IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
NO. 1:15-cv-00399

SANDRA LITTLE COVINGTON, *et al*., Plaintiffs, v. THE STATE OF NORTH CAROLINA, *et al*., Defendants.	**PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

Plaintiffs respectfully submit this Reply Memorandum in Support of their Motion for Preliminary Injunction.

I. Contrary to Defendants' Representations, Ample Authority Supports the Issuance of the Requested Injunction

Defendants are incorrect in asserting there is no precedent for the type of relief sought by Plaintiffs. Defs.' Opp. to Mtn. for Prelim. Injnctn. (ECF No. 33) (hereinafter "Opp.") at 32-34. There is ample precedent for the relief requested.[1] Before trial in *Perez v. Perry*, 132 S. Ct. 934 (2012) (per curiam), a case that included racial gerrymandering claims, the Supreme Court ordered a district court in Texas to use the preliminary-injunction standard for assessing the likelihood of compliance with Section 5

[1] Federal courts have issued preliminary injunctions enjoining county redistricting plans in a number of cases. *See, e.g., Chatman v. Spillers*, 44 F.3d 923, 925 (11th Cir. 1995) (ordering special elections); *United States v. Dallas Cnty. Comm'n*, 791 F.32 831, 832-33 (11th Cir. 1986) (enjoining elections until further order from the district court); *Watson v. Comm'rs Court of Harrison Cnty.*, 616 F.2d 105, 107 (5th Cir. 1980) (enjoining elections and ordering a new apportionment plan); *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1363 (M.D. Ala. 1986) (ordering early trial and for each county to submit a time schedule for developing a new election plan); *Johnson v. Halifax County*, 594 F. Supp. 161, 171 (E.D.N.C. 1984) (enjoining elections); *Taylor v. Haywood County*, 544 F. Supp. 1122, 1135 (W.D. Tenn. 1982) (enjoining election pending hearing on the merits).

when the preclearance process had not been completed in time for the 2012 elections. The district court did so, enjoining parts of the legislatively-enacted plan where it deemed that the state was likely to fail in efforts to obtain preclearance and remedying those defects in its interim plan. *Id.* at 942. After hearing "extensive testimony concerning the need to have the primaries as soon as possible," the court altered deadlines for federal, state, and local elections to allow time for implementation of the interim map. *Perez v. Texas*, 891 F. Supp. 2d 808, 810, 812 (W.D. Tex. 2012).

Similarly, in an equal-protection challenge to Georgia's legislative districts, the district court enjoined use of a legislative redistricting plan after independently evaluating each challenged district on a district-by-district basis and finding that the plaintiffs were likely to succeed on the merits, noting that "the record [wa]s replete with direct and circumstantial evidence that race was the predominant motivating factor" in drawing the challenged districts. *Johnson v. Miller*, 929 F. Supp. 1529, 1544, 1545-58 (S.D. Ga. 1996). In finding that the balance of equities tipped in the plaintiffs' favor in enjoining the plan, the district court noted that "[n]o department of the government or citizen has a legitimate interest in continuing in effect a violation of another citizen's constitutional rights." *Id.* at 1560. The court further found that enjoining the plan was in the public interest because "[t]he public has a strong interest in having elections conducted according to constitutionally drawn districts, instead of pursuant to racially gerrymandered lines that violate the constitutional rights of all citizens within those districts." *Id.* at 1560-61.

Entering a preliminary injunction now to prevent the use of districts likely to be found unconstitutional is also strongly in the public interest because it is less disruptive than the alternative course of action of remedying the constitutional violation after the fact by ordering special elections. Federal courts have the power to invalidate elections held under constitutionally infirm conditions. *Hadnott v. Amos,* 394 U.S. 358, 367, (1969); *see also Bell v. Southwell*, 376 F.2d 659, 662-65 (5th Cir. 1967) (where racial discrimination has affected the conduct of an election, it is the "established power of a Federal Court to extinguish its effects even to the point of setting aside the election"). Indeed, "the power to order special elections should be exercised whenever there is a possibility that the illegal voting practice affected the election's outcome," and federal courts have often done so. *Ketchum v. City Council of Chicago,* 630 F. Supp. 551, 565 (N.D. Ill. 1985) (citing *Smith v. Cherry*, 489 F.2d 1098, 1103 (7th Cir. 1973), *cert. denied*, 417 U.S. 910 (1974)). Where "voters are represented by unconstitutionally elected officials . . . [courts have] had no difficulty in determining that the terms of the officials elected" should be shortened and special elections held. *Tucker v. Burford,* 603 F. Supp. 276, 279 (N.D. Miss.1985) (redistricting case). It is in the public interest to enjoin the use of an unconstitutional redistricting plan where plaintiffs demonstrate likelihood of success on the merits rather than subsequently order special elections.

II. ***ALBC* Establishes Plaintiffs' Likelihood of Success on the Merits**

In *Ala. Legis. Black Caucus v. Alabama*, ___ U.S. ___, 135 S. Ct. 1257 (2015) (*ALBC*), the United States Supreme Court held:

> Section 5 does not require maintaining the same population percentages in majority-minority districts as in the prior plan. Rather, §5 is satisfied if minority voters retain the ability to elect their preferred candidates.

Id., 135 S. Ct. at 1273.

Defendants, however, argue that this case does not involve "the same type of 'mechanical' racial formula rejected by the Supreme Court in [*ALBC*]." Opp. 48-49. According to Defendants:

> [In *ALBC*], the Supreme Court found that the Alabama legislature's interpretation of Section 5 was wrong. In contrast, the North Carolina leaders followed a decision by the Supreme Court [*Bartlett v. Strickland*, 556 U.S. 1 (2009)] on the percentage of minority voting age population that must be included in a district designed to protect a state from liability under Section 2.

Opp. 48-49. In other words, Defendants essentially argue that Alabama used an *improper* racial formula to maintain or reduce the black-voting age population in VRA districts (for the purported goal of avoiding liability for retrogression under Section 5), whereas North Carolina used a *proper* formula to increase the black-voting age population in North Carolina (for the purported goal of ensuring preclearance under Section 5 and insulating themselves against liability Section 2 liability).[2]

[2] Defendants devote almost no discussion to defending the 2011 senate and house maps on the basis of Section 5. In any event, Defendants' enacted maps bear no relation to the requirements of Section 5, as interpreted in *Alabama*. Section 5 requires avoiding "diminution of a minority's groups proportionate strength" but does not require increasing the proportionate strength of a minority group, as the Defendants set out to do and did.

But just as the Alabama legislature mistakenly believed that Section 5 required it to "maintain, where feasible, the existing number of majority-black districts and not substantially reduce the relative percentage of black voters in those districts," *ALBC*, 135 S. Ct. at 1272, Defendants likewise mistakenly assert that Section 5 and Section 2 required them to draw, where feasible, a proportionate number of majority-black districts, and to increase the BVAP of those districts to over 50%, even where none had existed before. The United States Supreme Court essentially rejected both contentions in *ALBC*, holding that "courts should not mechanically rely upon numerical percentages but should take account of all significant circumstances," and that even a reduction in the black voting age population would not necessarily constitute forbidden retrogression under Section 5. *Id*. at 1273.

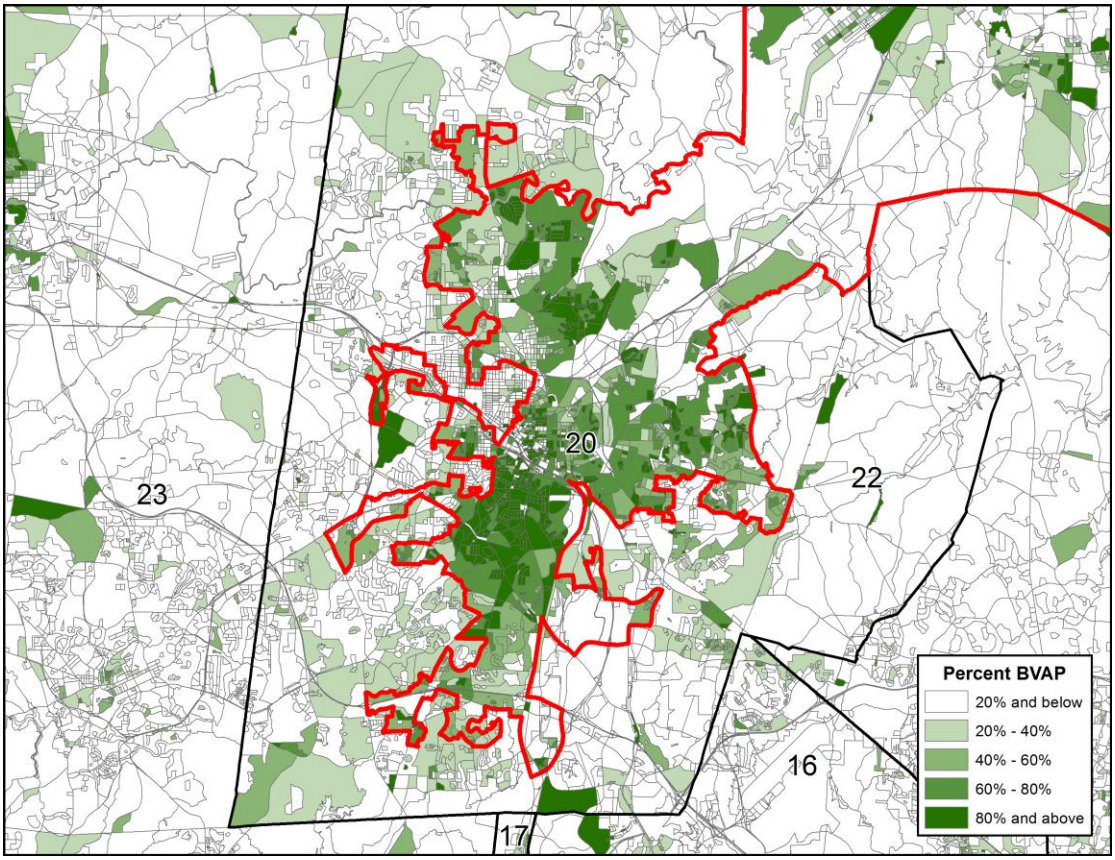
The Court focused upon Alabama Senate District 26, stating as follows:

> The legislators in charge of creating the redistricting plan believed, and told their technical adviser, that a primary redistricting goal was to maintain existing racial percentages in each majority-minority district, insofar as feasible. *There is considerable evidence that this goal had a direct and significant impact on the drawing of at least some of District 26's boundaries*. Of the 15,785 individuals that the new redistricting laws added to the population of District 26, just 36 were white—a remarkable feat given the local demographics. Transgressing their own redistricting guidelines, the drafters split seven precincts between the majority-black District 26 and the majority-white District 25, with the population in those precincts clearly divided on racial lines. And the District Court conceded that race "was a factor in the drawing of District 26," and that the legislature "preserved" "the percentage of the population that was black."

Id. at 1271 (emphasis added and internal citations omitted).

As in *ALBC*, there is "considerable evidence" that Defendants' race-based goals "had a direct and significant impact on the drawing" of the challenged districts. One illustrative example of why *ALBC* controls here is Senate District 20. It was underpopulated by 9,086 as of the 2010 Census. During the 2011 redistricting, Defendants added 15,008 African-American citizens to the district and removed 3,576 white citizens. *Compare* PI Mot. Ex. T *with* Ex. J. Thirty-five split precincts were used to form the boundary between SD 20 and SD 22 in Durham.[3] Of the black voting age citizens residing in those split precincts, 63.8% were assigned to SD 20. *Id*. Such racial sorting was the only way by which Defendants were able to increase the BVAP in SD 20 from 44.64% to 51.04%. The following map shows the highly irregular shape of the district line in Durham County and the racial data available to the map-drawer, Dr. Thomas Hofeller, as he was drawing that district line. That data allowed him to precisely place that line on the basis of race. (In the map below, the red line is the district line, and the green shading represents the BVAP% of each census block, with a legend in the bottom right-hand corner of the map.)

[3] N.C.G.A. Report Entitled "Voting Age Population by Race and Ethnicity, Rucho Senate 2" (copy attached as PI Exhibit W).



Copies of racial-density maps for all of the challenged districts are attached as Appendix 1. Examination of those maps establishes that race did predominate in the drawing of the challenged districts.

III. Defendants' Racial Quotas Were Inflexible

Defendants claim that the mechanical racial targets they employed were flexible rather than mechanical. Opp. at 23. Defendants' contention is belied by the 2011 redistricting process and by Senator Rucho and Representative Lewis' own contemporaneous words. In 2011, before even drawing districts, the mapdrawer, Dr. Hofeller, started with a quota—obtaining a proportional number of majority black districts without regard to whether conditions necessitated that extreme action. PI Mot.

Ex. E. It is undisputed that Dr. Hofeller began on this path well before any expert analysis on racially polarized voting was available. PI Mot. Ex. C, Lewis Dep. 121:15-124:2; Ex. A, Hofeller Dep. 78:1-10.

Furthermore, in their June 22, 2011 Public Statement, Defendants stated they would consider alternative plans, "provided the total districts proposed provide black voters with a substantially proportional state-wide opportunity to elect candidates of their choice" and that VRA districts "be drawn at a level that constitutes a true majority of black voting age population." PI Mot. Ex. M at 7. In other words, they would only consider alternative plans that subscribed to the two "mechanical racial targets." These racial goals were predetermined, prioritized above all other districting criteria, and could not be compromised.

IV. Defendants Mis-Apply *Bartlett v. Strickland*

Defendants drew each of the challenged districts based on their view that after *Bartlett v. Strickland*, any district drawn to comply with the VRA had to be drawn so that >50% of the voting age population assigned to the district was African American. That view is twice rejected in the *Bartlett* decision itself.

The Court first expressly cautioned the states: "**Our holding … should not be interpreted to entrench majority-minority districts by statutory command, for that, too, could pose constitutional concerns**." 556 U.S. at 23-24 (citing *Miller v. Johnson*, 515 U.S. 900 (1995) and *Shaw v. Reno*, 509 U.S. 630 (1993) (*Shaw I*) (emphasis added)). In fact, that is precisely what Defendants did—they purported to rely upon the Voting

Rights Act to "entrench majority-minority districts by statutory command" and create new ones for the first time.

The Court further warned that:

> Majority-minority districts are only required if all three *Gingles* factors are met and if § 2 applies based on a totality of the circumstances. **In areas with substantial crossover voting it is unlikely that the plaintiffs would be able to establish the third *Gingles* precondition--bloc voting by majority voters. In those areas majority-minority districts would not be required in the first place**; and in the exercise of lawful discretion States could draw crossover districts as they deemed appropriate.

Bartlett, 556 U.S. at 24 (emphasis added) (internal citations omitted). Again, that in fact is precisely what Defendants did—they mechanically converted districts with less than 50% BVAP (in which black candidates were winning by large margins) to districts with greater than 50% BVAP.

V. Defendants Mis-Apply *Johnson v. DeGrandy*

Defendants also drew the challenged districts based on their argument that creating majority black districts in numbers proportional to the State's black population would ensure Section 5 preclearance and inoculate the State against Section 2 liability. This view was based on Defendants' erroneous reliance upon *Johnson v. DeGrandy*, 512 U.S. 997 (1994).

DeGrandy held that "proportionality is not a safe harbor for States." *Id.* at 1026. The Court "reject[ed] the safe harbor rule because of a tendency the State would itself certainly condemn, a tendency to promote and **perpetuate efforts to devise majority-**

minority districts even in circumstances where they may not be necessary to achieve equal political and electoral opportunity." *Id.* at 1019-20 (emphasis added). Yet despite these clear admonitions from the Court, Defendants engaged in that precise mechanical practice.

VI. The Evidence Demonstrates that Race, Not Politics, Predominated

Defendants attempt to retreat from the numerous 2011 public statements offered by the legislative leaders, which plainly described the redistricting process as primarily motivated by the Voting Rights Act. The process is now described as a highly political one, where race was but one small, non-predominant consideration. Opp. at 14. Acceptance of this argument would require this Court to wholly discount the actual, contemporaneous admissions of the mapdrawer and the legislative leaders who directed his work.

For example, in their June 17, 2011 statement (when only the VRA districts had been drawn), Sen. Rucho and Rep. Lewis articulated that they were recommending that each legislative plan "include a sufficient number of majority African American districts to provide North Carolina's African American citizens with a substantially proportional and equal opportunity to elect their candidates of choice." PI Mot. Ex. H, at 5. Defendants' refusal to consider plans with VRA districts that contained <50% BVAP demonstrated explicitly that race was the dominant consideration in the creation of the challenged VRA districts. Indeed, that public statement explained that "increasing the number of majority African American districts will ensure non-retrogressive legislative

plans" and "furthers the State's obligation to comply with Section 2 of the Voting Rights Act." *Id*. at 6. These are racial goals, not political goals. In their June 22, 2011 public statement, Sen. Rucho and Rep. Lewis responded to accusations that the VRA districts were "an attempt to maintain Republican political power" by "correct[ing]" that "erroneous statement[]," telling citizens that the "State has an obligation to comply with the Voting Rights Act." PI Mot. Ex. M. at 1, 3. They stated that "while districts that adjoin majority black district may become more competitive for Republican candidates because of compliance with the VRA, such competitiveness results from compliance with the VRA." *Id.* at 4. That statement is direct evidence that political impacts were only derivative of Defendants' focus on racial considerations. Notably, when Sen. Rucho was asked at his deposition whether Rucho informed Dr. Hofeller that Rucho wanted Republicans to win in the districts, Sen. Rucho responded that he didn't "ever remember saying we want Republicans to win these districts." *See* PI Mot. Ex. B, Rucho Dep. 54:24-25.

To the extent that politics was a factor in the construction of any district, the fact "[t]hat the legislature addressed [partisan] interests does not in any way refute the fact that race was the legislature's predominant consideration" where race was the criterion that could not be compromised. *Shaw II*, 517 U.S. at 907.

VII. The Boundaries of the Challenged Districts Make Manifest that Race Predominated Over WCP Compliance

Defendants attempt to rescue their gerrymandered districts by contending that the Whole Counties Provision ("WCP") of the North Carolina Constitution,[4] rather than race, explains the boundaries of the challenged districts. This argument is contrary to decisions of the North Carolina Supreme Court, Defendants' own words, and the maps they drew.

In a leading case interpreting the WCP, the North Carolina Supreme Court explained that nine criteria must be followed, in order, for purposes of ensuring compliance with both the Voting Rights Act and the WCP. *Stephenson v. Bartlett*, 355 N.C. 354, 383-84 (2002) (*"Stephenson I"*). The first required criterion is that "legislative districts required by the VRA shall be formed" before non-VRA districts. *Id*. at 383; *Dickson v. Rucho*, 367 N.C. 542, 571 (2014). Maximizing the number of two "county clusters" are only the fifth and sixth criteria. *Id*. at 572.

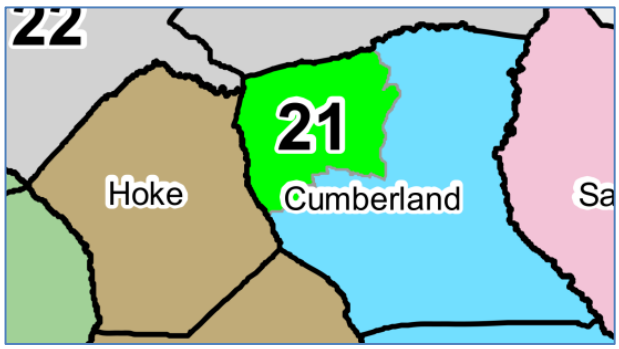
Aside from the fact that Defendants' argument is inconsistent with *Stephenson I*, it is inconsistent with Defendants' own statements. Senator Rucho and Representative Lewis acknowledged that, as required by *Stephenson I*, VRA districts were drawn before any other districts; moreover, such districts remained largely unchanged from June 17, 2011 (when they were made public) until July 27 and 28, 2011 (when they were enacted). *See* PI Mot. Ex. C, Lewis Dep. 99:10-12; 142:4-7; Ex. B, Rucho Dep. 64:17-69:19. For example, Rep. Lewis testified that "the counties were grouped around in as small a

[4] N.C. Const. art. II, §§ 3(3) and 5(3) (collectively, the "Whole Counties Provision").

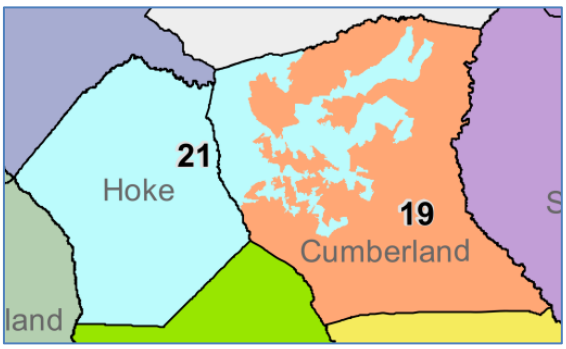
number as could be to accommodate the VRAs." *Id.* at 181:4-5. In other words, according to Defendants, county groupings did not affect the VRA districts.

In any event, this state constitutional command did not deter defendants from achieving their race-based goals; it simply made manifest the predominance of race in forming the challenged districts. The extraordinary manipulation of district boundaries required in order for Defendants to reach their race-based goals in light of this "clustering" requirement is perfectly illustrated, for example, by examining the boundaries of SD 21, which was drawn within Cumberland and Hoke counties:

Senate District 21
Benchmark Map (2003)



Senate District 21
Enacted Map (2011)



The county grouping did not cause the grotesque shape and appendages in the challenged districts—the incorrect assumption that these districts needed to be drawn at above 50% despite the demonstrated electoral successes of black voters in the districts did.

To the extent Defendants cannot use the county groupings requirement in the WCP to explain their racially-gerrymandered districts within a single county that is kept whole, they attempt to defend their single-county racial gerrymanders on the grounds that

plaintiffs "have not offered any judicially manageable standard that would explain why their proposed alternative districts are compact while the enacted districts are not." Opp. at 43. Were this a valid argument, no racial gerrymandering case would ever be successful. Where the shape of a district is explainable solely on the basis of race, using direct or indirect evidence (e.g., the racial density maps in App. 1), Plaintiffs are not required to proffer any new standard on compactness or an alternative to demonstrate what a compact district would look like.

VIII. *ALBC* Defeats any Claim that the Districts were narrowly tailored to Comply with Section 5

Defendants had no reasonable basis to conclude that the challenged districts were compelled by either Section 2 or Section 5 of the Voting Rights Act, particularly when from 1992 to 2010, previous plans had been precleared by the U.S. Department of Justice under Section 5 and had not been challenged by a single lawsuit under Section 2. Black voters had extensive and sustained success in the challenged districts in electing their candidates of choice. Thus, racially polarized voting did not cause the "usual" defeat of the black-preferred candidates in the challenged districts, and Defendants cannot argue that they reasonably acted to avoid Section 2 liability.

Defendants attempt to explain away the election of African-American candidates on the basis of incumbency, but the Fourth Circuit has rejected Defendants' argument. Opp. at 13. In *Lewis v. Alamance County*, plaintiffs brought a challenge under Section 2 to an at-large method of electing county commissioners, in part because the third prong

of *Gingles* was not satisfied and African-American-preferred candidates were not usually defeated. *Lewis*, 99 F.3d 600, 603 (4th Cir. 1996). Plaintiffs in that action wanted the Court to discount the success of an African-American commissioner due to incumbency. *Id*. at 617. The district court rejected that argument, and the Fourth Circuit affirmed, observing that "[t]o reverse as clearly erroneous the district court's decision under these circumstances would be to transform what was at most a narrow or 'special' circumstance envisioned by the Court only in dicta into a categorical rule that all electoral successes of a minority-preferred incumbent are to be discounted." *Id.*

In addition, many of the districts being challenged here have been represented by more than one African-American-preferred representative. For example, S.D. 4, which had <50% BVAP from 2003 to 2011, was represented by African-American Senators Robert L. Holloman in 2006 and Edward Jones in 2008 and 2010. PI Mot. Ex. P, Churchill Dep. Ex. 82, at 4, 11. As another example, in H.D. 33, voters elected by wide margins African-American Representatives Bernard Allen in 2006, Dan Blue in 2008, and Rosa Gill in 2010.[5] Thus, incumbency does not explain the success of African-American preferred candidates. PI Mot. Ex. P, Churchill Dep. Ex. 83 at 12, 31, 51.

[5] The loss of one African-American candidate in 2010, a successful election year for Republican candidates, cannot be grounds for Section 2 liability and cannot be used to justify the drawing of majority-black districts statewide. "Because loss of political power through vote dilution is distinct from the mere inability to win a particular election, a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election." *Gingles*, 478 U.S. at 57. For example, Defendants point to the loss of African-American candidate Don Davis in Senate District 5 as justification for their plan to draw new majority-black districts across the state. Sen. Davis was defeated in 2010, but he won in 2008, the year he first ran. PI Mot. Ex. P, Churchill Dep. Ex. 82, at 29. Thus, based on the data in front of the General

IX. Defendants Mis-Apply *Cromartie*

Defendants cite *Easley v. Cromartie*, 532 U.S. 234 (2001) (*Cromartie II*) for a checklist of what they argue plaintiffs must demonstrate in order to prove that race predominated in the drawing of a district challenged as a racial gerrymander. Defendants claim that "plaintiffs must also establish: (1) that . . . the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles; and (2) that those districting alternatives would have brought about significantly greater racial balance." Opp. at 38 (internal quotation marks omitted).

But what plaintiffs in *Cromartie II* needed to prove is different than what Plaintiffs must prove here. First, the Court in *Cromartie II* was clear that those requirements only applied "in a case such as this one." That case was, in fact, one that was in front of the Court for the fourth time, *id.* at 237, and where the legislature had redistricted again in order to cure earlier-identified constitutional defects. *Id*. at 239. The Court noted that with the remedial redistricting process, plaintiffs did not have "the kinds of direct evidence we have found significant in other redistricting cases." *Cromartie II*, 532 U.S. at 254 (citing *Bush v. Vera*, 517 U.S. 952, 959 (1996) (O'Connor, J., principal opinion) (State conceded that one of its goals was to create a majority-minority district); *Miller v. Johnson*, 515 U.S. 900, 907 (1995) (State set out to create majority-minority district);

Assembly, the African-American preferred candidate won in 50% of the general elections. Defendants also cite the loss of African-American candidate Tony Foriest in Senate District 24, but that district is not challenged as a racial gerrymander in this case.

Shaw II, 517 U.S. at 906 (recounting testimony by Cohen that creating a majority-minority district was the "principal reason" for the 1992 version of District 12)).

Another factor that distinguishes *Cromartie II* from the instant case is the splitting of precincts in the formation of the challenged districts. It is undisputed that political data is only collected and produced at the precinct level, *not* the census block level. PI Mot. Ex. R, Hofeller Dep. 217:4-7, 218:4-10. When a mapdrawer splits a precinct, the only reliable information he has is the Census Bureau's total population and racial demographics. The district at issue in *Cromartie II* had very few split precincts—therefore, the mapdrawer could have drawn the district based on accurate political data. This is not the case here, where Dr. Hofeller did not have reliable sub-precinct political data, and it is clear that where he split precincts, he did so to achieve a racial goal of >50% BVAP in the district. PI Mot. Ex. R, Hofeller Dep. 218:4-10.

Thus, in *Cromartie II*, there was a real question of whether race or politics predominated. It was given that setting, and where race and politics were highly correlated, that the Supreme Court directed plaintiffs to produce an alternate plan that achieved the same partisan goals. Given the extensive direct admissions that race predominated in this case, absent in *Cromartie II*, Plaintiffs do not need that further element of evidence on predominance.

X. Plaintiffs Can Use Statewide Data to Prove Racial Gerrymandering

Defendants, citing *ALBC*, also argue that "[s]tatewide criteria cannot be used to prove that a particular district was racially gerrymandered." Opp. at 47. On the contrary,

ALBC actually holds: "Voters, of course, can present statewide evidence in order to prove racial gerrymandering in a particular district. And voters might make the claim that every individual district in a State suffers from racial gerrymandering." 135 S. Ct. at 1265.

XI. The Public Interest, Balance of Equities, and Irreparable Harm to Plaintiffs all Favor the Injunction

Defendants rely on the declaration of a single election administrator to support their contention that delaying the March 15, 2016 primary to another date is not in the public interest. However, this reliance is unavailing because election administrators, by virtue of their duty to ensure that elections are conducted with as little disruption as possible, have a vested interest in maintaining the status quo when faced with the alternative of altering election districts and deadlines. Thus, regardless of when the challenge is brought, no election administrator is likely to say it is in the public interest to enjoin or modify election districts any time other than after decennial census redistricting. However, that has not stopped courts from ordering constitutional flaws to be corrected. More importantly, the North Carolina Supreme Court has weighed the balance of harm differently than Ms. Strach.

Plaintiffs' request for preliminary injunctive relief to ensure that elections for the North Carolina Senate and House are held in constitutionally valid districts is fully consistent with the extraordinary actions taken by the North Carolina Supreme Court in *Stephenson I*, the facts of which were as follows.

On February 20, 2002, after the process for conducting the 2002 legislative elections had begun, a North Carolina trial court declared that the 2001 Senate and House redistricting plans enacted by the General Assembly violated Article II, Sections 3(3) and 5(3) (collectively, the "Whole Counties Provision") of the North Carolina Constitution. *Stephenson I*, 355 N.C. at 358-59, 562 S.E.2d at 382.

On March 7, 2002, the Supreme Court, on its own motion, enjoined the State from using the 2001 redistricting maps to conduct primary elections scheduled for May 7, 2002, even though the candidate filing period for the 2002 elections had already closed and campaigning had begun. *Id.*, 355 N.C. at 360, 562 S.E.2d at 382-83.

On April 30, 2002, the Supreme Court affirmed the trial court's order and allowed the General Assembly two weeks to enact valid districts, subject to the approval of the trial court. *Id.*, 355 N.C. at 385, 562 S.E.2d at 398; *see also Stephenson v. Bartlett*, 357 N.C. 301, 303-04, 582 S.E.2d 247, 248-49 (2003) ("*Stephenson II*").

On May 17, 2002, the General Assembly enacted new plans designed to remedy the flaws identified by the Supreme Court. *Stephenson II*, 357 N.C. at 303-04, 582 S.E.2d at 248-49. Two weeks later, on May 31, 2002, the trial court declared that the General Assembly had again failed to enact valid districts and, as authorized by the Supreme Court, drew its own redistricting plans. *Id*. Those plans were precleared by the United States Department of Justice on July 12, 2002. The primaries under those court-drawn plans were held on September 10, 2002. On July 16, 2003, the Supreme Court affirmed the trial court's acts. *Id.*, 357 N.C. at 314, 582 S.E.2d at 254.

Plaintiffs' rights to have their representatives elected from districts that do not violate their rights under the federal constitution are surely no less compelling than the rights of the plaintiffs in *Stephenson* to elect their representatives from districts that adhere to county lines to the extent possible. The burdens and expenses imposed on election boards and candidates by the Supreme Court's orders in *Stephenson* are significantly greater than the burdens that would be imposed in providing relief to Plaintiffs here.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion for a Preliminary Injunction.

Respectfully submitted, this the 18th day of November, 2015.

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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the foregoing **PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**, with service 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 18th day of November, 2015.

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