

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.)

**REPLY MEMORANDUM IN
FURTHER SUPPORT OF
DEFENDANTS’ MOTION FOR
SUMMARY JUDGMENT**

All Defendants submit this Reply Memorandum in further support of their motion for summary judgment and show the Court as follows:

ARGUMENT

I. Plaintiffs’ claims in this action are barred by the doctrines of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion).

In their Memorandum in Opposition to Defendants’ Motion for Summary Judgment (“Opposition Memorandum”), Plaintiffs contend that they should not be bound by the judgment of the three-judge panel in the *State Redistricting Cases* dismissing the same claims with respect to the First and Twelfth Congressional Districts that they raise in this action. Plaintiffs’ arguments are unavailing for several reasons.

First, Plaintiffs contend that they are not bound by the judgment entered in the *State Redistricting Cases* because they are uncertain regarding whether they are members

of the North Carolina Conference of Branches of the NAACP (“NC NAACP”), one of the lead plaintiffs in that litigation. (D.E. 78, pp. 5-6.) Despite Plaintiffs’ alleged uncertainty regarding their membership status in the NC NAACP, the group’s president, Rev. William J. Barber II, testified that anyone who joins a local branch of the NAACP or pays dues to the national NAACP is also a member of the NC NAACP. (Deposition of Rev. Dr. William J. Barber II, pp. 17, 26-27, 33-35, Exs. 7, 20.) Plaintiffs have no evidence to dispute this testimony by Dr. Barber that they are members of the NC NAACP since both admit they joined either a local branch or the national organization.

Second, Plaintiffs claim that, prior to this litigation, they were not aware of the NC NAACP’s involvement in the *State Redistricting Cases* and similarly contend that the NC NAACP has no involvement in this lawsuit. (D.E. 78, pp. 4-6.) These arguments miss the point: Plaintiffs alleged lack of awareness of the NC NAACP’s participation in the *State Redistricting Cases* is irrelevant because the NC NAACP purported to have standing as a plaintiff in that litigation on the grounds that it was representing its members, among whom Plaintiffs are included. (D.E. 44-5, p. 17) (arguing that the NC NAACP and other organizational plaintiffs in the *State Redistricting Cases* had alleged “facts sufficient to establish organization standing under federal law by alleging that their members live throughout the state and would be harmed by the use of redistricting plans unjustifiably based on race.”)

If Plaintiffs’ argument that they may avoid being bound by the judgment of the court in the *State Redistricting Cases* because they were not “aware” of the efforts of the NC NAACP to litigate on their behalf is permitted to stand, the doctrine of associational

standing would be useless because any member of an organization that is a party to a lawsuit could institute his or her own lawsuit on the same grounds simply by disclaiming knowledge that the organization had filed suit on his or her behalf.

Finally, Plaintiffs contend that they are not bound by the judgment of the three-judge panel in the *State Redistricting Cases* because they were not “parties” to that action. (D.E. 78, pp. 4-13.) Plaintiffs further argue that Defendants are attempting to revive the concept of “virtual representation” that the United States Supreme Court rejected in *Taylor v. Sturgell*, 553 U.S. 880, 898 (2008). (*Id.* at pp. 9-13.) These arguments misstate Defendants’ position. Defendants are not making a virtual representation argument here.

In *Taylor*, the plaintiff filed a lawsuit seeking certain documents under the Freedom of Information Act. *Id.* at 885. Previously, the plaintiff’s friend, Herrick, had been unsuccessful in a suit seeking the same records. *Id.* Other than his status as Herrick’s friend, the plaintiff had no other connection with Herrick’s lawsuit and Herrick never purported to be representing the plaintiff’s interests in it. *Id.* at 905. The Supreme Court thus rejected an appellate court decision finding that Taylor was bound by the judgment in Herrick’s action on the grounds that Herrick was Taylor’s “virtual representative.” *Id.* But *Taylor* is inapposite to the present case. Here, there is no genuine dispute that the Plaintiffs in this case are members of the NC NAACP and were members throughout the duration of the *State Redistricting Cases*. In addition, they are not simply individuals who happen to share the same interests and goals as the NC NAACP. To the contrary, for purposes of the *State Redistricting Cases*, as members of

the NC NAACP, *Plaintiffs are the NC NAACP*. The fact that the NC NAACP asserted (and the state court agreed) that it had standing to sue in the *State Redistricting Cases* because it was representing its members makes this so. Therefore, even though Plaintiffs were not individually named in the *State Redistricting Cases*, the fact that they were members of the NC NAACP who, in essence, “borrowed” standing from them, means that they should be bound by the judgment of the three-judge panel in the *State Redistricting Cases*.¹ See, e.g., *Chicago-Midwest Meat Ass’n v. City of Evanston*, 589 F.2d 278, 281 n.3 (7th Cir. 1978) (noting that if plaintiff association was accorded standing to challenge local ordinances because of harm to association members, “defendants would have the opportunity in any case brought by members of the association to argue that the members are bound by the res judicata effect of [the court’s] decision in this case.”); Wright et al., 13A *Fed. Prac. & Proc. Juris.* § 3531.9.5 (3d ed.) (“The representational theory that an organization can derive standing from injury to its members inevitably leads to res judicata problems. A defendant who has been sued on this theory can reasonably argue that it should be protected against subsequent litigation, invoking the theory of preclusion by representation.”)

¹ In another action filed in this Court against the same defendants sued in this action and challenging changes made to North Carolina’s election laws under N.C. Session Law 2013-381 (commonly referred to as H.B. 589), the NC NAACP has asserted that it “has standing to challenge H.B. 589 on behalf of its members, who include African American and Latino voters in North Carolina.” See Pl’s Second Am. Compl. ¶ 19 (D.E. 52) filed in *North Carolina State Conference of the NAACP et al. v. McCrory et al.*, Civil Action No. 1:13-cv-658. If the Plaintiffs in this action are not bound by the judgment of the three-judge panel in the *State Redistricting Cases*, then it is questionable whether the NC NAACP can “borrow” the standing of its members to represent them in its lawsuit challenging N.C. Session Laws 2013-381.

II. The Defendants are entitled to judgment as a matter of law on Plaintiffs' claims regarding the First and Twelfth Districts.

A. Race was not the predominant factor behind the First District.²

Plaintiffs contend that because the State “purposefully drew CD 1 to be a majority-minority district” to protect the state from liability under Section of the Voting Rights Act (“VRA”), race was the predominant factor explaining the shape and lines of the district. (D.E. 78, pp. 13.) This argument is contrary to the law and common sense. As Defendants have previously explained, race is not the predominant motive and strict scrutiny does not apply to redistricting plans simply because the drafters prepared them with a “consciousness of race...nor does it apply to all cases of intentional creation of majority-minority districts.” *Bush v. Vera*, 517 U.S. 952, 958 (1996). Strict scrutiny also does not apply where race was “a motivation for the drawing of a majority-minority district.” *Easley v. Cromartie*, 532 U.S. 234, 257-58 (2001) (“*Cromartie II*”) (citing *Vera*, 517 U.S. at 916)). This makes sense because “[c]reating a majority minority district mandates placing minorities in that district and there is no dispute that race was a factor in drawing the district.” *Wilkins v. West*, 264 Va. 447, 463, 571 S.E.2d 100, 108

² Defendants are not bound by the three-judge panel’s finding in the *State Redistricting Cases* that race was the predominant factor explaining the First District because this finding by the state court was not essential to the court’s judgment. *See In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 325 (4th Cir. 2004) (reversing district court’s application of collateral estoppel and remanding with instructions to district court “to give preclusive effect only to factual findings that were necessary - meaning critical and essential - to the judgment affirmed by the [district court]”); *Ritter v. Mount St. Mary's Coll.*, 814 F.2d 986, 994 (4th Cir. 1987) (finding that “[n]on-essential findings should not serve as the basis for collateral estoppel”). This finding was dicta and not essential to the state court’s judgment because the panel also found that the First District survived a strict scrutiny analysis, mooted any dispute over whether race was the predominant fact behind it. (See D.E. 30-1, pp. 16-17.)

(2002). Simply because race was *a factor* in drawing the district does not mean that it was *the predominant factor*. *Id.* at 462-80, 571 S.E.2d at 108-19; *Vera*, 517 U.S. at 958; *Cromartie II*, 532 U.S. at 241.

In order to show that race was the predominant factor and that strict scrutiny is warranted, Plaintiffs must show that the General Assembly “substantially neglected traditional redistricting criteria,” *Vera*, 517 U.S. at 962, such that it “subordinated” these other criteria to race, *Cromartie II*, 532 U.S. at 241. Defendants explained in their Opposition to Plaintiffs’ Motion for Summary Judgment how the record evidence in this case demonstrates that the 2011 version First District was based upon the following race-neutral traditional redistricting principles: (1) it includes the core population from the 2001 version but also includes portions of Durham County to prevent the district from becoming underpopulated before the next round of redistricting; (2) the district protects incumbent Congressman G.K Buttetfield while attempting to accommodate his wishes about the shape and lines of the district; (3) the district also furthers the General Assembly’s goals of making districts adjoining it more competitive for Republicans. (D.E. 76, pp. 22-24.)

Plaintiffs have failed to show that the General Assembly “subordinated” these principles to race such that race became the predominant factor behind the district.³ Instead, at best, Plaintiffs’ arguments merely show that they disagree with the General

³ Plaintiffs have also not addressed the fact that an expert hired by the plaintiffs in the *State Redistricting Cases* agreed that race and politics played an equal role in the construction of the First District. (Deposition of Dr. David W. Peterson, p. 114, Ex. 288) (attached as Exhibit AA).

Assembly's political judgment in applying these criteria, however, the United States Supreme Court has recognized that the "legislature 'must have discretion to exercise the political judgment necessary to balance competing interests.'" *Cromartie II*, 532 U.S. at 242 (quoting *Miller v. Johnson*, 515 U.S. 900, 915-16 (1995)).

B. The First District is narrowly tailored to achieve the compelling governmental interest of protecting the State from liability under the Voting Rights Act.

Even if Plaintiffs could show that race was the predominant factor in drawing the First District, the record evidence shows that the General Assembly had a compelling governmental interest in protecting the State from liability under the VRA. In their Opposition to Plaintiffs' Motion for Summary Judgment, Defendants fully explained that the State had at least two compelling governmental interests in enacting the 2011 version of the First District. (D.E. 76, pp. 24-30.) First, the General Assembly had an interest in ensuring that the First District was swiftly precleared as required under Section 5 of the VRA by the United States Department of Justice. The United States Supreme Court has suggested that enacting plans that will be precleared under Section 5 serves a compelling governmental interests, *see Miller*, 515 U.S. at 921, and Plaintiffs cite no authority to the contrary since it is undisputed that preclearance was required at the time the First District was enacted in 2011.

Second, the General Assembly also had an interest in protecting the State from liability under Section 2 of the VRA. In their previous briefing, Defendants have described at length the "strong basis in evidence" in the legislative record of the three "preconditions" cited by the United States Supreme Court in *Thornburg v. Gingles*

justifying the General Assembly’s “reasonable fears” of Section 2 liability. (See D.E. 76, pp. 26-30; D.E. 29, 30-35.) These arguments, all of which were included in findings of fact by the three-judge panel in the *State Redistricting Cases*, are hereby incorporated by reference.

Plaintiffs’ Opposition Memorandum fails to explain how the First District is not narrowly tailored to achieve these compelling interests and have failed to propose a redistricting plan that is less reliant on race and that also achieves the legislature’s political goals.⁴ Defendants have nonetheless explained in their prior briefing how the First District was drawn to comply with the “bright line” rule in the Supreme Court’s decision in *Strickland v. Bartlett* that all districts drawn to protect a State from liability under Section 2 be drawn with at least a 50-percent-plus-one minority population. These arguments are also incorporated by reference. (See D.E. 76, pp. 30-31.)

C. The undisputed record evidence shows that politics—not race—best explains the shape and lines of the Twelfth Congressional District.

Plaintiffs have failed to identify any evidence in the record to show that Dr. Hofeller actually considered race in drawing the Twelfth District. Dr. Hofeller testified that he did not rely upon racial data in drawing the Twelfth District because no such data

⁴ Plaintiffs reference an alternative map of the First District submitted by Stephen Gerontakis yet Mr. Gerontakis submitted only an alternative map of the First District rather than an entire congressional plan. (D.E. 32-5, pp. 6, 9.) As such, Plaintiffs have not—and cannot—explain how Mr. Gerontakis’s proposed map would have allowed the General Assembly to accomplish its political goals of making the surrounding districts more competitive for Republicans while bringing about “significantly greater racial balance” as required. See *Cromartie II*, 532 U.S. at 258. In any event, the enacted version of the 2011 First District adopts Mr. Gerontakis’s suggestion that the First District be drawn into Durham County. (D.E. 32-5, p.6.)

appeared on the screen of the computer program he was using to draw it. (D.E. 30-2, p. 88-89.) Dr. Hofeller instead decided which precincts (VTDs) to include in the district based upon the amount of the vote that President Barack Obama received in each precinct during the 2008 General Election. (*Id.*; Deposition of Dr. Thomas Hofeller 49-51, 57-58.) This methodology completely explains why the TBVAP in the district increased when the district was re-drawn in 2011 and shows that politics, not race, was the predominant factor behind the Twelfth District.

As the United States Supreme Court has recognized, African American voters in North Carolina tend to vote for Democratic candidates far more consistently than white voters, regardless of their party affiliation. *Hunt v. Cromartie*, 526 U.S. 541, 556 (1999); *Cromartie II*, 532 U.S. at 235. Similarly, Dr. Ted Arrington—an expert witness for the plaintiffs in the *State Redistricting Cases*—testified that African American voters are much more likely to vote for a candidate of their own race, particularly when the African American candidate is a Democrat. (Deposition of Dr. Ted Arrington, pp. 76-77) (attached as Exhibit BB). It makes sense then that during the 2008 President Election, African Americans, regardless of their party affiliation, voted much more heavily for President Obama, an African American Democrat, than for Senator John McCain, a white Republican. It also follows that the percentage of African American voters in the Twelfth District increased as a result of Dr. Hofeller’s reliance on the 2008 vote totals for President Obama in each precinct to carry out the instructions given to him by the legislative leaders in the General Assembly to make the Twelfth District a stronger-performing district for Democrats.

In support of their arguments, Plaintiffs highlight the fact that legislative leaders expressed concern about African American voters in Guilford County being included in the Twelfth District and that the General Assembly noted that the TBVAP percentage in the district had increased in a statement made to USDOJ during the preclearance process. But Plaintiffs' reliance on these facts proves nothing and ignores Dr. Hofeller's undisputed testimony—which was credited by the three-judge panel in the *State Redistricting Cases* and incorporated into that court's findings of fact—that race was never considered when the Twelfth District was drawn and that the resulting increase in TBVAP was a byproduct of his instructions to make the Twelfth District a stronger district for Democrats. (D.E. 30-2, p. 88-89; Hofeller Dep. at 72-74.)

Finally, where, as here, the evidence shows a correlation between race and politics, Plaintiffs “must show *at the least* that the General Assembly could have achieved its legitimate political objections in alternative ways that are comparably consistent with traditional districting principles” and that “would have brought about significantly greater racial balance.” *Cromartie II*, 532 U.S. at 248 (emphasis added). Yet, the only alternative map mentioned by Plaintiffs in their legal memoranda is the one prepared by Stephen Gerontakis that included only an alternative version of the First District, not the Twelfth. As such, Plaintiffs have failed to meet their burden of proof with respect to the Twelfth District and their claims should be dismissed as a matter of law.

This the 3rd day of July, 2014.

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CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day electronically filed the foregoing **Reply Memorandum in further Support of Defendants' 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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This the 3rd day of July, 2014.

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