006, the Court in *Beer* ruled that nothing in § 5 prohibits states from creating more majority-black districts than the number of majority districts found in the benchmark plan. In *Bossier Parish* I, the Supreme Court ruled that, prior to 2006, § 5 did not include any of the standards established by § 2. In *Bossier Parish II*, "discriminatory purpose" under § 5 was limited to evidence showing an intent to retrogress. Finally, in *Ashcroft*, jurisdictions were given two options by which they could obtain preclearance of redistricting plans. First, they could seek preclearance through the creation of safe majority-black districts. Alternatively, they could seek preclearance of districts with smaller percentages of black population even though such districts would require black voters to build political coalitions to elect the candidate preferred by the minority. Under this second option, "excess" black voting age population – *i.e.*, black voters removed from majority-black districts to create "coalition" districts – could be spread to districts in which minority voters could not elect their candidate of choice but in which they would have political "influence" to help elect a candidate from their preferred political party.

E. The Reauthorization of the Voting Rights Act in 2006

On 27 July 2006 Congress amended and reauthorized § 5. *See* P.L. 109-246 (the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006), § 5. Section 5 was amended to expressly prohibit "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the *purpose* of or will have the *effect* of diminishing the ability of citizens of the United States on account of race or color . . . *to elect their preferred candidates of choice*." *Id.* (emphasis added). Congress provided that the term "purpose" shall include "any discriminatory purpose." *Id.*

By adopting these amendments, Congress legislatively reversed the United States Supreme Court's decision in *Bossier II* and any portion of *Ashcroft* allowing states to prefer coalition or influence districts over districts that allow minorities to elect their preferred candidates of choice. In so doing, Congress endorsed many of the arguments advanced by Justice Souter in the dissenting opinion in *Ashcroft*. *See* Report of the Senate Committee on the Judiciary, 109th Cong. Report 295, pp. 16-18 ("Any Discriminatory Purpose") and pp. 18-21 ("Preferred Candidate of Choice"); Report of the House Committee on the Judiciary, 109th Cong. Report 478 pp. 65-72. By expanding the statutory definition of "discriminatory purpose," Congress incorporated into § 5 the constitutional standard established in cases such as *Mobile,* 446 U.S. 55, *Washington v. Davis,* 426 U.S. 229 (1976) Senate Report p. 16, and *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) *("Village of Arlington Heights").* *See* House Report, pp. 66-68. Consistent with this intent, the Senate Report cautioned that:

> some witnesses raised concerns that the amendment could be misinterpreted, and that the Justice Department or Federal Courts might compel the creation of so-called influence or coalition districts. The adopted language does not prevent state officials

> from declining to combine a group of minority voters with a group of white voters who tend to support the same parties and candidates in a district where candidates supported by minorities will reliably prevail. Although such an action may make it more difficult for that coalition of voters to elect their preferred candidate, *the Voting Rights Act . . . is not designed to protect political parties, or to prevent statewide political realignment from being reflected in the redistricting process. Nor can any racial or political group claim a right under the Fourteenth Amendment to have its members placed as often as possible in districts where candidates of the party favored by that group's members will prevail . . . .*
>
> The language "any discriminatory purpose" does not permit a finding of discriminatory purpose based on a determination that the plan seeks partisan advantage . . . or protects incumbents.

Senate Report pp. 18 (emphasis added).

Both the Senate and the House reports explain that amended § 5 is designed to prevent elected officials from "unpacking" majority-minority districts and changing them into "influence" or "coalition" districts. *See, e.g.*, Senate Report p. 19; House Report pp. 68-71. Amended § 5 does not "lock into place coalition or influence districts" or "the competitive position of a political party." Senate Report p. 21. Congress "explicitly reject[ed] all that logically follows from Justice O'Connor's statement [in *Ashcroft*]" that state legislatures "should not focus solely on the comparative ability of a minority groups to elect a candidate of choice." House Report p. 71. Instead, under the § 5 effects test, as amended, "the relevant analysis . . . is a comparison between the minority community's ability to elect their preferred candidate of choice before and after a voting change." *Id.*

In summary, following the 2006 reauthorization of § 5, it remains settled that a jurisdiction may lawfully enact redistricting plans that increase the number of districts that allow a minority group to elect their preferred candidates of choice. Preclearance will now be denied if a redistricting plan has any discriminatory purpose. A discriminatory purpose may be established if a plan

intentionally fails to create districts that allow minority voters to elect their preferred candidates of choice. Federal Register, Vol. 76, No. 27 p. 7471 (February 9, 2011) (citing *Busbee v. Smith*, 549 F. Supp. 494, 508 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983), *Garza and United States v. County of Los Angeles*, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J. concurring and dissenting in part), *cert. denied*, 498 U.S. 1028 (1991)). Discriminatory purpose is not established because a jurisdiction refuses to create "coalition" or "influence" districts or because a new redistricting plan realigns political power within a state. Jurisdictions may not substitute coalition or influence districts, supported by incumbents or the party favored by minorities, for districts that allow minority voters to elect their candidates of choice. Instead, under the "effect" clause, whether an objection will be made depends upon whether a new plan reduces the number of districts that allow minorities to elect their preferred candidates as compared to the benchmark.

F. The *Pender County* Litigation

The interplay between federal law – § 2 of the VRA in particular – and the requirements of the WCP as interpreted in the *Stephenson* cases was brought into focus in an action by Pender County that made its way to the North Carolina Supreme Court and the United States Supreme Court. *See Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364, *aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1 (2009). Pender County challenged the North Carolina House Plan enacted in 2003, following *Stephenson I* and *II*, arguing that the county was improperly split into two House districts even though its population was less than that of an ideal House district. The State maintained that one of the districts, House District 18, was drawn "as a preemptive measure against the possibility that a lawsuit might be filed challenging the absence of a Section 2 district in southeastern North Carolina." *Pender County*, 361 N.C. at 496, 649 S.E.2d at 367. House District

18 had a total black population of 42.89%, a black voting age population of 39.36%, and a black Democratic voter registration of 53.72%. This, the State argued, allowed House District 18 to function as an effective influence or crossover district enabling minority voters to elect their candidates of choice. The plaintiffs maintained that House District 18 was not required by § 2, and indeed could not be justified by § 2 because the minority population was less than 50% and therefore did not meet the "majority" component of the first *Gingles* prong.

The Supreme Court agreed with plaintiffs, holding that

> if a minority group is geographically compact but nevertheless lacks a numerical majority of citizens of voting age, the minority group lacks the power to decide independently the outcome of an election, and its voting power has not been diluted by the lack of a legislative district. In such a case, the first *Gingles* precondition has not been satisfied and the General Assembly is not required to create a Section 2 legislative district.

Pender County, 361 N.C. at 506, 649 S.E.2d at 374. As a result, the Court held, "because current House District 18 is not required by Section 2, it must comply with the redistricting principles enunciated by this Court in *Stephenson I*." *Id.* at 507, 649 S.E.2d at 374. That is to say, because House District 18 was not required by § 2, the WCP required that Pender County be kept whole in any redistricting plan.

The State's petition for certiorari to the United States Supreme Court was allowed, and that Court affirmed the decision of the North Carolina Supreme Court, articulating for the first time a bright-line rule that "[o]nly when a geographically compact group of minority voters could form a majority in a single-member district has the first *Gingles* requirement been met." *Strickland*, 556 U.S. at 26. In rejecting the use of crossover districts to achieve compliance with § 2, the Court noted that "[t]here is a difference between a racial minority group's 'own choice' and the choice made by

a coalition." *Id.* at 15. As a result, the Court reasoned that "[n]othing in § 2 grants special protection to a minority group's right to form political coalitions. '[M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground.'" *Id.* at 15 (quoting *De Grandy*, 512 U.S. at 1020).

While the Court was careful to note that "[s]tates that wish to draw crossover districts are free to do so where no other prohibition exists," the Court was also clear that "[w]hen we address the mandate of § 2, however, we must note it is not concerned with maximizing minority voting strength, and, as a statutory matter, § 2 does not mandate creating or preserving crossover districts." *Strickland*, 556 U.S. at 24 (citations omitted). Under this framework, because House District 18 did not contain a minority population greater than 50%, the district was not required or justified by § 2, and the General Assembly's ability to maintain it as a crossover district was limited by the WCP.

III. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS THAT THE 2011 PLANS DO NOT COMPLY WITH THE WCP AS INTERPRETED IN *STEPHENSON I* AND *I* AND WITH "TRADITIONAL REDISTRICTING PRINCIPLES"

(*Dickson* Claims for Relief 11-16; *NC NAACP* Claims for Relief 4 and 5)

Plaintiffs claim that the 2011 Plans for North Carolina House and Senate violate the WCP and the requirements of the *Stephenson* decisions because of the number of counties divided in those plans. Specifically, plaintiffs allege that counties were divided when such division was not required by federal law. The NAACP plaintiffs also allege that the WCP "requires the North Carolina General Assembly to respect the traditional redistricting principles of compactness and respect for political subdivisions and communities of interest," (*NAACP* First Amended Complaint, ¶¶ 444 and

448), and that the 2011 Plans for North Carolina House and Senate violate this "requirement."[19] Plaintiffs' claims are grounded in a misapprehension of the *Stephenson* decisions.

A. Plaintiffs Ignore the *Stephenson* Decisions' Clear Holdings That the Requirements of the WCP Are Met When Counties Not Having an "Ideal Population" Are Grouped into the Smallest Groupings Possible

The crux of plaintiffs' claims under the WCP and under the *Stephenson* decisions that the 2011 House and Senate Plans divide too many counties turns on a single legal question: Do the WCP and *Stephenson* decisions require the division of the fewest counties possible or do they require that counties be grouped into the smallest groupings possible. The argument made by plaintiffs – that compliance with the WCP is measured by the number of counties kept whole, not by whether the minimum number of whole, contiguous counties necessary to comply with one person, one vote requirements – is the same argument made by the State and rejected by the North Carolina Supreme Court in *Stephenson II*. It must be rejected now as well.

In *Stephenson II*, the State argued that

> plaintiffs' insistence that one should start with all possible two-county groupings and then proceed to three-county groupings does not reflect the unambiguous direction of the Court to create groupings consisting of those counties not divisible evenly, or with non-VRA populations that are not evenly divisible, plainly indicating that the groupings be formed from the remaining counties or portions of counties not included in the VRA districts or the evenly-divisible counties. *Id.* Plaintiffs thus had the proverbial tail wagging the dog, with the grouping process predominant over the underlying constitutional principles.
>
> . . . [P]laintiffs' method is inconsistent with *Stephenson I*, elevating the grouping process to the height of ultimate goal rather than a means to the end. . . . This Court should recognize that the General Assembly's procedure, not plaintiffs', precisely tracked the process set out by this Court in *Stephenson I* in grouping counties and their districts as the last stage of the districting process. At the very least, the Court

[19] The *Dickson* plaintiffs' First Amended Complaint contains no claims concerning "traditional redistricting principles," compactness or communities of interest under the WCP, and neither amended complaint raises similar challenges with regard to the 2011 Congressional Plan.

> should acknowledge that the grouping process employed by the General Assembly furthered the goals of constitutional redistricting, giving force and effect to the WCP and the other principles of state and federal law governing the drawing of legislative districts. To rule otherwise would treat the grouping stage, clearly intended by this Court as a remedial principle, as the equal of the explicit constitutional directives set out in Article II, §§ 3 and 5.

(Brief for Appellants at 38-39, *Stephenson II*, 357 N.C. 301, 582 S.E.2d 247 (2003) (No. 94PA02-2)).[20]

The Court in *Stephenson II*, in restating the *Stephenson* criteria, *see* Argument II.B *supra*, rejected this argument, emphasizing that "*the requirements of the WCP are met* by combining or grouping the minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent one person, one vote standard and that "*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*." *Stephenson II*, 357 N.C. at 305-07, 582 S.E.2d at 250-51, (quoting *Stephenson I*, 355 N.C. at 383-84, 562 S.E.2d at 250). The Court further affirmed the findings of the trial court that "[t]he General Assembly's May 2002 Fewer Divided Counties Senate and Sutton 5 House Plans fail to comply with the requirement that in forming districts, only the smallest number of counties necessary to comply with the one-person, one-vote requirement should be combined in forming multi-county groupings" and that "[t]he General Assembly's failure to create *the maximum number of two-county groupings* in the May 2002 House Plan violates *Stephenson I*." *Stephenson II*, 357 N.C. at 308, 582 S.E.2d at 251 (emphasis added). Thus, the Supreme Court has made clear that the basis of plaintiffs' WCP claims is wrong and that the *Stephenson* criteria require the General Assembly to create the most two-county groupings possible, then the most three-county groupings possible, etc. The General Assembly followed this prescribed

[20] Available at http://www.ncappellatecourts.org/show-file.php?document_id=96775.

method in drawing the 2011 North Carolina House and Senate Plans.

Plaintiffs suggest that this creates some tension between the *Stephenson* decisions and the WCP, because it places the point of inquiry on the country groupings rather than on the raw number of counties kept whole. As a result, plaintiffs, pointing to the alternative maps, urge that the requirements of the WCP have not been met in the 2011 House and Senate Plans because, but for following the county grouping method enunciated in *Stephenson I*, it would be possible to keep more counties whole. In so arguing, plaintiffs ignore the clear statement of the Supreme Court in *Stephenson I* that by grouping the minimum number of counties necessary to comply with one person, one vote standards, and by ensuring that "only the smallest number of counties necessary" to comply with that standard are grouped together, "the requirements of the WCP *are met*." *Stephenson II*, 357 N.C. at 305-07, 582 S.E.2d at 250-51 (quoting *Stephenson I*, 355 N.C. at 383-84, 562 S.E.2d at 250). To put it simply, plaintiffs' argument is refuted by the clear and unambiguous language of *Stephenson I* and *Stephenson II*. By maximizing the number of two-county groupings and then three-county groupings, etc., the General Assembly, relying on what the Supreme Court clearly stated in the *Stephenson* cases, ensured that "the requirements of the WCP are met."

Plaintiffs do not dispute, nor can they, that the 2011 House Plan contains more two-county groupings than any alternative plan offered, and that the 2011 Senate Plan contains as many two-county groupings as the alternative Fair and Legal Plan, and also has more three-county groupings. As this chart shows, the enacted plans surpass the alternative plans in grouping together the smallest number of counties necessary to comply with the one person, one vote standard[21]:

[21] The single-county "groupings" in this chart as those counties where one or more districts can be drawn wholly within the county.

Number of Counties in Groupings:	1	2	3	4	5	6	7	8	9	10	11	20	46	Total
Lewis-Dollar-Dockham 4	11	15	4	2	2	0	0	0	1	0	0	1	0	36
House Fair and Legal	11	9	6	4	3	1	1	0	1	0	0	0	0	36
Possible House Districts	10	8	4	5	6	2	0	0	0	0	0	0	0	35
SCSJ House	8	8	3	4	1	0	0	0	0	0	0	0	1	25
Rucho Senate 2	1	11	4	3	1	1	1	2	1	1	0	0	0	26
Senate Fair and Legal	1	11	3	7	1	2	2	0	1	0	0	0	0	28
Possible Senate Districts	1	5	4	5	4	1	2	1	1	0	0	0	0	24
SCSJ Senate	1	4	7	2	3	2	1	1	1	0	1	0	0	23

Compared to the alternative plan, it is beyond question that the plans enacted by the General Assembly "create[d] the maximum number of two-county groupings," *see Stephenson II*, 357 N.C. at 308, 582 S.E.2d at 251, and then, within the framework of remaining counties, created the smallest three-county groupings, and then four-county groupings, etc., as possible. This being clearly the case, defendants are entitled to summary judgment on plaintiffs claims concerning compliance with the WCP and division of counties.

B. The *NAACP* Plaintiffs' Attempt to impose a Compactness or Communities of Interest Requirement Is Not Supported by the *Stephenson* Decisions, Nor Have the *NAACP* Plaintiffs Shown a Violation of Any Such Requirements

The *NAACP* plaintiffs also allege that the WCP and the *Stephenson* decisions impose a constitutional compactness requirement on the General Assembly, as well as impose a constitutional requirement that the General Assembly respect communities of interest and political subdivisions in drawing legislative districts. The *NAACP* plaintiffs' claims are not supported by the WCP or by *Stephenson*.

The WCP, of course simply state: "No county shall be divided in the formation of a senate district," and "No county shall be divided in the formation of a house district." N.C. Const., art. III, §§ 3(3) and 5(3). There is no mention of political subdivisions (other than counties), communities or interest or compactness in these provisions, or in any other constitutional provision dealing with

redistricting. *Stephenson I* states that "[t]he intent of the WCP is to limit the General Assembly's ability to draw legislative districts without according county lines a reasonable measure of respect," that "the requirements of the WCP are met by combining or grouping the minimum number of whole, contiguous counties" necessary to meet the one person, one vote standard, and that "the intent underlying the WCP must be enforced to the maximum extent possible." *Stephenson I*, 355 N.C. at 384, 562 S.E.2d at 397. Once this constitutional criterion is met "to the maximum extent possible," the General Assembly should "*consider*" "communities of interest" "in the formation of compact and contiguous electoral districts." *Id.* (emphasis added).

Neither communities of interest nor compactness are mentioned or defined in the State Constitution. Plaintiffs ignore the Court's explanation in *Stephenson I* that the State's constitutional limitations (*i.e.*, the WCP) operate to "uphold what the United States Supreme Court has termed 'traditional districting principles'" such as "compactness, contiguity, and respect for political subdivisions." *Stephenson I*, 355 N.C. at 371, 562 S.E.2d at 389. The *Stephenson I* Court then went on to say:

> The United States Supreme Court has "emphasized that these criteria are important not because they are constitutionally required – *they are not* – but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines."

Id. (emphasis added; citations omitted).

The North Carolina Supreme Court has not attempted to define the terms "communities of interest" or "compactness," or provided any judicially manageable standards for either concept. The Court has said that "communities of interest" shall be "considered" by the General Assembly without explaining the amount of "consideration" required or any ranking of different types of communities

of interest. Nor has the Court defined compactness or what constitutes sufficient legal compactness. In the absence of any definition for either term, the only logical conclusion is that the Court has given discretion to the General Assembly to decide the types of communities of interest that should be considered and whether a district is sufficiently compact, provided redistricting plans comply with the WCP.

There is a good reason for the North Carolina Supreme Court to defer to the discretion of the General Assembly regarding communicates of interest. As explained by plaintiffs' expert, Dr. Ted Arrington, there is no accepted definition of the term communities of interest. (Arrington Dep. pp. 97-100). Any set of districts can be justified by someone's definition of communities of interest. (Arrington Dep. p. 101). For example, both race and political affiliation represent communities of interest. (Arrington Dep. p. 102). Dr. Arrington agrees that the only "community of interest" identified in the North Carolina Constitution is a community of interest established by county lines, even though Dr. Arrington disagrees that counties represent a true community of interest. (Arrington Dep. p. 101). In *Stephenson I*, the Court wisely acted with judicial restraint by deferring to the legislature's political discretion to define, consider, and weigh purported communities of interest.

Like the amorphous concept of communities of interest, neither the North Carolina Supreme Court nor the United States Supreme Court has defined the term "compact" or established a standard that can be used by the General Assembly to determine whether a district satisfies a legal requirement for "compactness." (Arrington Dep. p. 145-46). When Dr. Arrington draws districts for the United States Department of Justice he uses an "intraocular test" to determine if a district is "compact." (Arrington Dep. p. 202). Under this test, the map drawer makes a subjective decision about whether a district is compact based upon the way it "looks." *Id.* Dr. Arrington agreed that

different people have different subjective opinions regarding the shape of a district and whether it is sufficiently compact. *Id.* There are no generally accepted standards for determining whether a district "looks" compact versus whether it "looks" non-compact. (Arrington Dep. p. 145, 202). Such a subjective standard can hardly function as a constitutional mandate.

The General Assembly's software included eight different mathematical tests for determining compactness, with the ability to provide a district's mathematical score under each test. (Deposition of Anthony Fairfax, p. 23). While these tests can be used to determine whether a district scores higher or lower than another district on a particular test, none of these tests explain what constitutes an acceptable score for determining legally sufficient compactness. (Fairfax Dep. pp. 33-34; Arrington Dep. pp 142, 145). Dr. Arrington acknowledged that the different tests are often contradictory. In many instances, District B is more compact than District A under one test, while A is more compact than District B under a different test. (Arrington Dep. pp. 142, 146). Even when a series of tests might show that one plan has more or less compact districts than another plan, there is no guidance for determining whether the lower-scoring plan is insufficiently compact from a legal standpoint. (Arrington Dep. pp. 142, 145). "[A] mindless, mechanical application of a compactness criterion is destructive to the really important criteria that promotes effective representation." (Arrington Dep. p. 144).

In light of the difficulties in establishing judicially manageable standards for concepts like communities of interest or compactness, and given the Supreme Court's decision not to define either term, it is not for the Superior Court to unilaterally adopt definitions for either term on a post hoc basis. It was reasonable for the General Assembly to conclude that the Constitution does not require compliance with established criteria for communities of interest or compactness and that application

of these redistricting principles has been left by the North Carolina Supreme Court to the political discretion of the General Assembly – provided the redistricting plans comply with the WCP criteria. The WCP provides a judicially manageable standard for the General Assembly and the courts to judge redistricting plans. No similar judicially manageable standards are possible for concepts like communities of interest or compactness. If a plan complies with the WCP, then districts drawn within a single county or a county grouping uphold communities of interest and are sufficiently compact. *Stephenson I*, 355 N.C. at 371, 562 S.E.2d at 389.

IV. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS OF RACIAL DISCRIMINATION AND IMPROPER RACIAL CLASSIFICATION

(*Dickson* Claims for Relief 19-24; *NC NAACP* Claims for Relief 1-3 and 9-11)

Plaintiffs have alleged three different claims of racial discrimination. Both sets of plaintiffs allege that the plans violate Article I, § 19 of the North Carolina Constitution and the Fourteenth Amendment of the United States Constitution because they constitute illegal racial gerrymanders. (*Dickson* Am. Compl., Claims for Relief 19, 20, 22 and 23; *NC NAACP* Am. Compl., Claims for Relief 1, 2, 9 and 10) The *NAACP* plaintiffs also allege that the enacted plans unconstitutionally discriminate against black voters in districts that adjoin majority-black districts because they have less "influence." (*NAACP* Am. Compl. ¶¶ 105, 134, 145, 156, 170, 183, 196, 210, 225, 238, 264, 372, 428, 429, 311, 323, 336, 344, 356, 368, 777, 383) There is no precedent whatsoever for this second type of claim alleged by the *NAACP* plaintiffs. Defendants are entitled to summary judgment on these claims.

A. The General Assembly Has an Obligation to Enact Redistricting Plans that Protect the State from Claims, under the Fourteenth Amendment and § 2 of the VRA, that the Voting Strength of African American Voters Has Been Illegally Diluted

1. Constitutional claims for vote dilution require proof of discriminatory intent

The United States Supreme Court has "entertained" claims that redistricting plans may violate the Fourteenth Amendment where they are "used to cancel out or minimize the voting strength of racial groups." *White*, 412 U.S. at 765 (citing *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *Burns v. Richardson*, 384 U.S. 73, 89 (1966); *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965). For example, the Court has recognized that multi-member districts violate the Fourteenth Amendment if "conceived or operated as purposeful devices to further racial discrimination by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population." *Rogers v. Lodge*, 458 U.S. 613, 617 (1982) (citing *Whitcomb*, 403 U.S. at 149). To prove a claim of unconstitutional vote dilution, plaintiffs must show "that the political processes leading to nomination and election were not equally open to participation by the group in question – *that its members had less opportunity than did other residents* . . . to participate in the political processes and to *elect legislators of their choice*." *White*, 412 U.S. at 766 (citing *Whitcomb*, 403 U.S. at 149-50 (emphasis added)).[22]

A state statute or practice does not violate the Fourteenth Amendment simply because it has a disparate or disproportionate impact on a minority group. *Village of Arlington Heights*, 429 U.S. at 265; *Washington*, 426 U.S. at 229. This principle applies to redistricting cases. *Rogers*, 458 U.S.

[22] As stated in *Strickland*, minorities can only elect candidates of their choice when they form a majority of the voters in a district. Otherwise, the candidate elected is, at best, the choice of a coalition, not of the minority community standing alone. 556 U.S. at 15.

at 617; *Wright v. Rockefeller*, 376 U.S. 52, 56, 58 (1964). Standing alone, the fact that minorities have not held "legislative seats in proportion to [their] voting potential," is not sufficient to prove a violation of the Fourteenth Amendment. *White*, 412 U.S. at 766. Instead, a plaintiff must prove that "the invidious quality of a law" can be "traced to a racially discriminatory purpose." *Rogers*, 458 U.S. at 617 (citing *Washington*, 426 U.S. at 240); *see also City of Mobile v. Bolden*, 446 U.S. 55, 63 (1980).

Thus, to prove that a redistricting plan unconstitutionally dilutes the voting strength of African Americans, plaintiffs must prove that the plan *purposefully* deprives the minority group of an equal opportunity to *elect legislators of their choice. White*, 412 U.S. at 766. Nothing in any of the relevant cases indicates that minorities may allege claims for "vote dilution" simply because the plan allegedly minimizes or dilutes the minority group's ability to have "influence." Nor do the cases indicate that a claim may be made where a redistricting plan favors a political party other than the one supported by the minority group. *See Hunt v. Cromartie*, 526 U.S. 541, 551-52 (1999) ("*Cromartie I*").

2. Claims for vote dilution under § 2 require proof of discriminatory effect

The United States Supreme Court has set forth the test that must be applied in determining whether § 2 of the VRA has been violated. *See* Argument II.C.1, *supra*. The Court has also held that the principles used to determine whether a redistricting plan with multi-member district violates § 2 apply equally to plans based upon single-member districts. *De Grandy*, 512 U.S. at 997; *Growe*, 507 U.S. at 40-42; *Voinovich*, 507 U.S. at 153. In a plan involving single-member districts, "the usual device for diluting minority voting power is the manipulation of district lines." *Voinovich*, 507 U.S. at 153. There are two different ways in which a single-member district plan can violate § 2.

The first way involves the concept of "cracking" or "fragmenting." *See Voinovich*, 507 U.S. at 153; *Thornburg*, 478 U.S. at 46 n.11. If a politically cohesive minority group is large enough to be a majority in a single-member district, it has a good chance of electing its candidate of choice provided the minority group is actually placed in a district where it is a majority. Cracking occurs when the minority group is divided among various districts so that it constitutes a majority in none. By cracking or fragmenting the minority group, a legislature can ensure that the minority group will be unable to muster sufficient votes in any of the districts in which it is placed "to carry its candidate to victory." *Voinovich*, 507 U.S. at 153.

The second way in which § 2 may be violated is by "packing" a minority group in a restricted number of districts. "A minority group, for example, might have sufficient numbers to constitute a majority in three districts" which will allow it to "elect three candidates of its choice ." *Id.* "But if the group is packed into two districts in which it constitutes a super-majority, it will be assured only two candidates." *Id.* at 153-54.

Thus, the Court has recognized that "'[d]ilution of racial minority group voting strength may be caused 'either' by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority.'" *Id.* at 154 (quoting *Thornburg*, 478 U.S. at 46 n.11).

Regardless of whether a single district plan "cracks" or "packs" black voters, plaintiffs face an additional requirement for proving a violation of § 2. "When applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *De Grandy*, 512 U.S. at 1008. Thus, as applied to a

state legislative redistricting plan, in order for plaintiffs to prove that the plan unlawfully diluted their voting strength, they must offer a plan that contains more districts that enable minorities to elect their candidate of choice as compared to the plan enacted by the legislature. *Id*.; *League of United American Citizens v. Perry*, 548 U.S. 399, 429-30 (2006) (hereinafter "*LULAC*"); *Shaw v. Hunt*, 517 U.S. 899, 916 n.8 (1996) ("*Shaw II*"). Even where plaintiffs offer such a plan, there is no violation if the enacted plan provides minority voters with substantial proportionality in the number of district that allow them to elect their candidates of choice. *De Grandy,* 512 U.S. at 1013-14, 1024; *LULAC*, 548 U.S. at 426-27. "Proportionality" only links "the number of majority-minority voting districts to minority members' share of the relevant population." *De Grandy,* 512 U.S. at 1014 n.11. The concept is distinct from the term "proportional representation" which "speaks to the success of minority candidates." *Id.* Instead, proportionality speaks only to an "equal opportunity" to elect candidates of choice and is "not a guarantee of electoral success for minority-preferred candidates ." *Id*.[23]

B. The General Assembly Has an Obligation to Enact Redistricting Plans That Can and Will Be Precleared under § 5 of the Voting Rights Act

1. Covered jurisdictions must show that new redistricting plans have neither the purpose nor the effect of discriminating against minority voters

As noted in footnote 4 *supra*, 40 counties in North Carolina are "covered jurisdictions" under § 5 of the VRA. *See* 42 U.S.C. § 1973c(a); 28 C.F.R. § 51, App. (2011). Section 5 suspends all changes to a covered jurisdiction's election procedures, including changes to district lines, until those

[23] The Court in *De Grandy* stopped short of holding that proportionality is an absolute defense to vote dilution claims. *De Grandy*, 512 U.S. at 1000. However, neither defendants nor plaintiffs' expert are aware of a case finding discrimination against minority voters under a plan that provides rough proportionality to the minority group. (Arrington Dep. p. 192)

changes are submitted to and approved by a three-judge United States District Court for the District of Columbia, or the Attorney General. *Perry*, 132 S. Ct. at 939 (citing *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 198 (2009)).

In determining whether a newly-enacted redistricting plan has the effect of discriminating against a minority population, the new plan is compared to the "benchmark" plan. The benchmark plan is the most recent legally enforceable redistricting plan in force or effect in the covered jurisdiction. *Riley v. Kennedy*, 553 U.S. 406 (2008); 28 C.F.R. § 51.54(b)(1).[24] By prohibiting the enforcement of a voting change until the jurisdiction has demonstrated that it does not have a discriminatory purpose or effect, "Congress desired to prevent States from 'undo[ing] or defeat[ing] the rights recently won'" by minorities. *Beer*, 425 U.S. at140-41 (citing H.R. Rep. No. 91-397, p. 8, U.S. Code Cong. & Admin. News 1970 p. 3284).

2. Districts that provide African American voters with an equal opportunity to elect their candidates of choice must include a black VAP in excess of 50%.

Prior to its reauthorization in 2006, the United States Supreme Court had ruled on several occasions that nothing under § 2 had been incorporated into § 5. *See*, *e.g.*, *Ashcroft*, 539 at 477-78 (§ 2 and § 5 "combat different evils and accordingly impose very different burdens upon the states"). However, in 2006, Congress expressly incorporated into § 5 language that is virtually identical to comparable language in § 2. While a violation of § 2 is established where the totality of circumstances show that minorities have "less opportunity . . . to elect representatives of their choice," the relevant question for preclearance under § 5, as amended in 2006, is whether a new redistricting plan diminishes the ability of minorities "to elect their preferred candidates of choice."

[24] Once a new plan is precleared, it becomes the new benchmark plan. *McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981). Thus, North Carolina's 2011 redistricting plans are now the benchmark plans.

Given the Supreme Court's rejection of influence or crossover districts as substitutes for districts that allow minorities to elect their candidates of choice for purposes of § 2, and Congress's rejection of influence or crossover districts as substitutes for districts that allow minorities to elect their candidates of choice for purposes of § 5, it follows that the definition of a district that allows minorities "to elect their preferred candidates of choice" under § 5 must be the same as the definition of a district that protects the right of minorities "to elect their candidate of choice" under § 2.[25]

Plaintiffs' expert, Dr. Ted Arrington, agrees that construing the two similar phrases as meaning the same thing is a reasonable and prudent interpretation of § 5 and § 2. (Arrington Dep. pp. 108-14). Indeed, as explained by Dr. Arrington, USDOJ has directed its experts, such as Dr. Arrington, to create districts that allow minorities to elect their candidate or preferred candidate of choice at a level in excess of 50%. (Arrington Dep. pp. 191, 216-17). The Department of Justice has issued these instructions to preclude any legal challenges regarding the correct percentage of TBVAP needed to comply with the VRA. (Arrington Dep. pp. 191, 216-17).[26]

---

[25] The United States Supreme Court follows a rule of construction of statutes similar to North Carolina's rule that statutes must be construed *in pari materia*. *See State v. Fink*, 179 N.C. 712, 103 S.E. 16, 17 (1920). Thus, all sections of a statute should be construed together. *Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972). "'[I]dentical words used in different parts of the same act are intended to have the same meaning.'" *Sorenson v. Sec. of the Treasury*, 475 U.S. 851, 860 (1986). Any "construction that creates an inconsistency should be avoided when a reasonable interpretation can be adopted which will not do violence to the plain words of the act, and will carry out the intention of Congress." *United States v. Raynor*, 302 U.S. 540, 547 (1938). It is inconceivable that the districts defined as those that allow minorities to "elect representatives of choice" under § 2 are different from districts that allow minorities "to elect their preferred candidates of choice" under § 5.

[26] In uniformly drawing the VRA districts with a 50% plus TBVAP, the legislative leaders followed a policy that is identical to USDOJ's decision to draw VRA districts with a TBVAP in excess of 50%. Like USDOJ, the leaders wanted to foreclose any legal challenges to VRA districts. (Arrington Dep. pp. 191, 216-17).

3. The 2011 Plans provide the State with a defense against constitutional and statutory claims of vote dilution and have been precleared; the alternative plans do not provide the State with a defense to claims of vote dilution and would not be precleared.

During the public hearing legislative process, all parties agreed that racially polarized voting remains widespread in the State of North Carolina and that VRA districts are still required to give African Americans an equal opportunity to elect candidates of choice. (First Rucho Aff., Ex. 6 pp. 10, 12-14, and Ex. 7 (Statements of Anita Earls); First Rucho Aff. Ex. 8 (Report of Expert for NC NAACP, Ray Block); Arrington Dep. p. 93; Brunell Dep. *passim*). All of the alternative plans recommended the creation of districts to provide African Americans with an equal opportunity to elect their candidates of choice, and the districts recommended by the alternative plans are located in the same regions and counties in which the enacted plans create VRA districts.

(a) All Senate plans support the need for voting rights districts in Northeastern North Carolina, and in Cumberland, Durham, Forsyth , Guilford, Mecklenburg and Wake Counties.

In the enacted Senate Plan, there are three VRA districts in the northeast (Districts 3, 4, and 5) drawn with a TBVAP in excess of 50%. The three alternative plans only draw two comparable districts in this area (alternative Districts 3 and 4). The SCSJ plan draws these districts with a TBVAP in excess of 50%. The Senate Fair and Legal Plan draws District 3 with a TBVAP of 46.96% and District 4 with a TBVAP of 50.19%. The LBC Plan would create District 3 with a TBVAP of 48.03% and District 4 with a TBVAP of 49.79%.

Under the enacted Senate Plan, there are two VRA districts that provide African American voters in two § 5 counties (Granville and Hoke) with their first opportunity to elect their preferred candidate of choice. District 20 includes Granville and Durham Counties and is drawn with a TBVAP of 51.04%. District 21 includes Hoke and Cumberland Counties with a TBVAP of 51.53%.

None of the alternative plans includes Hoke or Granville in a VRA Senate district. However, all three have comparable districts in Durham and Cumberland. District 20 is drawn with a TBVAP of 42.55% in the SCSJ Plan, 39.69% in the Fair and Legal Plan, and 44.98% in the LBC Plan. District 21 is drawn with a TBVAP of 46.17% in the SCSJ Plan, 44.95% in the Fair and Legal Plan, and 44.44% in the LBC Plan.[27]

The enacted Senate Plan has four majority-black districts drawn wholly within one county: District 14 (Wake); District 28 (Guilford); and Districts 38 and 40 (Mecklenburg). The enacted Senate Plan also has a district within Forsyth County created with a TBVAP of 42.53%. The SCSJ Plan is almost identical to the enacted plan with two majority-black districts in Mecklenburg (38 and 40), a majority-black district in Guilford (District 28), District 14 in Wake (48.05%) and District 32 in Forsyth (41.95%). The Senate Fair and Legal Plan and the LBC Plan have comparable districts. Senate Fair and Legal established four districts within single counties including Wake (District 14), Guilford (District 28), and Mecklenburg (Districts 38 and 40) with TBVAP ranging from 42.03% (District 14 in Wake) to 48.05% (District 28 in Guilford). The LBC Senate Plan creates these same four districts with a TBVAP between 42.04% (District 14 in Wake) and 47.52% (District 28 in Guilford).

In summary, the enacted Senate Plan has nine districts in excess of 50% TBVAP, one district in excess of 40% but less than 50% TBVAP, for a total of ten districts in excess of 40% TBVAP. The SCSJ Senate Plan has five districts in excess of 50% TBVAP, and four districts in excess of 40% but less than 50% TBVAP, for a total of nine districts in excess of 40% TBVAP. The Senate

[27] African Americans constitute a majority of the registered voters in all three alternative versions of District 21 in Cumberland County. (SCSJ: 51.52%; Fair and Legal: 51.13%; LBC: 50.31%). Much of the population in this district is non-voting military population, however, so the authors of all plans apparently agree that the TBVAP must be greater than 50%.

Fair and Legal Plan has only one district in excess of 50% TBVAP and six districts in excess of 40% but less than 50% TBVAP, for a total of seven districts in excess of 40%. Finally, the LBC Senate Plan has no districts in excess of 50% TBVAP and eight districts in excess of 40% but less than 50% TBVAP, for a total of eight districts in excess of 40% TBVAP.

(b) All House plans support the need for voting rights districts in northeastern North Carolina, southeastern North Carolina, and in the counties of Cumberland, Durham, Forsyth, Guilford, Mecklenburg and Wake.

All of the alternative House plans create districts that plaintiffs contend will allow black voters to elect their candidates of choice in the same regions as the enacted House Plan. The enacted House Plan creates six majority-black districts in the northeast (Districts 5, 7, 23, 24, 27, 32). Two of the alternative plans create five comparable districts in this area. Under the SCSJ House Plan, four of these districts are majority black (Districts 7, 8, 24, and 27) while one district is 49.63% TBVAP (District 5). The Fair and Legal House Plan also creates four majority black districts in this area (Districts 5, 7, 24, and 27) and one district that is 48.69% TBVAP (Districts 8). Like the enacted plan, the LBC House Plan creates six districts in this area. Five districts are majority black (Districts 5, 7, 8, 24, and 27). A sixth district in the LBC Plan (District 32) is 40.52% TBVAP.

In south-central to southeastern North Carolina, the enacted House Plan establishes three majority TBVAP districts (Districts 12, 21, and 48). All three alternative plans have comparable districts, none of which are in excess of 50% TBVAP but all of which have TBVAP of at least 44.22% (Fair and Legal District 48) or higher.[28]

The enacted plan has 14 majority black-districts drawn within a single county as follows:

[28] Fair and Legal District 48 is close to a majority-black district with its percentage of registered black voters (47.16%). (Second Frey Aff., ¶ 19 and Ex. 52)

Cumberland (Districts 42, 43) Wake (Districts 33, 38); Durham (Districts 29, 31); Guilford (Districts 57, 58, 60); and Mecklenburg (Districts 99, 101, 102, 106, 107). The enacted plan has two districts in Forsyth County with TBVAP of 45.59% (District 71) and 45.02% (District 72). Within these same counties, the SCSJ House Plan has seven districts with a majority TBVAP: Cumberland (District 43), Durham (District 31), Guilford (Districts 58 and 60), Mecklenburg (Districts 101 and 107), and Wake (District 33). The SCSJ Plan has six districts within these counties with a TBVAP in excess of 41.75%: Cumberland (District 42), Forsyth (Districts 71 and 72), and Mecklenburg (Districts 99, 100 and 102). In these nine counties the Fair and Legal House Plan has five majority black districts: Cumberland (District 43), Guilford (Districts 58 and 60), Mecklenburg(District 101), and Wake (District 33). The Fair and Legal House Plan establishes seven districts in excess of 41.38% TBVAP in these counties: Cumberland (District 42), Durham (Districts 29 and 31), Forsyth (Districts 71 and 72) and Mecklenburg (Districts 99 and 107). Finally, the LBC House Plan creates five majority black districts in these counties: Cumberland (District 43), Guilford (Districts 58 amd 60), Mecklenburg (District 101) and Wake (District 33). That plan creates ten districts in excess of 41.05%: Cumberland (District 42), Durham (Districts 29 and 31), Forsyth (Districts 71 and 72), and Mecklenburg (Districts 25, 99, 102, 106 and 107).[29]

Thus, in total, the enacted House Plan has 23 majority TBVAP districts and two districts with TBVAP in excess of 40% but less than 50%, or a total of 25 districts in excess of 40%. The SCSJ House Plan has eleven districts with TBVAP in excess of 50%, ten districts in excess of 40% but lower than 50%, for a total of 21 districts in excess of 40%. The Fair and Legal Plan has nine

[29] In all three alternative plans, District 42 in Cumberland has a majority of black registered voters because of the non-voting military population in Cumberland (SCSJ: 51.55%; Fair and Legal 51.55%; LBC:52.48%). (Second Frey Aff., ¶ 19 and Ex. 51-53)

districts in excess of 50% TBVAP, eleven districts in excess of 40% but lower than 50% TBVAP, for a total of 20 districts in excess of 40% TBVAP. Finally, the LBC Plan has ten districts in excess of 50% TBVAP, thirteen districts in excess of 40% but lower than 50% TBVAP, for a total of 23 districts in excess of 40% TBVAP.

(c) The alternative plans do not provide the State with a defense to vote dilution claims or comply with *Strickland* or § 5

There are three main differences between the enacted plans and the alternatives. The first difference is that the enacted plans better protect the State from a claim of vote dilution because of race. To prove that a legislative plan dilutes the voting strength of African American voters, a plaintiff must first produce an alternative plan with a larger number of districts than the enacted plan that allow African Americans to elect their candidates of choice. *See De Grandy,*; *LULAC, Shaw I.* The 2011 enacted legislative plans provide more districts in which African Americans can elect their preferred candidate of choice – as compared to the alternative plans – regardless of whether such districts are constructed with TBVAP in excess of 50% or TBVAP between 40% and 50%.

Plaintiffs' expert agrees that proportionality is a desirable goal. (Arrington Dep. p. 30).[30] He also testified that proportionality for African Americans in the Senate would result in ten or eleven districts in which African Americans can elect their candidates of choice. In the House Plan, proportionality equates to 24 or 25 districts. (Arrington Dep. p. 154). If districts that give African Americans a reasonable opportunity to elect their candidates of choice means districts in excess of 50% TBVAP, the enacted plan provides nine VRA Senate districts and 23 such VRA House

[30] Counsel for the *NAACP* plaintiffs has recognized the "proportionality" is different from "proportional representation" and that it is not "improper" for a legislature to enact plans that provide proportionality to minority voters. Appellate Brief in *Hall v. Virginia*, 2004 WL 3008671 n.9; Appellate Brief in *Bartlett v. Strickland*, 2007 WL 4613653.

districts. In contrast, the SCSJ Plan provides only five VRA Senate districts and only eleven VRA House districts. The Fair and Legal Plan provides only one VRA Senate district and nine VRA House districts. Finally, the LBC Plans provide no VRA Senate districts and only ten VRA House districts.

Even if districts that elect the candidate preferred by African Americans are defined as including districts with a TBVAP in excess of 40%, the enacted plans still provides more equal opportunity for minority voters. The enacted Senate Plan has ten VRA districts under this definition, while the SCSJ Senate Plan has nine, the Senate Fair and Legal Plan has seven, and the LBC Senate Plan has eight. Similarly, the enacted House Plan has 25 VRA districts under this definition, the SCSJ Plan has 21, the House Fair and Legal Plan has 20, and the LBC Plan has 23.

The second difference between the enacted and alternative plans is the percentage of TBVAP included in districts designed or allegedly designed to provide African Americans with an equal opportunity to elect candidates of choice. In compliance with the decision in *Strickland*, where reasonably possible, the General Assembly elected to follow a uniform policy by creating VRA districts with a TBVAP in excess of 50%.[31] In contrast, the alternative plans are completely inconsistent in their application of the *Strickland* rule.

For example, the LBC Plan creates five majority black House Districts in the northeast and a sixth district (32) with a TBVAP in excess of 40%. In contrast, neither of the two northeastern LBC Senate districts are in excess of 50%. The Fair and Legal House Plan has four majority black

[31] The only exception to this principle relates to districts in Forsyth County. There were two African American House incumbents in Forsyth and it was not possible to draw both districts in excess of 50% TBVAP. The enacted plan and all alternatives drew both of these districts in excess of 40%. Nor was it possible to draw Senate District 32 within Forsyth County at a majority black level. The enacted House districts have not been challenged in this lawsuit. However, both sets of plaintiffs have challenged Senate District 32 even though the alternative versions are nearly identical to the enacted version.

House Districts in the northeast but only one Senate district in excess of 50%. By what standards did the drafters of these plans determine that multiple majority black House districts were needed in the northeast, but majority black Senate districts were not necessary? Nothing submitted during the public hearing process or legislative session explains these distinctions.

Similarly, all three alternative plans create one House district in Cumberland County with a TBVAP in excess of 50% (District 43) and a second House district in Cumberland County at less than 50% (District 42). Why is one majority-black House district appropriate for Cumberland County while a second majority-black district is not?[32] Identical questions arise in Wake County, where all three alternative plans created House District 33 with a TBVAP in excess of 50%, while none of the alternative plans include a second majority-black district as found in the enacted plan (House District 38). Moreover, while the alternative plans agree that a majority TBVAP House district is needed in Wake County, none of the alternative plans create Wake's Senate District 14 in excess of 50%.[33]

These inconsistencies continue in other single counties in which the alternative plans propose majority-black districts or districts in excess of 40% TBVAP. In Durham, the SCSJ contended that a district in excess of 50% TBVAP was required for voters residing in District 31 – held by long-time incumbent Mickey Micheaux – but that House District 29 could be established with a TBVAP below 40%. In contrast, both the Fair and Legal and LBC House Plans recommended that both districts in Durham be established with a TBVAP in excess of 40% and that House District 31 be

[32] In all three alternative plans, blacks constitute a majority of the registered voters in each plan's version of House Districts 42 and 43. (Second Frey Aff., ¶ 19 and Ex. 51-53)

[33] The SCSJ version of Senate District 14 is nearly a majority-black district with 48.05% TBVAP. Blacks also constitute 52.62% of the registered voters. (Second Frey Aff., ¶ 17 and Ex. 46)

established so that blacks constitute a majority of the registered voters. In all three alternative plans, two majority-black districts were found to be necessary in Guilford County while none of the alternatives created a third majority-minority House District found in the enacted plan (District 57). In Mecklenburg County, the SCSJ concluded that two majority-black Senate districts were appropriate but that only two majority-black House districts were needed.[34] Both the SCSJ and LBC believed that five districts in Mecklenburg should be drawn with a TBVAP in excess of 40%, but that only two (SCSJ Districts 101 and 107) and one (LBC House District 101) should exceed 50% TBVAP. The Fair and Legal Plan recommends only one majority-black district in Mecklenburg (Fair and Legal District 101) and only two House districts with TBVAP in excess of 40% (Fair and Legal Districts 99 and 107).

How is it that the alternative plans agree that the conditions in Wake and Cumberland Counties support the creation of one majority-black House district but not a second majority district? Why do the alternative plans agree that two majority-black districts are needed in Guilford but challenge the enacted plan's third district? Why are two majority-black Senate districts needed in Mecklenburg, but only two majority house districts (SCSJ Plans)? Why do the SCSJ and LBC plans support five VRA districts (as defined by plaintiffs as districts with TBVAP in excess of 40%) in Mecklenburg but only draw two such districts (SCSJ) or one such district (LBC) with a TBVAP in excess of 50%?

Nothing in the record before the General Assembly explains the inconsistent application of

[34] The ideal population for a Senate district is 190,710. The ideal population for a House District is 79,462. The population of two Senate districts in Mecklenburg (281,420) is equivalent to 4.8 House districts (381,420 divided by 79,462). The SCSJ-AFRAM recommendation that two majority-black Senate districts are needed in Mecklenburg therefore supports the legislature's decision to create five majority-black House districts in that same county.

the *Strickland* rule by any of the alternative plans. Based upon the § 5 comment submitted to USDOJ by the NC NAACP and the SCSJ, the only logical conclusion is that plaintiffs' primary motivation is to replace enacted majority-black districts with "influence" districts designed to return control of the General Assembly to the Democratic Party. (Defendants' Second Notice of Filing, October 13, 2011, Letter from Anita Earls to T. Christian Herren, Jr., Chief of Voting Rights Section, Civil Rights Division ("NAACP Objection Letter"); Trende Aff. ¶¶ 69-76, 87-94, and Table 6-10)[35] These arguments, as well as the arguments made by the plaintiffs in their amended complaints, are the same ones advanced in *Strickland* by the NC NAACP and the Democratic legislative leadership that enacted the 2003 legislative plans. They previously found some support in *Ashcroft*. The argument that a jurisdiction has the option of obtaining preclearance by replacing districts that allow African Americans to elect their preferred candidates of choice with "crossover" or "influence" districts, however, was legislatively overruled by Congress in 2006. Further, in 2007 and 2009, the North Carolina Supreme Court and the United States Supreme Court rejected the argument that districts that allow minorities to elect their candidates of choice could be constructed with less than 50% TBVAP. *See Strickland.*

Plaintiffs' proposed plans, if they had been enacted by the General Assembly before 2006, might have been precleared under the standards established by *Ashcroft* prior to the decision in

[35] The letter by Ms. Earls to USDOJ objects to the 2011 enacted plans and was sent on behalf of the NC NAACP, one of the plaintiffs in this case. Included was a letter dated October 14, 2011, from the NC NAACP President, Dr. William Barber, to USDOJ. The NC NAACP accused the legislature of "packing" minority voters into districts "already performing with a TBVAP of over 40%" and that creating 50% plus TBVAP reduced the ability of African American voters in adjoining districts to elect their "candidates of choice." The legislative districts impacted by this alleged packing were all districts which had elected white Democrats, not African Americans, with the exception of 2003 Senate District 26 (which had elected a white Republican, President Pro Tem Phil Berger). None of these "impacted" white Democratic districts had a TBVAP in excess of even 40% under the 2003 Senate or 2003-2009 House Plans and were not, contrary to the NAACP's representation, districts that allow minorities to elect their "candidates of choice," as that term has been defined in *Strickland*.

Strickland, though even under *Ashcroft* states could choose between crossover districts and majority-minority districts. They would not be precleared under the amended version of § 5. Nor would they be precleared in the future because the 2011 plans are now the benchmarks. All three alternative Senate and House plans would require that the State dismantle or diminish districts in which African American voters have a reasonable opportunity to elect candidates of their choice in § 5 counties – *see*, *e.g.,* enacted Senate Districts 4, 5, 20, 21, and 28, and enacted House Districts 5, 7, 12, 21, 24, 32, 42, 48, and 57.[36] They would also require the cracking of Senate and House districts in counties covered only by § 2 (Senate Districts 14, 38, 40; House Districts 29, 31, 38, 99, 102, 106, and 107).[37] In some cases, plaintiffs' plans would eliminate majority-black districts (Senate District 5; House Districts 32, 38, 57, 102, and 106). In other instances, their plans would reduce the TBVAP to levels below 50% but above 40% (Senate Districts 4, 14, 20, 21, 28, 32, 38, and 40; House Districts 5, 12, 21, 24, 29, 31, 42, 99, 102, and 107). Both actions are proposed to increase Democratic voting strength in adjoining districts. *See* NAACP Objection Letter. The intentional elimination of a district which allows minority voters to elect their candidates of choice for the benefit of a political party provides a clear basis for a purposeful discrimination objection. *See* Federal Register Vol 76, No. 27, "Discriminatory Purpose," p. 7471 (2.9.11) (citing *Busbee v. Smith*, 549 F. Supp. 494, 508 (D.D.C. 1982), *aff'd*. 459 U.S. 1166 (1983), *Garza and United States v. County of Los Angeles*, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozenski, J. *concurring and dissenting* in part), *cert. denied*, 498 U.S. 1028 (1991)). Further, reducing the TBVAP in a district for political reasons to a level below

[36] It is noteworthy that in the 2012 general election, African Americans were elected for the first time in five of these districts – House Districts 32, 38 and 106, and Senate Districts 5 and 32.

[37] Both the Justice Department and the District Court for the District of Columbia must consider the entire plan and its impact on minority voters statewide. *Ashcroft*, 539 U.S. at 479.

50% would have the effect of diminishing the ability of minority voters in any such district to elect their preferred candidate of choice. *See* Senate Report at 20-21; House Report at 34. [38]

In summary, the enacted legislative plans are based upon reasonable interpretations of the decisions by the Supreme Court of North Carolina and the United States Supreme Court in *De Grandy, LULAC,* and *Strickland*, and § 5, as amended in 2006. The enacted plans provide a far better defense to any possible claim of racial vote dilution regardless of whether VRA districts are created pursuant to the *Strickland* standard or, instead, and in only some selected instances, with a TBVAP in excess of 40% but below 50%. Moreover, plaintiffs ask this Court to order the replacement of the enacted plans with alternatives that reduce the number of districts in which black voters can elect their preferred candidates of choice and replace them with "coalition" and "influence" districts. Plaintiffs' arguments completely ignore *De Grandy, LULAC*, and *Strickland*, as well as the express intent of Congress reflected in the legislative history for the 2006 reauthorization of § 5.[39]

C. None of the Enacted Legislative Districts Constitute Racial Gerrymanders.

Plaintiffs collectively argue that nine of the enacted Senate districts and 16 of the enacted House districts constitute illegal racial gerrymanders based upon the cause of action recognized in *Shaw v. Reno*, 509 U.S. 630 (1993) ("*Shaw I*") and *Shaw II*.[40] Plaintiffs' claims are meritless

[38] Defendants are aware of no case in which a jurisdiction has been ordered to reduce the TBVAP in a majority-black district to a level below 50% but above 40%. Plaintiffs' expert testified he was also unaware of any such cases. (Arrington Dep. p. 81)

[39] Plaintiffs ignore that even *Ashcroft* gave legislatures a preclearance option of enacting plans with majority-black districts as an acceptable alternative to plans based upon coalition or influence districts. *Ashcroft*, 539 U.S. at 480.

[40] Neither set of plaintiffs challenge Senate District 3 (represented by a white incumbent) or House Districts 23 (represented by a white incumbent), 27 (represented by a white incumbent), 43, 58, 60 and 101 (all represented by black incumbents). In their amended complaint, the *NAACP* plaintiffs also did not

because they cannot prove that race was the "predominant" motive in drawing any of these districts or that the challenged districts failed to reasonably advance the State's compelling interest in avoiding liability under the VRA.

1. The history of racial gerrymander litigation involving North Carolina congressional districts.

The law regarding racial gerrymanders has largely developed through cases challenging two congressional districts (First and Twelfth) created by the North Carolina General Assembly from 1991 through 1997.

In 1991, the General Assembly passed an initial congressional redistricting plan that included only one majority-minority district located largely in the northeastern portion of the State (First Congressional District). *See Shaw I*, 509 U.S. at 633-35. The United States Department of Justice objected to this initial plan pursuant to its authority under § 5, finding that the State should have created a second majority-minority district "to give effect to black and Native American voting strength" in North Carolina's south central to southeastern region. *Id.* at 635. The General Assembly responded by revising the Congressional Plan and adding a second majority-black district. But instead of creating the district in the area identified by USDOJ, the General Assembly created the second majority-black district (Twelfth Congressional District) in the central region of the State, running along Interstate I-85, from Gaston County to Durham County. *Id.*

Plaintiffs in *Shaw I* challenged both the First and Twelfth Congressional Districts on the ground that they were illegal racial gerrymanders. In *Shaw I*, the Court found that plaintiffs had

---

challenge Senate District 4 or House Districts 7, 12, 31, 33, and 101 (all represented by black incumbents). In their amended complaint, the *Dickson* plaintiffs did not challenge House Districts 32, 38, 42, 102 or 106. Plaintiffs' selectivity, accepting some majority-black districts, while challenging others as racial gerrymanders, further exposes plaintiffs' repeated failure to articulate standards that could be used by the legislature or the Court.

stated a claim under the equal protection clause that is "'analytically distinct' from a vote dilution claim." *Miller*, 515 U.S. at 911 (citing *Shaw I*, 509 U.S. at 652). In *Shaw II*, the Court held that plaintiffs had carried their burden of proof as to the Twelfth Congressional District, and declared it to be an illegal racial gerrymander. *Shaw II*, *supra*. However, the Court dismissed plaintiffs' claim as to the First Congressional District because none of the plaintiffs resided in that district and therefore lacked standing to challenge it. *Shaw II*, 517 U.S. at 904.

Following the ruling in *Shaw II*, in 1997 the North Carolina General Assembly enacted a modified Congressional plan that changed the configuration of the First and Twelfth Congressional Districts. *Cromartie v. Hunt*, 34 F. Supp. 2d 1029 (E.D. N.C. 1998) ("*Cromartie I*"), *reversed sub nom*., *decision on removal, Cromartie v. Hunt*, 133 F. Supp. 2d 407, 412-416 (E.D.N.C. 2000), *reversed sub nom. Easley v. Cromartie*, 532 U.S. 234 (2001) ("*Cromartie II*"). The 1997 version of the First District was drawn with a majority-black population (50.27%), but the percentage of black population in the 1997 Twelfth District was reduced to below a majority (46.67%). *See Cromartie II*, 133 F. Supp. 2d at 421. In *Cromartie I*, the Supreme Court reversed an order by the district court granting plaintiffs' motion for summary judgment asserting that the revised Twelfth District constituted a racial gerrymander. In *Cromartie II*, following a trial on the merits, the district court found that the Twelfth Congressional District violated the equal protection clause but that the First Congressional District did not. The district court's ruling regarding the First Congressional District was not appealed but its holding regarding the Twelfth District was. In *Cromartie II*, the Supreme Court reversed the district court's decision regarding the Twelfth Congressional District and ruled that plaintiffs had failed to establish that it constituted an illegal racial gerrymander. The facts and rulings in each of these decisions, and related cases, will be more fully discussed below.

2. Plaintiffs alleging claims of racial gerrymandering must satisfy a "demanding" burden of proof.

(a) Plaintiffs must first show that race was the legislature's predominant motive.

Laws based upon racial classification are "inherently suspect and thus call for the most exacting judicial examination." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (citing *Univ. of California Regents v. Bakke*, 438 U.S. 265, 991 (1978)). This test, often known as "strict scrutiny," has two prongs. First, any racial classification "'must be justified by a compelling governmental interest." *Wygant*, 476 U.S. at 274 (citations omitted). Second, "the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.'" *Id.* (citing *Fullilove v. Klutznick,* 448 U.S. 448, 489 (1980)).

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

Based upon these general principles, strict scrutiny does not apply to redistricting plans simply because the drafters prepared them with a "consciousness of race . . . nor does it apply to all cases of intentional creation of majority-minority districts." *Bush v. Vera*, 517 U.S. 952, 958 (1996) (citing *Shaw I*, 509 U.S. at 646 (internal citations omitted)). Strict scrutiny does not automatically

apply where race was "a motivation for the drawing of a majority-minority district." *Cromartie II*, 532 (citing *Vera*, 517 U.S. at 959). Instead, plaintiffs alleging an illegal racial gerrymander must show that "all other legislative districting principles were 'subordinated' to race . . . and that race was the predominant factor motivating the legislature's 'redistricting' decision." *Vera*, 517 U.S. at 559 (citing *Miller*, 515 U.S. at 916); *Cromartie II*, 532 U.S. at 241-42. This burden of proof is a "demanding one." *Cromartie II*, 532 U.S. at 241 (citing *Miller*, 515 U.S. at 909). Plaintiffs must show that a challenged district "' is unexplainable on grounds other than race.'" *Cromartie II*, 532 U.S. at 242 (citing *Cromartie I*, 526 U.S. at 546 (quoting *Shaw I*, 509 U.S. at 644 *in turn quoting Village of Arlington Heights*, 429 U.S. at 266)). Thus, to prove that race was the predominant factor, plaintiffs must establish, at a minimum, that the State "substantially neglected traditional districting criteria." *Vera*, 517 U.S. at 962. Absent proof that the legislature "substantially neglected" traditional districting criteria, strict scrutiny does not apply. *Id.* Indeed, states can avoid strict scrutiny altogether by respecting their own traditional districting principles, and nothing limits a state's discretion to apply those principles in the creation of majority-minority districts. *Id.* at 978.

Traditional redistricting criteria include "'compactness, contiguity, and respect for political subdivisions.'" *Stephenson I*, 355 N.C. at 371, 562 S.E.2d at 389 (quoting *Shaw I*, 509 U.S. at 647). Other traditional redistricting criteria include "partisan advantage and incumbency protection in the [legislature's] application of its discriminatory redistricting decisions."[41] *Stephenson I*, 355 N.C. at 371, 562 S.E.2d at 390 (citing *Gaffney v. Cummings*, 412 U.S. 735 (1973)). Jurisdictions are perfectly free to "engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that

[41] The General Assembly's discretion to consider politics in its discretionary decisions does not relieve it of its duty to comply with the WCP. *Stephenson I*, 355 N.C. at 371, 562 S.E.2d at 390.

fact." *Cromartie I*, 526 U.S. at 551 (citing *Vera*, 517 U.S. at 968; *Shaw II*, 517 U.S. at 905; *Shaw I*, 509 U.S. at 646).

Consistent with these principles, "[e]vidence that blacks constitute even a supermajority in one congressional district while amounting to less than a plurality in a neighboring district will not, by itself, suffice to prove that a jurisdiction was motivated by race in drawing its district lines when the evidence also shows a high correlation between race and party preference." *Cromartie I*, 526 U.S. at 551-52. Courts must exercise "caution" where "the State has articulated a legitimate political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated." *Cromartie II*, 532 U.S. at 242. Therefore, to prove that race was the predominant motive, "in a case . . . where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation," plaintiffs must also establish: (1) "that . . . the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles;" and (2) that "those districting alternatives would have brought about significantly greater racial balance." *Id.* at 234, 258.

The decision by the Supreme Court of Virginia in *Wilkins v. West,* 264 Va. 447, 571 S.E.2d 100 (2002), provides a good road map for analyzing plaintiffs' racial gerrymander claims. Like the plaintiffs here, the *Wilkins* plaintiffs challenged Virginia House and Senate districts for alleged violations of the Virginia State Constitution and on the grounds that the districts were racial gerrymanders. The *Wilkins* court first noted that where the evidence of alleged violations of the State constitution "would lead objective and reasonable persons to reach different conclusions, the legislative determination is considered fairly debatable and such a determination must be upheld by

the courts." *Wilkins*, 264 Va. at 463, 571 S.E.2d at 108.

Unlike North Carolina, the Virginia State Constitution requires that legislative districts be "compact." *Id.* The Court held that compactness must be judged from a "spatial perspective" while "taking into consideration the other factors which a legislative body must balance in designing a district." *Id.* Where the legislature's reconciliation of various criteria, including Virginia constitutional requirements for "compact districts," "is fairly debatable and not clearly erroneous, arbitrary, or wholly unwarranted," a court is precluded from finding a state constitutional violation. *Id*. at 462-63, 571 S.E.2d at 108. Because the evidence regarding the compactness of the challenged district was fairly debatable, the Court ruled that plaintiffs had failed to prove a violation of the Virginia constitutional criteria. *Id.* at 463-66, 571 S.E.2d at 109-11.

The *Wilkins* court also found that plaintiffs had failed to prove that any of the challenged districts constituted racial gerrymanders. *Id.* at 466-80, 571 S.E.2d at 111-119. The *Wilkins* court noted that plaintiffs were required to prove that race was the "predominate factors" – i.e., that the plans are "explainable on no other grounds but race." *Id.* at 467, 571 S.E.2d at 111 (citing *Cromartie II,* 532 U.S. at 241-42). Further, the court stated that where there is a high correlation in the voting age population and race and political affiliation, plaintiffs must "produce districting alternatives which were comparably consistent with traditional redistricting principles and which could have brought significantly greater [racial] balance while still achieving [the legislature's] legitimate political objectives." *Wilkins*, 264 Va. at 469, 571 S.E.2d at 112.

Like the plaintiffs in this case, the *Wilkins* plaintiffs alleged that the challenged districts constituted racial gerrymanders because "the use of split precincts in majority minority districts was disproportional, placing minorities in the majority minority district rather than in the majority white

district" and "because only racial data is available below the precinct level, these precincts were split based on race, not politics." *Id.* at 469-70, 571 S.E.2d at 113. The *Wilkins* court rejected all of these arguments.

The court observed that "[c]reating a majority minority district mandates placing minorities in that district and there is no dispute that race was a factor in drawing the district." *Id.* at 472, 571 S.E.2d at 114. This alone did not prove a racial gerrymander. In ruling against the plaintiffs, the *Wilkins* court stated that "[l]egislatures must balance competing redistricting criteria in creating electoral districts," and that the "record contains substantial evidence that the General Assembly implemented a number of traditional principles of redistricting." *Id.* These traditional principles included "population equalization, compactness and contiguity, retention of core districts where possible, and enhancement of communities of political interest." *Id.* at 474, 571 S.E.2d at 115. Based upon the evidence before the Virginia General Assembly, the *Wilkins* court concluded that plaintiffs had failed to meet their "heavy burden" of showing that the legislature, "in exercising its political judgment" had subordinated all other redistricting criteria to race. *Id.*

(b) Even where race is the predominant motive, plaintiffs must prove that majority-minority districts were not reasonably necessary to avoid a § 5 objection or to avoid liability under § 2.

Even assuming plaintiffs prove that race was the predominant motive underlying the drawing of district lines, a state may still defend any challenged district where the district or plan furthers a compelling governmental interest and is "narrowly tailored" to further that interest. *Shaw II*, 517 U.S. at 908 (citing *Miller*, 517 U.S. at 920). A redistricting plan furthers a compelling interest if the challenged districts were "reasonably necessary" to obtain preclearance of the plan under § 5 of the VRA. *Shaw I*, 509 U.S. at 655. A plan or district also survives strict scrutiny when the challenged

plan or district were reasonably established to avoid liability under § 2 of the VRA. *Vera*, 517 U.S. at 977 (citing *Growe*, 507 U.S. at 25, 37-42, *Shaw II*, 517 U.S. at 915, and *Miller*, 515 U.S. at 920-21).

To make this showing, a state need only articulate a "strong basis in evidence" in support of its contentions that challenged districts were enacted to avoid preclearance objections or liability for vote dilution claims under § 2. *Shaw II*, 517 U.S. at 910 (citing *Wygant*, 476 U.S. at 274-75). Whether a state had a "strong basis" for drawing districts predominately based upon race depends upon the evidence before the legislature when the plans were enacted. *Id.* (expert testimony prepared after the lawsuit was filed and which, therefore, could not have been considered by the legislature when it enacted redistricting plan is irrelevant); *Cromartie v. Hunt*, 133 F. Supp. 2d 407, 422 (E.D.N.C. 2000), *rev'd on other grounds sub nom, Cromartie*, 532 U.S. 234 (finding by district court that the legislature had a strong basis in the legislative record to conclude that the 1997 version of the First Congressional District was reasonably necessary to avoid § 2 liability).

A court must consider several important principles of judicial review when it evaluates whether a legislature had a strong basis in the legislative record for concluding that majority-minority districts were reasonably necessary to avoid liability under the VRA. First, the General Assembly is not required to have proof of a certain § 2 violation before drawing districts to avoid § 2 liability. To the contrary, "deference is due to [states'] reasonable fears of, and to their reasonable efforts to avoid, § 2 liability." *Vera*, 517 U.S. at 978. Indeed, the General Assembly retains "flexibility" that courts enforcing the VRA lack, "both insofar as they may avoid strict scrutiny altogether by respecting their own traditional districting principles, and insofar as deference is due to their reasonable fears of, and to their reasonable efforts to avoid, § 2 liability." *Id.*

Second, the "narrow tailoring" requirement of strict scrutiny allows a state a limited degree of "leeway." *Vera*, 517 U.S. at 977. If a state has a "strong basis in evidence," *Shaw I*, 509 U.S. at 656, for concluding that creation of a majority-minority district is reasonably necessary to comply with § 2 or avoid litigation under § 2, it satisfies strict scrutiny. Narrow tailoring does not require that "a district" have the "least possible amount of irregularity in shape, making allowances for traditional districting criteria." *Vera*, 517 U.S. at 977 (quoting *Wygant*, 476 U.S. at 291 (O'Connor, J., concurring in part and concurring in judgment) ("state actors should not be 'trapped between the competing hazards of liability' by the imposition of unattainable requirements under the rubric of strict scrutiny")). Thus, a § 2 district that is based on a reasonably compact minority population, which also takes into account traditional redistricting principles, "may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts in endless 'beauty contests.'" *Vera*, 517 U.S. at 977.

Third, in a § 2 lawsuit, a court may not impose a majority-minority district as a remedy to vote dilution unless it is necessary under the "totality of those circumstances." *Shaw II*, 517 U.S. at 914. None of the Supreme Court's racial gerrymandering decisions have imposed the "totality of the circumstances" requirement upon a state legislature.[42] Instead, legislatures have the discretion to enact majority-minority districts if there is a strong basis in the legislative record of the "*Gingles* preconditions," *i.e.*, that : (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) that the group is politically cohesive; and (3) that racial bloc voting usually will work to defeat the minority's "preferred candidate." *Vera*, 517

[42] The district court in *Cromartie* appears to have applied the totality of circumstances test in upholding the 1997 version of the First Congressional District. *See Cromartie II*, 133 F. Supp. 2d at 422-23.

U.S. at 978; *Growe*, 507 U.S. at 25, 40, 41; *De Grandy*, 512 U.S. at 1006-08.[43]

Fourth, even when the plaintiff shows that race was the predominant motive, the burden of proving the unconstitutionality of the district or plan remains with the plaintiff. In *Shaw II*, the Court held that there must be a strong basis in the legislative record to support a legislature's decision to adopt majority-minority districts predominantly drawn because of race. *Shaw II*, 517 U.S. at 910. The Court in *Shaw II* based this holding on the Court's decision in *Wygant*. In *Wygant*, the Court evaluated the constitutionality of an affirmative action plan that applied to layoffs from employment. Foreshadowing the decision in *Shaw II*, in *Wygant* the Court held that a government must show a strong basis in evidence for adopting race-based employment policies. *Wygant*, 476 U.S. at 277. However, the Court also noted that once the government makes such a showing, "[t]he ultimate burden remains with the [plaintiff] to demonstrate the unconstitutionality of an affirmative-action program." *Wygant*, 476 U.S. at 277-78. Mere allegations by the plaintiffs that the enacted plans were unnecessary to avoid an objection under § 5 or potential liability under § 2 do "not automatically impose upon" the legislature "the burden of convincing the court" that its decision to adopt majority-black districts had a reasonable basis in evidence. *Wygant*, 476 U.S. at 292 (O'Connor, J., concurring). In "reverse discrimination suits, . . . it is the plaintiffs who must bear the burden of demonstrating that their rights have been violated." *Id.* Plaintiffs "continue to bear the ultimate burden of persuading the court that the [State's] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently 'narrowly tailored.'" *Id.* at 293. Even assuming plaintiffs can prove that race was the predominant motive behind the drawing of any of the challenged districts, plaintiffs

[43] Regardless, there is ample evidence in the legislative record that the "totality of the circumstances" supports the creation of § 2 districts. *See* Argument IV.C.3(c), *supra*.

bear the burden of proving that the plan or district was not reasonably created to avoid an objection under § 5 or to insulate the state from liability under § 2.[44]

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

3. Race was not the predominant motive behind the enacted VRA districts.

Like the Virginia plaintiffs in *Wilkins*, the plaintiffs in this case cannot prove that the enacted VRA districts are inexplicable by any reason other than race or that the General Assembly subordinated all other redistricting principles to race. To the contrary, the evidence shows that the

[44] The obligation of the state to show a strong basis in evidence to support the creation of a majority-minority district is similar to the "burden of production" required of employers in employment disputes. *See N.C. Dep't of Corrections v. Gibson*, 308 N.C. 131, 138, 301 S.E.2d 78, 83 (1983) (wrongful discharge case by state employee) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (standard of proof under Title VII of the Civil Rights Act)); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981). Under these employment cases, plaintiffs must first show a prima facie case (for example, evidence that a black employee was discharged under circumstances that resulted in retention of white employee). *Gibson*, 308 N.C. at 137, 301 S.E.2d at 83. If the plaintiff proves a prima facie case, the employer has the burden of producing a legitimate non-discriminatory reason for its action. The employer is not required to prove that its actions were actually motivated by a non-discriminatory reason. *Id.* Instead, a plaintiff must prove that the employer's stated reason is a pretext for intentional discrimination. *Id.* at 139, 301 S.E.2d at 84. This is because "'[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.* at 138, 301 S.E.2d at 83 (citing *Burdine*, 450 U.S. at 253).

shape and location of the VRA districts were driven by the legislature's desire to enact plans that would preclear and protect the State from lawsuits alleging vote dilution. In addition, the General Assembly sought to satisfy North Carolina's unique constitutional criteria for equalizing the population among the various districts, the constitutional criteria for drawing districts within a single county or county group, the way in which county groups must be formed, the traditional redistricting principle of incumbency protection, and the desire to enact legislative redistricting plans that were more competitive for Republican candidates than the plans used during past decades and than any of the alternative plans. Race was not the predominant motive and strict scrutiny does not apply.

(a) *Stephenson I* requires compliance with federal law as a state redistricting criterion, but also requires compliance with the WCP to the maximum extent practicable.

In *Stephenson I*, the Supreme Court harmonized the requirements of federal law and of the WCP by requiring that "VRA shall be formed prior to creation of non-VRA districts." *Stephenson I*, 355 N.C. at 383, 562 S.E.2d at 397. *Stephenson I* also stated that all VRA districts should be formed in a manner "consistent with federal law and in a manner having no retrogressive effect upon minority voters." *Id.* In 2006, Congress decreed that preclearance under § 5 turns on how a new plan compares with the benchmark plan with respect to districts that give minorities the opportunity to elect their preferred candidates of choice. Congress also incorporated into § 5 the Constitutional test for purposeful vote dilution by a jurisdiction. In *Strickland*, both the North Carolina Supreme Court and the United States Supreme Court held that districts that give minorities an equal opportunity to elect their candidates of choice must be formed with a TBVAP in excess of 50%. Thus, as a matter of state law, VRA districts must have a TBVAP in excess of 50%. Moreover, as a matter of state law, new districts that provide minorities with an equal opportunity to elect

candidates of choice should be created to obtain preclearance and to avoid an objection for purposeful discrimination.

None of the proposed alternative plans uniformly establish VRA districts with a TBVAP in excess of 50%, even though all of the alternative plans agree that VRA districts are needed in all of the areas of the State in which they were enacted by the 2011 plans.[45] Moreover, the alternative plans do not create new VRA districts in some of these same areas of the State. Because the alternative plans ignore *Strickland* and the requirements of § 5 as amended in 2006, none of the alternative plans comply with the State Constitutional criterion requiring the creation of VRA districts that comply with federal law.

The Court in *Stephenson I* also required that "to the maximum extent practicable, . . . VRA districts shall . . . comply with the legal requirements of the WCP." *Stephenson I*, 355 N.C. at 384, 562 S.E.2d at 377. Application of the WCP must be done in a manner that complies with federal law including the "one person, one vote" standard. *Stephenson I*, 355 N.C. at 363, 562 S.E.2d at 384-85 (legislative districts must have some measure of population equality). Under federal law, absent other evidence, apportionment plans with a maximum population deviation under 10% are constitutional. *Brown v. Thomson*, 462 U.S. 835, 842 (1983). In *Stephenson I*, as a matter of state constitutional law, the North Carolina Supreme Court adopted a one person, one vote standard that satisfies the federal requirements while providing even less discretion to the General Assembly. Under the state standard for one person, one vote, the total population for all districts "must be at or within plus or minus five percent" of the ideal number. *Stephenson I*, 355 N.C. at 562 S.E.2d at

[45] Plaintiffs define VRA districts as districts with TBVAP in excess of 40%. (Affidavit of Allan Lichtman (July 18, 2012); Second Affidavit of Allan Lichtman pp. 6, 7 (defining VRA districts as districts with a TBVAP between 40% and 49%)).

405.[46]

North Carolina's standard for one person, one vote plays a critical role in determining how the General Assembly can comply with the WCP. The *Stephenson I* Court observed that "*the intent* of the WCP is to limit the General Assembly's ability to draw legislative districts without according county lines a reasonable measure of respect." *Stephenson I*, 355 N.C. at 382, 562 S.E.2d at 396 (emphasis added). The Court also held that "*[t]he intent* underlying the WCP must be enforced to the maximum extent possible." *Id.* at 384, 562 S.E.2d at 397 (emphasis added). Thus, under the WCP, counties that have enough population to create one or more legislative districts wholly within their boundaries, consistent with North Carolina's one person, one vote standard (plus or minus 5% of ideal number), must be kept whole. Any district or districts must then be drawn within each county's boundaries. *Stephenson I*, 355 N.C. at 354, 562 S.E.2d at 377. In counties that lack sufficient population to draw one or more legislative districts solely within their boundaries, "the requirements of the WCP are met by combining or grouping the minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent 'one person, one vote' standard." *Id.*

Under these standards, redistricting plans must start with the maximum number of single counties with sufficient population for one or more legislative districts within their borders, then the maximum number of two-county combinations with sufficient population within the group for one or more legislative districts, the maximum number of these county groups, and so forth. *Stephenson*

[46] The ideal number of a legislative or congressional district is determined by dividing the state's population by the total number of legislative districts, *i.e.* 50 for the Senate, 120 for the House. Under the 2010 Census, the ideal population number for a Senate districts is 190,710. This means that an acceptable plus or minus 5% range for a Senate seat lies between 181,174 to 200,245. The ideal population for a North Carolina House districts is 79,462, with an acceptable plus or minus 5% range of 75,488 to 83,435.

I, 355 N.C. at 384, 562 S.E.2d at 397; *Stephenson II*, 357 N.C. at 308, 582 S.E.2d at 251 ("The General Assembly's May 2002 Fewer Divided Counties Senate and Sutton 5 House Plans fail to comply with the requirement that in forming districts, *only the smallest number of counties necessary to comply with the one-person, one-vote requirement should be combined in forming multi-county groupings*." (emphasis added)). Within county groups, districts may cross interior county lines only when necessary to comply with federal law. *Stephenson I*, 355 N.C. at 384, 562 S.E.2d at 397.

Stephenson I acknowledged that federal law prevents a strict application of the WCP, including any interpretation of the WCP focused on the number of divided counties. *Id.* Because of the supremacy of federal law, "VRA shall be formed prior to creation of non-VRA districts." *Id.* at 383, 562 S.E.2d at 397. However, in harmonizing federal law with the State Constitution, the Court also required that "[t]o the maximum extent practicable, such VRA districts shall also comply with the legal requirements of the WCP, as herein established for all redistricting plans and districts throughout the State." *Id.*

The 2011 General Assembly followed the *Stephenson I* requirements when it created VRA districts. Proposed VRA district plans were first released by the General Assembly on 17 June 2011; a corrected version of proposed VRA districts for the House was released on 21 June 2011. The enacted plans then met the "requirements of the WCP" by drawing VRA districts within a single county where possible, or, in other instances, VRA districts were drawn by "combining or grouping the minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent "one person, one vote standard." *Id.* The enacted county combinations, based upon the plus or minus 5% standard, were established to ensure that "to the maximum extent practicable," VRA districts were created to meet "the requirements of the WCP." *Id.* None of the

alternative plans match or exceed the county combination formula reflected in the enacted plan. Thus, the shape and location of VRA districts were primarily due to the General Assembly's reasonable efforts to comply with the criteria of *Stephenson I* with respect to apportioning population and keeping counties whole.

A few specific examples help to show how VRA districts in the enacted plans were created to meet the requirements of the WCP. First, in the enacted Senate Plan, VRA districts were created wholly within single counties: Guilford, Mecklenburg and Wake, and a crossover district in Forsyth. Neither Durham nor Cumberland Counties had sufficient population for a whole number of Senate districts within their boundaries. Cumberland County was combined with Hoke County to form a two-county combination with enough population for two Senate districts. A majority-black district (District 21) was created by keeping Hoke County whole and traversing the Cumberland County line only once. A four-county combination was used in Caswell, Durham, Henderson and Person Counties to create a county group with sufficient population for two Senate districts. A majority-black district (District 20) was created by keeping Granville County whole and traversing the Durham County line once. Both Districts 20 and 21 enhanced minority voting strength by including minority voters from two different § 5 counties (Hoke and Granville). Minority voters in these two counties had never before had this opportunity even though two majority-black districts can be formed in their region consistent with the WCP criteria. Thus, the enacted Senate Plan best (1) combines counties in the minimum numbers needed to comply with one person, one vote requirements; (2) keeps all of Hoke County in District 21 and all of Granville County in District 20; and (3) traverses the Durham and Cumberland County lines only to establish districts that comply with federal law. This is exactly what the General Assembly was instructed to do under the

Stephenson I formula.

In northeastern North Carolina, the enacted Senate plan establishes three majority-black districts that meet the requirements of the WCP. For Senate District 3, eight whole counties were combined to form a county group with enough population for a Senate district which also happens to have a majority TBVAP. District 4 is included in a five-county group with enough population for two Senate districts. District 4 was created with three whole counties: Halifax, Vance and Warren. Portions of Nash and Wilson Counties were added to District 4 to comply with the one person, one vote requirements and to assure compliance with *Strickland*. Similarly, District 5 is part of a four-county combination with enough population for two Senate districts. District 5 includes all of Greene County, with portions of, Lenoir, Pitt and Wayne Counties added to satisfy the one person, one vote standard and *Strickland*. With the exception of Warren County, all of the counties included in Senate Districts 3, 4, and 5 are covered by § 5.

A similar explanation applies to the enacted VRA House Districts. In the enacted House plan, 14 VRA districts are drawn wholly within single counties: Cumberland (Districts 42, 43), Durham (Districts 29 and 31), Guilford (Districts 57, 58, and 60), Mecklenburg (Districts 99, 101, 102, 106, and 107), and Wake (Districts 33 and 38). The enacted House Plan also includes two districts in Forsyth (Districts 71 and 72), which have a TBVAP below 50%.[47]

In the northeast, there are four VRA districts that were created in four different two-county combinations. Districts 23 and 27 are each based upon two whole counties: Edgecombe and Martin Counties (District 23) and Halifax and Northampton Counties (District 27). District 7 is created in a two-county combination (Franklin and Nash) with enough population for two House districts

[47] Plaintiffs have not challenged the two enacted House districts in Forsyth County.

(Districts 7 and 25). District 24 is in a two-county combination (Pitt and Wilson) with enough population for three House districts (Districts 8, 9 and 24). District 32 is in a four-county combination (Granville, Person, Vance and Warren) with enough population for two House districts (Districts 2 and 32). District 32 includes two whole counties (Vance and Warren) and a portion of Granville. Finally, District 5 is in a nine-county combination (Bertie, Camden, Chowan, Currituck, Gates Hertford, Pasquotank, Perquimans and Tyrell) with enough population for two House districts (Districts 1 and 5). District 5 includes three whole counties (Bertie, Gates and Hertford) and a portion of Pasquotank County.

The three VRA districts in south-central to southeastern North Carolina (Districts 12, 21, 48) largely follow the traditional redistricting principle of basing new districts on their predecessor districts, *i.e.*, those in the 2003-2009 House Plan. These districts also show how the plus or minus 5% requirement of *Stephenson I* impacts other county groups as well as the shape of VRA districts within a particular county group. The State is required to draw districts within a single county if possible. *Stephenson I,* 355 N.C. at 383, 562 S.E.2d at 397. Under the 2010 Census, Mecklenburg County contains enough population for 12 House Districts, all of which are well below the ideal population, but within the acceptable minus 5% range.[48] Because of the impact of 12 lower-populated districts in Mecklenburg County, a corresponding county group with districts that are populated closer to the plus 5% range was needed to balance the lower populated Mecklenburg districts. The higher populated county group had to be created in a manner that was consistent with

[48] Under the 2010 Census, the total population of Mecklenburg is 919,628, or 33,916 below the number needed for 12 house districts based upon the ideal population. However, the total amount of population in Mecklenburg is sufficient to support 12 House districts drawn at (-3.6%) below the ideal population, or an average population for each district of 76,636 (919,628 divided by 12 equals 76,636). Therefore, under the *Stephenson* formula, Mecklenburg had to be maintained as a whole county with all 12 districts drawn with below-average population.

the *Stephenson I* rule that the General Assembly must combine counties in the minimum number needed to make a population pool for one or more whole districts. As this unfolded, the county group used to balance the lower-populated Mecklenburg districts is a twenty-county group that runs from Stanly County through south central and southeastern North Carolina to Dare County on the coast. House Districts 12, 21, and 48 are located in this twenty-county group. (Hofeller Dep. Vol. II, pp. 334-38)

In the 2003-2009 House Plan, District 12 was located in Craven and Lenoir Counties. This district could not be maintained because it was now underpopulated by 15,862 (or -19.96%). The General Assembly was able to bring this district into compliance with the one person, one vote standard, as well as *Strickland*, by retaining population from Craven and Lenoir and adding population from Greene.

The General Assembly took similar steps to retain much of the 2003-2009 versions of House Districts 21 and 48 while also drawing these districts in compliance with *Strickland*. In the 2003-2009 plan, District 21 was located in Sampson and Wayne Counties, but now was underpopulated by 9,837 (-12.38%). The General Assembly remedied the underpopulation of this district, and brought the district into conformity with *Strickland*, by retaining portions of Sampson and Wayne Counties in this district and adding population from Bladen County. In the 2003-2009 House Plan, District 48 included portions of Hoke, Robeson and Scotland Counties but now was underpopulated by 13,018 (-16.38%). Consistent with the twenty-county group required to balance Mecklenburg County, the General Assembly remedied both the underpopulation of District 48 while bringing the district into *Strickland* compliance by retaining portions of Hoke, Robeson and Scotland Counties, while adding population from Richmond County. Because the twenty-county group involving these

districts had to be created to balance out the underpopulated districts in Mecklenburg County, enacted District 21 has a total population of +4.48% while enacted District 48 has a total population of +4.63%.[49]

There is no dispute that race was a factor in the creation of VRA districts in the enacted plans. However, race is a more significant factor in the districts proposed in the alternative plans. Plaintiffs had to consider race in proposing the elimination of some of the VRA districts found in the enacted plans (*e.g.*, Senate District 5 and House Districts 32, 38 and 106) and the reduction of TBVAP in some but not all of the other VRA districts. Drafters of the alternative plans had to consider race in drawing the majority-TBVAP districts in the alternative plans as well as their 40% plus TBVAP. Plaintiffs also rely upon race in urging the creation of districts with TBVAP between 25% and 40%, so that African Americans have more political "influence." Plaintiffs want to disperse black voters because of their race in order to create more Democratic-leaning districts. This theory raises constitutional questions that are far more serious and widespread than plaintiffs' claims against the enacted plans. *LULAC*, 548 U.S. at 446 (any interpretation of § 2 that would require states to create "influence" districts "would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions); *Strickland*, 556 U.S. at 21 ("If § 2 were interpreted to require crossover districts throughout the Nation, 'it would infuse race into virtually every redistricting, raising serious constitutional questions.'" (quoting *LULAC*, 548 U.S. at 446)).

[49] The location of enacted House Districts 21 is very similar to the SCSJ-AFRAM proposed District 21, which also retains portions of Sampson and Wayne Counties while adding population from Bladen County. The drafters of SCSJ District 21 were able to draw this district with a population deviation of only 1.46% because, under the SCSJ House Plan, it was included in a 46-county group. The decision by the drafters of the SCSJ House Plan to ignore the *Stephenson I* requirement that counties be grouped in the smallest groupings possible provided greater flexibility to draw districts within their plan's 46-county group. Drawing a TBVAP district at a higher total population requires the division of more precincts and impacts the district's shape. (Third Hofeller Aff. ¶¶ 51, 52 and 66; Second Frey Aff., Ex. 16-28)

Yet, despite plaintiffs' evident consciousness of race, none of the plaintiffs' alternative plans combine counties in the "minimum number . . . necessary to comply with the at or within plus or minus five percent 'one person, one vote standard'" and therefore do not meet "the requirements of the WCP." *Stephenson I*, 355 N.C. at 383, 512 S.E.2d at 397. In contrast, the location and shape of enacted VRA districts were predominantly caused by North Carolina's unique one person, one vote standard and the *Stephenson I* county-combination formula. Plaintiffs cannot prove that defendants "substantially neglected" the requirements of *Stephenson I*, or that the shape and location of VRA districts is inexplicable for any reason other than race.

(b) The General Assembly utilized the traditional redistricting principles of incumbency protection and partisan advantage in drawing the legislative plans.

The General Assembly may use the traditional redistricting principles of incumbency protection and partisan advantage, provided a redistricting plan complies with the WCP and federal law. *Stephenson I*, 355 N.C. at 371, 562 S.E.2d at 390. The General Assembly relied upon both of these criteria in drawing the 2011 legislative plans. For example, one of the obvious criteria followed by the 2011 Plans is that none of the minority incumbents were "double bunked" with another incumbent. Instead, each was provided with a district likely to re-elect them or some other minority member of the political party with which they are associated. In North Carolina, there is a high correlation between race and the political party preferred by African American voters. *See Cromartie I*, 526 U.S. at 549-50; *Cromartie II*, 532 U.S. at 251, 257-58; Arrington Dep. pp. 58-60. In all of the enacted VRA districts, African American Democrats represent a majority or extremely strong plurality of registered voters. Thus, all of the districts in which African American incumbents were placed constitute safe seats for the African American Democratic incumbents.

Legislative leaders were fully aware that the 2011Plans would lead to more districts that are more competitive for Republican candidates than the 2003 Senate Plan, the 2003-2009 House Plan, or any of the alternative plans. (Rucho Deposition, pp. 54-55) As demonstrated by the Affidavit of Sean Trende, the 2011 legislative plans were designed to maintain or enhance, from a Republican perspective, the current political balance in both the Senate (31 incumbent Republican Senators) and House (67 incumbent Republican Representatives). (Trende Aff., ¶¶ 61-96 and Tables 5-10) The enacted plans may work a political realignment of the Senate and House districts by creating plans that are more favorable to Republicans than the 2003 Senate or 2003-2009 House Plans or any of the 2011 alternative plans. (Trende Aff., ¶¶ 61-96 and Tables 5-10)[50]

Because both of the enacted legislative plans were intended to create more competitive districts for Republicans, under the test established in *Cromartie I* and *Cromartie II* strict scrutiny does not apply. The enacted plans are not illegal racial gerrymanders unless the plaintiffs can produce maps showing: (1) that the legislature could have realized "its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles;" and (2) "that those districting alternatives would have brought about significantly greater racial balance." *Cromartie II*, 532 U.S. at 258. Plaintiffs' proof falls woefully short of either of these elements.

Plaintiffs' alternative plans do not comply with *Stephenson I*'s county-combination formula. Therefore, they are not "comparatively consistent with traditional redistricting principles" used in the enacted plans and required by the State Constitution. Further, adoption of any of the alternative plans would not achieve the legislature's legitimate political interests because all of the alternative plans are designed to achieve Democratic majorities in the General Assembly. (Trende Aff., ¶¶

[50] In fact, the political tendencies of the alternative plans mirror the enacted plans, except in favor of Democratic majorities. (Trende Aff. ¶¶ 69-78, 88-96 and Tables 5-10)

69-78, 88-96 and Tables 5-10) Neither the Constitution nor the VRA provide this Court with any grounds for enjoining redistricting plans simply because they disfavor the Democratic Party. *See Stephenson I*, 355 N.C. at 371, 562 S.E.2d at 390. This is true despite the high correlation between African Americans and support for the Democratic Party. *Cromartie I*, 526 U.S. at 551-52; *Cromartie II*, 532 U.S. at 257-58.

Nor can plaintiffs prove that the alternative plans will provide better "racial balance." The enacted legislative plans provide more districts in which African Americans can elect their candidates of choice than any of the alternatives. The enacted plans also create fewer districts (between 40% and 50% TBVAP) in which white voters could potentially defeat a cohesive African American plurality. Unlike the enacted plans, none of the alternative plans provide African Americans with a roughly proportional opportunity to elect their candidates of choice. Thus, any order by this court requiring the State to replace the enacted plans with any of the alternatives will, in fact, result in greater racial imbalance in the General Assembly. Indeed, plaintiffs are asking the Court to dismantle five districts – House Districts 32, 38 and 106, and Senate Districts 5 and 32 – that elected African Americans for the first time in the 2012 general election. Plaintiffs provide no explanation of why the Court should do so. The only reason appears to be to further the goal of electing more Democrats to the General Assembly statewide.

As made clear by the decisions in *Mobile, LULAC, Strickland*, and the legislative history for the 2006 reauthorization of § 5, minorities enjoy no constitutional right to specific percentages of minority population in a district, unless the evidence shows the possibility of constitutional or statutory vote dilution. Under either circumstance, the General Assembly may protect the State from potential liability by enacting a district that provides African Americans with an equal opportunity

to elect their candidate of choice. Any such district must be constructed with a TBVAP in excess of 50%. There is no requirement that a state create a district with less than 50% TBVAP or districts below 40% TBVAP in which African Americans can influence the election of Democrats. Indeed, if the Court were to do what plaintiffs suggest and dismantle majority TBVAP districts in favor of crossover and influence districts, the Court would be subjecting the State to potential liability.

Plaintiffs have not offered any judicially manageable standards for determining a preferable racial balance or influence. *See Ashcroft*, 539 U.S. at 495 (Souter, J. dissenting). Plaintiffs are asking the court to accept "the apparent sentiments of incumbents who might run in the new district," regarding the minimum percentage of TBVAP which needs to be included in a district that will re-elect the incumbent. *Id.* This argument was rejected by Congress when it reauthorized § 5. In the alternative, plaintiffs would require the General Assembly to hire "experts," like Dr. Arrington or Dr. Lichtman, to calculate what they think is the minimum percentage of TBVAP needed.[51] This second argument has also been rejected by the courts. *See*, *e.g., Strickland*, 556 U.S. at 17 (states should not be required to use experts to determine the percentage of black population below 50% TBVAP needed for VRA districts).

Simply put, the facts in this case are nearly identical to those in the Virginia redistricting plans upheld in *Wilkins*. The Court cannot employ strict scrutiny and must find the legislative plans constitutional, because the plaintiffs can not prove "substantial neglect" by the General Assembly of all redistricting principles other than race. Plaintiffs' alternative plans, which more consciously rely upon race than the enacted plans, are more vulnerable to claims that they, and not the enacted

[51] (Arrington Dep. 34-38 (noting that even experts can disagree on the "trigger point"))

plans, constitute illegal racial gerrymanders.[52]

(c) The General Assembly had a strong evidentiary basis for enacting the VRA districts included in the 2011 legislative plans, meeting strict scrutiny review if the Court were to apply that standard.

(i) The decision in *Gingles* is still binding.

The evidence before the General Assembly provided a strong basis for creating the legislative VRA districts. For example, the General Assembly was well aware that in *Gingles*, North Carolina was ordered to create majority-black districts as a remedy to § 2 violations in the following counties: Bertie, Chowan, Edgecombe, Forsyth, Gates, Halifax, Hertford, Martin, Mecklenburg, Nash, Northampton, Wake, Washington and Wilson. *See Gingles*, 590 F. Supp. at 365-66, *aff'd Thornburg,* 478 U.S. at 80 (affirming district court's findings with the exception of House District 23 located in Durham County). The order in *Gingles* has never been reversed or modified and still applies to the State of North Carolina. (Churchill Dep. Exh. 57, May 27, 2011 Letter from Michael Crowell and Bay Joyie, UNC School of Government, pp. 1, 2) ("it appears to be commonly accepted that the legislature remains obligated to maintain districts with effective African American voting majorities in the same areas decided in *Gingles,* if possible").

Not surprisingly, following the decision in *Gingles* until the present, North Carolina has continued to comply with the *Gingles* order by reenacting VRA districts in these same counties. For example, the 2003 Senate plan created VRA Senate districts (defined by plaintiffs as districts with TBVAP in excess of 40%) in Bertie, Chowan, Gates, Halifax, Hertford and Northampton (2003 Districts 4); Edgecombe and Martin (2003 District 3); Guilford (2003 District 28); Forsyth (2003

[52] Plaintiffs' expert also noted that plans which provide rough proportionality to a minority group cannot be a racial gerrymander (Arrington Dep. pp. 117-18).

District 32); Mecklenburg (2003 District 38) and Wake (2003 District 14). Similarly, the 2003-2009 House Plan created districts in excess of 40% TBVAP in the *Gingles* counties of Bertie, Gates and Hertford (2009 District 5); Edgecombe and Wilson (2009 District 24); Forsyth (2009 Districts 71 and 72); Guilford (2009 Districts 58 and 60); Halifax and Nash (2009 District 7); Halifax and Northampton (2009 District 27); Martin (2009 District 8); Mecklenburg (2009 Districts 99, 101, 102, and 107) and Wake (2009 District 33).

Over the years, the General Assembly also acted to avoid potential liability for vote dilution claims by creating districts with TBVAP in excess of 40% or 50% in numerous counties that were not included in the *Gingles* case. For example, in the 2003 Senate plan, District 3 included a portion of Pitt County and District 4 included all of Perquimans County. In 2003, the General Assembly also enacted a VRA Senate district with TBVAP in excess of 40% in Cumberland County (District 21). All of these counties are covered by § 5. The General Assembly also enacted Senate District 20, wholly in Durham County, with a TBVAP of 44.64%, despite the holding in *Gingles* that plaintiffs had failed to prove the existence of racially polarized voting in the 1982 version of House District 23. In the 2003-2009 House plan, Perquimans was added to House District 5 while all of Warren and a portion of Vance were included in House District 27. District 12 was based upon a portion of Craven and Lenoir, District 21 included portions of Sampson and Wayne, and District 48 included portions of Hoke, Robeson and Scotland. Districts 42 and 43 were drawn wholly within Cumberland County. All of the "non-*Gingles*" counties included in districts drawn with TBVAP in excess of 40% were also covered by Section 5, with the exception of Warren County.

All of the counties included in *Gingles*, and all of the counties not covered by *Gingles* but included in subsequent plans (as most recently reflected by the 2003 Senate and the 2003-2009

House plans) are included in VRA districts under the 2011 legislative plans. Just as the 2003-2009 legislative plans added counties to VRA districts not included in *Gingles*, the enacted Senate plan included the § 5 counties of Granville, Greene and Hoke Counties into VRA districts (2011 Senate Districts 5, 20 and 21). Minority voters in these three counties now enjoy their first equal opportunity to elect their preferred candidates of choice for the Senate. Similarly, the 2011 House plan adds minority voters in Franklin (District 7), Granville (District 32), Greene (District 12) and Richmond (District 48) so that these voters will have their first equal opportunity to elect their preferred candidates of choice for the House. All four of these counties are covered by § 5.

Thus, as demonstrated by the 2011 legislative plans, the General Assembly based almost all of its VRA districts on districts enacted by past General Assemblies. The only difference between prior maps and the enacted 2011 plans are the legislature's decisions to: (1) follow the decisions in *Strickland* by drawing VRA districts with a TBVAP in excess of 50%; (2) add a third VRA Senate district in northeastern North Carolina (District 5) using one whole § 5 county (Greene), and portions of three other counties that have been used in the past to create a VRA Senate district (Pitt) or VRA House districts (Lenoir, Pitt and Wayne); and (3) follow precedent by prior General Assemblies by adding new § 5 counties (Granville, Greene and Hoke) to majority Senate districts and new § 5 counties (Granville, Greene, Richmond, and Duplin) to VRA House districts.[53]

(ii) Substantial evidence presented during the public hearing process provided a strong evidentiary basis for the creation of the VRA districts in the 2011 Plans.

The General Assembly conducted an unprecedented number of public hearings prior to the

[53] The creation of majority-black districts based on counties formerly included by past plans in majority-black districts is further proof that race was not the predominant motive underlying the enacted VRA districts.

legislative session at which redistricting plans were enacted, which provided additional evidence in the record supporting enactment of the VRA districts. There were 13 different public hearing dates running from 13 April 2011, through 18 July 2011. Hearings were often conducted simultaneously in multiple counties and included 24 of the 40 counties covered by § 5. Proposed legislative VRA districts were created before non-VRA districts and the General Assembly conducted a hearing on VRA districts on 23 June 2011. A public hearing on a proposed congressional plan was held on 7 July 2011, and a hearing on proposed legislative plans (including both VRA and non-VRA districts) was held on 18 July 2011. (Affidavit of Robert Rucho (January 19, 2012 ("Rucho Aff.") Exhs. 1 and 2). Ample testimony was given during these hearings to provide a strong basis for the enacted VRA districts.

Some of the most significant evidence was presented by counsel for the *NC NAACP* plaintiffs, Anita Earls, and her colleague, Jessica Holmes, on 9 May 2011, and 23 June 2011. On 9 May 9 2011, both Ms. Earls and Ms. Holmes stated that they were appearing on behalf of AFRAM. (First Rucho Aff. Ex. 6. pp. 7, 8) Ms. Holmes explained that AFRAM was a "network of organizations" which included the SCSJ, and at least three of the organizational plaintiffs: Democracy NC, the NC NAACP, and the League of Women Voters. (First Rucho Aff. Ex. 6 p.6) Ms. Holmes stated that a proposed congressional map would be presented by the SCSJ following her statement. (First Rucho Aff. Ex. 6 p. 8)

During her presentation on May 9, 2011, Ms. Earls stated that she was speaking on behalf of the SCSJ. (First Rucho Aff. Ex. 6 p. 9) Ms. Earls referenced a report by a political scientist, Ray Block, Jr., showing "high levels of racially polarized voting in the State" and stated that "there is racially polarized voting in the state." (First Rucho Aff. Ex. 6 p.13) Ms. Earls also referenced a law

review article written by her and two other authors, and stated that the report explained that the "totality of circumstances" in North Carolina are "an important part of the record to justify drawing majority-minority districts." (First Rucho Aff. Ex. 6 pp. 10, 13, 14)

Ms. Earls also provided the Redistricting Committee with several important submissions. One of these was a SCSJ's Congressional Plan proposed by AFRAM (listed in the map notebook previously provided to the court as the "SCSJ Congress Plan"). Ms. Earls also provided her own written statement. (Rucho Aff., Ex. 7, Testimony of Anita S Earls, Esq., Executive Director, SCSJ (5/9/01)). In paragraph 2 of her written statement, Ms. Earls references Mr. Block's report and states that "[w]e asked him to examine every black v. white contest in 2006, 2008, and 2010 for congress and the state legislature." *Id.* Ms. Earls further stated that "the report analyzes 54 elections and finds significant levels of racially polarized voting." The report also finds that "the number of elections won by black candidates in majority-minority districts is much higher than in other districts. This data demonstrates the continued need for majority-minority districts." *Id.*

In his report, Mr. Block explains the statistical methods he used to analyze the 54 elections referenced by Ms. Earls, all of which were general elections (not primaries) that involved black versus white candidates (Rucho Aff. Ex. 8). Based upon this analysis, Mr. Block concluded that the evidence showed a correlation between the number of blacks who vote in a particular district and the amount of votes received by an African American candidate, that the evidence demonstrated "the presence of racially polarized voting" because "the proportion of African Americans who prefer the black candidate is noticeably higher in virtually all of the electoral contests" as "compared to those of non-blacks," that "the proportion of black candidates who win elections is noticeably higher in majority-minority districts than in non-majority-minority districts", and "that the relationship

between electoral success and district type is statistically significant." Mr. Block stated "that racially polarized voting can be identified as occurring when there is a consistent relationship between the race of a voter and the way in which she/he votes." *Id.* Based upon the 54 elections analyzed by Block, he concluded that "such a consistent pattern emerges" and that "majority-minority districts facilitate the election of African American candidates." *Id.*

The law review article submitted by Ms. Earls details many significant points. (First Rucho Aff. Ex. 9) These include problems encountered by North Carolina's covered jurisdictions in obtaining preclearance of local redistricting plans, a summary of the law in voting rights cases, and an appendix listing approximately 54 North Carolina cases involving voting rights disputes (many of which concerned § 2 lawsuits brought against local governments for alleged vote dilution in many of the same counties where VRA districts were created in the 2011 Plans). (First Rucho Aff. Appendix B) The law review article also details how the "totality of circumstances" factors, listed by the *Gingles* court, still exist in the State of North Carolina. Ms. Earls cited "current barriers to effective political participation by minority voters" as including numerous election irregularities. (Rucho Aff. p. 6) Ms. Earls also detailed continuing economic disadvantages suffered by African Americans due to discrimination. She included statistics showing blacks to be almost three times more likely than whites to be living below the poverty level, that 29% of black families were headed by females, compared to 7.5% for white families, that 35% of families headed by females lived in poverty, that 60% of black adults age twenty-five or older had a high school education or less (compared to 47% for whites), that the unemployment rate for blacks was two-to-six times that of whites, and that 19% of blacks lack health insurance coverage and are five times more likely to use Medicaid. (Rucho Aff. p.3) Ms. Earls concluded by stating:

> In summary, low income, low education levels and high unemployment are all factors associated with blacks in North Carolina. Moreover, these same factors are associated with a higher rate of health problems, ranging from mental disorders and physical ailments. In fact, the infant death rate average of black North Carolinians is more than double the rate for whites. All of these factors hinder the ability of blacks to participate in political activities.

(Rucho Aff. p.3)

Subsequently, during the public hearing on June 23, 2011, Ms. Earls provided an additional written statement on behalf of AFRAM. (First Rucho Aff. Ex. 12) Included with the statement were proposed legislative redistricting plans (previously provided to the court and designated "SCSJ Senate" and "SCSJ House"). In her written statement, Ms. Earls represented that the legislative districts in the ARAM Senate and House maps complied with federal and state laws and created districts that were "geographically compact." *Id.*[54]

Ms. Earls was not the only person during the public hearing process to give testimony on the continuing presence of racially polarized voting, the continuing need for majority-minority districts, and the continuing existence of the *Gingles* factors used to judge "the totality of the circumstances." On 13 April 2011, Lois Watkins, a member of the Rocky Mount City Council, asked the legislature to draw majority-minority districts and stated that there was a desire in the City of Rocky Mount to elect and keep representatives of choice. (NC11-S-28F-3(a) at pp. 13-15[55]) Another member of the Rocky Mount City Council, Reuben Blackwell, testified that there was inequality in housing, elections, transportation and economic development. (NC11-S-28F-3(a) at pp. 20-23) AFRAM

[54] As has been discussed, the AFRAM-SCSJ maps proposed VRA districts in all of the areas of the state in which enacted VRA districts are established by the 2011 Senate and 2011 House Plans. *See* Argument IV.C.3(c)(iv), *supra*.

[55] Citations beginning "NC11-S-28F" refer to a portion of the preclearance submission to USDOJ of the enacted Senate Plan dealing with public input. Pages cited herein are attached as "Attachment B," and a complete copyof the submissions of the 2011 House, Senate and Congressional Plans, with the exception of database files, are being filed with Defendants' Motion for Summary Judgment.

representative, Jessica Holmes, testified that many historical factors, including racial appeals in campaigns, had conspired to exclude African American voters from the political process. (NC11-S-28F-3(a) at pp. 24-27) Ms. Holmes further stated that social science would confirm that racially polarized voting continues to occur in many areas of North Carolina and that any redistricting plan should not have the purpose or effect of making African American voters worse off. (NC11-S-28F-3(a) at p. 26) Finally, Andre Knight, another member of the Rocky Mount City Council, and President of the local branch of the NAACP, testified about the historical exclusion of African Americans from the electoral process in Rocky Mount, that race and economic class continued to be divisive issues in regards to school systems, and that racially polarized voting still exists and is demonstrated by the negative attitude toward the African American majority in the Rocky Mount City Council. (NC11-S-28F-3(a) at pp. 28-30)

On 20 April 2011, Bob Hall, Executive Director of plaintiff Democracy NC and a proffered expert for plaintiffs, testified that race must be taken into consideration in the redistricting process, that discrimination still exists in North Carolina, and that racially polarized voting continues in some parts of the State. (NC11-S-28F-3(b) at pp. 29-31). Toye Shelton, an AFRAM representative, testified that African Americans and other protected groups must be afforded an equal opportunity to participate in the political process. (NC11-S-28F-3(b) at pp. 33-37) Terry Garrison, a Vance County Commissioner, urged the legislature to be cognizant of race as they drew districts. (NC11-S-28F-3(b) at pp. 41-44) Lavonia Allison, Chair of the Durham Committee on the Affairs of Black People, testified that racial minorities have faced discrimination in voting, that race must be taken into account when drawing redistricting plans to serve the goal of political participation, and that the VRA requires the General Assembly to draw districts in which minorities are afforded

the opportunity to elect a candidate of choice. (NC11-S-28F-3(b) at pp. 71-74) Ms. Allison also drew attention to the fact that African Americans represent 22% of the total population of North Carolinians and that fair representation would reflect that with proportional numbers of representatives in the General Assembly. *Id.*

On 28 April 2011, Bill Davis, Chair of the Guilford County Democratic Party, testified that redistricting plans should not undermine minority voting strength. (NC11-S-28F-3(d) at pp. 17-20) James Burroughs, Executive Director of Democracy at Home, advised that the legislature was "obligated by law" to create districts that provide an opportunity for minorities to elect candidates of choice. He asked that current minority districts be maintained and that other districts be created to fairly reflect minority voting strength. (NC11-S-28F-3(d) at pp. 26-28) Ben Grumon, a representative of the UNC College Democrats, urged legislators not to "pack" minorities or "dilute" votes of members of the minority group. (NC11-S-28F-3(d) at pp. 51-54)

On 30 April 2011, June Kimmel, a member of the League of Women Voters, told the committee that race should be considered when drawing districts and that the legislature must not "weaken" the minority vote to avoid a court challenge. (NC11-S-28F-3(f) at pp. 9-12) Mary Degree, the District 2 Director of the NAACP, stated that the legislature was legally obligated to consider race, that current majority-minority districts be preserved, and that new majority-minority districts be added based upon new census data. (NC11-S-28F-3(f) at pp. 17-19) Maxine Eaves, a member of the League of Women Voters, urged that any new plan fairly reflect minority voting strength. (NC11-S-28F-3(f) at pp. 28-31)

On 7 May 2011, Mary Perkins-Williams, a resident of Pitt County, testified that the VRA was in place to give minorities a chance to participate in the political process. She stated that Pitt County

African Americans had faced disenfranchisement and that it remained hard for African Americans to be elected in her county. (NC11-S-28F-3(j) at pp. 23-26) Taro Knight, a member of the Tarboro Town Council, expressed his opinion that wards for the Town Council drawn with 55% to 65% African American population properly strengthened the ability of minorities to be elected. (NC11-S-28F-3(j) at pp. 40-42)

On 7 May 2011, Keith Rivers, President of the Pasquotank County NAACP, stated that race must be considered, that current majority-minority districts should be preserved and that additional majority-minority districts should be drawn where possible. (NC11-S-28F-3(k) at pp. 9-11) Kathy Whitaker Knight, a resident of Halifax County, stated that race must be considered to enfranchise all voters. (NC11-S-28F-3(k) at pp. 35-37) Nehemiah Smith, editor of the *Weekly Defender*, testified that minorities have faced many obstacles to being involved in the electoral process throughout history. (NC11-S-28F-3(k) at pp. 39-41) David Harvey, President of the Halifax County NAACP, stated that communities in eastern North Carolina are linked by high poverty rates, disparities in employment, education, housing, health care, recreation and youth development, and that these communities have benefitted from majority-minority districts. (NC11-S-28F-3(k) at pp. 47-48)

On 23 June 2011, Florence Bell, a resident of Halifax County, testified that northeastern North Carolina continued to lag behind in the "*Gingles* factors" including "high poverty rates, health disparities, high unemployment, community exclusion, lack of recreational and youth development and that these are contributing factor to juvenile delinquency, issues of racial injustice, inequality of education and economic development." (NC11-S-28F-3(m) at pp. 97-100)

On 18 July 2011, Professor Irving Joyner, representing the NAACP, affirmed that racially

polarized voting continues to exist in North Carolina (NC11-S-28F-3(o) at pp. 68-76)

Throughout the public hearing process, numerous witnesses advocated that minority voters not be "packed" or "cracked." None of the witnesses gave definitions of either term or any examples of a specific proposed VRA district that "packed" or "cracked" minority voters.

In summary, during the public hearing process, many witnesses presented testimony that majority-minority districts were still needed, that racially polarized voting still exists throughout North Carolina, that new majority-minority districts should be created when possible, and that disparities in education, employment, health, etc., *i.e.*, the "*Gingles* factors," still exist in North Carolina. At least one leader of the African American community asked the legislature to examine the possibility of providing proportional opportunities for African Americans to elect candidates of choice and others supported the creation of new majority-black districts. Finally, the SCSJ and AFRAM submitted legislative redistricting maps that included "legal" and "compact" majority-minority districts or districts with TBVAP in excess of 40%, throughout the state and in all counties or regions in which VRA districts were enacted by the legislature. The enacted plans responded to the comments of the public. No concentration of African American population has been cracked and neither plan "packs" African Americans as those terms have been defined by the United States Supreme Court. *See Voinovich v. Quilter*, 507 U.S. 146, 153-54 (1993) (defining the terms "fragmentation" or cracking and "packing").

(iii) Other evidence before the General Assembly provides a strong evidentiary basis for VRA districts.

Dr. Thomas Brunell was engaged by the legislative leadership to review and supplement testimony given by Ms. Earls and the AFRAM/SCSJ expert, Professor Ray Block, on the existence

of racially polarized voting. Dr. Brunell was asked to supplement Dr. Block's report by examining elections in the 40 North Carolina counties covered by § 5, urban counties not covered by § 5 (such as Wake, Durham, Forsyth, and Cumberland) and a few other counties. Dr. Brunell submitted his report on 12 June 2011 and confirmed Mr. Block's conclusions that statistically significant racially polarized voting existed in all of the counties examined except Camden County, where lack of adequate sample size precluded any conclusions. (Rucho Aff., Ex. 10)

On 20 June 2011, the General Assembly obtained an expert report from Dr. Peter Morrison to consider how the State could comply with the requirement in *Pender County* that districts designed to comply with § 2 have a voting age minority *citizen* population in excess of 50%. *Pender County*, 361 N.C. at 506, 649 S.E.2d at 374. Based upon his examination of the 2010 Census data, the proposed 2011 legislative plans, and citizenship estimates by the American Community Survey ("ACS"), Dr. Morrison concluded that all of the VRA districts in the proposed 2011 legislative plans with a TBVAP in excess of 50% also included a citizen voting age majority of African American voters. (20 June 2011 Letter of Peter A. Morrison, p. 2)[56]

Finally, also available to the General Assembly was other information developed by ACS. This included surveys of household incomes by county based upon race, per capita income by county based upon race, education levels by county based upon race, and median age by county based upon race.[57]. The ACS survey confirmed the testimony by Ms. Earls and other witnesses that African Americans continue to lag behind the white majority in the areas of income, employment, education,

---

[56] http://www.ncga.state.nc.us/GIS/Download/ReferenceDocs/2011//6-20-2011_Peter_A_Morrison_Letter_to_the_Redistricting_Chairs.pdf

[57] The American Community Survey data is available at http://www.ncga.state.nc.us/representation/redistricting.aspx under the heading "2011 Documents."

and life expectancy and that the *Gingles* factors continue to exist in the State of North Carolina.

(iv) All alternative legislative maps confirmed the need for VRA districts.

As already noted, all of the alternative legislative plans – the SCSJ Senate and House maps, the Fair and Legal Senate and House maps, and the LBC Senate and House maps – proposed VRA districts, defined by plaintiffs as including districts with TBVAP in excess of 40%, in all of the areas of the state in which 50% plus VRA districts are established by the enacted 2011 Senate and House plans. The alternative plans differ from the enacted plans only to the extent that:

(1) Alternative plans selectively create some districts with TBVAP in excess of 50% and others with a TBVAP above 40% but less than 50%; and

(2) The enacted plans establish a few specific VRA districts that are not included in some or all of the alternatives (*i.e.*, enacted Senate District 5, enacted House Districts 32, 38, 57 and 106). During the public hearing process and legislative session, no one disputed that VRA districts are still needed in the regions or counties in which they have been created by the 2011 Plans. Democratic members of the General Assembly voiced no opposition to any specific district prior to the legislative session where they were considered, nor did they propose alternative plans. When the session started, the opposition voiced by Democratic legislators focused on alleged "packing," because the General Assembly uniformly enacted VRA districts with a TBVAP in excess of 50%, and because the enacted plans create more VRA districts than the alternatives.

The claim that the legislature packed VRA districts finds no legal support in any case rendered by the United State Supreme Court. The alternative plans, and not the enacted plans, are guilty of cracking because they eliminate majority-TBVAP districts or reduce the percentage of

TBVAP to a level below 50%. These changes in the alternative plans created more districts that would elect white Democrats. This is the very danger which prompted the enactment of the 1982 amendment to § 2. (Arrington Dep. pp. 64-67, 68, 73, 74, Ex. 246 p. 82) (Testimony of Theodore Arrington, U.S. House Committee on the Judiciary (11/9/05)).

"Packing" occurs when a district is packed with a super-majority of African American population so as to prevent the creation of one or more other districts that would allow African Americans to elect their preferred candidate of choice. *See Voinovich*, 507 U.S. at 153-54; Arrington Dep. p. 68. Plaintiffs have pointed to and can point to no example in the enacted plans where the percentage of black population in an enacted district prevented the creation of an adjoining majority-black district – or indeed any other district (such as an alleged crossover district) – that would allegedly allow African Americans to elect their candidate of choice. Plaintiffs' expert, Dr. Arrington, admitted that there are no cases finding a constitutional or § 2 violation because a jurisdiction created a majority-black district that lessened the alleged influence of black Democrats in an adjoining district. (Arrington Dep. p. 41). Yet, this is the exact injury alleged by the *NAACP* plaintiffs in their § 5 submission to the USDOJ and amended complaint. (Defendant's Second Notice of Filing, July 10, 2012) (SCSJ/NAACP Letter to USDOJ, October 12, 2011, pp. 5-8).[58]

Plaintiffs' theory regarding the percentage of black representation needed to create a VRA district has been rejected in *Strickland*. Furthermore, neither plaintiffs nor any members of the General Assembly submitted into the public hearing or legislative record any expert testimony that African Americans allegedly could elect their candidate of choice in a new district, modified to

[58] Plaintiffs' expert, Allan Lichtman, also describes the alleged injury suffered by the *NAACP* plaintiffs because of the creation of majority-black districts as the loss of political influence in districts that adjoin majority-black districts. Second Affidavit of Allan Lichtman, ¶ 14.

comply with the 2010 Census and the *Stephenson* formula, with something less than a 50% TBVAP. While plaintiffs' experts, Dr. Arrington and Dr. Allen Lichtman, have now given *post hoc* affidavits to support the argument that TBVAP between 40% and 49% is "sufficient," neither of these affidavits are in the legislative record and are therefore irrelevant as a matter of law. *Shaw II*, 517 U.S. at 910; *Cromartie II*, 133 F. Supp. 2d at 422.

The frivolous nature of plaintiffs' packing argument is exposed by the inconsistencies in the alternative plans support by plaintiffs. For example, in the SCSJ-AFRAM Senate Plan, which were presented to the General Assembly as complying with all state and federal requirements, the TBVAP in two proposed Senate Districts – District 4 (53.33%) and District 40 (52.06%) – exceeds the TBVAP included in the enacted versions of District 4 (52.75%) and District 40 (51.84%).

A larger number of discrepancies are found in the alternative House plans. House District 7 in the enacted plan has a TBVAP of 50.67%, while the SCSJ-AFRAM version has a TBVAP of 58.69% and the Fair and Legal version of 52.75%. House District 33 in the enacted plan has a TBVAP of 51.42% as compared to the SCSJ version (56.45%). The TBVAP of all three versions of House Districts 42 and 58, as proposed by SCSJ-AFRAM, Fair and Legal, and LBC, have higher percentages of TBVAP than the enacted Districts 42 and 58. The SCSJ-AFRAM and Fair and Legal version of Districts 60 and 102, have higher percentages of TBVAP than enacted Districts 60 and 102. The SCSJ-AFRAM version of District 107 has higher TBVAP than the enacted version. Thus, if districts in the enacted plans are indeed "packed" as plaintiffs assert, one can only conclude that the alternative plans are more guilty of "packing" than the enacted versions. Plaintiffs have given no rationale for their districts with higher minority populations that can be squared with their contention that all enacted majority-TBVAP districts are "packed."

Moreover, the only evidence in the legislative record related to plaintiffs' arguments that VRA districts should be created with less than 50% TBVAP are election results for black-white legislative races from 2006-2010, and congressional races from 1992-2010. This information does not support plaintiffs' arguments for several reasons.

First, all of the districts in question were created before the ruling in *Strickland* and before the reauthorization of § 5 in 2006. Based upon these two events, it was reasonable for the General Assembly to conclude that districts that allow African Americans to elect their candidate of choice, or preferred candidates of choice, must be created with TBVAP in excess of 50%. The General Assembly uniformly applied this standard to all VRA districts instead of selectively choosing which districts could, in theory, be created at lower percentages.

Second, the election results actually support the testimony given by Ms. Earls and Mr. Block, as well as Dr. Brunell, that racially polarized voting continues to exist in North Carolina, and that majority-TBVAP districts facilitate the election of candidates preferred by minorities. There are no examples of African American candidates regularly being elected in districts with less than 40% TBVAP. Most of the past election results in districts with TBVAP between 40% and 50% are for long-time African American incumbents who ran for election in districts that are now overpopulated or underpopulated under the 2010 Census. One of the guiding principles of *Strickland* is that the legislature should not be required to determine the impact of incumbency or the type of white voters who must be placed in a new district to allow African American voters the opportunity to elect candidates of choice. *See Strickland*, 556 U.S. at 17. Incumbency protection is not the purpose of the VRA. Instead, the Act is designed to protect the rights of African American voters to have an equal opportunity to elect their candidates of choice. *See* Senate Rep. p. 20. The 50% TBVAP rule

eliminates any requirement that the legislature hire experts to determine the effect of incumbency or the "minimum" percentage of TBVAP needed for a particular district, *see Strickland*, 556 U.S. at 17, and provides the General Assembly with a "safe harbor." *See Strickland*, 361 N.C. at 505, 649 S.E.2d at 373.[59]

Plaintiffs did not consistently follow their argument that an increase in TBVAP was unnecessary in districts represented by African American incumbents. The SCSJ-AFRAM Senate Plan recommends increases in TBVAP, as compared to the 2003 Senate Plan for Senate Districts 3, 4, 14, 21, 28, 38, and 40. For example, Senate District 14, represented by incumbent Senator Dan Blue, had a TBVAP of 42. 62% under its 2003 version, yet SCSJ-AFRAM plan recommends that this district be created for 2011 with a TBVAP of 48.05%. In the SCSJ-AFRAM House plan, incumbents in House Districts 8, 24, 27, 31, 33, 42, 43, 58, 60, 101, and 107 were given proposed new districts with a TBVAP percentage that was higher than the districts to which they were elected under the 2003-2009 House Plan.[60] As compared to the 2003 Senate Plan, the Fair and Legal Senate Plan increased the TBVAP in its proposed districts 3, 4, 21, 28, and 40. The LBC Senate Plan increased the TBVAP in its districts 3, 4, 20, 28, and 40. As compared to the 2003-2009 House Plan, the Fair and Legal Plan increased TBVAP in districts 5, 21, 31, 33, 42, 58, and 60. The LBC House Plan increased TBVAP in districts 5, 12, 21, 31, 48, 58, and 60. Plaintiffs have offered no explanation for how the legislature packed enacted districts with a TBVAP in excess of 50%, where

[59] Dr. Arrington testified that incumbency may be worth 5% or more in election results and that a "strong, well-thought of entrenched African American incumbent" could win an election with a lower percentage of TBVAP in his districts as compared to "a new person running." (Arrington Dep. p. 52-56). Very few of the enacted VRA district have a TBVAP that exceeds one or more of the alternative versions by an amount substantially in excess of 5%.

[60] Some of the increases in SCSJ-AFRAM House Districts were slight increases. These include SCSJ-AFRAM proposed House Districts 8, 24, 42, 43, 45, 58, and 60.

their proposed alternatives also increase TBVAP in districts with black incumbents while sometimes even recommending TBVAP for specific districts that is higher (or more "packed") than the enacted versions.

Finally, plaintiffs' "packing" argument is nonsensical because of the slight differences in the TBVAP recommended by the alternative plans as compared to the enacted versions. Many examples can be found in all alternative plans. For example, the SCSJ-AFRAM plan proposed that Senate District 14, located in Wake County, be created with a TBVAP of 48.05%, as compared to 51.28% TBVAP in enacted Senate District 14. SCSJ-AFRAM Senate District 21 was proposed with a TBVAP of 46.17%, or less than 6% lower than enacted Senate District 21.[61] Many examples of minor differences in TBVAP can be identified by comparing all of the enacted VRA districts with corresponding districts in the alternative plans. Again, plaintiffs give no explanation for why a 46.17% TBVAP district is not packed or where "packing" commences on the line from 46.17% to 51.28% TBVAP.

D. The enacted legislative districts are reasonably compact and narrowly tailored to avoid § 5 objections or potential lawsuits alleging constitutional or statutory vote dilution.

(1) None of the enacted districts resemble the 1992 Twelfth Congressional District and all of them appear no less compact than the 1997 First Congressional District or plaintiffs alternative districts.

As we have described above, no court – including the United States Supreme Court and the North Carolina Supreme Court – has adopted a test or definition available to the General Assembly to decide whether an enacted VRA district is based upon a reasonably compact population of African

[61] This small difference is further marginalized when the percentage of registered voters for each district is examined by race. For example, in the enacted District 21, 49.49% of its registered voters are African American. In contrast, in the SCSJ District 21, 51.52% of the registered voters are African American.

Americans. During the 1990s, the courts determined that the 1992 version of the Twelfth Congressional Districts were not compact but that the 1997 version of the First Congressional District was compact. Both of these cases were part of the legislative record for redistricting in 2011 and provided a frame of reference for the General Assembly to exercise its discretion without providing a specific test.

In *Shaw II*, the Court found that the 1992 Twelfth District was not based upon a reasonably compact black population and that it could not be used to remedy a possible claim for vote dilution for the majority-minority population running from Mecklenburg County through southeastern North Carolina. *Shaw II*, 517 U.S. at 916-18. The 1992 Twelfth Congressional District literally used the northbound and southbound lanes of I-85 to attach dispersed population centers starting in Gaston County and running through Mecklenburg, Iredell, Catawba, Rowan, Davidson, Forsyth, Guilford, Alamance, Caswell, Person, and Durham Counties. In *Shaw I*, the Court observed "Northbound and southbound drivers on I-85 sometimes [found] themselves in separate districts in one county. only to 'trade' districts when they enter[ed] the next county." *Shaw I*, 509 U.S. at 636. A state legislator remarked that '"if you [drive] down the interstate with both car doors open, you'd kill most of the people in the district.' *Id.* The Twelfth and two other districts remained "contiguous" only because all three districts intersected each other at a single mathematical point. *Id*.[62] The population bypassed by these narrow corridors was so substantial that the district completely dissected the Sixth Congressional District while adjoining the boundaries of six other districts (Second, Fourth, Fifth, Eighth, Ninth, and Tenth).

In *Cromartie II*, the district court found that the 1997 version of the First Congressional

[62] The North Carolina Supreme Court has declared point contiguity unconstitutional. *See Stephenson II*, 357 N.C. at 313, 582 S.E.2d at 254.

District was based upon a reasonably compact black population, and, therefore, was narrowly tailored to protect the state from vote dilution claims. *Cromartie II*, 133 F. Supp.2d at 423. The 1997 First Congressional District did not use point contiguity, did not completely dissect any other congressional district, did not use an interstate highway to connect black communities located in five dispersed urban areas, and only adjoined four other congressional districts.[63] The 2001 First Congressional District was based upon the 1997 version. Under the test for compactness currently used by USDOJ – *i.e.*, the "interocular" perspective (Arrington Dep. p. 202) – the 1997 and 2001 versions of the First Congressional District are obviously less bizarre in appearance than the 1992 Twelfth Congressional District.

A visual comparison of all of the 2011 legislative districts with the 1992 Twelfth Congressional District should lead any observer to conclude that the Twelfth Congressional District is far more bizarrely shaped than any of the legislative districts. None of the enacted legislative districts completely dissect another district, use point contiguity, or use highways to connect multiple and dispersed urban areas. Moreover, no observer could reasonably argue that any of the legislative districts are more visually bizarre than the "compact" 1997 and 2001 versions of the First Congressional District. None of the enacted legislative districts are more bizarrely shaped than several districts proposed in the proposed alternative maps, all of which, according to plaintiffs, are compact. *See* SCSJ Senate Districts 3, 21, 32, 38 and House Districts 5, 7, 27, 24, 42, 43, 12, 21, 48, 60; Fair and Legal Senate Districts 14, 21, 28, 32, 38; House Districts 7, 8, 23, 12, 21, 48, 33, 31, 42, 43, 60; LBC Senate Districts 3, 14, 21, 20, 28, 32, 38; House Districts 7, 8, 27, 32, 12, 21,

[63] Information on the 2001 Congressional Plan can be found at the General Assembly's website at: http://www.ncga.state.nc.us/representation/Content/Plans/PlanPage_DB_2001.asp?Plan=Congress_ZeroDeviation&Body=Congress.

42, 43, 48, 33, 29, 31, 50, 99, 101, 102, 106, 25. There are no consistent standards to explain why the 1997 or 2001 versions of the First Congressional District or the VRA districts in plaintiffs' alternative plans are all compact, while the enacted VRA districts are not.

(2) Plaintiffs' mathematical compactness tests are irrelevant because they compare districts in different plans located in different county groups and otherwise demonstrate, at best, insignificant and inconsistent differences between the enacted districts and alternatives.

Notwithstanding testimony by their expert, Dr. Ted Arrington, regarding the uselessness of mathematical compactness tests, plaintiffs assert that their proposed VRA districts are compact, and that the enacted districts are not, through a summary of compactness scores organized by Anthony Fairfax. Mr. Fairfax's reports are either irrelevant or demonstrate that all enacted legislative VRA districts are sufficiently compact when compared to districts in alternative plans which plaintiffs describe as compact.

Mr. Fairfax has submitted two affidavits and has been deposed regarding them. In general, he purported to compare the 2011 enacted Congressional, House, and Senate plans against the former "benchmark" plans (2001 Congressional, 2003 Senate and 2003-2009 House) and the Fair and Legal Congressional, Senate and House Plans offered by Democratic leaders during the 2011 legislative sessions.[64] Mr. Fairfax did not make a comparison between the 2011 enacted plans and the plans offered by SCSJ-AFRAM for Congress, Senate, or House, or the LBC plans offered for the Senate and House, even though plaintiffs have alleged that these alternative plans are also legal and compact. Mr. Fairfax's testimony is largely irrelevant for the following reasons.

First, any comparison between the 2011 plans and the plans enacted during the 2000s is

[64] Of course, none of the plans used during the 2000s remain "benchmark plans" because all of the 2011 redistricting plans have been enacted and precleared by USDOJ. Under case precedent and USDOJ regulations, the 2011 plans are now the benchmark plans. *See* Argument IV.B.1, *supra*.

completely irrelevant. Few of the 2000-era districts in any of the three plans comply with the applicable one person, one vote standard. Moreover, as it relates to the legislative plans, almost all of the 2000-era VRA districts are located in different county groups (which have different average population levels for each district within a specific group) or are drawn within single counties at different population deviations as compared to the legislative districts enacted in 2011.[65]

Second, any comparison between the enacted legislative plans and the Fair and Legal Plans is irrelevant to the extent enacted legislative districts are compared by Mr. Fairfax to Fair and Legal districts located in different county groups. This defect in Mr. Fairfax's analysis applies to any comparison of enacted Senate Districts 3, 4, 5, 14, 20, 21, 28, and 32 with their alleged equivalent in the Fair and Legal Senate Plan. The only two VRA districts in the enacted Senate Plan draws within the same "county group" as found in Fair and Legal Senate are Districts 38 and 40 in Mecklenburg County. Similarly, in the enacted House Plan, Districts 5, 7, 12, 21, 23, 24, 29, 31, 32, and 48, are all located in different county groups from the groups used in the Fair and Legal Plan. (Second Frey Aff., Ex. 14 and 15).

Third, only one of the Fair and Legal Senate Districts are drawn with a TBVAP in excess of 50% (District 4) and it is located in a different county group than the enacted Senate District 4. Only nine Fair and Legal House Districts are drawn with a TBVAP in excess of 50%. Three of the Fair and Legal House Districts that are drawn to exceed 50% TBVAP are located in different county groups from the enacted districts to which they are compared (House Districts 5, 7, and 24).

Fourth, Mr. Fairfax performed a simplistic and misleading comparison of the enacted and "Fair and Legal" plans. Instead of disclosing the actual scores for each district in each plan, Mr.

[65] Similarly, both the SCSJ and LBC plans use different county groups for most if not all of these same districts. (Second Frey Aff., Ex. 14 and 15).

Fairfax created a matrix which only explains which of the comparable districts received a "better" score under each of the tests. He explains nothing about the magnitude of the different scores. Mr. Fairfax admitted in his deposition that there are no legal standards related to the magnitude of differences between two districts under a particular test. (Fairfax Dep. pp. 33-35, 76-77). Moreover, he admitted that no court has ever explained what constitutes "sufficient legal compactness" under any of the various tests. (Fairfax Dep. pp. 33-34).

Finally, an examination of the actual scores for each district demonstrates that it is impossible to identify judicially manageable standards for determining when a district is "compact" according to a mathematical test. For example, under the "Reock" test used by Mr. Fairfax, the least compact enacted Senate VRA districts (District 5 located in eastern North Carolina and District 28 in Guilford County) received a score of 0.25. Mr. Fairfax compared enacted Districts 5 and 28 against Fair and Legal Districts 5 and 28, but discloses only that the Fair and Legal districts have a "better" score and does not explain the magnitude or the significance of the difference. Mr. Fairfax also ignores that Fair and Legal Districts 5 and 28 and are drawn with a TBVAP of only 32.94% and 48.02%, respectively, and that the only Fair and Legal Senate District drawn with a TBVAP in excess of 50% (Fair and Legal Senate District 4) recorded a Reock score (0.25%), equal to the enacted plan's "non-compact" Senate Districts 5 and 28. Nor did Mr. Fairfax report that Fair and Legal District 28 received a Reock score of only 0.27.

Further, Mr. Fairfax failed to disclose that the Fair and Legal Senate Plan has two non-VRA districts, alleged by the plaintiffs as meeting all *Stephenson I* compactness requirements, that received lower Reock scores than enacted Senate Districts 5 and 28 (Fair and Legal District 9 – 0.23%; Fair and Legal Senate District 11 – 0.24%). Finally, Mr. Fairfax does not disclose that the

Senate Fair and Legal VRA District 3 received a Reock score of only 0.32 and that five Fair and Legal non-VRA districts received Reock scores between 0.28 and 0.32 (District 39 – 0.28; District 7 – 0.31; District 33 – 0.30; District 34 – 0.32; and District 46 – 0.29). (Second Frey Aff., Ex. 32). Plaintiffs and their experts have not identified any judicially manageable standard that would have told the General Assembly that a Reock score of 0.27 is legally compact while a score of 0.25 is not.

The uselessness of Mr. Fairfax's analysis is further highlighted if "non-compact" enacted Senate Districts 5 and 28 are compared to "compact" Fair and Legal House VRA Districts. For example, lower Reock scores for "compact" Fair and Legal VRA House Districts include: District 12 – 0.14; District 21 – 0.21; District 29 – 0.24; District 33 – 0.24; and District 48 – 0.21. Like the Fair and Legal Senate Plan, the Fair and Legal House Plan has eighteen non-VRA "compact" districts with lower or comparable Reock scores as compared to "non-compact" 2011 enacted Senate Districts 5 and 28. These include Fair and Legal House Districts 19 (0.20), 113 (0.24), 14 (0.25), 50 (0.25), 83 (0.26), 67 (0.26), 26 (0.27), 73 (0.28), 96 (0.28), 74 (0.29), 3 (0.29), 38 (0.30), 13 (0.31), 68 (0.31), 65 (0.31), 63 (.32), 81 (0.32), and 55 (0.32). Finally, Fair and Legal "compact" VRA House District 101 received a Reock score of 0.28. (Second Frey Aff., Ex. 32 and 33).

Direct comparison between enacted House Districts and alleged equivalents under the Fair and Legal House Plan reveal similar discrepancies. For example, the four lowest Reock scores in enacted House Districts are District 12 (0.12), District 21 (0.19), District 60 (0.22), and District 48 (0.23). Fair and Legal Reock scores for Fair and Legal Districts 12 (0.14), District 21 (0.21), and District 48 (0.21) are essentially equivalent to their enacted counterparts. All three of these "compact" Fair and Legal House Districts scored lower than the Reock score for enacted House District 60 (0.22). Further discrepancies are disclosed by comparing the Reock scores for the LBC

"compact" VRA Districts 12 (0.10), 221 (0.13), and 48 (0.19) as these three "compact" LBC districts score lower than all four of the "least" compact enacted House Districts.

Even more discrepancies are revealed by a comparison of VRA districts drawn wholly within a single county as proposed by all of the plans. Using only the Reock test, here is a comparison of the actual scores, with the least compact version of each district shaded.

Roeck Scores for Enacted VRA House Districts
Within a Single County Compared to Alternatives

District	LDD4	SCSJ	Fair & Legal	Possible House Districts
29	0.47	0.38	0.24	0.30
31	0.45	0.49	0.46	0.41
33	0.47	0.51	0.24	0.32
38	0.31	0.45	0.30	0.44
42	0.44	0.37	0.37	0.48
43	0.32	0.41	0.41	0.32
57	0.39	0.52	0.51	0.51
58	0.38	0.61	0.61	0.65
60	0.22	0.32	0.33	0.38
99	0.48	0.58	0.61	0.45
101	0.47	0.40	0.28	0.49
102	0.32	0.47	0.47	0.27
106	0.49	0.49	0.40	0.35
107	0.35	0.31	0.40	0.52

(Second Frey Aff., Ex. 32 and 33)

As this chart illustrates, in the 14 districts compared, ten of the alternative districts scored lower than the comparable districts in the enacted plan; in only three instances did the enacted plan have the least compact district per the Reock test. In the enacted House Plan, District 60, located in Guilford County, has the lowest Reock score of all the enacted House Districts drawn within a single county (0.22). Enacted Districts 58 (0.38) and 60 (0.22) have lower scores than all alternative versions of Districts 58 and 60. But none of the alternative plans have three majority TBVAP districts in Guilford County. While enacted District 60 has the lowest score as compared to all versions of VRA districts drawn within a single county, it has a higher Reock score (0.22) when compared to the SCSJ District 12 (0.12); Fair and Legal Districts 12 (0.14), 21 (0.21), and 48 (0.21); and Possible House Districts 12 (0.10), 21 (0.13) and 48 (0.19). Moreover, "non-compact" enacted District 58 has an equal or higher Reock score (0.38) as compared to alternative districts drawn

wholly within a single county including: SCSJ-AFRAM Districts 29 (0.38), 42 (0.37), 60 (0.32) (Guilford County), and 107 (0.31); Fair and Legal Districts 29 (0.24), 33 (0.24), 42 (0.37), 60 (0.33) (Guilford County), and 107 (0.31); and LBC Districts 29 (0.30), 33 (0.32), 43 (0.32), 60 (0.38) (Guilford County), and 102 (0.27).

Indeed, in analyzing districts drawn within a single county, with the exception of District 60 in the enacted plan (0.22), each of the alternative plans has a district that scores lower using the Reock test than any district in the enacted plan. Aside from District 60, the lowest Reock score in the enacted plan is 0.32 (District 43). But in the SCSJ plan, District 107 has a score of 0.31. In the Fair and Legal plan, District 101 has a score of 0.28 and Districts 29 and 33 have scores of 0.24. In the Possible House Districts plan, Districts 33 and 43 match the 0.32 score of District 43 in the enacted plan, while District 29 has a score of 0.30 and District 106 has a score of 0.27. This inconsistency between the plans plaintiffs put forth as complying with all legal requirements and the undefined compactness standard they urge this Court to adopt confirms Dr. Arrington's testimony that compactness tests are contradictory and that no legal standards were available to the General Assembly to determine when a district is sufficiently compact under any of the mathematical tests. Plaintiffs have proposed no such standard, nor given the scores like those shown above, could they propose a standard under which the enacted plan would fall short but the alternative plans would not.

E. The *NAACP* Plaintiffs Have No Claim for an Alleged Constitutional Denial of Political "Influence."

(1) There are no judicially manageable standards to adjudicate alleged denial of political influence.

In *Davis v. Bandemer*, 478 U.S. 109 (1986), Indiana Democrats alleged that 1981 legislative redistricting plans adopted by the Republican-controlled General Assembly constituted illegal

political gerrymanders under the Fourteenth Amendment. The main evidence supporting these claims were the results of the 1982 General Election, in which Democratic legislators were elected to office in numbers that were substantially lower than the statewide proportion of the Democratic vote. Plaintiffs alleged that because of the gerrymandered plans they had "been unconstitutionally denied [their] chance to effectively influence the political process." *Bandemer*, 478 U.S. at 132-33.

The plurality opinion in *Bandemer* found plaintiffs' claim to be justicable. However, the Court also ruled that plaintiffs had failed to carry the heavy burden needed to show an equal protection violation based upon an alleged denial of political influence. The *Bandemer* court found that plaintiffs alleging the denial of political influence must "prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Bandemer*, 478 U.S. at 127. While the *Bandemer* Court assumed the presence of discriminatory intent, it rejected plaintiffs' arguments that they had established a discriminatory effect.[66] In cases involving the alleged denial of political influence, plaintiffs must show that "the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Id.* at 132. The results or the proposed results of one election is insufficient evidence to show a discriminatory effect. *Id.* at 139. In part, this is because " the power to influence the political process is not limited to winning elections." *Id.* at 132. The Court noted that, "[a]n individual or group of individuals who vote for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have had as much opportunity to influence that candidate as other voters in the district." *Id.* At a minimum, plaintiffs must show "a history" of

[66] Regarding the element of discriminatory intent, the Court noted that, "As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." *Bandemer*, 478 U.S. at 129.

"disproportionate results" and demonstrate that their group has "essentially been shut out of the political process." *Id.* at 139.

Justice O'Connor, the author of *Shaw v. Reno*, filed a concurring opinion in *Bandemer*, which was joined by Chief Justice Rehnquist. Justice O'Connor opined that there were no "judicially manageable standards" for adjudicating claims alleging the denial of political influence. *Bandemer*, 478 U.S. at 155 (O'Connor, J., concurring); *see also Ashcroft*, 539 U.S. at 495 (Souter, J., dissenting) (no judicially manageable standards for measuring "influence" districts). Justice O'Connor also concluded that under their plurality's test, neither of the two major political parties would ever be able to prove that they had been "shut out" of the political process. *Bandemer*, 478 U.S. at 152-53 (O'Connor, J., concurring).

Following the decision in *Bandemer*, no court has found a congressional or legislative redistricting scheme unconstitutional on the grounds of political gerrymandering. (Arrington Dep. pp. 128-29). In some measure, the absence of any such decision was predicted by Justice O'Connor's concurring opinion in *Bandemer*. Subsequent to *Bandemer*, the Court has been unable to agree on a judicially manageable standard for adjudicating these claims. *See LULAC*, 548 U.S. at 413-423 (plurality opinion) (plaintiffs failed to identify a judicially manageable standard to adjudicate claim of political gerrymandering); *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion holding that political gerrymandering claims are nonjusticable because no judicially discernable standards for adjudicating such claims exist); *Cromartie I*, 526 U.S. at 551 n.7. (Court has not agreed on standards to govern claims of political gerrymandering). In addition, given their dominant positions in American politics, it is unlikely that either of the two major political parties can ever prove that they have been "shut out" of the political process. *Bandemer*, 478 U.S. at 152-53

(O.Connor, J., concurring); *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C.), *aff'd*, 506 U.S. 801 (1992).

(2) Any interpretation of the North Carolina Constitution that would recognize an "influence" claim only for African American Democrats for an alleged denial of political influence would violate the Fourteenth Amendment of the United States Constitution.

As shown above, the Supreme Court has yet to find any legislative or congressional redistricting plan unconstitutional because it deprived plaintiffs of influence. Indeed, such claims may even be non-justicable. Despite this history, plaintiffs ask this Court to recognize an "influence" claim on behalf of African American Democrats. There is no basis whatsoever for any such claim under the federal Constitution, and any interpretation of the North Carolina Constitution recognizing such a claim would violate the Fourteenth Amendment and the Equal Protection guarantees of the North Carolina Constitution.

As described above, the "discriminatory effect" minorities must prove under a § 2 claim is identical to the burden of proof of "discriminatory effect" in a case alleging unconstitutional vote dilution because of race. *See* Argument II.D.1, *supra*. The only difference between a § 2 claim and a constitutional claim for racial vote dilution is that under the former effects alone establish a violation, while under the latter plaintiffs must also prove a discriminatory purpose. *See* Argument II.D.1, *supra*. The Supreme Court has squarely rejected claims that a state's failure to create "influence" districts constitutes a discriminatory effect under § 2. *See LULAC*. Because the statutory test for discriminatory effect is identical to the constitutional test, North Carolina's alleged failure to create influence districts cannot constitute an unconstitutional racially discriminatory effect under the Fourteenth Amendment.[67]

[67] Plaintiffs have cited to no constitutional racial vote dilution case showing a constitutional violation because of the absence of an "influence" district. (Arrington Dep. pp. 40, 41, 81).

The United States Supreme Court has warned against the constitutional dangers underlying plaintiffs' influence theories. In *LULAC*, the Court rejected an argument that the § 2 "effects" test might be violated because of the failure to create a minority "influence" district. The Court held that "if Section 2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *LULAC*, 548 U.S. at 445-46 (citing *Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring)). Recognizing a claim on behalf of African American Democrats for influence or crossover districts "would grant minority voters 'a right to preserve their strength for the purposes of forging an advantageous political alliance,'" a right that is not available to any other voters. *Strickland*, 556 U.S. at 15 (citing *Hall v. Virginia*, 385 F.3d 421, 431 (4th Cir. 2004), *cert. denied*, 544 U.S. 961 (2005)). This argument also raises the question of whether such a claim would itself run afoul of the equal protection guarantees of the Fourteenth Amendment and of the North Carolina Constitution. Nothing in federal law "grants special protection to a minority group's right to form political coalitions." Strickland, 556 U.S. at 15. Nor does federal law grant minority groups any right to the maximum possible voting strength. *Id.* at 15-16.

That plaintiffs are standing on constitutional quicksand is even more obvious in this case. This is because both legislative plans provide African American voters with substantially proportional opportunities to elect their candidates of choice. *De Grandy*, 512 U.S. at 1015-16. Given the proportional opportunities provided by the enacted plans, any argument that plaintiffs are entitled to additional districts to maximize their influence "causes its own dangers, and they are not to be courted." *Id.* at 1016.[68]

[68] Plaintiffs' expert Dr. Arrington testified that he is not aware of a case requiring a jurisdiction to draw additional districts that elect a minority group's candidates of choice or influence districts under a

The enacted legislative plans provide increased opportunity for African American voters to elect their candidates of choice. Like all other political gerrymander cases, plaintiffs cannot provide a judicially manageable standard to determine the number or composition of influence districts, which they contend are constitutionally required. Nor have plaintiffs explained why African American voters cannot have influence in districts that elect Republicans. *Bandemer*, 478 U.S. at 139; *Pope*, 809 F. Supp. at 397. Plaintiffs' real complaint is the increased likelihood, under the 2011 legislative plans, that Republicans will maintain control of the General Assembly. Clearly, this is not enough to prove unconstitutional denial of minority political influence. *See Bandemer*.

V. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON THE NAACP PLAINTIFFS' CLAIM THAT DIVIDED PRECINCTS VIOLATE THE UNITED STATES CONSTITUTION OR THE NORTH CAROLINA CONSTITUTION.

(*Dickson* Claims for Relief 9 and 10; *NC NAACP* Claims for Relief 1-3 and 9 and 10)

The *NAACP* plaintiffs allege that the divided precincts in the legislative plans have an unconstitutional disparate impact on African American voters, while the *Dickson* plaintiffs allege that divided precincts violate the "right to vote" guaranteed by Article VI, § 1, and Article I, § 19, of the North Carolina Constitution. Plaintiffs cannot cite a single case in which anything remotely similar to these types of allegations has formed the basis for constitutional relief. (Arrington Dep. p. 187) (no cases finding constitutional violations because of divided precincts). Plaintiffs' theories must fail because they

- would give county boards of election, and not the legislature, the *de facto* right to

redistricting plan that provides the minority group with rough proportionality. (Arrington Dep. pp. 32, 41, 42). Dr. Arrington also testified that he would not support a plan that would provide African American voters with more than rough proportionality. (Arrington Dep. pp. 34, 35). Even assuming the Court could order the State to draw influence districts, by seeking to dismantle or eliminate the enacted VRA districts and replace them with 10 to 15 "influence" districts, plaintiffs are seeking to maximize their influence beyond proportionality.

draw legislative districts,

- ignore the reality that precincts must be divided to create majority-TBVAP districts,
- provide no judicially manageable standards to determine when precincts may be constitutionally divided and when they may not,
- ignore that the divided precincts in the alternative plans also have a similar "disparate impact" on minorities,
- ignore that any purported harm falls on all voters, black and white alike,
- rely upon inadmissible speculation by party activists concerning any alleged confusion caused by divided precincts, and
- overlook the legal principle that disproportionate impact alone does not equate to a constitutional violation.

A. Any Court Order Requiring the General Assembly to Follow Precinct Lines in its Creation of Legislative or Congressional Districts Would Constitute an Unconstitutional Delegation of Legislative Authority.

It is important for the Court to understand the history of precincts and how they are created. Under North Carolina law, precincts exist for the purpose of election administration. N.C. GEN. STAT. § 1563-128 (counties are "divided into a convenient number of precincts for the purpose of voting."). Precinct lines are established by each county board of elections. N.C. GEN. STAT. § 163-33(4) and -128. Members of county boards of elections are appointed by the Governor. N.C. GEN. STAT. § 163-30. There are no uniform, statewide criteria which must be followed by county boards of election when they create a precinct.[69] The lines for many, if not most, North Carolina precincts,

[69] There is one recent restriction on the county board's discretion in creating new precincts. In 2008, the State was required to report its "Vote Tabulation Districts" ("VTDs") to the Census Bureau. N.C. GEN. STAT. § 163-132.1B(a1). In 2008, the State's VTDs were virtually identical to the existing precincts as they had been established over the years by each county board of elections. N.C. GEN. STAT. § 163-132.1B(a1).

have not been changed for 20 or more years. *See*, *e.g.*, Bartlett Dep. pp. 21-22; Collicutt Dep. pp. 46-47; Doss Dep. pp. 19-20; Poucher Dep. p. 39. There is no requirement that precincts comply with the *Stephenson I* plus or minus 5% rule, or otherwise be based upon equal population. N.C. GEN. STAT. § 163–33(4), -128 and -132.1 *et seq*. Unlike the General Assembly, which must redistrict legislative seats every ten years, the county boards do not revise precinct lines upon receipt of the most recent Decennial Census. N.C. GEN. STAT. § 162-33(4) (providing for revision of precincts as county boards of elections "may deem expedient"). There is no requirement that precincts be drawn "compactly" or that they respect "communities of interest." N.C. GEN. STAT. § 163–33(4), -128 and -132.1 *et seq*. Precinct lines divide neighborhoods and communities of interest. (Arrington Dep. pp. 105-106). Nothing in the Constitution or *Stephenson I* or *Stephenson II* indicates that maintaining precinct lines is a criterion for legislative or congressional redistricting.

Plaintiffs have wrongly argued that the enacted plans failed to "respect" precinct lines. In truth, the vast majority of precinct lines were "upheld" by application of the *Stephenson I* requirements. *Stephenson I*, 355 N.C. at 371, 562 S.E.2d at 389 (traditional districting criteria upheld by WCP). At the time the 2011 Plans were enacted, the redistricting software used by the State and third parties did not include precinct lines, but the mapping software did report the boundaries of the 2008 precincts or Vote Tabulation Districts ("VTDs"). (Frey Dep. p.25; Third Hofeller Aff., ¶ 77). There are a total of 2,692 VTDs in the State of North Carolina. (First Frey Aff. ¶15). The enacted legislative and congressional plans and all alternative plans divide VTDs into separate districts. (First Frey Aff. ¶16 and Ex. 7). Yet, the 2011 Plans overwhelmingly respect VTD lines. The enacted House plan divides a total of 395 VTDs or only 14.67% of the total number of

By statute, any new precinct established by a county board after 2008 must be established within a 2008 VTD or through a combination of one or more of the 2008 VTDs. N.C. GEN. STAT. § 163-132.1B(a2).

VTDs. Over 85% of the State's VTDs are not divided in the enacted House Plan. In the enacted Senate Plan, 257 VTDs or only 9.5% are divided. Approximately 91.5% of the State's VTDs were not divided. Finally, only 68 VTDs are divided by the enacted Congressional Plan (2.5%). Approximately 98.5% of the State's VTDs are not divided. (First Frey Aff. ¶¶ 16-18 and Ex. 7).

Even assuming the General Assembly did not respect precinct lines, there is nothing in the Constitution prohibiting the General Assembly from dividing every VTD in the State of North Carolina if it chose to do so. Neither the Constitution nor *Stephenson I* or *Stephenson II*, identify maintaining precinct lines as a criterion that must be followed by the General Assembly. Precinct lines are not established by the General Assembly. Instead, they are established by 100 different county boards of election in the exercise of their discretion and based upon factors such as the amount of funding made available by their county's board of commissioners and the availability of suitable polling places. N.C. GEN. STAT. § 163-33(4); Poucher Dep. p. 43. In contrast, the decision to divide precincts in the creation of legislative and congressional districts is a policy decision reserved to the legislature. *Perry*, 132 S. Ct. at 940, 943-44. This is because redistricting "ordinarily involves criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment." *Id.* at 941. A court shall not "ignore" a legislature's decision to divide VTDs when the legislature has "accepted the costs of splitting precincts in order to accomplish other goals." *Id.* at 944. Should this court impose a *post hoc* requirement that the General Assembly must follow precinct lines in the creation of districts, it would effectively turn districting decisions over to 100 different county boards of elections and 100 different county boards of commissioners operating without any uniform criteria or standards. Any such holding is without precedent and would constitute an unconstitutional delegation of legislative authority by the court

to county boards.

B. Plaintiffs Have Failed to Articulate a Judicially Manageable Standard for Establishing When a Plan Divides Too Many Precincts.

All of the alternative plans divide VTDs. (First Frey Aff. ¶¶16, 17, Ex. 7). Any comparison of the number of divided precincts in the enacted legislative plans with any of the alternative plans is misleading because none of the alternative plans comply with the *Stephenson I* formula for compliance with the WCP. For example, in the SCSJ-AFRAM House Plan, all of eastern North Carolina is placed in a 46-county group. In contrast, in the same general area the enacted House Plan includes four two-county groups, one nine-county group, and one twenty-county group. (Second Aff. of Dan Frey). None of the alternative plans uniformly draw VRA districts with TBVAP in excess of 50%. The decision by drafters of the alternative plans to ignore both *Stephenson* decisions and *Strickland* gave them greater discretion to reduce the number of divided VTDs in the enacted plans, which follow the requirements of both *Stephenson* decisions and of *Strickland*. (Third Affidavit of Tom Hofeller, ¶¶ 23-68)[70]

Plaintiffs offer no explanation for why 395 divided VTDs in the enacted House Plan are unconstitutional, while 285 divided VTDs (2003-2009 House Plan), 212 divided VTDs (LBC House Plan), 202 divided VTDs (SCSJ-AFRAM House Plan) or 129 divided VTDs (Fair and Legal House Plan) are legal. The same dilemma exists in the Senate Plans. Why are the enacted Senate Plan's 257 divided VTDs illegal as compared to the legal 2003 Senate Plan (79 divided VTDs), SCSJ-AFRAM Senate (70 divided VTDs), LBC Senate (70 divided VTDs), and Fair and Legal Senate (6

[70] An apples to apples comparison would be an alternative plan, using the same county groups as found in the enacted plans, with an equivalent number of VRA districts uniformly drawn to comply with *Strickland*. Plaintiffs have not produced such a map or explained how fewer precincts could have been divided in a plan that complied with *Stephenson I* and *II*, *Strickland* and gave African American voters a roughly proportional opportunity to elect their candidates of choice.

divided VTDs). While the alternative plans have fewer divided VTDs – a criterion not to be found in the Constitution or the *Stephenson* decisions – all of the alternative plans fail to comply with the constitutionally required county combination formula as well as the *Strickland* 50% rule regarding VRA districts. Plaintiffs ask the Court to declare the enacted plans illegal because the alternative plans are allegedly more compliant with plaintiffs' discretionary criteria (divided VTDs) even though the alternative plans do not comply with constitutionally required criteria. Plaintiffs' logic can be adopted only if this Court decides to effectively "overrule" *Stephenson I*, *Stephenson II*, and *Strickland*, and judicially amends the Constitution to make not dividing precincts – established by county agencies, not the legislature – mandatory redistricting criteria.

C. VTDs Must Be Divided to Comply with the Voting Rights Act.

In 1995, the General Assembly enacted legislation that would prohibit legislative and congressional districts from crossing precinct lines. *See* N.C. GEN. STAT. § 120-2.2 and § 163-261.22 ("whole precinct statutes"). On 12 February 1996, USDOJ objected to the implementation of this statute pursuant to § 5 of the VRA. USDOJ concluded that the State had failed to prove that the proposed statute was "free from a racially discriminatory purpose." USDOJ also found that the State had failed to prove that the statute would not have a discriminatory "effect" or "lead to a retrogression in the position of . . . minorities with respect to their effective exercise of the electoral franchise." (Arrington Dep. Ex. 238) (2/13/96 letter of USDOJ to Charles M. Hensey, Special Deputy Attorney General, p. 3) (quoting *Beer*, 425 U.S. at 131).

The State's responsibility to create "majority-black districts" formed the basis of USDOJ's objection to the whole-precinct statute. *Id.* p. 3. USDOJ noted that "under existing state law, county election officials may use their discretion with regard to the population size and racial composition

of precincts," *Id.* p. 2, and noted that prior to the whole precinct requirement, "the size and composition of the precincts were of little relevance because the legislature could draw distinct lines through precinct lines for any number of reasons (*e.g.,* to protect interests, to voluntarily satisfy the VRA, etc.)." *Id.* Precincts took on "new importance" because under the whole-precinct statute they would "be used as the building blocks for each district." *Id.* USDOJ observed that, "if precincts do not fairly reflect minority voting strength, it is virtually impossible for districts to do so. *Id.* Based upon this analysis, USDOJ blocked the enforcement of the whole-precinct statute because it "unnecessarily restrict[ed]" the redistricting process and made "it more difficult to maintain existing majority-black districts and to create new ones." *Id.* p. 3.

As shown by the Second Affidavit of Dan Frey, the majority of the additional divided VTDs found in the enacted legislative plans, as compared to alternative plans, relates to maintaining already-existing, majority-black districts, bringing already-established districts with between 40% and 50% TBVAP up to the *Strickland* 50% requirement, and creating a few new majority-black districts, all done within the parameters of the WCP's requirements for one person, one vote and the combination of counties. (Second Aff. of Dan Frey ¶¶ 5-7, Ex.16-26). In short, the enacted plans illustrate the reasons for USDOJ's objection letter of 13 February 1996, as well as comply with the *Stephenson I* and *Strickland* criteria. Plaintiffs' alternative plans do not. Plaintiffs ask this Court to declare unlawful a decision by the General Assembly to divide "too many" VTDs because the General Assembly created "too many" majority-black districts that comply with the WCP county grouping formula and *Strickland*. If the Court adopts plaintiffs' theory, it will be doing exactly what was condemned by USDOJ in its objection to the whole-precinct statute. Because USDOJ has already objected to a statutory rule which would require whole precincts in the creation of legislative

and congressional districts, it is certain that a similar objection would be made to a rulecreated by a State court requiring the use of whole precincts. Any such order by this Court could not be enforced unless it was precleared, a result that USDOJ previous objection would indicate is highly unlikely.

As with their arguments concerning compactness, plaintiffs have failed to explain why the enacted plans are unconstitutional due to division of precincts while their alternative plans, which also divide precincts, are constitutional. Plaintiffs have failed to identify a realistic, practical and judicially manageable standard, much less a standard grounded in the Constitution, that could be used by a legislature or a court to know when it is acceptable to divide precincts and when it is not. Plaintiffs might have a colorable argument if they had shown how a proportional number of VRA districts could have been created within the enacted county groups, in compliance with *Strickland*, and with fewer divided VTDs. None of the alternative plans are a vehicle for such a comparison.

D. The Court Should Reject Plaintiffs' Argument That African American Voters Have Suffered an Alleged Disparate Impact Because of Divided VTDs.

1. Under plaintiffs' incorrect theory of disparate impact, black voters statewide are more likely to live in a divided VTD under any plan that creates majority-black districts.

In their complaint, the *NAACP* plaintiffs allege that the enacted plans have a disproportionate impact on black voters because they are more likely than whites to reside in divided VTDs. (*NC NAACP* Am. Compl., ¶¶ 3, 90) If a comparison is made of the statewide total voting age population versus the voting age population that resides in a split precinct, a theoretical argument can be made that African American voters are more likely to live in a divided precinct as compared to white voters. Dan Frey, the General Assembly's Geographic Information Systems analyst, has explained

plaintiffs' theory as follows. A total of 855,820 white voters reside in a divided VTD under the 2011 House Plan. This equates to 16.67% of the statewide white voting age population of 5,155,756. In contrast, 411,946 African American voters reside in a divided VTD which represents 26.8% of the state-wide TBVAP of 1,536,233. The difference between the percentage of statewide TBVAP living in a divided VTD (26.8%) versus the state-wide white voting age population living in a divided VTD (16.6%) equals 10.2. The difference of 10.2% represents 61.5% of 16.6%. Thus, under plaintiffs' theory, black voters in North Carolina are 61.5% more likely to live in a divided VTD than white voters. (Frey Aff. ¶¶19-24 and Frey Ex. 8)

There are several serious flaws in plaintiffs' theory. First, assuming that black voters are 61.57% more likely to live in a divided precinct under the 2011 House Plan and 64.6% more likely to live in a divided precinct under the 2011 Senate Plan (First Frey Aff. ¶¶19-24, Ex. 8), an even larger disparate impact exists under several of the alternative plans support by the plaintiffs, which are represented to comply with federal and state law. Pursuant to plaintiffs' theory, under the SCSJ-AFRAM House Plan, black voters are 82.5% more likely to live in a divided VTD than white voters. Under the LBC House Plan, black voters are 65.3% more likely to live in a divided VTD than whites. In the SCSJ-AFRAM Senate Plan, black voters are 112.8% more likely to live in a divided VTD. If these plans meet all legal requirements, as alleged by plaintiffs, and therefore have no unconstitutional impact on black voters, how can the enacted plans be illegal? Further, under plaintiffs' theory of disparate impact, under the Fair and Legal House Plan blacks are 51.1% more likely to live in a divided VTD than whites. Assuming this represents a "legal" disparate impact, where is the case or precedent for holding that the enacted House Plan is illegal because blacks are 10% more likely to live in a divided VTD in the enacted House Plan as compared to the Fair and

Legal House Plan? Like many of plaintiffs' theories, there is no case to support plaintiffs' argument that the enacted House Plan has a disparate impact while the Fair and Legal House Plan does not.[71]

2. Any purported harm arising from living in a divided VTD falls on all voters.

Plaintiffs' theory also ignores another basic fact. All divided VTDs in the enacted plans include white voters as well as black voters. As a result, any purported harm that may arise from voting in a split precinct "fall[s] indiscriminately on individuals within the allegedly disadvantaged group and individuals outside the group, and thus cannot form the predicate for an equal protection claim." *Pope*, 809 F. Supp. at 397.

As shown by the First Affidavit of Dan Frey, a total of 1,414,567 voters reside in divided VTDs under the 2011 House Plan. Out of this total, 855,820 are white voters as compared to 411,946 black voters. Whites constitute 60% of the total number of voters residing in divided VTDs and there are 433,874 more white voters living in divided VTDs than black voters. A similar story exists under the 2011 Senate Plan. A total of 998,957 voters live in divided VTDs. Out of this total, 607,092 (61%) are white while 297,770 (30%) are black. Defendants deny that voters suffer any constitutional harm just because they reside in a divided VTD but to the extent that some theoretical harm might exist, it falls equally upon white and black voters who reside in a divided VTD

[71] The Senate Fair and Legal Plan only divides 6 VTDs while the LBC Senate Plan divides only 10 VTDs. (First Frey Aff. ¶¶15-18, Frey Ex. 7). Therefore, it is not surprising that whites are 57.6% more likely to live in a divided VTD under the Senate Fair and Legal Plan, and that blacks are only 10.8% more likely to live in a divided VTD under the LBC Senate Plan. (First Frey Aff. Ex. 8). However, comparisons of these plans and the enacted Senate Plan are not valid. Neither plan complies with the WCP county combination formula. (Second Aff. of Dan Frey, ¶ 3 and 4, Ex. 14 and 15). Further, as compared against the enacted Senate Plan, the Fair and Legal Senate Plan has only one majority-black Senate District (District 4), while the LBC Senate Plan has no majority-black district. There are many cases finding constitutional and statutory injuries to black voters because of a jurisdiction's refusal to draw districts that allow minority voters an equal opportunity to elect their candidates of choice. There are no cases finding a jurisdiction liable because it divided precincts to create districts that allow minority voters an equal opportunity to elect their candidates of choice. (Arrington Dep. p. 187).

regardless of their race. *Pope*, 809 F. Supp. at 397.

3. Plaintiffs have offered no proof other than speculation and inadmissible lay opinion testimony to support any argument that they or other voters have been injured by divided precincts.

The *NAACP* plaintiffs contend that divided precincts make it more likely that African Americans *might* receive incorrect ballot styles and that it is more difficult for parties or candidates to organize. *NAACP* Am. Compl., ¶¶ 90, 94, 471 and 479. The *Dickson* plaintiffs make similar claims about themselves.[72] The facts show that these allegations are based upon speculation and inadmissible lay opinion testimony.

When a precinct or VTD is divided into different legislative districts, voters within that precinct must receive different ballot styles so that a precinct resident living in District A does not receive a ballot for District B. *See*, *e.g.*, Robertson Dep. pp. 96-100. The numbers of styles required for a precinct is often compounded when the precinct has also been divided by local governments into different districts for county commissioner, city councils, or school boards or by the legislature into different judicial districts. (*Id*., pp. 100-01) Conducting elections in divided precincts is not a new phenomena. For example, the 2003 Senate Plan divided 79 VTDs, the 2003-2009 House Plan divided 285 VTDs, and the 2001 Congressional Plan divided 93 VTDs. (First Frey Aff. ¶¶15-17, Frey Ex. 7). Moreover, during the past decade, counties held elections for county and local offices under districting plans that divided VTDs or precincts. *See*, *e.g.*, Robertson Dep. pp.123-25, 131-32.

Voters are assigned to the appropriate legislative districts by their county board of elections with the assistance and oversight of the State Board of Elections. *See*, *e.g.*, Bartlett Dep. pp. 42-43 In theory, voters could receive incorrect ballot styles because they have been assigned by their county

[72] Neither of these actions has been pled or certified as a class action.

board to the wrong district or because precinct workers have handed them the wrong ballot style. Yet, despite North Carolina's long history of dividing precincts for congressional, legislative and local offices, plaintiffs have not cited to a single instance of a voter who was improperly assigned to a congressional or legislative district for the 2012 general election because they were in a divided precinct.[73]

Plaintiffs' proffered expert Bob Hall, provided only three examples of cases considered by the State Board of Elections involving voters who received incorrect ballots. (Bob Hall Deposition, Ex. 221 (Aff. of Bob Hall) Aff. Exs. C, D, and E) The first examples involved a 2006 Republican legislative primary for House District 10 in Craven County. In 2006, voters in Craven County cast their ballots on "touch screen" systems. Under these systems, precinct workers are responsible for touching a computer screen to call up the proper ballot style for each voter. The State Board concluded that some voters had voted incorrect ballot styles and that some of the touch screens had been improperly calibrated. (Hall Dep. Ex. 221, Aff. Ex. C) The other two examples submitted by Mr. Hall involved a city council election and an election for representatives for water districts. (Hall Dep. Ex. 221, Aff. Exs. D, E)

The errors by the Craven County Board of Elections during the 2006 Republican primary, and errors by the Chatham County Board of Elections for one city council election in 2007, and one election for a water district in 2004, is scant evidence that minority voters are more likely than whites to receive incorrect ballot styles in the 2012 legislative or congressional races, or indeed that split

[73] Defendants do not dispute that voters in the recent or past election cycles may have on occasion been improperly assigned, particularly in the first election cycle after redistricting, as a result of human error. But defendants are aware of no evidence suggesting that any voters were improperly assigned for the 2012 general election as a result of residing in a divided precinct.

precincts pose an unacceptably high risk of any voters being given the wrong ballot.[74]

Plaintiffs wrongly contend that voters in divided precincts are more likely to have been assigned to wrong districts. Plaintiffs have not provided any evidence to support this proposition, or that black voters have been wrongly assigned to incorrect districts in greater numbers than whites. Human error is always a possibility, if not a probability, in an election system designed to accommodate over six million registered voters. For example, during discovery in this case, the parties uncovered a census block in Guilford County, included within a VTD that was not divided into different legislative or congressional districts, but that had been improperly assigned in the 2000s to a non-contiguous precinct. Voters within this wrongfully assigned census block voted in the wrong legislative and congressional races throughout the past decade. (Doss Dep. pp. 39-40, 44-47) This improper assignment was the result of human error, and not because of the division of a VTD into different districts. (Doss Dep. p. 47)

The Guilford County "error" was only discovered during audits conducted by the State Board of Elections and county boards in 2012 in connection with assignment of voters under the 2011 plans. (Doss Dep. pp. 38-39). Unlike the previous decade, the State Board of Elections now employs a statewide data base which includes the names and addresses of all registered voters. Initial assignments of voters to legislative and congressional districts are made by each county board. Each voter's address is given a "geocode" which is entered into the state database which is received and reviewed electronically by the State Board of Elections. Beginning in early 2012 and running

[74] During the 2012 May primary, under State law, seventeen-year-olds could vote in any primary but could not vote on the Marriage Amendment. (Bartlett Dep. p. 80) There were approximately 2.2 million ballots cast in the 2012 primary. (Bartlett Dep. p. 110) Approximately 30 voters who were 18 or older improperly received ballots intended for 17-year-olds, making them unable to vote on the marriage amendment. (Bartlett Dep. pp. 81-81) This error, by a very few precinct officials, was not the result of divided legislative or congressional districts.

until the election, the State Board has conducted at least five different electronic audits of all legislative and congressional districts assignments by each county board and conveyed the audits to the county boards. (Bartlett Dep. pp. 42-44, 100, 107) This unprecedented audit process makes it substantially *more* likely, rather than less likely as compared to previous decades, that all North Carolina voters were properly assigned to legislative and congressional districts for the 2012 General Election. (Bartlett Dep. pp. 108-09)

Plaintiffs also ignore the advances in technology designed to ensure that precinct workers give voters the proper ballot style. For example, most North Carolina counties use paper ballots which are counted by an electronic scanning device. The State Board of Elections has mandated the use of ballot scanners, not generally available until the 2010 elections, in paper ballot counties. (Bartlett Dep. pp. 33-34). In these counties, prior to the day of the elections, a voter authorization form is prepared for each registered voter. Each voter's form has a bar code which includes the ballot style required for the voter. On election day, each voter must sign the authorization form and then take the form to a precinct worker in charge of distributing ballots. A handheld scanner is used by the ballot handler to scan the bar code on the authorization form and the bar code on the ballot style to be given to the voter. The precinct worker scans the authorized form and the ballot and electronically confirms that the voter is receiving the correct ballot style; if a voter is given the wrong ballot style, the scanner will not scan any further ballots until the situation is corrected by matching the voter to the correct ballot style. (Sims Dep. p. 134-35).

Touch-screen technology requires a precinct worker to call up on a computer screen the ballot style authorized by each voter's authorization form. (Bartlett Dep. p. 35). Plaintiffs' evidence of one example, in one county, where precinct workers may have failed to call up the correct ballot

styles in a 2006 Republican primary, using touch-screen machines that were not properly calibrated, is hardly evidence that black voters in touch-screen counties have a higher risk of receiving an incorrect ballot style than white voters.

Plaintiffs contend that it is more difficult to organize politically in divided precincts. It is hard to understand how non-partisan groups, such as the organizational plaintiffs, face any challenges in non-partisan voter registration or turn out the vote efforts because precincts are divided into different legislative, congressional, or local districts. The precincts themselves have not been changed and the same information regarding these voters, such as party affiliation, race, voting history, address, etc. is still available from the boards of election. *See*, *e.g.*, Perry Dep. pp. 56-57 Candidates can purchase enhanced lists for all voters in their districts (including voters who reside in a divided precinct). Enhanced lists can include each voter's phone number or email address. (Arrington Dep. pp. 121-22). Candidates and political parties have run many elections in the past involving divided precincts. Plaintiffs have given no examples regarding any specific candidate or party that has suffered cognizable injury because of past elections involving divided precincts.[75]

Plaintiffs also allege that voters in divided precincts will be more confused about the candidates and their districts. *See*, *e.g.*, *Dickson* Am. Compl. ¶ 84, 103 and 208. Again, however, plaintiffs offer no evidence supporting this allegation, much less evidence that any confusion is attributable to the enacted plans themselves and not to a voters failure to adequately inform himself. Moreover, this argument assumes that voters know the districts number to which they have been assigned and the names of the candidates. Less than 25% of voters know the name of the incumbent

[75] Almost all of the evidence regarding alleged injury because of divided precincts comes from inadmissible lay opinion testimony by Democratic activists, none of whom cite past examples of organizing problems caused by divided precincts.

legislator who represents them and an even smaller percentage of voters know the name of the incumbent's challenger. (Arrington Dep. pp. 55-56). Black voters are far more likely to vote a straight ticket than white voters (Arrington Dep. pp. 59-60). Up to 90% of African American voters are registered Democrats. (Arrington Dep. pp. 58-59). African Americans are unlikely to ever vote for Republican candidates. (Arrington Dep. pp. 57, 58). Because African Americans "vote overwhelmingly for Democratic candidates" they are more likely than white voters to vote for the Democratic candidate if they are among the 75% of voters who do not know the name of the incumbent or the challenger. (Arrington Dep. pp. 60, 61). Based upon these facts, an argument can be made that white voters, and not blacks, are more likely to suffer harm because of divided precincts because white voters are more likely to vote split tickets.

Finally, plaintiffs' arguments regarding organizational injury caused by divided precincts runs counter to plaintiffs' support of early voting. Each early voting center must warehouse *all* of the ballot styles used throughout the entire county, making each center in effect a county-wide split precinct. Because early voting locations must have correct ballots for all of the voters in a county, more ballot styles must be available at early voting locations than the number required by a single precinct. *See*, *e.g.*, Poucher Dep. pp. 26-27, 29. The alleged difficulties in organizing voters on election day, or the alleged potential for a voter receiving the wrong ballot style – under plaintiffs' theory – are exponentially greater at early voting sites. Yet the record demonstrates that the plaintiffs prefer early voting and there have been no prior organizing or ballot distribution difficulties at early voting locations. Indeed, plaintiffs planned a more extensive early voting effort in 2012. (Barber Dep. pp. 61-63, 65) These efforts appear to have born fruit: In the 2008 general election, 70.9% of African American voters at one-stop sites, and in 2012, 70.5% of African American voters did so.

(Third Bartlett Aff., ¶ 2)

Finally, the *NAACP* plaintiffs' claims regarding an alleged disparate impact on black voters is resolved by the decision in *Pope*. Like the plaintiffs in this case, the plaintiffs in *Pope* alleged constitutional violations because the 1992 congressional plan diverged "from any reasonable standard of compactness or communities of interest," unnecessarily divided counties and cities, and unnecessarily divided fifty precincts just along the I-85 corridor.[76] The *Pope* plaintiffs' alleged various examples of injury because of these divisions, including diminished opportunities for voters to have access to their representative, voter confusion, voter apathy, difficulty in recruiting challengers to incumbents, and difficulty in campaigning. (*Pope* Compl. ¶¶ 82-85) Like the plaintiffs in this action, the *Pope* plaintiffs alleged that these divisions violated their Fourteenth Amendment right "to exercise their elective franchise and to participate on an equal basis with those living in communities which have not been fractured by the General Assembly for illegitimate purposes." (*Pope* Compl. ¶ 89)

The three-judge district court in *Pope* dismissed the complaint for failure to state a claim. In support of its ruling, the three-judge court summarized the *Pope* plaintiffs' claims as "disruptions . . . alleged to be caused by the distorted and elongated shapes of the electoral districts." *Pope*, 809 F. Supp. at 397. In dismissing these claims, the *Pope* court observed that "such disruptions fall indiscriminately on individuals within the allegedly disadvantaged group and individuals outside the group, and thus cannot form the predicate for an equal protection claim." *Id.*

Like the *Pope* plaintiffs, the plaintiffs in this case ignore the reality that any alleged injury caused by divided precincts "fall indiscriminately on individuals within the allegedly disadvantaged

[76] A copy of the complaint in Pope was provided to the Court as Exhibit 2 to defendants' 28 December 2011 Memorandum in Support of Motion to Dismiss.

group and individuals outside the group." *Id.* Under such circumstances, no equal protection claim can be stated.

4. Even assuming divided precincts have a disparate impact on black voters, there is no evidence of discriminatory purpose.

As discussed above, to prove a constitutional violation based upon evidence of a disparate impact, plaintiffs must also show a discriminatory purpose. *See* Argument II.D.1, *supra*; Arrington Dep. p. 157. There is no set of circumstances under which the *NAACP* plaintiffs can prove that precincts were divided to discriminate against black voters. Indeed, precincts were largely divided to provide black voters with districts that comply with *Strickland* and provide black voters with a roughly proportional opportunity to elect their preferred candidates of choice.

Plaintiffs can cite no case in which a court has found a jurisdiction discriminated against minority voters because the jurisdiction created districts that provided minority voters an equal opportunity to elect candidates of choice. (Arrington Dep. pp. 40, 41, 68-72, 81) Nor can plaintiffs cite to a case in which a jurisdiction has been found guilty of racial discrimination because of a redistricting plan that gave African Americans a roughly proportional opportunity to elect their preferred candidate of choice. (Arrington Dep. pp. 32, 192)

The *NAACP* plaintiffs' discrimination theories rest on two dubious propositions. First, that a jurisdiction purposefully discriminates against minority voters when it refuses to create VRA districts with the minimum TBVAP, as estimated by an expert, that will allow blacks an equal opportunity to elect their preferred candidates of choice. Second, that a jurisdiction purposefully discriminates against minority voters when it creates districts that allow the minority group to elect candidates of choice instead of influencing the choice of a candidate. Both of these theories of

alleged discrimination have been rejected by the courts and Congress. Any decision by this Court interpreting the State Constitution as supporting plaintiffs' theories would violate the Fourteenth Amendment because either theory gives only African American voters "political" rights that are not enjoyed by any other voters.

VI. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS THAT ENACTED CONGRESSIONAL DISTRICTS 1, 4 AND 12 ARE RACIAL GERRYMANDERS.

(*Dickson* Claims for Relief 21 and 24; *NC NAACP* Claims for Relief 3 and 11)

Plaintiffs argue that enacted Congressional Districts 1, 4, and 12 are racial gerrymanders in violation of the Fourteenth Amendment to the United States Constitution. Plaintiffs' claims are meritless because they cannot prove that race was the "predominant" motive in drawing any of these districts or that the challenged districts failed to reasonably advance the State's compelling interest in avoiding liability under the Voting Rights Act.

Based on the legal standards explained in Argument II.A, II.D and II.E, *supra*, and for the reasons below, defendants are entitled to summary judgment on plaintiffs' claims challenging the First, Fourth, and Twelfth Congressional Districts.

A. Race Was Not the Predominant Motive in Drawing the First, Fourth, or Twelfth Congressional Districts

Undisputed evidence demonstrates the legislature's numerous non-discriminatory motivations for the First, Fourth, and Twelfth Districts. (Churchill Dep. Ex. 55)

1. First District

As in previous redistricting cycles, the 2011 First District was drawn as a VRA district using the core of the 2001 First District and to ensure preclearance of the congressional plan. Multiple considerations other than race predominated the drawing of the First District.

First, simply looking at the district demonstrates that the overall shape of the district was based on the 2001 version of the First District. It is not disputed that the core of the enacted First District is the same as the core of the 2001 version of the First District. Indeed, approximately 70% of the population from the 2001 First District is in the enacted 2011 First District. (Second Frey Aff. ¶ 9, Ex. 31) The First District was drawn as a VRA District in 2001 and the General Assembly took the same course with the current district. (Second Hofeller Aff. ¶ 5) Because no one has ever challenged that the 2001 First District constitutes a racial gerrymander, it is hard to fathom how a district based upon the 2001 First District could be challenged as a racial gerrymander.

Second, to the extent that the enacted First District differs from the 2001 version, much of the difference can be explained by the legislative defendants' desire to honor requests and address concerns of incumbent Congressmen and the public. For instance, during the redistricting process, Congressman Butterfield, the incumbent in the First District, initially requested that population from Wake County be added to the district to address the underpopulation issues. However, after the legislature released its first draft of the First District, Congressman Butterfield complained that

voters covered by Section 5 of the VRA had been removed. Consequently, the district was modified to include more population covered by § 5. (First Hofeller Aff. ¶ 40) Plaintiffs have not offered one iota of evidence demonstrating that race better explains the shape of the First District than the considerations of retaining the core of the district and satisfying these demands of the incumbent.

Third, the need to achieve population equality substantially affected the shape of the 2011 First District. As noted above, after the 2010 census, the First District lacked over 97,000 persons to meet the population equality requirements. Thus, the legislature was obliged to add population to the district from more populous areas, such as the Research Triangle Park, to cover this deficiency. (First Hofeller Aff. ¶ 40) Indeed, a commenter at a public hearing had suggested such a solution to the population deficiencies of this district. Moreover, adding growing areas from the RTP balanced the trend of loss of population in other parts of the First District from census to census. Even the SCSJ supported the notion that the First District needed to be re-drawn into the Wake County area because the 2001 version was so under-populated. (Holmes Dep. Ex. 258, attached hereto as "Attachment C") Again, plaintiffs have submitted no evidence suggesting that race better explains the shape of the district than these population equality issues.

Fourth, there is unrebutted testimony in the record that the drafters of the enacted First District were aware that black voters correlate highly with Democratic voters and that continuing to maintain the First District as a majority minority district as required by the VRA would make the surrounding districts more competitive for Republican candidates. (First Hofeller Aff. ¶ 13; Third Hofeller Aff. ¶¶ 18-22)

Despite the requirements of *Cromartie*, plaintiffs have proposed no alternative plans which would have achieved the legislature's goal of making the districts surrounding the First District more

competitive for Republicans while making the First District allegedly more racially balanced. For that reason alone, plaintiffs cannot meet their burden of demonstrating that race predominated the drawing of the First District, and this claim must therefore be dismissed.

2. Twelfth District

Like the First District, undisputed evidence supports the non-racial motivations of the Twelfth District's boundaries. First, as with the First District, the legislature based the 2011 Twelfth District on the core of the 2001 Twelfth District. (First Hofeller Aff. ¶ 41) Similar to the First District, with regard to the Twelfth District, the legislature agreed to the incumbent's request to model the new district after the 2001 Twelfth District. The legislature essentially inherited the Twelfth District from prior General Assemblies.

In adopting the Twelfth District, the legislature intended to accommodate the wishes expressed by Congressman Watt, as it understood them, to continue to include populations located in Mecklenburg, Guilford, and Forsyth Counties. The revised version of this district makes it more compact, does not split VTDs, and continues the district as a very strong Democratic district. (First Hofeller Aff. ¶ 41)

Second, because one of the counties in the Twelfth (Guilford) is covered by Section 5 of the VRA, the legislature's decision to draw the Twelfth as a majority black district ensured preclearance of the plan.

Third, as with the First District, the legislature created the Twelfth as a strong Democratic district so that adjoining districts would be more competitive for Republican candidates. (Third Hofeller Aff. ¶ 19) The Twelfth had been approved by the United States Supreme Court as a district lawfully drawn to elect a Democrat. *Cromartie II*, 532 U.S. at 242. The District had also been

precleared under Section 5 of the Voting Rights Act on at least two prior occasions.

3. Fourth District

Plaintiffs do not even make a serious attempt to argue that the Fourth District is a racial gerrymander. Unlike with the First and Twelfth Districts, plaintiffs have not even attempted to provide expert testimony regarding any alleged racial motivations for the Fourth District. The analysis by plaintiffs' expert, Dr. Peterson, is seriously flawed as described below; nonetheless, plaintiffs did not ask Dr. Peterson to analyze the Fourth District.

The Fourth District is not majority black. It is difficult to understand how a district that is not even majority black could be assailed as a racial gerrymander. Instead, the Fourth District is simply a strong Democratic district in the same way that the Twelfth was intended to be a strong Democratic district. The 2011 Fourth District also mirrors the 2001 version of the Thirteenth District. In the 2001 congressional map, the Thirteenth District was 110 miles in length, stretched from Raleigh to Greensboro, and was only contiguous at a point. The 2011 Fourth District is only 87 miles in length, connects urban communities of interest, and is fully contiguous. (Third Hofeller Aff. ¶¶ 21-22)

The only affirmative evidence put forth by plaintiffs regarding the alleged racial motivation of these districts is the testimony and affidavit of Dr. David Peterson. Dr. Peterson conducted a so-called "segment analysis" on the First and Twelfth Districts in which he concluded that race "better explains" the boundary of those districts than political considerations. However, Dr. Peterson's analysis is fundamentally and fatally flawed, and there is no other evidence rebutting the legitimate motives proffered by the legislature for the boundaries of the First, Fourth, and Twelfth Districts. Accordingly, these claims must be dismissed.

B. The Fundamental and Fatal Flaws of Dr. Peterson's "Segment Analysis"

1. Dr. Peterson's Conclusion is Limited and Legally Irrelevant

The primary legal issue in analyzing plaintiffs' racial gerrymandering claims is whether race was the predominant motive in the legislature's districting choices. However, as to both the First and the Twelfth Districts, Dr. Peterson admits that he *did not and could not* conclude that race was the predominant motive in drawing the districts. (Peterson Dep. pp. 86-91) Rather, Dr. Peterson rendered the limited opinion that race "better accounts for" the boundaries of those districts than the political party of voters. (Peterson Dep. Ex. 286) That is not the legal standard. The law requires that race *predominated*, and that *all* other considerations, not just political party, were subordinated to race.

There are countless other considerations that may determine a district's shape, yet Dr. Peterson did not attempt to study whether any or all of these other considerations were subordinated to race. Population equality, compliance with Section 2 and Section 5 of the VRA, incumbent protection, contiguity, compactness, connecting communities of interest, and voting patterns are just a few of the other possible explanations for the shape of the First and Twelfth Districts. Yet, Dr. Peterson made no attempt to compare the extent to which these considerations predominated over the districting choices. Under these circumstances, Dr. Peterson's analysis is unhelpful, and in fact misleading, as to the dispositive legal issue before the Court on plaintiffs' racial gerrymandering claims.

Moreover, assuming Dr. Peterson's conclusion had any relevant meaning, the conclusion itself does not assist plaintiffs' case. First, Dr. Peterson's work shows that the issue of whether the Twelfth District is better explained by race or party is at best inconclusive. In his analysis,

Dr. Peterson labeled pairs of VTDS as either "R" for "race" or "P" for "party." An R pair means that the choice of that VTD is better explained by race than by party. A "P" pair means that the choice of that VTD is better explained by party than by race. (Peterson Dep. Ex. 286 ¶¶ 7-11) Out of 330 different VTD pairs in the Twelfth District, only 29 of them could be determined to be either an R pair or a P pair, but not neither or both. (Third Hofeller Aff. ¶ 4) Dr. Peterson then performed twelve separate studies of those pairings using different proxy data for race (such as voting age population) and party (such as election results). (Peterson Dep. Ex. 286 ¶¶ 12-14) Of these twelve studies six (6) favored the race hypothesis (that race better explains the district boundary than politics), four (4) favored the political hypothesis (that political party better explains the district boundary than race), and two (2) were neutral (the boundary could not be better explained by race or party). (Peterson Dep. Ex. 286 ¶ 15) Thus, out of twelve studies of the 29 pairs, *six favored the race hypothesis and six did not favor it*. Dr. Peterson's own data, therefore, demonstrates that as between race and party, his study was inconclusive at best.

Second, in those instances in which Dr. Peterson's data was unequivocal, the race versus party explanation was at best a tie. Out the 29 pairs identified and then studied by Dr. Peterson for the Twelfth District, only two (2) pairs were unequivocally R or P. That is, in most of the pairs, depending on which data was used to study the pair (say, voter registration data versus voting age population data), the study would yield some instances in which race was a better explanation and other instances in which party was a better indicator. In each study, Dr. Peterson would label the pair R or P depending on which was a better indicator for a majority of the studies run on that pair. However, in just one pair, no matter which data was used, the result of that pair was always that party was a better explanation, and the result was always P. In just one other pair, no matter which

data was used, the result of that pair was always that race was a better explanation, and the result was always R. (Peterson Dep. pp. 100-01; Peterson Dep. Ex. 286 ¶ 16)

One pair was thus unequivocally R and one pair was unequivocally P, essentially canceling each other out. Dr. Peterson concedes that one would have to conclude in looking at this information only that the race and political hypotheses have equal support and that one could therefore not better account for the boundary than the other. (Peterson Dep. pp. 100-01) Thus, the only unequivocal conclusion one can draw from Dr. Peterson's study of the Twelfth District is that the role of race and politics is inconclusive. Dr. Peterson's own data refutes any notion that race predominated the drawing of the Twelfth District.

The same is equally true for Dr. Peterson's analysis of the First District. As Dr. Peterson conceded, all of the same assumptions (and, presumably, all of its flaws) of his analysis with respect to the Twelfth District apply equally to his analysis of the First District. (Peterson Dep. p. 114) Moreover, as with his analysis of the Twelfth District, only two (2) pairs in the First District were unequivocally R or P. And, as with the Twelfth District, one was R and one was P, essentially canceling each other out. (Peterson Dep. Ex. 288 ¶ 16) Again, Dr. Peterson's own data is inconclusive regarding the role of race in the First and Twelfth Districts.

Third, when limited to the information that the legislature's mapdrawer, Dr. Hoffeler, in fact used during the mapdrawing process (voting age population and election results for President Obama in 2008), Dr. Peterson's own data shows that the *party* hypothesis is a better explanation for the boundaries of the Twelfth District. The same data show that the race hypothesis and the party hypothesis are tied in the analysis for the First District. (Peterson Dep. pp. 113-15)

Thus, Dr. Peterson's conclusions, limited as they are, in many respects refute plaintiffs'

allegations that race predominated the drawing of the First and Twelfth Districts.

2. Dr. Peterson's Analysis is Fundamentally Flawed

Dr. Peterson's fatally limited conclusion is exacerbated by the fundamentally flawed analysis he used to draw the conclusion. Dr. Peterson's segment analysis - devised by him and, as far as can be discerned, is not used by anyone else for any other purpose - is an overly simplistic "binary" comparison of the racial and political composition of the population of VTDs on the inside boundary of a district with the population of adjoining VTDs on the outside boundary of the same district. Using a binary comparison fails on its face because it can and does lead to faulty conclusions in redistricting and other political cases. Using binary indicators would have resulted in John McCain carrying North Carolina in the 2008 election even though he clearly lost.[77] The flawed binary comparisons in Dr. Peterson's analysis renders it useless as an accurate assessment of the role of race and party in the drawing of North Carolina's congressional districts. (Third Hofeller Aff. ¶¶ 14-17)

Using binary indicators is fatally flawed for another reason: it attempts to analyze the mapdrawer's "choice of a boundary at each step of the way" around the boundary of the district. (Peterson Dep. p. 48) The analysis assumes that at "each step of the way" the mapdrawer is faced with a "local decision" regarding the next VTD to select as he makes his way around the boundary of the district. (Peterson Dep. pp. 48-49, 51) At each "step of the way", Dr. Peterson analyzes the choice made by the mapdrawer. That "choice" is a binary comparison of the VTD selected next by the mapdrawer. As Dr. Peterson explained it, the binary comparison is this: "In extending the boundary for its next increment . . . does the extension seem to have been driven more by political

[77] If, instead of using the actual votes cast, one assigns binary indicators to each of North Carolina's precincts for its 2008 Obama vote (a "1" if Obama received more votes than McCain and a "0" if he did not), Obama's statewide binary vote would be 1,105. On the other hand, McCain's statewide binary vote would be 1,585, resulting in McCain carrying North Carolina by a 59% to 41% margin. (Third Hofeller Aff. ¶ 15)

considerations or by racial considerations." (Peterson Dep. p. 52)

Dr. Peterson's segment analysis is a form of what he calls "forensic decision analysis." As explained by him, forensic decision analysis is an "objective way of inferring why decisions made in the past were made the way they were." (Peterson Dep. p.18) In an "ideal" forensic decision analysis, the analyst is able to identify all alternatives reasonably available to the decisionmaker to compare them to the choice ultimately made. (Peterson Dep. p. 56) Dr. Peterson acknowledges, however, that in the redistricting context, it is not possible to identify all of the reasonably available alternatives to the mapdrawer, and for that reason, his segment analysis is "not the most ideal form" of forensic decision analysis. (Peterson Dep. pp. 56-57) Peterson further conceded that the segment analysis is not intended to analyze which VTD the mapdrawer should have chosen instead of the VTD that Peterson's analysis claims was racially motivated. (Peterson Dep. p. 58) Indeed, Dr. Peterson's segment analysis does not and cannot account for the alternative choices available to the mapdrawer because "[t]here are just so many possible alternatives it seems beyond practicality to enumerate them all." (Peterson Dep. pp. 82, 120)

These admitted limitations of Dr. Peterson's analysis eviscerate its utility. The analysis simply does not account for the reality of mapdrawing. Drawing a set of districts for Congress does not occur in a vacuum. Each choice made affects hundreds if not thousands of other decisions in the same set of districts. The process of redistricting simply does not involve binary choices. (Third Hofeller Aff. § 17) Nor does a mapdrawer proceed by "walking along the boundary" of a district and choosing VTDs in sequential order. (Peterson Dep. p. 120)

It is not surprising that Dr. Peterson would fail to account for the realities of mapmaking because he has never drawn a set of political districts. (Peterson Dep. pp. 20-21) He has never used,

or even looked at, Maptitude, the software used in North Carolina to draw districts. (Peterson Dep. pp. 21, 22) In fact, Dr. Peterson has never even observed someone else in the process of constructing districts. (Peterson Dep. p. 21)

It is a complete fallacy to reduce decisions that are affected by hundreds of other possible decisions to a simple choice between two isolated VTDs that happen to adjoin each other. As even Dr. Peterson acknowledged, choices made in one district affect choices made and available for other districts. (Peterson Dep. p. 26) Moreover, because of population equality requirements, choosing a particular populous or less populous VTD in one area affects and is affected by possible VTD choices in dozens if not hundreds of other places on the map. In short, Dr. Peterson's segment analysis relies on a naïve, nonsensical assumption about the mapdrawer's choices, and purposefully fails to account for scores of reasons other than race or party that a mapdrawer might choose one VTD over another. This fundamental flaw renders his conclusions useless and misleading. (Third Hofeller Aff. ¶¶ 13-17)

While Dr. Peterson's failure to account for the reality of choices available to mapdrawers in redistricting is a serious flaw, his analysis suffers many additional defects. First, the analysis does not account for VTD choices motivated by geographic and related decisions. For instance, the Twelfth District consists of several urban areas in Mecklenburg and Forsyth connected by "transit" VTDs – those VTDs in the corridor between the more populated urban areas. The transit VTDs are simply the mapmaker's way of getting from Point A to Point B on the map. In the 2001 version of the Twelfth District, this corridor took an unusual set of turns to pick up solidly Republican areas in Davidson, Cabarrus, and Rowan and "submerge" those voters in the overall reliably Democratic Twelfth district. (First Hofeller Aff. ¶ 59) In the 2011 Congressional Plan, the legislature

"un-submerged" those voters and created a more direct corridor of VTDs between Mecklenburg and Forsyth. Dr. Peterson's analysis fails to account for the extent to which these factors motivated the VTDs chosen in the corridor of the District. Indeed, 16 of the 29 VTD pairs studied by Dr. Peterson were chosen solely for geographic reasons related to creating a more rational corridor for the Twelfth District. (Third Hoffeler Aff. ¶ 9) Because Dr. Peterson's analysis cannot account for geographic motivations for VTD selection (Peterson Dep. p. 26, 120), more than one-half of his study is rendered irrelevant.

Second, Dr. Peterson's analysis does not account for the "core" of the First and Twelfth Districts - those VTDs within the District that do not touch the boundary of the District. (Peterson Dep. p. 38) By ignoring these VTDs - and the racial and political composition of them - Dr. Peterson excludes the vast majority of the population of each District in his analysis.

Third, related to his failure to consider the "core" VTDs, Dr. Peterson does not account for the fact that the enacted First and Twelfth Districts were largely based on the 2001 version of those districts. (First Hofeller Aff. ¶ 41) Thus, his analysis penalizes the 2011 mapdrawers for choices made by the 2001 mapdrawers, just because the 2011 mapdrawers decided to use the core of the First and Twelfth as their basis for the new districts.

Fourth, Dr. Peterson's analysis makes no attempt to measure the amplitude of the differences in the population measures he uses, thus rendering his analysis statistically unreliable. In determining whether a VTD pair will be labeled "R" or "P", Dr. Peterson compares the raw number of black population in the VTD inside the district with the raw number of black population in the VTD outside the district. No matter how small the difference in black population may be, if the black population in the inside VTD is higher, then Dr. Peterson labels it a "B", or "black" VTD - the

precursor to ultimately being labeled an "R" or "race" pair in his analysis. (Peterson Dep. Ex. 286 ¶¶ 7-8) As an example, in one VTD pair - VTD 02-08 and VTD 241 - the difference between the black voting age population is less than one percent. VTD 02-08 contains a black voting age population of 15.35% while VTD 241 contains a black voting age population of 14.86%. Yet because of this extremely slight difference in black voting age population, Dr. Peterson's analysis brands the inside VTD as having been selected because of race. (Peterson Dep. pp. 73-76) Dr. Peterson did not weight the percentage differences, which would have made the analysis more accurate. (Peterson Dep. pp. 58-61) Dr. Peterson admitted that such an analysis could have been done, but he just did not do it. (Peterson Dep. pp. 58-61)

Fifth, Dr. Peterson's analysis contains no attempt to account for the extent to which protecting incumbents or meeting incumbent demands is a factor in choosing certain VTDs. (Peterson Dep. p. 66) As described more fully below, the legislature designed the First and Twelfth Districts to maintain them as strong Democratic-performing districts to protect the African-American incumbents in those districts. Moreover, the legislature made multiple changes and concessions in these districts at the request of the Democratic incumbents. Dr. Peterson's analysis ignores these permissible motivations for the VTD choices in both districts.

Sixth, Dr. Peterson's analysis double-counts some VTDs and not others. Some of the VTD pairs Dr. Peterson used to draw his conclusions contained "inside" VTDs that adjoined multiple "outside" VTDs, while some of the inside VTDs adjoined only one outside VTD. (Peterson Dep. pp. 69-71) Dr. Peterson conceded that a VTD adjoining only one outside VTD would count less than a VTD adjoining multiple outside VTDs. (Peterson Dep. p. 70) Nonetheless, Dr. Peterson's analysis does not account for this double counting or over-weighting of certain VTDs.

Seventh, Dr. Peterson did not conduct a segment analysis of any of the alternative plans introduced by SCSJ or during the legislative process. (Peterson Dep. pp. 70-77). Thus, there is no frame of reference for his scoring of the enacted plans.

Eighth, Dr. Peterson's analysis does not account for the extent to which population differences in the VTDs affect the mapdrawer's choices in selecting VTDs to include or exclude from the district. (Peterson Dep. p. 82) For instance, prior to redistricting, the First District was seriously underpopulated by over 97,500 people. For this reason, the legislature had to bring portions of population from the Research Triangle Park Area into the district. Dr. Peterson's analysis fails to account for the impact this underpopulation had on the VTDs selected to be included in the district.

Ninth, Dr. Peterson's analysis does not account for the extent to which the mapdrawer's choice to select VTDs that voted strongly for President Obama in 2008 would correlate with VTDs in which many of the voters would be black. (Peterson Dep. pp. 110-111) By failing to do this analysis, it is impossible for Dr. Peterson to determine whether a strategy of selecting strong Obama-performing VTDs would, as a byproduct, also result in choosing VTDs with high percentages of black voters. Indeed, as noted above, Dr. Peterson's own analysis demonstrates that in studies analyzing only black voting age population and Obama vote percentage the party hypothesis predominated over the race hypothesis.

Finally, Dr. Peterson's analysis uses only a fraction of the VTDs in the First and Twelfth Districts to draw his irrelevant conclusions. In the Twelfth District, he studied only 29 out of 330 VTD pairs. As noted above, out of those 29 pairs, 16 were indisputably chosen for geographic reasons related to forming the District corridor. Moreover, several pairs as noted above were double

counted, reducing the actual number of legitimate pairs for study to eleven. Studying eleven pairs out of 330 is not a sufficient number from which to draw any meaningful conclusions, especially where those eleven pairs have not been randomly selected. (Third Hofeller Aff. ¶¶ 11-12)

C. Plaintiffs cannot prove that the First District, a majority-minority district, was not reasonably necessary to avoid a Section 5 objection or to avoid liability under § 2.

Assuming that plaintiffs could prove that race was the predominant motive underlying the drawing of district lines, the state may still defend any challenged district or plan where the district or plan further a compelling governmental interest and are "narrowly tailored." *Shaw II*, 517 U.S. at 908 (citing *Miller*, 517 U.S. at 920). Plaintiffs have utterly failed to meet their burden of proof on this issue.

Substantial evidence presented during the legislature's deliberations provided a basis for the creation of a majority black First District. First, the First District has been drawn as a majority black VRA district since 1992. No evidence has been presented by plaintiffs demonstrating that the *Gingles* preconditions are not still prevalent in the area of the State covered by the First District.

As already discussed, *supra*, counsel for the *NAACP* plaintiffs, Anita Earls, and her colleague, Jessica Holmes, referenced a report by a political scientist, Ray Block, Jr., showing "high levels of racially polarized voting in the State" and stated that "there is racially polarized voting in the state." Ms. Earls also referenced a law review article written by her and two other authors, and stated that her article explained that the existing "totality of circumstances" in North Carolina are "an important part of the record to justify drawing majority minority districts."

Moreover, because the core of the 2011 First District is based in large part on the core of the 2001 First District, its compactness cannot be reasonably questioned. The 2011 First District relied

upon previous versions of the First District which have been found to be based on a geographically compact minority population. The 2011 First District relied upon the 2001 First District, which itself had relied upon the 1997 First District. In *Cromartie II*, the district court found that the 1997 version of First District was based on a reasonably compact black population. *Cromartie II*. Moreover, unlike the 1992 version of the Twelfth District, the First District does not use point contiguity, does not completely dissect any other congressional district, and does not use an interstate highway to connect dispersed minority populations.

Plaintiffs cannot reasonably question that the *Gingles* standards are still met in the northeastern part of the state encompassed by the First District and that a majority black district is still required.

For all of these reasons, plaintiffs' claims alleging that the First, Fourth, and Twelfth Congressional Districts are racial gerrymanders are without merit and must be dismissed.

CONCLUSION

For the foregoing reasons, summary judgment should be entered for defendants.

Respectfully submitted, this the 10th day of December, 2012.

ROY COOPER
ATTORNEY GENERAL OF NORTH CAROLINA

By: _____
Alexander McC. Peters
Special Deputy Attorney General
N.C. State Bar No. 13654
apeters@ncdoj.gov

Susan K. Nichols
Special Deputy Attorney General
N.C. State Bar No. 9904
snichols@ncdoj.gov

N.C. Department of Justice
P.O. Box 629
Raleigh, N.C. 27602
Telephone: 919.716.6900
Facsimile: 919.716-6763

Counsel for All Defendants

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

Thomas A. Farr
N.C. State Bar No. 10871
thomas.farr@ogletreedeakins.com

Phillip J. Strach
N.C. State Bar No. 29456
phil.strach@ogletreedeakins.com

4208 Six Forks Road, Suite 1100
Raleigh, North Carolina 27622
Telephone: 919.787.9700
Facsimile: 919.783.9412

Counsel for the Legislative Defendants

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT** in the above titled action upon all other parties to this cause by:

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

[x] By e-mail transmittal, or

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

Edwin M. Speas. Jr.
John W. O'Hale
Caroline P. Mackie
POYNER SPRUILL LLP
Post Office Box 1801
Raleigh, NC 27602-1801
espeas@poynerspruill.com
johale@poynerspruill.com
Cmackie@poynerspruill.com

Counsel for Dickson *Plaintiffs*

Anita S. Earls
Clare Barnett
Allison Riggs
SOUTHERN COALITION FOR SOCIAL JUSTICE
1415 Highway 54, Suite 101
Durham, NC 27707
anita@southerncoalition.org
ClareBarnett@southerncoalition.org
AllisonRiggs@southerncoalition.org

Adam Stein
FERGUSON STEIN CHAMBERS GRESHAM & SUMTER, P.A.
312 West Franklin Street
Chapel Hill NC 27516
astein@fergusonstein.com
Counsel for NAACP *Plaintiffs*

Irving Joyner
Jennifer Watson Marsh
North Carolina NAACP
P.O. Box 335
Durham, NC 27702
jwmarsh1@gmail.com

Victor L. Goode
Assistant General Counsel
NAACP
4805 Mt. Hope Drive
Baltimore, MD 21215-3297
vgoode@naacpnet.org

Counsel for Plaintiffs NC NAACP,
Davis, Hightower, Gardenhight, Rivers, Murphy, White, Lewis, Albert, Brown and Lanier.

This the 10th day of December, 2012.

Alexander McC. Peters
Special Deputy Attorney General