IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION
Civil Action No. 1:13-CV-00949

DAVID HARRIS; CHRISTINE BOWSER; and SAMUEL LOVE, Plaintiffs, v. PATRICK MCCRORY, in his capacity as Governor of North Carolina; NORTH CAROLINA STATE BOARD OF ELECTIONS; and JOSHUA HOWARD, in his capacity as Chairman of the North Carolina State Board of Elections, Defendants.	**DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

INTRODUCTION

The claims raised by the plaintiffs in the instant case have been thoroughly litigated (by many of the same lawyers) in a nearly identical State court case currently pending before the North Carolina Supreme Court. Plaintiffs' interests in that case were advocated by their counsel in this case (Poyner and Spruill) and other lawyers – all of whom are among the foremost voting rights attorneys in the country. The State court in that litigation denied a similar motion for a preliminary injunction in January 2011. Thereafter, following extensive discovery and a two-day trial, the State court entered a lengthy and detailed opinion rejecting claims by those plaintiffs that the First or Twelfth Congressional Districts are unconstitutional gerrymanders. Plaintiffs in this case equally have failed to make a clear showing that they are likely to succeed on the merits.

Moreover, it is hard to understand how plaintiffs could be irreparably harmed should the State hold congressional elections under a plan that was used in the 2012 general elections and which has already been found to be constitutional in a well-reasoned opinion by a three-judge State court.

I. FACTUAL BACKGROUND

A. The 2011 Redistricting Proceedings in State Court.

The history of the 2011 redistricting which produced the First and Twelfth Districts at issue in this case, as well as the lengthy and thorough State court proceedings finding those districts constitutional, is recounted in a detailed Judgment and Memorandum Opinion issued by a three-judge court of the North Carolina Superior Court appointed by the Chief Justice of the North Carolina Supreme Court. *See* Judgment and Memorandum Opinion, *Dickson v. Rucho*, Nos. 11 CVS 16896 and 11 CVS 16940 (consolidated) (July 8, 2013) ("*Dickson*") (attached as Ex. A)[1] Pages 5 – 7 of the Opinion accurately recite this history and defendants incorporate it herein by reference.

As it relates to the instant litigation, the *Dickson* plaintiffs also challenged the First and Twelfth Congressional Districts on all of the grounds that the *Harris* plaintiffs challenge them here. After a two-day trial focusing on, among other districts, the Twelfth District, the three-judge panel issued its Opinion. Regarding the 2011 First District, the court found as a matter of law that the General Assembly had a strong basis

[1] The Judgment and Memorandum Opinion without appendix is available on Westlaw at 2013 WL 3376658. Because the electronic version does not contain the appendix, for consistency citations in this memorandum will correspond to the page numbers as they appear in Ex. A with the two appendices and not the online version.

in evidence to conclude that the district was reasonably necessary to protect the State from liability under the Voting Rights Act ("VRA") and that the district was narrowly tailored. (*Dickson*, pp. 9-23, 28-30, 44, Appendix A pp. 77-95, F.F. Nos. 1-36; 155-57, F.F. Nos. 165-71)

Regarding the 2011 Twelfth District, the three-judge court, sitting as the finder of disputed facts, made detailed and express findings that the General Assembly's predominant motive for the location of the district lines was to re-create the 2011 Twelfth District as a strong Democratic-performing district and that race was not the predominant motive. (*Dickson*, pp. 46-49, Appendix A, pp. 157-59, Appendix B. pp. 161-63)

On July 22, 2013, the *Dickson* and *NC NAACP* plaintiffs filed their notice of appeal from the State trial court's Judgment. Oral argument on this appeal was held by the North Carolina Supreme Court on January 6, 2014. Plaintiffs in the instant case filed their Complaint on October 24, 2013 -- three months after the State court Judgment, and filed the instant Motion for Preliminary Injunction on December 24, 2013 -- five months after the Judgment.

B. The relevant history of the challenged districts: majority-minority, minority coalition, crossover, and influence districts under § 2 of the VRA.

To understand the issues in this case, a brief background of the legal developments affecting the First and Twelfth Districts is necessary.

Over the years of voting rights litigation, courts have defined four different types of districts based upon their racial compositions. In 2009, the Supreme Court clarified that "majority-minority districts" are districts in which a specific minority constitutes an

actual majority of the voting age population. *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009). Minority "coalition" districts are districts in which two minority groups constitute a majority and form a coalition to elect the coalition's candidate of choice. *Id.* Majority-white "crossover" districts are districts in which minority voters make up less than a majority but are potentially large enough to elect their candidate of choice with the help of some white "crossover" voters. *Id*. "Influence" districts are districts in which the minority group can influence the outcome of an election even if its preferred candidate of choice cannot be elected. *Id*.

During redistricting, a State may enact § 2 districts when it has a reasonable fear of potential liability under § 2. *Bush v. Vera*, 517 U.S. 952, 997 (1996). In *League of Latin American Voters v. Perry*, 548 U.S. 399 (2006) ("*LULAC*"), the United States Supreme Court rejected the proposition that influence districts could be required under § 2. *Id.* at 445-46. In *Strickland*, the State of North Carolina argued that a white crossover district (House District 18) was an acceptable remedy for racially polarized voting under § 2. The U.S. Supreme Court rejected this argument and held that a majority-minority district under § 2 requires that the specific minority group constitute a majority of the voting age population. *Strickland*, 556 U.S. at 19-20. The Court also held that majority-white crossover districts are not an acceptable remedy under § 2. *Id.* at 23. Finally, the Court declined to rule on whether § 2 might require a state to draw a majority-minority coalition district. *Id.*

Thus, by the time the North Carolina General Assembly convened in 2011 to consider the redistricting plans at issue in this litigation, the Supreme Court had clarified

ambiguities in the law that existed when the previous Congressional redistricting plan (known as Congress Zero Deviation) was enacted in 2001. By 2011, the Supreme Court had ruled that states could not be required to enact influence districts under § 2, had rejected arguments that white crossover districts might be required under § 2, and had held that a majority-minority district had to be constructed so that the minority group constituted an actual majority of the voting age population. The *Strickland* decision thereby rejected another theory of VRA districts, expressed in a concurring opinion by Justices Souter and Ginsburg in *LULAC*, that § 2 might require a remedial district with less than a majority of minority population provided the minority group was a majority of the registered voters of the party that usually controlled the district. *LULAC*, 548 U.S. at 485-86.[2]

C. Racial gerrymandering litigation involving the First and Twelfth Congressional Districts.

In 1991, the State of North Carolina adopted a congressional plan with a single majority-black district, the First Congressional District ("First District"), located in the northeastern region of the State and extending into Durham County. *Shaw v. Hunt*, 861

[2] Two circuit courts have held that majority-minority coalition districts might be required under § 2 when a specific minority group is not large enough to constitute an actual majority. *Bridgeport Coalition for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 273 (2d Cir. 1984); *Campos v. City of Baytown Texas*, 840 F.2d 1240, 1244 (5th Cir. 1988). One circuit has rejected majority coalition districts as possible remedies under § 2. *Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996). To date, the Supreme Court has declined to resolve this split between the circuit courts. *See Strickland*, 556 U.S. at 13-14.

F. Supp. 408, 460-61 (E.D.N.C. 1984), *rev'd*, 517 U.S. 899, 902 (1996) ("*Shaw II*").[3] The State submitted the plan for preclearance under § 5 of the VRA. The United States Attorney General ("USAG") did not object to the proposed First District, but did register an objection to the State's failure to create a majority-minority coalition district that would combine African Americans with Native Americans living in Mecklenburg County and the southcentral and southeastern parts of the State. *Id.*

The General Assembly responded by enacting a new version of the First District and a second majority-black district (the "Twelfth Congressional District" or "Twelfth District"). This district started in Gaston County, continued through Mecklenburg County, and then used interstate highways to connect dispersed pockets of African American population in Forsyth, Guilford, and Durham Counties. 861 F. Supp. at 465-67; 517 U.S. at 902; 1991 N.C. Extra Sess. Laws Chapter 7.[4] The General Assembly declined to enact the district suggested by the USAG because of the negative political impact such a district would have on three incumbent Democratic Congressmen. 864 F. Supp. at 465-67.

Under the 1990 Census, the 1992 version of the First District was created with a Black Population ("BPOP") of 57.26% and a Black Voting Age Population ("BVAP") of

[3] The 1991 First District was drawn into Durham County and is similar in appearance to the 2011 First District. (*Dickson*, Third Affidavit of Dan Frey ("Third Frey Aff."), ¶ 22, Ex. 84) (attached as Ex. D)

[4] (*See* Fourth Affidavit of Dan Frey ("Fourth Frey Aff."), Listing of North Carolina Congressional Districts, Maps, and Statistics, Ex. 1 [1992 Congressional Base Plan # 10]) (attached as Ex. E)

53.40%. The Twelfth District was constructed with a BPOP of 56.63% and a BVAP of 53.43%. (*See* Fourth Frey Aff. Ex. 1, pp. 2, 3) (attached as Ex. E)

In *Shaw v. Reno*, 509 U.S. 630 (1993) ("*Shaw I*"), the Supreme Court held that plaintiffs had stated a claim with allegations that the First and Twelfth Districts constituted racial gerrymanders. The Court held that statutes that are "unexplainable on grounds other than race" must be narrowly tailored to further a compelling government interest. *Shaw I*, 509 U.S. at 643 (*citing Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 277, 277-78 (1986); *Arlington Heights v. Metropolitan Housing Devel. Corp.*, 429 U.S. 252, 266 (1977)). The case was then remanded for trial. *Shaw I*, 509 U.S. at 658.

Following remand, the trial court ruled in favor of the defendants and dismissed plaintiffs' claims. *Shaw II*, 861 F. Supp. at 408. In support of this holding, the Court ruled that the two districts advanced a compelling interest because they were reasonably necessary to avoid liability under § 5 and § 2 of the VRA. The Court also held that the districts were narrowly tailored. *Shaw II*, 861 F. Supp. at 473-74.

In *Shaw II*, the Supreme Court reversed the district court and found that plaintiffs had carried their burden of proving that the Twelfth District constituted an illegal racial gerrymander.[5]

Subsequent cases have held or reiterated that plaintiffs bear the burden of proving that race was the predominant motive for the shape and location of the challenged district and that race is not the predominant motive for a specific district simply because the

[5] The Court dismissed plaintiff's claims regarding the First District because none of the plaintiffs resided in the First District and therefore lacked standing to challenge its composition. *Shaw II*, 517 U.S. at 904.

challenged district was drawn with a "consciousness" of race or has a majority TBVAP. *Vera*, 517 U.S. at 958. Race is the predominant motive *only* when a plaintiff proves that the challenged district "is unexplainable on grounds other than race." *Easley v. Cromartie*, 133 F. Supp. 2d 407, *rev'd in part*, 532 U.S. 234, 242 (2001) ("*Cromartie II*") (citing *Cromartie v. Hunt*, 526 U.S. 541, 546 (1999) ("*Cromartie I*") and quoting *Shaw I*, 509 U.S. at 644). In *Cromartie II*, the Court described plaintiffs' burden of proof on the issue of predominant motive as a "demanding one." *Id.* at 241 (internal citation omitted).

Assuming plaintiffs prove that race was the predominant motive, "in . . . a reverse-discrimination case, as in any other Equal Protection case, the ultimate burden remains with the plaintiff to demonstrate [the] unconstitutionality of [the] affirmative-action program." *Shaw II*, 861 F. Supp. at 436; 517 U.S. at 910 (quoting *Wygant*, 476 U.S. at 277). This only gives rise to a presumption that the district is unconstitutional. The presumption "shifts" to the State a burden of "'demonstrating' that its use of race was justified by a compelling governmental interest." *Id.* (quoting *Wygant*, 476 U.S. at 293). The State's burden is one of production, not persuasion. *Id.*; *see also Johnson v. Miller*, 864 F. Supp. 1354, 1378-79 (S.D. Ga. 1994), *aff'd*, *Miller v. Johnson*, 515 U.S. 900 (1995). Defendants can meet this burden of production by showing that when the General Assembly enacted a challenged district, it had "a strong basis in evidence" to conclude that the district was reasonably necessary to protect the State from liability under the VRA. *Shaw II*, 517 U.S. at 910; *Vera*, 517 U.S. at 979.[6] Once defendants have

[6] The strong basis in evidence test resembles the "substantial evidence" standard used by the North Carolina Supreme Court and federal courts to review agency decisions. *See,*

shown a strong basis in the legislative record that reasonably supports the creation of a challenged VRA district, they have satisfied their burden of production, and it remains plaintiffs' burden to prove that the challenged district is nevertheless unconstitutional. *Shaw II*, 517 U.S. at 910 (quoting *Wygant*, 476 U.S. at 277).[7]

The Court in *Shaw II* found that plaintiffs had demonstrated that race "was the predominant factor" behind the legislature's decision to place a significant number of voters within or without the Twelfth district. *Id.* at 905. The Court rejected the district court's decision that the Twelfth District was narrowly tailored to protect the State from liability under § 5 or § 2. *Id.* at 911. The Court held that, because of its location, the Twelfth District could not substantially remedy any vote dilution claim that might be

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e.g., *N.C. Dep't of Env't and Natural Res. v. Carroll*, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004) (applying whole record test and stating that "[s]ubstantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion.") (citations and quotation marks omitted). The term "substantial evidence" means "such relevant evidence as a reasonable mind *might* accept as adequate to support a conclusion." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 477 (1951) (emphasis added). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. FMC*, 383 U.S. 607, 620 (1966) (internal citations omitted).

[7] The model for analyzing evidence in a racial gerrymander case (if plaintiffs prove that race was the predominant motive) is similar to the formula used by the United States Supreme Court to analyze evidence in employment cases. To meet their burden of production in employment cases, defendants are only required to state a legitimate, non-discriminatory reason for their decision. *Texas Dep't of Comm. Affairs v. Burdine*, 450 U.S. 248, 250 (1981).

alleged by African American and Native Americans living in Mecklenburg County or south central and southeastern North Carolina. *Id.* at 917-18. [8]

Following *Shaw II*, the State once again changed the First and Twelfth Congressional Districts. *Cromartie I*, 526 U.S. at 542; 1997 N.C. Sess. Laws Ch. 11; (Fourth Frey Aff. Ex. 2 [1997 House/Senate Plan A]) (attached as Ex. E) Under the 1997 plan, African Americans constituted approximately 47% of the total population and 43% of the voting age population in the Twelfth District. *Cromartie I*, 526 U.S. at 544. The First District was constructed so that African-Americans constituted 50.27% of the total population and 46.53% of the voting age population. *Cromartie II*, 133 F. Supp. 2d at 415 n.6.

In *Cromartie I*, the district court granted plaintiffs' motion for summary judgment, holding that the 1997 version of the Twelfth Congressional District constituted a racial gerrymander. The district court rejected the State's argument that political considerations, and not race, were the predominant reason for the location of the district lines.

In *Cromartie I*, the Supreme Court reversed the district court and remanded the case for trial. 526 U.S. at 553-54. The Court held that the district court was required to accept as true the State's evidence that the Twelfth District was politically motivated and that summary judgment was therefore inappropriate. *Id.* at 551. The Court stated that evidence that blacks constitute even a *super*majority in a challenged district does not

[8] This was the minority population identified by the USAG as the compact minority population capable of alleging a § 2 claim.

"suffice" to prove that "a jurisdiction was motivated by race in drawing its district lines when the evidence shows a high correlation between race and party preference." *Id.* The Court also noted that "just as summary judgment is rarely granted in plaintiff's favor in cases where the issue is defendant's racial motivation, such as disparate treatment suits under Title VII . . . the same hold true for racial gerrymandering claims." *Id.* at 553 n. 9.[9]

In *Cromartie II*, following a trial on the merits, the district court found that the First District was based upon the compelling interest of avoiding liability under the VRA and that the district was narrowly tailored and therefore constitutional. 133 F. Supp. at 421-23. The factual basis to support this finding included a stipulation, approved by the district court that "the white majority votes sufficiently as a bloc to often enable it to defeat the minority's preferred candidate." *Id*. at 422. In contrast, the district court ruled that the Twelfth District was an illegal racial gerrymander. *Id.* at 418-21. The Court once again relied on testimony by plaintiffs' expert that race, and not *party registration*, better explained the district lines. *Id.* at 419.

Plaintiffs did not appeal the district court's ruling in *Cromartie II* regarding the First District. However, the State appealed the district court's holding that the Twelfth

[9] In a concurring opinion, Justices Stevens, Souter, Ginsberg, and Breyer noted that "the most remarkable feature of the District Court's erroneous decision is that it relied entirely on data concerning the location of registered Democrats and ignored the more probative evidence of how people who live near the borders of District 12 actually voted in recent elections." *Id.* at 557. The concurring Justices also noted that the evidence showed that the members responsible for drawing District 12 had relied upon "election results, not voter registration," and that "all of the majority-Democrat precincts that the State legislature excluded from District 12 in favor of precincts with higher black populations produced significantly less dependable Democratic results and actually voted for one or more Republicans in recent elections." *Id.*

District was unconstitutional. In *Cromartie II*, in an opinion written by Justice Souter, the Court once again reversed the decision by the district court. The Court outlined the following criteria to be applied in cases involving claims of alleged racial gerrymanders.

> 1. Plaintiffs' burden of proof is a "demanding one." *Cromartie II*, 532 U.S. at 241.
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> 2. Plaintiffs must show at a minimum that the "legislature subordinated traditional race-neutral criteria . . . to racial considerations." *Id.*
>
> 3. Race must not simply have been a factor, but must be the *predominant* factor motivating the legislature's districting decision. *Id.* (citing *Cromartie I*, 526 U.S. at 547).
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> 4. Plaintiffs must show that the district lines are "unexplainable on grounds other than race." *Id.* at 242.
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> 5. Districting decisions ordinarily fall within a legislature's sphere of competence. *Id.* (citing *Miller*, 515 U.S. at 915). A legislature must have discretion to exercise the political judgment necessary to balance competing interests and a court must exercise extraordinary caution in adjudicating claims that a state has drawn district lines on the basis of race. *Id.* (citing *Miller*, 515 U.S. at 916). Caution is especially appropriate when 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. *Id.* (citing *Cromartie I*, 526 U.S. at 551-52).
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> 6. Finally, in cases where "majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with "political affiliation" plaintiffs "must show" that: (a) the legislature could have achieved its political objectives in alternative ways that are "comparably consistent with traditional districting principles;" and (b) that districting alternatives proposed by plaintiffs would "have brought about significantly greater racial balance." *Id.* at 258.

Applying these standards, the Court found that the district court's findings were clearly erroneous. *Id.* at 242. The Court found that the district court had again erroneously relied upon *party registration* statistics as opposed to actual voting patterns.

Id. at 245. This included evidence that white registered Democrats vote for Republican candidates at a far higher percentage than do African Americans. *Id.* The Court observed that:

> A legislature trying to secure a safe Democratic seat is interested in Democratic voting behavior. Hence a legislature may, by placing reliable Democratic precincts within a district without regard to race, end up with a district containing heavily African-American precincts, but the reasons would be political rather than racial.

Id.

D. The 2001 Congressional Plans created both the First and Twelfth Congressional Districts as majority-minority coalition districts and as strong Democratic districts in which African-Americans constituted a majority of the registered Democrats.

Following the decision in *Cromartie II*, in 2001 the North Carolina General Assembly enacted a Congressional Plan called "Congress Zero Deviation." (Fourth Frey Aff. Ex. 4) (attached as Ex. E) The 2001 First District was based upon the 1997 version and therefore designed to protect the State from § 2 liability. Under the 2000 census, it was established with a majority-black population ("BPOP") of 50.71% and a "white" total population of 45.44%. (*Id.* at p. 1)[10] "Other" racial groups constituted 3.85% of the total population. (*Id.*) Under the 2000 Census, blacks constituted 47.76% of the voting age population ("VAP"), "whites" constituted 48.80% of the voting age population ("VAP"), and Hispanics constituted 2.77% of the VAP. (*Id.* at pp. 4, 5)[11]

[10] The category of "white" is calculated without regard to ethnicity and therefore includes Hispanics. (*See Dickson*, Second Affidavit of Dan Frey ("Second Frey Aff.") p. 26, Exs. 60-64, notes) (attached as Ex. C); (Fourth Frey Aff. ¶ 3) (attached as Ex. E)

[11] Under the 2000 Census, both the BPOP and the BVAP for the 2001 First District was slightly higher than the comparable percentages for the 1997 version of that district under the 1990 Census.

Thus, under the 2000 Census, the First District was not a majority-white district, whether the census category consists of total population or voting age population. The 2001 First District was a majority-black district based upon total population. The 2001 First District was a majority-minority coalition district based upon VAP.

The 2001 version of the Twelfth District is almost identical to the 1997 version. (*Id.*) Thus, it was again established by the General Assembly as a safe district for a Democratic candidate. Under the 2000 Census, the Twelfth District was created with a BPOP of 45.02% and a BVAP of 42.31%. White population, including Hispanics, totaled 47.18%. The white VAP, including Hispanics, was 50.57%. Other groups constituted 7.82% of the total population and 7.12% of the VAP. Hispanics constituted 6.72% of the VAP. (*Id.* at Ex. 4, pp. 2, 4, 5) Therefore, under the 2000 Census, the 2001 version of the Twelfth District was not majority-white in total population. Non-Hispanic whites were not a majority of VAP because Hispanics represented at least 6.72% of the VAP.

The 2011 General Assembly released statistics on the racial composition of the 2001 First and Twelfth Districts under the 2010 Census. For the first time, the General Assembly released three new reports that are relevant to this litigation. Statistics for each district included a column for persons who reported themselves to the Census Bureau as being single race black (or "Black" under the General Assembly's reports) plus individuals who reported themselves "any part black" (or "Total Black" under the

General Assembly's reports) (Fourth Frey Aff. ¶ 7) (attached as Ex. E)[12] The 2011 reports also included a column for "non-Hispanic white" in the categories of total population and VAP. Finally, the 2011 reports include registration by party and race. (*See id.* at Ex. 5; Second Frey Aff. ¶ 26, Exs. 60, 64) (attached as Ex. C))

Under the 2010 Census, the 2001 First District was under-populated by 97,563 persons as compared to the 2010 ideal population for a congressional district (733,499). (Fourth Frey Aff. Ex. 5, p. 1) (attached as Ex. E) The 2001 First District was the most under-populated of North Carolina's thirteen congressional districts. (*Id.*). Under the 2010 Census, the 2001 First District's total population was 49.65% single-race black, 44.19% white, including Hispanics, 50.65% any part black or Total Black Population ("TBPOP"), and 42.56% non-Hispanic white.[13] Voting age population in the 2001 district was 48.07% single race black, 46.92% white including Hispanics, 48.63% any part black or "Total Black Voting Age Population" ("TBVAP"), and 45.59% non-Hispanic white.[14] Democrats constituted 67.78% of the registered Democrats in the First

[12] The category any part black or "Total Black" is the census category preferred by the United States Department of Justice and the United States Supreme Court. *Georgia v. Ashcroft*, 539 U.S. 461, 473 n.1 (2003).

[13] Under the 2010 Census, statewide, single-race blacks constitute 21.48% of the total population. Any part black or TBPOP constitutes 22.56% of the state wide population. (*See* Fourth Frey Aff. Ex. 5, p. 2) (attached as Ex. E)

[14] Under the 2010 Census, single-race blacks constitute 20.64% of the state wide voting age population. Any part black or TBVAP constitutes 21.18% of the state wide voting age population. (*See* Fourth Frey Aff. Ex. 5, p. 3) (attached as Ex. E)

District. Blacks constituted 66.55% of the registered Democrats. (Second Frey Aff. ¶ 27, Ex. 60, 64) (attached as Ex. C); (Fourth Frey Aff. Ex. 5, pp. 2-4) (attached as Ex. E)[15]

Under the 2010 Census, the 2001 Twelfth District was over-populated by 2,847 persons or 0.39%. (Fourth Frey Aff. at Ex. 5, p. 1) (attached as Ex. E) Single race blacks comprised 43.90% of the total population, whites including Hispanics made up 42.24% of the total population, and TBPOP was 45.39%. Hispanics constituted 12.38% of the total population while non-Hispanic whites made up only 38.58% of the population. Single-race black VAP was 42.87%, white VAP, including Hispanics, was 45.63%, any part black or TBVAP was 43.77%, and non-Hispanic white was 42.40%. Democrats represented 58.42% of the registered voters and blacks comprised 71.44% of registered Democrats. (*Id.* at Ex. 5, pp. 2-4); (*Dickson,* Second Frey Aff. ¶¶ 26, 27, Exs. 60, 64) (attached as Ex. C)

The 2001 versions of the First and Twelfth Districts were created before the United States Supreme Court ruled that majority-minority districts enacted to protect the State from § 2 liability must include an actual majority of the minority group. Both districts were created before the United States Supreme Court ruled that neither crossover districts nor influence districts can protect the State from liability under § 2.[16]

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[15] Under the 2010 Census, Democrats constitute 44.65% of registered voters. Blacks constitute 41.38% of the registered voters. (*See* Fourth Frey Aff. Ex. 5, p. 4) (attached as Ex. E)

[16] Under the 2000 Census, the First District was a majority-black district in single race black population. Under the 2010 Census, it was a majority TBPOP district. Under both the 2000 Census and the 2010 Census, the 2001 versions of the First and Twelfth Districts were not majority-minority VAP districts but instead were majority-minority-VAP-coalition districts. Neither district was majority non-Hispanic white.

The 2011 reports released by the General Assembly also show that both districts were created with super-majorities of Democrats and that blacks represented majorities of the registered Democrats in each district. Thus, these districts were constructed in a manner consistent with the concurring opinion of Justices Souter and Ginsberg in *LULAC*, who stated that VRA districts could be less than majority-minority if the minority group constituted a majority of the political party that normally wins elections in the district. This view was rejected in *Strickland*.

E. 2011 Legislative Proceedings

During the 2011 legislative proceedings leading to the enactment of redistricting plans in July, the General Assembly conducted an unprecedented number of public hearings. (*Dickson*, First Aff. of Robert Rucho ("First Rucho Aff.") ¶ 6, Exs. 1, 2) (attached as Ex. F) The leadership of the General Assembly also provided an unprecedented level of support to the Legislative Black Caucus ("LBC") (*Dickson*, Deposition of Erika Churchill ("Churchill Dep."), Ex. 55 [Joint Statement of Sen. Bob Rucho and Rep. David Lewis (6-22-11)] p. 6) (attached as Ex. G)

During a public hearing on May 9, 2011, representatives of a coalition called "Alliance for Fair Redistricting and Minority Voting Rights" ("AFRAM"), presented a proposed Congressional plan. The NC NAACP was a member of AFRAM and AFRAM was represented by attorneys from the Southern Coalition for Social Justice ("SCSJ"). Thus, the plan was designated by General Assembly Staff as "Southern Coalition for Social Justice – Congress." (Fourth Frey Aff. Ex. 6) (attached as Ex. E); (*Dickson*, Rucho Aff. Ex. 6, pp. 8-11) (attached as Ex. F)

SCSJ attorneys had previously opined that drawing the First District into the Research Triangle Park area might be required to ensure that the new version of this district complied with one person, one vote. (Response to First Set of Requests for Production by NC NAACP plaintiffs in *Dickson*) (attached as Ex. H) However, under the plan actually proposed by the SCSJ, the First District remained largely in northeastern and eastern North Carolina. (Fourth Frey Aff. Ex. 6) (attached as Ex. E)

On July 1, 2011, the legislative leadership released its first proposed Congressional Map, known as Rucho-Lewis Congress 1 ("Rucho-Lewis Congress 1") (Fourth Frey Aff. Ex. 7) (attached as Ex. E); (Churchill Dep. Ex. 55 [Joint Statement by Senator Bob Rucho and David Lewis ("legislative leaders" or "leaders") Regarding the Proposed Congressional Plan (July 1, 2011) ("1 July 2011 Joint Statement")]) (attached as Ex. G) As evidenced by their joint statement, the legislative leadership considered the following in drawing a 2011 version of the First District:

1. The version of the First District found in Rucho-Lewis Congress 1 was based on the 2001 version of the First District.

2. The legislative leaders intended that new Congressional districts should comply with the federal one person, one vote requirement as stated in *Wesberry v. Sanders*, 376 U.S. 1 (1964) and *Karchner v. Daggett*, 466 U.S. 910 (1984).

3. The legislative leaders intended that the new plan comply with the VRA. The leadership also noted that under *Strickland*, the Supreme Court had recently held that majority-minority districts enacted to protect the State from § 2 liability must be drawn with a majority-black voting age population.

In their 1 July 2011 Joint Statement, the leaders also explained why drawing the First District into the RTP area was necessary. The 2001 version of the First District was under-populated because of the rapid growth of urban areas and the slower growth of rural areas. Thus, drawing the First District into the RTP area would make it less likely that the district would again become substantially under-populated during the 2010-2020 decade and more likely that the configuration drawn for the First District in 2011 would be retained after the 2020 Census.

In their 1 July 2011 Joint Statement, the legislative leaders explained their intention of continuing the 2011 version of the Twelfth District as a very strong Democratic district. One of the leaders (Senator Rucho) met with Congressman Watt. Both leaders agreed to accommodate Congressman Watts' request that the 2011 version of the Twelfth District be modeled after the 2001 version (as opposed to moving the district from Mecklenburg County to the east as suggested by the USAG in 1991 prior to the *Shaw* cases). Because one of the counties in the District was covered by § 5 (Guilford), the leaders noted that the 2011 version would be precleared because the black voting age population was higher than the 2001 version. The leaders also noted their criterion of placing urban areas in more than one Congressional district.

After the legislative leaders released Rucho-Lewis 1, Congressman Butterfield and Congressman Watt published their opposition to the plan. Both of them criticized the plan. (*See* attached Exs. I and J) Congressman Butterfield's main complaint was that the Rucho-Lewis Congress 1 version of the First District had reduced the number of voters in his district who resided in counties covered by § 5.

On July 7, 2011, legislative leaders conducted a public hearing on Rucho-Lewis Congress 1. During this hearing, a witness named Steven Gerontakis objected to the impact of Rucho-Lewis Congress 1 on population in § 5 counties. He proposed an alternative majority-black district that would be drawn into Durham County rather than Wake County. Under Mr. Gerontakis' proposal, a larger number of persons from § 5 counties would reside in his proposed First District as compared to the version in Rucho-Lewis Congress 1. (*See* attached Ex. K)

On July 19, 2011, the legislative leaders released a new Congressional plan called Rucho-Lewis Congress 2 ("Rucho-Lewis Congress 2"). (Fourth FreyAff. Ex. 8) (attached as Ex. E); (Churchill Dep. Ex. 55 [Joint Statement of Senator Bob Rucho and Representative David Lewis (7-19-11)] p. 1 ("19 July Joint Statement")) (attached as Ex. G) Rucho-Lewis Congress 2 addressed Congressman Butterfield's objection by adopting Mr. Gerontakis' suggestion that the First District be drawn into Durham County instead of Wake County. In their 19 July Joint Statement, the leaders explained that by using Durham County instead of Wake County, the Rucho-Lewis Congress 2 version of the First District included population from all of the § 5 counties found in the 2001 version. Moreover, the TBVAP located in § 5 counties in the Rucho-Lewis Congress 2 version of the First District exceeded the TBVAP found in the 2001 version.

In their 19 July Joint Statement, the leaders again stated that the Twelfth District in Rucho-Lewis Congress 2 was based upon the 1997 and 2001 versions and that the 2011 version was again drawn by the legislative leaders as a "very strong Democratic

district" and "based upon whole precincts that voted heavily for President Obama in the 2008 General Election."

The General Assembly convened in legislative session on Monday, July 25, 2011, for purposes of enacting redistricting plans. On that same date, Democratic leaders published a proposed congressional plan: Congressional Fair and Legal ("Fair & Legal") (*Dickson*, Appendix A, p. 91, F.F. No. 34) The Fair & Legal Plan did not draw the First District into the RTP or create the district with a majority TBVAP. (Fourth Frey Aff. Ex. 10) (attached as Ex. E)

On July 27, 2011, the General Assembly enacted Rucho-Lewis Congress 3 ("Rucho-Lewis Congress 3") as the 2011 Congressional Plan for the State of North Carolina. (*Dickson*, Appendix A, p. 91) (attached as Ex. A) Rucho-Lewis Congress 3 was nearly identical to Rucho-Lewis Congress 2 and a variation called Rucho-Lewis 2A, both of which drew the First District into Durham County. (Fourth Frey Aff. Exs. 8, 9, 11) (attached as Ex. E)[17]

The total population of the First District under Rucho-Lewis 3 was 53.63% "black," 37.51% "white," 54.74% TBPOP, 7.99% Hispanic, and 35.17% non-Hispanic white. The voting age population was 51.97% "black," 41.51% white, 52.65% TBVAP, 6.5% Hispanic VAP, and 38.52% non-Hispanic white. Registered Democrats constituted 69.79% of the registered voters and blacks constituted 69.29% of the registered

[17] During the legislative debates, Representative Lewis explained the very minor differences between Rucho-Lewis Congress 2 and 2A and Rucho-Lewis Congress 3. (*See* Transcript of Proceedings on July 27, 2011) (attached as Ex. L)

Democrats. (Fourth Frey Aff. Ex. 11, pp. 2-4) (attached as Ex. E); (Second Frey Aff. ¶¶ 26, 27, Exs. 61, 65) (attached as Ex. C)

The total population of the Twelfth District under Rucho-Lewis 3 was 50.76% "black," 33.58% "white," 52.47% TBPOP, 14.27% Hispanic, and 29.05% non-Hispanic white. Voting age population in the district was 49.59% "black," 36.84% "white," 50.66% TBVAP, 12.08% Hispanic, and 32.92% non-Hispanic white. Democrats represent 63.93% of all registered voters. Blacks represent 76.26% of all registered Democrats. (Fourth Frey Aff. Ex. 11, pp. 2-4) (attached as Ex. E); (Second Frey Aff. Exs. 61, 65) (attached as Ex. C)

II. ARGUMENT

A. Standard of Review of Plaintiffs' Motion for Preliminary Injunction

To obtain preliminary injunctive relief, plaintiffs must make a "clear showing" that: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary injunctive relief; (3) the balance of equities tip in their favor; and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 12 (2008). All four elements must be satisfied. *Id.* Under this standard, plaintiffs' have a demanding burden of "clearly showing" that they are likely to succeed on the merits. Plaintiffs' motion for a preliminary injunction must be denied because plaintiffs have failed to make a clear showing that all four of these elements are present.

B. Plaintiffs have not shown that they are likely to succeed on their claims regarding the Twelfth Congressional District.

Plaintiffs contend that they are likely to prevail on their claims regarding the Twelfth District because of the following: (1) the map drawer for the General Assembly allegedly drew the First and Twelfth Districts before other Congressional districts; (2) alleged admissions by legislative leaders that race was the predominant factor; (3) statements by the State in its preclearance submission; (4) the shape of the Twelfth District; (5) mathematical tests for compactness of the Twelfth District; (6) the fact that the 2011 Twelfth District does not contain a single whole county; (7) expert testimony that blacks residing in an "envelope" surrounding the Twelfth District were more likely to be included in that district; (8) that race and not *party registration* better explains the district; and (9) that no compelling State interests support the creation of the Twelfth District. (Pl. Mem. pp. 1, 6, 7-13, 19, 20-27).[18]

Plaintiffs' argument ignores the evidence before the three-judge State court and the detailed findings of fact made by that court.

[18] Plaintiffs incorrectly allege that the 1997 version of the Twelfth Congressional District had a BVAP of 32.56% (Pl. Mem. p. 4). As we have discussed, the 1997 and 2001 versions of the Twelfth district were majority-minority coalition districts with BVAP well in excess of 40%. (*See infra* at 34). In response to the decision by the district court decision that was reversed in *Cromartie I*, the State enacted a 1998 version of the Twelfth Congressional District. 1998 N.C. Sess. Law, ch.2. This plan dropped the BVAP in the Twelfth district to 35.56%. (Fourth Frey Aff. Ex. 3, p. 3) (attached as Ex. E) The State conducted its 1998 elections under this version of District 12. However, the General Assembly provided that the Congressional Plan would revert to the 1997 configuration upon a reversal of the district court's opinion in *Cromartie I*. 526 U.S. at 545, n. 1. After the district court again found the Twelfth District unconstitutional in *Cromartie II*, the United States Supreme Court entered an order staying that judgment. Thus, the 2000 election for the Twelfth District was conducted under the 1997 configuration. *See Hunt v. Cromartie*, 529 U.S. 1014 (2000). Elections were held under the 1998 version of the Twelfth District only in 1998.

The State's map drawer, Dr. Thomas Hofeller, was engaged by the General Assembly to draw districts, not to provide expert testimony on racially polarized voting. (*Dickson,* App. B, Finding of Fact Number (F.F. No. 179) It is not relevant that Hofeller never attended a public hearing. However, Hofeller testified as a witness in *Shaw II* and is familiar with the decision in *Cromartie II* (*Dickson*, App. B, p. 161, F.F. No. 180).

Hofeller never testified that he drew the First and Twelfth District before other congressional districts. Hofeller's testimony cited by plaintiffs related to the formula he followed to draw *legislative* districts, not congressional districts. (Pl. Mem. p. 6)

The State court found that the 2011 version of the Twelfth District was based upon the same political principles that motivated the 1997 and 2001 versions, and those versions are located in the same area. (*Dickson*, App. B, p. 161, F.F. No. 181) Hofeller was instructed by the legislative leaders to follow the same legal standard stated in *Cromartie II*. (*Id.* at p. 161, F.F. No. 182, 183) Hofeller was instructed to increase the number of Democratic voters in the 2011 version of District 12, as compared to the 2001 version, to make it an even stronger Democratic district. The leaders gave this instruction to make districts adjoining the 2011 version more competitive for Republicans. (*Id.* at pp. 161-62, F.F. No. 184)

The 1997, 2001 and 2011 versions of the Twelfth District are based upon urban population centers located in Mecklenburg, Guilford, and Forsyth Counties. They are connected by narrow corridors located in Cabarrus, Rowan, and Davidson Counties. The principle differences between the 2001 version and the 2011 version is that the 2011 version added more Democratic voters residing in Mecklenburg and Guilford Counties

and removed Republican voters formerly assigned to the 2001 version located in the corridor counties of Cabarrus, Rowan, Davidson and other locations. (*Id.* at App. B., p. 162, F.F. Nos. 186-87)[19]

Dr. Hofeller constructed the 2011 version based upon whole Vote Tabulation Districts ("VTD") in which President Obama received the highest vote totals during the 2008 Presidential election.[20] The only information on the computer screen used by Dr. Hofeller was the percentage by which President Obama won or lost a particular VTD. There was no racial data on the screen used by Dr. Hofeller to construct the district. (*Dickson*, App. B., pp. 162-63 F.F. No. 188) Nor did Dr. Hofeller reference party registration statistics. In this respect, Dr. Hofeller followed the same criteria used by the map drawers of the 1997 version. *Cromartie I*, 526 U.S. at 555, 557 (Stevens, J., Souter, J., Ginsburg, J., and Bryer, J., concurring).[21]

By increasing the number of Democratic voters in the 2011 Twelfth District, the 2011 Congressional Plan created other districts that were more competitive for Republicans as compared to the 2011 versions, including the Sixth, Eighth, Ninth, and Thirteenth Districts. (*Id.* at App. B, p. 163, F.F. No. 191)

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[19] Plaintiffs attack the 2011 version of the Twelfth District because it fails to contain a whole county. However, no prior version of the Twelfth District included a whole county except for the 1998 plan which included all of Rowan County. (*See* Fourth Frey Aff. Exs. 1-4) (attached as Ex. E) The 2011 version is located in the same six counties as the 2001 version. (*Dickson*, App. B., pp. 162, F.F. No. 185)

[20] VTDs are a unit of geography used by the Census Bureau. They are usually synonymous with precincts. (*Dickson*, p. 69 n. 33)

[21] Plaintiffs' reliance on partisan registration statistics instead of actual voting behavior is remarkable given that the district court in *Cromartie* was reversed twice in part for relying on registration statistics.

The State court's findings dispel plaintiffs' argument that race and not partisan affiliation better explains the location of the district's lines. Contrary to plaintiffs' allegations, defendants' legislative leaders never admitted that race was a predominant motive for the 2011 version of the Twelfth District. The statements cited by plaintiffs merely reference that Guilford County has been included in prior versions of the Twelfth District, was retained in the 2011 version with the support of Congressman Watt, and that the TBVAP in the district was a relevant issue to obtaining preclearance of any district that included Guilford County. (*See infra* at 35) Similarly, defendants' preclearance submissions only reference the TBVAP in the 2011 Twelfth District because of the presence of a covered county in that district.

Plaintiffs incorrectly assert that the "white majority" VAP did not vote as a bloc to defeat Congressman Watt. (Pl. Mem. p. 4) Plaintiffs also attack the compactness of the 2011 Twelfth District. (Pl. Mem. p. 3) Both of these arguments are irrelevant because the State has never asserted that the 2011 Twelfth District was enacted to protect the State from a § 2 claim.[22] Regardless, plaintiffs' argument that District 12 was a white majority district is incorrect. Except for the 1998 General Election, non-Hispanic white voters have never been a majority in the Twelfth District. The original 1992 version of the Twelfth District was majority-black and the subsequent 1997 and 2001 versions were majority-minority coalition districts. (*See supra* at 6, 9, 10, 13-15)[23]

[22] This also makes irrelevant plaintiffs' claims that the Twelfth District fails to advance a compelling government interest.

[23] Plaintiffs also rely on trial testimony by Congressman Watt that Senator Rucho told him during a private meeting that other legislators had instructed Rucho and Lewis to

Plaintiffs have also failed to offer a version of District 12 that would achieve the General Assembly's political objectives or bring greater racial balance. *Cromartie II*, 532 U.S. at 258. This failure is fatal to plaintiffs' motion because they cannot succeed on the merits without making such a showing. Plaintiffs cannot offer any such alternative version because the race of voters in and around the Twelfth District correlates highly with political affiliation. *Id.; Cromartie I*, 526 U.S. at 551-52.[24]

C. Plaintiffs have not shown that they are likely to succeed on their claims involving the First District.

1. Plaintiffs have not shown that race was the predominant factor for the location of district lines.

Plaintiffs' argument that race was the predominant factor for the district lines of the First District is based upon comments by legislative leaders that they intended to create the district with TBVAP in excess of 50% and that the leaders were committed to enacting a plan that would preclear under § 5 and protect the State from § 2 liability.

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increase the TBVAP for the Twelfth District so that it would exceed 50%. Senator Rucho denied making the comment, a witness to the conversation denied hearing it, and the State court did not rely on it or even mention it in its detailed findings. (*Dickson* Trial Transcript "T.T.", pp. 356-65 June 5, 2012) (Ex. M) In any event, this statement would not be sufficient proof that race was the predominant motive. This is because "evidence 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. Raising the Twelfth District to a TBVAP level slightly above 50% did not create a supermajority-black voting age population.

[24] Plaintiffs claim that the legislature illegally "packed" black voters into the First and Twelfth Districts. (Pl. Mem. p. 2) "Packing" is an incendiary term that plaintiffs do not define. In fact, packing does not mean placing "too many" black voters in a district or more than the minimum "needed" for blacks to win elections, as plaintiffs infer. Instead, "packing" occurs when there is enough minority population to create three majority minority districts, but the jurisdiction instead decides to concentrate black voters in only two super majority minority districts. *Voinovich v. Quilter*, 507 U.S. 146, 153-54 (1993).

However, predominant motive is not established because a legislature enacted a district with a "consciousness of race," created a majority-black district, or enacted plans that would comply with federal law. (*See supra* at 7, 10, 12); *Wilkins v. West*, 264 Va. 447, 462-80, 571 S.E.2d 100, 108-19 (2002) (evidence that legislature drew districts to comply with the VRA does not prove that race was the predominant factor).

The First District is clearly legal and based upon several legitimate districting principles other than race. First, the 2011 version of the First District is based upon the core population from the 2001 version. (Second Frey Aff. ¶ 9, Ex. 3) (76% of the population in the 2001 First District is included in the 2011 First District) (attached as Ex. C) Using the core of the "old" district to form the "new" district is a traditional and legitimate districting principle. *Karcher v. Daggett,* 462 U.S. 725, 740 (1983). An exact replica of the older version of the First District could not be adopted in 2011 because the 2001 version was under-populated by over 97,000 people. The past and future population growth in North Carolina has been and will be more rapid in urban as compared to rural areas. Thus, the legislative leaders decided to draw the First District into the RTP area to address the massive under-population of the district not only under the 2010 Census but in the future.

Second, following public hearings, the legislative leaders decided to move the district from Wake County to Durham County to address objections made by an incumbent Congressman and speakers at a public hearing. Accommodating a request from an incumbent regarding the location of his district's lines has nothing to do with

race and is a legitimate districting principle. *Stephenson I*, 355 N.C. 354, 371, 562 S.E.2d 372, 390 (2002) ("*Stephenson I*").

The legislative leaders also intended to make this district a safe district for the incumbent and any other Democratic candidate. (Churchill Dep. Ex. 55 [1 July 2011 Joint Statement and 19 July 2011 Joint Statement]) (attached as Ex. G) Incumbent protection is a legitimate districting principle. *Stephenson I*, 355 N.C. at 371, 562 S.E. 2d at 390. The legislative leaders also understood that districts adjoining majority black districts would become more competitive for Republicans. (Churchill Dep. Ex. 55, 22 June 2011 Joint Statement, p.4) (attached as Ex. G) Partisan advantage is a legitimate redistricting principle. *Stephenson I, supra.*

This evidence demonstrates that the lines for the First District are not unexplainable for any reason other than race. Thus, while it was a harmless error, the State court erred in applying the strict scrutiny standard without giving the *Dickson* defendants an opportunity at trial to dispute the contention that race was a predominant motive for the First District. *Cromartie I*, 526 U.S. at 553 n. 9.[25]

For the reasons stated above, plaintiffs have failed to show that they are likely to succeed on their claim that race was the predominant factor for the location of district lines for the 2011 First District.

[25] The State court admitted that a persuasive argument could be made that race was not the predominant motive and that the challenged VRA districts might be more properly subject to a lower standard of review. (*Dickson*, p. 15) The State court noted that any error on its part was irrelevant if the challenged VRA districts survived strict scrutiny. *(Id.* at p. 42 n. 23) The State court also noted that strict scrutiny review would be mooted upon a finding of a correlation between race and politics in a particular district. (*Id.*)

2. Plaintiffs ignore the State court's findings that the 2011 First District serves the compelling interest of protecting the State from § 2 liability and is narrowly tailored.

(a) The legislative record contained a strong basis in evidence that racially polarized voting continues to exist in the areas encompassed by the First District.

In *Dickson*, the State court made extensive findings that the legislative record provided a strong basis for the General Assembly to conclude that racially polarized voting continues to exist in the area of the State encompassed by the 2011 First District.[26]

The *Dickson* court relied upon this evidence to make extensive findings regarding racial polarization in general (*Dickson*, App. A., pp. 77-91, F.F. No. 1-35) and more specific findings regarding the 2011 First Congressional District (*Dickson*, App. A., pp. 92-95, F.F. No. 36a-h, pp. 155-57, F.F. Nos. 165-71).

Plaintiffs' main argument is that racially polarized voting could not be present in the 2001 First District because it was "majority-white." (Pl. Mem. pp. 3, 4, 29, 30) While this is not an accurate description of the 2001 First District, racially polarized voting can still exist in a majority-white district. For example, almost all of the multi-member districts in *Gingles* were majority-white. Several were found illegal even though

[26] This evidence included: (1) testimony from lay witnesses at numerous public hearings; (2) testimony and correspondence from interest groups including the SCSJ, the NC NAACP, and League of Women Voters; (3) legal opinions from faculty of the UNC School of Government; (4) scholarly writings on voting rights in North Carolina; (5) law review articles; (6) election results conducted through 2010; (7) the American Community survey of North Carolina household incomes, education levels, employment and other demographic dates; (8) an expert report on polarized voting from Dr. Ray Block offered by SCSJ, counsel for the NC NAACP; (9) an expert report on polarized voting from Dr. Thomas Brunell who was retained by the General Assembly; (10) prior redistricting plans; and (11) alternative redistricting plans offered by the SCSJ, Democratic leaders, and the LBC. (*Dickson*, pp. 19-20)

a few black candidates in those districts had experienced some electoral success. *Gingles v. Edmisten,* 590 F. Supp. 345, 257, 365-72, 376 (E.D.N.C. 1984), *aff'd in part, rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986) (reversing only the district court's finding regarding House District 23 in Durham County).

More importantly, no prior version of the First District was a "majority-white" district. All prior versions were majority-black in total populations and majority-minority coalition districts in VAP. Non-Hispanic whites have never been in the majority in past versions and none of the past versions were majority-white crossover districts. Thus, contrary to plaintiffs' argument, whites could never join in a bloc to defeat the African-American candidate of choice because non-Hispanic whites have never enjoyed majority status in the First District.

Nor does the fact that black incumbents have always won in the district prove the absence of racially polarized voting. Collectively, the two experts who submitted reports to the General Assembly found the existence of racially polarized voting in all of the counties encompassed by the 2011 First District. (*Dickson,* App. A., pp. 81-85, 92-95, F.F. No. 10-21, 36 f and g)[27]

[27] The polarization tests performed by both experts evaluated elections between black and white candidates by comparing the "black vote" to the non-black vote. They did not separate white voters from other "non-black" voters such as Hispanics. Because of this limitation, the polarization studies actually over-stated the percentage of white voters who voted for the African-American candidate in the First District. (*Dickson*, App. A. pp. 83-4, F.F. No. 14) Further, black candidates often faced no opposition or token opposition. Thus, the polarization studies also overstate the percentage of non-black voters who would vote for a black candidate with genuine opposition. (*Id.* at p. 84, F.F. No. 15)

In *Strickland*, the Supreme Court held that establishing a bright line for a § 2 district (50% plus one TBVAP) provided a judicially manageable standard for courts and legislatures alike. It also relieved the State from hiring an expert to provide opinions on the minimum black voting age needed to create a district that could be controlled by black voters. *Strickland*, 556 U.S. at 17. Any such expert would have to predict the type of white voters that would need to be added to or subtracted from a district (to comply with one person, one vote) who would support the minority group's candidate of choice, the impact of incumbency, whether white voters retained in the district would continue to support the minority group's candidate of choice after new voters were added, and other "speculative" factors. *Id.* The State court in *Dickson* made specific factual findings regarding the First District related to all of these points. (*Dickson*, App. A, F.F. Nos. 6, 7, 165, 166-67, 169, 170) Based upon the foregoing, plaintiffs have failed to show they are likely to prove that the General Assembly lacked a strong basis in evidence that racially polarized voting was present in the areas encompassed by the 2011 First District.

(b) The legislative record contains a strong basis for concluding that the First District is based upon a reasonably compact African American population.

As was the case in *Dickson*, Plaintiffs do not cite a case that provides a definition of compactness nor do they give the court a judicially manageable standard for finding the First District to be non-compact. For example, plaintiffs contend that the 2011 First District is less compact than the 2001 version because of a test that measures "dispersion compactness," known as the Reock test. Plaintiff's Expert Report of Stephen

Ansolageheve ("Pl. Exp. Rep.", Table 1)[28] "Dispersion compactness" measures the geographic dispersion of a district. A circle is drawn around the district. The reported coefficient is the proportion of the area of the circumscribed circle which is also included on the district. *Id*.; *Cromartie II*, 133 F. Supp. at 415 n. 4.

In *Cromartie II*, the district court found that the 1997 version of the First District satisfied the "compactness" element of *Gingles* with a dispersion or Reock score of 0.317. Plaintiffs' expert reports a Reock score of .390 for the 2001 version of the First District and a score of .294 for the 2011 version. Plaintiffs do not explain, nor do they cite a case that explains, why a score of .390 is compact while a score of .294 is not. Nor do they explain how the 1997 version could be legally compact with a score of .317 while the score of .294 for the 2011 First District is not legally compact (only .023 lower than the "compact" 1997 version).

This dilemma, exposed by plaintiffs' own evidence, all demonstrates that mathematical tests for compactness have no utility. *Karcher*, 462 U.S. at 756 (compactness requirements are of little use because of vague definitions and imprecise application). Defendants are aware of no cases, federal or state, that define the term "compact" or establish a judicially manageable standard by which a legislative or a court could use to measure legally acceptable compactness. (*Dickson*, p. 62) In *Dickson*, plaintiffs' expert, Dr. Ted Arrington, explained the problems with mathematical compactness tests as follows:

[28] Defendants have filed an extensive expert report critiquing plaintiffs' expert report. (*See* Expert Report of Dr. Thomas B. Hofeller, Ph.D. [17 January 2014]) (attached as Ex. N)

> Courts and reformers often cite compactness as a valuable technical criterion in redistricting, but scholars do not think it should be a priority. One problem is that there are many different and partially conflicting ways to measure the compactness of a district or a district plan. And there can be no mathematical standard of compactness that can be applied across varying geography in a way that equal populations can have a mathematical standard. The most one can say is that with the use of a particular statistic, one redistricting plan for a particular jurisdiction has more or less compact districts than another plan for the same jurisdiction. But there is no standard that can tell us whether the districts in a plan are compact enough.

(*Dickson*, p. 67)

Dr. Ted Arrington is often hired by the United States Department of Justice to draw proposed districts that comply with § 2 and any restrictions imposed by *Shaw I* and *Shaw II*. Instead of a mathematical test, Arrington relies upon an "interocular test" to determine whether a district is too irregular. *Dickson*, pp. 62-3. The court in *Dickson* found the interocular test to be unsuitable for judicial review because any such test would not provide the court (or a legislature) with a judicially manageable standard. *Dickson*, pp. 62-3.

In any case, plaintiffs' own evidence shows that the Reock score for the 2011 First District is not dramatically different from the 1997 or the 2001 versions. Further, under Dr. Arrington's "interocular test," there is no meaningful difference between the shapes of the 2011 First District, the 1997 and 2001 versions, or all of the 2011 alternatives. (*See* Fourth Frey Aff. Exs. 2, 5, 6, 10, 11) (attached as Ex. E)

Plaintiffs have not demonstrated that they are likely to succeed on their claim that the General Assembly lacked a strong basis in evidence for concluding that the 2011 First District was based upon a geographically compact minority population.

3. The 2011 First District furthered the State's interest in obtaining swift preclearance of the 2011 Congressional Plan.

During the 2011 legislative section, forty North Carolina counties were covered by § 5. (See 28 C.F.R. § 51.4 and pt. 51 App. at 96-97 (2002) (App. 1-3)). Guilford County was covered by § 5. *Id.* Almost all of the counties in the 2011 version of the First District were covered. (*Id.*; *see also Dickson*, App. A, p. 93, F.F. No. 36e) In *Shelby County v. Holder*, 133 S.Ct. 2612 (2013), the Supreme Court found unconstitutional the coverage formula used by the USAG to determine covered jurisdictions under § 5. It did not find that § 5 was unconstitutional.

Defendants agree that unless and until Congress amends the VRA by adding a constitutional coverage formula, states will no longer be required to seek preclearance of redistricting plans. Thus, states will no longer be able to use § 5 to justify future majority-minority districts. Any district created in the future, where race is the predominant factor, will have to be based upon evidence in the legislative record showing a strong basis for a § 2 district.

However, at the time North Carolina enacted its 2011 Congressional Plans, elections could not be held under the 2011 plan absent preclearance. *Clark v. Roemer*, 500 U.S. 646, 652 (1991). The Supreme Court has assumed, without expressly deciding, that enacting plans that will preclear under § 5 can serve a compelling governmental interest. *Miller v. Johnson*, 515 U.S. 900, 921 (1995); (*Dickson*, pp. 21, 22) There can

be no question that at the time of enactment, establishing congressional districts that would preclear served an important and compelling governmental interest.

D. Plaintiffs have failed to make a clear showing that they will suffer irreparable harm, that the balance of equities tips in their favor, or that a preliminary injunction is in the public interest.

The claims raised by the plaintiffs were thoroughly litigated in the *Dickson* case. It is hard to understand how plaintiffs could be irreparably harmed should the State hold congressional elections under a plan that was used in the 2012 general elections and which has already been found to be constitutional in a well-reasoned opinion by a three-judge state court.

Even if plaintiffs had demonstrated any concrete rather than speculative harm in the 2011 districting, such harm would be due largely to their own lack of diligence in pursuing their claims. North Carolina's current congressional plan was enacted in July of 2011. Elections were held under this plan in 2012. Plaintiffs waited until December 24, 2013, to file their motion for a preliminary injunction. Plaintiffs have simply waited too long to interfere with the 2014 electoral process. Equity demands that those who would seek to enjoin the use of duly-enacted legislative districting plans, whether permanently or preliminarily, do so with sufficient dispatch and haste as to avoid unnecessary disruption of the electoral process. *See Quince Orchard Valley Citizens Ass'n v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989) (approving the district court's denial of a preliminary injunction on the ground that any potential harm to the plaintiff was a result of its own delay in seeking injunctive relief). Here, as in *Quince Orchard Valley Citizens Ass'n*, responsibility for any harm plaintiffs may suffer lies with the plaintiffs, who waited until

the beginning of 2014 election to request preliminary injunctive relief that would derail the schedule for this election cycle. Equity demands that plaintiffs' lack of dispatch in seeking preliminary injunctive relief result in a denial of preliminary injunctive relief.

In contrast to the speculative harm facing plaintiffs, defendants would be subjected to irreparable harm should a preliminary injunction be issued. "[A]ny time a state is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977). Undue judicial interference with the redistricting process has been recognized as a form of irreparable injury. *Karcher*, 455 U.S. at 1306-07.[29] In their memorandum, plaintiffs cite one case in which a preliminary injunction was purportedly

[29] Along these lines, the case of *Pender County v. Bartlett*, 361 N.C. 491, 649 S.E. 2d 364 (2007) is instructive though certainly not binding. In *Pender County*, the Court reversed a final judgment finding that District 18 in the 2003 House Plan did not violate the Whole County Provision of the N.C. Constitution, Art. II, §§ 3 and 5 ("WCP"). Instead, the Court held that District 18 did in fact violate the WCP. Rather than order the General Assembly to immediately correct the deficiencies in District 18 as well as "other legislative districts directly and indirectly affected" by the Court's opinion, the Court stayed its remedy until after the next election. The timing of the *Pender County* case is significant. The *Pender County* Court issued its opinion on August 24, 2007. Despite the fact that the filing period was not set to begin until February 2008 – nearly six months later – and the primary was not until May 2008, the Court refused to direct the General Assembly to correct the deficient districts at a time when such correction would have required a special session. Moreover, the case involved only a limited redistricting in one area of the State as opposed to the entire statewide plan. In refusing to disrupt the elections process, the Court explained that it "realize[s] that candidates have been preparing for the 2008 election in reliance upon the districts as presently drawn." Thus, the North Carolina Supreme Court refused to require the General Assembly to correct *finally adjudicated* deficiencies in *one legislative district* in the North Carolina House Plan where the Court issued its ruling in *August* prior to the next year's election. In the instant case, Plaintiffs did not even file their preliminary injunction request until December 24, 2013, just a little more than a month away from the opening of the filing period. Using the example set by *Pender County*, plaintiffs have plainly missed their window of opportunity to disrupt the 2014 elections.

issued in a racial gerrymandering case. *Cannon v. N.C. State Board of Elections*, 917 F. Supp. 387 (E.D.N.C. 1996). However, plaintiffs fail to note that a preliminary injunction was actually denied. While the court considered entering a temporary restraining order, the court ultimately instead set the matter on for hearing on a motion for preliminary injunction and, after hearing, denied the motion. *Id.* at 391; *Cannon v. N.C. State Board of Elections*, Case No. 96-cv-115 (E.D.N.C.) (D.E. 32) (order entered on April 1, 1996 denying motion for preliminary injunction; motion denied in open court on March 22, 1996).

Moreover, *Cannon* was decided long before the Supreme Court clarified the demanding burden plaintiffs must meet, particularly in cases where there is a correlation between race and political affiliation, to prove that race was the predominant factor for the location of a challenged district's lines. *Cromartie I*, supra; *Cromartie II*, supra.

The *Cannon* case also followed the requirements for a preliminary injunction established in *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 193 (4th Cir. 1997). Of course, *Blackwelder* was effectively overruled by the Supreme Court's decision in *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 12 (2008). *See Real Truth About Obama, Inc. v. Fed. Elec. Comm'n*, 575 F.3d 342, 346 (4th Cir. 2009), *vacated on other grounds*, 559 U.S. 1089 (2010). In *Blackwelder*, the Fourth Circuit had previously instructed that the first step in analyzing a motion for a preliminary injunction was application of the balance of hardship test. *Real Truth About Obama*, 574 F.3d at 346, *citing Blackwelder* 550 F.2d at 195-96. Under *Blackwelder*, the likelihood of success element was considered only after a balancing of the hardships and then only

under the "relaxed standard of showing 'grave or serious questions'" had been presented. *Id*. Even assuming plaintiffs have presented "grave issues", which defendants dispute, they have not made the more demanding burden of "clearly showing" that they are likely to succeed on the merits. Thus, the *Cannon* decision is not useful precedent.

Plaintiffs also rely on preliminary injunctions issued in cases involving alleged violations of the one person, one vote requirements of the federal constitution. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Desena v. Maine*, 793 F. Supp. 2d 456 (D. Maine 2011). In cases challenging districts for one person, one vote violations, there is usually no factual dispute regarding the amount of population assigned to the various districts. The question before the court is mainly legal –namely – whether population disparities between districts violate the acceptable deviation range. *Karcher*, 462 U.S. at 730, 741-44. In contrast, racial gerrymandering cases involve questions of disputed facts – such as legislative intent and whether race was the legislature's predominant motive. These are the types of issues that are uniquely difficult to resolve against a state defendant through a preliminary motion and short of trial. *Cromartie I*, 526 U.S at 553 n. 9.

Prior decisions involving the First and Twelfth Districts warrant against preliminary injunctive relief. For example, in *Shaw II*, the district court entered an order on March 1, 1994, denying the plaintiff's motion for a preliminary injunction. *Shaw II*, 861 F. Supp. at 421. In *Cromartie II*, the Supreme Court took the extraordinary action of issuing a stay of the district court's judgment enjoining the State from conducting the 2000 elections under the 1997 version of the Twelfth District. *See Hunt v. Cromartie*, 529 U.S. 1014 (2000). There are also several other cases in which the Supreme Court has

stayed orders of three-judge courts invalidating election plans and enjoining elections. *See Voinovich v. Quilter*, 503 U.S. 979 (1992); *Wetherall v. DeGrandy*, 505 U.S. 1231 (1992); *Louisiana v. Hays*, 512 U.S. 1273 (1994); *Miller v. Johnson*, 512. U.S. 1283 (1994).

In other instances, the Court has affirmed the lower courts' decisions to permit elections under illegal plans because these plans were not invalidated until late in the election process. *See e.g., Watkins v. Mabus*, 502 U.S. 954 (1991) (summarily affirming in relevant part *Watkins v. Mabus*, 771 F. Supp. 789, 801, 802-05 (S.D. Miss 1991) (three-judge court)); *Republican Party of Shelby County v. Dixon*, 429 U.S. 934 (1976) (Summarily affirming *Dixon v. Hassler*, 412 F. Supp. 1036, 1038 (W.D. Tenn. 1976) (three-judge court)). *See also Growe v. Emison*, 507 U.S. 25 (1993) (noting that elections must often be held under a legislatively-enacted plan prior to any appellate review of that plan).

Further, under the *Winters* test, whether an injunction is in the public interest plays a much higher role in plaintiffs' burden of proof. *Real Truth About Obama*, 575 F. 3d at 346-347. As illustrated by affidavits provided by the then Executive Director of the North Carolina State Board of Elections in the *Dickson* case, Gary Bartlett, enjoining the 2014 congressional elections is not in the public interest. Moving the May 2014 Congressional primary to another date will cost the State millions of dollars, create confusion among voters, and substantially reduce turnaround for the congressional primary. (*Dickson*, Affidavit of Gary Bartlett and Second Affidavit of Gary Bartlett) (attached as Exs. O, P)

III. CONCLUSION

For all of the reasons stated above, plaintiffs' motion should be denied.

Respectfully submitted this 17th day of January, 2014.

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CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day electronically filed the foregoing **DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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This the 17th day of January, 2014.

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