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.**	**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Plaintiffs, by and through their counsel of record, submit this Memorandum in Support of their Motion for Summary Judgment.

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I. NATURE OF THE MATTER BEFORE THE COURT

Plaintiffs seek an order precluding the State of North Carolina from conducting further elections for the U.S. House of Representatives pursuant to a redistricting plan that is an illegal racial gerrymander. The State has "packed" African-American voters in Congressional Districts 1 and 12 ("CD 1" and "CD 12," respectively), using race as the predominant factor in drawing these districts with no compelling interest to do so.

The evidence of racial gerrymandering, as further developed in discovery after Plaintiffs filed their preliminary injunction motion, is clear and unequivocal: the shapes of the districts are bizarre; public statements made during the redistricting process reference race as the primary consideration; and demographic data establish that registered voters were dramatically more likely to be included within the new CD 1 and CD 12 if they were African-American—even when controlling for party affiliation. For example, under the new district lines, an individual who lives in a county included in CD 12 is *more than four times as likely* to have been included within CD 12 if that person is African-American than if he is White, irrespective of party affiliation. *See* Section IV-B-3-b, *infra*, at 21-23.

Further, there is no compelling interest to justify the State's blatant use of race. Not only has the Supreme Court's recent holding in *Shelby County., Ala. v. Holder*, 570 U.S. ___, 133 S. Ct. 2612 (2013), removed North Carolina's ability to rely on Section 5 as a compelling interest, but Section 5 would never have compelled the affirmative creation of two majority-minority districts that did not exist in the benchmark plan. Moreover, there is no reasonable basis for believing that packing African-American

voters into these two districts was necessary to avoid liability under Section 2 of the Voting Rights Act ("VRA").

Plaintiffs therefore respectfully submit that the Court should grant summary judgment in Plaintiffs' favor, declare the current redistricting plan unconstitutional, and enjoin the conduct of further elections under the map.

II. STATEMENT OF FACTS

A. Former CD 1 and 12

1. CD 1

CD 1 was first drawn in an iteration of its present form in 1992. *See* Declaration of John M. Devaney ("Devaney Decl."), Ex. 1. For the past 20 years, CD 1 has been represented by an African-American representative. *See id.*, Ex. 2. Between 1997 and 2011, CD 1 did not have a majority Black Voting Age Population ("BVAP").

In 1997, the General Assembly redrew the boundaries of the district. *See id.*, Ex. 3. Between 1997 and 2001, the BVAP of CD 1 was 46.54%. *See id.*, Ex. 4. The 1997 congressional plan, including CD 1, was precleared by the United States Department of Justice ("DOJ") under Section 5 of the VRA. In addition to preclearance by the DOJ, no legal challenges to the 1997 version of CD 1 under Section 2 of the VRA were filed by the DOJ or any other party. In 1998 and 2000, Representative Clayton prevailed in CD 1, winning 62% and 66% of the vote, respectively. *See id.*, Ex. 2. Thus, although CD 1 was not a majority-minority district, the White majority did not vote as a bloc to defeat the candidate favored by African-American voters.

After the 2000 Census, the General Assembly redrew CD 1, modestly increasing the BVAP of the district to 47.76%. *See id.*, Ex. 5. The 2001 congressional plan was precleared by the DOJ, and there were no Section 2 challenges to the redrawn version of CD 1 included in that plan. In each of the five general elections held under the 2000 Congressional map, an African-American candidate prevailed in CD 1. Indeed, between 2002 and 2010, the African-American candidate received no less than 59% of the vote. *See id.*, Ex. 2. Again, although CD 1 was not a majority-minority district, the White majority did not vote as a bloc to defeat African-Americans' candidates of choice. To the contrary, the election results in CD 1 continued to manifest significant crossover voting by the White majority in support of African-American candidates.

2. CD 12

CD 12 has existed in roughly its current form since 1992, when it was drawn as a majority African-American district in response to the DOJ's objection, under its then-existent "maximization" policy. *See id.*, Ex. 6, at 2. In 1997, after years of litigation and the U.S. Supreme Court's repudiation of the DOJ's maximization policy, *see Miller v. Johnson*, 515 U.S. 900, 921-24 (1995), the General Assembly redrew CD 12.

The redrawn CD 12 had a BVAP of 32.56%, *see* Devaney Decl., Ex. 4, which reflected the North Carolina General Assembly's determination in 1997 that the VRA did not require drawing CD 12 as a majority African-American district. *See Cromartie v. Hunt*, 133 F. Supp. 2d 407, 413 (E.D.N.C. 2000) (noting that "District 12 [was] not a majority-minority district"). The 1997 congressional plan, including CD 12, was

precleared by the DOJ, and there were no legal challenges to CD 12 under Section 2 of the VRA.

After the 2000 Census, CD 12 was again redrawn. The BVAP of the new CD 12 was 42.31%. *See id.*, Ex. 5. The 2000 congressional plan, including CD 12, was also precleared by the DOJ and, again, no lawsuit challenging the 2000 version of CD 12 under Section 2 of the VRA was filed.

Between the 1992 General Election and January 2014, CD 12 was served by Representative Mel Watt, who is African American. *See id.*, Ex. 2. Although CD 12 has not been majority-minority for 15 years, Representative Watt never received less than 56% of the vote, and did not receive less than approximately 64% of the vote under the version of CD 12 in effect during the 2000s. *See id.* The White majority thus did not vote as a bloc to defeat the candidate favored by African-American voters in these elections. Instead, the election results in CD 12 continued to manifest significant crossover voting by the White majority in support of African-American candidates.

B. The 2011 Redistricting Process

As the General Assembly confronted the task of redrawing the Congressional map after the 2010 Census, it had several important data points before it:

- CD 1 and CD 12 had been represented by African-American members of Congress since 1992, even though neither district had a majority BVAP under the last two redistricting maps passed by the General Assembly.
- The DOJ had precleared those previous maps without objection.
- No Section 2 lawsuits had been filed to challenge the previous iterations of CD 1 and CD 12. Indeed, no statewide Section 2 challenge of any kind had been filed in North Carolina in the past 30 years.

Notwithstanding this long history of stability, the General Assembly decided in 2011 to fundamentally restructure CD 1 and CD 12 by transforming them into majority-BVAP districts. CD 1 increased from 47.76% to 52.65% BVAP; CD 12 increased from 43.77% to 50.66% BVAP. *See id.*, Exs. 18, 23. The end result consists of bizarrely-shaped districts that pack African-Americans and flout basic redistricting legal principles.

1. Development of the 2011 Congressional Plan

Senator Robert Rucho, Chair of the Senate Redistricting Committee, and Representative David Lewis, Chair of the House Redistricting Committee, had principal responsibility for the 2011 Congressional map-drawing process. *See id.*, Ex. 7, at 5-6; Ex. 8 (Lewis Dep. 30:21-24, 33:3-6, 19-22).

Work on the Congressional map had, however, already begun. In 2010, Rucho and Lewis engaged Dr. Thomas B. Hofeller to design and draw the Congressional map (as well as the House and Senate maps). *See id.* (Hofeller *Dickson* Dep. 35:20-36:20). Hofeller started work on redistricting in late 2010 and had a primary map-drawing role thereafter. *See id.* (Hofeller *Dickson* Dep. 36:8-20).

2. Rucho and Lewis Acknowledged the Racial Purpose Underlying the Creation of CD 1 and CD 12

On July 1, 2011, Rucho and Lewis issued a joint public statement to accompany the release of their Congressional plan in which they expressly acknowledged that CD 1 was created with a racial purpose:

> The State's First Congressional District was originally drawn in 1992 as a majority black district. It was established by the State to comply with Section 2 of the Voting Rights Act. Under the decision by the United States Supreme Court in

> *Strickland v. Bartlett*, 129 U.S. 1231 (2009), the State is now obligated to draw majority black districts with true majority black voting age population. Under the 2010 Census, the current version of the First District does not contain a majority black voting age population.
>
> [. . .]
>
> Because African-Americans represent a high percentage of the population added to the First District . . . we have . . . been able to re-establish Congressman Butterfield's district as a true majority black district under the Strickland case.

See id., Ex. 10, at 3-4. Consistent with this admission of racial purpose, Rucho and Lewis also acknowledged that the map's "precinct divisions were prompted by the creation of Congressman Butterfield's majority black [CD 1]." *Id.*, Ex. 10, at 7.

Rucho and Lewis similarly emphasized that race was the driving factor in creating CD 12. In a section of their public statement captioned "Compliance with the Voting Rights Act," they stated that they drew the "proposed [CD 12] at a black voting age level that is above the percentage of black voting age population found in the current [CD 12]" to "ensure preclearance" under Section 5 of the VRA. *Id.*, Ex. 10, at 2-5. CD 12 contains Guilford County which was—at the time—a covered jurisdiction under Section 5 of the VRA. *Id.*, Ex. 10, at 5.

Rucho and Lewis made similar admissions of racial purpose in a July 19, 2011 joint public statement that accompanied a revised version of the Congressional plan. They again stated that CD 1 was redrawn to include a majority BVAP "as required by Section 2 of the Voting Rights Act" and that they added to CD 1 "a sufficient number of

African-Americans so that the [CD 1] can re-establish as a majority black district." *Id.*, Ex. 11, at 3. The statement emphasized the importance of BVAP in creating the district:

> While our initial version of [CD 1] was fully compliant with Section 2 and Section 5 of the [VRA], our second version includes population from all of the Section 5 counties found in the 2001 version of [CD 1]. Moreover, the total BVAP located in Section 5 counties in Rucho-Lewis 2 exceeds the total BVAP currently found in the 2001 version.

Id., Ex. 11, at 4.

During the debate surrounding passage of the 2011 Congressional Plan, Rucho and Lewis reiterated that they had redrawn CD 1 to be majority-BVAP. Rucho stated that CD 1 was "required by Section 2" of the VRA to contain a majority BVAP, and that CD 1 "must include a sufficient number of African-Americans so that [CD 1] can re-establish as a majority black district." *Id.*, Ex. 12 (July 25, 2011 Senate Testimony (Sen. Rucho), 8:19-9:6); *see also id.* (17:23-25) (CD 1 "has Section 2 requirements, and we fulfill those requirements"); *see also id.*, Ex. 13 (July 27, 2011 House Testimony (Rep. Lewis), 30:2-4) (CD 1 "was drawn with race as a consideration, as is required by the [VRA]").

The focus on race in the legislative debate was similarly prominent with respect to CD 12. Although their plan recreated CD 12 as a majority-BVAP district, Rucho and Lewis maintained that CD 12 was *not* a "VRA" district. Instead, they claimed that CD 12 was drawn to pack Democratic voters into the district. *See, e.g.*, Ex. 14 (Rucho Dep. 182:5-184:9). Statements by the Republican leadership, however, told a different story. For example, when asked whether CD 12 was a "voting rights district," Senator Andrew Brock, Vice Chair of the Redistricting Committee, replied "I think you do have voting

rights in District 12, through Guilford County," and Rucho reiterated that "[t]here is a significant Section 5 population in Guilford County." *Id.*, Ex. 15 (July 22, 2011 Senate Testimony (Sen. Brock), 26:5-6); *see also id.*, Ex. 16 (July 21, 2011 Joint Redistricting Committee Testimony (Rep. Lewis), 12:19-13:8) (describing, in addition to CD 12, how "[m]inority population was also considered in other districts as well").

On July 28, 2011, the North Carolina General Assembly enacted redistricting legislation for North Carolina's congressional districts, which legislation was set forth at Session Law 2011-403, and which was amended by curative legislation enacted as Session Law 2011-414 on November 7, 2011 (herein, as amended, the "2011 Congressional Plan"). *See Dickson v. Rucho et al.*, Civil Action No. 11 CVS 16896 (Wake County Superior Court) (Plaintiffs' Second Set of Stipulations By All Parties, filed 25 February 2013, at ¶ 2(c)) ("Stip.").

C. In Its Section 5 Preclearance Submission, the State Emphasized that It Purposefully Drew CD 1 to Increase the African-American Population

In its preclearance submission to the DOJ, the State acknowledged that under the congressional plans in effect between 1992 and 2010, "African-American candidates and incumbents have been elected in [CD 1 and 12] under all of these different plans." *See id.*, Ex. 7, at 10-11. Despite the sustained success of African-American candidates in these districts, the State trumpeted the fact that it had added more African-American population to the districts so that they would be majority BVAP districts:

> [T]he 2011 Congressional Plan recreates District 1 at a majority African-American level and continues District 12 as an African-American and very strong Democratic district that has continually elected a Democratic African American since

> 1992 . . . . Minority voters have clearly retained their ability to elect two preferred candidates of choice in the 2011 versions of District 1 and 12.

See id., Ex. 7, at 15. According to the State, CD 1 had a "structural problem" after the 2010 Census that required re-drawing CD 1 to add a large number of African-Americans. Specifically, the State decided that because the post-Census CD 1 had a "BVAP of only 48.63%," it had to be "re-create[d] . . . at a majority African-American level." *Id.*, Ex. 7, at 12; *see also id.*, Ex. 7, at 13 (discussing how the "majority African-American status of the District is corrected by drawing the District into Durham County.").

Attempting to justify its dramatic increase in the BVAP of CD 12, the State cited purported "concerns" that 20 years earlier the DOJ had objected to the 1991 Congressional Plan because there was not a second majority-minority district. *Id.*, Ex. 7, at 14. The State therefore added tens of thousands of African-Americans to CD 12. Its new version of the district was "similar to the 2001 version," but it increased the district's BVAP from 43.77% to 50.66%. *Id.*, Ex. 7, at 15.

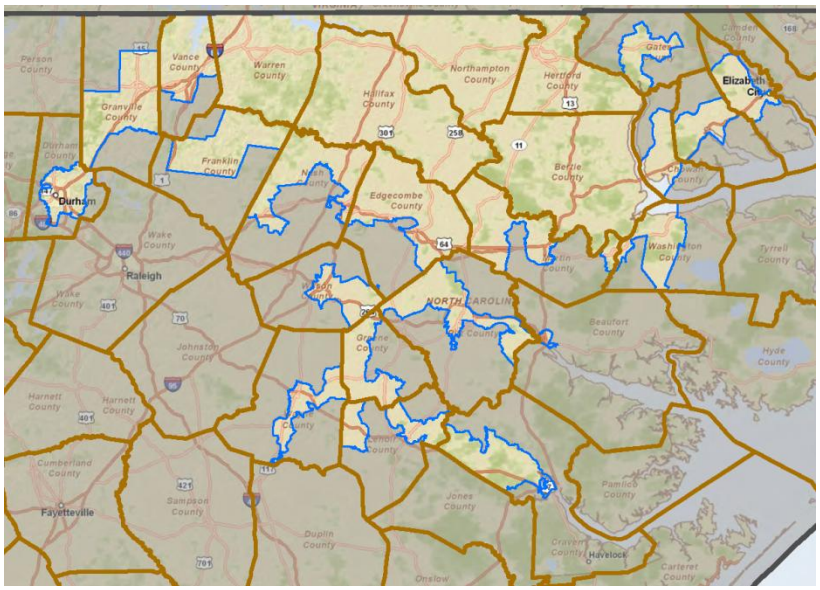
In December 2011, the DOJ precleared the Congressional Plan containing these racially-focused versions of CD 1 and CD 12. *See id.*, Ex. 17.

D. The Revised Configurations of CD 1 and CD 12

The end result of the redistricting process was the 2011 Congressional Plan, which includes CD 1 and CD 12.

1. Reconfigured CD 1

While the former CD 1 had a BVAP of 47.76%,[1] the new CD 1 has a 52.65% BVAP. *See id.*, Ex. 18. Transforming CD 1 into a majority BVAP district required creation of a behemoth sprawling from the rural Coastal Plain to the City of Durham:



See id., Ex. 19. What used to be a "distinctively rural" district, *Shaw v. Hunt*, 861 F. Supp. 408, 469 (E.D.N.C. 1994), now includes a significant urban population. Durham, which had never before been part of CD 1, now constitutes 20% of CD 1's population. *See* Devaney Decl., Ex. 20. But the State only included the "right" Durhamites in CD 1—the district now includes more than 78% of all African-American registered voters in Durham, compared to less than 39% of Whites. *See* Devaney Decl., Ex. 21, ¶ 49.

The new CD 1 is substantially less compact than its predecessor district. A common method for measuring a district's compactness is to calculate its Reock score, which is the ratio of the area of the district compared to the area of the smallest circle that

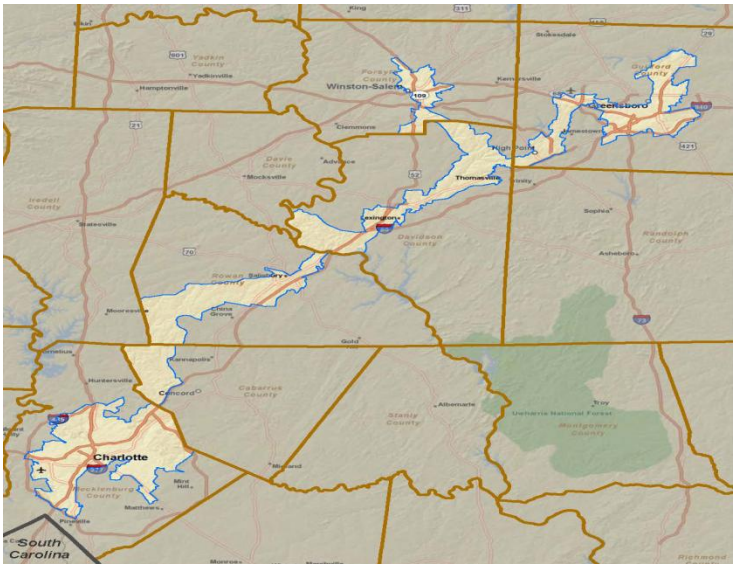
[1] Based on 2010 Census data, former CD 1 had a BVAP of 48.63%. http://www.ncleg.net/GIS/Download/District_Plans/DB_2011/Congress/Congress_ZeroDeviation/Reports/VTD_SingleDistrict/Vap_PDF/rptVTDVap-1.pdf.

could inscribe it. *See id.*, Ex. 22, at ¶ 9. The Reock score for the reconfigured district declined significantly from the score for the old district—from 0.390 to 0.294. *See id.*, Table 1. Other measures of compactness show the same result. For instance, the ratio of CD 1's area to its perimeter dropped from 11,098 to 6,896. *See id.*

The reconfigured CD 1 also disregards geographic and political boundaries to a greater extent than its predecessor. Whereas the old version of CD 1 split only 10 counties, the reconfigured CD 1 contains only five whole counties, with the other 19 split between CD 1 and one or more other districts. *See* Dkt. #33-2 (Hofeller Report), at ¶ 45. CD 1 also splits 21 cities or towns. *See id.* ¶ 47.

2. Reconfigured CD 12

New CD 12 is a 120-mile-long serpentine that is a mere 20 miles across at its widest part. *See* Devaney Decl., Ex. 24. It includes fragments of Charlotte and Greensboro connected by a thin strip that traces Interstate 85. *See id.* A person traveling on Interstate 85 between the two cities would exit the district multiple times. *See id.*



After the Rucho-Lewis redistricting, CD 12's Reock score fell from 0.116 to 0.071, which puts CD 12 among the most non-compact districts in the country. *See id.*, Ex. 22, at ¶ 15; *see also id.*, Ex. 25. The ratio of its area to perimeter fell from 2,404 to 1,839. *Id.*, Ex. 22, Table 1. No Congressional District in North Carolina is less compact. *See id.* New CD 12 also disregards geographic and political boundaries, splitting the boundaries of 13 different cities and towns. *See id.* ¶ 17.

E. The State-Law Challenge to the 2011 Congressional Plan

After the 2011 Congressional Plan was passed, two sets of plaintiffs challenged it (and the state legislative redistricting plans) in state court, alleging, among other things, that the plans were illegal racial gerrymanders under state law. *See N.C. Conference of Branches of the NAACP et al. v. State of North Carolina et al.*, 1st Am. Compl. (12/9/12); *Dickson et al. v. Rucho et al.*, 1st Am. Compl. (12/12/12). The two cases were consolidated in front of a three-judge court pursuant to N.C. Gen. Stat. § 1-267.1.

After a bench trial, the court issued a Judgment and Memorandum of Decision denying Plaintiffs' pending motion for summary judgment and entering judgment in Defendants' favor. *See generally Dickson et al. v. Rucho et al.*, Judgment and Memorandum of Opinion ("State Court Opinion"). Of particular importance here, the state court found that the General Assembly used race as the predominant factor in drawing CD 1. The court stated it is "undisputed" that the General Assembly "intended to create" CD 1 to be a "Voting Rights Act district" that included at least 50% BVAP. *See id.* at 14. Although the court held that this racial purpose triggered review of CD 1 under the strict scrutiny standard, the court ultimately did not conduct a strict scrutiny

evaluation that was specific to the district. Instead, addressing all VRA districts generically, the state court concluded that the State had a compelling interest in avoiding Section 2 and Section 5 liability and that the State's VRA districts were narrowly tailored to those ends. *See generally id.* at 20-44.

The state court also considered CD 12 and other "non-VRA" districts and concluded that politics—not race—drove the creation of CD 12. *Id. at* 46-48, Appx. B 161-65. Applying rational basis review, it upheld CD 12. *Id.* at 46-48.

The state court plaintiffs have appealed the state court's decision to the North Carolina Supreme Court. *See Dickson v. Rucho*, 11-CVS-16940 (Plaintiffs' Notice of Appeal (July 22, 2013)). No order has been issued staying the 2014 elections or adopting an interim map while the legality of the Rucho-Lewis map is determined.[2] The general election is scheduled for November 4, 2014. Devaney Decl., Ex. 26.

III. QUESTION PRESENTED

Whether North Carolina Congressional Districts 1 and 12 constitute illegal racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

IV. ARGUMENT

A. Summary Judgment Standards

Summary judgment is appropriate where the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). When the non-moving party has the burden of proof

[2] This Court has already noted that it is "not convinced that the North Carolina Supreme Court will issue a decision in the state litigation in a timely manner." Dkt. #65, at 9.

on the merits, the moving party is entitled to summary judgment if it shows the absence of material disputed facts. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 325 (1986); *see also Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 341 (4th Cir. 2001) (discussing government defendant's burden on summary judgment when strict scrutiny analysis applies). "[A] non-moving party must establish more than the 'mere existence of a scintilla of evidence' to support his position." *Brown v. Penn Nat. Sec. Inc. Co.*, 1:12CV1204, 2014 WL 1028329, at *2 (M.D.N.C. Mar. 17, 2014) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). Thus, summary judgment is appropriate where the non-movant fails to offer "evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252. A non-moving party cannot rely on mere conclusory statements to defeat summary judgment. *See United States v. Roane*, 378 F.3d 382, 400–01 (4th Cir. 2004) (observing that "[a]iry generalities, conclusory assertions and hearsay statements [do] not suffice to stave off summary judgment"); *cf. Yellowbear v. Lampert*, 741 F.3d 48, 59 (10th Cir. 2014) (where the government must establish that it possessed a compelling interest for a challenged action, it must do more than merely assert the existence of a compelling interest).

B. Strict Scrutiny Applies Because Race Was the Predominant Factor in Drawing CD 1 and CD 12

1. An Unconstitutional Gerrymander Exists When Race Was the Predominant Factor and There Is No Compelling Interest to Justify the Use of Race

"[A] State may not, absent extraordinary justification, . . . separate its citizens into different voting districts on the basis of race." *Miller*, 515 U.S. at 911-12 (internal

quotations and citations omitted). The reason is simple: "When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, think alike, share the same political interests, and will prefer the same candidates at the polls." *Id.* (internal quotations and citations omitted). A voting district is an unconstitutional racial gerrymander when a redistricting plan "cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." *Shaw v. Reno*, 509 U.S. 630, 643, 649 (1993) ("*Shaw I*").

In a racial gerrymander case, "[t]he plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 916. "To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, such as compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.* Public statements, submissions, and sworn testimony by the individuals involved in the redistricting process are relevant. *See, e.g.*, *Bush v. Vera*, 517 U.S. 952, 960-61 (1996) (examining the state's preclearance submission to the DOJ and the testimony of state officials).

Where a state has "concentrated a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions," *Shaw I*, 509 U.S. at 647, or where the "State's own

concessions" provide such overwhelming evidence of race as the predominant purpose that it is "practically stipulated by the parties involved," *Miller*, 515 U.S. at 910 (internal quotation marks and citation omitted), Plaintiffs' burden is easily satisfied.

If Plaintiffs establish that race was the predominant factor, the Court applies strict scrutiny, and "the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." *Miller*, 515 U.S. at 920.

2. Race Was the Predominant Factor in Drawing CD 1

Here, there is no doubt that race was the predominant factor driving the creation of CD 1. The State has admitted as much.

First, the legislators responsible for the new CD 1, Rucho and Lewis, conceded through contemporaneous public statements that CD 1 was drawn based on race. Among other things, Rucho and Lewis have expressly stated that CD 1 was redrawn to include a majority-BVAP "as required by Section 2 of the Voting Rights Act" and that they added to CD 1 "a sufficient number of African-Americans so that [CD 1] can re-establish as a majority black district." Devaney Decl., Ex. 11. They have also stated that they sacrificed traditional redistricting principles to allow CD 1 to be recast with a majority-BVAP population. *See, e.g., id.*, Ex. 10 ("[M]ost of our precinct divisions were prompted by the creation of . . . majority black [CD 1]"); *see also id.*, Ex. 27 (Hofeller Dep. 38:19-39:11) (to draw CD 1 as majority-BVAP, "it became necessary to split some precincts

[and counties], and they were split"); *id.* (Hofeller Dep. 41:15-42:12) (agreeing that most precinct splits were the result of creating CD 1 as majority-BVAP).[3]

Second, the testimony of the mapdrawer, Dr. Thomas B. Hofeller, confirms Rucho's and Lewis' prior public statements. Hofeller testified that Rucho and Lewis instructed him that CD 1 "should be drawn with a African-American percentage in excess of 50 percent total VAP." *Id.* (Hofeller Dep. 22:2-24, 35:13-36:10). According to Hofeller, he drew CD 1 to be majority-BVAP because it is "a 'VRA Section 2 Minority District.'" Dkt. 33-2 (Hofeller Report), ¶ 19 (emphasis added).[4] Indeed, not only did Hofeller draw CD 1 to be majority-BVAP, he drew it to include *specific* African-Americans. Hofeller asserts that he complied with a request by a "minority Congressman" 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.

Third, the relevant data shows that the State used race as the predominant factor in constructing CD 1 as a "Minority District." CD 1 includes more than 78% of all African-American registered voters in Durham County, compared to only 39% of White voters. *See* Devaney Decl., Ex. 21, ¶ 49. The fact that a Durham County voter was twice as

[3] In addition, North Carolina's submission for preclearance to the DOJ conceded that CD 1 had been drawn primarily with race in mind. The State could not have been more explicit: CD 1 was "re-create[d] . . . at a majority African-American level." See *id.*, Ex. 7, at 15.

[4] The report that Dr. Hofeller submitted in this case 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.").

likely to be pulled into CD 1 if he is African-American than if he is White is explainable only by race. The State's preclearance submission expressly said so. *Compare* Dkt. #18-2, Ex. 7, at 13 (the State extended CD 1 into Durham County to ensure the "majority African-American status of [CD 1]") *with 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").

All of the evidence before the Court reveals that in drawing CD 1, the mapdrawers' primary intent was to make it a majority-minority district. There is no other justification for CD 1. The district is bizarre on its face. *See supra* at 10-11. It tramples over political subdivisions. It connects profoundly disparate parts of the State, including the small, rural communities of the Coastal Plain and the City of Durham. *See supra* at 10-11. And African-Americans in the counties from which CD 1 was created were packed into the district, just as the drawers intended. *See supra* at 5-11. 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. As Hofeller confirms, given his marching orders to draw CD 1 as a "Minority District," CD 1 was "always in [his] mind" and he routinely needed to "circle back" to CD 1 in the course of drawing the overall map to ensure that changes to other districts did not change CD 1's demographics—because "if the district were to be drawn as a Voting Rights Act district, it had to be in excess of 50 percent [BVAP]." Devaney Decl., Ex. 27 (Hofeller Dep. 28:16-30:14). In short, even

if the State may have had other goals in drawing CD 1, race was the *predominant* purpose. *See Clark v. Putnam Cnty.*, 293 F.3d 1261, 1270 (11th Cir. 2002) (the "fact that other considerations may have played a role in . . . redistricting does not mean that race did not predominate").[5]

Thus, it is not surprising that the North Carolina state court found it "undisputed" that race was the predominant factor in drawing CD 1. *See* State Court Opinion, at 14-15 (concluding it was "undisputed" that the General Assembly drew CD 1 as a "VRA" district with a majority-BVAP and determining that CD 1's "shape, location and racial composition" was "predominantly determined by a racial objective.").

It is obvious from the State's contemporaneous statements, testimony from this lawsuit, and the underlying data, that race was the predominant factor behind CD 1. The State cannot have it both ways. It cannot hide behind the VRA to justify its race-based approach to drawing CD 1 at the time of redistricting, and then take the litigation position that race was not the predominant purpose in drawing CD 1. For CD 1 to withstand constitutional scrutiny, the State must prove that its use of race is justified by a compelling state interest, which it cannot do.

3. Race Was Also the Predominant Factor in Drawing CD 12

The State has not conceded that CD 12 was drawn based primarily on race. According to Hofeller, the dramatic increase in BVAP in CD 12—from 43.8% to

[5] *See also Bush*, 517 U.S. at 963 (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*, 515 U.S. at 918 (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"); *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").

50.7%—was not an "intended consequence" but rather an inadvertent consequence. Devaney Decl., Ex. 27 (Hofeller Dep. 72:6-74:8). The evidence instead supports the obvious inference—the State did not "accidentally" make CD 12 majority-BVAP. Indeed, the only distinction between CD 1 and CD 12 is that State officials outright admitted their use of race to draw CD 1. Other than that, CD 1 and 12 reflect the same race-driven process.

a. CD 12 Is Not Justified by Traditional Redistricting Principles

Like CD 1, CD 12 is bizarrely shaped, consisting of meandering tentacles that extend in erratic directions, slicing through county lines and encircling areas otherwise carved out from the district. *See* Devaney Decl., Ex. 24. Indeed, CD 12's shape is arguably the more bizarre of the two, as it lacks any central nucleus. The district is 120 miles long but only 20 miles wide at its widest point. *See id.* It traces I-85 and includes parts of two cities that are over 90 miles apart—Charlotte and Greensboro. *See id.*

CD 12 cannot be explained by the traditional districting principle of compactness. Prior to the 2010 Census, CD 12 had a Reock score of 0.116. Devaney Decl., Ex. 22, ¶ 15. The 2011 Congressional Plan reduced CD 12's score even further—to an abysmal 0.071, a fraction of the median score for the state, 0.377. *See id.* The ratio of CD 12's area to its perimeter also declined substantially, from 2,404 to 1,839. The new CD 12 is often cited as the *least compact district in the U.S. Id.*, Ex. 26.[6] Plaintiffs were thus not surprised to learn that Hofeller did not even *consider* mathematical measures of compactness in drawing CD 12. *Id.*, Ex. 27 (Hofeller Dep. 44:19-45:12).

[6] CD 1, which the State admits was a racial gerrymander, manifests the same pattern: its Reock score was reduced from 0.39 to just 0.29. *See* Ansolabehere Report, Table 1.

Also like CD 1, CD 12 cannot be explained as an effort to protect political subdivisions. CD 12 weaves through six counties and does not contain a single county in its entirety, an accomplishment not even CD 1 can match. New CD 12 also splits 13 cities or towns, with several of those cities and towns split among three or even four different congressional districts. *See* Devaney Decl., Ex. 22, ¶ 17.

b. CD 12 Is Explained By Race

The shape and composition of CD 12 are thus not explained by traditional redistricting principles. The real explanation is the State's primary focus on race in drawing the district.

First, legislative leaders admitted that Section 5 preclearance requirements, which focus on racial dynamics, were part of the calculus in drawing CD 12. *See supra* at 5-8. This is why the State, in its Section 5 preclearance submission, called the new CD 12 "an African-American" district and explained that the new CD 12 "maintains, and in fact increases, the African-American community's ability to elect their candidate of choice." Devaney Decl., Ex. 7. Again, these contemporaneous statements were confirmed by the mapdrawer, who testified that Rucho and Lewis instructed him to move African-Americans residing in Guilford County into CD 12 because failure to do so "could endanger the plan and make a challenge to the plan" under Section 5. *See id.* Ex. 27 (Hofeller Dep. 37:2-22, 71:2-21, 74:9-75:16).

Second, the data show that African-Americans were purposefully packed into CD 12. The BVAP of CD 12 was increased hugely, from 43.8% to 50.7%. *Id.*, Ex. 22, ¶¶ 18-19; *see also id.*, Ex. 23. There are roughly *75,000* more African-Americans of

voting age population in the new CD 12 as compared to its prior version. *Id.*, Ex. 27 (Hofeller Dep. 69:23-70:8). This increase exceeds even the increase exhibited in the new CD 1, where the BVAP was increased by approximately 5%.

Analysis of the demographics of CD 12 relative to the demographics of the counties that are partly or wholly within it (CD 12's "envelope") puts the role of race in drawing CD 12 into greater focus. This analysis, performed by Plaintiff's expert Dr. Ansolabehere, considers the area from which the General Assembly had to draw to fill CD 12 without crossing additional county boundaries or dramatically reconfiguring CD 12. *Id.*, Ex. 22, ¶ 20. Notably, Hofeller does not disagree with any of the facts or data presented through Dr. Ansolabehere's analysis below. *Id.*, Ex. 27 (Hofeller Dep. 15:12-18:17).

The population of CD 12 comprises 30.3% of the population of the envelope. *Id.*, Ex. 22, ¶ 34. Compare the likelihood that a person of a given race, who lives within the envelope, was included within CD 12:

Likelihood that a Person of a Given Race was Put in CD 12				
Population Group	Population in Envelope		Population in CD 12	
White	993,642	**67.4%**	158,959	**16.0%**
Black	396,078	**26.9%**	254,119	**64.2%**

Id. ¶¶ 34-36. In other words, under the new district lines, an individual who lives in a county included in CD 12 is *more than four times as likely* to have been included within CD 12 if that person is African-American than if he is White. Like the increase in African-Americans in the voting age population, this ratio exceeds the one present in

CD 1, which state officials acknowledge was drawn based on race, where a person was approximately twice as likely to be included within CD 1 if that person is African-American than if he is White. *Id.* ¶ 22.

The same results hold at an even more granular level of analysis. Compare the racial composition of the Voting Tabulation Districts (VTDs) that were included in CD 12 in the prior map with the ones included in current CD 1:

Racial Composition of VTDs in former vs. new CD 12 (Registered Voters)		
	Black	White
Remained in CD 12	**54.0%**	31.9%
Moved into CD 12	**44.0%**	37.1%
Moved out of CD 12	23.2%	**64.0%**

Id., Ex. 22, ¶ 38. The VTDs the State chose to keep in or add to CD 12 have higher Black populations. The VTDs removed from CD 12 have dramatically higher White populations. And the net difference in percent Black registration between VTDs moved into CD 12 and VTDs removed from CD 12 is 20.9%. The same pattern holds if the metric is population generally or voting age population, rather than registered voters.

c. CD 12 Is Better Explained By Race—Not Politics

The State's "race-neutral" explanation is that 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. *Id.*, Ex. 27 (Hofeller Dep. 56:2-5). The record evidence does not support the State's contention that it did not consider race in drawing CD 12.

The threshold problem with the State's explanation is that Hofeller could not have relied *solely* on election returns for the 2008 presidential election. Political data is not available below the precinct level; racial data is available at a sub-precinct level. Hofeller split VTDs to create CD 12, necessarily examining data at the sub-precinct level. *See id.*, Ex. 9 (Hofeller *Dickson* Dep. 47:14-50:13, 218:4-219:19); *id.*, Ex. 27 (Hofeller Dep. 50:18-51:6).

Moreover, the data shows that race—not politics—better explains the redrawn CD 12. If political considerations were the predominant factor, one would expect that the percentage of African-American and White voters included within CD 12 would be equal (or nearly so) for any given party registration. That is not the case. The percentage of African-American and White voters included within CD 12 is vastly different *even holding party affiliation constant*.

First consider the "envelope analysis" discussed above, adding party registration as a control variable:

Likelihood that a Person of a Given Race and Party was put in CD 12				
Party of Registration	Population Group	Population In Envelope	Population in CD 12	Percent of Group in CD 12
Democrat	White	280,915	51,367	**18.3%**
	Black	334,427	217,266	**65.0%**
Republican	White	448,914	61,740	**13.8%**
	Black	10,341	6,199	**59.9%**
Undeclared	White	262,024	45,496	**17.4%**
	Black	51,061	30,505	**59.7%**

Id., Ex. 22, ¶ 44. If an individual within the envelope is African-American, the odds that she was included within CD 12 were still approximately four times higher than if she were White—*irrespective of party*.

These disparities are significantly greater under new CD 12 than they were under the prior map. For instance, under the old map, 40.4% of White Democrats were included within CD 12. *Id.* ¶ 45. If the State drew CD 12 as a political gerrymander, not a racial gerrymander, there is no reason why that number should have been cut by more than half, down to just 18.3%.

Now consider again the VTD analysis with party registration added:

Racial Composition of VTDs in former vs. new CD 12, Controlling for Party Registration (Registered Voters)

	Among Democrats		Among Republicans		Among Undeclared	
	Black	White	Black	White	Black	White
Remained in CD 12	79.5%	15.3%	9.6%	85.7%	37.0%	49.3%
Moved into CD 12	68.1%	24.8%	6.7%	87.0%	29.8%	55.2%
Moved out of CD 12	45.8%	48.8%	1.7%	95.6%	13.0%	78.4%

Id., Table 10. Within all three categories of party registration, the VTDs kept in CD 12 or moved into CD 12 had much higher proportions of African-American voters than the VTDs that were moved out.

Reorganizing the data to sort first by race then by party registration further undermines the State's purported explanation:

Racial Composition of VTDs in former vs. new CD 12, Controlling for Party Registration (Registered Voters)						
	Among Whites			Among Blacks		
	Dem.	Rep.	Unreg.	Dem.	Rep.	Unreg.
Remained in CD 12	31.1%	40.4%	28.4%	85.7%	2.4%	11.3%
Moved into CD 12	34.3%	36.2%	29.2%	87.0%	2.5%	14.0%
Moved out of CD 12	29.3%	45.1%	24.5%	95.6%	2.5%	12.9%

Id., Table 11. The differences in party registration between the VTDs kept or moved within CD 12 compared to those moved out are trivially small. For instance, among White voters, the VTDs kept within CD 12 had only a slightly higher percentage of Democrats than those moved out (31.1% vs. 29.3%). And remarkably, among African-American voters, the VTDs moved into CD 12 had a *lower* percentage of Democrats than the VTDs moved out (87.0% vs. 95.6%). The quantitative evidence all point in the same direction: race, not traditional districting principles or even political affiliation, was the dominant factor in drawing CD 12, just as it was for CD 1. *Id.* ¶ 53.

The validity of Dr. Ansolabehere's "envelope analysis" of CD 12 is confirmed by Dr. David Peterson's "boundary segment analysis" of CD 12. Dr. Peterson first conducted a boundary segment analysis of CD 12 in 1996 as an expert witness for the State in an effort to determine whether race or partisan politics best explained the boundary the State chose for the 1996 version of CD 12. To conduct this analysis, Dr. Peterson divided the boundary of CD 12 into segments of corresponding precincts immediately within and immediately outside the district lines. He then compared the

racial and partisan political characteristics of the residents assigned to precincts just inside the boundary of CD 12, versus the racial and partisan political characteristics of the citizens assigned to precincts just outside the border, to determine whether the placement of the line was better explained by race or partisan politics. As explained by the Supreme Court in *Easley v. Cromartie*, 532 U.S. 234 (2001), "[t]he principle underlying Dr. Peterson's analysis is that if the district were drawn with race predominantly in mind, one would expect the boundaries of the district to correlate with race more than with politics." *Cromartie*, 532 U.S. at 251. Dr. Peterson's analysis of the 1996 version of CD 12 established that partisan politics explained the boundary that the General Assembly chose for CD 12 in 1996 better than race did. This analysis was cited by the Supreme Court in concluding that the trial court clearly erred when it found that race, not partisan politics, best explained the boundary of the 1996 version of CD 12. *Cromartie*, 532 U.S. at 251-53.

Dr. Peterson repeated this analysis for CD 12 as enacted by Defendants in 2011. This time, his analysis established the *opposite* conclusion: race, not partisan considerations, best explained the way the State chose to draw the lines of CD 12 in 2011. *See* Devaney Decl., Ex. 28 ¶¶ 3, 18.[7]

C. The Legislature's Use of Race to Draw CD 1 and CD 12 Cannot Survive Strict Scrutiny Because There Is No Compelling Interest for Drawing the Lines Based on Race

Because race was the predominant factor motivating the creation of CD 1 and CD 12, strict scrutiny applies. Strict scrutiny requires this Court to "conduct the most

[7] Dr. Peterson performed a similar segment analysis of CD 1 and reached the same conclusion. *Id.*, Ex. 29, ¶¶ 3, 17.

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.

To survive strict scrutiny, "the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." *Miller*, 515 U.S. at 920. The U.S. Supreme Court has assumed, without deciding, that compliance with Section 2 and Section 5 of the VRA can be compelling state interests. *Bush*, 517 U.S. at 977. But the creation of majority-minority districts is narrowly tailored to achieve a compelling state interest only where such districting is "reasonably necessary" to comply with the VRA. *Id.*; *see also Shaw I*, 509 U.S. at 655.

Here, the State has asserted that CD 12 is not a "VRA" district. Other than admitting that it included African-Americans from Guilford County in CD 12 because of vaguely articulated Section 5 concerns, the State has never made any real effort to assert that compliance with the VRA serves as a compelling interest justifying CD 12. If the Court concludes that CD 12 was drawn with race as the predominant purpose, CD 12 thus necessarily fails strict scrutiny.

As to CD 1, there is no compelling interest to justify North Carolina's use of race in redrawing the district. Section 5 does not justify the district. Plaintiffs disagree with the Supreme Court's recent decision in *Shelby County* and support legislative efforts to restore application of Section 5's preclearance requirements, but the law of the land is that no North Carolina counties remain covered jurisdictions for purposes of that VRA provision. And even if Section 5 were applicable, it by no means compelled the

affirmative creation of two new majority-minority districts. Second, the State had no basis for concluding that Section 2 required the creation of CD 1.

1. The State Can Assert No Compelling Interest in Section 5 of the VRA

Section 5 of the VRA mandates that certain "covered" jurisdictions obtain preclearance from the DOJ or from the District Court for the District of Columbia before changing any "standard, practice, or procedure with respect to voting." 42 U.S.C. § 1973c. In North Carolina, 40 counties were considered "covered" jurisdictions for purposes of Section 5. Because the Supreme Court held that the coverage formula provided in Section 4(b) of the VRA is unconstitutional, *Shelby Cnty., Ala. v. Holder*, 570 U.S. ___, 133 S. Ct. 2612 (2013), the State cannot rely on compliance with Section 5 as a compelling state interest.

But even under the law as it stood prior to *Shelby County*, the changes the State made to CDs 1 and 12 would not have been required by Section 5, and the State would have been precluded from relying on that provision to defend its unconstitutional actions. For purposes of preclearance under Section 5, the standard normally applied in the redistricting context is one of "retrogression." *Beer v. United States*, 425 U.S. 130, 141 (1976). "'Retrogression' may be defined as a decrease in the new districting plan or other voting scheme from the previous plan or scheme in the absolute number of representatives which a minority group has a fair chance to elect." *Ketchum v. Byrne*, 740 F.2d 1398, 1402 n.2 (7th Cir. 1984). As shown by the evidence described above, African-Americans were consistently able to elect candidates of their choice in CDs 1 and 12 under the previous two redistricting maps, notwithstanding that neither district

was drawn as a majority-BVAP district. It is well-established that Section 5 cannot be used to "justify not maintenance, but substantial augmentation, of the African-American population percentage" in the challenged district. *See Bush*, 517 U.S. at 983.

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. Section 2 Did Not Require the State to Make CD 1 Majority-Minority

Section 2 of the VRA requires the creation of majority-minority districts only where three preconditions are met: (1) the minority group is "sufficiently large and geographically compact to constitute a majority" in a single-member district; (2) the minority group is "politically cohesive"; and (3) the White majority votes "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986); *see also Growe v. Emison*, 507 U.S. 25, 40 (1993). If these preconditions are met, the court must then apply a totality of circumstances analysis to determine whether there has been a violation of Section 2. *Lewis v. Alamance Cnty., N.C.*, 99 F.3d 600, 604 (4th Cir. 1996).

In order for a state to satisfy strict scrutiny for race-based redistricting based on Section 2 compliance, it must have a "'strong basis in evidence' for concluding that the creation of a majority-minority district is reasonably necessary to comply with § 2." *Bush*, 517 U.S. at 977 (quoting *Shaw I*, 509 U.S. at 656). "[G]eneralized assumptions about the prevalence of racial bloc voting" do not qualify as a "strong basis in evidence." *Id.* at 994 (O'Connor, J., concurring). The district must "substantially address[]" the

potential Section 2 liability without "subordinat[ing] traditional districting principles to race substantially more than is 'reasonably necessary' to avoid" that liability." *Id.* at 977, 979.

As to CD 1, which the State admits it drew purposefully to be majority-BVAP, the State had no basis for concluding that Section 2 required it to do so. The State cannot meet its burden of proof.

As to the first precondition, the State cannot establish 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."); *Gause v. Brunswick Cnty.*, 92 F.3d 1178 (4th Cir. 1996) (rejecting a Section 2 claim where the plaintiff failed to establish this precondition). To the contrary, as evidenced by the tortured district lines that stretch every which way to encompass African-American voters, the minority population in the northeastern part of the state is not presently geographically compact enough to comprise a majority in a single-member district. 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 v. Hunt*, 517 U.S. 899, 916 (1996) (*Shaw II*).

Nor can the State establish the second and third preconditions—racially-polarized voting significant enough that the White majority routinely votes as a bloc to defeat the minority candidate of choice. Under the prior two congressional plans, CD 1 was not

majority-BVAP, and no lawsuits were filed challenging the district under Section 2. Indeed, no statewide Section 2 challenge of any kind had been filed in North Carolina in the past 30 years. Moreover, minority-preferred candidates have consistently won in the prior iteration of CD 1 (and CD 12), even without majority-minority districts. *Id.* Thus, the White majority has not voted as a bloc to defeat the candidates favored by African-American voters. As Hofeller concedes, the "best predictor of the results of elections in Congressional Districts 1 and 12 would have been the past election results in those districts." Devaney Decl., Ex. 27 (Hofeller Dep. 77:13-78:8). The past election results in those districts illustrates the frailty of the State's position here. *See, e.g.*, *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 438-39 (S.D.N.Y. 2004) (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 has never suggested that it considered the totality of the circumstances inquiry under Section 2.

In sum, the State had no strong basis in evidence for believing that drawing either CD 1 or CD 12 as majority-BVAP was compelled by the VRA. The law is clear. A state can use race to draw districts *required* by the VRA, but it *cannot* justify race-based redistricting undertaken simply to avoid potential litigation. *See Shaw II*, 517 U.S. at 908 n.4 (rejecting dissent's contention that an "acceptable reason for creating a second majority-minority district" would be the "State's interest in avoiding . . . litigation,"

because a state must "have a 'strong basis in evidence,' for believing that it is violating the Act") (internal citations omitted).

The State cannot invoke Section 2 to justify its effort to pack minority voters into a district, as the General Assembly sought to do here. The very suggestion is offensive to the spirit and purpose of the VRA. Compliance with Section 2 is not a compelling interest that justifies the General Assembly's racial gerrymanders of CD 1 and CD 12.

D. Neither CD 1 nor CD 12 is Narrowly Tailored

Even assuming the VRA required the drawing of an unprecedented number of majority-minority districts in the state of North Carolina, which it clearly did not, Defendants cannot demonstrate that either CD 1 or CD 12 was narrowly tailored to comply with Section 2 of the VRA. *See Shaw II*, 517 U.S. at 915; *LULAC v. Perry*, 548 U.S. 399, 519 (1994) (Scalia, J., concurring and dissenting) ("[A] State cannot use racial considerations to achieve results beyond those that are required to comply with the [VRA]").

African-American citizens last constituted a majority of the voting age population in CD 1 and CD 12 during the 1996 elections. In the 8 congressional elections held in CD 1 and 12 since 1996, African-American candidates have won every election by a wide margin, demonstrating beyond peradventure that packing more African-Americans in those districts serves no valid Section 2 purpose. Turning the Voting Rights Act on its head in 2011, Defendants increased the TBVAP in both CD 1 and CD 12 far more than would be required for a "narrowly tailored" Section 2 remedy. CD 1 increased from 47.76% to 52.65% BVAP, and CD 12 increased from 43.77% to 50.66% BVAP.

The cost to the citizens of North Carolina from the action was high. In order to achieve their goal, Defendants had to sacrifice traditional districting principles. *Bush*, 517 U.S. at 977-78. The challenged districts are not geographically compact (and, comparatively speaking, are less geographically compact than the prior districts). *See supra*, at 10-12 (describing the substantially lower compactness scores of the current districts). Nor do the challenged districts respect communities of interest. *Id.* (describing the high number of split counties and cities). For example, the prior version of CD 1 was comprised of 13 whole counties and pieces of 10 other counties, whereas the current version of CD 1 is comprised of five whole counties and pieces of 18 other counties. *See supra*, at 11. Moreover, alternative maps indicate that CD 1 did not need to extend into either Durham or Wake County in order to comply with equal population requirements. *See* Stip. 1(a)(xix) ("Congressional Fair and Legal" map and stat pack). And as previously noted, CD 12 splits the boundaries of 13 different cities and towns. *See supra*, at 12.[8]

"The State has the burden of producing evidence of narrow[] tailoring to achieve its compelling state interest." *Vera v. Richards*, 861 F. Supp. 1304, 1342 (S.D. Tex. 1994). Broadly asserting that racially-polarized voting exists in North Carolina does not suffice—each of the challenged districts must be justified by specific evidence of need for a remedy and how that remedy is the most limited remedy available. Because North

[8] This Court should further note that when the United States Supreme Court examined North Carolina Congressional District 12 in the 1990s, the Supreme Court stated that "[n]o one looking at District 12 could reasonably suggest that the district contains a "geographically compact" population of any race," and thus, "District 12 is not narrowly tailored to the State's asserted interest in complying with § 2 of the Voting Rights Act." *Shaw II*, 517 U.S. at 916, 918 (internal citations omitted).

Carolina ignored traditional redistricting criteria and engaged in a blatant maximization agenda across the state, there is no reasonable argument that the current versions of CD 1 and CD 12 are narrowly tailored to remedying Section 2 violations.

V. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court enter a summary judgment order declaring the 2011 Congressional Plan, including Congressional Districts 1 and 12, as well as the districts resulting from those districts' configuration, constitutionally invalid. Plaintiffs further request that the Court enjoin use of the 2011 Congressional Plan and these specific districts in the 2014 congressional election and any future election.

Respectfully submitted, this the 6th day of June, 2014.

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Local Rule 83.1
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CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the foregoing **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** 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 6th day of June, 2014.

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