

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

DAVID HARRIS; CHRISTINE)
BOWSER; and SAMUEL LOVE,)
))
Plaintiffs,)
))
v.)
))
PATRICK MCCRORY, in his capacity)
as Governor of North Carolina; NORTH)
CAROLINA STATE BOARD OF)
ELECTIONS; and JOSHUA HOWARD,)
in his capacity as Chairman of the North)
Carolina State Board of Elections,)
))
Defendants.)

**DEFENDANTS’ MEMORANDUM
OF LAW IN OPPOSITION TO
PLAINTIFFS’ MOTION FOR
SUMMARY JUDGMENT**

All Defendants submit this Memorandum of Law in opposition to the motion for summary judgment filed by Plaintiffs David Harris and Christine Bowser (collectively “Plaintiffs”) and respectfully show the Court as follows:

I. STATEMENT OF FACTS

A. First Congressional District

1. Relevant History and Demographics

The First Congressional District was originally drawn in 1992 as a majority-black district. (D.E. 31-1, pp. 8-9.) Between 1997 and 2011, the First District was a majority-minority coalition district. *See infra* pp. 2-4. In 2011, after the United States Supreme Court’s 2009 mandate in *Strickland v. Bartlett* that any district drawn to protect the State from liability under Section 2 of the VRA be drawn with a true majority-minority voting-

age population (“VAP”), the General Assembly returned the First District to its status as a majority-black district. 556 U.S. 1, 19-20 (2009); (Hofeller Dep. 22-23, 35-36; D.E. 32-1, pp.12, 15, 23, 35, 37). Since 1992, the First District has always been designed to protect the State from liability under Section 2 of the Voting Rights Act (“VRA”). (Hofeller Dep. 34); *Shaw v. Reno*, 509 U.S. 630, 635 (1993) (“*Shaw I*”).

In support of their Motion for Summary Judgment, Plaintiffs repeatedly reference a “White majority” in the First District (D.E. 75, pp. 6-7); however, the First District has not contained a “white majority”¹ for decades. The version of the First District used in the 1992 elections was created with a Black Population (“BPOP”) of 57.26% and a Black Voting Age Population (“BVAP”) of 53.40%. (D.E. 31-1, pp. 8-9.) As a result of the *Shaw* litigation, the First District was re-drawn again in 1997 with a BPOP of 50.27%, a BVAP of 46.54%, a total white (including Hispanics) population of 48.62% and a white (including Hispanics) VAP of 52.42%.² *Cromartie v. Hunt*, 133 F.Supp.2d 407, 415 n.6 (2000) (“*Cromartie II*”); (D.E. 31-1, pp.12-13).

¹ The term “white” can be misleading when referencing Census figures because the Census category of “white” is calculated without regard to ethnicity and therefore includes Hispanics. (See D.E. 31-1, p. 3). Additionally, before *Strickland* clarified that a “majority-minority” district must contain at least a 50% plus minority VAP, 556 U.S. at 12-13, it was not clear whether the percentage of minorities in a “majority-minority” district included total population, VAP, or both.

² Ethnicity was not included in the General Assembly’s reports until after the 2000 Census so the exact number of non-Hispanic whites in the district at the time the 1997 version was drawn is unknown. (D.E. 31-1, p.3.) However, under the 2000 Census, Hispanics made up 3.04% of the total population and 2.66% of the VAP in the 1997 First District which strongly suggests that the percentage of non-Hispanic whites in the district was under 50% in terms of both total population and VAP when it was enacted. (See attached Ex. 1.)

The First District was re-drawn again in 2001 following the 2000 Census. The 2001 version of the First District had a BPOP of 50.71% and a BVAP of 47.76%. (D.E. 31-1, pp. 20, 22.) The total white population of the district was 45.44 while “other” racial groups made up 1.66% of the total population. (*Id.*) White voters constituted 48.80% of the VAP while Hispanics voters made up 2.77%. (*Id.*) So, under the 2000 Census, the 2001 version of the First District was *not* “majority White,” even including Hispanic whites. Instead, the 2001 First District was a majority-black district based upon total population and a majority-minority coalition district based upon VAP under the 2000 Census.

Prior to the 2011 round of redistricting by the General Assembly, the 2010 Census showed that the 2001 version of the First District had become underpopulated by 97,563 people, the most of any of North Carolina’s 13 congressional districts. (D.E. 31-1, p. 26.) Under the 2010 Census, the total population statistics for the 2001 version of the First District were as follows: 49.65% single-race black, 44.19% “white” (including Hispanics), 50.65% any part black or Total Black Population (“TBPOP”), and 42.56% non-Hispanic white. (D.E. 30-4, pp. 9, 11, 15; D.E. 31-1, pp. 26-27.) The VAP statistics for the 2001 version of the First District under the 2010 Census were as follows: 48.07% single race black, 46.92% white (including Hispanics), 48.63% any part black or “Total Black Voting Age Population” (“TBVAP”),³ and 45.59% non-Hispanic white. (*Id.*)

³ During the 2011 redistricting process, the General Assembly, for the first time, released statistics that included a breakdown of TBVAP and “non-Hispanic white” in the categories of total population and VAP. (D.E. 31-1, p. 3.) The census figures cited by Plaintiffs in their Memorandum of Law are therefore different from those used by the

Thus, the district was majority-black based upon total population and a majority-minority coalition district based upon VAP under the 2010 Census.⁴

2. The 2011 Redistricting Process

In 2011, the General Assembly, using statistics from the 2010 Census, enacted the version of the First District that Plaintiffs challenge here. The total population statistics for the 2011 version of the First District are as follows: 53.63% black, 37.51% white, 54.74% TBPOP, 7.99% Hispanic, and 35.17% non-Hispanic white. The voting-age population of the 2011 First District is: 51.97% black, 41.51% white, 52.65% TBVAP, 6.5% Hispanic VAP, and 38.52% non-Hispanic white VAP.

In addition to restoring the district's African American voting-age majority to comply with the *Strickland* decision, the General Assembly also added Durham County to the district. Despite Plaintiffs' assertion that "Durham had never before been part of CD 1" (D.E. p. 13), Durham County was, in fact, included in the original version of the First District enacted by the General Assembly in 1991.⁵ (D.E. 30-5, pp. 7, 17-19.) The

General Assembly in 2011 because the General Assembly relied upon TBVAP in the redistricting process rather than the Black Voting Age Population ("BVAP") statistics cited by Plaintiffs. (*Compare* D.E. 31-2, pp. 5, 50 *with* D.E. 75, pp. 5-8, 13.) The United States Supreme Court has noted that TBVAP, rather than the BVAP statistics cited by Plaintiffs, is the preferred Census category. *See Georgia v. Ashcroft*, 539 U.S. 461, 473 n.1 (2003).

⁴ These figures are explained in greater detail in Defendants' Memorandum in Opposition to Plaintiffs' Motion for a Preliminary Injunction. (*See* D.E. 29 pp. 13-16.)

⁵ No election was ever held in the 1991 version of the district because the General Assembly enacted a new version of the First District that was used in the 1992 General Election in response to objections registered by the United States Department of Justice (USDOJ) when the 1991 Congressional Plan that was submitted to USDOJ for preclearance. (*See* D.E. 29, p.6.); *Shaw I*, 509 U.S. at 633-35. The USDOJ did not object to the 1991 version of the First District but instead objected to the State's failure to create

General Assembly added Durham to the district in 2011 after deciding that the First District needed to be drawn into the Research Triangle area to prevent the district from becoming substantially underpopulated before the next round of redistricting, as had occurred during the 2001-2011 decade. (D.E. 30-5, pp. 7, 17-19; Deposition of Dr. Thomas Hofeller (“Hofeller Dep”) at 25-26, 60; Deposition of Dr. Stephen Ansolabehere (“Ansolabehere Dep.”) at 79-80.)

In enacting the First District in 2011, the General Assembly had significant evidence before it to conclude the racially polarized voting existing in the area where the district is located and, as a result, that a majority-minority district was needed to protect the State from liability under Section 2 of the VRA. This evidence included the following items, all of which were also recognized by the three-judge court in its findings of fact in the *State Redistricting Cases*⁶:

- Two federal court decisions finding legally significant racially polarized voting in the area where the First District is located remained binding on the State during the 2011 redistricting process: First, the legislative leaders sought guidance from

a majority-minority coalition district running from Mecklenburg County to the Southeastern part of the state that combined African Americans with Native Americans living in that corridor. *Shaw I*, 509 U.S. at 635. The State responded to the USDOJ’s objection by creating the Twelfth District, which included Durham County. *Id.*; (D.E. 31-1, p. 7.)

⁶This term refers to the Judgment and Memorandum Decision of Three-Judge State Court in the combined cases of *Dickson et al v. Rucho et al*, Civil Action No. 11 CVS 16896, and *North Carolina State Conference of Branches of the NAACP et al. v. The State of North Carolina et al.*, Civil Action No. 11 CVS 16940, entered in Wake County Superior Court on July 8, 2013 and filed with this court as D.E. 30-1 and 30-2 along with Defendants’ Memorandum in Opposition to Plaintiffs’ Motion for a Preliminary Injunction.

the North Carolina School of Government faculty regarding whether North Carolina remained bound by the United States Supreme Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986) and were told that the legislature "remains obligated to maintain districts with effective African-American voting majorities in the same areas of the state as decided in *Gingles*," which includes the following counties in the 2011 version of the First District: Bertie, Chowan, Edgecombe, Gates, Halifax, Martin, Nash, Northampton, Washington, and Wilson. (D.E. 30-2, pp. 3, 18.) Second, in *Cromartie II*, the parties stipulated, and the court agreed, that legally significant racially polarized voting was present in the then-1997 version of the First District and the court ruled that the First District was reasonably necessary to protect the State from liability under the VRA. (*Id.* at pp. 5-6) (citing 133 F.Supp.2d at 422-23). Because that part of the district court's decision in *Cromartie II* was never appealed, it remains binding on the State. (*Id.*)

- Nearly all of the counties included in the 2011 version of the First District were included in majority-black or majority-minority districts drawn by the General Assembly in redistricting performed in 2001 and 2003. (*Id.* at pp.18-19.) Furthermore, all of the alternative legislative plans proposed in 2011 included majority-black and majority-minority coalition legislative districts in all of the counties encompassed by the enacted 2011 First District. (*Id.* at pp. 81-82) (discussing alternative plans drawn by the Southern Coalition for Social Justice, the Democratic leadership in the General Assembly, and the Legislative Black Caucus).

- Undisputed expert testimony from Dr. Ray Block, Jr., an expert retained by the Southern Coalition for Social Justice, and from Dr. Thomas Brunell, an expert retained by the General Assembly. Both experts provided reports to the General Assembly finding “significant” levels of racially polarized voting in North Carolina, including in *all* of the counties included in the 2011 First District. (*Id.* at pp. 8-11.) In its decision in the *State Redistricting Cases*, the court found that “there is no evidence in the legislative record disputing the conclusions of Dr. Block and Dr. Brunell that racially polarized voting continued to be present” in counties included in the First District. (*Id.* at p. 81.)
- During public hearings in the 2011 redistricting process, many witnesses, including those residing in counties included in the 2011 First District, testified about the continuing presence of racially polarized voting, the continuing need for majority-minority districts, and the continuing existence of the “totality of the circumstances” factors from the *Gingles* decision. (*Id.* at pp. 12-17.) In fact, as explained by the court in the *State Redistricting Cases*, “[n]ot a single witness testified that racial polarization had vanished either statewide or in areas in which the General Assembly had enacted past VRA districts,” including the First District. (*Id.* at p. 12.)
- In the previous version of the First District drawn in 2001, the non-Hispanic white population was less than 50% and African Americans were a majority of all registered voters. (*Id.* at pp.81-82.) Moreover, in all of the alternative maps introduced in the *State Redistricting Cases*, the non-Hispanic white population

was less than 50% (46.47% in one alternative plan and 46.46% in the other) and African-American voters constituted a “very strong” plurality of all registered voters (49.32 % in one alternative plan and 49.12% in the other). (*Id.*)

- The Plaintiffs in this action have not introduced *any* alternative maps of the First District. Further, like every previous version of the First District, no one has suggested that the district be white majority and the only two alternatives to the 2011 plans enacted by the General Assembly both recommended that the district be re-enacted as a majority-minority coalition district.

3. District Politics

Politically, the First District has always been a strong district for Democrats. As a matter of party registration, the 2001 version of the First District was heavily Democratic (67.78% of all registered voters) with African Americans making up a super-majority of the registered Democrats in the district (66.55%). (*Id.*) Like the 2001 version of the First District, the 2011 version is also heavily Democratic as a matter of party registration: registered Democrats constitute 69.79% of the registered voters in the district with African Americans making up a 69.29% super-majority of the registered Democrats in the district. (D.E. 30-4, pp.8-9, 12,16; D.E. 31-2, pp. 48-52.)

Plaintiffs are correct that African American voters have been able to elect their candidates of choice in the First District since the district was established in 1992. Plaintiffs assert that this is because the “White majority” in the First District has never “vote[d] as a bloc to defeat the candidate favored by African-American voters” since the district was created. (D.E. 75, pp. 6-7.) However, as explained above, any claim that the

First District had a “white majority” is simply not true. Moreover, Plaintiffs’ assertions with respect to the historical success of African American candidates in the First District contain no context, such as that the district had become underpopulated, the level of opposition faced by the prevailing African American candidates in the district, or the amount of money spent by these candidates relative to their opponents. In the *State Redistricting Cases*, the court found the following data relevant to its conclusion that the 2011 First District, as a matter of law, was not an illegal racial gerrymander:

- Congressman G.K. Butterfield, who has represented the First District since 2004, defeated his Republican opponent by 60,158 votes in the 2004 General Election. (D.E. 30-2, pp. 82-83.) During the 2004 election cycle, Congressman Butterfield raised and spent more than \$400,000 while his Republican opponent spent only \$46,030. (*Id.* at p. 83.)
- In the 2006 General Election, Congressman Butterfield had no opponent. (*Id.*)
- In 2008, Congressman Butterfield defeated his Republican opponent by 111,259 votes while spending \$703,696. (*Id.* at pp. 82-83.) His Republican opponent did not report any contributions or expenditures during the 2008 election cycle. (*Id.* at p. 83.)
- In 2010, Congressman Butterfield defeated his Republican opponent by a smaller margin, 32,427 votes, while spending \$794,383. (*Id.* at pp. 82-83.) His Republican opponent spent \$134,386 during the 2010 election cycle. (*Id.* at p. 83.)

- Congressman Butterfield’s margin of victory in the 2004 and 2010 General Elections was less than the number of people by which the First District became underpopulated between the 2000 Census and the 2010 Census. (*Id.* at pp. 82-83.)

B. Twelfth Congressional District

1. Relevant History and Demographics

Like the First District, the Twelfth District was originally drawn as a majority-black district as a response to objections made by USDOJ to the General Assembly’s 1991 congressional redistricting plan. *Shaw v. Hunt*, 861 F. Supp. 408, 460-61 (E.D.N.C. 1984), *rev’d*, 517 U.S. 899, 902 (1996) (“*Shaw II*”). Rather than create a majority-minority coalition district running from Charlotte to Southeastern North Carolina as the USDOJ suggested, and to avoid the negative political impact such a district would have on three incumbent Democratic Congressmen, the General Assembly in 1992 instead chose to enact the Twelfth District by linking dispersed pockets of African American populations in Gaston, Mecklenburg, Forsyth, Guilford, and Durham counties along the Interstate 85 corridor. *Shaw I*, 509 U.S. at 635; *Shaw II*, 861 F. Supp. at 465-67; 517 U.S. at 902; 1991 N.C. Extra Sess. Laws Chapter 7. Under the 1990 Census, the original version of the Twelfth District enacted by the General Assembly in 1992 had a BPOP of 56.63% and a BVAP of 53.34%. (*See* D.E. 31-1, pp. 8-9.)

As with First District, the General Assembly redrew the Twelfth District in 1997 following the *Shaw* litigation. *Hunt v. Cromartie*, 526 U.S. 541, 542 (1999) (“*Cromartie I*”); 1997 N.C. Sess. Laws Ch. 11; (D.E. 31-1, pp. 3, 10-13.) Contrary to the statistics

cited by Plaintiffs, under the 1990 Census, the 1997 version of the Twelfth District had a BPOP of 46.67% and a BVAP of 43.36%. (D.E. 31-1, pp. 12-13); *Compare* D.E. 75, pp.6 (incorrectly stating that “[t]he redrawn CD 12 had a BVAP of 32.56%”) with *Cromartie I*, 526 U.S. at 544 (stating that “[t]he State's 1997 plan altered District 12 in several respects” and that “[b]lack now account for approximately 47% of the district's total population, 43% of its voting age population, and 46% of registered voters.”).

After the 1997 version of the Twelfth District was enacted, the *Cromartie* litigation commenced and, as in this case, both the First and Twelfth Districts were challenged on the grounds that they were illegal racial gerrymanders. In response to the district court’s decision in *Cromartie I* granting the plaintiffs’ motion for summary judgment on the grounds that the district was a racial gerrymander,⁷ the General Assembly enacted another version of the Twelfth District in 1998. *See* 1998 N.C. Sess. Laws, ch. 2. In the 1998 version of the Twelfth District, the General Assembly dropped the BVAP in the district from 43.36% to 35.58%. (D.E. 31-1, p. 16.)

The 1998 version of the Twelfth District was used only once—in the 1998 election cycle—because, in the session law enacting the 1998 version of the district, the General Assembly included a provision requiring that the congressional plan, including the Twelfth District, revert back to the district lines drawn in 1997 if and when the district

⁷ The district court’s decision was later reversed by the United States Supreme Court. *See Cromartie I*, 526 U.S. at 554 (stating that “[p]erhaps, after trial, the evidence will support a finding that race was the State's predominant motive, but we express no position as to that question” and finding that “this case was not suited for summary disposition”).

court's decision in *Cromartie* was reversed. See *Cromartie I*, 526 U.S. at 545, n.1 (citing 1998 N.C. Sess. Laws, ch. 2, § 1.1). Although the district court in *Cromartie II* conducted a trial and again found that the Twelfth District was an unconstitutional racial gerrymander, the United States Supreme Court stayed the district court's order, clearing the way for the 2000 election to be conducted under the 1997 version of the district rather than the 1998 version. See *Hunt v. Cromartie*, 529 U.S. 1014 (2000). Ultimately, in *Easley v. Cromartie*, 532 U.S. 234, 257-58 (2001) ("*Cromartie II*"), the Twelfth District was upheld by the United States Supreme Court on the grounds that political considerations—specifically the legislature's desire to draw a strong Democratic-performing district—rather than race was the predominant factor in the shape and lines of the district.

In 2001, following the *Cromartie II* decision and the 2000 Census, the North Carolina General Assembly again enacted a new congressional district plan that made modest revisions to the 1997 version of the Twelfth District. (D.E. 31-1, pp. 3, 18-23.) The 2001 Twelfth District was created with a BPOP of 45.02% and a BVAP of 42.31% while the white population of this district, including Hispanics, totaled 47.18%. (*Id.*) The white VAP, including Hispanics, was 50.57%. (*Id.*) Other groups constituted 7.82% of the total population and 7.12% of the VAP. (*Id.*) Hispanics constituted 6.72% of the VAP. (*Id.*) Here again, the 2001 version of the Twelfth District was *not* majority-white in total population nor did non-Hispanic whites make up a majority of the VAP because Hispanics represented at least 6.72% of the VAP.

Under the 2010 Census, the 2001 Twelfth District had become over-populated by 2,847 persons. (D.E. 31-1, p. 26.) Single-race blacks comprised 43.90% of the total population, whites, including Hispanics, made up 42.24% of the total population, and TBPOP was 45.39%. (*Id.* at pp. 27-28.) Hispanics constituted 12.38% of the total population and non-Hispanic whites made up only 38.58% of the population. (*Id.*) Single-race black VAP was 42.87%, white VAP, including Hispanics, was 45.63%, TBVAP was 43.77%, and the non-Hispanic white VAP was 42.40%. (*Id.*) Thus, the 2011 version of the Twelfth District was not majority white under the 2000 or 2010 Census.

2. The 2011 Redistricting Process

In 2011, following the 2010 Census, the General Assembly enacted a new congressional district plan that included the current version of the Twelfth District challenged in this action. The Twelfth District currently has the following population statistics: 50.76% “black,” 33.58% “white,” 52.47% TBPOP, 14.27% Hispanic, and 29.05% non-Hispanic white. The VAP in the district is 49.59% black, 36.84% white, 50.66% TBVAP, 12.08% Hispanic, and 32.92% non-Hispanic white. (D.E. 31-2, pp. 49-50.)

The 2011 version of the Twelfth District was based upon the 1997 and 2001 versions of the district and was drawn as a “very strong Democratic district” containing “whole precincts that voted heavily for President Obama in the 2008 General Election.” (D.E. 32-1, pp.43-44.) The legislative leaders noted that this formula for the Twelfth District had been approved by the United States Supreme Court in *Cromartie II* and had

been precleared under Section 5 of the Voting Rights Act “on at least two prior occasions.” (D.E. 32-1, p. 43.) In addition to the strong legal reasons for modeling the Twelfth District on previous version, the legislative leaders further understood that “[b]y continuing to maintain [the Twelfth District] as a very strong Democratic district . . . districts adjoining the Twelfth District will be more competitive for Republicans.” (D.E. 32-1, pp. 43-44.) As the court in the *State Redistricting Cases* found, “[t]he principal differences between the 2001 version of the Twelfth Congressional District and the 2011 version is that the 2011 version adds more strong Democratic voters located in Mecklenburg and Guilford Counties and removes Republican voters who had formerly been assigned to the 2001 Twelfth Congressional District from the corridor counties of Cabarrus, Rowan, Davidson, and other locations.” (D.E. 30-2, p.88.)

In drawing the Twelfth District, Dr. Thomas Hofeller, the expert retained by the General Assembly to draw the 2011 maps, did not rely upon or consider the race of voters living in a particular Voting Tabulation District (“VTD”) or precinct. He instead constructed the 2011 version based upon whole VTDs in which President Obama received the highest vote totals during the 2008 Presidential election. (D.E. 30-2, pp. 88-89.) The only information on the screen of the computer program used by Dr. Hofeller to draw the districts was the percentage by which President Obama won or lost a particular VTD. (*Id.*; Hofeller Dep. 49-51, 57-58.) There was no racial data on the screen used by Dr. Hofeller to construct the Twelfth District. (D.E. 30-2, p. 88-89).

Of the 179 VTDs currently in the Twelfth District, only six are divided. (D.E. 30-2, p. 89.) As the court in the *State Redistricting Cases* found, “[n]one of the VTDs were

divided based upon racial criteria.” (*Id.*) Instead, any divided VTDs resulted from the need to equalize the population between the Twelfth District and other districts or for political reasons such as dividing a VTD in Guilford County to allow incumbent Congressman Howard Coble to be assigned to his long-time home in the Sixth Congressional District rather than to the Twelfth District. (*Id.*)

3. District Politics

As discussed above, by design, the Twelfth District has always been a strong district for Democrats. For example, in the 2001 version of the district, Democrats represented 58.42% of the district’s registered voters while African American voters comprised a super-majority of the registered Democrats in the district (71.44%). (D.E. 31-1, p. 29.) Similarly, in the 2011 version of the district, Democrats represented 63.93% of all registered voters while African American voters represented a 76.26% supermajority of all registered Democrats in the district. (D.E. 31-2, p. 51.)

While Plaintiffs are correct in asserting that African American voters in the Twelfth District have been able to elect Mel Watt, their candidate of choice since the district was established in 1992, and that Congressman Watt often won the General Election by substantial margins, Plaintiffs’ contention that this is because the “White majority...did not vote as a bloc to defeat” him ignores important facts regarding the political environment in which Congressman Watt was continually re-elected. In fact, Plaintiff Christine Bowser, who has lived in the Twelfth District for the entirety of Congressman Watt’s tenure, testified in her deposition that Congressman Watt “hasn’t

had anyone to really run against him to take his position” and was able to “easily” defeat any challengers. (Deposition of Christine Bowser, p. 10-11, 22-23.)

Moreover, as with the First District, Plaintiffs’ contention that the Twelfth District had a white majority, (*see* D.E. 75, p. 7), is misleading because, as the above-cited statistics show, the Twelfth District has never contained a white majority except during the 1998 election cycle. In every other election cycle, the Twelfth District has been a majority-minority district: it was a majority-black district under the 1992 version and was a majority-minority coalition district under the 1997 and 2001 versions.⁸

Congressman Watt’s lowest margin of victory—55.95%—came in the 1998 general election, the only election cycle in which the Twelfth District was a majority-white district. (*See* Exhibit 81 of the Deposition of Erica Churchill filed in the *State Redistricting Cases*) (attached as Ex. 2). Before and after the 1998 election cycle, Congressman Watt enjoyed much wider margins of victory when his district was either majority-black or a majority-minority coalition district. (*Id.*) Additionally, in the *State Redistricting Cases*, the court noted that even through Congressman Watt had a Republican or Libertarian opponent in each of the 2004, 2006, 2008, and 2010 election cycles, he outspent these opponents by a margin of \$519,885 to \$104,668 in 2004, by a

⁸ In support of their Motion for Summary Judgment, Plaintiffs inexplicably assert that “CD 12 has not been majority-minority for 15 years.” (D.E. 75, p. 7.) This assertion is not only refuted by the above-cited statistics (and not supported by any citation provided by Plaintiffs), it is contrary to the findings of the court in the *State Redistricting Cases* that the 2001 version of the Twelfth District was “not ‘less than majority minority’” and was not a “majority-white crossover district.” (D.E. 30-2, p. 83.)

margin of \$535,747 to \$444,044 in 2006, by a margin of \$646,079 to \$25,584 in 2008, and by a margin of \$591,203 to \$12,995 in 2010. (D.E. 30-2, p. 84.)

II. ARGUMENT

A. Summary judgment in favor of plaintiffs is not appropriate in racial gerrymandering cases.

To prevail on their racial gerrymandering claims in this action, Plaintiffs must prove that race was the “predominant factor” in the enactment of the First and Twelfth Districts, such that the district lines are “unexplainable on grounds other than race.” *Cromartie II*, 532 U.S. at 237, 242. Racial gerrymandering cases are analogous to disparate treatment claims in the employment context because both types of cases require a plaintiff to prove intent to discriminate by the defendant. *See Cromartie I*, 526 U.S. at 553 n. 9. Accordingly, as the United States Supreme Court recognized in *Cromartie I*, “[j]ust as summary judgment is rarely granted in a plaintiff’s favor in cases where the issue is a defendant’s racial motivation, such as disparate treatment suits under Title VII or racial discrimination claims under 42 U.S.C. § 1981, the same holds true for racial gerrymandering claims of the sort brought here.” *Id.* In contrast, summary judgment is routinely granted in favor of a defendant in cases where a plaintiff has failed to carry his or her burden. Here, for the reasons stated in Defendants’ Memorandum of Law in Support of their Motion for Summary Judgment (D.E. 74), the Court should grant Defendants’ Motion for Summary Judgment. Even if the Court denies Defendants’ Motion for Summary Judgment, it would be error for the Court to grant Plaintiffs’ Motion for Summary Judgment.

B. The First Congressional District is not an illegal racial gerrymander under Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

1. Plaintiffs have failed to carry their burden of showing that race was the “predominant factor” used by the General Assembly in enacting the First Congressional District.

Plaintiffs bear the burden of proving that race was the “predominant factor” in drawing the First District. *Easley v. Cromartie*, 133 F. Supp. 2d 407 (E.D.N.C. 2000), *rev’d in part, Cromartie II*, 532 U.S. at 242 (citing *Cromartie I*, 526 U.S. at 546 and quoting *Shaw I*, 509 U.S. at 644). To prove the race was the “predominant factor,” Plaintiffs must establish, at a minimum, that the State “substantially neglected traditional redistricting criteria.” *Bush v. Vera*, 517 U.S. 952, 962 (1996). This burden of proof is a “demanding one.” *Cromartie II*, 133 F.Supp.2d at 241 (internal citation omitted). As shown below, Plaintiffs have failed to meet this burden with respect to the First District.

Plaintiffs’ argument that race was the predominant factor for the lines of the First District is based upon statements by legislative leaders that they intended to create the district with TBVAP in excess of 50% as required by *Strickland* and that they were committed to enacting a plan that would be precleared by USDOJ under Section 5 while protecting the State from Section 2 liability. (D.E. 75, pp. 19-22.) Contrary to Plaintiffs’ contention, the fact that the General Assembly enacted a district with a “consciousness of race,” created a majority-black district, or enacted a redistricting plan that complied with federal law does not mean that race was the predominant factor in drawing the First District. *See Vera*, 517 U.S. at 958 (holding that race is not the predominant motive

simply because the district was drawn with a “consciousness” of race or has a majority TBVAP); *Wilkins v. West*, 264 Va. 447, 462-80, 571 S.E.2d 100, 108-19 (2002) (evidence that legislature drew districts to comply with the VRA does not prove that race was the predominant factor).

In *Strickland*, the Court clarified that “majority-minority districts” are districts in which a specific minority constitutes an actual majority of the voting age population. *Strickland*, 556 U.S. at 12-13. The Court also described three other types of districts recognized by courts over the years based upon their racial composition: (1) Minority “coalition” districts, which are districts in which two minority groups constitute a majority and form a coalition to elect the coalition’s candidate of choice; (2) Majority-white “crossover” districts, which are districts in which minority voters make up less than a majority but are potentially large enough to elect their candidate of choice with the help of some white “crossover” voters; and (3) “Influence” districts, which are districts in which the minority group can influence the outcome of an election even if its preferred candidate of choice cannot be elected. *Id.* at 13.

During redistricting, a state may enact majority-minority districts when it has a reasonable fear of potential liability under Section 2. *Vera*, 517 U.S. at 997. In *League of Latin American Voters v. Perry*, 548 U.S. 399 (2006) (“*LULAC*”), the Supreme Court rejected the proposition that “influence” districts could be required under Section 2. *Id.* at 445-46. Three years later in *Strickland*, in addition to holding that a majority-minority district under Section 2 requires that the specific minority group constitute a majority of

the voting age population, 556 U.S. at 19-20, the Court also held that majority-white crossover districts are not an acceptable remedy under Section 2, *id.* at 23.

The *Strickland* Court declined to resolve a split among the courts regarding whether a majority-minority coalition district could protect the State from liability under Section 2. To date, at least two circuit courts have held that majority-minority coalition districts might be required under Section 2 when a specific minority group is not large enough to constitute an actual majority, *Bridgeport Coalition for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 273 (2d Cir. 1984); *Campos v. City of Baytown Texas*, 840 F.2d 1240, 1244 (5th Cir. 1988), while one circuit has rejected majority coalition districts as possible remedies under Section 2. *Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996). The Fourth Circuit has not issued any opinion on this issue.

Given the lack of certainty regarding whether majority-minority coalition districts can be used to protect the state from Section 2 claims, the General Assembly decided to follow the clear bright-line rule provided in *Strickland* and draw the First District with a 50%-plus TBVAP. (D.E. 32-1, p. 12; Hoeller Dep. 22.) In doing so, the TBVAP in the 2011 First District increased only 4.02% under the 2010 Census, from 48.63% in the 2001 version to 52.65% in the 2011 version. (*Compare* D.E. 31-2, p. 28 *with* D.E. 31-2, p. 50.)

Plaintiffs also argue that race was the predominant motive in constructing the First District because “a Durham County voter was twice as likely to be pulled into CD 1 if he is African-American than if he is white” (D.E. 75, p.21.) This argument is baseless for several reasons. First, in *any* majority-black district, a voter in a county is going to be

more likely to be included in the district if he is African American rather than if he is white; otherwise, the district would not have a majority-minority population as required by law. Every majority-minority district would be a racial gerrymander under Plaintiffs' theory whenever a county was divided in drawing the district and a majority of the minority population in the county was included to form a majority-minority district.

Second, the population in Durham was added not only to make the district majority-minority but also to equalize population and to avoid having the district become under-populated during the 2011-2021 decade as had occurred during the previous 10 years.

Third, drawing the First District into Durham was not a novel concept concocted by Dr. Hofeller and the 2011 General Assembly—the original version of the First District drawn in 1991 also included Durham County.

Fourth, Plaintiffs' contention ignores the political impact of placing reliable Democratic voters in Durham into the strongly Democratic First District, which had the effect of furthering the General Assembly's goal of making adjoining congressional districts, such as the Thirteenth District, more competitive for Republicans.

Tellingly, Plaintiffs have cited no authority in support of this novel argument because it has never before been adopted by a court. The adoption of such an argument would have the effect of preventing any jurisdiction from enacting any majority-minority district that crossed county lines.

Plaintiffs also erroneously cite the fact that the court in the *State Redistricting Cases* assumed that race was the predominant motive for the First District and applied

strict scrutiny to decide that the First District was not an illegal racial gerrymander as Plaintiffs claim here.⁹ (D.E. 75, p. 22.) Even if this argument was well-founded, it further undermines Plaintiffs' claims here because if the First District can survive a strict scrutiny standard of review as that court found it did, it is irrelevant whether race was the "predominant factor" in drawing the district. (See D.E. 30-1, p.17.) Additionally, Plaintiffs ignore the fact that the state court also stated that "a persuasive argument can be made" that race was *not* the predominant motive and that the challenged VRA districts might be more properly subject to a lower standard of review. (*Id.* at p. 16.) There is ample record evidence showing that the First District is based upon several legitimate districting principles other than race, including the following:

- As an initial matter, the 2011 version of the First District is based upon the core population from the 2001 version. (D.E. 30-4, pp. 4, 10; Hofeller Dep. 27, 33-34.) In fact, 76% of the population in the 2001 First District is included in the 2011 First District. (*Id.*) Using the core of the "old" district to form the "new" district is a traditional and legitimate districting principle. *Karcher v. Daggett*, 462 U.S. 725, 740 (1983).
- An exact replica of the older version of the First District could not be adopted in 2011 because the 2001 version was under-populated by over

⁹ Under the United States Supreme Court's decision in *Cromartie I*, the defendants in the *State Redistricting Cases* should have been given an opportunity at trial to dispute the contention that race was the predominant motive for the First District. See *Cromartie I*, 526 U.S. at 553 n. 9. However, as noted by the state court, its decision to grant Defendants summary judgment under a strict scrutiny standard mooted any argument that Defendants were entitled to a trial on whether the shape and location of the First District are unexplainable but for race. (See D.E. 30-1, p. 17.)

97,000 people. As Dr. Hofeller testified, the “preeminent” factor in any redistricting plan is the need to equalize the population in all districts. (Hofeller Dep. 25; D.E. 32-1, p. 27.) Because the past and future population growth in North Carolina has been and will be more rapid in urban as compared to rural areas, the General Assembly drew the First District into the RTP area to address the massive under-population of the district not only under the 2010 Census but in the future. Ensuring the principle of one-person, one-vote is a traditional and legitimate redistricting principle unrelated to race.

- Following public hearings, the legislative leaders eventually moved the district from Wake County to Durham County to address objections made by Congressman Butterfield, the incumbent in the First District, and speakers at a public hearing. Accommodating a request from an incumbent regarding the location of his district’s lines has nothing to do with race and is a legitimate districting principle. *Stephenson v. Bartlett*, 355 N.C. 354, 371, 562 S.E.2d 372, 390 (2002) (“*Stephenson I*”).
- The legislative leaders also intended to make this district a safe district for Congressman Butterfield and any other Democratic candidate. (D.E. 32-1, pp. 28-30, 41.) Incumbent protection is a legitimate districting principle. *Stephenson I*, 355 N.C. at 371, 562 S.E. 2d at 390.
- Changing the political balance of the plan to create three strong Democratic districts and 10 competitive Republican districts impacted the shape and

location of every district. (*See, e.g.,* Hofeller Dep. 25.) The legislative leaders also understood that districts adjoining majority-black districts would become more competitive for Republicans. (D.E. 32-1, p. 22.) Partisan advantage is a legitimate redistricting principle. *Stephenson I, supra.*

This evidence demonstrates that the lines for the First District are not “unexplainable on grounds other than race” and Plaintiffs have therefore failed to carry their “demanding” burden of showing that, as a matter of law, race was the predominant factor for the location of district lines for the 2011 First District.

2. Even if Plaintiffs had demonstrated that race was the “predominant factor” in drawing the First District—which they have not—the district is narrowly tailored to achieve the compelling interest of getting the congressional plan promptly pre-cleared by USDOJ and protecting the State from liability under Section 2 of the VRA.

Even if Plaintiffs had met their “demanding burden” of showing that race was the “predominant factor” in the construction of the First District, the State had at least two compelling governmental interests in enacting the 2011 version of the First District: (1) obtaining swift preclearance from USDOJ under Section 5 of the VRA and (2) protecting the State from liability under Section 2 of the VRA.

a. Because the 2011 First District was enacted before the *Shelby County* decision was handed down in 2013, the State had a compelling interest in obtaining swift preclearance from the USDOJ under Section 5 of the VRA.

In support of their Motion for Summary Judgment, Plaintiffs contend that, after the United States Supreme Court’s decision in *Shelby County v. Holder*, 133 S.Ct. 2612

(2013), obtaining preclearance under Section 5 of the VRA is not a compelling governmental interest that Defendants can rely on to justify drawing the First District as a majority-minority district. (D.E. 75, pp. 32-33.) But during the 2011 legislative session, forty North Carolina counties were covered by Section 5, including almost all of the counties in the 2011 version of the First District. *See* 28 C.F.R. § 51.4 and pt. 51 App. at 96-97 (2002) (App. 1-3)); (*see also* D.E. 30-2, p. 19).

In *Shelby County*, the Supreme Court found unconstitutional the coverage formula used by the USAG to determine covered jurisdictions under Section 5. It did not find that Section 5 itself was unconstitutional. Defendants agree that unless and until Congress amends the VRA by adding a constitutional coverage formula, states will no longer be required to seek preclearance of redistricting plans and will no longer be able to use Section 5 to justify future majority-minority districts. So, any district created *in the future*, where race is the predominant factor, will have to be based upon evidence in the legislative record showing a strong basis for a Section 2 district. However, at the time North Carolina enacted its 2011 Congressional Plans, elections could not be held under the 2011 plan absent preclearance. *Clark v. Roemer*, 500 U.S. 646, 652 (1991). The United States Supreme Court has strongly suggested, without expressly deciding, that enacting plans that would preclear under Section 5 served a compelling governmental interest. *Miller v. Johnson*, 515 U.S. 900, 921 (1995); (D.E. 30-1, p.22 n.17.) There can be no question that at the time of enactment, establishing congressional districts that would preclear served an important and compelling governmental interest.

b. The State also had a compelling interest in drawing the First District as a majority-minority district in order to protect itself from liability under Section 2 of the VRA.

The burden on a legislature when it decides to draw a district to protect the State from a Section 2 claim is much different than a plaintiff in a Section 2 lawsuit. As stated by the court in the *State Redistricting Cases*, “[t]he General Assembly is not required to have proof of a certain § 2 violation before drawing districts to avoid § 2 liability, but, rather, the trial court is required to defer to the General Assembly’s ‘reasonable fears of, and their reasonable efforts to avoid, § 2 liability.’” (D.E. 30-1, p. 19) (citing *Vera*, 517 U.S. at 978). Under these circumstances, a legislature’s “reasonable fears” of Section 2 liability must be based upon a “strong basis in evidence” in the legislative record of three “preconditions” cited by the United States Supreme Court in *Thornburg v. Gingles*.

Here, Plaintiffs dispute the presence of all three *Gingles* factors with respect to the 2011 First District. With respect to the first *Gingles* factor, Plaintiffs contend that “the minority population in the northeastern part of the state is not geographically compact enough to comprise a single-member district.” (D.E. 75, p. 34.) Plaintiffs further contend that the 2011 First District is “substantially less compact than its predecessor district” because, under a “dispersion compactness” test known as a “Reock score,” the 2011 version of the district received a score of 0.294 while the 2001 version was scored at 0.390. (D.E. 75, p. 13.) Despite these contentions, Plaintiffs have not provided the Court with a judicially manageable standard by which to measure compactness nor have they defined what makes a Reock score reduction “substantial.” But, as explained in

Defendants' Memorandum in Support of their Motion for Summary Judgment, the Reock score of the 2011 First District is only 0.023 lower than the Reock score for the 1997 version of the First District, which a federal court found to be legally compact. *See Cromartie II*, 133 F. Supp. at 432 & n.27; (D.E. 74, pp.21-22.) Plaintiffs' own expert in this case conceded that a 0.023 difference in a Reock score is not "substantial" and that a Reock score of .200—well below that of the 2011 First District—is the threshold for a district with "low compactness." (Ansolabehere Dep. 68-70, 74, 83.) Plaintiffs' evidence fails to support their contention that the First District is not based upon a geographically compact minority population.

There is no dispute that African American voters are politically cohesive. Thus, Plaintiffs' primary argument relates to the third *Gingles* factor. Specifically, Plaintiffs contend that, in the First District, there is not "racially polarized voting significant enough that the White majority routinely votes as a bloc to defeat the minority candidate of choice." (D.E. 75, pp. 31-32.) Plaintiffs stand alone in making this claim.

In the *State Redistricting Cases*, the three-judge panel found made the following findings that wholly undermine Plaintiffs' racial polarization argument:

- "Not a single witness testified that racial polarization had vanished either statewide or in areas in which the General Assembly had enacted past VRA districts," which include the First District. (D.E. 30-2, p. 12.)
- There was "no evidence in the legislative record disputing the conclusions of [experts hired by the Southern Coalition for Social Justice and the

General Assembly] that racially polarized voting continued to be present” in the counties included in the First District. (*Id.* at p. 81.)

- The parties in *Cromartie II* stipulated that legally significant racially polarized voting was present in the 1997 version of the First District. (*See* D.E. 30-2, pp. 5-6) (citing 133 F.Supp.2d at 422-23).
- The two alternative congressional plans proposed during the 2011 redistricting process recommended that the First District be created as a majority-minority coalition district. In neither proposed alternative did whites nor non-Hispanic whites constitute a majority of the VAP. (D.E. 30-2, pp. 83-84.)
- All of the alternative legislative plans proposed in 2011 included majority-black and majority-minority coalition legislative districts in all of the counties included in the enacted 2011 First District. (*See* D.E. 30-2 at pp. 20-21.)

Additionally, Plaintiffs’ repeated claims that the First District contained a white majority ignore the facts: the district has not contained a white majority in decades, and therefore there has not been a non-Hispanic white majority that could have voted to defeat African American candidates of choice in the First District. But even if the First District had a white majority as Plaintiffs claim, racially polarized voting can still exist in a majority-white district. For example, almost all of the multi-member districts in *Gingles* were majority-white. Several were found illegal even though a few black candidates in those districts had experienced some electoral success. *Gingles v.*

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

Plaintiffs also rely on the fact that African American candidates in the First District have always won, in some cases by large margins, to prove the absence of racially polarized voting. When viewed in context, however, historical election results in the First District fail to support Plaintiffs' argument. For example, despite outspending his Republican opponent by margins of nearly 10-to-1 and 6-to-1 in the 2004 and 2010 elections, respectively, the margin by which Congressman Butterfield won in the General Election each of those years was less than the 97,000 voters by which the First District had become underpopulated during the 2001 to 2011 period. *See supra* pp. 8-9.

Finally, Plaintiffs' contend that "the State has never suggested that it considered the totality of the circumstances inquiry under Section 2." (D.E. 75, p. 35.) This argument is wrong. There is a significant question of whether the "totality of the circumstances" test, which plaintiffs in Section 2 cases must satisfy, even applies to state legislatures enacting legislation to protect the state from Section 2 claims. (D.E. 30-1, p. 20 & n.13.) Regardless, the State did, in fact, consider the "totality of the circumstances" and the three-judge panel in the *State Redistricting Cases* found that the record contained more than enough evidence to show the totality of the circumstances factors existed. (*Id.*)

Based upon the foregoing, Plaintiffs have failed to show that the General Assembly lacked a strong basis in evidence that each of the *Gingles* factors were present

in the areas encompassed by the 2011 First District and that the First District was needed to protect the State from liability under Section 2 of the VRA.

c. The First District is narrowly tailored to achieve the State's compelling interests.

Plaintiffs claim that the two districts challenged in this action are not narrowly tailored because “Defendants increased the TBVAP in both CD 1 and CD 12 far more than would be required for a ‘narrowly tailored’ Section 2 remedy.” (D.E. 75, p. 36.) Given the overwhelming evidence that racially polarized voting remains in the area encompassed by the First District, the 2011 General Assembly followed the “bright line” standard adopted by the United States Supreme Court in *Strickland* to avoid arguments exactly of this nature. In *Strickland*, the Supreme Court held that a 50% plus one TBVAP rule provided a judicially manageable standard for court and legislatures to follow. 556 U.S. at 17-20. Under this standard, the State is relieved from hiring an expert to weigh factors such as incumbency, the type of white voters who would need to be added or subtracted from the district, and other “speculative” factors in order to provide an opinion on the minimum TBVAP “required” to create a district that would give African-American voters an opportunity to elect candidates of choice. *Id.* at 17.

Despite claiming that the First District could be drawn in a more narrowly tailored manner, Plaintiffs have *not* proposed a redistricting plan that is less reliant on race and that also achieves the legislature’s political goals. See *Cromartie II*, 532 U.S. at 258. Plaintiffs’ arguments in this regard are further undermined by the fact that, like all of the previously enacted versions of the First District, none of the alternative plans proposed

during the 2011 redistricting cycle recommended that the First District be drawn with a white majority. Instead, both of the alternative plans recommended that the First District be re-enacted as a majority-minority coalition district with a TBVAP ranging from 49.12% to 49.32% and a total non-Hispanic white population ranging from 46.46% to 46.47% (D.E. 30-2, pp.81-82.)

3. **The Twelfth Congressional District is not an illegal racial gerrymander under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.**

Plaintiffs' arguments that race was the predominant motive in the location of the lines of the Twelfth District ignore the extensive findings of fact made by the three-judge panel in the *State Redistricting Cases* following a trial on the merits on this very same issue. Plaintiffs first contend race was the predominant factor because "legislative leaders admitted that Section 5 preclearance requirements, which focus on racial dynamics, were part of the calculus in drawing CD 12" and the State noted that the African-American voting age population in the district had increased in its Section 5 preclearance submission. (D.E. 75, p. 24.) This argument arises from a concern raised by the legislative leaders to Dr. Hofeller that, because Guilford County was included in the Twelfth District and was a "covered jurisdiction" under Section 5, pre-clearance of the district could be jeopardized if, in drawing the Twelfth District, the African American population within Guilford County was divided into two different congressional districts. (Hofeller Dep. 71. 75.) Critically, in making their argument, Plaintiffs have cited no evidence in the record—because there is none—that Dr. Hofeller used any data regarding race to address this concern. Instead, Dr. Hofeller testified that he addressed this concern

by focusing on the legislative leaders' primary goal in drawing the Twelfth District: to make the district more strongly Democratic so that surrounding districts would perform better for Republicans. (*Id.* at 71-72.)

Similarly, the fact that the State mentioned that the African American voting-age population in the Twelfth District increased in the 2011 version does nothing to prove that race was the “predominant factor” in drawing the district. Indeed, Dr. Hofeller testified that this increase was not an “intended result” of the redistricting process but instead was a byproduct of his instructions to make the Twelfth District a stronger district for Democrats. (*Id.* at 72-74.) With the exception of the plans used in the 1998 General Election, all prior congressional plans in North Carolina since 1991 included two majority-minority coalition districts. As such, it would have been irresponsible for the State to fail to point out the fact that the TBVAP in the 2011 version of the Twelfth District exceeded that of the 2001 version in its preclearance submission because this fact is proof that the 2011 plan was not “retrogressive,” the standard the State had to meet in order to achieve preclearance.

Plaintiffs' other arguments that race was the predominant factor in drawing the Twelfth District—all of which relate to the number of African Americans who were included in the 2011 Twelfth District—are similarly unavailing. All of these arguments ignore the findings of the United States Supreme Court in *Cromartie I*, in which the Court held that “[e]vidence that blacks constitute even a supermajority in one congressional district while amounting to less than a plurality in a neighboring district will not, by itself, suffice to prove that a jurisdiction was motivated by race in drawing its

district lines when the evidence also shows a high correlation between race and party preference.” 526 U.S. at 551-52.

One example of this is Plaintiffs’ claim that “[t]here are roughly 75,000 more African-Americans of voting age population in the new CD12 as compared to the prior version.” (D.E. 75, pp.24-25.) Plaintiffs arrived at this statistic by comparing the black VAP of the 2001 First District under the 2000 Census with the black VAP of the 2011 First District under the 2010 Census. As Dr. Hofeller pointed out in his deposition testimony, the appropriate “benchmark” is to compare the population statistics of the two districts under the 2010 Census. (Hofeller Dep. 70-71.) When the 2010 Census figures are used as the basis for comparing the two districts, the 2011 version of the Twelfth Districts added only 34,654 more African Americans of voting age while the ideal total population of each of North Carolina’s thirteen congressional districts grew by 114,321 people to 733,499 from the 2001 ideal population of 619,178. (D.E. 31-1, pp. 20, 26, 28, 50; Hofeller Dep. 70-71.)

Plaintiffs rely upon the “envelope of counties” analysis performed by their expert, Dr. Ansolabehere. However, not only has Dr. Ansolabehere’s theory never been adopted by any court in a racial gerrymandering case, Dr. Ansolabehere’s theory is flawed because it ignores “what individuals were doing when they drew the maps” but instead focused on the “effects” of the districts as they were drawn. (Ansolabehere Dep. 56.) Unlike Dr. Hofeller, who relied exclusively upon election results in drawing the Twelfth District, Dr. Ansolabehere ignored election results and relied upon a comparison of race and voter registration statistics. Dr. Ansolabehere admitted he did not review either of the

Cromartie decisions in preparing his analysis (Ansolabehere Dep. 61), and his theory of proving racial gerrymandering was rejected twice by the United States Supreme Court in those decisions. *See Cromartie I*, 526 U.S. at 550-51, 557; *Cromartie II*, 532 U.S. at 243-45.

The problem with Dr. Ansolabehere's use of party registration statistics rather than election results becomes obvious when examining Plaintiffs' argument that race rather than politics must explain the lines of the Twelfth District because of the number of white Democrats and Unaffiliated Voters in the 2011 version of the district. Because Dr. Hofeller was relying upon the results of the 2008 Presidential Election rather than party registration statistics to draw the district, this result makes sense because, as noted by the United States Supreme Court in *Cromartie I and II*, white Democratic and unaffiliated voters were less likely to vote for President Obama in 2008, and more likely to vote for Republicans in general, than African American voters. *See Cromartie I*, 526 U.S. at 556 ("The Congressional Quarterly recently recorded the fact that in North Carolina "Democratic voter registration edges ... no longer translat[e] into success in statewide or national races. In recent years, conservative white Democrats have gravitated toward Republican candidates.") (Stevens, J., concurring); *Cromartie II*, 532 U.S. at 235 ("White registered Democrats 'cross-over' to vote Republican more often than do African-Americans, who register and vote Democratic between 95% and 97% of the time."). Even Dr. Ansolabehere agreed that the VTDs added to the Twelfth District in 2011 were high-performing for Democratic candidates while the VTDs that were removed would

perform better for Republican candidates. (Ansolabehere Dep. 118-20.) This confirms that the motive for the district was political, not racial.

Finally, Plaintiffs have identified no evidence in the record to dispute the finding of the three-judge panel in the *State Redistricting Cases* that Dr. Hofeller did not use race as a factor in drawing the Twelfth District. Dr. Hofeller testified, and the court found, that “[t]here was no racial data on the screen used by Dr. Hofeller to constrict this district.” (D.E. 30-2, p. 89.) Though Plaintiffs argue that, because six of the district’s 179 precincts (VTDs) are divided in the 2011 version of the district, Dr. Hofeller must have relied upon racial data in splitting these precincts since only “racial data,” not “political data” is “available below the precinct level.” (D.E. 75, p. 27.) This argument ignores Dr. Hofeller’s undisputed testimony and the finding of the three-judge panel that “[n]one of the VTDs were divided based upon racial criteria” and that the division of VTDs in this district “did not have any impact on the political performance of the 2011 Twelfth Congressional District or its racial composition.” (D.E. 30-2, p.89.)

In sum, Plaintiffs’ have failed to show that race was the “predominant factor” for the shape and location of the lines of the Twelfth District.

III. CONCLUSION

For the foregoing reasons, Plaintiffs’ motion for summary judgment should be denied.

This the 23rd day of June, 2014.

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CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day electronically filed the foregoing **Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment** with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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