No. 201PA12-3 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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MARGARET DICKSON, *et al.*, *Plaintiffs,* v. ROBERT RUCHO, *et al.*, *Defendants.* NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP, *et al.*, *Plaintiffs,* v. THE STATE OF NORTH CAROLINA, *et al.*, *Defendants.*	)	**From Wake County**

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PLAINTIFF-APPELLANTS' REPLY BRIEF ON REMAND

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INDEX

TABLE OF AUTHORITIES ii

I. THE RECORD FULLY ESTABLISHES THAT RACE PREDOMINATED IN DRAWING THE CHALLENGED DISTRICTS 2

II. DEFENDANTS DO NOT DISPUTE THAT INOCULATION AGAINST LEGAL CHALLENGE IS NOT A COMPELLING INTEREST JUSTIFYING GERRYMANDERED DISTRICTS 12

III. DISTRICTS DRAWN BASED ON AN INCORRECT INTERPRETATION OF THE VRA BY DEFINITION ARE NOT NARROWLY TAILORED TO COMPLY WITH THE VRA 13

A. Defendants' erroneous construction of Section 5 13
B. Defendants' erroneous construction of Section 2 17

IV. DEFENDANTS HAVE NOT DISPUTED THAT GERRYMANDERED DISTRICTS MECHANICALLY DRAWN TO ACHIEVE ARTIFICIAL GOALS ARE NOT NARROWLY TAILORED 29

V. DEFENDANTS' ARGUMENTS THAT THE TRIAL COURT'S NARROW TAILORING FINDINGS ARE BINDING ON APPEAL ARE WRONG ON A NUMBER OF GROUNDS 31

VI. DEFENDANTS' EFFORTS TO SALVAGE CD 12 AND SD 32 FAIL 34

VII. DEFENDANTS CANNOT DISTINGUISH *PAGE V. VIRGINIA STATE BOARD OF ELECTIONS* 36

CONCLUSION 38

CERTIFICATE OF SERVICE 42

TABLE OF AUTHORITIES

Cases **Page(s)**

Alabama Legislative Black Caucus v. Alabama,
135 S. Ct. 1257 (2015) ..... *passim*

Bartlett v. Strickland,
556 U.S. 1 (2009) ..... *passim*

Bush v. Vera,
517 U.S. 952 (1996) 17

Clark v. Putnam County,
293 F.3d 1261 (11th Cir. 2002) 5

Clarke v. City of Cincinnati,
40 F.3d 807 (6th Cir. 1994) 18

Concerned Citizens v. State,
329 N.C. 37, 404 S.E.2d 677 (1991) 31

Dickson v. Rucho,
No. 201PA12-2 (Oct. 11, 2013) 24

Easley v. Cromartie,
532 U.S. 234 (2001) 2, 5

Fisher v. University of Texas,
133 S. Ct. 2411 (2013) 33

Helms v. Rea,
282 N.C. 610, 194 S.E.2d 1 (1973) 31

Lewis v. Alamance Cty.,
99 F.3d 600 (4th Cir. 1996) 22

Marbury v. Madison,
5 U.S. 137 (1803) 17

Miller v. Johnson,
515 U.S. 900 (1995) 13, 17, 26, 35

Page v. Virginia State Board of Elections,
No. 3:13-cv-678 (E.D. Va. Jun. 25, 2015) 36, 37, 38

Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989) 17, 33

Shaw v. Hunt,
517 U.S. 899 (1996) 4

Shaw v. Reno,
509 U.S. 630 (1993) 2, 3

Stephenson v. Bartlett,
355 N.C. 354, 562 S.E.2d 377 (2002) 5

Texas Dep't of Hous. and Cmty. Affairs v. The Inclusive Communities Project, Inc.,
192 L. Ed. 2d 514 (2015) 18

Uno v. City of Holyoke,
72 F.3d 973 (1st Cir. 1995) 19

Statutes

N.C.G.S. § 163-132.1B(a) 4

Voting Rights Act. ..... *passim*

Other Authorities

U.S. Const. amend. XIV 3, 15

Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act* (Jan. 1, 2015) 20

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PLAINTIFF-APPELLANTS' REPLY BRIEF ON REMAND

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The legislative and congressional districts challenged in these cases were constructed on flawed and erroneous legal theories that are contrary to United Supreme Court precedent. Defendants' lengthy brief reveals those flawed and erroneous theories. For the reasons set forth herein and those in Plaintiffs' previous briefs in these matters, this Court should apply *Alabama Legislative Black*

Caucus v. Alabama, 135 S. Ct. 1257 (2015) (hereafter "*ALBC*") and declare the challenged districts unconstitutional and invalid.

I. THE RECORD FULLY ESTABLISHES THAT RACE PREDOMINATED IN DRAWING THE CHALLENGED DISTRICTS

The test for determining the existence of a racial gerrymander is straightforward. As the United States Supreme Court explained this Spring, a racial gerrymander exists when it is proved that "the legislature 'placed' race above 'traditional districting considerations in determining *which* persons were placed in *appropriately apportioned districts*.'" *ALBC*, 135 S. Ct. at 1271.[1] This test applies regardless of the legislature's motive. As the Supreme Court held in *Shaw v. Reno*, 509 U.S. 630, 657 (1993) ("*Shaw I*"), racial gerrymandering, even for "remedial purposes," is permissible under the Fourteenth Amendment only when narrowly tailored to serve a compelling governmental interest.

In their responsive brief, Defendants affirmatively acknowledge that the challenged districts were created for the purposes of avoiding Section 2 liability and ensuring preclearance under Section 5, and that to accomplish those goals each

[1] At one point in their brief Defendants seem to suggest that the test for proving preponderance is different than the test described by the United States Supreme Court just four months ago in *ALBC*. (Defs.' Br. 35) (plaintiffs must prove that a district is "unexplainable on grounds other than race"). These words, found in *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) ("*Cromartie II*"), created some uncertainty about the precise test for proving "preponderance" before *ALBC*. As the North Carolina law professors explain in their amicus brief, *ALBC* resolved whatever uncertainty existed. (N.C. Professors' Amicus Br. 4-9).

challenged district was deliberately drawn to encompass more black citizens than white citizens within its boundaries, and that such districts were collectively and deliberately drawn in numbers proportional to the State's black population. Appendix A to Plaintiffs' opening brief describes the stark racial disparities Defendants' race-based goals caused in the assignment of black voters to the challenged districts and in the assignment of white voter to adjoining districts. The accuracy of this chart is not contested by Defendants.

Defendants correctly inform the Court that "neutral redistricting criteria 'are objective factors that may serve *to defeat* a claim that a district has been gerrymandered on racial lines." (Defs.' Br. 30, fn. 27) (emphasis added) (quoting *Shaw I*, 509 U.S. at 647). At no point in these proceedings, however, have Defendants established that neutral redistricting criteria explain the assignment of voters. Defendants have not disputed that the challenged districts are oddly shaped, whether those odd shapes are measured visually or mathematically.[2] Defendants also do not dispute that those odd shapes are the results of Defendants' decisions (a) to draw peculiar appendages out from the cores of the challenged

[2] Defendants' observation at page 50 of their brief that Plaintiffs "have not offered any judicially manageable standard" for measuring compactness is a relic from earlier stages of these proceedings when the parties were debating whether compactness is an independent constitutional requirement. Defendants surely do not mean by that statement to contest the relevance of compactness as important evidence in determining whether race predominated in the drawing of districts in violation of the 14th Amendment.

districts to corral the required number of black citizens and (b) to form the boundaries of the challenged districts from pieces of precincts divided on racial grounds. Nor have Defendants disputed that they split precincts in unprecedented numbers for the purpose of achieving their race-based goals. Defendants do argue—wrongly—that Plaintiffs' uncontradicted split precinct evidence is "misleading" because North Carolina, unlike Alabama, "never adopted a policy that precincts should not be divided." (Defs.' Br. 84). To the contrary, N.C.G.S. § 163-132.1B(a), enacted by Defendants in 2006, requires the State to participate in the federal Redistricting Data Program so that the State can "revise districts at all levels without splitting precincts."

With regard to the relative importance of race and other factors in the design and construction of the challenged districts, Defendants do not deny that the architects of those districts (Senator Rucho and Representative Lewis, who instructed map drawer Tom Hofeller) described their racial goals as paramount over all other goals. In carefully worded written statements Rucho and Lewis informed all North Carolinians that any suggested revisions to the proposed challenged districts would be considered "provided" the revisions did not compromise their racial goals. Defendants' statements constitute direct evidence of race-based districting, even if they thought their motives were benign. *See Shaw v. Hunt*, 517 U.S. 899, 906 (1996) ("*Shaw II*") (finding direct evidence of the

legislature's objective by a statement in its preclearance submission that its overriding purpose was to create two districts with effective black voting majorities); *Clark v. Putnam County*, 293 F.3d 1261 (11th Cir. 2002) (finding race predominated because of statements, testimony, and representations made to the Department of Justice that maintenance of majority-black districts were the goal, that the map drawer should maximize black voting strength in two districts, and that doing so was required for preclearance); *but cf. Cromartie II*, 532 U.S. 234 (2001) (lone legislator statement that "the plan provides for a fair, geographic, racial, and partisan balance" was insufficient to show race predominated over politics).

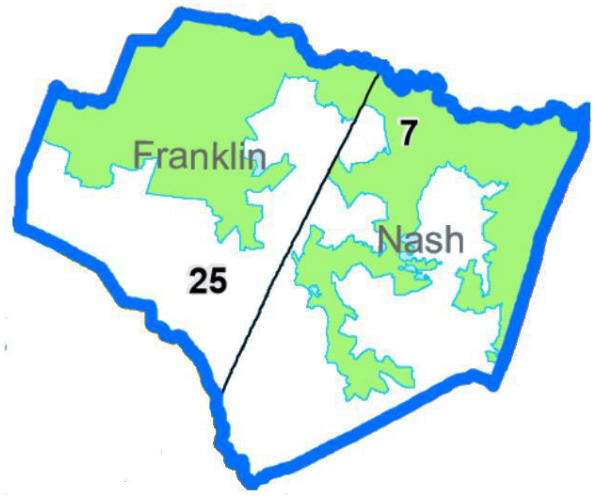
Defendants make two feeble efforts to refute the powerful force of their uncompromised pursuit of their race-based goals. First, in an illogical assertion contrary to the evidence, Defendants blame this Court's *Stephenson* decision, 355 N.C. 354, 562 S.E.2d 377 (2002), for the shape of the challenged districts. They argue that grouping counties to comply with the Whole County Provision ("WCP") of the State Constitution "was the predominant reason for the location of district lines for all legislative districts, including the VRA districts." (Defs.' Br. 48). As Plaintiffs noted in their first brief, this effort does not withstand even superficial analysis. (Pls.' Br. 15). *Stephenson*, of course, imposes an obligation on the General Assembly to honor county boundaries in the formation of legislative

districts within single counties or within the boundaries of groups of counties. Had Defendants followed the boundaries of single counties or groups of counties in drawing the boundaries of the challenged majority minority districts, Defendants' point would have merit. Indeed the majority-minority districts in the House and Senate plans formed using only county lines (SD 3 (52.43% TBVAP), HD 23 (51.83% TBVAP), and HD 27 (53.71% TBVAP)) were not challenged by Plaintiffs precisely because county lines, not race, explain the boundaries of those districts.

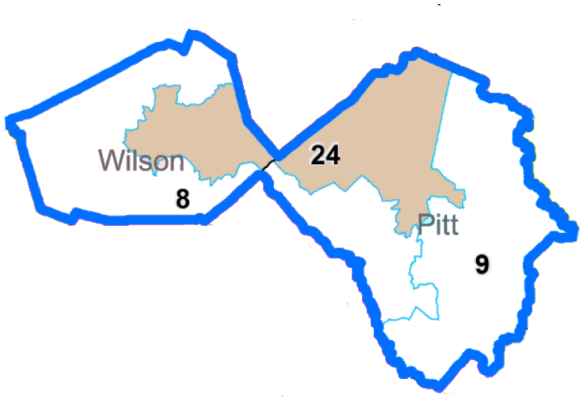
By contrast, county lines and county clustering were no impediment to the accomplishment of Defendants' race-based objectives in the challenged districts. Clustering of course had nothing to do with the boundaries of the challenged districts located within a single county. In the Senate plan, these districts are Senate Districts 14, 28, 38, and 40. In the House plan, these districts are House Districts 29, 31, 32, 33, 38, 57, 99, 102, 106, and 107. As for the challenged districts located in a cluster of counties, the maps of these districts below clearly demonstrate that clustering in no sense explains their shapes.

Challenged Districts Located in Two-County Clusters

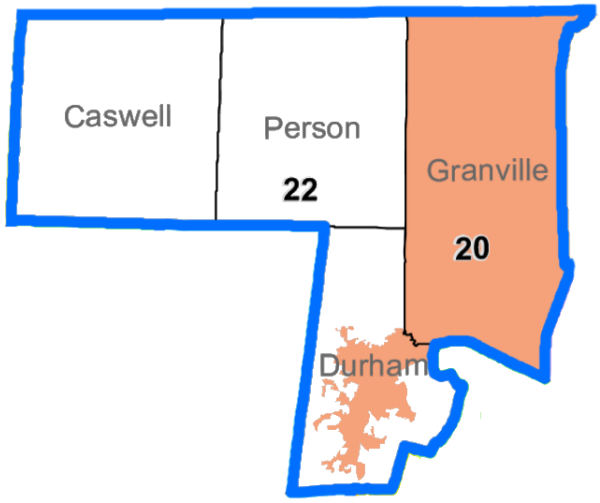
HD 7:



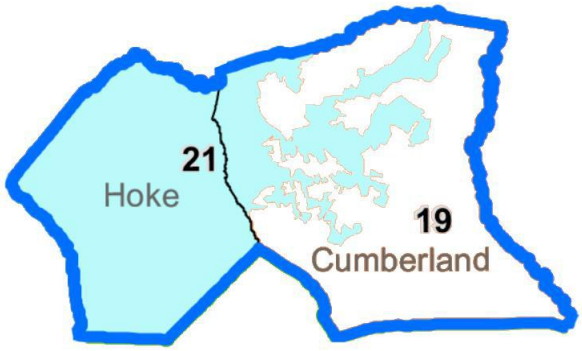
HD 24:



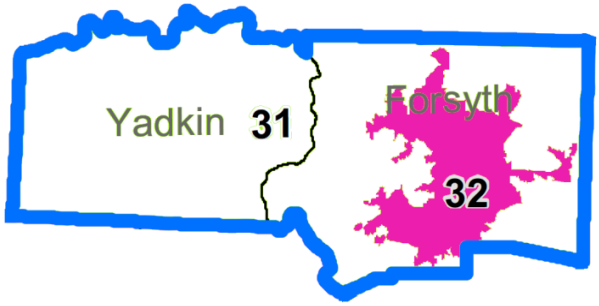
SD 20:



SD 21:

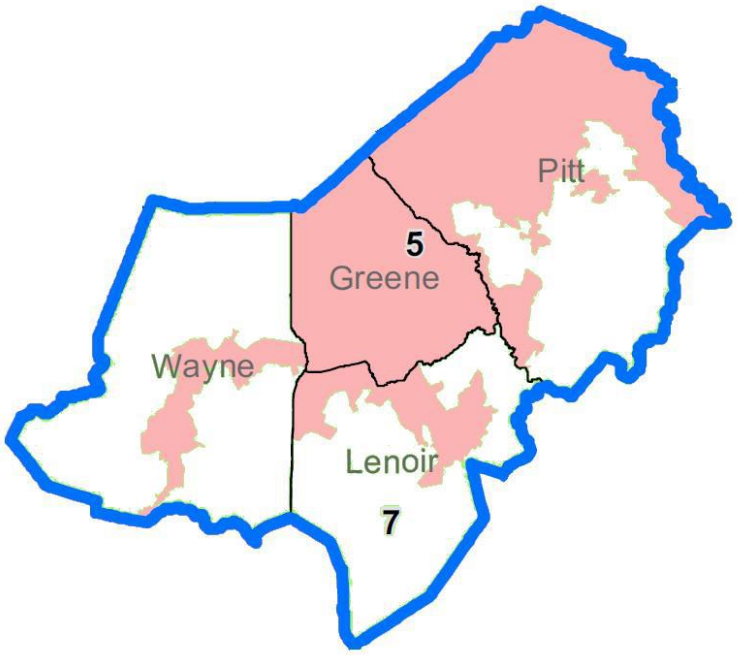


SD 32:



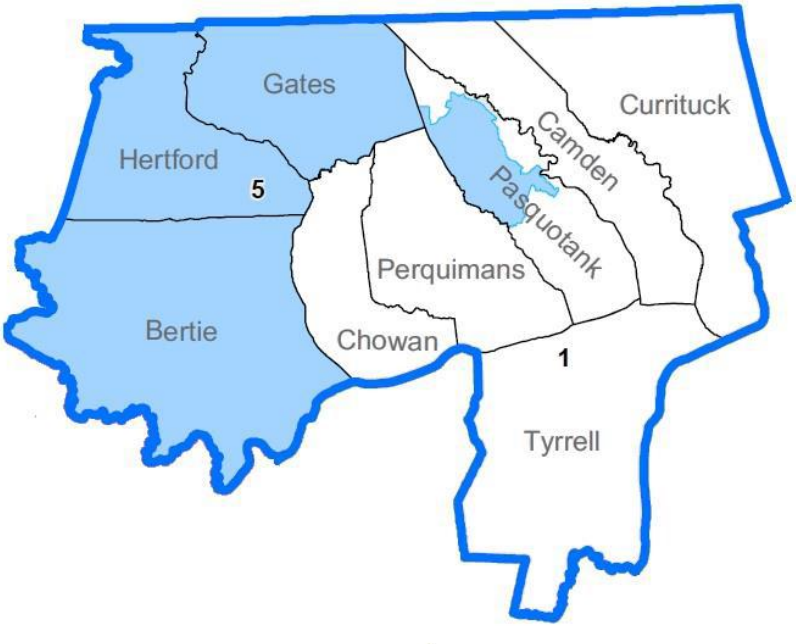
Challenged District Located in a Four-County Cluster

SD 5:



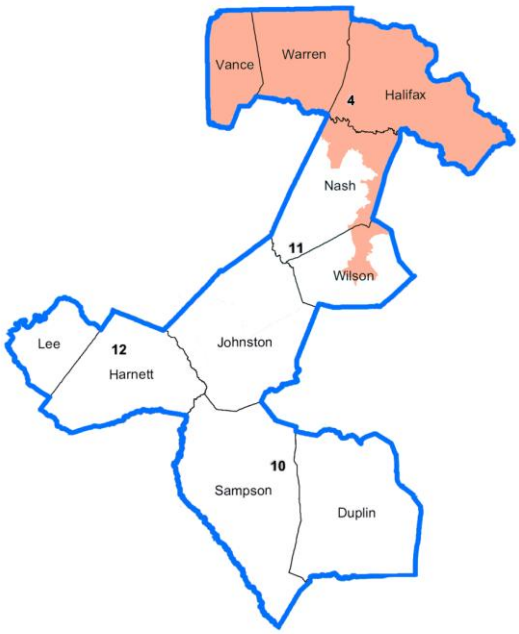
Challenged District Located in a Nine-County Cluster

HD 5:



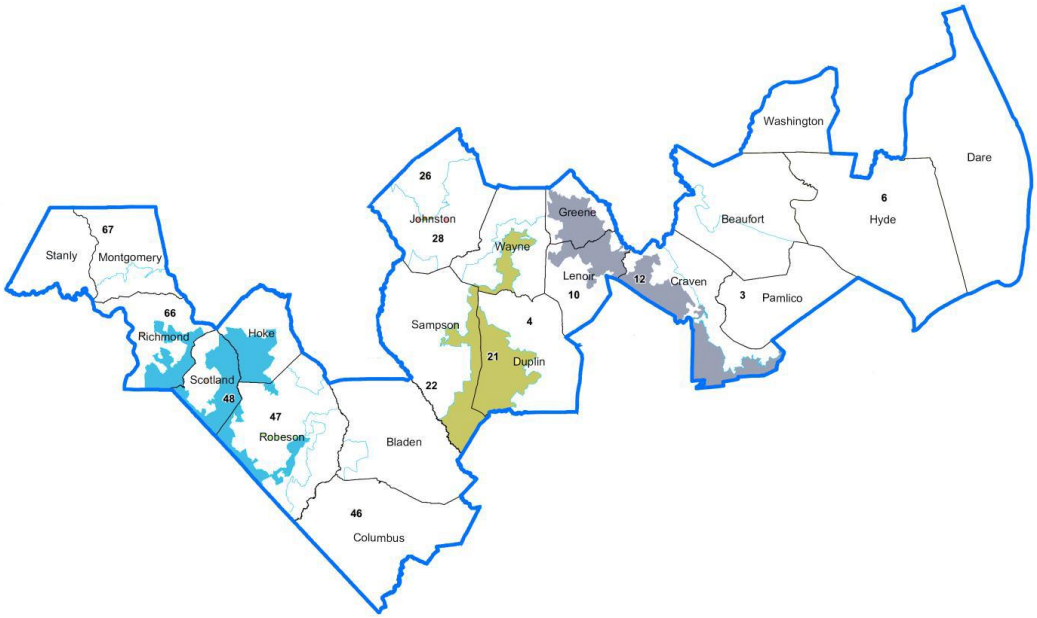
Challenged District Located in a Ten-County Cluster

SD 4:



Challenged Districts Located in a Twenty-County Cluster

HD 48, 21, and 12:



The convoluted explanation Defendants offer in support of the demonstrably false proposition that the boundaries of the challenged districts are the product of WCP compliance and not race only underscores the extent to which race and the pursuit of VRA immunity dominated the design and construction of the challenged districts from the very beginning of the redistricting process. According to Defendants themselves, the first step in the redistricting process was to draw maps showing where black citizens lived so that they could identify areas in which majority black districts in number proportional to the State's black population could be drawn. (Defs.' Br. 51-52). Once these areas were identified, the actual boundaries of the districts were drawn, twisting and turning as necessary to achieve their goal of immunity from Section 2 liability and to guarantee preclearance through proportionality and rigid adherence to their 50% plus rule. (Defs.' Br. 51-55). Defendants' race-based goals were achieved in spite of, not because of, the WCP.

Politics is the second ground on which Defendants seek to rewrite the history they created. They assert race was not predominant because "the enacted *plans* were designed to ensure Republic majorities in the House and Senate." (Defs.' Br. 55) (emphasis added). This is surely true but Defendants do not assert and no contemporaneous evidence would support any assertion that politics rather

than race predominated in the design and construction of the challenged districts.[3] When Rucho and Lewis explained their reasons for drawing the challenged districts, they did not tell North Carolinians that the challenged districts were part and parcel of a partisan gerrymander. Instead, they talked at length, and exclusively, about drawing districts to provide "proportionality for the African American citizens in North Carolina" and their VRA obligations. (Doc. Ex. 542). When citizens claimed that the proposed VRA districts were "an attempt to maintain Republican political power," Rucho and Lewis "correct[ed]" that "erroneous statement[]" by telling citizens "[t]he State has an obligation to comply with the Voting Rights Act." (Doc. Ex. 550). When asked at his deposition if he told the map drawer he wanted Republicans to win in the districts, Senator Rucho stated, "I don't ever remember saying we want Republicans to win these districts." (Doc. Ex. 3091-92).

Moreover, Defendants' assertion is that "*the enacted plans* were designed to ensure Republican majorities." (Defs.' Br. 55) (emphasis added). These cases, however, are not about the validity of the challenged plans; they are about the validity of specific districts contained in those plans. Racial gerrymander claims

[3] For this reason Defendants' numerous assertions that some sort of special or heightened proof is required by Plaintiffs when a state defends districts from racial gerrymandering claims on partisan political grounds are off the mark and irrelevant. *See, e.g.*, Defs.' Br. 38-39.

are district-specific claims that must be made and defended on a district-specific basis. As the Supreme Court held in *ALBC*: "A racial gerrymandering claim…applies to the boundaries of individual districts. It applies district-by-district. It does not apply to a State considered as an undifferentiated 'whole.'" 135 S. Ct. at 1265.[4] At no point in these proceedings have Defendants made any argument, or cited any evidence, that any part of any boundary of any challenged district is predominantly, or even partly, the result of partisanship. From the beginning to the end of the 2011 redistricting process, Defendants proclaimed that each of the challenged districts was drawn for the two purposes (1) "inoculating" themselves against Section 2 liability and (2) guaranteeing preclearance under Section 5. Voting Rights Act compliance is not obtained by assigning white Republicans, Democrats or Independents to districts.

II. DEFENDANTS DO NOT DISPUTE THAT INOCULATION AGAINST LEGAL CHALLENGE IS NOT A COMPELLING INTEREST JUSTIFYING GERRYMANDERED DISTRICTS

Plaintiffs' opening brief makes the point that complying with a correct interpretation of the VRA is a compelling interest sufficient to justify a gerrymandered district, but that drawing districts to "survive any possible legal

[4] Amici North Carolina Law Professors aptly describe how this district-specific requirement applies not only to plaintiffs' claims but also to the State's defense and the court's review of the claims. (N.C. Professors' Amicus Br. 18-20).

challenge" is not. (Pls.' Br. 19-21). Defendants' lengthy brief contains no argument refuting that point on either factual or legal grounds.

III. DISTRICTS DRAWN BASED ON AN INCORRECT INTERPRETATION OF THE VRA BY DEFINITION ARE NOT NARROWLY TAILORED TO COMPLY WITH THE VRA

A racially gerrymandered district drawn based on an incorrect understanding of the VRA by definition cannot be narrowly tailored to comply with the VRA, properly interpreted. *See ALBC* (holding that a district drawn based on an incorrect answer to a State's obligations under Section 5 of the VRA is not narrowly tailored). Defendants' brief repeatedly describes their understanding of their obligations under the VRA that served as the predicate for the districts they drew. Because they understood the VRA to impose greater obligations than it does, the districts they drew exceeded any remedial obligation the State had under the VRA and therefore are not narrowly tailored to comply with the VRA. *See Miller v. Johnson*, 515 U.S. 900, 926 (1995) (rejecting interpretation of the VRA under the Justice Department's maximization policy because it goes beyond what the VRA requires).

A. Defendants' erroneous construction of Section 5.

Defendants increased the TBVAP in the challenged districts located in the 40 counties covered by Section 5, and they have defended those increases on the grounds that they were justified by Section 5. They are wrong. As explained in

Plaintiffs' opening brief, the decision in *ALBC* unequivocally establishes that Defendants' only duty under Section 5 was to avoid "diminution of a minority group's proportionate strength" and that the only compelling interest they had under Section 5 sufficient to justify a racial gerrymandered district was "in preventing Section 5 retrogression." (Pls.' Br. 28-32). Thus, Defendants' decision to adopt across the board TBVAP increases in the gerrymandered districts located in Section 5 counties exceeded any Section 5 obligation Defendants had under the VRA. The resulting districts were not narrowly tailored to comply with Section 5, properly interpreted.

Defendants do not deny the accuracy of these points in their brief. They also acknowledge that the Supreme Court in *ALBC* held that "Section 5 only required that states adopt racial percentages for each district needed to 'maintain a minority's ability to elect a preferred candidate of choice.'" (Defs.' Br. 32). Instead, they argue that notwithstanding *ALBC* they had "good reasons" to believe that Section 5 required them to increase the TBVAP in those districts. In other words, Defendants contend that in addition to having a compelling interest in complying with a proper interpretation of Section 5, they also had a compelling interest in drawing districts based on an erroneous interpretation of Section 5 as long as they can show "good reasons" for their erroneous interpretation. The "good reasons" the State says it has for its erroneous Section 5 interpretation is that

the words "candidate of choice" in Section 5 must be given the same meaning as the words "candidate of choice" under Section 2, and that under Section 2 as interpreted in *Bartlett v. Strickland*, 556 U.S. 1 (2009), "districts drawn to give a minority group an equal opportunity to elect their candidate of choice must be created with a *majority* of the minority groups' voting age population." (Defs.' Br. 70) (emphasis added). *See also* Defs.' Br. 32.

As shown hereinafter at pages 19-21, this interpretation of the requirement of Section 2 after *Strickland* is itself demonstrably wrong. More fundamentally, the notion that Defendants have a compelling interest in drawing gerrymandered districts to comply with an erroneous interpretation of a federal law so long as they can show they had "good reasons" for that erroneous interpretation is truly preposterous. Statutes are not expanded or contracted because a party had "good reason" for its interpretation. The Supremacy Clauses of the United States Constitution and North Carolina Constitution surely will not permit Defendants to violate the 14th Amendment rights of North Carolina citizens on the grounds that Defendants had "good reasons" for their ignorance of federal law or their failure to correctly understand the Voting Rights Act.

Defendants say they find support for this new extension of states' rights in *ALBC*. They are once again wrong. No reasonable reading of *ALBC* permits any such conclusion. The Court said:

> [W]e do not insist that a legislature guess precisely what percentage reduction a court or the Justice Department might eventually find to be retrogressive. The law cannot insist that a state legislature, when redistricting, determine *precisely* what percent minority population § 5 demands…The law cannot lay a trap for an unwary legislature, condemning its redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place a few too many minority voters in a district or (2) retrogressive under § 5 should the legislature place a few too few. Thus we agree with the United States that a court's analysis of the narrow tailoring requirement insists only that the legislature have a 'strong basis in evidence' in support of the (race-based) choice that it has made.

135 S. Ct. at 1273-74 (emphasis in original) (internal citations omitted). The race-based choice over which the Defendants had some leeway—if they had a strong basis in evidence in drawing the district in the first place —was with regard to the percentage of minority voters that should be assigned to a district to comply with Section 5's non-retrogression principle. For example, where the candidate of choice of minority voters has won election in a district covered by Section 5 under an old plan by a 10% margin, a range of reductions in the TBVAP for that district in a new plan may be justified as not retrogressive. Likewise, where the candidate of choice of minority voters in a district covered by Section 5 has barely won election, a range of small increases in the TBVAP for the district in a new plan will not by itself condemn the district as an unconstitutional racial gerrymander. The leeway that strict scrutiny allows defendants is limited to determining "*precisely* what percent minority population § 5 allows." *Id.* at 1273 (emphasis in original).

Defendants have no leeway with regard to the actual requirement of the federal law or to create a version of federal law they would apply in drawing the challenged districts. *See ALBC*, 135 S. Ct. at 1274; *accord Bush v. Vera*, 517 U.S. 952, 977 (1996) (observing that states have leeway in applying the traditional redistricting criteria, but nowhere observing that states have discretion to misinterpret federal law). Further this Court cannot defer to Defendants' understanding of the law. *Miller*, 515 U.S. at 922-23 (the judiciary cannot defer to the state's interpretation of the VRA but must enforce the constitutional limits on race-based official action). "It is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803), and it is this Court's responsibility to engage in a "searching judicial inquiry" into the State's use of race. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

B. Defendants' erroneous construction of Section 2.

As explained in Plaintiffs' opening brief, *ALBC* confirms that absent a strong basis in evidence for a finding by Defendants that the majority votes sufficiently as a bloc usually to defeat the minority's preferred candidate in a particular area, Defendants had no reasonable grounds—much less a strong basis in evidence—for concluding they faced potential Section 2 liability if they did not increase the TBVAP in each of the challenged districts to more than 50%. Evidence of statistically significant racially polarized voting alone is not sufficient

to satisfy the third prong of *Gingles*.[5] It must also be supported by evidence that the statistical pattern of white citizens voting for white candidates usually translates into the defeat of black candidates. (Pls.' Br. 34-39). *See Congressional Black Caucus Amicus Br*. 16 (noting that *ALBC* "reaffirms the principle that the existence of racially polarized voting in a district is insufficient on its own to provide a state legislature with a justification to maintain or increase the number of minority voters in that district."). *See also Clarke v. City of Cincinnati*, 40 F.3d 807, 812-13 (6th Cir. 1994) (finding that 47% success rate was "no reason to find that blacks' preferred black candidates have 'usually' been defeated"), *cert. denied*,

[5] The need for Defendants to have more than evidence of statistical disparities to support a valid conclusion that Section 2 liability would have existed without increasing the TBVAP in the challenged districts to more than 50% was underscored by the United States Supreme Court in its 25 June 2015 decision in *Texas Dep't of Hous. and Cmty. Affairs v. The Inclusive Communities Project, Inc*., 192 L. Ed. 2d 514 (2015). There the Court observed that if race-based federal discrimination claims could be proved simply by showing mere statistical disparities, governmental and private entities "would almost inexorably" adopt numerical race-based quotas as a preemptive defense against such claims. *Id.* at 538. The adoption of a race-based quota as a preemptive defense to discrimination claims of course raises "serious constitutional questions." *Id.* To prevent such behaviors by potential defendants, statistical disparities alone are never sufficient to establish liability for violation of federal anti-discrimination laws. Violations are only established when statistical disparities are accompanied by "robust" proof that the statistical disparities were caused by "a defendant's policy or practices." *Id*. at 538, 526. The Court made these observations in the context of the level of proof necessary to establish a violation of the federal Fair Housing Act. But they illustrate precisely Defendants' flawed interpretation of their potential Voting Rights Act liability that led them to put in place constitutionally infirm remedies to protect against their misperceived Voting Rights Act liability.

131 L. Ed. 2d 851, 115 S. Ct. 1960 (1995); *Uno v. City of Holyoke*, 72 F.3d 973, 985 (1st Cir. 1995) ("To be legally significant, racially polarized voting in a specific community must be such that, over a period of years, whites vote sufficiently as a bloc to defeat minority [-preferred] candidates most of the time.") (emphasis added).

Defendants responded to this misperceived potential liability by drawing the challenged districts so that they could "survive any possible legal challenge." (Doc. Ex. 563). The vaccine they chose to inoculate themselves from liability was itself infected with a constitutional virus—a pre-determined goal to mechanically draw districts in which black citizens were more than half the voting age in numbers proportional to the State's black voting age population.

Tellingly, Defendants do not address or refute these points in their brief. Indeed, Defendants implicitly acknowledge their accuracy when they distinguish "legally significant racially polarized voting" from "significant levels of racially polarized voting." (Defs.' Br. 65). Instead, as Defendants argue in their brief, they drew the challenged districts, and continue to defend them, on the theory that as a consequence of the United States Supreme Court decision in *Strickland*, any district drawn with a TBVAP lower than 50% is not an effective defense to a Section 2 action. They also contend that because coalition districts, crossover districts and influence districts all have less than 50% minority population, they

are, after *Strickland*, ineffective defenses to a Section 2 claim. (Defs.' Br. 10, 17, 51, 57, 60). This reading of *Strickland* is demonstrably incorrect.

The Court in *Strickland* specifically cautioned against the very strategy Defendants adopted for drawing the challenged districts.

> Our holding should not be interpreted to entrench majority-minority districts by statutory command, for that, too, could pose constitutional concerns. States that wish to draw crossover districts are free to do so where no other prohibition exists. Majority minority districts are only required if all three *Gingles* factors are met and if § 2 applies based on a totality of the circumstances. In areas with substantial crossover voting it is unlikely that the plaintiffs would be able to establish the third *Gingles* precondition - -bloc voting by majority voters. In those areas majority-minority districts would not be required in the first place; and in the exercise of lawful discretion States could draw crossover districts as they deemed appropriate. States can- -and in proper cases should- -defend against alleged § 2 violations by pointing to crossover voting patterns and to effective crossover districts.

Strickland, 556 U.S. at 24 (internal citations omitted). *See also* Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act*, at 19-20 (Jan. 1, 2015) (unpublished legal studies paper, forthcoming Fl. St. U. L. Rev.), *available at* SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2487426 ("It is crucial to recognize, however, that *Bartlett*'s 50.1% threshold affects only the predicate conditions for section 2 *liability*," not "for constructing a remedy once vote dilution is satisfied") (emphasis in original). Defendants not only failed to avoid "entrench[ing] majority-minority districts by statutory command" as cautioned by the Supreme Court, they created many new majority-minority

districts which will persist in the future under their theory of the VRA, creating a permanent division of white and black North Carolinians into separate electoral districts. *Strickland*, 556 U.S. at 4.

After *Strickland*, the question Defendants should have asked themselves to determine if they had potential Section 2 liability in specific areas of the State was whether white citizens were voting sufficiently as a bloc usually to defeat the preferred candidate of black citizens in existing districts.[6] For each district for which the answer was "yes," drawing that district at more than 50% TBVAP would have provided Defendants both a defense against any Section 2 claim that might have been asserted and, provided the district was narrowly tailored, a defense against the racial gerrymander claims here. For each district for which the answer was "no," Section 2 did not require a 50% district and no Section 2 defense would exist to the racial gerrymander claims asserted here. Further, a crossover district, instead of a 50% district, would have provided a defense against any Section 2 claim that might have been filed.

The evidence that best answered that question for the challenged districts was election results for the challenged districts under the 2003 legislative

[6] Defendants had to ask this question for each of the challenged districts. *See* North Carolina Professors' Amicus Brief at 18-19 (noting that under *ALBC*, the dispositive question concerns the legislature's use of race in specific districts and the legislature must defend the specific districts, not the plan as a whole).

redistricting plan and the 2001 congressional redistricting plan. Those results are undisputed and were known to both Defendants and the trial court, but ignored. Those results are set out in Plaintiffs' opening brief at pages 36-38 and are not disputed by Defendants.[7] Because of their importance to the resolution of these cases, and for the convenience of the Court, they are set out again below.

- In 2003 the General Assembly set the TBVAP in SD 14 located in Wake County at 41.62%. The candidate of choice of black voters won election in that district by 64.1% to 35.9% in 2004, by 65.9% to 34.1% in 2006, by 69.45% to 30.55% in 2008 and by 65.9% to 34.1% in 2010. In 2011 the General Assembly increased the TBVAP in SD 14 by 9.65% to 51.27%.

- In 2003 the General Assembly set the TBVAP in SD 20 located in Durham County at 44.64%. The candidate of choice of black voters in that district was not opposed in 2006 and won election in that district by 90.2% to 9.8% in 2004, by 73.58% to 25.22% in 2008 and by 73.11% to 26.89% in 2010. In 2011 the General Assembly increased the TBVAP in that district by 6.40% to 51.04%.

- In 2003 the General Assembly set the TBVAP in SD 21 located in Cumberland County at 44.93%. The candidate of choice of black voters was not opposed in 2008 and won election by 61.21% to 38.4% in 2004, by 61.6% to 38.4% in 2006 and by 67.6% to 33.4% in 2010. In 2011 the General Assembly increased the TBVAP in that district by 6.60% to 51.53%.

- In 2003 the General Assembly set the TBVAP in District 28 located in Guilford County at 47.20%. The candidate of choice of black voters was not opposed in 2004, 2006 or 2008. In 2010, candidate of choice of black voters

[7] Defendants instead point to very limited evidence of isolated instances where black candidates for the state legislature were defeated, primarily from the 2010 midterm elections. The Voting Rights Act is not a guarantee of black electoral success, only a guarantee of the equal opportunity to participate in the political process. *Lewis v. Alamance Cty.*, 99 F.3d 600, 617 (4th Cir. 1996).

defeated a white candidate and another black candidate 47.84% to 38.69% to 13.47% in 2010. In 2011 the General Assembly increased the TBVAP in that distinct by 9.29% to 56.49%.

- In 2003 the General Assembly set the TBVAP in SD 38 located in Mecklenburg County at 46.97%. The candidate of choice of black voters in that district was not opposed in 2004 or 2006 and won election by 73.33% to 23.87% in 2008 and by 68.67% to 31.33% in 2010. In 2011 the General assembly increased the TBVAP in that district by 5.54% to 52.51%.

- In 2003 the General Assembly set the TBVAP in SD 40 located in Mecklenburg County at 35.43%. The candidate of choice of black voters was elected in that district by 57.88% to 42.11% in 2004, by 61,47% to 38.52% in 2006, by 66.96% to 33.04% in 2008 and by 58.16% to 41.84% in 2010. In 2011 the General Assembly increased the TBVAP in that district by 16.41% to 51.84%.

- In 2003 the General Assembly set the TBVAP in HD 12 located in Craven, Lenoir, and Greene Counties at 46.54%. The candidate of choice of black voters was elected in that district by 64.69% to 35.50% in 2004, by 66,27% to 33.72% in 2006, by 69.13% to 30.86% in 2008 and by 60.20% to 39.79% in 2010. In 2011 the General Assembly increased the TBVAP in that district by to 50.60%.

- In 2003 the General Assembly set the TBVAP in HD 21 located in Wayne, Sampson, and Duplin Counties at 46.25%. The candidate of choice of black voters was not opposed in 2004, 2006 or 2008 and won election by 65.59% to 34.40% in 2010. In 2011 the General Assembly increased the TBVAP in that district by 5.75% to 51.90%.

- In 2003 the General Assembly set the TBVAP in HD 29 located in Durham County at 39.99%. The candidate of choice of black voters was not opposed in 2004, 2006, or 2010 and won election in 2008 by 90.37% to 9.27%. In 2011 the General Assembly increased the TBVAP in that district by 21.35% to 51.34%.

- In 2003 the General Assembly set the TBVAP in HD 31 located in Durham County at 47.31%. The candidate of choice of black voters was not opposed in 2006 or 2008 and won election by 85.79% to 14.02% in 2004 and by 75.5% to 24.5% in 2010. In 2011 the General Assembly increased the TBVAP by 4.68% to 51.81%.

- In 2003 the General Assembly set the TBVAP in HD 48 located in Richmond, Scotland, Hoke, and Robeson Counties at 45.56%. The candidate of choice of black voters was not opposed in 2004, 2006 or 2008 and won election by 73.75% to 26.25% in 2010. In 2011 the General Assembly increased the TBVAP by 5.75% to 51.27%.

- In 2003 the General Assembly set the TBVAP in HD 99 located in Mecklenburg County at 41.26%. The candidate of choice of black voters won election by 65.32% to 34.68% in 2008 and by 72.01% to 27.99% in 2010. In 2011 the General Assembly increased the TBVAP by 13.39% to 54.65%.

- In 2003 the General Assembly set the TBVAP in HD 107 located in Mecklenburg County at 47.14%. The candidate of choice of black voters did not have an opponent in 2006 and won election by 68.20% to 31.80% in 2004, by 75.26% to 24.74% in 2008 and by 67.26% to 32.73% in 2010. In 2011 the General Assembly increased the TBVAP by 5.11% to 52.25%.

(Brief of Plaintiffs-Appellants at App. 62, *Dickson v. Rucho*, No. 201PA12-2 (Oct. 11, 2013)).[8] These election results reveal a consistent pattern in all of the challenged districts: white citizens were not voting sufficiently as a bloc usually to defeat the preferred candidate of black citizens. To the contrary, the preferred candidates of black voters were consistently winning election by comfortable margins in districts that were less than 50% TBVAP.

This undisputed evidence has a number of legal consequences, all of which are fatal to the validity of the challenged districts. First, it establishes that

[8] The record contains similar, undisputed election results for the other districts challenged here: SD 4 (R pp 1098-99); SD 5 (R pp 1100-01); HD 5 (R p 1067); HD 6 (R pp 1068-69); HD 24 (R pp1073-74); HD 32, 33, and 38 (R pp 1080-86); HD 42 (R pp 1087-88); HD 57 (R pp 1091-97); HD 102 and 106 (R pp 1095-96).

Defendants did not have any reasonable basis, much less a strong basis in evidence, upon which to conclude that they faced potential Section 2 liability in the areas where they drew the challenged districts. Second, it establishes that Defendants had no compelling justification for corralling black citizens in the challenged districts and for creating those districts in numbers proportional to the State's black population. Third, it establishes that that the challenged districts use race excessively and are not narrowly tailored.

Instead of focusing on the critical question whether white citizens vote sufficiently as a bloc in the challenged districts usually to defeat the preferred candidate of black voters, Defendants have invented, *post hoc*, an alternative factual basis supposedly providing them a strong basis in evidence to corral black voters in the challenged districts to comply with the VRA, as they interpreted it. This alternative ground begins with the fact that "the actual margins of victory for African-American incumbents in elections…were less than the amount by which their districts were underpopulated or overpopulated." (Defs'. Br. 69).

This evidence is legally and logically flawed. Moreover, an examination of the actual numbers on which Defendants base this argument further demonstrates Defendants' extraordinary focus on race in drawing the challenged districts and the massive race-based shifting of citizens required to create the challenged districts.

Initially, this evidence does not even address, much less answer, the critical question here: whether white citizens in the challenged districts were voting sufficiently as a bloc usually to defeat the preferred candidate of black citizens. The irrelevance of this evidence to the critical issue here is illustrated by Defendants' failure to cite any case at any time in which any other court has received or weighed such evidence. Further, this is not a factual issue on which Plaintiffs bear the burden of proof. *See Miller*, 515 U.S. at 920 ("To satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest") (internal quotations and citations omitted). That is Defendants' burden, and it cannot be carried by irrelevant evidence.

Placing this evidence in context demonstrates both its irrelevance in answering whether white citizens vote sufficiently as a bloc usually to defeat the preferred candidate of black citizens and its power in demonstrating Defendants' extraordinary focus on, and use of, race in drawing the challenged districts whether they were under-populated or overpopulated. Examples from the Senate, House, and Congressional plans illustrate the excessive use of race without justification:

Senate examples. Based on 2010 census data, SD 14, in Wake County as enacted in 2003 was overpopulated by 41,804. As of 2010, 75,610 white voting age citizens and 70,421 black voting age citizens resided in the district. At the

2010 election, Senator Blue defeated his Republican opponent in this majority white district by a 2 to 1 ratio (40,746 votes to 21,067 votes). To correct the overpopulation problem in SD 14 and at the same time meet their 50% plus TBVAP goal for revised SD 14, despite the landslide victory of the preferred candidate of black voters in 2010, Defendants moved 26,960 white citizens out of the district, but only 642 black citizens out of the district. (R pp 657-68, 1214-15).

Based on 2010 census data, SD 21, in Cumberland County as enacted in 2003 was under populated by 26,593. As of 2010, 55,371 white voting age citizens and 54,173 black voting age citizens resided in the district. At the 2010 election, Senator Mansfield defeated his Republican opponent in this majority white district by a 2 to 1 ratio (21,004 votes to 10,062 votes). To correct the under-population problem in SD 21 and at the same time meet their 50% plus TBVAP goal for revised SD 21, despite the landslide victory of the preferred candidate of black voters in 2010, Defendants moved 13,184 black citizens into the district and moved 5,535 white citizens out of the district. (R p 657-68, 1219).

House examples. Based on 2010 census data, HD 21, in Sampson and Wayne counties as enacted in 2003 was under-populated by 9,837. As of 2010, 22,177 white voting age citizens and 23,908 black voting age citizens resided in the district. At the 2010 election, Representative Bell defeated his Republican opponent in this district by a 2 to 1 ratio (11,678 votes to 6,126 votes). To correct

the under-population problem in HD 21 and at the same time meet their 50% plus TBVAP goal for revised HD 21, despite the landslide victory of the preferred candidate of black voters in 2010, Defendants moved 8,426 black citizens into the district but only moved 2,000 white citizens into the district. (R p 657-68, 1229).

Based on 2010 census data, HD 99 in Mecklenburg County as enacted in 2003 was over populated by 32,850. As of 2010, 37,203 white voting age citizens and 35,277 black voting age citizens resided in the district. At the 2010 election, Representative Moore defeated his Republican opponent in this majority white district by a 2 to 1 ratio (15,591 votes to 6,059 votes). To correct the overpopulation problem in HD 99 and at the same time meet their 50% plus TBVAP goal for revised HD 99, despite the landslide victory of the preferred candidate of black voters in 2010, defendants moved 21,306 white voters out of the district but only moved 6,025 black voters out of the district. (R pp 657-68, 1237).

Congressional example. Based on 2010 census data, CD 1, as enacted in 2001 was under populated by 97,563. As of 2010, 228,430 white voting age citizens and 236,757 black voting age citizens resided in the district. At the 2010 election, Congressman Butterfield defeated his Republican opponent in this district by a 5-to 2 ratio (103,294 votes to 70,867 votes). To correct the under-population problem in CD 1 and at the same time meet their 50% plus TBVAP goal for revised CD 1, despite the landslide victory of the preferred candidate of black

voters in 2010, Defendants moved 41,151 black citizens into the district and moved 1,006 white citizens out of the district. 1,006. (R pp 657-68, 1240).

Each of these examples illustrates that Defendants' use of race permeated every decision Defendants and their consultant made in drawing the district lines. *See ALBC*, 135 S. Ct. at 1271 ("if the legislature must place 1,000 or so additional voters in a particular district in order to achieve an equal population goal, the 'predominance' question concerns *which* voters the legislature decides to choose, and specifically whether the legislature predominately uses race as opposed to other, 'traditional' factors when doing so"). The population disparities reveal nothing about *which* voters the legislature decided to choose and thus nothing about whether Defendants had a strong basis in evidence to support their race-based choices.

IV. DEFENDANTS HAVE NOT DISPUTED THAT GERRYMANDERED DISTRICTS MECHANICALLY DRAWN TO ACHIEVE ARTIFICIAL GOALS ARE NOT NARROWLY TAILORED

The United States Supreme Court in *ALBC* condemned the construction of districts based on a "mechanically numerical view" of Alabama's duties under the Voting Rights Act, and described the reasons why a mechanical, numbers-based approach to redistricting will not survive strict scrutiny. (Pls.' Br. 27). These points are not disputed by Defendants in their brief. Nor can there be any dispute

that Defendants here, like the defendant in *ALBC*, used a mechanical, numbers-based process to draw the challenged districts.

Senator Rucho and Representative Lewis first set their race based goals: draw 10 Senate Districts and 24 House districts in which black citizens were at least 50% of the district's voting age population. The goal for the number of Senate and House districts was based on a mechanical calculation: the State's TBVAP divided by the number of seats in the Senate and House. They then retained an out of state consultant unfamiliar with any of the state's 100 counties or its 522 municipalities and instructed him to draw these districts on a blank map of the state before filling in any of the other 40 Senate seats or 96 House seats. Using racial data the consultant located these 10 Senate seats and 24 House seats in diverse urban and rural areas from the Coastal Plain through the Piedmont. He applied the 50% minimum TBVAP percentage requirement mechanically across the state as if voting patterns, behaviors and results were the same in counties as culturally, economically, and historically diverse as Gates and Mecklenburg, Martin and Guilford, Bertie and Durham, Robeson and Wake, and Hertford and Cumberland. The General Assembly then enacted 9 Senate districts with more than 50% TBVAP and 23 House districts with more than 50% TBVAP, as drawn by their out of state consultant with only minor modifications.

V. DEFENDANTS' ARGUMENTS THAT THE TRIAL COURT'S NARROW TAILORING FINDINGS ARE BINDING ON APPEAL ARE WRONG ON A NUMBER OF GROUNDS

Defendants argue that the findings of fact made by the trial court are "unchallenged and more than show a strong basis in evidence to support the trial court's legal conclusions." (Defs.' Br. 64). They are wrong on both counts. The findings to which Defendants refer are the findings the trial court made following a two-day trial to resolve the following issue drafted by the trial court:

> Assuming application of a strict scrutiny standard and, in considering whether the Enacted Plans were narrowly tailored, was each challenged VRA district drawn in a place where a remedy or potential remedy for *racially polarized voting was reasonable for purposes of preclearance or protection of the State from vote dilution claims* under the Constitution or under Section 2 of the VRA?

(R p 1270) (emphasis added).

There are two major flaws in the findings the trial court made regarding this issue. First, it is well established that "facts found under misapprehension of the law will be set aside on the theory that the evidence should be considered in its true legal light." *Concerned Citizens v. State*, 329 N.C. 37, 46, 404 S.E.2d 677, 683 (1991) (quoting *Helms v. Rea*, 282 N.C. 610, 620, 194 S.E.2d 1, 8 (1973)). On its face the issue drafted by the trial court encompasses at least four separate legal errors establishing that the trial court, in numerous respects, did not consider the evidence in its true light:

(A) The strict scrutiny standard that Defendants had to meet was not whether they had "reasonable" grounds for drawing the districts; they had to have a "strong basis in evidence" for concluding that the challenged districts were both necessary, and narrowly tailored, to comply with proper interpretations of the VRA. *ALBC*, 135 S. Ct. at 1273-74.

(B) As noted above, "racially polarized voting" is an insufficient ground upon which Defendants could conclude that they had "a strong basis in evidence" that the challenged districts were necessary to obtain preclearance under Section 5, properly interpreted, or to comply with Section 2, properly interpreted.

(C) As also noted above, Defendants' purpose in drawing the challenged districts was not simply to obtain "preclearance or protection" from Section 2 claims. Their purpose was the non-compelling purpose of guaranteed preclearance and immunity from Section 2 claims.

(D) As pointed out in Plaintiffs' opening brief at pages 39-42, the trial court then allocated to Plaintiffs the burden to prove that Defendants did not have an adequate basis for drawing the challenged districts in direct violation of the explicit holding of

> the United States Supreme Court in 2013 in *Fisher v. University of Texas*, 133 S. Ct. 2411, 2419-20 (2013), that "[s]trict scrutiny is a searching examination, and *it is the government that bears the burden to prove* that the reasons for any racial classification are clearly identified and unquestionably legitimate," and the "*University must prove* that the means chosen by the University to attain diversity are narrowly tailored to that goal." (emphasis added).

This failure by the trial court to view the narrow tailoring evidence in its "true light" was compounded by the trial court's verbatim adoption, as its own, of the findings of fact on this issue presented by Defendants. Strict scrutiny requires a "searching judicial inquiry," and "blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *J.A. Croson Co.*, 488 U.S. at 493, 501.

The second major flaw in the trial court's findings is that those findings ignored the undisputed evidence most probative of the central issues in this case: first, whether Defendants had a strong basis in evidence for concluding that absent an increase in the TBVAP percentages in the challenged districts in Section 5 counties the districts would not be precleared and second, that an increase in the TBVAP in all challenged districts was necessary to protect the State from liability

under Section 2, properly interpreted. When that undisputed evidence is considered it is clear that this Court should issue an order declaring all challenged districts unconstitutional.

VI. DEFENDANTS' EFFORTS TO SALVAGE CD 12 AND SD 32 FAIL

Defendants make an effort in their brief to salvage CD 12 and SD 32. (Defs.' Br. 39-44). Those efforts fail.

There is no doubt that the same racial considerations that drove Defendants to draw the lines of the 26 challenged VRA districts also motivated Defendants in drawing Congressional District 12 and Senate District 32. With regard to SD 32, Defendants now contend the WCP and equal population objectives dictated the district lines. They claim the WCP "speaks to the identity of voters who are placed in a district and not just the number of voters." (Defs.' Br. 46) (citing *ALBC*, 135 S. Ct. at 1271). They fail to explain how the WCP resulted in the placement of the lines within Forsyth County. It is difficult to determine how the WCP grouping requirement resulted in the bizarre lines drawn to pick up black voters and exclude white voters, particularly where the district is drawn wholly within a single county. (Doc. Ex. 7404). The same can be said for the equal population requirements. Any constraints on Defendants in drawing the district lines to account for county groupings or equal population requirements had no effect on which voters within Forsyth County were placed in the district. Equal population objectives are a

background rule, taken as a given, not a factor to balance when determining whether race predominated. *ALBC*, 135 S. Ct. at 1271. *ALBC* makes clear that in determining whether race predominated, this Court must compare the voters placed into the district with those excluded from the district. *Id.* at 1265. A review of the shaded map of SD32 reveals that Defendants drew the district lines based on the race of the individuals residing in the census blocks. The higher the percentage of black voters in a census block, the more likely that census block would be included in SD 32. Thus, race, not equal population or the WCP, determined the district's shape. Moreover, simply because the percentage of black voters in SD 32 is below 50% does not mean race did not predominate. The predominance test the U.S. Supreme Court explained is whether race is "the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Id.* (quoting *Miller*, 515 U.S. at 916). By the Supreme Court's own words, the test does not require the district to have a majority of black voters, and Defendants have cited no case requiring a majority of black voters to constitute a racial gerrymander.

With regard to CD 12, Defendants' position appears to be that because in 1997 and 2001 Democrats drew the district on the basis of politics, Defendants must have also drawn it on the basis of politics in 2011. This argument does not make logical sense, and again, Defendants are asking the wrong question. The

question for the 2011 version of CD 12, as it was for the two prior versions, is whether race was the predominant factor motivating the decision to place a significant number of voters in or out of the district. *ALBC*, 135 S. Ct. at 1265. Dr. David Peterson's segment analysis answers this question, showing that racial considerations better explain the boundary lines than partisan considerations. (Doc. Ex. 348). Furthermore, in their own written statement, Rucho and Lewis stated they drew CD 12 with a higher BVAP to ensure preclearance. (Doc. Ex. 559). Their contemporaneous statement, along with the increase in TBVAP from 43.8% to 50.7%, the excessive splitting of precincts and counties, and the shape of CD 12 make evident that race, not politics, predominated.

VII. DEFENDANTS CANNOT DISTINGUISH *PAGE V. VIRGINIA STATE BOARD OF ELECTIONS*

Defendants argue the recent redistricting decision in Virginia on remand from the United States Supreme Court is distinguishable, making four feeble arguments to distinguish this case from *Page v. Virginia State Board of Elections*, No. 3:13-cv-678 (E.D. Va. Jun. 25, 2015) (Opinion at Dkt. No. 170). Defendants' arguments are untrue and irrelevant. First, Defendants contend *Page* did not involve any neutral redistricting criteria, like the WCP, or a political defense. Defendants are wrong. In *Page*, the intervenor-defendants argued the legislature's use of race simply coincided with "its acknowledged race-neutral goals of politics, incumbency protection, and core preservation." Intervenor-Defendants' Response

Brief Regarding Alabama Legislative Black Caucus v. Alabama, 3:13-cv-678, D.E. # 151, p. 2. Thus, both politics and neutral redistricting criteria were defenses advanced by the legislature in *Page*. There, as here, they were insufficient to overcome the conclusion that race predominated in the drawing of the challenged districts. Second, Defendants contend that the *Page* plaintiffs did not argue congressional district 3 was a racial gerrymander just because it was majority-black. Defendants' point is irrelevant. Plaintiffs here are not arguing that the challenged districts are racial gerrymanders just because they are majority-black. As previously described, the issue is whether race predominated over traditional redistricting criteria. In *Page*, the evidence showed the legislature established and applied a threshold of 55% for the BVAP of the district. That threshold is akin to the quota and the threshold of 50% plus one here. In both cases, ALBC establishes that mechanical quotas and thresholds are constitutionally-problematic.

Third, Defendants contend there was no expert testimony in *Page* of racially-polarized voting in the area of Virginia's Third Congressional District. This point does not make *Page* inapplicable here. In *Page*, the legislature failed to conduct any racially polarized voting analysis at all. Here, Defendants erroneously relied on generalized findings of racially polarized voting, rather than determining whether that racially polarized voting usually resulted in the defeat of black voters' candidates of choice. Both practices are contrary to what is required to survive

strict scrutiny when a legislature intentionally uses race to draw election districts. Finally, Defendants contend that there was no Section 2 defense in *Page* and that North Carolina used a Section 2 standard for percentages set by the North Carolina and United States Supreme Courts. Again, this contention is irrelevant. Here, Defendants' Section 5 defense fails for the reasons explained by *ALBC* and *Page* and as described in Plaintiffs' opening brief at pages 21-23. Neither *ALBC* nor *Page* established that 50% plus one is automatically constitutionally permissible. The reason no court (including the Supreme Court in *Strickland*, as described above) has ever said 50% plus one is a sufficient use of race to inoculate against potential liability is because any racial remedy has to be justified. It is the minority voters' inability to elect candidates of choice that justifies the use of race, not a predetermined racial threshold. Thus, for all of these reasons and for the reasons in Plaintiffs' opening brief, the *Page* decision is relevant guidance for this Court in applying *ALBC* on remand.

CONCLUSION

For the foregoing reasons and for all of the reasons in Plaintiffs' opening brief, Plaintiffs respectfully request that this Court, applying the United States Supreme Court holding in *ALBC*, rule that the districts challenged here are unconstitutional racial gerrymanders in violation of Plaintiffs' right to equal

protection of the law and permit the General Assembly two weeks to enact new districts that remedy the constitutional violation.

Respectfully submitted, this the 27th day of July, 2015.

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This the 27th day of June, 2015.

/s/ Edwin M. Speas, Jr.
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