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

SANDRA LITTLE COVINGTON, *et al.,*	)	
	)	
Plaintiffs,	)	
	)	**DEFENDANTS' POST**
v.	)	**TRIAL BRIEF ON**
	)	**BURDEN OF PROOF**
STATE OF NORTH CAROLINA, *et al.*	)	**AND NARROW TAILORING**
	)	
Defendants.	)	
	)	

1. Plaintiffs failed to carry their burden of proof on the issue of racial predominance.

Even in cases involving claims of racial gerrymandering, the Supreme Court has made "clear" that "the underlying districting decision is one that ordinarily falls within a legislature's sphere of competence." *Easley v. Cromartie,* 532 U.S. 234, 242 (2001) ("*Cromartie II"*) (citing *Miller v. Johnson*, 515 U.S. 900, 915 (1995)). The "legislature 'must have discretion to exercise the political judgment necessary to balance competing interests." *Id.* Because redistricting is ultimately based upon political judgments, "courts must exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Cromartie II,* 532 U.S. at 242 (quoting *Miller,* 515 U.S. at 916).

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) (citing *Shaw v. Reno*, 509 U.S. 630, 646 (1993) ("*Shaw I*")) (internal citations omitted). Nor does strict scrutiny apply because race was "a motivation for the drawing of a majority-minority district." *Cromartie II*, 532 U.S. at 242 (citing *Vera*, 517 U.S. at 959). Instead, plaintiffs alleging an illegal racial gerrymander must prove that "all other legislative districting principles were subordinated to race . . . and that race was the predominant factor motivating the legislature's redistricting decision." *Vera*, 517 U.S. at 959 (citing *Miller*, 515 U.S. at 916); *Cromartie II*, 532 U.S. at 241-42.

This burden of proof is a "demanding one." *Cromartie II*, 532 U.S. at 241 (citing *Miller*, 515 U.S. at 909). Plaintiffs must prove that a challenged district "is *unexplainable* on grounds other than race." *Id.* at 242 (citing *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) ("*Cromartie I*") (quoting *Shaw I*, 509 U.S. at 644 *in turn quoting Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)) (emphasis added). This standard requires proof that the State "substantially neglected traditional districting criteria." *Vera*, 517 U.S. at 962. Traditional redistricting criteria include "compactness, contiguity, and respect for political subdivisions." *Stephenson v. Bartlett*, 355 N.C. 354, 371, 562 S.E.2d 377, 389 (2002) ("*Stephenson I*") (quoting *Shaw I*, 509 U.S. at 647). States can avoid strict scrutiny altogether by respecting their own traditional districting principles. Where a state has followed its traditional redistricting criteria to intentionally create a majority black district, race is not the predominant motive. *Vera*, 517 U.S. at 978.[1]

[1] Even plaintiffs have agreed that districts intentionally created to be majority black districts are not illegal racial gerrymanders when they are based upon "traditional

In *Shaw I*, the Court noted that "traditional redistricting principles such as compactness . . . are objective factors that may serve to defeat a claim that a district has been gerrymandered based on racial lines." 509 U.S. at 647 (citing *Karcher v. Daggett*, 462 U.S. 725, 755 (1983)). The undisputed evidence presented at trial by Dr. Thomas Hofeller showed that the challenged districts are based upon reasonably compact concentrations of black population in which blacks constitute a majority of the voters in single member districts. (Tr. Vol. IV, pp. 221:23-222:1, 228:5-230:18; Vol. V, pp. 20:20-22:23; DX 3001, Maps 11, 14) If North Carolina had relied solely upon these areas to form compact single-member districts, plaintiffs could not prove that the principle of compactness had been subordinated to race.[2]

Moreover, at trial Dr. Hofeller explained that the shapes and locations of the challenged VRA districts were driven by an "iterative process" to harmonize the areas of compact black population represented by the exemplar districts with the equal population and county grouping formula established by the *Stephenson* cases. (*Harris v. Ariz. Indep. Redist. Comm'n*, 136 S. Ct. 1301, 1308 (2016); Tr. Vol. IV, pp. 233:2-241:7; Vol. V, pp. 25:20-30:22)

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redistricting principles" or are "naturally occurring." (Tr., Vol. I, pp. 17, 18; Tr., Vol. V, p. 175)

[2] If the State had adopted voting rights districts ("VRA districts") based upon Dr. Hofeller's exemplar maps, plaintiffs' claims would fail. This is easily demonstrated by comparing each of the exemplar districts to the 1992 version of Congressional District 12, found to be an illegal racial gerrymander in *Shaw II*. All of the exemplar districts appear far more visually compact as compared to the 1992 CD 12 and all of the exemplar districts have Reock scores well above the low compactness level of 0.15. *Cromartie II*, 133 F. Supp. 2d at 415 (citing *Vera*, 517 U.S. at 959-60; Pildes & Niemi, *Expressive Harms, "Bizarre Districts"* and *Voting Rights" Evaluating Election Districts Appearance After Shaw v. Reno*, 92 Mich. L. Rev. 483, 564 (1993) ("*Pildes* & *Niemi*")).

Nor did plaintiffs offer alternative plans showing districts that complied with the *Stephenson* criteria. This unrefuted evidence shows that the reason why persons were assigned to the challenged districts was not predominantly because of race but instead was the result of compliance with the state's constitutional requirements for legislative districts.[3]

Other traditional redistricting criteria include "partisan advantage and incumbency protection." *Stephenson I,* 355 N.C. at 371, 562 S.E.2d at 390 (citing *Gaffney v. Cummings,* 412 U.S. 735 (1973)). On March 24, 2011, the redistricting chairs announced that politics and partisan advantage would play a significant role during the 2011 redistricting. (Tr. Vol. III, p. 123:10-20; DX 3013-3) On March 30, 2011, the Chairs' statement on redistricting and politics was amplified when they released their Legislative Guide on Redistricting. (Tr. Vol. III pp. 126:22-128:4; 133:14-22; JX 1012) Prior to the first hearing on proposed VRA districts, the chairs also stated that creating VRA districts in compliance with *Strickland* made adjoining districts more competitive for Republican candidates. (Tr. Vol. III, pp. 171:15-23; 174:23-175:4; JX 1006) All members of the General Assembly understood that the State was free to "engage in constitutional political

[3] Even the shape and location of challenged districts within a single county were impacted by the amount of population within that county or the county group to which the districts were assigned. (D.E. 32-1, F.F. Nos. 199-212; Tr. Vol. IV, pp. 241:8-244:4; Vol. V, pp. 19:11-20:19; 31:13-23) In any case, all challenged VRA districts located within single counties are no less visually compact than VRA districts enacted in the past (including the 1997 version of Congressional District 1) or any of the 2011 alternative districts. Moreover, all of the 2011 enacted VRA districts located within a single county, as well as Senate District 20 (Granville and Durham) and Senate District 21 (Hoke and Cumberland) score well above 0.15 under the Reock standard. *Pildes* & *Niemi, supra.*; DX 3018-32, DX 3018-33.

gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact." *Cromartie I*, 526 U.S. at 551 (citing *Vera*, 517 U.S. at 968; *Shaw v. Hunt*, 517 U.S. 899, 905 (1996) ("*Shaw II*"); *Shaw I*, 509 U.S. at 646). "[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." *Cromartie I*, 526 U.S. at 551-52.[4]

Plaintiffs have failed to carry their burden of proof that the challenged VRA districts are "unexplainable on grounds other than race." *Shaw I*, 509 U.S. at 643. As confirmed by plaintiffs' expert, Dr. Lichtman, prior legislatures in North Carolina had arbitrarily limited the number of districts that gave black voters the ability to elect their candidates of choice. (Tr. Vol. III, pp. 66:17-69:10) Yet, plaintiffs' case rests almost entirely on their comparisons of the 2011 enacted districts versus the now undisputedly illegal 2003 legislative districts. However, those plans (as well as alternative maps submitted to the legislature in 2011) had fewer ability to elect districts than the 2011

[4] Courts must exercise "caution" where "the State has articulated a legitimate political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated." *Cromartie II*, 532 U.S. at 242. Therefore, to prove that race was the predominant motive, "in a case . . . where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation," 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." *Id.* at 234, 258.

plans and instead replaced ability to elect districts with "influence" districts that plaintiffs' own experts agree favor white Democratic candidates. *Id.* Plaintiffs have not offered alternative legal maps that comply with state constitutional criteria while also accomplishing the legislature's legitimate political goals but supposedly bringing greater racial "balance." Even Dr. Lichtman admitted that his comparisons of illegal 2003 districts versus 2011 districts should be given little weight. (Tr. Vol. III, 109:17 - 110:23)

This Court is obligated to give the North Carolina General Assembly leeway in legislative redistricting decisions. The 2011 plans were enacted by a Republican General Assembly and designed to maintain the partisan balance established in the 2010 General Election. (Tr. Vol. III, pp. 123:24-124:5) The enacted plans comply with the *Stephenson* standards for equal population and the formula for grouping counties. *Dickson v. Rucho*, 367 N.C. 542, 570-75, 766 S.E.2d 238, 257-60 (2014). None of the 2011 alternative plans complied with this state criteria. *Id.* None of the challenged VRA districts are even remotely similar in appearance to the uncompact 1992 version of CD 12.[5] Plaintiffs have simply failed to prove that the shapes and locations of the challenged districts "are unexplainable on grounds other than race." *Shaw II, supra*.[6]

[5] The Reock score for the 1992 Congressional District 12 was 0.05. Pildes and Niemi at 562, Table 1. None of the exemplar districts or the 2011 enacted VRA districts have a Reock score remotely approaching 0.05.

[6] In *Dickson* the trial court conducted a trial only on whether the state had a strong basis in evidence for the VRA districts challenged in that case and whether race was the predominant motive for certain non VRA districts challenged. *Dickson v. Rucho*, 2013 WL 3376658, *3, n. 6 (N.C. Sup. Ct. July 8, 2013). Without conducting a trial, the trial court held that race was the predominant motive for the VRA districts based exclusively on evidence that the legislature considered proportionality. *Id.* at *6-7. In so holding, the trial court recognized that the evidence showing the state's compliance with the whole

2. In any event, plaintiffs failed to prove that North Carolina lacked good reasons for enacting the districts.

Even where race is found to be the predominant motive for the drawing of district lines, a state may still defend any challenged district where the district furthers a compelling governmental interest and is "narrowly tailored." *Alabama Legislature Black Caucus v. Alabama*, 575 U.S. ___, 135 S. Ct. 1257, 1262 (2015) ("*Alabama*"); *Shaw II*, 517 U.S. at 908 (citing *Miller*, 515 U.S. at 920). A challenged district furthers a compelling interest if it was "reasonably necessary" to obtain preclearance of the plan under Section 5 of the VRA. *Shaw I*, 509 U.S. at 655; *see also Alabama*, 135 S. Ct. at 1274. A challenged district also survives strict scrutiny when it was reasonably established to avoid liability under Section 2 of the VRA. *Vera*, 517 U.S. at 977 (citing *Growe v. Emison*, 507 U.S. 25, 37-42 (1993); *Shaw II*, 517 U.S. at 915; and *Miller*, 515 U.S. at 920-21).

To make this showing, a state need only articulate a "strong basis in evidence" that challenged districts were enacted to avoid preclearance objections or liability for vote dilution under Section 2. *Alabama*, 135 S. Ct. at 1274; *Shaw II*, 517 U.S. at 910 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986)). Legislatures "may have a

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county provision also supported the legislature's argument that race was not the predominant motive. The trial court decided that this issue was moot based upon its decision that the record showed a strong basis in evidence for the challenged districts. *Id.* at *23. On appeal, relying upon the United States Supreme Court opinion in *Cromartie I*, the North Carolina Supreme Court ruled that the trial court had erred by finding racial predominance without a trial, but that the error was moot because of the strong basis in evidence supporting the VRA districts. *Dickson v. Rucho*, 367 N.C. 542, 552-54, 766 S.E.2d 238, 246-47 (2014); *Cromartie I*, 526 U.S. at 543-49.

strong basis in evidence to use racial classifications when they have *good reasons to believe such use is required, even if a court does not find that the actions were necessary for statutory compliance.*" *Alabama*, 135 S. Ct. at 1274 (emphasis added). The General Assembly is not required to prove a violation of Section 2 before drawing districts to avoid Section 2 liability. Thus, there is no requirement that a state legislature prove the presence of "legally significant" racially polarized voting as would be required of a Section 2 plaintiff or before a court can order a state to adopt a VRA district. *Id.* Instead, "deference is due to [states'] reasonable fears of, and to their reasonable efforts to avoid § 2 liability." *Vera*, 517 U.S. at 978. Indeed, the General Assembly retains "flexibility" that courts enforcing the VRA lack, "both insofar as they may avoid strict scrutiny altogether by respecting their own traditional districting principles, and insofar as deference is due to their reasonable fears of, and to their reasonable efforts to avoid, § 2 liability." *Id.*

The "narrow tailoring" requirement of strict scrutiny allows a state a limited degree of "leeway." *Vera*, 517 U.S. at 977; *Alabama*, 135 S. Ct. at 1273-74. Narrow tailoring does not require that North Carolina identify and use just the right percentage of African American population for a majority black district. *Alabama*, 135 S. Ct. at 1274.[7] Nor does narrow tailoring require that "a district" have the "least possible amount of irregularity in shape, making allowances for traditional districting criteria." *Vera*, 517

[7] As we have shown, in some cases the alternative plans proposed majority black districts with higher black VAP than the black VAP in the 2003 districts and the 2011 enacted districts. In any case, the difference in black VAP between the challenged VRA districts and all of the 2011 alternatives is insignificant. (DX 3019-77 and DX 3019-78) The General Assembly had "good reasons" to draw VRA districts slightly above 50%, instead of the same districts found in the 2003 plans and all 2011 alternatives with black VAP between 40% and 50%, given the Supreme Court decision in *Strickland*.

U.S. at 977 (quoting *Wygant*, 476 U.S. at 291 (O'Connor, concurring in part and concurring in judgment) (state actors should not be "trapped between the competing hazards of liability" by the imposition of unattainable requirements under the rubric of strict scrutiny)). Thus, a Section 2 majority black district that is based on a reasonably compact majority minority population, "may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts in endless 'beauty contests.'" *Vera*, 517 U.S. at 977.

The ultimate burden of proving the unconstitutionality of any challenged district remains at all times with the plaintiff. The formula adopted in *Shaw I*, 509 U.S. at 656, and *Shaw II*, 517 U.S. at 909, comes from the Supreme Court's decision in *Wygant*. Under these standards, once the government articulates a strong basis in evidence, "[t]he ultimate burden remains with the [plaintiff] to demonstrate the unconstitutionality of an affirmative-action program." *Wygant*, 476 U.S. at 277-78. Mere allegations by the plaintiffs of reverse discrimination do "not automatically impose upon" the legislature "the burden of convincing the court" that its decision to adopt race-based measures had a strong basis in evidence. *Id.* at 292 (O'Connor, J., concurring). In "reverse discrimination suits . . . it is the plaintiffs who must bear the burden of demonstrating that their rights have been violated." *Id.*[8]

[8] Neither *Alabama* nor the decision in *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013), altered the standard burden of proof which rests upon every plaintiff in a case under the Fourteenth Amendment. The burden of proof does not shift to the defendants even assuming plaintiffs have established a *prima facie* case by proving that race was the predominant motive for the lines of a specific district. *Johnson v. Miller*, 864 F. Supp. 1354, 1378-79 (S.D. Ga. 1994), *aff'd, Miller*, 515 U.S. 900 (1995); *Shaw*, 861 F. Supp. at

Assuming plaintiffs have proved that race was the predominant motive for any of the challenged districts, defendants have more than demonstrated that the General Assembly had good reasons to believe that all of the challenged districts represented "reasonable efforts to avoid § 2 liability." *Vera, supra*. This evidence includes: (1) the history of vote dilution cases in North Carolina, starting with *Gingles* and including many cases involving county and local governments in which VRA districts have been imposed by federal courts (DX 3013-9); (2) the history and locations of prior VRA districts enacted by the General Assembly dating back to the 1980s through the 2003 and 2009 legislative plans (DX 3000, 3001, 3021-3024); (3) testimony by counsel for the NC NAACP that significant levels of racially polarized voting still exist and that majority minority districts are still needed in North Carolina (DX 3013-7); (4) a report prepared by an expert for the NC NAACP (Dr. Ray Block) and other organizations represented by plaintiffs' counsel analyzing legislative and congressional general elections involving black and white candidates in 2001 and 2003 era VRA districts (DX 3013-8); (5) substantial lay testimony during the public hearing process that racially polarized voting continues to exist, that majority black districts are still needed, and that the General Assembly should consider enacting sufficient VRA districts to provide black voters with

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436, *rev'd on other grounds*, *Shaw II*, 517 U.S. at 909-910 (citing *Wygant*, 476 U.S. at 277). Plaintiffs in *Shaw II* prevailed not because the Supreme Court changed the traditional standards for burden of proof from plaintiffs to defendants but instead because plaintiffs carried their burden of proof that the 1992 version of CD 12 was neither supported by a strong basis in evidence nor narrowly tailored. *Shaw II*, 517 U.S. at 910, 916-18. The decision in *Fisher*, an affirmative action case, did not overrule *Wygant*, another affirmative action case, regarding the plaintiffs' burden of proof in cases alleging violations of the Fourteenth Amendment.

proportionality (DX 3015A); (6) an expert report prepared by the General Assembly's expert (Dr. Thomas Brunell) designed to supplement the report submitted by the expert for the NC NAACP (Dr. Block) (DX 3033); (7) opinions by the North Carolina School of Government that North Carolina remained obligated to create effective black majority districts in the areas of the state covered by the *Gingles* remedy (DX 3014-11); and (8) evidence demonstrating that all of the 2011 alternative plans, including plans prepared by the NC NAACP, proposed VRA districts in all the same counties and areas where VRA districts were enacted in 2011. (DX 3000, 3001)[9]

From the time of *Gingles* through the present, no legislature in the country whose districting plans have been challenged has had a stronger basis in evidence to enact VRA districts than the 2011 General Assembly. In contrast, during the 2000 redistricting cycle, the General Assembly relied upon only one expert report, and that one report only studied Congressional elections in Congressional Districts 1 and 12. (Tr. Vol. III, p. 156:14-158:10; DX 3071, 3072) In *Alabama*, there is no evidence that the state relied upon any expert reports or any lay testimony showing the need for the super majority black districts (black VAP in excess of 60%) questioned by the Supreme Court. Under the standards set by *Alabama*, North Carolina does not have to show that this Court

[9] Throughout the *Dickson* litigation and in this case plaintiffs have ignored the report authored by Dr. Block and presented to the General Assembly on behalf of the NC NAACP. Dr. Block essentially performed a "particularized" study of elections that was similar to the report prepared by Dr. Lichtman for litigation purposes. Dr. Block analyzed black versus white legislative or congressional races from 2006 through 2010. Dr. Block did not qualify his opinion by urging the enactment of 40% to 50% districts as opposed to districts that comply with *Strickland*. Even though Dr. Block's report was offered to the General Assembly by the NC NAACP and counsel for the plaintiffs in *Dickson* and this case, plaintiffs did not call Dr. Block as a witness in either case.

would impose VRA districts in the context of a hypothetical Section 2 lawsuit. *Alabama*, 133 S. Ct. at 1274. Plaintiffs' two trial experts agree that African American voters still require VRA districts in order to have an equal ability to elect their candidates of choice, though they disagree with the Supreme Court on the percentage of black population that must be included in these districts. (Tr. Vol. I, p. 142:18-143:7; Vol. III, p. 59:10-19) Thus the testimony by plaintiffs' trial experts confirms the evidence before the General Assembly that North Carolina had good reasons to enact districts with BVAP levels substantially above the black percentage of North Carolina's voting age population (22%) to avoid potential liability under the Voting Rights Act.[10]

3. All of plaintiffs' arguments on narrow tailoring have been rejected by the Supreme Court in *Strickland*.

Plaintiffs' narrow tailoring arguments boil down to two issues. The first concerns plaintiffs' argument that drawing VRA districts with a population in excess of 50% somehow stigmatizes African American voters in a way that does not occur if districts are drawn with black population between 40% and 49.99%. This argument is illogical as demonstrated by the 2003 legislative plans and all of the 2011 alternative plans. All of these plans used race to draw some districts with black population in excess of 50% while other districts fall within the 40% to 50% range. Neither the General Assembly in 2003 nor the plaintiffs offered any explanation or analysis justifying this distinction. Regardless, drawing districts to ensure they include black VAP between 40% and 50%

[10] The North Carolina Supreme Court on two occasions affirmed the ruling by the *Dickson* three-judge trial court that the challenged VRA districts were supported by a strong basis in evidence. *Dickson v. Rucho*, 367 N.C. 542, 766 S.E.2d 238 (2014) and 781 S.E.2d 404 (N.C. 2015).

establishes a "target" for VRA districts that is no less race conscious than the majority target established by *Strickland* and followed by North Carolina.

Plaintiffs' arguments are identical to those made by the State in *Strickland* and rejected by the Supreme Court. The Court adopted a majority minority rule because of the need "for workable standards and sound judicial and legislative administration." *Id.* at 556 U.S. at 3. The Court recited all the reasons why hiring experts like Dr. Lichtman to decide on the "just right" percentage is not required by Section 2. Even Dr. Lichtman lacks the special knowledge to predict "many political variables" and "tying them to race-based assumptions." *Id.* "Experienced analysts" like Dr. Lichtman cannot predict complicated issues such as the types of voters that need to be added or subtracted from underpopulated or overpopulated districts so that African Americans retain their ability to elect with some percentage of black VAP below 50%. *Id.* Nor can Dr. Lichtman evaluate the impact of incumbency, said by Senator Dan Blue to be worth an additional 15% in favorable votes. (*Id.*, Tr. Vol. I, p. 95:14-21)[11]

Plaintiffs' case rests upon their argument that majority black districts are not needed to give black voters an equal opportunity to elect their candidates of choice. Throughout this case and in the *Dickson* litigation, plaintiffs have attempted to obscure

[11] The answers to questions like these are "elusive" and "ought not to be inferred from the text or purpose of § 2." *Id.* It is no wonder that the United States Department of Justice has instructed Dr. Arrington to draw illustrative VRA districts with over 50% black voting age population in order to avoid "legal disputes." (Tr. Vol. I, p. 147:9 –149:4) Nor is it any wonder that Dr. Arrington agrees that the decision in *Strickland* provided North Carolina with good reasons to conclude that VRA districts should be created with a majority of black voting age population. (Tr. Vol. I, p. 145:6-16; 146:14-147:8; DX 3061)

that in the districts relied upon by them to make this point, non-Hispanic whites have been a minority of the voting age population and that black voters represent a majority or near majority of all registered voters. (DX 3018-34 to 3018-53)

During his cross examination, Dr. Lichtman admitted that his racial polarization analysis compared black voters to non-black voters but discounted the impact of Hispanic voting age population. (Tr. Vol. III, pp. 88:4-24; 89:9-24) In response to this testimony, Dr. Hofeller demonstrated that almost all of the 2003 districts relied upon by plaintiffs to show that "black majorities" did not exist and are therefore not needed, are, in fact, majority black districts once the Hispanic voting age population is removed from the equation.[12] Dr. Hofeller's testimony shows how a district's racial population can be manipulated by those who draw the districts in order to achieve their political goals. Under *Strickland*, the 2011 General Assembly had no obligation to determine which voters (either Hispanics or Democrat voting non-Hispanic whites) could be added to a VRA district so that the overall voting age population of the districts could be maintained at a target between 40% and 50% black VAP. In fact, *Strickland* expressly rejects this

[12] Under the 2010 Census, the 2003 House Plan, ten VRA districts had majority black VAP while eleven districts had black VAP between 39.99% and 48.87%. If the Hispanic VAP is removed from the eleven districts with black VAP between 39.99% and 48.87%, ten of those districts become majority black districts. In the 2003 Senate Plan, eight districts had black VAP between 42.50% and 49.79%. If the Hispanic VAP is removed from these districts, seven of these districts become majority black. (Tr. Vol. V, pp. 70:22-71:6; 77:6-20; DX 3116 and DX 3117) The only Senate District that was not majority black minus the Hispanic VAP, Senate District 3, regularly elected a white candidate. Following the 2011 redistricting, Senate District 3 was created with a majority black VAP. In the 2014 Democratic primary, the long-standing white incumbent was defeated by a black candidate. (Tr. Vol. IV, pp. 117:10-122:1, DX 3020-1)

concept because it is based upon an unconstitutional motivation to maximize the political influence of black voters in other districts. *Strickland*, 556 U.S. at 23-25.

The General Assembly's decision to follow the 50% plus one benchmark is not remotely similar to Alabama's "mechanized formula" of keeping VRA districts at super-majority levels to obtain preclearance under Section 5. Instead, it is a "workable standard" adopted by the United States Supreme Court to provide "sound judicial and legislative administration." *Id*. at 3.

4. Even though plaintiffs' experts and the Supreme Court agree that states should consider proportionality in the number of VRA districts, plaintiffs want this Court to order the State to replace ability to elect districts with influence districts.

Plaintiffs' second narrow tailoring argument concerns the number of VRA districts that states should consider. Both of plaintiffs' experts testified that the "injury" to African American voters caused by the 2011 enacted plans was the decline of influence to help elect Democrat candidates in districts that adjoin majority black districts.[13] (Tr. Vol. I at 143:8-12; Vol. III at 63:20-64:13; DX 2089 at 4; and Tables 5 and 6) Of course, Section 2 does not provide a cause of action for "influence" districts and any interpretation of Section 2 that would obligate states to maximize the political influence of African Americans would violate the Fourteenth Amendment. *Strickland*, 556 U.S. at 23-25. The Supreme Court has repeatedly stated that the analysis of a vote dilution claim starts with a comparison of the number of ability to elect district in an enacted plan as

[13] Neither of plaintiffs' trial experts testified that African American voters were "stigmatized" in districts over 50%, but not "stigmatized" in districts drawn with black VAP between 40% and 49%. *Shaw I*, 509 U.S. at 643.

compared to a proportional number of districts under a hypothetical plan. *Strickland*, 556 U.S. at 29, *citing Johnson v. De Grandy*, 512 U.S. 997, 1016-1017 (1994) and *League of United Latin Americans Citizens v. Perry*, 548 U.S. 399, 436-37 (2006) ("*LULAC*") (Souter J., dissenting). Both of plaintiffs' experts testified that they have supported plans that provide plaintiffs with proportionality in the number of ability to elect districts. (Tr. Vol. I, pp. 153:17-155:21; Vol. III, pp. 68:11-69:6) Dr. Lichtman even agreed that, when a benchmark plan (like the 2003 plans) does not provide proportionality, it would be appropriate for the General Assembly to consider whether it was possible in a new plan. (Tr. Vol. III, pp. 69:7-11) Of course, that is exactly what was done by the 2011 General Assembly.

Despite the testimony of their own experts, plaintiffs inexplicably argue that merely considering whether a proportional number of districts can be created constitutes proof that race was the predominant motive for the challenged districts. But they provide no alternative guidance on how a state should determine the number of VRA districts that should be considered to protect the State from vote dilution claims. The only possible explanation of plaintiffs' position is that a Republican General Assembly is obligated only to enact the same number of VRA districts previously enacted by a Democratic General Assembly. This is demonstrated by plaintiffs' major piece of evidence – their repeated comparisons of the 2011 enacted VRA districts with the 2003 versions. These are irrelevant comparisons because the 2003 legislative plans no longer comply with North Carolina's one person, one vote standard or the county grouping formula required by the *Stephenson* cases or the standard set by *Strickland*. *See Dickson*, 367 N.C. at 574-

75; 766 S.E.2d at 260. Even Dr. Lichtman agreed that comparing an illegal plan to a plan that complies with one person, one vote and the *Stephenson* formula can prove nothing about the illegality of the 2011 VRA districts. (Tr. Vol. III, 110:16-23) Yet, Dr. Lichtman's comparisons of the 2003 legislative plans versus the 2011 enacted plans are relevant because they demonstrate why plaintiffs' theory of liability should be rejected.

Dr. Lichtman has agreed that in order to provide African American voters with an equal opportunity to elect their candidates of choice, North Carolina must create districts that fit within his target range of 40% to 50% black voting age population. Dr. Lichtman also agrees that districts with black VAP between 30% and 38% are far more likely to elect a white Democrat over a black Democrat. Dr. Lichtman's testimony that black candidates are highly unlikely to win in legislative districts with a black VAP below 40% is supported by the evidence available to the General Assembly at the time of the 2011 redistricting. (Tr. Vol. IV, pp. 117:10-122:1; DX 3020-1, 3020-3, 3020-5, 3020-7)

But Dr. Lichtman also agreed that districts drawn with a black voting age population in excess of 50% provide black voters with an equal opportunity to elect their preferred candidates of choice. (Tr. Vol. III, p. 62:16-20) Dr. Lichtman's own report shows that the 2011 enacted plans provide African American voters with more ability to elect districts than either of the 2003 legislative plans. Moreover, Dr. Lichtman's report also shows that the 2003 plans, advanced by plaintiffs as proper comparisons to the 2011

plans, established influence districts in the place of majority black districts. (Tr. Vol. III at 66:5-68:10; DX 2089 Tables 5 and 6)[14]

5. The demographics of North Carolina's optimum county groups show the need for VRA districts even under the theories of plaintiffs' experts.

In his Second Expert Report (DX 3030), Dr. Hofeller provided maps and demographic statistics for county groupings that best comply with the *Stephenson* formula. Maps 1 and 2 in this report show the 2011 Carolina House Optimum County Groups and Appendix 2 provides the racial demographics for these groups. Maps 3 and 4 represent maps of the 2011 Carolina Senate Optimum County Groups and Appendix 3 provides the racial demographics for these groups. (Tr. Vol. IV, p. 233:2-16; Vol. V, pp. 25:20-27:24)

Defendants have attached calculations for the Optimum House Group Plan, based upon the demographics for that plan as indicated in Dr. Hofeller's Appendix 2. These calculations show the percentage of black voting age population in each group that includes a county that is included in a 2011 House VRA District. (*See* Attachment A)

[14] When it reauthorized Section 5, Congress explicitly condemned districting plans that substitute influence districts for ability to elect districts. *See* S. Rep No. 109-295 at 18-21 (2006) ("Preferred candidate of choice"): H.R. Rep No. 109-478 at 65-72 (2006) If the standard under the reauthorized Section 5 was now in place, the 2003 plans supported by plaintiffs would not preclear as replacements for the 2011 plans. Further, it is well established that jurisdictions are guilty of purposeful discrimination in violation of the Fourteenth Amendment when they enact districting plans that eliminate ability to elect districts to provide political advantage to a particular party. Fed. Reg. Vol. 76, No. 27 p. 7471 (Feb. 9, 2011) (citing *Busbee v. Smith*, 549 F. Supp. 494, 508 (D.D.C. 1983), *aff'd*, 459 U.S. 1166 (1983); *Garza and United States v. Cnty. of Los Angeles*, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J. concurring and dissenting in part), *cert. denied*, 498 U.S. 1028 (1991)).

Defendants have also included the same information for the 2011 Optimum Senate Group Plan. (*See* Attachment B)

The percentage black VAP for the House and Senate county groups supports Dr. Hofeller's testimony that if the state is compelled to use the optimum county groups, as would be required absent VRA districts, plans based upon the optimum groups will result in fewer districts that provide black voters with an ability to elect their candidates of choice and more districts that will elect white Democrats. (Tr. Vol. V, pp. 119:14-20; 121:2-122:7) Plaintiffs' experts have opined that the degree of racially polarized voting in North Carolina requires that ability to elect districts be created with a black VAP of 40% to 50% as opposed to the statewide percentage of black VAP (22%). (Tr. Vol. I, pp. 142:18-143:7; Vol. III, p. 59:4-9) Thus, according to plaintiffs' experts, any map drawer would be required to consider race in drawing districts to protect the State from vote dilution claims, but the map drawer could stop considering race when the district he was drawing hit their preferred target of 40% to 50% black VAP.

As demonstrated by Attachment A, there are at least 17 of the optimum House county groups that include a county that is included in one of the 2011 enacted House VRA districts. The black VAP exceeds 40% in only two of these county groups (Group 31 consisting of Gates, Hertford, and Pasquotank (44%) and Group 40 consisting of Edgecombe and Martin (52%). In the remaining 15 county groups, the black VAP is no higher than 39% and in most cases substantially lower than 39%.

The same is true for the 12 Senate optimum county groups that include at least one county that is found in a 2011 enacted Senate VRA district. Senate County group 15

(Edgecombe, Halifax, and Wilson) has a black VAP of 47%. Senate County group 23 (Beaufort, Bertie, Martin, Northampton, Vance, and Warren) has a black VAP of 44%. The remaining ten county groups have a black VAP of only 36% or much lower. (*See* Attachment B)

If each county group represented a single legislative district, even under the theories advanced by plaintiffs' experts, only two out of seventeen House groups would provide black voters with an ability to elect their candidates of choice. Under plaintiffs' theory that *Strickland* should be ignored and districts drawn with black VAP between 40 and 50 percent, "legally significant" racially polarized voting would exist in the other 15 groups. And only 2 out of twelve Senate groups would provide black voters with an ability to elect their candidates of choice. Again, under plaintiffs' theory, "legally significant" racially polarized voting would be present in the other 10 groups.

Plaintiffs have never proposed alternative plans showing how the State could comply with its obligations under the Voting Rights Act and the North Carolina Constitution. Plaintiffs' failure to suggest legal criteria for how districts should be drawn coupled with the percentage of black VAP found in the optimum county groups shows the difficult and competing hazards of liability facing the State of North Carolina. The State had more than good reasons for considering proportionality, drawing VRA districts with black VAP slightly in excess of 50%, and establishing VRA districts that comply with the *Stephenson* formula to the maximum extent practicable by using an iterative map drawing process that blends compact areas of black population with the optimum county grouping formulas for House and Senate districts.

CONCLUSION

For the foregoing reasons, plaintiffs' claims should be dismissed and judgment entered for the defendants.

This the 6th day of May, 2016.

NORTH CAROLINA DEPARTMENT OF JUSTICE

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