IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

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.

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Oral Argument Requested

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Plaintiffs, by and through their counsel of record, submit this Reply in Support of their Motion for Preliminary Injunction. As set out in Plaintiffs' Motion for Oral Argument (Dkt. #28), Plaintiffs respectfully ask the Court to set this motion for hearing.

A. Plaintiffs Have Demonstrated They Are Likely to Succeed on the Merits

1. The State Cannot Justify Its Race-Based Redistricting of CD 1

a. Race Was the Predominant Factor in Drawing CD 1

The State's attempts to argue that race was not the predominant factor in drawing Congressional District 1 ("CD 1") cannot be squared with the record.

Plaintiffs have already detailed the State's race-centered approach to drawing CD 1 (Dkt. #36, Mem. at 6-10) and will not repeat that evidence here. Suffice to say, legislative leaders stated that they redrew CD 1 to include a majority of African-Americans by voting age population ("BVAP") because they believed Section 2 of the Voting Rights Act ("VRA") obligated them to do so, and that they subordinated other redistricting criteria to accomplish that goal.[1] The State's evidence only reinforces this fact. Most notably, the expert report submitted by the mapdrawer, Dr. Thomas Hofeller, asserts that CD 1 "*must* be characterized as a 'VRA Section 2 Minority District.'" Dkt. 33-2 (Hofeller Report), ¶ 19 (emphasis added).[2] All of the evidence before the Court

[1] *See, e.g.*, Dkt. #18-2, Ex. 14 (CD 1 "must include a sufficient number of African-Americans so that [CD 1] can re-establish as a majority black district"); *id.*, Ex. 13, at 3 (CD 1 was redrawn to include a majority BVAP "as required by Section 2 of the [VRA]"); *id.*, Ex. 12, at 7 (the 2011 Congressional Plan's "precinct divisions were prompted by the creation of Congressman Butterfield's majority black [CD 1]").

[2] Dr. Hofeller repeatedly emphasizes the central role race played in drawing CD 1. *See, e.g.*, Hofeller Report ¶ 42 ("[T]he General Assembly determined that the New District 1 had to be a majority-minority district which required an African-American TBVAP in excess of 50%."); *id.* ¶ 31 ("District 1 was and is clearly identified as a 'Section 2 district' and must be constructed in that context."); *id.* ¶ 20 ("Even though other policy goals played an important role in the location of the 1st District, obtaining U. S. Department of Justice (DOJ) preclearance was always an important policy objective.").

reveals that in drawing CD 1, the mapdrawers' primary intent was to make it a majority-minority district.

It is thus no surprise that the State Court, whose opinion the State otherwise embraces, found that race was the predominant factor behind CD 1. *See* State Court Opinion, at 14.[3] In arguing this Court should conclude to the contrary, the State argues race was not the *only* factor behind CD 1 and so, *ipse dixit*, race was not the predominant factor. But the "fact that other considerations may have played a role in . . . redistricting does not mean that race did not predominate." *Clark v. Putnam Cnty.*, 293 F.3d 1261, 1270 (11th Cir. 2002).[4] The math is inexorable. Because the State wanted to draw CD 1 as majority-BVAP, whatever its other interests, the *one thing* that would be (and is) true about the District is that the mapdrawer needed to (and did) identify and include new areas based on the racial composition of the people who live within them.

In any event, the State's proffered "race-neutral" justifications for CD 1 in no way detract from the conclusion that race was the predominant factor behind CD 1. First, the State points to its purported desire to address a theoretical future underpopulation of CD 1 after the 2020 Census. To begin, the State cites no authority to establish that a hypothetical change in future population can serve as a legal justification for district line-

[3] The State claims that "the claims raised by the plaintiffs in the instant case have been thoroughly litigated" and "the State court entered a lengthy and detailed opinion rejecting [those] claims." Resp. at 1. The State provides no legal argument on this point, however, presumably because the state court litigation was brought under both state and federal law, and both the parties and the State Court's judgment focused primarily on state legislative districts.

[4] *See also Bush v. Vera*, 517 U.S. 952, 963 (1996) (race was predominant factor where a legislature conceded one of its objectives was to create majority-minority districts, notwithstanding that "[s]everal factors other than race were at work in the drawing of the districts"); *Miller v. Johnson*, 515 U.S. 900, 918 (1995) (race was predominant purpose where it was undisputed that a district was "the product of a desire by the General Assembly to create a majority black district" even though districts were of equal population); *Diaz v. Silver*, 978 F. Supp. 96, 119 (E.D.N.Y.) *aff'd*, 522 U.S. 801,*and aff'd sub nom. Acosta v. Diaz*, 522 U.S. 801 (1997*) and aff'd sub nom. Lau v. Diaz*, 522 U.S. 801 (race was predominant factor where legislature admittedly sought to draw majority-minority districts, "overriding any other concern including incumbency").

drawing. Even if it were, it simply begs the question: How did the State determine *which* individuals should be drawn into CD 1? The State provides no answer—it cites no model or method by which it evaluated population growth, made projections, and determined which parts of the Research Triangle Park area would address the supposed issue.

The reason for the State's silence is made obvious by the underlying data. Defendants' efforts to explain CD 1 as the product of an effort to stabilize the District's population in fact demonstrates that—true to its goal of creating a "Minority District"—race was the factor that could not be compromised in the construction of the district. CD 1 now includes *more than 78% of all African-American registered voters in Durham County*, compared to only 39% of white voters. *See* Second Ansolabehere Report ¶ 49 (copy attached as Exhibit 1); *see also Miller*, 515 U.S. at 916 (plaintiffs' burden is to show "that race was the predominant factor motivating the legislature's decision to place *a significant number of voters* within or without a particular district") (emphasis added). The fact that a Durham County voter was twice as likely to be pulled into CD 1 if he is African-American than if he is white is not explained by a population projection; it is explained by race. Further, the State's post-litigation explanation that the State pulled portions of Durham County into CD 1 simply to address population fluctuations is not consistent with its earlier assertions. The State's preclearance submission expressly identified the "majority African-American status of [CD 1]" as a basis for extending CD 1 into Durham County. Dkt. #18-2, Ex. 7, at 13.

Second, the State claims it drew CD 1 to address a request by Congressman Butterfield, a decision that "ha[d] nothing to do with race." Dkt. #29, Resp. at 28-29. But Dr. Hofeller describes this alleged request in expressly racial terms: A "minority Congressman" requested that CD 1 be drawn to "have the same number of adult African-Americans drawn from counties covered by Section 5 of the VRA, as were contained in the Old District." Hofeller Report ¶ 50. This has everything to do with race.

Third, the State points to the Republican majority's desire to increase its political advantage. But in drawing CD 1 as a "Minority District," the State's lodestar was race, not politics, as shown by the fact that voter tabulation districts that were retained, added, or removed from CD 1 are best explained by race, not political affiliation. S*ee* Dkt. #18-1, ¶¶ 22-32, 40-43, 46-48, 50-53.[5] "Race was the criterion that, in the State's view, could not be compromised," and thus the State's political goals "came into play only after the race-based decision had been made." *Shaw v. Hunt*, 517 U.S. 899, 907 (1996).

It is obvious from the State's contemporaneous statements, the underlying data, and the State's response to this motion that race was the predominant factor behind CD 1.

[5] The State's contention that the *Cromartie* cases hold that it is error to use party registration statistics to examine the relationship between race and politics misreads those cases badly. In fact, the Court in *Cromartie I* held that evidence that the State excluded from CD 12 precincts that had a lower percentage of black population but were as Democratic (in terms of registered voters) as the precincts inside CD 12 "tends to support an inference that the State drew its district lines with an impermissible racial motive." *Hunt v. Cromartie*, 526 U.S. 541, 548-49 (1999). It simply found that the District Court erred in granting summary judgment to the plaintiffs. *Id.* at 550-54. And in *Cromartie II*, the Court was persuaded by the State's evidence of its political motivations—a report by Dr. Peterson that relied on years of election data to show that "the State included the more heavily Democratic precinct much more often than the more heavily black precinct," which refuted the plaintiffs' registration-based evidence. *Id.* at 549-50; *see also Easley v. Cromartie*, 532 U.S. 234, 243-46 (2001). Ironically, Dr. Peterson testified on behalf of the plaintiffs in the case currently pending before the North Carolina Supreme Court, performed the same analysis he did in *Cromartie*, and concluded that race better explains the contours of CD 12. *See* Second Declaration of John Devaney ("Second Devaney Declaration") (copy attached as Exhibit 2), ¶ 2 & Ex. 1 (Second Affidavit of David Peterson, Ph.D). The State, understandably, does not highlight Dr. Peterson's analysis to this Court.

b. The State Cannot Meet Its Burden on Strict Scrutiny

(i) No Showing that Section 2 Compliance Was a Compelling Interest to Which CD 1 Was Narrowly Tailored

Because race was the predominant factor in drawing CD 1, this Court must "conduct the most exacting judicial examination of the evidence of the State." *H.B. Rowe Co. v. Tippett*, 615 F.3d 233, 250 (4th Cir. 2010) (internal quotation marks and citations omitted). That is, "[s]trict scrutiny remains . . . strict." *Bush*, 517 U.S. at 978.

In tacit acknowledgment that CD 1 was drawn based on race, the State argues that it did so because it had a "reasonable fear" of liability under Section 2. In making this argument, the State takes on the demanding burden of establishing a "'strong basis in evidence' for finding that the threshold conditions for § 2 liability are present," *Bush*, 517 U.S. at 978, lest Section 2 be used to justify the racially-discriminatory gerrymandering it was intended to preclude. But the State never addresses why it believed the preconditions for Section 2 liability applied to CD 1, and instead seeks to divert the analysis to a false debate over whether there is racially polarized voting in North Carolina.

As to the first of the preconditions—the minority group must be "sufficiently large and geographically compact to constitute a majority," *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986)—the State provides no evidence to support its contention that a cohesive and geographically compact African-American community exists in CD 1, such that it could constitute the majority of the district's BVAP. Indeed, the State offers no evidence that it even *evaluated* this factor. The State instead admits that it could not draw CD 1 as

a majority-BVAP district without greatly *expanding* its boundaries. Dkt. #18-2, Ex. 7, at 13.[6] A State cannot use Section 2 to justify its race-based redistricting where it draws a district that "reaches out to grab small and apparently isolated minority communities which, based on the evidence presented, could not possibly form part of a compact majority-minority district." *Bush*, 517 U.S. at 979; *see also Shaw*, 517 U.S. at 916.

The State's response to the third precondition—the white majority must vote "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate," *Thornburg*, 478 U.S. at 50-51—is even more confounding. As Plaintiffs explained in their Memorandum, by 2011, there were two decades of election results proving that the African-American community in Northeastern North Carolina can elect its representative of choice *even if it does not constitute a majority of CD 1.* The State's only response is that this data does not prove "the absence of racially polarized voting," Resp. at 31, failing to recognize it is the *State's* burden to prove the presence and extent of racially polarized voting. The State also makes the curious statement that "whites could never join in a bloc to defeat the African-American candidate of choice," *id.*, a fact that only shows that the third precondition for Section 2 liability was not present. In short, there was no basis for the State to have concluded that it needed to dramatically increase the number of African-American voters in CD 1 to prevent the majority from defeating the minority's preferred candidate. If the State was defending against a Section

[6] The State takes issue with the very notion that it must demonstrate a geographically compact African-American population, dismissing measures of compactness as meaningless. But a Section 2 violation requires proof of a geographically compact minority community. *Bush*, 517 U.S. at 979 ("If, because of the dispersion of the minority population, a reasonably compact majority-minority district cannot be created, § 2 does not require a majority-minority district."). The Fourth Circuit does not hesitate to reject Section 2 claims where the plaintiff fails to establish this precondition, such as where, as here, the minority community is spread throughout the geographic region in question. *Gause v. Brunswick Cnty., N.C.*, 92 F.3d 1178 (4th Cir. 1996).

2 lawsuit, instead of disingenuously relying on Section 2 as a talisman, that is precisely the point it would make. *See, e.g.*, *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 438-39 (S.D.N.Y.) (rejecting an "analysis [that] examines racially polarized voting without addressing the specifics of the third *Gingles* factor, which requires white majority bloc voting that usually defeats the [minority]-preferred candidate" and noting that "[e]ven if there were racially polarized voting, the report does not speak—one way or the other—to the effects of the polarized voting"), *aff'd*, 543 U.S. 997 (2004).

Finally, the State's opposition brief never suggests that the State considered the totality of the circumstances inquiry under Section 2, much less had a "strong basis" for concluding it faced a serious risk of Section 2 liability unless it recast CD 1 as a majority-BVAP district.

(ii) No Showing that Section 5 Constituted a Compelling Interest

The State also argues that its use of race in drawing CD 1 is justified by Section 5 of the VRA. But the State does not even attempt to respond to Plaintiffs' main point: Even if Section 5 remained effective after *Shelby County, Alabama v. Holder*, 570 U.S. __, 133 S. Ct. 2612 (2013), the changes the State made would not have been required by Section 5, because the State did not hold CD 1's BVAP steady to avoid retrogression—it dramatically *increased* the number of African-American voters to make CD 1 BVAP-majority. *See Bush*, 517 U.S. at 983 (rejecting argument that Section 5 can "justify not maintenance, but substantial augmentation, of the African-American population percentage" in the challenged district).

Moreover, while the State acknowledges that, in the wake of *Shelby County*, states cannot "use § 5 to justify future majority-minority districts," Resp. at 35, the State advances (with no legal support) the startling proposition that the compelling state interest inquiry ends upon enactment of a districting plan. That assumption ignores a well-developed body of case law holding that changes in either factual circumstances or the legal landscape can render a law unconstitutional even though it would have survived strict scrutiny at some point in the past. For example, in the wake of the seminal redistricting cases requiring that districts be composed of equal population, *see, e.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964), the Supreme Court affirmed an order requiring reapportionment of the Indiana General Assembly on the basis of population inequalities across districts. *Whitcomb v. Chavis*, 403 U.S. 124, 162-63 (1971). The Court flatly rejected the State's argument that a federal court had already approved its apportionment scheme in 1965 and it could not be compelled to redistrict again before the next Census:

> Here, the District Court did not order reapportionment as a result of population shifts since the 1965 Stout decision, but only because the disparities among districts which were thought to be permissible at the time of that decision had been shown by intervening decisions of this Court to be excessive.

Id. Thus, a court may order statewide redistricting where "intervening decisions of [the Supreme] Court" establish that a redistricting plan is no longer valid. *Id*. at 163.

Because the VRA no longer requires North Carolina to draw district lines to satisfy preclearance requirements, Section 5 cannot constitute a compelling state interest for the State's predominant use of race in drawing CD 1.

2. The State Cannot Justify Its Race-Based Redistricting of CD 12

a. Race Was the Predominant Factor in Drawing CD 12

In redrawing CD 12, the State ramped up the district's BVAP by nearly 7% and made the district majority-minority. Nonetheless, the State's expert asserts that CD 12 was "drawn without race as a factor." Hofeller Report ¶ 38. That statement is directly contradicted by the record and strains credulity. The State has previously described CD 12 as "an African-American" district. Dkt. #18-2, Ex. 7. And Rucho and Lewis, the plan's legislative sponsors, explained that this new "African American" district was "drawn . . . at a Black voting age level that is above the percentage of Black voting age population found in the current Twelfth District." *Id.*, Ex. 7, at 24. Thus, the State's argument that it did *not* draw CD 12 predominantly on the basis of race—or, indeed, did not consider race at all—would require the Court to credit the proposition that although Rucho and Lewis *said* the State purposefully increased this "African-American" district's African-American population, it is mere coincidence that the BVAP of CD 12 increased dramatically from 43.77% to 50.66%.

As the State would tell it now, the difference between old CD 12 and new CD 12 is that the State "added more Democratic voters . . . and removed Republican voters." Resp. at 24-25. The State's "race-neutral" explanation is that Dr. Hofeller used data pertaining to a single election—of the Nation's first African-American President, with unusually high African-American voter turnout—to reconstruct CD 12 to pack Democrats into CD 12 and bolster Republican performance in surrounding districts. The threshold problem with the State's explanation is that Dr. Hofeller could not have relied

solely on election returns for the 2008 presidential election. Political data is available only at the precinct-level; racial data is available at a sub-precinct level. Dr. Hofeller split VTDs to create CD 12, necessarily examining data at the sub-precinct level. *See* Second Devaney Decl. ¶ 3 & Ex. 2 (Hofeller Dep. Tr. at 47:14-50:13, 218:4-219:19).[7] Moreover, Plaintiffs demonstrated in their opening brief that race, not politics, explains the contours of new CD 12. Notably, the State moved White Democrats out of CD 12 and moved Black and Independent Republicans *into* CD 12 at disproportionately high rates. *See* Ansolabehere Report ¶¶ 20-53.

Further, the State's explanation defies common sense. If the State wanted to diminish the influence of individuals who vote for Democratic congressional candidates—the "legitimate" policy goal the State invokes as a talisman again and again—one would expect the State to consider election results from several elections, including recent Congressional elections. It did not, and the State's purported use of election data from a single, uniquely racially polarized Presidential election, further demonstrates that the State did not draw CD 12 for political purposes, but rather based on race. *See Old Person v. Cooney*, 230 F.3d 1113, 1123-24 (9th Cir. 2000) (noting that elections involving minority candidates are usually used for the purpose of assessing the existence of racially polarized voting).

[7] Notably, if Dr. Hofeller concededly set out to make CD 1 majority-minority—as he says he did—it is unclear how he could have accomplished that goal without considering the racial demographics of the districts he was drawing.

The last time CD 12 was drawn to be majority-African-American, the Supreme Court rejected it is as a racial gerrymander. *See generally Shaw*, 517 U.S. 899. This Court should do the same here.

b. The State Cannot Meet Its Burden on Strict Scrutiny

The State does not identify any compelling interest that would justify its use of race or explain why CD 12 is narrowly tailored to serving such an interest. If the Court finds that CD 12 was drawn predominantly on the basis of race, the State has conceded that CD 12 is unconstitutional.[8]

B. Plaintiffs are Likely to Suffer Irreparable Harm

For preliminary relief to be appropriate, Plaintiffs must establish that they are likely to suffer irreparable harm if relief is not granted. *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346 (4th Cir. 2009) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008)), *vacated on other grounds*, 559 U.S. 1089 (2010).[9] As Plaintiffs explained in their opening brief, the claims at issue in this case relate to Plaintiffs' core constitutional rights, and a deprivation of those rights, even for a single election, unquestionably constitutes irreparable harm. The State responds that any harm

[8] Dr. Hofeller explains, "[t]he General Assembly, mindful that Guilford County was covered by Section 5 of the VRA, determined that it was prudent to reunify the African-American community in Guilford County" in CD 12. Hofeller Report ¶ 39. The State's reluctance to rely squarely on Section 5 to justify its decision to turn CD 12 into a majority-BVAP district is understandable. As discussed above, Section 5 no longer applies to Guilford County in the wake of *Shelby County*. Even if it did, Section 5 precludes only retrogression—for example, splitting the African-American community in Guilford County further. It cannot be used to, as the State described it in its preclearance submission, " increase[] the African-American community's ability to elect their candidate of choice." Dkt. #18-2, Ex. 7.

[9] The State is correct that the Fourth Circuit has effectively overruled the preliminary injunction standard stated in *Blackwelder Furniture Co. v. Selig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1997). *See Real Truth About Obama*, 575 F.3d at 346-47. Plaintiffs cited pre-*Winter* redistricting cases, including *Cannon v. North Carolina Board of Elections*, 917 F. Supp. 387 (E.D.N.C. 1996), primarily to illustrate the unique harms at stake in redistricting cases, and courts' sensitivity to those harms. Each element of the four-factor test for issuing an injunction must be independently satisfied, and the strength of a showing of one factor does not lessen the burden of proof on another.

to Plaintiffs is "speculative" because the 2011 congressional map was used in 2012, and a North Carolina state court found the map constitutional (a decision currently under review by the North Carolina Supreme Court).[10] The State is wrong.

To begin, the premise of the State's argument is incorrect. The question of irreparable harm asks whether, if that party ultimately succeeds on the merits, it will have suffered irreparable harm from having been denied preliminary relief. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976) (finding that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," without reference to the likelihood that plaintiffs will ultimately prove such loss); *see also Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d at 346 (explaining that the likelihood of success inquiry is separate from likelihood of irreparable harm). To the extent the State Court's finding is relevant, it is relevant only to the likelihood of success on the merits, not the likelihood that Plaintiffs will suffer irreparable harm if they are denied preliminary relief and later succeed on the merits.

In addition, there is nothing "speculative" about the harm Plaintiffs will have suffered if the congressional map is declared unconstitutional. As Plaintiffs explained in their opening brief, a congressional election would be held based on a map that not only violates Plaintiffs' core constitutional rights (and the rights of those similarly situated), but also reinforces harmful racial stereotypes and stigmas. Indeed, even the State would likely suffer irreparable harm. *See Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521

[10] Although each element of the preliminary injunction standard must be analyzed separately, and although Plaintiffs presented their arguments that way, the State lumps together its arguments on three of the four elements: irreparable harm, balance of equities, and public interest. Plaintiffs have attempted to match the State's arguments back to the legal standard and address them in turn.

(4th Cir. 2002) (observing that a state benefits from an injunction that prevents the state from enforcing an unconstitutional law).

Further, the State is incorrect that use of the congressional map in the 2012 election establishes that Plaintiffs are not likely to suffer irreparable harm in the 2014 election. The State cites no authority for its position that once an electoral map is used (even if unconstitutionally) there can be no harm from its future use. Moreover, as discussed below, the legal landscape has changed since 2012, and any purported interest the State may have once had in drawing CD 1 or CD 12 based on race to comply with Section 5 of the VRA is now gone.

C. The Equities Favor Granting Preliminary Relief

The State argues that the equities weigh against preliminary relief for two reasons: (1) Plaintiffs waited too long to raise their claims, and (2) preliminary relief would inflict irreparable harm on the State. Neither argument has merit.

To advance its claim that Plaintiffs have not been sufficiently diligent, the State starts the clock in July 2011, when the 2011 congressional plan was enacted. Resp. at 29. In doing so, the State ignores the role the Supreme Court's decision in *Shelby County* plays in Plaintiffs' case. In passing the 2011 Congressional Plan, the State expressly relied on Section 5. The Court's decision changed the landscape of redistricting law by removing any purported interest the State may have once had in drawing a congressional map based on race to comply with Section 5. The State also ignores the timeline of the state court litigation, which for a time held the possibility of relief prior to the 2014

election cycle. The North Carolina Supreme Court has now refused to grant preliminary injunctive relief. *See Dickson v. Rucho*, No. 201PA12-2.

Viewed in this context, it is clear that Plaintiffs did not delay raising their claims. Plaintiffs filed suit four months after the Court's landmark decision in *Shelby County*, three months after the state court case went on appeal (which dramatically reduced the odds of relief prior to the 2014 election), four months before the 2014 candidate registration period, seven months before the primary election, and more than a year before the general election. Plaintiffs retained an expert, and drafted and filed this motion for a preliminary injunction, a mere 60 days after filing suit.

The State further argues that even if Plaintiffs did not delay, courts have "permit[ted] elections under illegal plans because these plans were not invalidated until late in the election process." Resp. at 40. The case law on which the State relies relates primarily to instances in which a court has adopted an interim map, on a temporary basis, which may be flawed but is necessary to allow elections to proceed while a more permanent map is developed. *See, e.g.*, *Watkins v. Mabus*, 771 F. Supp. 789, 802-805 (S.D. Miss. 1991), *aff'd in part, vacated in part*, 502 U.S. 954. The State's argument jumps the gun—the issue presented here is not what relief should be granted *after* the State's map is found to be invalid, but what to do in the period before a final decision on the merits. Further, the timelines in the two cases cited by the State were much different than the timeline here; in one, *Watkins*, 771 F. Supp. 789 (S.D. Miss. 1991), the decision was issued within a month of the primary election, and in the other, *Dixon v. Hassler*, 412 F. Supp. 1036 (D.C. Tenn. 1976), it was issued only a week before the general election.

Here, we are still three months away from the primary election and ten months away from the general election.

The State is also incorrect that inconvenience or harm to the State precludes preliminary relief. As Plaintiffs stated in their opening brief, "a state is in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional." *Giovani Carandola*, 303 F.3d at 521. The State's position that any order enjoining a state from effectuating its statutes constitutes undue irreparable injury would effectively foreclose preliminary relief in any redistricting case, a result not supported by the rules or case law.

D. The Public Interest Is Served by Granting Preliminary Relief

To reiterate, "upholding constitutional rights is in the public interest," *Legend Night Club v. Miller*, 637 F.3d 291, 303 (4th Cir. 2011) (citing *Giovani Carandola*, 303 F.3d at 521), as is avoiding the damaging collateral effects of racial gerrymanders, *see Shaw v. Reno*, 509 U.S. 630, 643, 647, 648 (1993). The State has no response on these points, and instead attempts to steer the Court's attention to the purported cost, confusion, and effect on turnout of granting preliminary relief.[11]

But the State's argument only bolsters the importance of granting preliminary relief. If Plaintiffs are likely to succeed on the merits (an issue addressed above), and the State is correct that changing electoral maps is costly, confusing, and dampens turnout, the public interest is best served by adopting a new map *now*, as far in advance of the

[11] The State misstates Plaintiff's position as seeking to enjoin "the 2014 congressional elections." Resp. at 40. Plaintiffs have never asked that the elections themselves be enjoined, only that the State be precluded from commencing the 2014 election cycle using the current race-based boundaries for CD 1 and CD 12. Plaintiffs seek to have a new map adopted quickly, so the 2014 congressional elections may proceed as scheduled.

elections as possible. The magnitude of the cost, confusion and turnout issues will only grow as the election nears, and the time to implement changes and educate candidates and voters decreases. *See* Defendants' Memorandum in Opposition to Plaintiffs' Motion for a Preliminary Injunction, Exs. O, P.[12]

Further, for evidence of expense, confusion, and low turnout, the State relies solely on two affidavits submitted in the state court litigation. (Resp. at 40.) Those affidavits addressed the potential challenges of moving the date of an election primary (a) in a presidential election year, (b) in a case in which numerous federal and state political boundaries were at issue, and (c) pursuant to Section 5 preclearance procedures. None of those circumstances exists here. Moreover, the State has provided *no* evidence of harm to the public interest if an interim map is adopted in time for the primary election to stay on schedule, which is exactly what Plaintiffs seek to do. *See* N.C. Gen. Stat. § 120-2.4 (requiring only two weeks to "remedy any defects" in voting districts).

CONCLUSION

For the reasons stated above, and in Plaintiffs' Motion for Preliminary Injunction, the Court should enter a preliminary injunction enjoining the State from holding elections under the 2011 Congressional Plan.

[12] The State's concern about voter confusion rings particularly hollow in light of the fact that Plaintiffs seek a more sensible map for CD 12, which is commonly recognized as the least compact, most bizarrely-drawn congressional district in the country. *See* Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 21.

Respectfully submitted, this the 3rd day of February, 2014.

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the foregoing **PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** to be made by electronic filing with the Clerk of the Court using the CM/ECF System, which will send a Notice of Electronic Filing to all parties with an e-mail address of record, who have appeared and consent to electronic service in this action.

This the 3rd day of February, 2014.

/s/ Edwin M. Speas, Jr.
Edwin M. Speas, Jr.