NO. 201PA12-3 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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MARGARET DICKSON, *et al.*, *Plaintiffs*, v. ROBERT RUCHO, *et al.*, *Defendants*. NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP, *et al.*, *Plaintiffs*, v. THE STATE OF NORTH CAROLINA, *et al.*, *Defendants*.	))))))))))))))))))	**<u>From Wake County</u>** 11 CVS 16896 11 CVS 16940 *(Consolidated)*

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BRIEF OF *AMICUS CURIAE* THE CONGRESSIONAL BLACK CAUCUS

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STATEMENT OF INTEREST

Amicus curiae the Congressional Black Caucus (the "CBC") is a bipartisan, unincorporated association of elected members of the United States House of Representatives and the United States Senate.[1]

Since its establishment in 1971, the CBC has empowered America's neglected citizens and worked to address their legislative concerns. The CBC has consistently been the voice in Congress for people of color and vulnerable communities. It is committed to utilizing the full constitutional power, statutory authority and financial resources of the federal government to ensure that everyone in the United States has an opportunity to achieve his or her own version of the American Dream.

The CBC focuses its efforts on supporting social and economic progress, equality and fairness for all Americans and especially for African Americans and neglected groups. Of particular importance to the CBC is the elimination of barriers to equal voting rights. Members of the CBC participated in the historic Selma to Montgomery, Alabama marches, as well as other key efforts that led to the passage of the Voting Rights Act of 1965. The CBC, along with the

[1] Congresswoman Alma S. Adams (NC-12), a Plaintiff in this action, is a member of the Congressional Black Caucus. Congresswoman Adams took no part in the preparation of this brief.

overwhelming majority of Congress, actively supported extending the Voting Rights Act at every juncture, including most recently in 2006.

As lawmakers, members of the CBC are committed to ensuring fidelity to the text, history and purpose of the Voting Rights Act so that the Voting Rights Act continues to serve as a robust and meaningful vehicle for protecting access to the voting booth and full enfranchisement for all Americans of voting age.

The CBC therefore has a strong interest in this case and particularly in ensuring that racial gerrymandering claims are evaluated in a way consistent with the Voting Rights Act, as mandated by the Supreme Court of the United States most recently in *Alabama Legislative Black Caucus* v. *Alabama*, 575 U.S. ___, 135 S. Ct. 1257 (2015) ("*Alabama*"). Applying the standards of *Alabama* to this case is necessary to protect against the disenfranchisement of minority voters in North Carolina as a result of racial gerrymandering effected by the congressional and state legislative redistricting plans enacted by the North Carolina legislature in 2011. The CBC is in a unique position to appreciate and thus vocalize the potential consequences—local and national—that could arise if this Court permits the North Carolina legislature to undermine the very purpose of the Voting Rights Act by interpreting it in a way that disenfranchises minority voters through racial gerrymandering.

STATEMENT OF THE CASE

Amicus curiae adopts by reference Plaintiffs' Statement of the Case. N.C. R. App. P. 28(f).

STATEMENT OF THE FACTS

Amicus curiae adopts by reference Plaintiffs' Statement of the Facts. N.C. R. App. P. 28(f).

SUMMARY OF THE ARGUMENT

The recent decision by the United States Supreme Court in *Alabama* establishes standards for evaluating racial gerrymandering claims in a manner consistent with the purpose of the Voting Rights Act—protecting against the disenfranchisement of minority voters. Under *Alabama*, a court must strictly scrutinize a redistricting plan, like the North Carolina legislature's 2011 plan challenged here, where race predominated the state legislature's decisions about where to redraw district lines. Moreover, *Alabama* instructs the reviewing court to scrutinize such a plan on a district-by-district basis, and to take a "purpose-oriented view" of the Voting Rights Act, rather than a "mechanically numerical view" that results in a perversion of the statute. *Alabama* makes clear that this is necessary to prevent the purpose of the Voting Rights Act from being thwarted by redistricting plans that pack minority voters into a small number of districts and dilute their

evolving voting power, purportedly in the name of compliance with the Voting Rights Act.

Congress enacted the Voting Rights Act in 1965 to combat a long history of disenfranchisement on the basis of race. The Voting Rights Act empowered millions of people to exercise the fundamental right of our democracy—participating freely and fully in the electoral process. Yet, discriminatory laws continue to undermine many Americans' ability to exercise their right to vote.

In *Alabama*, the Supreme Court addressed one form of such discriminatory laws: racial gerrymandering by state legislatures. The *Alabama* Court established that racial gerrymandering claims must be evaluated in a manner consistent with, and giving full force to, the text, history and purpose of the Voting Rights Act. The standards that the Supreme Court set forth in *Alabama* prohibit courts from rubberstamping racially motivated redistricting plans enacted by state legislatures. What is clear now is that a state legislature cannot mechanically increase racial percentages in districts to pack African American voters into districts where African Americans have had success in electing candidates of choice—with the effect of diluting the power of minority voters—and then avoid challenges of racial gerrymandering by claiming that the redistricting plan is justified by the purported compelling interest of compliance with the Voting Rights Act. *Alabama* demands

that a court strike down such a redistricting plan as impermissible racial gerrymandering.

Alabama applies in this case because the North Carolina legislature's 2011 redistricting plan presents the same constitutional concerns as the redistricting plan in *Alabama*. In both cases, the state legislature used a superficial and unsupported analysis of African American electoral power to justify enacting a redistricting plan that actually frustrates the purpose of the Voting Rights Act by diluting, rather than strengthening, the voting power of the African American community. Moreover, the lower court here erred in many of the same ways that the Supreme Court found that the lower court in *Alabama* erred. The lower court here mechanically looked at numerical percentages without taking account of all significant circumstances in the relevant districts. And the lower court did not apply strict scrutiny on a district-by-district basis, as *Alabama* requires.

This issue is especially important given the history of race-predominated redistricting in North Carolina, as well as the troubling trend of other state legislatures across the nation that have renewed the use of racial gerrymandering as a means of disenfranchisement. When the North Carolina legislature enacted a racially gerrymandered redistricting plan in 1991, the Supreme Court held that voters in North Carolina could challenge that redistricting plan through claims under the Equal Protection Clause of the Fourteenth Amendment, and that the plan

would have to satisfy strict scrutiny. *Shaw* v. *Reno*, 509 U. S. 630 (1993) ("*Shaw I*"). In *Alabama*, the Supreme Court reaffirmed the fundamental principles of its ruling in *Shaw I*, applied strict scrutiny to racial gerrymandering claims, and found that the North Carolina legislature's redistricting plan did not pass muster under the Voting Rights Act where it mechanically increased the number of minority voters in a small number of districts without justification.

Alabama's standards for evaluating racial gerrymandering claims under the Voting Rights Act apply to all cases challenging redistricting plans as racial gerrymandering—including this one. On remand, this Court should follow the guidance the Supreme Court provided in *Alabama* for proper evaluation of racial gerrymandering claims consistent with the Voting Rights Act, revisit its analysis whether strict scrutiny applies to the North Carolina legislature's race-predominated redistricting plan, and reverse the lower court's decision permitting the North Carolina legislature to disenfranchise minority voters through racial gerrymandering.

ARGUMENT

I. THE STANDARDS ANNOUNCED BY THE SUPREME COURT IN *ALABAMA* FOR EVALUATING CLAIMS OF RACIAL GERRYMANDERING ARE APLLICABLE TO THIS CASE.

Alabama established standards to be applied by any court evaluating a claim of racial gerrymandering under the Voting Rights Act. The Supreme Court's decision in *Alabama* affirms the text, history and purpose of the Voting Rights Act and ensures that a state legislature cannot interpret the Voting Rights Act's protections perversely in a way that allows the dilution of minority voting power through packing minorities into a small number of awkwardly drawn districts. *Alabama* directs, instead, that a court evaluating racial gerrymandering claims take a fact-intensive, "purpose-oriented view" of the Voting Rights Act by applying strict scrutiny to a racially motivated redistricting plan on a district-by-district basis and strike down the plan if it hurts rather than helps minorities by going further than needed to comply with the Voting Rights Act. *See Alabama*, 135 S. Ct. at 1273. Accordingly, *Alabama* is applicable to this case.

A. The Supreme Court's decision in *Alabama* respects the text, history and purpose of the Voting Rights Act by protecting minority voters from disenfranchisement.

The Supreme Court in *Alabama* overturned the decision by the three-judge federal district court below in part because the lower court was not sufficiently mindful of the history and purpose of the Voting Rights Act in its evaluation of

plaintiffs' racial gerrymandering claims. *Id.* Understanding the history of the Voting Rights Act, the circumstances that demanded its passage—as well as those that require its continued existence today—and its purpose thus provides a crucial backdrop to evaluating the claims here in light of the standards established in *Alabama*.

Congress passed the Voting Rights Act in 1965 with the ambitious aim of bringing an end to discriminatory practices that disenfranchise African Americans. The right to vote had been guaranteed to African Americans almost a century earlier when the States ratified the Fifteenth Amendment to the Constitution in 1870. In the years that followed, however, states—including North Carolina—instituted poll taxes, literacy tests and grandfather clauses designed to disenfranchise African Americans.[2] States also engaged in racial gerrymandering, redrawing district boundaries to dilute African American voters' power.[3]

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[2] *See South Carolina* v. *Katzenbach*, 383 U.S. 301, 310 (1966), *abrogated on other grounds by Shelby Cnty.* v. *Holder*, 133 S. Ct. 2612 (2013); *see also* Barbara Arnwine & Marcia Johnson-Blanco, *Voting Rights at a Crossroads: The Supreme Court Decision in* Shelby *Is the Latest Challenge in the 'Unfinished March' to Full Black Access to the Ballot*, Economic Policy Institute 3–4 (Oct. 24, 2013), *available at* http://www.epi.org/publication/voting-rights-crossroads-supreme-court-decision/.

[3] *Shaw I*, 509 U.S. at 640 ("Another of the weapons in the States' arsenal was the racial gerrymander—'the deliberate and arbitrary distortion of district boundaries . . . for [racial] purposes.'") (quoting *Davis* v. *Bandemer*, 478 U.S. 109, 164 (1986) (Powell, J., concurring in part and dissenting in part)).

African Americans challenged these discriminatory practices in the courts, and many of their claims succeeded. The Supreme Court struck down, for example, a grandfather clause in Oklahoma, *Guinn* v. *United States*, 238 U.S. 347 (1915); literacy tests in Oklahoma, *Schnell* v. *Davis*, 336 U.S. 933 (1949) (*per curiam*); and racial gerrymandering in Alabama, *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). But piecemeal relief in individual lawsuits could not conquer widespread discrimination imposed by many state legislatures. In that era, "discrimination against minority voters was a quintessentially political problem requiring a political solution." *Shelby Cnty.* v. *Holder*, 570 U.S. ___, 133 S. Ct. 2612, 2633 (Ginsburg, J., dissenting).

That political solution came when Congress passed the Voting Rights Act of 1965. This historic legislation sought to bring an end to the discriminatory practices disenfranchising African Americans. President Lyndon B. Johnson had called for the legislation in a Special Message to Congress on March 15, 1965, eight days after the nation witnessed the events in Selma, Alabama, that came to be known as Bloody Sunday. On March 7, 1965, hundreds of non-violent civil rights workers gathered to march from Selma to Montgomery, Alabama in peaceful protest of the discriminatory practices in the South that had disenfranchised African American voters. The marchers—including Congressman John Lewis,

then the chairman of the Student Nonviolent Coordinating Committee—were attacked by local law enforcement officers on the Edmund Pettus Bridge.

Five months after Bloody Sunday, Congress enacted the Voting Rights Act. Five decades after Bloody Sunday, Congressman Lewis returned to the Edmund Pettus Bridge, joined by President Barack Obama and former President George W. Bush, to mark the 50th anniversary of the marches from Selma to Montgomery that led to the passage of the Voting Rights Act. And today, as the CBC prepares for the 50th anniversary of the passage of the Voting Rights Act, it is clear that this landmark civil rights legislation remains a vital protection against the disenfranchisement of minorities.

The Supreme Court recently acknowledged that "[t]he historic accomplishments of the Voting Rights Act are undeniable." *Nw. Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 201 (2009). Indeed, the impact of the Voting Rights Act was immediately apparent. In the state of Mississippi, for example, African American voter turnout increased from 6 percent in 1965 to 60 percent just three years later. Spencer Overton, *Stealing Democracy: The New Politics of Voter Suppression* 97 (2006). African American representation in elected offices saw similarly sharp increases. At the time the Voting Rights Act was passed in 1965, there were only six African American members of the United States House of Representatives, and no African American members in the Senate.

By 1971, there were 13 African American members of the House and one African American member of the Senate. Today, there are 46 African American members of the House and two African American members of the Senate. *See* Jennifer E. Manning, Cong. Research Serv., *Membership of the 114th Congress: A Profile* 7 (2015).

Despite these gains, voter discrimination persisted after the passage of the Voting Rights Act. African Americans, as before, turned to the courts to protect their right to full enfranchisement. Again, many of their claims were successful. The Supreme Court invalidated, for example, state legislatures' racial gerrymandering in *Allen* v. *State Bd. of Elections*, 393 U.S. 544 (1969) and *Shaw I* (holding that minority voters' challenge to North Carolina legislature's racial gerrymandering adequately stated a claim under the Equal Protection Clause).

But continued discrimination made obvious the need for the protections of the Voting Rights Act to endure. Congress, encouraged by members of the CBC, extended the Voting Rights Act through amendments in 1975 and 1982 and reauthorization in 2006. During the vote on the 2006 reauthorization of the Voting Rights Act, Congressman G.K. Butterfield, Jr. of North Carolina and current chairman of the CBC discussed its protections against the dilution of minority voters' power:

> The Voting Rights Act permits minority citizens to bring Federal lawsuits when they feel their vote is being diluted. Hundreds of these lawsuits have been successfully litigated in the Federal courts. In my prior life, I was a voting rights attorney in North Carolina. As a result of court ordered remedies, local jurisdictions have been required to create election districts that do not dilute minority voting strength. When I was in law school 32 years ago, there were virtually no black elected officials in my congressional district. Today, I count 302.

152 CONG. REC. 14,263 (2006) (statement of Rep. Butterfield).

As the present case demonstrates, the Voting Rights Act remains a necessary bulwark against discrimination and disenfranchisement at the hands of state legislatures. And the judiciary remains the avenue for redress when minorities face discriminatory practices by state legislatures designed to deny the full enfranchisement guaranteed by the Voting Rights Act and the Equal Protection Clause. African American voters who find themselves disenfranchised by state legislatures' discriminatory practices continue to bring claims under the Voting Rights Act—just as the Plaintiffs in *Alabama* did. And the Supreme Court in *Alabama* responded by establishing clear standards for a court evaluating racial gerrymandering claims under the Equal Protection Clause—standards that are applicable to this Court's review of the North Carolina legislature's 2011 redistricting plan.

B. *Alabama* is applicable because it establishes standards to be applied by any court evaluating racial gerrymandering claims.

In *Alabama*, the Supreme Court established the legal standards to be applied by *any* court evaluating claims of racial gerrymandering in violation of the Equal Protection Clause. At the time *Alabama* was announced, it was clear that the decision would have "profound implications . . . for the future of the Voting Rights Act." *Alabama*, 135 S. Ct. at 1274 (Scalia, J., dissenting). The Supreme Court's subsequent order granting *certiorari* in this case and remanding for further consideration in light of *Alabama* suggests that the Supreme Court believes its standards for evaluating racial gerrymandering claims should apply here. And those standards do apply, because this Court is reviewing a state legislature's redistricting plan that is similar to the redistricting plan that was the subject of the *Alabama* decision. Additionally, this Court is tasked with reviewing a lower court's decision that suffers from many of the same flaws as those identified by the *Alabama* Court.

1. *Alabama* holds that mechanically increasing racial percentages to pack minorities into a small number of districts is not a narrowly tailored means of achieving a compelling interest.

A central holding of *Alabama* is that a state legislature cannot in rote fashion cite purported fears of non-compliance with the Voting Rights Act as a justification for enacting a redistricting plan that thwarts the purpose of the Voting

Rights Act. The teaching is clear: Courts following *Alabama*'s guidance should review a challenged plan with strict scrutiny and invalidate it where it is not narrowly tailored to achieve a compelling government interest.

Alabama instructs that a court reviewing a state legislature's race-predominated redistricting plan should not mechanically apply the Voting Rights Act but should take account of all significant circumstances. *Id.* at 1273.[4] Indeed, a "mechanical interpretation" of the requirements of the Voting Rights Act "can raise serious constitutional concerns." *Id.*

Sensitive to those constitutional concerns, the Court in *Alabama* further held that a redistricting plan that packs a district with a greater number or proportion of minority voters than is necessary to elect candidates of choice is not a narrowly tailored means by which to address or avoid Voting Rights Act violations. *Id.* Rather, the Court instructed, state legislatures—and courts reviewing their redistricting plans—should take "the more purpose-oriented view reflected in the

[4] In *Thornburg* v. *Gingles*, the Supreme Court noted that the 1982 amendments to the Voting Rights Act and the legislative history of those amendments made clear that "in evaluating a statutory claim of vote dilution through districting, the trial court is to consider the totality of the circumstances." 478 U.S. 30, 79 (1986) (internal quotation marks omitted). The CBC was a driving force behind the introduction and passage of the 1982 amendments extending the protections of the Voting Rights Act. Christina R. Rivers, *The Congressional Black Caucus, Minority Voting Rights, and the U.S. Supreme Court*, 77 (2012) ("Continuing its mission to broaden and elevate the influence of African Americans in the political, legislative, and public policy arenas, the CBC was at the forefront of the 1982 amendments.").

statute's language" when determining whether a race-predominated redistricting plan satisfies strict scrutiny. *Id.*

The purpose of the Voting Rights Act is to prohibit a state legislature from adopting a redistricting plan that "has the purpose of or will have the effect of diminishing the ability of [a minority group] to elect their preferred candidates of choice." *Id.* at 1272 (citing the Voting Rights Act, 52 U.S.C. § 10304 (b) (2006)). As the Court explained in *Alabama*, a plan to increase racial percentages in some districts, without considering all the relevant circumstances, and decrease minorities' voting power in other districts is inconsistent with this central purpose of the Voting Rights Act. *Id.* at 1273–74.

In short, *Alabama* holds that a state legislature cannot go overboard in trying to comply with the Voting Rights Act, especially if doing so would have the effect of harming minority electoral opportunities. *Id.* at 1273. Rather, the Voting Rights Act only "requires the [state legislature] to maintain a minority's ability to elect a preferred candidate of choice." *Id.* at 1272. Where a rigorous factual inquiry demonstrates that a district's minority voters have had success electing their

candidates of choice, the state legislature cannot establish a compelling interest in increasing the number or proportion of minority voters in the district. *Id.* at 1273.[5]

Thus, *Alabama* reaffirms the principle that the existence of racially polarized voting in a district is insufficient on its own to provide a state legislature with a justification to maintain or increase the number of minority voters in that district. *Id.* This holding is consistent with the conditions for affirmatively proving violations of § 2 of the Voting Rights Act under the Supreme Court's decision in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). *Gingles* established three conditions necessary for a group of minority voters to prove a § 2 claim: the minority must show that (1) it is sufficiently large and geographically compact to constitute a majority in a district; (2) it is politically cohesive and votes as a group; and (3) voting in the district is racially polarized and the white majority votes sufficiently as a bloc to enable it "usually to defeat the minority's preferred candidate." 478 U.S. at 50–51. The Supreme Court in *Alabama* found that the lower court there had failed to conduct an appropriate inquiry into the third prong under *Gingles*. The lower court's analysis ended at the showing of racially polarized voting. As the Supreme Court explained in *Alabama*, a court scrutinizing an argument by a

[5] The *Alabama* Court noted that these principles follow from the language Congress adopted in the 2006 reauthorization of the Voting Rights Act. 135 S. Ct. at 1273. CBC members co-sponsored the 2006 reauthorization, and the CBC played a pivotal role in securing its passage. Rivers, *supra* at 87–98.

state legislature that it had a compelling interest to redraw district lines based on racial considerations must determine whether changes to the racial percentage of a district are necessary for the minority voters in the district to elect their preferred candidate of choice. *Alabama*, 135 S. Ct. at 1272–73.

2. *Alabama* requires a court to apply strict scrutiny on a district-by-district basis when reviewing a plan that increases racial percentages mechanically in majority-minority districts.

The Supreme Court in *Alabama* reaffirmed that strict scrutiny applies whenever race predominates a state legislature's redistricting plan. Race predominates the decision to redraw district lines when the state legislature "subordinate[s] traditional race-neutral districting principles . . . to racial considerations." *Alabama*, 135 S. Ct. at 1270 (quoting *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995)).[6]

A court applying strict scrutiny must consider claims of impermissible racial gerrymandering on a district-by-district basis and "scrutinize *each challenged district* . . ." for violations of the Equal Protection Clause. *Id.* at 1265 (quoting *Bush* v. *Vera*, 517 U.S. 952, 965 (1996)). This is because "the harms that underlie

[6] In *Alabama*, the state legislators responsible for the challenged redistricting plan believed "that a primary redistricting goal was to maintain existing racial percentages in each majority-minority district, insofar as feasible." *Id.* at 1271. Such a race-conscious redistricting goal, the *Alabama* Court held, triggers strict scrutiny if it is the predominant consideration in the state legislators' boundary-drawing decision. *Id.* at 1271–72.

a racial gerrymandering claim . . . threaten a voter who lives in the *district* attacked." *Id.* A court, when faced with a challenge to a redistricting plan in a certain district, cannot rely on the absence of racial gerrymandering in *some* districts within the state to defeat claims that race predominated in the decision to draw *other* districts within the state. *Id.* at 1266.

II. THIS COURT SHOULD REVISIT ITS PRIOR DECISION IN LIGHT OF *ALABAMA*, REVERSE THE LOWER COURT'S DECISION AND INVALIDATE THE NORTH CAROLINA LEGISLATURE'S REDISTRICTING PLAN.

The Supreme Court vacated this Court's prior decision and remanded for further consideration in light of *Alabama*. *Dickson* v. *Rucho*, 135 S. Ct. 1843 (Mem) (U.S. Apr. 20, 2015). When it revisits the issues presented by the decision below, this Court should apply the principles established in *Alabama* to this case and rule that the lower court erred in finding that the North Carolina legislature's redistricting plan satisfied strict scrutiny. *Alabama* makes clear that the North Carolina legislature should have conducted a meaningful, district-specific inquiry into the ability of African Americans to elect candidates of their preferred choice. The North Carolina legislature failed to do so, instead impermissibly relying on limited data primarily from a single election cycle to justify its race-predominated decision to pack minority voters into a small number of majority-minority districts. Moreover, the North Carolina legislature relied solely on evidence of racially

polarized voting as a basis for its decision mechanically to increase the percentages of minorities in those districts, even though the minority voters had successfully chosen preferred candidates of interest. In further considering these issues in light of the standards of *Alabama*, this Court should reverse the lower court's ruling that the North Carolina legislature's redistricting plan passes strict scrutiny.

A. *Alabama* clarifies that strict scrutiny applies when a state legislature prioritizes a mechanical increase in the percentage of minorities in a district above other districting criteria.

Alabama instructs that strict scrutiny applies to the North Carolina legislature's redistricting plan because the North Carolina legislature unquestionably subordinated traditional, race-neutral districting principles to racial considerations. The North Carolina legislature expressly set out to create a number of majority-minority districts that would be proportional to the statewide African American voting age population. *See Dickson* v. *Rucho*, 367 N.C. 542, 579–80, 766 S.E.2d 238, 263 (2014) *vacated*, 135 S. Ct. 1843 (2015) ("*Dickson*"). The State argues that race-neutral concerns justified the North Carolina legislature's decision to pack a large percentage of minority voters into a small number of districts. *Id.*, 367 N.C. at 554–55, 766 S.E.2d at 247–48. According to the North Carolina legislature, it redrew district lines based on a consideration of race-neutral principles including population equalization, incumbency protection, and political affiliation. *See* Appellees' Brief, *Dickson* v. *Rucho*, No. 201PA12-2, 2013 WL

6710857, at *101–05 (Dec. 9, 2013). Following *Alabama,* it is clear that population equalization is "part of the redistricting background, taken as a given, when determining whether race, or other factors, predominate in a legislator's determination as to how equal population objectives will be met." *Alabama,* 135 S. Ct. at 1270. Here, the legislative history of the redistricting plans—evaluated in light of the instructions from the Supreme Court in *Alabama* regarding the predominance inquiry—reveals that race predominated in the North Carolina legislature's decisions about which voters to place in certain districts. *Dickson*, 367 N.C. at 579–80, 766 S.E.2d at 263; *see Alabama*, 135 S. Ct. at 1267. When the redistricting scheme is viewed in context, it is evident that race predominated the North Carolina legislature's decision to create black districts and white districts.

North Carolina legislators sought to "draw a 50% plus one district wherever in the state there [was] a sufficiently compact black population" to do so, even where such districts were not needed to enable African Americans to elect candidates of choice. *Dickson*, 367 N.C. at 579, 766 S.E.2d at 263. Even if the aim was legitimate, the effect was unconstitutionally to dilute the power of minority voters by packing large numbers of minority voters into a small number of awkwardly drawn districts.

Disturbingly, this dilution of African American voting power in North Carolina is consistent with what appears to have been deliberate efforts to weaken African American electoral power in other states through similar redistricting plans.[7]

In its prior decision, this Court acknowledged that the North Carolina legislators designed their districting map with the express purpose of providing "substantial proportional[ity]" between the percentage of the state's population that is African American and the percentage of districts that would be African American. *Id.* at 579, 766 S.E.2d at 263. This Court held that strict scrutiny did not necessarily apply to the North Carolina legislators' plan, however, because there were "many other considerations *potentially* in play." *Id.* at 246 (emphasis added). *Alabama* clarifies that strict scrutiny must apply where the state legislature "placed race above traditional districting considerations in determining *which* persons were placed *in appropriately apportioned districts*." 135 S. Ct. at 1271 (internal quotations omitted); *see also Shaw I*, 509 U. S. at 653 (finding that racial gerrymandering gives rise to Equal Protection Clause claims and stating that "the

[7] In South Carolina, for example, one state representative described in a sworn affidavit a conversation in which another state representative said that "race was a very important part" of the state legislature's redistricting strategy and explained that, as a result of racial gerrymandering, "South Carolina will soon be black and white." *See* Aff. of the Hon. Mia Butler Garrick ¶ 16, *Backus* v. *South Carolina*, Case No. 3:11-cv-03120-PMD-HFF-MBS (D.S.C. Feb. 22, 2012) (Doc. 147).

Equal Protection Clause demands strict scrutiny of all racial classifications . . . ."). The Supreme Court has held that considerations "potentially in play" should not be a part of a court's predominance inquiry. *See Shaw* v. *Hunt*, 517 U.S. 899, 908 n.4 (1996) ("[A] racial classification cannot withstand strict scrutiny based upon speculation about what 'may have motivated' the legislature."). In revisiting these issues in light of *Alabama*, this Court should find that strict scrutiny applies to the North Carolina legislature's redistricting plan. *See Alabama*, 135 S. Ct. at 1270; *see also Hunt* v. *Cromartie*, 526 U.S. 541, 546 (1999) ("[A]ll laws that classify citizens on the basis of race, including racially gerrymandered districting schemes, are constitutionally suspect and must be strictly scrutinized.").

This Court found no error in the lower court's determination that the North Carolina legislature's redistricting plan satisfied strict scrutiny. With the benefit and guidance of *Alabama*, it is now clear that the rigors of scrutiny were not satisfied by this Court's reliance on statistics from 26 combined districts rather than viewing the impact of the North Carolina legislature's redistricting plan on a district-by-district level. When confronted with the data from the districts in which the North Carolina legislature's packing of minority voters was most egregious—House District 24, where the Total Black Voting Age Population increased from 50.25% to 57.33%, and Senate District 28, where the Total Black Voting Age Population increased from 47.2% to 56.49%—this Court did not review the

consequences of the redrawn boundaries with respect to each individual district on its own. Instead, the Court's analysis focused on calculations for the average percentage of all 26 challenged Voting Rights Act districts in North Carolina:

> The Total Black Voting Age Population percentage ranges from a low of 50.45% to a high of 57.33% in the twenty-six districts in question. However, the average Total Black Voting Age Population of the challenged districts is only 52.28% . . . [and] only two of these districts, Senate 28 and House 24, exceed 55% Total Black Voting Age Population.

Dickson, 367 N.C. at 564–65, 766 S.E.2d at 254.

We now have the benefit of the Supreme Court's guidance in *Alabama*, and that guidance demands a different type of analysis. The Supreme Court held that "[a] racial gerrymandering claim . . . applies to the boundaries of individual districts. It applies district-by-district." *Alabama*, 135 S. Ct. at 1265 (citing *Bush* v. *Vera*, 517 U.S. 952, 965 (1996) (principal opinion) ("[Courts] must scrutinize *each challenged district* . . . .") (emphasis added)). When applying strict scrutiny on remand, this Court should examine each challenged district on its own. Doing so reveals the extent of the consequences minority voters in these districts will suffer as a result of the North Carolina legislature's impermissible racial gerrymandering.

B. *Alabama* demonstrates that the North Carolina legislature's redistricting plan was not narrowly tailored to achieve a compelling interest.

The North Carolina legislature's method of mechanically increasing percentages of African Americans in districts where minority voters had proven capable of electing their preferred candidates of choice was not narrowly tailored to achieve a compelling interest. Before deciding that it needed to increase the African American population in a district, the North Carolina legislature should have engaged in a detailed, district-specific factual analysis accounting for the totality of circumstances, including the historical successes of African American candidates in the impacted districts. Instead, the North Carolina legislature mechanically applied a numerical view of the protections of the Voting Rights Act and packed minority voters into a small number of awkwardly drawn districts, with the aim of creating black districts and white districts. The State claims the North Carolina legislature did this to avoid violating the Voting Rights Act—that is an upside-down view of the Voting Rights Act's protections against the disenfranchisement of minority voters. The only way the North Carolina legislature credibly could argue that its redistricting scheme was necessary to avoid a Voting Rights Act violation is by ignoring the North Carolina legislature's wholesale failure to engage in the district-specific factual inquiry required to satisfy strict scrutiny. This Court should strike down the North Carolina

legislature's gerrymandered plan on remand in light of *Alabama* so as not to establish a dangerous precedent to be followed by other states, especially those where recent plans to redraw district maps along racial lines already have been put into place.

This Court's earlier strict scrutiny review, *Alabama* makes clear, afforded too much deference to the North Carolina legislature's purported fear of liability under the Voting Rights Act, which the State claimed as a compelling interest justifying the North Carolina legislature's redistricting plan. The court below accepted the State's argument without meaningfully analyzing whether or not there was a real risk that the State could be accused of a Voting Rights Act violation in the districts at issue. That was error. On remand, this Court should follow the guidance of *Alabama* to undertake a more rigorous analysis of the facts and consider all significant circumstances. *Id.* at 1273.

Such an inquiry reveals that the State's purported fears were unfounded. For example, the State had the burden of proving with a strong basis in evidence that, absent the redistricting plan, the State would have been liable for claims under § 2 of the Voting Rights Act. *See Dickson*, 367 N.C. at 556, 766 S.E.2d at 249. As described above, *supra* at pp. 16–17, the third condition for a viable § 2 claim requires a showing that the minority voters' candidates of choice are usually defeated in each district. *Gingles*, 478 U.S. at 51. The State has made no showing

that this condition is met. Instead, the State has demonstrated only that evidence of racially polarized voting exists in many of the districts. Racially polarized voting, without more, does not satisfy the third precondition of *Gingles*. *Gingles*, 478 U.S. at 51; *see also LULAC* v. *Clements*, 999 F.2d 831, 860-61 (5th Cir. 1993) (*en banc*).

This inquiry is important because, as a result of higher African American registration and turnout rates, African Americans in recent years have shown an ability to elect preferred candidates of choice to state legislatures at lower thresholds than previously—including, in North Carolina, at thresholds well below 50%.[8] State legislatures must take these factual circumstances into account. In *Alabama*, the Supreme Court explained that the Voting Rights Act is satisfied "if

[8] *See Pender Cnty.* v. *Bartlett*, 361 N.C. 491, 494, 649 S.E.2d 364, 367 (2007), *aff'd sub nom. Bartlett* v. *Strickland*, 556 U.S. 1 (2009) ("Past election results in North Carolina demonstrate that a legislative voting district with a total African-American population of at least 41.54 percent, or an African-American voting age population of at least 38.37 percent, creates an opportunity to elect African-American candidates."); Bernard Grofman *et al.*, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. Rev. 1383, 1397–98 (2001) (noting that African American candidates for the U.S. House in Florida, Georgia, North Carolina, Texas, and Virginia were elected during the 1990s in districts that were not majority African American); *id.* at 1423 ("As our analysis of recent congressional elections in the South—and state legislative contests in South Carolina—clearly demonstrates, no simple cutoff point of 50% minority—or any other percent minority—guarantees minority voters an equal opportunity to elect candidates of choice. A case-specific functional analysis . . . must be done.").

minority voters retain the ability to elect their preferred candidates." 135 S. Ct. at 1273. Thus, it was inappropriate for the North Carolina legislature to respond to purported fears of liability under the Voting Rights Act by mechanically increasing minority percentages in various districts. *Alabama* holds that a state legislature is not permitted to use a superficial analysis of African American electoral strength when it draws a districting map, but instead must determine, taking into account all significant circumstances, whether a particular district is likely to give African Americans the chance to elect their candidate of choice, notwithstanding racially polarized voting. *Id.* An appropriately rigorous factual inquiry, as required by the Voting Rights Act, demonstrates that the North Carolina legislature's redistricting plan does not satisfy strict scrutiny.

The problem in this case is that to the extent that the trial court relied on election results at all, it focused primarily on the results of a single election cycle—the tidal wave election of 2010. *Dickson*, 367 N.C. at 558, 776 S.E.2d at 250. This approach ignored multiple other elections over the course of a decade that showed increasingly effective and cohesive African American electoral strength. On remand, this Court should follow the example of *Alabama* and consider the extensive history of electoral successes enjoyed by African American candidates seeking state legislative seats in North Carolina and the ability of minority voters in each district to elect their candidate of choice. Accordingly, the Court should

find that the North Carolina legislature did not have a legitimate basis in evidence to fear that it would face liability under the Voting Rights Act absent its enactment of the 2011 redistricting plan.

C. *Alabama* prohibits the North Carolina legislature and other state legislatures from adopting redistricting plans that dilute the voting power of minority communities.

The decision by the North Carolina legislature to use a superficial and perfunctory retrogression analysis, and to raise the percentage of African Americans in specified districts mechanically without considering the totality of the circumstances, is especially disturbing because similar strategies are being deployed by other state legislatures to minimize minority voters' influence, raising serious concerns about intent.[9]

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[9] *See, e.g.*, *Ala. Legis. Black Caucus* v. *Alabama*, 989 F. Supp. 2d 1227, 1297 (M.D. Ala. 2013) (describing gerrymandering in Alabama as an attempt to pack more minorities into majority-minority districts to avoid § 5 liability), *vacated*, 135 S. Ct. 1257 (2015); *In re Senate Joint Resolution of Legislative Apportionment 1776*, 83 So.3d 597, 656 (Fla. 2012) (documenting Florida Senate's failure to use election results or voter-registration data when attempting to avoid state constitution's minority voting protection provision); *Texas* v. *United States*, 831 F. Supp. 2d 244, 253 (D.D.C. 2011) (finding that Texas used only demographics as opposed to a multiple factor functional analysis advocated for by the United States), *vacated on other grounds by* 133 S. Ct. 2885 (2013); *Page* v. *Va. State Bd. of Elections*, No. 313-cv-00678, slip op. at *46–47 (E.D. Va. June 5, 2015) (finding that the Virginia state legislature's use of racial thresholds was not narrowly tailored). *Page* is particularly instructive. There, voters challenged Virginia's 2012 redistricting plan as impermissible racial gerrymandering because the state legislature mechanically increased minority populations in districts where minorities had been effective in electing their candidates of choice. The Supreme

The North Carolina legislature is trying, yet again, to dilute the power of minorities' votes through racial gerrymandering. This is the same practice, enacted by the same legislative body, affecting the same districts as the racial gerrymandering that the Supreme Court struck down in *Shaw I*. *See* 509 U. S. at 635–36.[10] The State tries to hide behind purported fears of potential Voting Rights Act violations, but there is no strong basis in evidence that this fear is substantiated. To the contrary, the Supreme Court previously ruled, with respect to some of the very districts at issue here, that minority voters' previous successes in electing preferred candidates of choice precluded a § 2 claim under the Voting Rights Act. *Gingles*, 478 U.S. at 77. Those successes have continued since *Shaw I*, and they reveal the North Carolina legislature's redistricting plan for what it is—

Court of the United States remanded the case to the Virginia Supreme Court for further consideration in light of *Alabama*. *Id.* at *15. The Virginia Supreme Court ultimately found that the state legislature's redistricting plan constituted improper racial gerrymandering and could not satisfy strict scrutiny. *Id.* at 46–47.

[10] The similarities between the North Carolina legislators' 2011 redistricting scheme challenged here and the North Carolina legislators' 1991 redistricting scheme at issue in *Shaw I* are striking. In both cases, North Carolina legislators reapportioned the district map by packing minority voters into a small number of districts. And in both cases, the North Carolina legislators purported to act in an effort to comply with the Voting Rights Act. *Cf. Shaw I*, 509 U.S. at 635–36; Appellees' Brief, *Dickson* v. *Rucho*, No. 201PA12-2, 2013 WL 6710857, at 15 (Dec. 9, 2013). The Supreme Court saw through this attempt in *Shaw I*, denouncing racial gerrymandering and demanding that the lower court apply strict scrutiny to the North Carolina legislators' redistricting plan. *Shaw I*, 509 U.S. at 658. This Court should do the same here on remand, guided by the applicable holdings of the Supreme Court's decision in *Alabama*.

an attempt to pervert the Voting Rights Act by mechanically increasing the percentages of minorities in a small number of districts, with the effect of diluting the minorities' voting power. On remand, this Court should apply the standards announced by the Supreme Court in *Alabama* for evaluating claims of gerrymandering in this precise context, and reverse the decision of the lower court.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully asks this Court to reverse the court below.

Respectfully submitted, this the 11th day of June, 2015.

By: _____

Michael E. Casterline, P.A.
68 North Market St
Asheville, NC 28801
mcasterline@gmail.com

I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
Theodore V. Wells, Jr. (*pro hac vice* pending)
Robert A. Atkins (*pro hac vice* pending)
Jaren Janghorbani (*pro hac vice* pending)
Farrah R. Berse (*pro hac vice* pending)
Pietro Signoracci (*pro hac vice* pending)
1285 Avenue of the Americas
New York, NY 10019-6064
Telephone: 212-373-3000
Fax: 212-757-3990
twells@paulweiss.com

BRAZIL & BURKE, P.A.
Meghann K. Burke
N.C. State Bar No. 42209
77 Central Ave., Suite E
Asheville, NC 28801
Telephone: 828-423-3790
Fax: 828-258-8972
mburke@cobralawfirm.com

Counsel for *Amicus Curiae*[11]

[11] Law clerks Alexander M. Levine and Daniel M. Stone of Paul, Weiss, Rifkind, Wharton & Garrison LLP also contributed to the preparation of this brief.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **BRIEF OF *AMICUS CURIAE* THE CONGRESSIONAL BLACK CAUCUS** on counsel by transmitting a copy via e-mail to the following persons at the following e-mail addresses:

Alexander M. Peters
Special Deputy Attorney General
Susan K. Nichols
Special Deputy Attorney General
Office of the Attorney General
P.O. Box 629
Raleigh, NC 27602
apeters@ncdoj.gov
snichols@ncdoj.gov

Counsel for Defendants

Thomas A. Farr and Phillip J. Strach
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
4208 Six Forks Road, Suite 1100
Raleigh, NC 27602
thomas.farr@ogletreedeakins.com
phillip.strach@ogletreedeakins.com

Counsel for Defendants Rucho, Lewis, Dollar, Dockham, Berger, and Tillis

Edwin M. Speas, Jr.
espeas@poynerspruill.com
John W. O'Hale
johale@poynerspruill.com
Caroline P. Mackie
cmackie@poynerspruill.com
Poyner Spruill LLP
Post Office Box 1801
Raleigh, NC 27602-1801
Telephone: (919) 783-6400
Facsimile: (919) 783-1075

Counsel for Dickson Plaintiffs

Anita S. Earls
anita@southerncoalition.org
Clare Barnett
ClareBarnett@southerncoalition.org
Allison Riggs
AllisonRiggs@southerncoalition.org
Southern Coalition for Social Justice
1415 Highway 54, Suite 101
Durham, NC 27707
Telephone: (919) 323-3380
Facsimile: (919) 323-3942

Counsel for NC NAACP Plaintiffs

Adam Stein
astein@tinfulton.com
Tin Fulton Walker & Owen PLLC
312 West Franklin St
Chapel Hill, NC 27516
Phone: (919) 240-7089
Fax: (919) 967-4953

Counsel for NC NAACP Plaintiffs

This the 11th day of June, 2015.

_____