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

DAVID HARRIS and CHRISTINE BOWSER, Plaintiffs, v. PATRICK MCCRORY, in his capacity as Governor of North Carolina; NORTH CAROLINA STATE BOARD OF ELECTIONS; and JOSHUA HOWARD, in his capacity as Chairman of the North Carolina State Board of Elections, Defendants.	)	**DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

TABLE OF CONTENTS

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

DAVID HARRIS and CHRISTINE BOWSER, Plaintiffs, v. PATRICK MCCRORY, in his capacity as Governor of North Carolina; NORTH CAROLINA STATE BOARD OF ELECTIONS; and JOSHUA HOWARD, in his capacity as Chairman of the North Carolina State Board of Elections, Defendants.	)	**DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Defendants, by and through undersigned counsel, submit the following proposed findings of fact and conclusions of law under Fed. R. Civ. P. 52(a).

I. INTRODUCTION

The plaintiffs in this action seek to re-litigate claims that have already been decided against them and their arguments. Once by a three-judge state court in 2013 and previously by the United States Supreme Court when these same arguments were raised, heard, and rejected with respect to the same districts at issue here more than a decade ago.

In *Cromartie v. Hunt*, 133 F. Supp. 2d 407 (E.D.N.C. 2000) (three-judge court) *rev'd sub nom Easley v. Cromartie*, 532 U.S. 234 (2001) ("*Cromartie II*"), the district court entered judgment in favor of the plaintiff, finding that the 1997 Twelfth

Congressional District ("CD 12") was an illegal racial gerrymander. In reversing the district court, the United States Supreme Court was critical of the district court's reliance on an email from General Assembly legislative staff to the then-redistricting chair and other legislative leadership, referencing the "black" section of Greensboro, as well as expert testimony evaluating the percentage of registered Democrats residing in precincts within the 1997 version of CD 12 or immediately outside its boundaries. The Supreme Court did not agree with the district court's rejection of the state's explanation that the high percentage of black population in the 1997 CD 12 was a coincidence. Here, plaintiffs make all the same arguments made by the *Cromartie* plaintiffs that were rejected by the United States Supreme Court. For the same reasons explained by the Court in *Cromartie II*, the Court should reject the very same arguments made by the plaintiffs in this case and find that plaintiffs have failed to prove that race was the predominant motive for the 2011 version of CD 12.

The Court should also find that plaintiffs failed to provide that race was the predominant motive for the 2011 First Congressional District ("CD 1"). In any case, the General Assembly had a strong basis in evidence to draw a majority-minority district in this area of the state and created a narrowly tailored district. There are no significant differences between the 1997 version of CD1 that was found legal by the district court in *Cromartie II* other than a reasonable decision by the General Assembly to draw the 2011 version in compliance with the Supreme Court's decision in *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009), with a single-race and any part black voting age population slightly

above 50 percent and only 4 percent higher than that in the 2001 version of CD 1 it replaced.

Accordingly, this Court should adopt defendants' proposed findings of fact and conclusions of law and dismiss plaintiffs' claims in this action.

II. FINDINGS OF FACT

A. History of Voting Rights litigation prior to the 2011 redistricting process

1. Prior to the 2000 Census, the Census Bureau reported racial categories as black and white. Hispanics were included in both categories. Beginning with the 2000 Census, the Census Bureau began to report the following categories: (a) single-race black, which included persons who reported themselves as only black with no other racial component; (b) "any part black," which included persons who were single-race black and persons who reported themselves as having multiple racial backgrounds with one of the components being black; (c) a category called "white," which included Hispanic whites, and; (d) a category called non-Hispanic white. While this information was available in 2001, the standard reports issued by the General Assembly during the 2001 Congressional redistricting only included the category of single-race black (titled "black") and whites including Hispanic whites (titled "white"). The 2001 era reports did not include categories for any part black or "non-Hispanic white." In contrast, the standard reports issued by the General assembly during the 2011 redistricting included a category for any part black called "Total Black" in the 2011 North Carolina reports. The standard reports issued in 2011 also included a category for non-Hispanic whites. All

reports included the total population for each category reported and the voting age population for each category reported. (Tr. 435-44, 453-54; D-126, Tabs 2-6; P-80)

2. Over the years courts have defined four different types of districts that have been described as "voting rights districts" or "VRA districts."

(a) "Majority-minority districts" are districts in which a specific minority group constitutes an actual majority of the voting age population ("VAP"). *Strickland*, 556 U.S. at 13.

(b) Minority "coalition" districts are districts in which two minority groups constitute a majority of the VAP and form a coalition to elect the coalition's candidate of choice. *Id.*

(c) Majority-white "crossover" districts are district in which minority voters make up less than a majority of the VAP but are potentially large enough to elect their candidate of choice with the help of some white "crossover" voters. *Id.*

(d) "Influence" districts are districts in which the minority group is a minority of the VAP but sufficiently large enough to influence the outcome of an election even if the preferred candidate of choice cannot be elected. *Id.*

In addition to these types of districts, at least two justices of the United States Supreme Court have voiced their opinion that a VRA district could be established where the "minority voters in a reconstituted or putative district constitute a majority of those voting in a primary of the dominant party, that is the party tending to win in the general election." *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 485-86 (2006) (Souter and Ginsburg J.J., *concurring in part and dissenting in part*) ("*LULAC*").

In *Thornburg v. Gingles*, 478 U.S. 30, 46 n. 12 (1984), the Supreme Court declined to consider "whether § 2 [of the Voting Rights Act] permits, and if it does, what standards should pertain to a claim brought by a minority group that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to *influence* elections." (emphasis in the original).

3. In *Thornburg*, North Carolina was ordered to create majority-black legislative districts as a remedy for violations of Section 2 of the Voting Rights Act ("VRA") in the following counties: Bertie, Chowan, Edgecombe, Forsyth, Gates, Halifax, Martin, Mecklenburg, Nash, Northampton, Wake, Washington, and Wilson. *Gingles v. Edminsten*, 590 F. Supp. 345, 365-66 (E.D.N.C. 1984), *aff'd Thornburg*, 478 U.S. at 80; Judgment and Memorandum Opinion, App. A, p. 77, F.F. No. 1, *Dickson v. Rucho*, Nos. 11 CVS 16896 and 11 CVS 16940 (consolidated) (July 8, 2013) ("*Dickson*")[1] (filed with the Court in this case as part of the *Dickson* record at D.E. 100-4, p. 39 through D.E. 100-5, p. 142, Defendants' Exhibits 61 and 62[2]); D-15, pp. 1, 2 (6/3/11 Memorandum from Michael Crowell and Bob Joyce, UNC School of Government)). However, the Court reversed the district court's finding that racially polarized voting was present in the 1982 version of a multimember district, House District 23, located in Durham County because

[1] The Judgment and Memorandum Opinion without appendix is available on Westlaw at 2013 WL 3376658. Because the electronic version does not contain the appendix, for consistency citations in the memorandum in this memorandum will correspond to the page numbers as they appear in the record with the two appendices and not the online version.

[2] Citations to the *Dickson v. Rucho* Judgment and Memorandum Opinion and appendices will be made to Defendants' Trial Exhibits 61 and 62.

of the sustained success of black candidates in that district. As explained by both the Court and the district court, the dynamic of racially polarized voting is completely different in a multi-member district as compared to a single-member district. In a multi-member district an African American candidate may be elected when he or she is the last choice of white voters but where the number of candidates running is identical to the number of positions to be elected. *Thornburg*, 590 F. Supp. 345, 368 n. 1, 369 (E.D.N.C. 1984) (three judge court). Further "bullet" or "single shot" voting (a practice that would allow African American voters to cast one vote for their candidate of choice as opposed to voting for three candidates in a three member, multi-member district) may result in the election of a African American candidate even when voting in the district is racially polarized. *Thornburg*, 478 U.S. at 38 n. 5, 57. The Court in *Thornburg* made no ruling on whether racially polarized voting would have been present in Durham County in 1984 if the districts in question had been single-member districts as opposed to one multi-member district.

4. Following *Thornburg*, in 1991, North Carolina enacted a Congressional Plan with one majority-black district (1991 CD 1) mainly in northeastern North Carolina. The district included many of the counties in which Section 2 liability had been found in *Thornburg*. Notwithstanding the decision in *Thornburg* that racially polarized voting was not present in a multi-member legislative district in Durham County in 1984, the 1991 General Assembly drew the 1991 CD1 into Durham County. The 1991 version of CD 1 was single-race majority-black in total population and VAP. The State filed for administrative preclearance of the 1991 under Section 5 of the VRA. The United States

Attorney General did not object to the 1991 CD 1 but did interpose an objection to the 1991 Congressional Plan because of the state's failure to create a second majority-minority coalition district running from the southcentral to southeastern region of the State. *Shaw v. Hunt*, 517 U.S. 899, 902, 912 (1996) ("*Shaw II*") (stating that the 1991 version of CD 1 drawn into Durham County "indisputably was ameliorative"); (D-126, Tab 1, "Section 5 Submission for 1991 Congressional Redistricting Plan")

5. The General Assembly responded by drawing a new Congressional Plan in 1992. The 1992 plan included a different version of Congressional District 1 that was majority black but that did not include any portion of Durham County. The General Assembly created a new majority-black district (Congressional District 12) running from Gaston County and stretching largely along the lines of interstate highways through Mecklenburg County to Forsyth and Guilford Counties. Notwithstanding the decision in *Thornburg* that racially polarized voting was not present in 1984 in a multi-member legislative district in Durham County, the 1992 version of CD 12, like the 1991 version of CD 1, was drawn into Durham County. The Attorney General did not interpose an objection to the 1992 Congressional Plan.

6. Under the 1992 Congressional Plan, CD 1 was drawn with a single-race total black population of 57.26% and a single-race black VAP of 53.40%. Under the 1992 Congressional Plan, CD 12 was drawn with a single-race total black population of 56.69% and a single-race black VAP of 53.34%. (D-126 Tab 2, "1992 Congressional Base Plan #10"; D-4.1A; D-4) Under a mathematical test for measuring the compactness of districts called the Reock test (also known as the dispersion test) the 1992 CD 1 had a

compactness score of 0.25 while the 1992 CD 12 had a compactness score of 0.05. (Trial testimony of Stephen Ansolabehere, p. 352, D-128, pp. 29.30) Plaintiffs' expert testified at trial that a Reock score below 0.2 is considered low and that a compactness score above 0.2 is not considered low. (Tr. 354, 378)

7. In *Shaw v. Reno*, 509 U.S. 630 (1993) ("*Shaw I*"), the Court found that plaintiffs had stated a claim for relief by alleging that the two 1992 Congressional majority-black districts constituted illegal racial gerrymanders in violation of the Fourteenth Amendment and remanded the case for further proceedings. (*See also* D-126, Tabs 1 and 2, "Section 5 Submission for 1991 Congressional Redistricting Plan" and "1992 Congressional Base Plan #10"; D-3.84; D-4.1A; D-4.1)

8. In *Shaw II*, the Court found that the 1992 CD 12 constituted an illegal racial gerrymander under the Fourteenth Amendment. The Court dismissed plaintiffs' appeal regarding the 1992 CD 1 because no plaintiff resided in that district and therefore no plaintiff had standing to challenge that district. The Court held that race was the predominant motive for the 1992 CD 12. 517 U.S. at 906. The Court also held that the State had not shown a strong basis in evidence to support the district. The only evidence cited by the State were expert witness reports that were not before the legislature because they were prepared after plaintiffs had filed their lawsuit challenging the districts. *Id.* at 910. The Court also found that the 1992 CD 12 was not narrowly tailored because the district could not be described as being based upon a reasonably compact minority population and because the location of the district did not remedy the vote dilution injuries suffered by voters living in the district proposed by the Attorney General's

Section 5 objection (minority voters living in southcentral and southeastern North Carolina). *Id.* at 916-17.

9. Following the decision in *Shaw II* in 1997, the North Carolina General Assembly enacted new versions of CD 1 and CD12. The State's two primary goals were to cure the constitutional defect found in *Shaw II* and to preserve the existing "partisan balance" in the State's 1992 Congressional plan. (P-73, p. 9) In 1996, under the 1992 plan, six members of Congress were Democrats and six were Republicans. The decision to keep a 6-6 plan in the 1997 Congressional Plan resulted from the Democratic Party's control of the State Senate and the Republican Party's control of the State House. (*Id.*)

10. The 1997 version of CD 1 was again largely located in northeastern North Carolina. (D-126, Tab 3, "97 House/Senate Plan A") Again, under the 1990 Census, there was not a category reported for any part black or non-Hispanic white. (Tr. 435-36) The 1997 CD 1 was drawn with a total black population of 50.27% and a black voting age population of 46.54%. The white voting age population, including Hispanic white, in that category was 52.42%. (D-126, Tab 3, pp. 12, 13; Tr. 437-38) In its Section 5 preclearance submission, the State argued that the 1997 CD 1 was a majority-black district based upon total population and that the district was needed to protect the State from liability under Section 2. (P-73, p. 10)

11. The 1997 version of CD 12 was drawn into portions of six counties: Mecklenburg, Iredell, Rowan, Davidson, Forsyth and Guilford. (D-126, Tab 3, "97 House/Senate Plan A") Under the 1990 Census it was drawn with a black total population of 46.67% and a black voting age population of 43.36%. In its Section 5

submission, the State argued that the 1997 CD 12 was drawn "with a significant African American population" to "provide a fair opportunity for incumbent Congressman Watt to win election." (P-73, pp. 9, 10)

12. In *Cromartie v. Hunt*, 34 F. Supp. 2d 1029 (E.D.N.C. 1998) (three-judge court), *rev'd sub nom Hunt v. Cromartie*, 526 U.S. 541 (1999) ("*Cromartie I*"), the district court granted plaintiffs' motion for summary judgment holding that the 1997 version of CD 12 constituted an illegal racial gerrymander in violation of the Fourteenth Amendment. In response to this ruling, North Carolina filed a notice of appeal and enacted a new version of CD 12 in 1998. 526 U.S. at 545 n. 1. (D-126, Tab 4, "98 Congressional Plan A"; D-4.3A; D-4.3) The legislation enacting the 1998 plan provided that the State would revert back to the 1997 plan if the State's appeal in *Cromartie I* was successful. 526 U.S. at 545 n. 1. The 1998 version of CD 12 was used in the 1998 General Election. In that election Congressman Mel Watt won by only 21,000 votes, the lowest margin of victory for any of the elections in which Congressman Watt was elected from 1992 through 2012. (P-69, p.11; Tr. 103-04, 118-19)

13. In *Cromartie I*, the Supreme Court reversed the district court's order granting summary judgment. The Court explained that in cases involving claims of intentional discrimination, summary judgment for the plaintiffs is rarely a proper method for resolving a case. *Cromartie I*, 526 U.S. at 553 n. 9. In relevant part, the Court held:

> Our prior decisions have made clear that a jurisdiction may engage in constitutional political 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*. *See Bush v. Vera*, 517 U.S. 952, 968 (1996); *Id.* at 1001 (Thomas, J. concurring in judgment);

> *Shaw II*, 517 U.S. at 905; *Miller v. Johnson*, 515 U.S. 900, 916 (1995); *Shaw I*, 509 U.S. at 646. Evidence that blacks constitute even a super majority 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 shows a high correlation between race and party preference.

Id. at 551-52 (emphasis in original).

14. The concurring opinion in *Cromartie I* strongly criticized the district court for relying on registration statistics instead of actual voting patterns. *Id.* at 557-58.

15. On remand, in *Cromartie II*, the district court conducted a trial on whether the 1997 CD 1 or 1997 CD 12 constituted illegal racial gerrymanders under the Fourteenth Amendment. The 1997 CD 1 included all or portions of the following counties: Gates, Granville, Greene, Halifax, Hertford, Jones, Lenoir, Martin, Northampton, Person, Pitt, Vance, Warren, Washington, Wayne and Wilson. (D-62, p. 5, FF. No. 6; D-126, Tab 3, "97 House/Senate Plan A"; D-4.2A; D-4.2) Despite the fact that under the 1990 Census the 1997 CD 1 did not have a majority-black VAP, the Court agreed with the argument made by the State in its Section 5 submission that the district was a majority-minority district based upon its majority single-race total black population. 133 F. Supp. 2d at 431-32. The parties entered into a stipulation approved by the district court that racially polarized voting was present in the counties encompassed by the 1997 CD 1. 133 F. Supp. 2d at 422. There was no dispute that African American voters were cohesive and that the 1997 CD 1 (with a Reock or dispersion score of 0.317) was based upon a compact black population that could be a majority in a single member district. *Id.* The district court found a strong basis in

evidence for this district based upon this evidence and evidence that African Americans had been victims of racial discrimination and that a substantial majority of the State's population were still at a disadvantage in comparison to white citizens with respect to income, housing, education, and health. Based upon this strong basis in evidence, the district court found that the 1997 CD 1 served a compelling governmental interest of protecting the State from liability under the Voting Rights Act, and that the district was narrowly tailored. 133 F. Supp. 2d at 422-23.

16. In contrast, the district court found the 1997 version of CD 12 to be an unconstitutional racial gerrymander in violation of the Fourteenth Amendment. The district court, in part, based its decision on testimony by a member of the General Assembly staff, Dan Frey, explaining the movement of persons from the 1992 plan to the 1997 plan and the number of divided precincts. The district court also relied upon the testimony by the then-redistricting chair that race was a factor in the construction of the 1997 plan. *Cromartie II*, 133 F. Supp. 2d at 411, 412. The district court also relied upon an email from a staff member to the legislative leadership that "refer[ed] specifically to categorizing a section of Greensboro as 'Black.'" *Id.* at 420. The district court also expressed skepticism about the state's explanation of the percentage of black population in the 1997 CD 12 being "sheer happenstance." *Id.* at 420, n. 8. Further, "the primary evidence upon which the District Court relied for its 'race not politics' conclusion [was] evidence of voter registration, not voting behavior. . . ." *Cromartie II*, 532 U.S. at 244.

17. In *Cromartie II*, plaintiffs did not appeal the district court's decision affirming the constitutionality of the 1997 CD 1, but the State appealed the district

court's ruling that the 1997 version of CD 12 constituted an unconstitutional racial gerrymander. Before this appeal could be resolved, the district court's decision enjoining the use of the 1997 CD 1 for the 2000 General Election was stayed by the United States Supreme Court on March 16, 2000, only nine days after the district court's order invalidating the 1997 CD 12 on March 7, 2000. *See Hunt v. Cromartie*, 529 U.S. 1014 (2000).

18. Despite the State's admission in its 1997 preclearance submission that it drew the 1997 CD 12 with enough African American population to "provide a fair opportunity for incumbent Congressman Watt to win election," the admission by the State at trial that the General Assembly considered race in drawing CD 12, and the district court's skeptical rejection of evidence that the high level of black population in CD 12 was sheer happenstance, in *Cromartie II*, the Supreme Court reversed the district court's ruling the 1997 CD 12 constituted an illegal racial gerrymander. The Court found that politics was the predominant motive for the district, not race. The Court criticized the district court for relying on registration statistics instead of election results. The Supreme Court noted that "registration figures do not accurately predict preference at the polls." 532 U.S. at 245. The Supreme Court had previously criticized the district court for relying on registration statistics in *Cromartie I* explaining that:

> party registration and party preference do not always correspond. (citing *Cromartie I*, 526 U.S. at 550-51). In part this is because white voters registered as Democrats "crossover" to vote for a Republican candidate more often than do African Americans who register and vote Democratic between 95% and 97% of the time . . . . A legislature trying to secure a safe Democratic seat is interested in Democratic voting behavior. Hence, a legislature may, by placing

> reliable Democratic precincts within a district without regard to race, end up with a district containing more heavily African American precincts, but the reasons would be political rather than racial.

532 U.S. at 245.

19. In 2001, the North Carolina General Assembly enacted the Congress Zero Deviation Plan ("2001 Congressional Plan"). (D-126, Tab 5, "Congress Zero Deviation 2000 Census"; D-4.4A; D-4.4) The 2001 version of CD 1 was again mostly located in northeastern North Carolina in many of the counties in which Section 2 liability had been found in *Thornburg*. The 2001 version of CD 12 was located in portions of the following counties: Mecklenburg, Catawba, Rowan, Davidson, Forsyth, and Guilford. Strongly performing Democratic precincts located in northern Guilford County that had been included in the 1997 version of CD 1 were removed and placed in a new CD 13 that was drawn from Wake to Guilford County and designed to serve as a very strong Democratic district. Portions of the 1997 CD 12 located in Mecklenburg County were removed and placed in the 2001 version of CD 8 to make that district a stronger Democratic district. (Tr. 490).

20. The 2001 reports issued by the General Assembly for the 2001 Congressional Plan do not include categories for any part black or non-Hispanic white under the 2000 Census. However, these categories are reported in the 2000 Census and available in the General Assembly 2001 database. (Tr. 439-40, 453-54; D-126, Tab 4) Evidence at trial demonstrated that under the 2000 Census the 2001 CD 1was drawn with a single-race total black population of 50.71% and an any part black total population of 51.21%. Single-race black VAP was 47.76% and any part black VAP was 48.05%.

Blacks represented 48.86% of registered voters. Democrats were 72.06% of registered voters in the district and blacks were 59.77% of registered voters. Non-Hispanic whites were 44.90% of the total population and 47.87% of the VAP. (Tr. 453-54, 456-57; P-80; P-23, "2001 Congressional Plan – 2000 Census")

21. Under the 2000 Census, the 2001 CD 12 was drawn with a single race total population of 45.02% and an any part black total population of 45.75%. Single race black VAP was 42.31% and any part black VAP was 42.81%. Blacks constituted 45.36% of all registered voters. Democrats were 58.45% of all registered voters and blacks constituted 66.87% of all registered Democrats. The total non-Hispanic white population was 44.57% and the total non-Hispanic white voting age population was 48.07%. (*Id.*) Thus, under the 2000 Census, non-Hispanic whites constituted a minority of both the total population and the voting age population in the 2001 versions of CD 1 and CD 12.

22. As in 1997, the 2001 General Assembly drew the 2001 versions of CD 1 and CD 12 with a consciousness of race. In the December 17, 2001 preclearance submission by the State of North Carolina to the Voting Rights Section of the United States Department of Justice, North Carolina argued that these two districts should be precleared because the state had raised the black population in each district. The submission stated that the "black population percentage in Congressional Zero Deviation is marginally higher. According to the 2000 Census, the black percentage of total population of District 1 in the 1997 plan was 50.46%; in Congress Zero Deviation it is 50.71%. For District 12, the black percentage in District 12 was 44.46%; in Congress Zero Deviation it is 45.02%. . . [t]he black voting strength in District 12 in Congress Zero

Deviation remains at least as great as in the 1997 plan." (D-59, pp. 17, 19) The State also argued that the 2001 version of CD 1 "met strict scrutiny because it was narrowly tailored to meet the requirements of § 2 of the Voting Rights Act," citing the district court opinion in *Cromartie II*, and that the 2001 version of CD 1 should be precleared because "all barometers of black voting strength . . . percentage of total population, of voting age population, of all registered voters, of Democratic registered voters, and of victory for the two statewide Democratic nominees in 2000 – the new District 1 has *higher numbers* than the old." (D-59, p. 19 (emphasis added))

23. At the time of the enactment of the 2001 Congressional Plan, and as stated by the Court in *Thornburg*, the Supreme Court had not clarified whether states could enact majority-black total population districts, majority-minority coalition districts (like the 1997 or 2001 versions of CD 1), crossover districts, or influence districts to avoid liability under the Voting Rights Act. Like the 1997 CD 1, under the 2000 Census, the 2001 versions of CD 1 was majority single-race black in total population. The 2001 versions of CD 1 and CD12 were not majority-white crossover districts. Even assuming equal turnout rates, whites could not vote in a bloc in either district to defeat the candidate of choice of black voters because whites were a minority of the total population and VAP in both districts.

24. The decision by the 2001 General Assembly to enact CD 1 as a majority-minority coalition district reflected an acceptable political strategy available at the time to states under Section 5, as explained in *Georgia v. Ashcroft*, 539 U.S. 461 (2003). There the Court described two options for states to obtain preclearance under Section 5. Under

the first option, states could create "a certain number of 'safe districts' in which it is highly likely that minority voters will be able to elect their candidates of choice." *Id.* at 480. The Court also approved an alternative strategy that allowed states to make the political decision to enact a combination of districts, including coalition and influence districts, instead of safe majority-minority districts. *Id.* at 480-83.

25. While North Carolina had originally created the 1991 and 1992 versions of CD 1 as true majority-black VAP districts, in 1997 and 2001, the General Assembly adopted the "political strategy" and enacted CD 1 as a majority-minority VAP coalition district. The State did not create the 1997 or the 2001 version of CD 1 with less than a majority-black VAP because it believed (or argued to the Court in *Cromartie II* or the Attorney General in its 2001 Section 5 submission) that racially polarized voting was no longer present in the area encompassed by CD 1. In fact, in *Cromartie II*, all sides stipulated, and the district court agreed, that racially polarized voting was present in a district that was majority black in total population but slightly below majority black in VAP. Further, at the time the State enacted the 1997 and 2001 versions of CD 1, there was precedent for the proposition that racially polarized voting could be remedied and a state could protect itself from liability under the VRA with a majority-minority coalition district. *Ashcroft*, *supra.*

26. The legal landscape established by *Ashcroft* was short-lived. In *LULAC*, the Supreme Court rejected the argument that Section 2 requires influence districts because "the opportunity 'to elect representatives of their choice'. . . requires more than the ability to influence the outcome between some candidates, none of whom is [the

minority group's] candidate of choice." 548 U.S. 399, 445-46 (2006); *see also Strickland*, 556 U.S. at 13.

27. Another significant legal development occurred in 2006 when Congress reauthorized Section 5. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, P.L. 109-246, 120 Stat. 577 (2006). Section 5 was amended to prohibit "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the *purpose* of or will have the *effect* of diminishing the ability of any citizens of the United States on account of race or color . . . *to elect their preferred candidates of choice*." *Id.* (emphasis added). One of the purposes of these amendments was to reverse any portion of *Ashcroft* which gave states the option of selecting coalition or influence districts over districts that allow the minority group to elect their preferred candidates of choice. *See* S. REP. NO. 109-295, at 18-21 (2006) ("Preferred Candidate of Choice"); H.R. REP. NO. 109-478, at 65-72 (2006).

28. The final significant legal change occurred in *Strickland*. Under a 2003 redistricting plan for the North Carolina House, North Carolina divided Pender County into different districts to create a majority-white crossover district (House District 18). The plaintiffs contended that dividing Pender County into different districts violated state law restrictions on dividing counties into different legislative districts. North Carolina defended the division of Pender County on the ground that majority-white crossover districts served as a defense to vote dilution claims under Section 2. *Pender Cnty. v. Bartlett*, 361 N.C. 491, 493-98, 649 S.E.2d 364, 366-68 (2007) ("*Pender County*"). The

North Carolina Supreme Court held that Section 2 did not authorize the creation of coalition districts, crossover districts, or influence districts, and that any district enacted to protect the State from Section 2 liability would need to be established with a true majority-minority population. *Id.* at 503-07, 649 S.E.2d at 372-74.

29. On appeal, the United States Supreme Court affirmed that crossover districts could not be required under Section 2 because districts designed to protect a state from Section 2 liability must be numerically majority-minority. *Strickland*, 556 U.S. at 12-20. While the Court did not squarely address whether coalition districts could be required by Section 2, it stated that such districts had never been ordered as a remedy for a Section 2 violation by any of the circuit courts. *Id.* at 13, 19.

B. Census Development and Election Results Following the Enactment of the 2001 Congressional Plan

30. During the 2011 redistricting process, the 2011 General Assembly published statistics on the racial composition of the 2001 CD 1 and CD 12 under the 2010 Census. These statistics accompanied all proposed 2011 redistricting plans when they were published and were available to all members of the General Assembly before the 2011 Congressional Plan was enacted. (D-22, pp. 194-236, "Congressional"; D-126 Tabs 6-12) For the first time, the General Assembly provided in its standard reports four new categories that are relevant to this litigation. Statistics for each district included a column for persons who reported themselves to the Census Bureau as being single-race black (or "Black" under the General Assembly's reports) plus individuals who reported themselves "any part black" (or "Total Black" under the General Assembly's reports). (D-4, pp. 2-3,

¶ 7)[3] The 2011 reports also included a column for "non-Hispanic white" in the categories of total population and VAP. Finally, the 2011 reports published for all members of the General Assembly included registration by party and race. (*See* D-4.5; D-2, p. 7, ¶ 26; D-2.60; D-2.64)[4]

31. Under regulations issued by the United States Attorney General for purposes of reviewing Section 5 submissions, the most current population data, in this case the 2010 Census, is used to measure a benchmark plan (2001 Congressional) against the newly enacted redistricting plan. (PE-700 p. 7472; 28 CFR 51.54(b)(2)) Under the 2010 Census, the 2001 CD 1 was under-populated by 97,563 persons as compared to the 2010 ideal population for a congressional district (733,499). (D-4.5, p. 3) CD 1 was the most under-populated of North Carolina's thirteen congressional districts. (*Id.*) Under the 2010 Census, CD 1's total population was 49.65% single-race black, 44.19% white, including Hispanics, 50.65% any part black and 42.56% non-Hispanic white.[5] Voting age population in the 2001 district was 48.07% single-race black, 46.92% white,

[3] The category any part black or "Total Black" is the census category preferred by the United States Department of Justice and the United States Supreme Court. *Ashcroft*, 539 U.S. at 473 n. 1.

[4] All compilation exhibits cited are based on figures available in the General Assembly database. Furthermore, most of the statistics are contained in the statistical packages attached to all maps in the Map Notebook, D-22. Finally, all election results were widely available as public records from the State Board of Elections database when the General Assembly enacted the plans. Therefore, whether or not the specific compilation exhibits prepared by Mr. Frey were available to the General Assembly is irrelevant because all the same information was expressly published by the General Assembly and available on the SBE web page before the 2011 Congressional Plan was enacted.

[5] Under the 2010 Census, statewide, single-race blacks constituted 21.48% of the total population. Any part black or TBPOP constituted 22.56% of the state wide population. (*See* D-4.5, p. 4)

including Hispanic whites, 48.63% any part black, and 45.59% non-Hispanic white.[6] Blacks also represented a majority of the registered voters (50.66%). (D-2.64) Democrats constituted 67.78% of the registered Democrats in CD 1. Blacks constituted 66.55% of the registered Democrats. (D-2, p. 8, ¶ 27; D-2.60; D-2.64; D-4.5, p. 6)[7]

32. Under the 2010 Census, the 2001 CD 12 was over-populated by only 2,847 persons or 0.39%. (D-4.5, p. 3) Single-race blacks comprised 43.90% of the total population; whites, including Hispanic whites, made up 42.24% of the total population; and the any part black population was 45.39%. Hispanics constituted 12.38% of the total population while non-Hispanic whites made up only 38.58% of the population. Single-race black VAP was 42.87%; white VAP (including Hispanic whites) was 45.63%; any part black VAP was 43.77%; and non-Hispanic white VAP was 42.40%. African Americans represented 48% of all registered voters while whites (including Hispanic whites) represented 45.26% of registered voters. Democrats represented 58.42% of the registered voters and African Americans comprised 71.44% of registered Democrats. (D-4.5, pp. 4-6; D-2, pp. 7-8, ¶¶ 26, 27: D-2.60; D-2.64)

33. The 2011 reports released by the General Assembly show that both districts had been created in 2001 with super-majorities of registered Democrats and that African Americans represented super-majorities of the registered Democrats. CD 1 was

[6] Under the 2010 Census, single-race blacks constituted 20.64% of the statewide voting age population. Any part black VAP constituted 21.18% of the statewide voting age population. (*See* D-4.5, p. 5)

[7] Under the 2010 Census, statewide Democrats constituted 44.65% of all registered voters. African Americans constituted 41.38% of all registered Democrats. (*See* D-4.5, p. 6)

constructed as a VRA district in a manner consistent with the concurring opinion of Justices Souter and Ginsberg in *LULAC*, who stated that VRA districts could be less than majority-minority if the minority group constituted a majority of the political party that normally wins elections in the district. *LULAC*, 548 U.S. at 485-86. This view was rejected in *Strickland*.

34. In the 2004 General Election, African American Democrat G.K. Butterfield defeated his Republican opponent 137,667 to 77,508 (+60,159). Congressman Butterfield had no opposition in the 2006 General Election. In 2008, Congressman Butterfield defeated his Republican opponent 192,765 to 81,506 (+111,259). In 2010, Congressman Butterfield defeated his Republican opponent 103,294 to 70,867 (+32,427). The population deviation for this district under the 2010 Census (-97,563) exceeds Congressman Butterfield's margin of victory for 2004 and 2010. (D-62, pp. 82-83, F.F. No. 169; D-90)

35. In the 2004 cycle, Congressman Butterfield raised $429,441 and spent $404,055. His Republican opponent raised $41,955 and spent $46,030. In 2008, Congressman Butterfield raised $792,331 and spent $703,696. His Republican opponent did not report any contributions or expenditures. In 2010, Congressman Butterfield raised $828,116 and spent $794,383. His Republican opponent raised $134,393 and spent $134,386. (D-62, p. 83, F.F. No. 170; D-90)

36. Congressman Butterfield was first elected on July 20, 2004 and has served through the present. (D-62, p. 83, F.F. No. 171; see also http://butterfield.house.gov/biography/.)

37. Congressman Mel Watt, first elected to CD in 1992, was challenged by a Republican opponent in 2004, 2006, 2008, and 2012. In all of these elections, Congressman Watt's margin of victory exceeded the deviation for this district under the 2010 Census (+2,847). (D-62, p. 84, F.F. No. 176; D-1, ¶ 24; D-1.12).

38. In 2004, Congressman Watt raised $579,199 and spent $519,885. His Republican opponent raised $108,189 and spent $104,668. In 2006, Congressman Watt raised $503,515 and spent $535,747. His Republican opponent raised $444,044 and spent $446,782. In 2008, Congressman Watt raised $680,473 and spent $646,079. His Republican opponent raised $25,306 and spent $25,584. In 2010, Congressman Watt raised $604,718 and spent $591,203. His Republican opponent raised $13,041 and spent $12,995. (D-62, p. 84, F.F. No. 177; D-90)

39. Congressman Watt was first elected in 1992 and served continuously in this office through 2012. (Tr. 102-03; D-62, p. 85, F.F. No. 178; see also http://watt.house.gov/index.php?option=com_content&view=article&id=2578&Itemid=75)

40. In 2010, eighteen African American candidates were elected to the State House and seven African American candidates were elected to the State Senate. (D-62, p. 4, F.F. No. 3; D-1.10; D-1.11; P-2, exs. 6,7; D-90) Two African American candidates were elected to Congress in 2010. (D-62, p. 4, F.F. No. 3; P-629, pp. 26-30; D-90, p. 6; D-2.62) All African American incumbents elected to the General Assembly in 2010 or the Congress in 2010 were elected in districts that were either majority-African American

VAP or majority-minority VAP coalition districts. (D-62, p. 4, F.F. No. 3; D-2.34; D-2.39; D-2.60)[8]

41. No African American candidate elected in 2010 was elected from a majority-white crossover district. (D-62, p. 4, F.F. No. 4; P-629, pp. 26-30; D-90, pp. 6-10, 14-19; D-22, Senate Tab 2, "2003 Senate Plan with 2010 Census Data," House Tab 2, "2009 House Plan with 2010 Census Data," Congressional Tab 2, "2001 Congressional Plan with 2010 Census Data") In fact, two African American incumbent senators were defeated in the 2010 General Election, running in majority-white districts. (D-62, p. 4, F.F. No. 4; D-90, pp. 18-19; D-22, Senate Tab 2, "2003 Senate Plan with 2010 Census Data," Districts 5 and 24 statistics) From 2006 through 2010, no African American candidate was elected to more than two consecutive terms to the legislature in a majority-white district. (D-62, p. 4, F.F. No. 4; P-629; D-90, pp. 14-19) From 1992 through 2010, no African American candidate for Congress was elected from a Congressional district other than CD 1 or CD 12. (D-62, p. 4, F.F. No. 4; P-629)

42. From 2004 through 2010, no African American candidate was elected to state office in North Carolina in a statewide partisan election. In 2000, an African American candidate, Ralph Campbell, was elected State Auditor in a partisan election. In 2004, Campbell was defeated by a white Republican, Les Merritt, in a partisan election for state auditor. (D-62, p. 5, F.F. No. 5; *see also Gingles*, 590 F. Supp. at 364-65 (lack

[8] The census categories of "white," "black," "Hispanic," "total black," and "non-Hispanic white" are included for each district with the "stat packs" attached to all of the various plans in the Map Notebook. The "white" category is without regard to ethnicity and includes people who are Hispanic or Latino. The category "Non-Hispanic white" excludes that portion of the population. (D-62, p. 4, F.F. No. 3; D-2.34, Notes)

of success by African American candidates in statewide elections is relevant evidence of legally significant racially polarized voting)

C. 2011 Legislative Proceedings

43. Early in the 2011 redistricting process, the co-chairs of the Joint Senate and House Redistricting Committee (Senator Bob Rucho and Representative David Lewis) released a Legislator's Guide to Redistricting. (D-13; P-1493, pp. 51-53) ("Legislator's Guide") The Legislator's Guide explained numerous cases that would govern redistricting in 2011, including, for example, *Stephenson v. Bartlett*, 355 N.C. 354, 371, 562 S.E.2d 372, 390 (2002) ("*Stephenson I*"); *Thornburg*; *Pender County*; *Strickland*; *Shaw I*; *Shaw II*; *Cromartie I*; *Cromartie II*, and other cases. (P-1493, pp. 51-53) The Guide also reported the decision by Congress to amend Section 5 because of the decision in *Ashcroft*.

44. The Legislator's Guide also contains sections on politics and redistricting and political gerrymandering. The Legislator's Guide states that political gerrymandering is legal, that politics always plays a role in redistricting, and that the North Carolina Supreme Court has held that the General Assembly may consider partisan advantage in its redistricting decisions. (D-13, pp. 10, 11)

45. On March 24, 2011, the co-chairs advised legislators that in their opinion the General Assembly was obligated to comply with *Strickland* in forming VRA districts, that "political considerations" would play a role in redistricting, that the General Assembly would "consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions," "that race cannot be the

predominant factor in redistricting so that traditional redistricting principles are subordinated to race," and that any new plans could not be "retrogressive." (D-5.3)

46. On March 31, 2011, the co-chairs mailed a letter to the General Assembly's "minority contact" list, which included the NC NAACP and its counsel. In their letter, the co-chairs solicited input on whether the State was still experiencing racially polarized voting in statewide, legislative, congressional or other elections particularly in counties covered by Section 5 and areas that had been or may be subject to claims under Section 2. The letter also sought input on the meaning of *Strickland*, the continuing presence of the *Gingles* factors, and any matters related to VRA compliance. All members of the Legislative Black Caucus were copied on this letter. (D-5.4; D-5.5)

47. During the 2011 legislative proceedings leading to the enactment of redistricting plans in July, the General Assembly conducted an unprecedented number of public hearings. (D-5, pp. 2-3, ¶ 6; D-5.1; D-5.2) During a public hearing on May 9, 2011, representatives of a coalition called "Alliance for Fair Redistricting and Minority Voting Rights" ("AFRAM") presented a proposed Congressional plan. The NC NAACP was a member of AFRAM and AFRAM was represented by attorneys from the Southern Coalition for Social Justice ("SCSJ"). Thus, the plan was designated by General Assembly Staff as "Southern Coalition for Social Justice – Congress." (D-4.6; D-5.6, pp. 4-7)

48. During the public hearing, counsel for the NC NAACP stated that AFRAM was responding to the letter from the co-chairs dated March 31, 2011. Counsel for the NC NAACP offered a congressional map designated as the SCSJ Congressional Plan.

She argued that both CD 1 and CD 12 were covered by the nonretrogression principle of Section 5 and that the General Assembly was obligated to consider race in drawing both districts. Prior to the public hearing, the NC NAACP had recognized that drawing CD 1 into the Research Triangle Park ("RTP") area might be necessary to ensure that the new version of the district complied with one person, one vote. (D-7) Nevertheless, the SCSJ version of CD 1 was not drawn into RTP. Like the 2001 version of CD 1, the SCSJ proposed that the 2011 version be created as a majority-minority coalition district with an any part black VAP of 47.44% and a non-Hispanic white voting age population of 46.47%. African Americans constituted 49.2% of all registered voters while whites (including Hispanic whites) constituted 47.40% of registered voters. Democrats constituted 66.89% of all registered voters with African Americans constituting 65.73% of all registered Democrats. Thus, the 2011 version of CD 1 proposed by the SCSJ was based upon a formula followed by the 2001 General Assembly, and endorsed by Justices Souter and Ginsburg in *LULAC*, but rejected by the Supreme Court in *Strickland*.

49. The version of CD 12 proposed by SCSJ was very similar to the version enacted by the 2001 General Assembly. The SCSJ CD 12 had an any part black voting age population of 43.89%, a Hispanic VAP of 10%, and a non-Hispanic white VAP of 42.38%. African Americans constituted 48.7% of all registered voters while whites (including Hispanic whites) constituted 45.17% of registered voters. Democrats represented 58.51% of all registered voters with African Americans constituting 71.53% of all registered Democrats. (D-2.62; D-2.66)

50. Under the 2010 Census, the any part black VAP of North Carolina was 21.18% with African Americans representing 21.63% of all registered voters. Neither the NAACP nor the SCSJ, nor their counsel, proposed that either CD 1 or 12 be reduced in black VAP (or in the percentage of registered black voters) to levels even remotely approaching the statewide black percentages. Instead, the NC NAACP advised the legislative committee on May 9, 2011, that North Carolina continues to "have very high levels of racially polarized voting in the state." (D-5.6, pp. 8-9) In support of this opinion, counsel for the NC NAACP offered an expert report by Dr. Ray Block. (D-5.8) Dr. Block examined black-white election results for 54 elections involving a white candidate and an African American candidate in 2006, 2008, and 2010, many of them in counties encompassed by all versions of CD 1, including the counties eventually included in the 2011 enacted version. Dr. Block stated that this report was "evidence that non-blacks consistently vote against African American candidates and that blacks demonstrate high rates of racial bloc voting in favor of co-ethnic candidates." (D-5.8, p. 1) Dr. Block stated that racially polarized voting, as that term was defined by Justice Brennan in *Thornburg*, was present because there was a "consistent relationship between the race of a voter and the way in which s/he votes." (D-5.8, p. 3) Block stated that "in all elections examined here, such a consistent pattern emerges" and that "the evidence . . . suggests that majority-minority districts facilitate the election of African American candidates." (D-5.8, p. 3)

51. In a letter provided to the Committee, counsel for the NC NAACP stated that Dr. Block had analyzed "54 elections and finds significant levels of racially polarized

voting." (D-5.7, p. 2) She also stated that Dr. Block's report found that "the number of elections won by Black candidates in majority-minority districts is much higher than in other districts" and that "this data demonstrates the continued need for majority-minority districts." (D-5.7, p. 2) She also stated that there was a continuing "need to have majority-minority districts" to protect the State from vote dilution claims under Section 2 (*Id.*), and that the "totality of the circumstances" factor, relevant to claims under Section 2, were still present in North Carolina as demonstrated by a law review article authored by counsel for the NC NAACP. (D-5.9)

52. Representative Lewis and Senator Rucho relied upon the racial polarization findings of Dr. Block and the testimony of the counsel for NC NAACP in formulating the redistricting plans. (P-857, pp. 195-96; P-1493, pp. 65, 121-22, 213-15)

53. Dr. Block's report is highly informative in demonstrating racially polarized voting in many areas of the State. To a limited extent, it leaves a few questions in some areas. First, Dr. Block assessed 54 elections in the State of North Carolina in 2006, 2008, and 2010 to determine the degree to which African American candidates for political office failed to win the support of "non-blacks" in the event they were the preferred candidate among black voters. In Dr. Block's analysis, the non-black vote for the black candidate includes whites and minorities other than blacks who voted for the black candidate. Thus, any assessment of the "non-black" vote for the black candidates in an election held in a majority-black or a majority-minority coalition district does not represent the exact percentage of non-Hispanic white voters who voted for the candidate

of choice of African American voters. (D-62, pp. 9-10, F.F. No. 14; D-5.8, p. 1, n.1; D-2.34; D-2.39; D-2.60)

54. Second, Dr. Block's report likely overstates the percentage of non-black voters who would vote for an African American candidate in an election with genuine opposition. This is because most of the African American candidates, including Congressman Butterfield, were incumbents or faced token opposition in the general election. (D-62, p. 10, F.F. No. 15; P-629; D-90; see also *Thornburg*, 478 U.S. at 57, 60, 61)

55. Third, Dr. Block could not analyze a congressional or legislative election where the African American candidate had no opposition. For example, Congressman Butterfield ran unopposed in 2006. Many of the legislative elections from 2006-2010 involved races where the African American candidate was unopposed. (D-62, p. 10, F.F. No. 16; D-5.8, pp. 1-7; P-629; D-90)

56. Finally, because Dr. Block only looked at contested legislative or congressional elections, his report provided no information regarding counties in eastern North Carolina that have never before been included in a majority-black or majority-minority district. (D-62, p. 10, F.F. No. 17)

57. Because of these limitations, the General Assembly engaged Dr. Thomas Brunell to prepare a report that would supplement the report provided by Dr. Block. (D-62, p. 10, F.F. No. 18; D-5, pp. 5-6, ¶ 15; D-5.10)

58. At trial, Congressman Butterfield suggested the racial polarization reports should examine voting patterns in regions. (Tr. 200). Dr. Brunell did this very analysis.

Dr. Brunell was asked to assess the extent to which racially polarized voting was present in recent elections in 51 counties in North Carolina. (D-62, pp. 10-11, F.F. No. 19; D-5.10, p. 3) These counties included the 40 North Carolina counties covered by Section 5 of the VRA as well as Columbus, Duplin, Durham, Forsyth, Jones, Mecklenburg, Richmond, Sampson, Tyrell, Wake, and Warren counties. (D-5.10, p. 3) Elections analyzed by Dr. Brunell included the 2008 Democratic Presidential primary, the 2008 Presidential General Election, the 2004 General Election for State Auditor (the only statewide partisan election for a North Carolina office between African American and white candidates), local elections in Durham County, local elections in Wake County, the 2010 General Election for Senate District 5, the 2006 General Election for House District 60, local elections in Mecklenburg County, local elections in Robeson County, and the 2010 Democratic primary for Senate District 3. (D-62, pp. 10-11, F.F. No. 19; D-5.10, pp. 5-25)

59. Based upon his analysis, Dr. Brunell found "statistically significant racially polarized voting in 50 of the 51 counties." (D-62, p. 11, F.F. No. 20; D-5.10, p. 3) Dr. Brunell could not conclude whether statistically significant racially polarized voting had occurred in Camden County because of the small sample size. (D-5.10, p. 3) All of the counties located in the 2011 CD 1, VRA districts in the 2011 Senate Plan, and VRA districts in the 2011 House Plan are included in Dr. Brunell's analysis. (D-62, p. 11, F.F. No. 20)

60. At no time during the public hearing or legislative process did any legislator, witness, or expert question the findings by Dr. Block or Dr. Brunell. It was reasonable for the General Assembly to rely on these studies. (D-62, p. 11, F.F. No. 21)

61. During the public hearing process, many witnesses besides counsel for the NAACP testified about the continuing presence of racially polarized voting, the continuing need for majority-minority districts, and the continuing existence of the "*Gingles* factors" used to judge "the totality of the circumstances." Not a single witness testified that North Carolina's long and established history of racial polarization had vanished either statewide or in areas in which the General Assembly had enacted past VRA districts or 2011 VRA districts. See *Thornburg*, 478 U.S. at 52, 56 (court noted that district court had relied on lay-witness testimony in addition to statistical evidence presented by experts); *McDaniels v. Mehfoud*, 702 F. Supp. 588, 593 (E.D. Va. 1988) (racially polarized voting can be established through both expert analysis and anecdotal evidence); *Sanchez v. Bond*, 875 F.2d 1488 (10th Cir. 1989) (finding "nothing in *Gingles* to suggest that a trial court is prohibited from considering lay testimony in deciding whether" racially polarized voting exists); *See also Carrollton Branch of the NAACP v. Stallings*, 829 F.2d 1547, 1558 (11th Cir. 1987) (plaintiffs established existence of racially polarized voting through regression analysis and the testimony of lay witnesses) (emphasis added).

62. On April 13, 2011, Lois Watkins, a member of the Rocky Mount City Council, asked the legislature to draw majority-minority districts and stated that there was a desire in the City of Rocky Mount to elect and keep representatives of choice. (D-

62, pp. 12-13, F.F. No. 24; D-48) Another member of the Rocky Mount City Council, Reuben Blackwell, testified that there was inequality in housing, elections, transportation, and economic development. (D-62, pp. 12-13, F.F. No. 24; D-53) AFRAM representative Jessica Holmes testified that many historical factors, including racial appeals in campaigns, had conspired to exclude African American voters from the political process. (D-62, pp. 12-13, F.F. No. 24; D-43) Ms. Holmes further stated that social science would confirm that racially polarized voting continues to occur in many areas of North Carolina and that any redistricting plan should not have the purpose or effect of making African American voters worse off. (D-62, pp. 12-13, F.F. No. 24; D-43) Andre Knight, another member of the Rocky Mount City Council and President of the local branch of the NAACP, testified about the historical exclusion of African Americans from the electoral process in Rocky Mount, that race and economic class continued to be divisive issues in regard to school systems, and that racially polarized voting still exists and is demonstrated by the negative attitude toward the African American majority on the Rocky Mount City Council. (D-62, pp. 12-13, F.F. No. 24; D-36)

63. On 20 April 2011, Bob Hall, Executive Director of Democracy NC testified that race must be taken into consideration in the redistricting process, that discrimination still exists in North Carolina, and that racially polarized voting continues in some parts of the State. (D-62, pp. 13-14, F.F. No. 25; D-38) Toye Shelton, an AFRAM representative, testified that African Americans and other protected groups must be afforded an equal opportunity to participate in the political process. (D-62, pp.13-14, F.F. No. 25; D-56) Terry Garrison, a Vance County Commissioner, urged the legislature to be cognizant of

race as they drew districts. (D-62, pp. 13-14, F.F. No. 25; D-55) Lavonia Allison, Chair of the Durham Committee on the Affairs of Black People, testified that racial minorities have faced discrimination in voting, that race must be taken into account when drawing redistricting plans to serve the goal of political participation, and that the VRA requires the General Assembly to draw districts in which minorities are afforded the opportunity to elect a candidate of choice. (D-62, pp. 13-14, F.F. No. 25; D-47) Ms. Allison also drew attention to the fact that African Americans represent 22% of the total population of North Carolina and that fair representation would reflect that with proportional numbers of representatives in the General Assembly. (*Id.*)

64. On 28 April 2011, Bill Davis, Chair of the Guilford County Democratic Party, testified that redistricting plans should not undermine minority voting strength. (D-62, p. 14, F.F. No. 26; D-37) James Burroughs, Executive Director of Democracy at Home, advised that the legislature was "obligated by law" to create districts that provide an opportunity for minorities to elect candidates of choice. He asked that current minority districts be maintained and that other districts be created to fairly reflect minority voting strength. (D-62, p. 14, F.F. No. 26; D-42)

65. On 30 April 2011, June Kimmel, a member of the League of Women Voters, told the committee that race should be considered when drawing districts and that the legislature must not "weaken" the minority vote to avoid a court challenge. (D-62, pp. 14-15, F.F. No. 27; D-44) Mary Degree, the District 2 Director of the NAACP, stated that the legislature was legally obligated to consider race, asked that current majority-minority districts be preserved, and asked that new majority-minority districts be added

based upon new census data. (D-62, pp. 14-15, F.F. No. 27; D-49) Maxine Eaves, a member of the League of Women Voters, urged that any new plan fairly reflect minority voting strength. (D-62, pp. 14-15, F.F. No. 27; D-51)

66. On 7 May 2011, Mary Perkins-Williams, a resident of Pitt County, testified that the VRA was in place to give minorities a chance to participate in the political process. She stated that Pitt County African Americans had faced disenfranchisement and that it remained hard for African Americans to be elected in her county. (D-62, p. 15, F.F. No. 28; D-50) Taro Knight, a member of the Tarboro Town Council, expressed his opinion that wards for the Town Council drawn with 55% to 65% African American population properly strengthened the ability of minorities to be elected. (D-62, p. 15, F.F. No. 28; D-54)

67. On 7 May 2011, Keith Rivers, President of the Pasquotank County NAACP, stated that race must be considered, that current majority-minority districts should be preserved, and that additional majority-minority districts should be drawn where possible. (D-62, p. 15, F.F. No. 29; D-46) Kathy Whitaker Knight, a resident of Halifax County, stated that race must be considered to enfranchise all voters. (D-62, p. 15, F.F. No. 29; D-45) Nehemiah Smith, editor of the Weekly Defender, a publication in Rocky Mount, North Carolina, testified that minorities have faced many obstacles to being involved in the electoral process throughout history. (D-62, p. 15, F.F. 29; D-52) David Harvey, President of the Halifax County NAACP, stated that communities in eastern North Carolina are linked by high poverty rates, disparities in employment, education, housing, health care, recreation and youth development, and that these

communities have benefitted from majority-minority districts. (D-62, p. 15, F.F. 29; D-39) On 23 June 2011, Florence Bell, a resident of Halifax County, testified that northeastern North Carolina continued to lag behind in the "Gingles factors" including "high poverty rates, health disparities, high unemployment, community exclusion, lack of recreational and youth development and that these are contributing factors to juvenile delinquency, issues of racial injustice, inequality of education and economic development." (D-62, p. 16, F.F. 30; D-40)

68. On May 17, 2011, the co-chairs once again sought input from the Legislative Black Caucus and other interested parties and experts. (*See* D-14, 5/17/11 letter from co-chairs to the Honorable Floyd B. McKissick and others) One response was a letter from Professors Michael Crowell and Bob Joyce of the University of North Carolina School of Government. (*See* D-15) In relevant part, Professors Crowell and Joyce advised that North Carolina remained bound by the judgment in *Gingles* and that majority-minority districts should still be established in the counties at issue in *Gingles* including those encompassed by prior versions of CD

> 1. What counties were the subject of a finding of liability under Section 2 of the Voting Rights Act in the case of *Thornburg v. Gingles*, 478 U.S. 30 (1986) ("*Gingles*")?
>
> In *Gingles* the United States Supreme Court upheld the finding of Section 2 violations in North Carolina's 1982 legislative redistricting plans. The areas where violations were found included: . . . (4) a six-member House district comprising Wake County; and (5) a four-member House district consisting of Edgecombe, Nash and Wilson counties. In addition, a Section 2 violation was found in eastern North Carolina in the area where a single-member Senate district had been created consisting of all of Bertie, Chowan, Gates, Hertford and Northampton counties and parts of Edgecombe, Halifax, Martin and Washington counties . . . .

> Thus the Supreme Court found the three *Gingles* elements—a cohesive minority group, lack of minority success because of racially polarized voting, and the ability to create a reasonably compact minority district—to exist in . . . in the combined area of Edgecombe, Nash and Wilson counties; and in an area of eastern North Carolina that included Bertie, Chowan, Edgecombe, Gates, Halifax, Hertford, Martin, Northampton and Washington counties. . . .
>
> 2. Following *Gingles*, and in all subsequent legislative redistricting plans, has the General Assembly created legislative districts in those counties with a total black population of at least 40 percent or higher?
>
> We believe the answer is yes but do not have ready access to the documents necessary to confirm our response. The legislative staff can provide a definite answer.
>
> 3. Has there ever been a judicial ruling modifying, overturning, or vacating the judgment entered in *Gingles*?
>
> Although there have been numerous court decisions in the quarter century since *Gingles* that elaborate upon its meaning, *Gingles* has not been overturned and remains the principal case defining the elements of a Section 2 violation . . . .
>
> The April 1984 trial court order in *Gingles* approved the General Assembly's March 1984 redistricting plan as a remedy for the Section 2 violation but did not specify how long the remedy should remain in effect nor address future redistricting. *Nevertheless it appears to be commonly accepted that the legislature remains obligated to maintain districts with effective African American voting majorities in the same areas as decided in Gingles, if possible*. (emphasis added)

69. On June 22, 2011, the co-chairs released a joint statement to respond to criticism by Democratic elected officials to a proposed legislative plan released by the chairs on June 21, 2011, which contained only proposed legislative VRA districts. In relevant part, the co-chairs stated that creating majority-black districts in compliance with the VRA would make adjoining districts more competitive for Republican candidates.

The co-chairs also noted that the 2001 CD 1 had been found to be "based upon a reasonably compact black population" by a federal court. (*See* D-72, pp. 19-25; D-18)

70. On June 23, 2011, counsel for the NC NAACP and AFRAM provided an additional submission to the Joint Redistricting Committee. (D-5, pp. 6-7, ¶ 18; D-5.12) This submission included a written statement by counsel for the NC NAACP and proposed North Carolina Senate and North Carolina House maps. (D-512; D-22, Senate Tab 3, "Southern Coalition for Social Justice-Senate," House Tab 3, "Southern Coalition for Social Justice-House") In her statement, counsel for the NC NAACP stated that the two SCSJ legislative plans should be considered because they "compl[ied] with the Voting Rights Act." (D-5.12, p. 1) More specifically, counsel stated that the SCSJ Senate and House Plans complied "with the non-retrogression criteria for districts in counties covered by Section 5 of the Voting Rights Act" and "Section 2 of the Voting Rights Act in Mecklenburg, Forsyth, and Wake Counties." (*Id.*) The SCSJ Senate map proposed three majority-black or majority-minority coalition districts in counties eventually included in the enacted 2011 CD 1. The SCSJ House Plan proposed nine majority-black or majority-minority coalition districts in areas eventually included in the enacted 2011 CD 1.

71. On 18 July 2011, Professor Irving Joyner, representing the NC NAACP, affirmed that racially polarized voting continues to exist in North Carolina. (D-62, p. 16, F.F. No. 32; D-41)

72. On July 1, 2011, the legislative leadership released its first proposed Congressional Map, known as Rucho-Lewis Congress 1 ("Rucho-Lewis Congress 1")

(D-4.7; D-4.7A; D-72, pp. 26-33 [Joint Statement by Senator Bob Rucho and David Lewis ("legislative leaders" or "leaders") Regarding the Proposed Congressional Plan (July 1, 2011) ("1 July 2011 Joint Statement")]) As evidenced by their joint statement, the legislative leadership considered the following in drawing a 2011 version of CD 1. First, the version of CD 1 in Rucho-Lewis Congress 1 was based on the 2001 version of CD 1. Second, the legislature intended that new Congressional districts should comply with the federal one person, one vote requirement as stated in *Wesberry v. Sanders*, 376 U.S. 1 (1964) and *Karchner v. Daggett*, 466 U.S. 910 (1984). In addition, the new plan must comply with the VRA. The leaders noted that under *Strickland*, the Supreme Court had recently held that majority-minority districts enacted to protect the State from Section 2 liability must be drawn with a majority-black VAP. (Tr. 478, 479, 489)

73. The leaders also explained that the 2001 version of CD 1 was under-populated because of the rapid growth of urban areas and the slower growth of rural areas. Thus, drawing CD 1 into the RTP area would make it less likely that the district would again become substantially under-populated during the 2010-2020 decade and more likely that the configuration would be retained after the 2020 Census. This was also consistent with the strategy of the co-chairs to create multiple congressional districts within North Carolina's urban counties, based upon their opinion that urban counties are best represented by multiple members of congress. (Tr. 489; P-1493, pp. 150-51)

74. The legislative leaders also explained their intention of continuing the 2011 version of CD 12 as a very strong Democratic district. (Tr. 495, 501) They explained that one of them (Senator Rucho) had met with Congressman Watt and had agreed to

accommodate Congressman Watt's request that the 2011 version of CD 12 be modeled after the 2001 version (as opposed to moving the district from Mecklenburg County to the east as suggested by the USAG in 1991 prior to the *Shaw* cases).

75. Senator Rucho had two meetings with Congressman Watt regarding CD 12. Senator Rucho's first meeting with Congressman Watt occurred in Raleigh on or about April 25, 2011. (*Dickson* Tr. 363; Tr. 105.) Senator Rucho met with Congressman Watt a second time at Senator Rucho's home in Charlotte sometime before July 1, 2011 when the first maps of North Carolina's Congressional Districts were released to share a map of CD 12 with Congressman Watt. (*Dickson* Tr. 362, 365). Representative Ruth Samuelson attended this meeting. (*Dickson* Tr. 357). At trial, Congressman Watt contended that, during this meeting, Senator Rucho told him that leadership had asked him to "ramp up" the black population in *both* CD 1 and CD 12 to over 50% to comply with the Voting Rights Act. (Tr. 108, 136).

76. Senator Rucho denied making any comment to Congressman Watt about "ramping up" the black population in CD 12 to over 50 percent. (*Dickson* Tr. 364). At trial in *Dickson*, Senator Rucho testified that he did not make any comments to Congressman Watt about the racial composition of CD 12 during their meeting at his house. (*Id.*) Rep. Samuelson also testified at trial that Senator Rucho did not make any comment about "ramping up" the black population in the Twelfth District to over 50 percent during the meeting with Congressman Watt at Senator Rucho's home. (*Dickson* Tr. 358).

77. Congressman Watt is a lawyer and was heavily involved in the *Shaw* and *Cromartie* cases that also involved CD 12. He agreed that a statement from one of the redistricting chairs that "ramping up" the African-American representation in CD 12 to 50 percent would be relevant to legal challenges to the district. (*Dickson* Tr. 203-04) Congressman Watt also admitted that Senator Rucho's alleged statement would have been important information for the General Assembly to have known. (*Dickson* Tr. 205, Tr. 140) Despite these admissions and the fact that he described alleged "misrepresentations" made by Senator Rucho during their meeting at Senator Rucho's house in letters and a statement he had read to the General Assembly on his behalf after the districts were released, Congressman Watt did not mention in his letter or statement at any time before he testified at the trial in *Dickson* that Senator Rucho had advised him that "leadership" had directed Senator Rucho to "ramp up" the black population in CD 12 over 50 percent. (*Dickson* Tr. 205-10; Tr. 140, 145-49; D-27, 28, 30)

78. At both the trial in *Dickson* and in this matter, Congressman Watt testified that race had to be considered when drawing CD 12, particularly with respect to Guilford County. In *Dickson*, Congressman Watt testified that he told Senator Rucho that because Greensboro was in a Section 5 county, "he needed to be very careful about retrogressing" and that he "might have some problems if he took Greensboro out." (*Dickson* Tr. 181) In the trial in this matter, Congressman Watt also admitted telling Senator Rucho that retrogression in Guilford County could create a legal problem for the redistricting plan. (Tr. 129)

79. Congressman Watt admitted that he told Senator Rucho that "it's one thing not to retrogress" but that he did not believe that the black percentage in his district needed to be increased to over 50 percent for him to win re-election. (*Dickson* Tr. 184) Congressman Watt testified that "if there had been a basis for [increasing the black population in his district], it would have had to have been in Guilford [County] because it was a Section 5 county." (*Dickson* Tr. 191) He also admitted that the voters added to CD 12 in Mecklenburg and Guilford Counties during the 2011 round of redistricting were strong Democratic voters. (*Dickson* Tr. 220) Congressman Watt admitted that the changes made to his district made it easier for Republicans in adjoining districts to win. (Tr. 150)

80. The Court does not find that Senator Rucho stated to Congressman Watt that he had been instructed to "ramp up" the black population in CD 12. The state has never argued that the 2011 CD 12 was enacted to protect the state from Section 2 liability and, indeed, any such argument would be futile in light of the decision in *Shaw II*. No version of CD 12 has ever been based on a compact minority population and there was no possible basis for the state to intentionally draw CD 12 as a Section 2 district. In any event, such a statement would have no bearing on whether race was the predominant motive in the way the district was drawn because Congressman Watt admitted at the trial in this matter and in *Dickson* that the General Assembly had to consider race in drawing CD 12 to avoid "retrogression" and potential legal problems that could have resulted if the black population in the district had been lowered.

81. After the legislative leaders released Rucho-Lewis Congress 1, Congressman Butterfield and Congressman Watt published their opposition to the plan. (D-8; D-27) Congressman Butterfield complained that the co-chairs incorrectly reported that he had expressed a preference on his district being drawn into Wake County and that the Rucho-Lewis Congress 1 version of CD 1 had reduced the number of voters in his district who resided in counties covered by Section 5.

82. On July 7, 2011, a public hearing was held on Rucho-Lewis Congress 1. During this hearing, a witness named Steven Gerontakis objected to the impact of Rucho-Lewis Congress 1 on population in Section 5 counties. He proposed an alternative majority-black district that would be drawn into Durham County rather than Wake County. Under Mr. Gerontakis' proposal, a larger number of persons from Section 5 counties would reside in his proposed CD 1 as compared to the version in Rucho-Lewis Congress 1. (D-9, pp. 3-8)

83. On July 19, 2011, the legislative leaders released a new Congressional plan called Rucho-Lewis Congress 2 ("Rucho-Lewis Congress 2"). (D-4.8; D-72, pp. 40-44 [Joint Statement of Senator Bob Rucho and Representative David Lewis (7-19-11)] p. 1 ("19 July Joint Statement")) Rucho-Lewis Congress 2 adopted Mr. Gerontakis' suggestion that CD 1 be drawn into Durham County instead of Wake County. This configuration of CD 1 is very similar to the original version of CD 1 enacted in 1991 and recognized as an "indisputably . . . remedial" district by the Supreme Court in *Shaw II*, 517 U.S. at 912. In their 19 July Joint Statement, the leaders explained that their new version of CD 1 was drawn to address criticisms made by Congressman Butterfield and

others. By using Durham County instead of Wake County, the Rucho-Lewis Congress 2 version of CD 1 was drawn to include more population from all of the Section 5 counties found in the 2001 version. Moreover, using Durham County in the place of Wake County to construct CD 1 allowed the chairs to use strongly performing Democratic districts in Wake County to create a new version of CD 4 as a very strong Democratic District. This allowed the chairs to achieve their political goals of making districts that adjoined CD 1 and CD 4 more competitive for Republican candidates, including the 2011 versions of CD 2, 3, 7, 8, and 13. (Tr. 477-78, 491-93; P-1493, pp. 116, 125, 128, 147-49, 203; P-857, pp. 89-90, 179, 180-81)

84. In their July 19, 2011 Joint Statement, the leaders stated that CD 12 in Rucho-Lewis Congress 2 was based upon the 1997 and 2001 versions and that the 2011 version was again drawn by the legislative leaders as a "very strong Democratic district . . . based upon whole precincts that voted heavily for President Obama in the 2008 General Election." The co-chairs stated that by making CD 12 a very strong Democratic district, adjoining districts would be more competitive for Republicans. (D-72, pp. 40-44, "19 July Joint Statement"; Tr. 491-93, 535-36; D-26.1, pp. 21-22, Maps 2 and 3)

85. The General Assembly convened in legislative session on Monday, July 25, 2011, for purposes of enacting redistricting plans. On that same date, Democratic leaders released a proposed congressional plan: Congressional Fair and Legal ("Fair & Legal") (D-62, p. 17, F.F. No. 34) Despite prior requests for possible districting plans dating back to March 2011, the Fair and Legal Plan was the first congressional plan suggested by the Democratic members of the General Assembly. The Fair & Legal Plan

did not draw CD 1 into the RTP area or create the district with a majority any part black VAP. (D-4.10; D-4.10A) Under the 2010 Census, the Fair and Legal Plan was drawn with an any part black VAP of 47.82%, and a non-Hispanic white VAP of 46.46%. Democrats represented 66.74% of registered voters with blacks representing 65.66% of all registered Democrats. (D-2.63; D-2.67) The Fair and Legal version of CD 12 had an any part black VAP of 41.99% with a non-Hispanic white VAP of 41.84%. Hispanics constituted 12.39% of the VAP. African Americans represented 46.54% of all registered voters with whites (including Hispanic whites) equaling 46.09% of registered voters. (D-2.67; D-2.66; D-22, "Congressional Fair and Legal – Stein")

86. Also on July 25, 2011, Democratic Leaders published their two other redistricting plans: Senate Fair and Legal; and House Fair and Legal (D-62, p. 17, F.F. No. 34; http://www.ncleg.net/representation/Content/Plans/PlanPage_DB_2011.asp?Plan=Congressional_Fair_and_Legal&Body=Congress; http://www.ncleg.net/representation/Content/Plans/PlanPage_DB_2011.asp?Plan=Senate_Fair_and_Legal&Body=Senate; http://www.ncleg.net/representation/Content/Plans/PlanPage_DB_2011.asp?Plan=House_Fair_and_Legal&Body=House) On that same date, the Legislative Black Caucus published, for the first time, their Possible Senate Plan and Possible House Plan. (D-62, p. 17, F.F. No. 34; http://www.ncleg.net/representation/Content/Plans/PlanPage_DB_2011.asp?Plan=Possible_Senate_Districts&Body=Senate; http://www.ncleg.net/representation/Content/Plans/PlanPage_DB_2011.asp?Plan=Possible_House_Districts&Body=House)

87. On 27 July 2011, the General Assembly passed the 2011 Senate Redistricting Plan, 2011 S.L. 404 (Rucho Senate 2) and the 2011 Congressional Plan, 2011 S.L. 403 (Rucho-Lewis Congress 3). (D-62, pp. 17-18, F.F. No. 35; D-57.242, p. 16, ¶ 65) On 28 July 2011, the General Assembly enacted the 2011 House Redistricting Plan, 2011 S.L. 402 (Lewis-Dollar-Dockham 4). (*Id.*) All of the enacted VRA districts in all three plans are located in the areas of the state where Democratic leaders and the Legislative Black Caucus recommended the enactment of congressional or legislative majority-black districts or majority-minority coalition districts. (D-62, pp. 17-18, F.F. No. 35; D-1.10; D-1.11; D-1.12; D-2.36; D-2.37; D-2.38; D-2.41; D-2.42; D-2.43; D-2.66; D-2.67)

88. The 2011 CD 1 has an any part black VAP of 52.65%, which was only 4.02% higher than the any part black VAP in the 2001 CD 1 under the 2010 Census (48.63%). (D-126, Tab 12, p. 3, Tab 6, p. 3; D-62, p. 18, F.F. No. 36; D-1.12) CD 1 is comprised of the portions of the following counties: Beaufort, Bertie, Chowan, Craven, Durham, Edgecombe, Franklin, Gates, Granville, Greene, Halifax, Hertford, Lenoir, Martin, Nash, Northampton, Pasquotank, Perquimans, Pitt, Vance, Warren, Washington, Wayne, and Wilson. (D-62, p. 18, F.F. No. 36; D-126, Tab 12, "Rucho-Lewis Congress 3") Moreover,

(a) Bertie, Chowan, Edgecombe, Gates, Halifax, Martin, Nash, Northampton, Washington, and Wilson counties were included in the *Thornburg* majority black legislative districts. (D-62, p. 18, F.F. No. 36; D-1.10; D-1.11; D-1.12; D-2.36; D-2.37; D-2.38; D-2.41; D-2.42; D-2.43; D-2.66; D-2.67)

(b) Beaufort, Bertie, Craven, Edgecombe, Gates, Granville, Greene, Halifax, Hertford, Lenoir, Martin, Northampton, Pitt, Vance, Warren, Washington, Wayne, and Wilson counties were included in the 1997 CD 1 that was upheld by the district court in *Cromartie II*. (*Id.*)

(c) The following counties included in the 2011 CD 1 were part of a 2001/2003/2009 majority-black or majority-minority congressional or legislative district: Durham, Granville, Vance, Warren, Northampton, Hartford, Gates, Pasquotank, Perquimans, Chowan, Bertie, Halifax, Edgecombe, Martin, Washington, Wilson, Pitt, Beaufort, Wayne, Greene, Lenoir, and Craven. (*Id.*)

(d) The following are counties in the 2011 CD 1 were covered counties under Section 5: Bertie, Chowan, Craven, Edgecombe, Franklin, Gates, Granville, Greene, Halifax, Hertford, Lenoir, Martin, Nash, Northampton, Pasquotank, Perquimans, Pitt, Vance, Washington, Wayne, and Wilson. (*Id.*)

(e) The following counties are included in Dr. Block's analysis of district elections from 2006-2010:

2006 HD 5: Bertie, Gates, Hertford, Perquimans

2006 HD 12: Craven, Lenoir

2008 SD 5: Greene, Lenoir, Pitt, Wayne

2008 HD 12: Craven, Lenoir

2010 CD 1: Granville, Vance, Warren, Halifax, Northampton, Hertford, Gates, Pasquotank, Perquimans, Chowan, Bertie, Martin, Edgecombe, Wilson, Greene, Pitt, Beaufort, Washington, Craven, Jones, Lenoir, Wayne.

2010 SD 4: Bertie, Chowan, Halifax, Hertford, Northampton

2010 SD 5: Greene, Lenoir, Pitt, Wayne

2010 HD 12: Craven, Lenoir

2010 HD 21: Wayne

2010 HD 24: Edgecombe, Wilson

(D-62, p. 19, F.F. No. 36; D-5.8, pp. 5-7)

(f) All of the counties in the 2011 CD 1 were analyzed by Dr. Brunell who confirmed that each was continuing to experience statistically significant racially polarized voting:

Beaufort, Bertie, Chowan, Craven, Durham, Edgecombe, Franklin, Gates, Granville, Greene, Halifax, Hertford, Lenoir, Martin, Nash, Northampton, Pasquotank, Perquimans, Pitt, Vance, Warren, Washington, Wayne, and Wilson. (D-62, pp. 19-20, F.F. No. 36; D-5.10, pp. 1-14)

(g) The following counties were included in majority-black or majority-minority coalition districts in plans proposed by SCSJ or Democratic Leaders:

SCSJ CD 1: Beaufort, Bertie, Chowan, Craven, Edgecombe, Franklin, Gates, Granville, Greene, Halifax, Hertford, Lenoir, Martin, Nash, Northampton, Pasquotank, Perquimans, Pitt, Vance, Warren, Washington, Wayne, Wilson.

Congressional F&L CD 1: Beaufort, Bertie, Chowan, Craven, Edgecombe, Franklin, Gates, Granville, Greene, Halifax, Hertford, Lenoir, Martin, Nash, Northampton, Pasquotank, Perquimans, Pitt, Vance, Warren, Washington, Wayne, Wilson.

SCSJ SD 3: Edgecombe, Martin, Pitt, Wilson, Washington

F&L SD 3: Bertie, Edgecombe, Martin, Wilson

PSD SD 3: Edgecombe, Nash, Pitt

SCSJ SD 4: Bertie, Gates, Halifax, Hertford, Northampton, Vance, Warren

F&L SD 4: Chowan, Gates, Halifax, Hertford, Northampton, Vance, Warren

PSD SD 4: Bertie, Chowan, Gates, Halifax, Hertford, Warren, Northampton, Perquimans, Washington

SCSJ HD 5: Bertie, Chowan, Gates, Hertford, Pasquotank, Perquimans, Washington

SCSJ HD 7: Edgecombe, Halifax, Nash

SCSJ HD 8: Bertie, Martin, Pitt

SCSJ HD 24: Edgecombe, Halifax, Wilson

SCSJ HD 27: Gates, Halifax, Hertford, Northampton, Vance, Warren

SCSJ HD 12: Craven, Greene, Lenoir

SCSJ HD 21: Wayne

F&L HD 5: Bertie, Gates, Hertford, Martin

F&L HD 7: Edgecombe, Nash

F&L HD 8: Pitt

F&L HD 24: Edgecombe, Wilson

F&L HD 27: Halifax, Northampton

F&L HD 12: Craven, Greene, Lenoir

F&L HD 21: Wayne

PHD HD 5: Bertie, Gates, Hertford, Martin

PHD HD 7: Halifax, Nash

PHD HD 8: Greene, Pitt

PHD HD 24: Edgecombe, Wilson

PHD HD 27: Northampton, Warren

PHD HD 12: Craven, Lenoir

PHD HD 21: Wayne

(D-62, pp. 20-21, F.F. No. 36; D-22, Senate Tabs 3, 4, 5, "Southern Coalition for Social Justice-Senate," "Senate Fair and Legal-Nesbitt," and "Possible Senate Districts-McKissick"; House Tabs 3, 4, 5, "Southern Coalition for Social Justice-House," "House Fair and Legal-Martin," and "Possible House Districts-K. Alexander"; Congressional

Tabs 3, 4, "Southern Coalition for Social Justice-Congress," and "Congressional Fair and Legal-Stein"; D-1.10; D-1.11; D-1.12; D-2.36; D-2.37; D-2.38; D-2.41; D-2.42; D-2.43; D-2.66; D-2.67)

89. There is no evidence in the legislative record disputing the conclusions of Dr. Block and Dr. Brunell that racially polarized voting continues to be present in these counties. (D-62, pp. 81-82, F.F. No. 165; D-5.8, pp. 1-7; D-5.10, pp. 3-14) In all versions of CD 1 in the previous or alternative plans, the non-Hispanic white population is less than 50%: 2001 First Congressional (45.59%); SCSJ First Congressional (46.47%); F&L First congressional (46.46%). The evidence shows that the 2001 version of CD 1 was not "less than majority-minority." (D-62, pp. 81-82, F.F. No. 165; D-2, ¶ 26; D-2.60; D-2.61; D-2.62; D-2.63; D-2.66; D-2.67) Nor was this district a majority-white crossover district. (D-62, p. 82, F.F. No. 166)

90. In the previous and alternative versions of CD 1, African Americans represent a super-majority of registered Democrats: 2001 First Congressional (66.55%); SCSJ First Congressional (65.73%); F&L First Congressional (65.66%). (D-62, p. 82, F.F. No. 166; D-2, ¶ 27; D-2.64; D-2.66; D-2.67) In comparison, the statewide percentage of Democrats who are African American is 41.38%. (D-62, p. 82, F.F. No. 166)

91. In the 2001 CD 1, at the time of the 2011 redistricting, African Americans were a majority of all registered voters (50.66%). African Americans constituted a very strong plurality of all registered voters in the SCSJ First Congressional (49.32%) and in

the F&L First Congressional (49.12%). (D-62, p. 82, F.F. No. 167; D-2, ¶ 27; D-2.64; D-2.66; D-2.67)

92. In the previous and alternative versions of CD 1, at the time of the 2011 redistricting white voters constituted a minority of all registered voters: 2001 First Congressional (46.03%); SCSJ First Congressional (47.40%); F&L First Congressional (47.71%). (D-62, p. 82, F.F. No. 168; D-2, ¶ 27; D-2.64; D-2.66; D-2.67)

93. In the previous and alternative versions of the CD 12, at the time of the 2001 redistricting African Americans constituted a super-majority of registered Democrats: 2001 Twelfth Congressional (71.44%); SCSJ Twelfth Congressional (71.53%); and F&L Twelfth Congressional (69.14%). (D-62, pp. 83-84, F.F. No. 173; D-2, ¶ 27; D-2.64; D-2.66; D-2.67) In comparison, the statewide percentage of Democrats who are African Americans is 41.38%. (D-62, pp. 83-84, F.F. No. 173)

94. At the time of the 2011 redistricting, African Americans constituted a very high plurality of registered voters in the previous and alternative versions of the CD 12: 2001 Twelfth Congressional (48.56%); SCSJ Twelfth Congressional (48.70%); and F&L Twelfth Congressional (46.54%). (D-62, p. 84, p. 158, F.F. No. 174; D-2, ¶ 27; D-2.64; D-2.66; D-2.67)

95. At the time of the 2011 redistricting, whites were a minority of all registered voters in the previous and alternative versions of the CD 12: 2001 Twelfth Congressional (45.26%); SCSJ Twelfth Congressional (45.17%); and F&L Twelfth Congressional (46.09%). (D-62, p. 84, p. 158, F.F. No. 175; D-2, ¶ 27; D-2.64; D-2.66; D-2.67)

96. Dr. Thomas Hofeller was engaged by counsel to the legislative leaders of the General Assembly for the purpose of drawing redistricting plans. (Tr. 476; D-62, p. 87, F.F. No. 179; D-31, pp. 236-37) He was not engaged to prepare expert testimony regarding the presence or absence of racially polarized voting. (D-62, p. 87, F.F. No. 179; D-31, pp. 239-40)

97. Dr. Hofeller testified as a witness in *Shaw II*, a case that challenged the 1992 North Carolina CD 12 as a racial gerrymander. (D-62, p. 87, F.F. No. 180; D-31, p. 236) Dr. Hofeller is familiar with the decision in *Cromartie II*, a decision in which the 1997 version of the CD 12 was upheld on the grounds that politics explained the shape and location of the district's lines as opposed to race. (Tr. 472-73, 479; D-62, p. 87, F.F. No. 180; D-31, pp. 242-43)

98. The 2001 version of the CD 12 was based upon the same principles that motivated the 1997 version and is located in the same general area as the 1997 version. (Tr. 479; D-62, p. 87, F.F. No. 181; D-31, pp. 244-49)

99. Dr. Hofeller took instructions for drawing maps from Senator Robert Rucho and Representative David Lewis. (Tr. 476; D-62, p. 87, F.F. No. 182; D-31, pp. 246-47) They did not provide Dr. Hofeller with written criteria to use in drawing the districts because Representative Lewis and Senator Rucho believed that the Dr. Hofeller already understood the requirements of the applicable case law and statutes and the VRA. (P-1493, pp. 71-72). Dr. Hofeller was instructed to follow the law and other specific instructions were provided orally by Representative Lewis and Senator Rucho. (Tr. 477-83; P-1493, p. 72). Meetings with Dr. Hofeller were typically in person so that maps

could be viewed during discussions about the redistricting process. (Tr. 477-83; P-857, p. 173). The oral instructions given to Dr. Hofeller were reflected in the Legislator's Guide to Redistricting, prior correspondence from the co-chairs and members of the General Assembly, and released in the form of written public statements. (*See* DX-72, pp. 11-44) Two of the public statements specifically addressed Congressional criteria. (P-857, pp. 82, 148 D-72, pp. 26-33).

100. Senator Rucho and Representative Lewis instructed Dr. Hofeller to follow the legal standard stated in *Cromartie II*, in the drawing of the 2011 CD 12. (Tr. 479; D-62, p. 87, F.F. No. 182; D-31, p. 247)

101. Senator Rucho and Representative Lewis instructed Dr. Hofeller to increase the number of Democratic voters included in the 2011 CD 12 as compared to the number of Democratic voters included in the 2001 version. By increasing the number of Democratic voters in the 2011 version of the CD 12, the two Chairmen intended to achieve two goals: (1) creating the 2011 CD 12 as an even stronger Democratic district as compared to the 2001 version; and (2) by doing so, making districts that adjoin the CD 12 more competitive for Republicans in their 2011 versions as compared to these districts as they were created in the 2001 Congressional Plan. (Tr. 477, 479, 490; D-26.1, Maps 2, 3; D-62, pp. 87-88, F.F. No. 182; D-31, pp. 247-50; P-1493, pp. 203, 204; P-857, pp. 85, 86, 92, 182-83, 186)

102. The 2011 CD 12 is located in the same six counties as the 2001 version. (Tr. 480; D-62, p. 88, F.F. No. 185; D-31, pp. 220-21, 245-46, D-126, Tabs 3 and 4)

103. The 1997, 2001, and 2011 versions of CD 12 are based upon urban population centers located in Mecklenburg, Guilford, and Forsyth Counties. These urban areas are connected by more narrow corridors located in Cabarrus (2001), Rowan, Davidson, or Iredell (1997) counties. (Tr. 560-62; D-62, p. 88, F.F. No. 186; D-31, p. 245)

104. The principal differences between the 2001 version of CD 12 and the 2011 version is that the 2011 version adds more strong Democratic voters located in Mecklenburg and Guilford Counties, adds more Democratic voters to the 2011 CD 5 because it was able to accept additional Democrats while remaining a strong Republican district, removes Democratic voters from the 2011 CD 6 in Guilford County and places them in the 2001 CD 12, and removes Republican voters who had formerly been assigned to the 2001 CD 12 from the corridor counties of Cabarrus, Rowan, Davidson and other locations. (Tr. 490-92, 495, 560-62; D-62, p. 88, F.F. No. 187; D-31, pp. 220, 247-49)

105. Dr. Hofeller constructed the 2011 CD 12 based upon whole Vote Tabulation Districts ("VTDs") in which President Obama received the highest voter totals during the 2008 Presidential Election. (Tr. 479, 495, 500, 662; D-62, pp. 88-89, F.F. No. 188; D-31, pp. 249-51) The only information on the computer screen used by Dr. Hofeller in selecting VTDs for inclusion in the CD 12 was the percentage by which President Obama won or lost a particular VTD. (Tr. 472, 479, 495-96, 662; D-62, pp. 88-89, F.F. No. 188; D-31, pp. 250-51) There was no racial data on the screen used by Dr. Hofeller to construct this district. (D-62, pp. 88-89, F.F. No. 188; D-31, pp. 256-57)

106. The 2011 CD 12 includes 179 VTDs. (D-62, p. 89, F.F. No. 189; D-2.28) Only six VTDs were divided by Dr. Hofeller in forming the 2011 CD 12. (D-62, p. 89, F.F. No. 189; D-31, pp. 253-56) All of these divisions were done to equalize population among the CD 12 and other districts or for political reasons, such as dividing a VTD in Guilford County so that incumbent Congressman Howard Coble could be assigned to the 2011 CD 6 as opposed to being placed in the 2011 CD 12. None of the VTDs selected were based upon racial criteria. (*Id*.; Tr. 501, 526)

107. Dr. Hofeller's division of VTDs in his construction of the CD 12 did not have any impact on the political performance of the 2011 CD 12 or its racial composition. (D-62, p. 89, F.F. No. 190; D-31, p. 262)

108. By increasing the number of Democratic voters in the 2011 CD 12 located in Mecklenburg and Guilford Counties, the 2011 Congressional Plan created other districts that were more competitive for Republican candidates as compared to the 2001 versions of these districts, including CD 6, CD 8, CD 9, and CD 13. (Tr. 491-95; D-26.1, pp. 22-23, maps 2 and 3; D-62, p. 89, F.F. No. 191; D-31, p. 247; -126, Tab 6, "Congress Zero Deviation 2010 Census", Tab 12, "Rucho-Lewis Congress 3")

D. The Plaintiffs in this action are members of the organizational plaintiffs in *Dickson*

1. Plaintiff David Harris

109. Plaintiff David Harris ("Mr. Harris") is a resident of Durham and lives in CD 1. (D-34, p. 16.) He has been a resident of CD 1 since it was drawn into Durham County following the 2011 round of redistricting. (D-34, p. 16.) Before that, Mr. Harris lived in CD 4. (*Id*.)

110. Mr. Harris was recruited to serve as a plaintiff in this action by T.E. Austin, the immediate past chair of the North Carolina Democratic Party's Fourth Congressional District. (*Id*. at 71-72.) Mr. Harris had not seen the Complaint in this lawsuit before it was filed and didn't know what districts were involved when he agreed to serve as a plaintiff. (*Id.* at 15, 76-77, 79-80.) He has no responsibility for paying any attorneys' fees or costs associated with his participation in this action. (*Id.* at 70, 86.)

111. Mr. Harris cannot identify harm or injury that he personally sustained as a result of being placed in CD 1. (*Id.* at 42-43, 94-95.) Mr. Harris's objection to CD 1 is based upon his belief that this district "diffuse[s]" the ability of African-American voters to influence the outcome of elections in other districts. (*Id.* at 95.)

112. Mr. Harris joined the NAACP in 2009 or 2010 and has been a member every year since. (*Id.* at 44-46, 49-50, Ex. 6.) Mr. Harris completed a membership form and sent the form and his membership dues to an address in Baltimore, Maryland. (*Id.* at 45-47, Ex. 7.) Mr. Harris is also a member of the North Carolina State Conference of the NAACP. At his deposition in this action, Rev. Barber confirmed that an individual who is a member of a local branch or the national NAACP is also a member of the NC NAACP. (D-35, pp. 17, 26-27.) Rev. Barber also confirmed that the membership form Mr. Harris acknowledged completing is the same membership form that is available on the NC NAACP's website. (D-35, pp. 33-35; D-35.20; D-35.18)

2. Plaintiff Christine Bowser

113. Plaintiff Christine Bowser ("Ms. Bowser") resides in CD 12 and has lived in the district since it was first drawn by the General Assembly in 1992. (Deposition of

Christine Bowser (D-33, pp. 22-23.) Ms. Bowser testified that Congressman Watt is a candidate of choice of African-American voters and, until his resignation, had represented CD 12 since its inception. (*Id.* at 23, 28.) Ms. Bowser testified that during his tenure, Congressman Watt "hasn't had anyone to really run against him to take his position" and was able to "easily" defeat any challengers. (*Id.* at 23.) Ms. Bowser also testified that even though Congressman Watt no longer represents this district, she expects the district will continue to elect a Democrat to Congress "[b]ecause there are more Democrats in that district." (*Id.* at 30.)

114. Ms. Bowser was recruited to serve as a plaintiff in this action by Dr. Robbie Akhere, who is the chair of the Twelfth Congressional District for the North Carolina Democratic Party. (D-33, pp. 31, 38.) She, like Mr. Harris, has no responsibility for paying her attorneys' fees or related costs in this case. (*Id.* at 62.) Ms. Bowser testified that she did not think that she had seen a copy of the Complaint filed in this action before her deposition. (*Id.* at 21-22, 26.)

115. Just as Mr. Harris testified with respect to CD 1, Ms. Bowser also testified that she objects to the current version of CD 12 because "it prevents us (black voters) from being in other districts." (*Id.* at 28.)

116. Ms. Bowser has been involved with several organizations that are plaintiffs in *Dickson*. Specifically, Ms. Bowser testified that she has made contributions to the League of Women Voters of North Carolina "on and off" since 2004. (*Id.* at 50, Ex. 4, p. 4.) Ms. Bowser also testified that she has been a member of Democracy North Carolina for the past five years and made "periodic donations" to the organization during that time.

(*Id.* at 51, Ex. 4, p. 5.) Finally, Ms. Bowser has been a member of Mecklenburg County Branch of the NAACP "on and off since the 1960s" and has paid dues or made contributions to both the Mecklenburg County Branch and the national NAACP, most recently in 2013. (*Id.* at 45, 48, Ex. 4, p.4.)

3. Both Plaintiffs are members of organizational plaintiffs in *Dickson* that asserted standing in *Dickson* based upon their ability to represent their members.

117. The NC NAACP's complaint in *Dickson* included the following allegation: "Plaintiff the North Carolina State Conferences of Branches of the NAACP is a non-partisan, nonprofit organization composed of over 100 branches and 20,000 individual members throughout the state of North Carolina." (D.E. 44-1, p. 5) (NC NAACP Compl. ¶ 9). On December 19, 2011, the defendants in the *Dickson* litigation moved to dismiss the four organizational plaintiffs, the NC NAACP, the LWV NC, Democracy NC, and the Randolph Institute (collectively the "Organizational Plaintiffs") named in the NAACP Plaintiffs' Amended Complaint on the grounds that these plaintiffs lacked standing to challenge the districts, including the First and Twelfth Congressional Districts. The Organizational Plaintiffs filed a memorandum of law in opposition to the motion to dismiss in which they argued that they had alleged in their Amended Complaint "facts sufficient to establish organizational standing under federal law by alleging that their members live throughout the state and would be harmed by the use of redistricting plans unjustifiably based on race." (*See* D.E. 44-5, p.11). In their memorandum, the Organizational Plaintiffs also quoted language from the United States Supreme Court's decision in *Warth v. Seldin,* 422 U.S. 490 (1975), in which the Supreme Court held that

"an association may have standing solely as the representative of its members" and that "the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction." (*See id*.) (quoting *Warth*, 422 U.S. at 511).

On February 6, 2012, the three-judge state court denied, in part, defendants' motion to dismiss but did not specifically rule on whether the Organizational Plaintiffs lacked standing. (D.E. 44-6) The Organizational Plaintiffs, however, have remained plaintiffs in *Dickson*.

III. CONCLUSIONS OF LAW

A. Standard of Review

The Supreme Court has developed a specific standard for the application of the strict scrutiny test to redistricting plans. The Court has made "clear" that "the underlying districting decision is one that ordinarily falls within a legislature's sphere of competence." *Cromartie II*, 532 U.S. at 242 (citing *Miller v. Johnson*, 515 U.S. 900, 915 (1995)). Therefore, the "legislature 'must have discretion to exercise the political judgment necessary to balance competing interests.'" *Id.* Because redistricting is ultimately based upon political judgment, "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).

Based upon these general principles, 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 I*, 509 U.S. at 646 (internal citations

omitted)). Strict scrutiny does not automatically apply where 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 show 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 559 (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). Moreover, plaintiffs must show that a challenged district "is unexplainable on grounds other than race." *Cromartie II*, 532 U.S. at 242 (citing *Cromartie I*, 526 U.S. at 546 (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))). Thus, to prove that race was the predominant factor, plaintiffs must establish, at a minimum, that the State "substantially neglected traditional districting criteria." *Vera*, 517 U.S. at 962. Absent proof that the legislature "substantially neglected" traditional districting criteria, strict scrutiny does not apply. *Id.* Indeed, states can avoid strict scrutiny altogether by respecting their own traditional districting principles, and nothing limits a state's discretion to apply those principles in the creation of majority-minority districts. *Id.* at 978.

Traditional redistricting criteria include "compactness, contiguity, and respect for political subdivisions." *Stephenson I*, 355 N.C. at 371, 562 S.E.2d at 389 (quoting *Shaw I*, 509 U.S. at 647). 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)). Jurisdictions are perfectly free to "engage

in constitutional political 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 II*, 517 U.S. at 905; *Shaw I*, 509 U.S. at 646).

Consistent with these principles, "[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. 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.

Even assuming plaintiffs prove that race was the predominant motive underlying the drawing of district lines, a state may still defend any challenged district where the district or plan furthers a compelling governmental interest and is "narrowly tailored" to

further that interest. *Shaw II,* 517 U.S. at 908 (citing *Miller,* 517 U.S. at 920). A redistricting plan furthers a compelling interest if the challenged districts were "reasonably necessary" to obtain preclearance of the plan under Section 5 of the VRA. *Shaw I,* 509 U.S. at 655. A plan or district also survives strict scrutiny when the challenged plan or district 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" in support of its contentions that challenged districts were enacted to avoid preclearance objections or liability for vote dilution claims under Section 2. *Shaw II,* 517 U.S. at 910 (citing *Wygant v. Jackson Bd. of Educ.,* 476 U.S. 267, 274-75 (1986)). Whether a state had a strong basis for drawing districts predominately based upon race depends upon the evidence before the legislature when the plans were enacted. *Id.* (expert testimony prepared after the lawsuit was filed and which, therefore, could not have been considered by the legislature when it enacted redistricting plan is irrelevant); *Cromartie II,* 133 F. Supp. 2d at 422 (finding by district court that the legislature had a strong basis in the legislative record to conclude that the 1997 version of the CD 1 was reasonably necessary to avoid Section 2 liability).

A court must consider several important principles of judicial review when it evaluates whether a legislature had a strong basis in the legislative record for concluding that majority-minority districts were reasonably necessary to avoid liability under the VRA. First, the General Assembly is not required to have proof of a certain Section 2

violation before drawing districts to avoid Section 2 liability. To the contrary, "deference is due to [states'] reasonable fears of, and to their reasonable efforts to avoid, Section 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.*

Second, the "narrow tailoring" requirement of strict scrutiny allows a state a limited degree of "leeway." *Vera,* 517 U.S. at 977. If a state has a "strong basis in evidence," *Shaw I,* 509 U.S. at 656, for concluding that creation of a majority-minority district is reasonably necessary to comply with Section 2 or avoid litigation under Section 2, it satisfies strict scrutiny. Narrow tailoring does not require that "a district" have the "least possible amount of irregularity in shape, making allowances for traditional districting criteria." *Vera*, 517 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 district that is based on a reasonably compact minority population, and that also takes into account traditional redistricting principles "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.

Third, in a Section 2 lawsuit, a court may not impose a majority-minority district as a remedy to vote dilution unless it is necessary under the "totality of those

circumstances." *Shaw II*, 517 U.S. at 914. None of the Supreme Court's racial gerrymandering decisions have imposed the "totality of the circumstances" requirement upon a state legislature. Instead, legislatures have the discretion to enact majority-minority districts if there is a strong basis in the legislative record of the "*Gingles* preconditions," *i.e.*, that : (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) that the group is politically cohesive; and (3) that racial bloc voting usually will work to defeat the minority's "preferred candidate." *Vera,* 517 U.S. at 978; *Growe,* 507 U.S. at 25, 40, 41; *Johnson v. De Grandy*, 512 U.S. 997, 1006-08 (1994).

Fourth, even when the plaintiff shows that race was the predominant motive, the burden of proving the unconstitutionality of the district or plan remains with the plaintiff. In *Shaw II*, the Court held that there must be a strong basis in the legislative record to support a legislature's decision to adopt majority-minority districts predominantly drawn because of race. *Shaw II*, 517 U.S. at 910. The Court in *Shaw II* based this holding on the Court's decision in *Wygant.* In *Wygant*, the Court evaluated the constitutionality of an affirmative action plan that applied to layoffs from employment. Foreshadowing the decision in *Shaw II*, in *Wygant* the Court held that a government must show a strong basis in evidence for adopting race-based employment policies. *Wygant*, 476 U.S. at 277. However, the Court also noted that once the government makes such a showing, "[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 that the enacted plans were unnecessary to avoid an objection under Section 5

or potential liability under Section 2 do "not automatically impose upon" the legislature "the burden of convincing the court" that its decision to adopt majority-black districts had a reasonable basis in evidence. *Wygant*, 476 U.S. 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.* Plaintiffs "continue to bear the ultimate burden of persuading the court that the [State's] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently 'narrowly tailored.'" *Id.* at 293. Even assuming plaintiffs can prove that race was the predominant motive behind the drawing of any of the challenged districts, plaintiffs bear the burden of proving that the plan or district was not reasonably created to avoid an objection under Section 5 or to insulate the state from liability under Section 2.

Thus, as applied to a case involving alleged racial gerrymandering, plaintiffs must carry their "heavy burden" of proving that race was the predominant motive. If plaintiffs carry this burden, a state can respond by showing a strong basis in the legislative record to support its conclusions that the challenged plans or districts were reasonably necessary to avoid an objection under Section 5 or liability under Section 2. Once a state makes this showing, plaintiffs must prove that the legislature lacked an evidentiary basis for the plans and that the districts were not reasonably tailored to avoid an objection under Section 5 or potential Section 2 liability. At all times, the burden of proof remains on plaintiffs to demonstrate the unconstitutionality of any plan or specific district. *Shaw II*, 517 U.S. at 910 (citing *Wygant*, 476 U.S. at 277).

B. Race was not the predominant motive for either CD 1 or CD 12.

1. The Supreme Court's decision in *Alabama* supports North Carolina's position on the racial predominance issue.

In *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. ___, 135 S. Ct. 1257 (2015) ("*Alabama*"), the Court, relying upon *Shaw I*, and its progeny, including *Miller*, *Shaw II*, *Vera*, and *Cromartie II*, reversed and remanded a decision by the trial court affirming certain majority-black districts enacted by the State of Alabama in 2012. The Court held that claims of racial gerrymandering require an evaluation of whether "race was improperly used in the drawing of the boundaries of one or more specific electoral districts." *Alabama*, 135 S. Ct. at 1265. The fact that "Alabama expressly adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria (save one person, one vote) provides evidence that race motivated the drawing of particular lines in multiple districts . . . ." *Id.* at 1267.[9] But evidence of a legislative statewide goal for VRA districts does not "transform a racial gerrymandering claim about a set of individual districts into a separate, general claim that the legislature racially gerrymandered the State as an undifferentiated 'whole.'" *Id.*

The Court also reaffirmed that plaintiffs must prove that race was the "predominant factor motivating the legislature's decision to place a significant number of voters within or without a district." *Id.* at 1270 (citing *Miller*, 515 U.S. at 916). To do so, the "plaintiff must prove that the legislature subordinated traditional race-neutral

[9] The "mechanical racial target" was Alabama's legislative decision to keep all majority-black districts at the same or higher super-majority levels of BVAP based upon Alabama's incorrect interpretation of Section 5.

districting principles . . . to racial considerations." *Id.* Traditional race-neutral districting principles include "compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, . . . *incumbency protection and political affiliation.*" *Id.* (citing *Vera*, 517 U.S. at 914) (emphasis added).[10] The Court then found that the district court's sole reliance on Alabama's equal population criteria as evidence that race did not predominate in the creation of other district was in error.

The United States Supreme Court observed that Alabama's Senate District 26 (BVAP of 72.7%) was "the one district that the parties . . . discussed . . . in depth." *Id.* at 1271. The Court concluded that other than the legislature's rule on equal population, the record contained no evidence that any other neutral redistricting criteria played any role in the construction of this district. While the legislative leaders had adopted criteria stating that districts should follow county lines and be based upon whole precincts, neither criterion was followed in the construction of Senate District 26. *Id.* at 1271-72.

As discussed below, neither of the challenged North Carolina congressional districts were the product of a "mechanical racial target" and the state offered and proved numerous traditional redistricting criteria that explain the shape and location of the districts.

[10] Traditional or race-neutral redistricting criteria are not constitutionally required. *Shaw I*, 509 U.S. at 647. Instead, neutral redistricting criteria "are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines." *Id.*

2. Race was not the predominant motive for CD 12.

In drawing the 2011 CD 12, the North Carolina General Assembly was not operating on a clean slate. The 2011 legislature essentially inherited CD 12 and its long, tortured litigation history from prior General Assemblies.

In light of the long history of CD 12, the legislature created the 2011 CD 12, just like the 1997 and 2001 versions, as a very strong Democratic district. Even though the district court had rejected the testimony of the legislative redistricting chair, that the high black population in CD 12 was coincidental, in 2001, the United States Supreme Court ruled that the 1997 version of CD 12 was not a racial gerrymander because the 1997 General Assembly had created this district to be a strong Democratic district. Politics and not race was the predominant factor. *Cromartie II*, *supra*. The 1997 and 2001 versions of CD 12 were drawn by a Democratic-controlled General Assembly while the 2011 version was drawn by a Republican-controlled General Assembly. The 2011 version is based upon populations in the same counties used to construct both the 1997 and 2001 versions of CD 12. Over 67% of the population in the 2011 CD 12 had previously been assigned to the 2001 version. (D-2.31)[11] The 2011 General Assembly accomplished its political goals by moving voters who supported Republican presidential candidate, John McCain, in 2008 out of the district and replacing them with voters in other 2001 congressional districts who supported President Obama. The State used this criterion because the 2011 General Assembly intended to create districts that adjoined the

[11] Moreover, in adopting CD 12, the legislature intended to accommodate the wishes expressed by Congressman Watt, as it understood them, by modeling the 2011 CD 12 on the 2001 CD 12. (Doc. Ex. 1228-29 ¶ 41; D-72, p. 30)

2011 CD 12 that were better for Republicans than the adjoining versions enacted by Democratic-controlled General Assembly in 1997 and 2001. While the 1997 and the 2001 General Assemblies intended to make CD 12 a strong Democratic district, they also intended to make the districts adjoining CD 12 more favorable for Democrats. Politics was the prime motivation for this district in 1997, 2001, and 2011, but the political interests of the 1997 and 2001 Democratic-controlled General Assemblies were different than the Republican-controlled General Assembly in 2011. (Tr. pp. 477-93; D-26.1, Maps 2 of 3; *See also* P-857, pp. 185-86; Doc. Ex. 2016 Vol. I, p. 151; D-130, ¶ 5)

In addition, because one of the counties in CD 12 (Guilford) was covered by Section 5 of the VRA, the fact that CD 12 ended up with a higher black VAP than the prior version ensured that the plan would be precleared. The joint statements issued by the legislative redistricting chairs do not show that CD 12 was intentionally drawn over 50% under the guise of complying with the VRA. The co-chairs never stated that one of their goals was to draw CD 12 to have an any part black VAP in excess of 50%. Instead, in their July 1, 2011 statement, the co-chairs noted that Guilford County, which was located in the 2001 CD 12 and continues to be located in the 2011 CD 12, was a covered jurisdiction under Section 5. The co-chairs' statement only explained that the any part black VAP for the enacted 2011 CD 12 was higher than the any part VAP for the 2001 version and that this would ensure preclearance under Section 5. In making their argument, the 2011 redistricting chairs merely repeated similar arguments by legislative

leaders in 2001 that the 2001 version should be precleared because the 2001 CD 1 and 12 had higher black populations than the 1992 versions.[12] (D-59, pp. 17-19)

Defendants have never suggested that the enacted 2011 CD 12 was designed to protect the State from liability under Section 2. In fact, it would defy common sense to make such an argument given prior rulings by the Supreme Court that prior versions of CD 12 were not compact and not located in an area of the state where a remedy for vote dilution was available. The fact that the percentage of any part black VAP for this district increased in 2011, as compared to the 2001 version, is strictly a function of making the 2011 version an even stronger Democratic-performing district. (Doc. Ex. 1228-29 ¶ 41; D-130, ¶ 5; P-857, pp. 185-86; P-1493, pp. 203-04; Doc. Ex. 2016 Vol. I, p. 151) Nothing has changed since *Cromartie II*. There remains a very high correlation between African American voters and voters who regularly vote a straight Democratic ticket and support national Democratic candidates like President Obama. (Arrington Dep. pp. 57-61, 63, 95-96)[13] The fact that there is a very high correlation between African Americans and the racial breakdown of straight-ticket Democrats does not show that the district was drawn to comply with *Strickland* or that race was the predominant factor in drawing the district. *Cromartie I*, 526 U.S. at 549-52 (racial composition of district does

[12] There is also a question of whether the 2011 CD 12 is a "majority black" district. Throughout the trial, Plaintiffs relied upon the single race black VAP for the 2001 CDs 1 and 12 under the 2000 census. Under the 2010 census, the 2011 CD 12 is slightly below a majority single race black VAP (49.59%). (D-126, Tab 12, p. 3)

[13] The deposition of Dr. Theodore Arrington is contained on the Dickson v. Rucho record DVD filed with the North Carolina Supreme Court and moved into evidence in this trial. The deposition may be accessed at ROA/NativeFormat/CDs/PS83/Depositions/ArringtonDeposition.

not prove racial gerrymander where there is a high correlation between race and party preference).

Other than the fact that there is a high correlation between African Americans and those who vote for Democratic candidates, plaintiffs can offer no evidence that race was a factor motivating the legislature's decision on which voters should be included in the 2011 CD 12. *Cromartie II*, 532 U.S. at 242. The 2011 CD 12 is not unexplainable on grounds other than race. *Id.* But even assuming plaintiffs could prove that race was the predominant motive, they have failed to offer alternative plans that achieve the political goals of the 2011 Republican-controlled General Assembly. *Id.* Plaintiffs' claims regarding CD 12 are thus unfounded.

3. Race was not the predominant motive for CD 1.

Plaintiffs' argument that race was the predominant motive for CD 1 is based upon comments by legislative leaders that they intended to create VRA districts with an any part black VAP in excess of 50% to protect the state from liability under Section 2. The Court in *Alabama* clarified that general legislative goals for VRA districts do not prove that race was the predominant motive for a specific district. *Alabama*, 135 S. Ct. at 1270-71. This is because predominant motive cannot be established because a legislature enacted a district with a "consciousness of race" or created a majority-black district to comply with federal law. *Vera, supra.* Moreover, unlike the 70%+ black VAP district at issue in *Alabama*, the North Carolina General Assembly used other criteria besides equal population and race to construct the 2011 CD 1. CD 1 is based upon several legitimate

districting principles which were not subordinated to race and the district is not unexplainable but for race.

First, the 2011 version of CD 1 is based upon the core population from the 2001 version. (D-2, p. 4, ¶ 9; D-2.3) (76% of the population in the 2001 CD 1 is included in the 2011 CD 1) These persons were not assigned to the district solely because of their race. The 2011 General Assembly used the core of the "old" district to form the "new" district. Basing a new district on an old district is a traditional and legitimate districting principle. *Karcher,* 462 U.S. at 740.

Second, an exact replica of the 2001 version of CD 1 could not be adopted in 2011 because the 2001 version was under-populated by over 97,000 people. To remedy this deficiency, even the NC NAACP recognized that drawing the district into RTP was a legitimate goal. (D-2, p.2) Indeed, a commenter at a public hearing had suggested such a solution to the population deficiencies of this district. The past and future population growth in North Carolina has been and will be more rapid in urban as compared to rural areas. Thus, the legislative leaders decided to draw CD 1 into the RTP area to address the massive under-population of the district not only under the 2010 Census but in the future. Following public hearings, the legislative leaders decided to move the district from Wake County to Durham County to address objections made by an incumbent Congressman and speakers at a public hearing and to advance their political goals for districts adjacent to CD 1. Accommodating a request from an incumbent regarding the location of his district's lines and partisan considerations are neutral and legitimate

redistricting criteria that have nothing to do with race. *Alabama*, 135 S. Ct. at 1263, 1270; *Shaw I*, 509 U.S. at 646-47.

The legislative leaders also intended to make this district a safer district for the incumbent and any other Democratic candidate. (D-72, pp. 26-33, 40-44 [1 July 2011 Joint Statement and 19 July 2011 Joint Statement]) Incumbent protection is a legitimate districting principle. *Alabama*, 135 S. Ct. at 1263, 1270; *Vera*, 517 U.S. at 964-65; *Stephenson I*, 355 N.C. at 371(citing *Gaffney*, 412 U.S. at 735). The legislative leaders also understood that making the district a safer Democratic district would make surrounding districts more competitive for Republicans. (D-72, pp. 19-25 [22 June 2011 Joint Statement]) Partisan advantage is also a legitimate redistricting principle. *Alabama*, 135 S. Ct. at 1263, 1270; *Vera*, 517 U.S. at 964-65, 968.

Moreover, simply looking at the district demonstrates that the overall shape of the district was based on the 2001 version of CD 1. CD 1 was drawn as a VRA District in 2001 and the General Assembly took the same course with the current district. (Tr. 479). To the extent that the enacted CD 1 differs from the 2001 version, much of the difference can be explained by the legislature's desire to honor requests and address concerns of incumbent Congressmen and the public. For instance, during the redistricting process, the legislative co-chairs understood Congressman Butterfield, the incumbent in CD 1, to initially request that population from Wake County be added to the district to address the under-population issues. After the legislature released its first draft of CD 1, Congressman Butterfield complained that he had not expressed a preference for Wake County and that voters covered by Section 5 of the VRA had been removed.

Consequently, the district was modified to include more population covered by Section 5. (D-25.8 ¶ 50)

Despite the requirements of *Cromartie,* plaintiffs have proposed no alternative plans which would have achieved the legislature's goal of making the districts surrounding CD 1 more competitive for Republicans while making CD 1 allegedly more racially balanced. For that reason alone, plaintiffs cannot meet their burden of demonstrating that race predominated the drawing of CD 1.

This evidence demonstrates that several legitimate redistricting criteria reasons other than race were used to assign voters to this district. Defendants are therefore entitled to judgment in their favor without regard to whether this district furthers a compelling interest.

4. Dr. Peterson's deeply flawed expert testimony is irrelevant and does not establish racial predominance.

The primary legal issue in analyzing plaintiffs' racial gerrymandering claims is whether race was the *predominant* motive in the legislature's districting choices. However, as to both CD 1 and CD 12, Dr. Peterson admitted that he *did not and could not* conclude that race was the predominant motive in drawing the districts. (D-122, pp. 86-91) Rather, Dr. Peterson rendered the limited opinion that race "better accounts for" the boundaries of those districts than the political party of voters. (D-122, pp. 205-23) That is not the legal standard. The law requires that race *predominated,* and that *all* other considerations, not just politics, were subordinated to race. Dr. Peterson's evidence is therefore of little to no use to this Court in this case.

Dr. Peterson's evidence in this case is rendered even less relevant because he did not conduct the same two-part study he employed in *Cromartie*. In that case, Dr. Peterson performed his segment analysis, relied upon by the plaintiffs in this case, and an analysis comparing race with partisan voting behavior. In *Cromartie II*, the Supreme Court reversed the district court's decision that CD 12 was an illegal racial gerrymander. The Supreme Court noted that the district court's criticism of Dr. Peterson focused on his segment analysis as opposed to Dr. Peterson's study on the voting behavior of African Americans. *Cromartie II,* 532 U.S. at 252. Without regard to Dr. Peterson's segment analysis, the Supreme Court in *Cromartie II* concluded that the evidence before the District Court did not prove a racial gerrymander "because race in this case correlates closely with political behavior." *Id.* at 257.

Because the Supreme Court relied on evidence showing a correlation between race and politics, including Dr. Peterson's analysis of that issue, Dr. Peterson's segment analysis was never subjected to any serious scrutiny by that Court. Significantly, in this case Dr. Peterson did not even study whether race continues to correlate closely with political behavior, (D-122, pp. 110-11), even though it could be dispositive under the holding in *Cromartie II*.

While Dr. Peterson in this case declined to examine any correlation between race and voting behavior, other witnesses did provide such evidence. (Arrington Dep. 57-61, 63, 77, 95; D-5.7, p. 2 (testimony by AFRAM's counsel); D-5.8 (expert report by Dr, Ray Block); D-5.9, pp. 12-13 (written statement by AFRAM's counsel); D-5.10 (expert report by Dr. Thomas Brunell)) This evidence demonstrates that, as in *Cromartie*,

African Americans continue to be highly reliable Democratic voters. Based upon this evidence, as in *Cromartie*, the plaintiffs here simply cannot prove that the legislature drew the districts' boundaries "because of race *rather than* because of political behavior." *Cromartie II*, 532 U.S at 257 (emphasis in original).

Moreover, Dr. Peterson's statement that race better explains the challenged districts than politics is contradicted by his own segment analysis. Out of twelve studies conducted by Dr. Peterson of CD 12, six favored the race hypothesis and six did not favor it. (D-122, p. 210, ¶ 15) Thus, Dr. Peterson's own data demonstrates that as between race and party, his study was inconclusive. Moreover, in those instances in which Dr. Peterson's data was unequivocal, the race-versus-party explanation was at best a tie. (D-122, pp. 100-01, 210, ¶ 16, 245-46, ¶ 16) Dr. Peterson even conceded that the race and political hypotheses have *equal* support under his segment analysis and that one could therefore not better account for the boundary than the other. (D-122, pp. 100-01)

More importantly, when limited to the information that the legislature's mapdrawing consultant, Dr. Hofeller, actually used during the mapdrawing process (voting age population and election results for President Obama in 2008), Dr. Peterson's own data shows that the *party* hypothesis is a *better* explanation for the boundaries of CD 12. The same data show that the race hypothesis and the party hypothesis are tied in the analysis for CD 1. (D-122, pp. 113-15)

The plaintiffs' burden of proof in this case is far more demanding as compared to the State's burden of production in *Cromartie*. In *Cromartie*, Dr. Peterson was an expert for the State. The State was attempting to justify CD 12 as a political district, not a racial

district. The State's burden in that case was simply to offer evidence that a motivation other than race might explain the district's shape. In *Cromartie*, using both his segment analysis and data correlating African American voting behavior, Dr. Peterson did not conclude that politics was the "predominant motive" but only that politics "better explained" the district than race.

Dr. Peterson's role in this case is completely different than his role of State's expert in *Cromartie*. Here, Dr. Peterson is assisting the parties challenging the plans, not the State defending the plans. In this posture, Dr. Peterson's clients have the burden of proving that race was the predominant motive for the challenged districts. In *Cromartie*, Dr. Peterson's client, the State, had the opposite burden – that of producing evidence showing that motivations other than race contributed to the shape and location of the challenged districts. Unlike *Cromartie*, where Dr. Peterson concluded that politics was a "better explanation" than race, his conclusion here that race "better accounts for" the shape of the district falls woefully short of plaintiffs' burden of proving predominant motive.

That Dr. Peterson's conclusions in this case are so unhelpful should not be surprising – his analysis was not nearly as important to the *Cromartie* case as the plaintiffs here would lead the Court to believe. The decision in *Cromartie II* is based on evidence showing a correlation between African Americans and voters who support Democratic candidates. The decision is not based upon Dr. Peterson's segment analysis.

Thus, Dr. Peterson's segment analysis has not been "accepted" by the Supreme Court nor has it been subjected to any serious scrutiny by that Court.[14]

5. Dr. Ansolabehere's deeply flawed testimony also does not establish racial predominance.

The Court does not credit the testimony of plaintiffs' primary witness, Dr. Stephen Ansolabehere, that race was the predominant motive for either CD 1 or CD 12.

Dr. Ansolabehere has never drawn a redistricting plan for a state legislature or for a person or party to introduce before a state legislature. (Tr. 342) The only times Dr. Ansolabehere has drawn a district or a districting plan has been as an expert witness. (Tr. 343, 404) Dr. Ansolabehere admitted at his deposition that the United States Supreme Court in *Cromartie I* and *II* found that election results were better predictors of future voting behavior than party registration. (Tr. 338) In another recent case, Dr. Ansolabehere admitted that his expert report was based upon actual election results. (Tr. 348) Dr. Ansolabehere even admitted, at his deposition, that prior to finalizing his report in this case he had reviewed the percentage of McCain voters from the 2008 Presidential Election in the vote tabulation districts moved into and out of CD 12. (Tr. 390-91)

Despite his understanding of the *Cromartie* decision, his expert testimony in another case, and his review of the percentage of McCain voters in VTDs moved into and out of North Carolina's CD 12, in his expert reports in this case Dr. Ansolabehere did not review or explain any election results – either as the 2001 version of CD 1 and CD 12

[14] During the trial of this matter, defendants identified numerous fatal flaws in Dr. Peterson's methodology. (Tr. 233-52, 551-54) These flaws were not the focus of the Supreme Court in *Cromartie*. Dr. Hofeller also explained several of these flaws in his trial testimony in this case. (Tr. 551-54) Plaintiffs did not recall Dr. Peterson as a witness to rebut any of Dr. Hofeller's criticisms of Dr. Peterson's analysis.

compared to the 2011 versions or in the VTDs moved out of or into either district. (Tr. 347, 348, 389, 407) Instead, Dr. Ansolabehere attempted to prove racial predominance by evaluating racial and registration statistics. (Tr. 341, 348) Dr. Ansolabehere admitted that African Americans who vote for Democratic candidates tend to be in the 90 percent range (Tr. 379), but white Democrats vote for Democratic candidates at a "much lower rate" than African American voters. (Tr. 380) He also agreed that all African American voters vote for the Democratic candidate at a much higher rate than all white voters. (Tr. 381) Despite these admissions, Dr. Ansolabehere testified that an equal number of white and black voters should be moved into or out of CD 1 and CD 12 if the motive of the map drawer was to make a stronger Democratic district. (P-17, p. 9, ¶¶ 20, 21; Tr. 382-83) This testimony and Dr. Ansolabehere's entire report, which is based upon a theory already rejected by the Supreme Court, is not credible and does not warrant acceptance by the Court.

Even assuming Dr. Ansolabehere's testimony raised the possibility of racial predominance in either district, Dr. Ansolabehere failed to examine the political policy goals of the 2011 General Assembly or prepare a map less reliant on race that would still achieve the policy goals of the 2011 General Assembly. *Cromartie II*, 532 U.S. at 258.

Neither the plaintiffs nor Dr. Ansolabehere offered an alternative redistricting plan based upon criteria they believe to be legal. (Tr. 369) Nor did Dr. Ansolabehere ever attempt to analyze the political impact of the 2011 CD 1 or 12 on adjoining districts or compare the political balance of the 2001 plan versus the 2011 plan. (Tr. 358-59) He

cannot explain how political consideration related to the drawing of other 2011 district may have impacted the changes made in the 2011 CD 1 and CD 12. (Tr. 359, 363)

For example, Dr. Ansolabehere has no answer for Dr. Hofeller's testimony that strongly Democratic performing VTDs in Mecklenburg County were removed from the 2001 version of CD 8 and placed into the 2011 version of CD 12 to make the 2011 version of CD 8 stronger for Republicans. (Tr. 535-36, 562; D-26.1, Maps 2 of 3) Nor did Dr. Ansolabehere consider that strong Democratic VTDs in Forsyth County included in the 2001 version of CD 12 were transferred to the 2011 version of CD 5 because the 2001 version of CD 5 was packed with Republican voters and could absorb new Democratic voters while remaining a strong Republican district. (Tr. 496, 560-62) Similarly, Dr. Ansolabehere did not account for the removal of a strong 2001 Democratic district from Guilford County (CD 13) and the inclusion of strongly performing precincts from the 2001 CD 13 into the 2011 CD 12 to protect Republican voting strength in CD 6. (Tr. 495-96, 536-41; D-26.1, Maps 2 of 3, 4-19) Dr. Ansolabehere also did not investigate which party's candidates won in 2010 versus 2012 in CD 8 and 13, two districts that bordered the 2001 version of CD 12. (Tr. 150-52, 360-61) In short, Dr. Ansolabehere did not even attempt to determine how the drawing of other districts may have impacted the shape or location of the 2011 CD 1 and 12, the legitimate political goals of the 2011 General Assembly versus the 2001 General Assembly, or how the 2011 General Assembly's political goals could have been achieved by an alternative map.

In addition to comparing registration and racial statistics for VTDs moved into and out of CD 1 and 12, Dr. Ansolabehere also employed a theory he describes as an

"envelope" analysis. The reports prepared by Dr. Ansolabehere seem to indicate that the envelope consists of the counties in which the district is located. After establishing the envelope for the district, Dr. Ansolabehere then compared the racial percentage of people within the envelope who reside inside or outside of the district. Again, despite the very high Democratic voting patterns of African American voters as compared to whites, Dr. Ansolabehere repeated his unsupportable assumption that the racial and registration percentages of voters within the envelope should be the same, both inside and outside of the district. (P-17, p. 9, ¶ 20)

As this analysis relates to CD 12, Dr. Ansolabehere ignores that a strong Democratic district located within the six counties, similar to the 1997, 2001, and 2011 versions of CD 12, are certain to have a higher percentage of African American voters than other districts created in those same six counties (Mecklenburg, Cabarrus, Rowan, Davidson, Forsyth, and Guilford). For example, under the 2010 Census, the 2001 version of CD 12 had an any part black voting age population of 42.81%. (Tr. 453-54; P-80) In comparison, all of the districts that adjoined the 2001 version of CD 12 had a much lower percentage including districts formed within the 2001 "envelope." For example, under the 2010 Census, the any part black VAP for these districts is: 2001 CD 8 – 27.95%; 2001 CD 9 – 14.70%; 2001 CD 5 – 7.78%; 2001 CD 6 – 10.21%; 2001 CD 13 – 28.22%. (D-126 Tab 6 p. 3 of 8 (voting age population)). The district within the 2001 envelope with the next highest BVAP, the 2001 CD 13, was a Democratic gerrymander, drawn from Wake County to Guilford County, by the redistricting chair of the North Carolina Senate, Brad Miller, who then was elected to Congress from this district. (Tr. 150-52,

490) It is not disputed that the 2001 CD 12 was based upon the 1997 CD 12 found to be legal in *Cromartie II*. Dr. Ansolabehere admits that he did not subject the 1997 plans, or any of the alternative 2011 plans, to his "envelope" analysis. (Tr. 361, 383, 387) But under Dr. Ansolabehere's envelope theory, both the 1997 versions of CD 12 and its progeny, the 2001 version, would be illegal racial gerrymanders because the percentages of BVAP in the adjoining "envelope" districts were all lower than the percentage of African Americans in CD 12.

Regarding CD 1, Dr. Ansolabehere's envelope theory is not credible for another reason. Unlike the 2001 and 2011 versions of CD 12, the 2001 and 2011 versions of CD 1 were not located in the same counties. In making his comparison of the 2001 and 2011 versions of CD 1, Dr. Ansolabehere created an envelope consisting of a "super set" of counties. (Tr. 393-94) The 2001 version of CD 1 did not include Durham County. Yet Dr. Ansolabehere included Durham County in the "super set" envelope he used to compare the amount of population within the envelope that was inside or outside of CD 1. Dr. Ansolabehere did not disclose in his report the inclusion of Durham County in the super set used to evaluate the number of African Americans in the envelope who resided inside or outside of the 2001 CD 1. (Tr. 394-96) The Court can take judicial notice that all of the counties included in either the 2001 or 2011 CD 1, Durham County is one of the largest in population. (Tr. 546) Thus, by including Durham County within the envelope used to evaluate the 2001 CD 1, Dr. Ansolabehere substantially inflated the percentage of registered voters who are African Americans located outside of the "envelope" for the

2001 CD 1 as compared to the 2001 version. (P-17, pp. 24, 25, 34, 35, Tables 3, 4, 5, and 6; Tr. 544-46)

In truth, Dr. Ansolabehere actually provided testimony that strongly supports defendants' position that the 2011 CD 12, like the 1997 and 2000 versions, was based upon politics and not race. For example, Dr. Ansolabehere admitted that the percentage by which Congressman Watt and Congressman Butterfield won their districts in 2012 increased. (Tr. 362) He also "expects" that in 2008, Senator McCain received more votes in the VTDs moved out of CD 12 than in the VTDs moved into the districts. (Tr. 390-91) Dr. Ansolabehere admitted that he never reviewed any of the statements by the redistricting co-chairs or the testimony of the co-chairs of Dr. Hofeller in *Dickson v. Rucho*. (Tr. 346) In his deposition, Dr. Ansolabehere candidly admitted that he examined "effects rather than, you know what individuals were doing at the time." (D-24, p. 56) Having been trained in the software program used by Dr. Hofeller to draw the 2011 Congressional Plan, Dr. Ansolabehere admitted that the map drawer can isolate on the computer screen the information they want to review. (Tr. 343-44) He agreed the map drawer could review election results for every VTD and that racial data would not be available to the map drawer if they relied only on election results. (Tr. 345) He admitted that if a map drawer looks only at election results he would be unable to determine the race of the voters who supported one candidate as opposed to the other candidate. (Tr. 401)

Dr. Ansolabehere used two different compactness tests to evaluate CD 1 and CD 12. Whether or not CD 12 is "compact" is irrelevant because defendants have never

argued that CD 12 is a VRA district based upon a reasonably compact minority population. Clearly, under *Shaw II*, none of the versions of CD 12 starting in 1992 and continuing through 2011, are based upon a reasonably compact minority population.

Regarding CD 1, Dr. Ansolabehere conceded that a Reock score of over .20 is not considered "non-compact." (Tr. 354, 358) Dr. Ansolabehere confirmed that the Reock score for the 2011 CD 1 (.29) was higher than the Reock score for the 1992 CD 1 (0.25). (Tr. 352) He could provide no legal authority that the 2011 CD 1 is "substantially" less compact than the 2001 CD 1 which had a Reock score of .39. (Tr. 352-53) In *Cromartie II*, the Reock score for the 1997 version of CD 1 was .317. *Cromartie II*, 133 F. Supp. 2d at 416. In *Cromartie II*, the district court found that the 1997 CD 1 satisfied all of the *Thornburg* conditions, including the Court's opinion that it was based upon a compact minority population. *Id.* at 423. Dr. Ansolabehere agreed that he would not consider a decline in a Reock score from .319 to .29 to be "substantial." (Tr. 356)

Dr. Ansolabehere also agreed that the 2011 CD 1 scored better on the Reock test than two 2001 Congressional Districts (CD 12 and CD 13) with no substantial difference between the 2011 CD 1 and the 2001 CD 2. (Tr. 357) He agreed that five 2011 congressional districts scored lower on the Reock test than the 2011 CD 1. (Tr. 357) Under his version of the "ratio of area to perimeter" test, regardless of whether his software measured districts by miles or meters, the 2011 CD 1 was more "compact" than the 2001 versions of CD 9, 12, and 13 and more "compact" than the 2011 version of CD 4, 9, 12, and 13. (Tr. 368-69)

In his second report, and even though Dr. Ansolabehere has never drawn a redistricting plan for a legislature, he criticized Dr. Hofeller for only relying on the 2008 Obama-McCain presidential election to evaluate VTDs located in the 2011 CD 12. (P-18, pp. 4-7, ¶¶ 12-20) Dr. Ansolabehere essentially argues that using the Obama-McCain race is evidence that race was the predominant motive because President Obama was the first African American to run for President. (*Id.*) Dr. Ansolabehere offered no other evidence that reliance on a Presidential election to test Democratic voting strength shows that racial consideration predominated in the minds of Dr. Hofeller or the redistricting chairs. In addition, Dr. Ansolabehere's argument ignores that a map drawer can only see one election on the computer screen as the map drawer is evaluating the VTDs to include or exclude from a district. (Tr. 662) Dr. Hofeller, an expert in drawing redistricting maps, has often used the results from only one election to draw redistricting plans. (Tr. 502) Dr. Hofeller used the 2008 Obama-McCain election because it was a presidential election with very high turnout. A high turnout presidential election is a better way to predict future voting patterns than other elections. (Tr. 501-02) But regardless, before he began the map drawing process, Dr. Hofeller reviewed other major elections including the 2008 Governor and Senate races and determined that they largely tracked the same results for individual VTDs as the 2008 Presidential Election. (Tr. 502, 649, 650)

Dr. Hofeller's testimony that a correlation of Democratic voting strength exists between the results of the 2008 Presidential election and other major elections can be confirmed by a review of the statistical packages made available to the General Assembly prior to the enactment of the 2011 Congressional Plan. (*See* D-22, Congressional, Tab 1,

2011 Enacted Plan, pp. 7, 8; Tab 2, 2001 Enacted Plan, pp. 7, 8) These reports show the election results for statewide elections in 2008 within the 2001 CD 1 and 12 as well as within the 2011 CD 1 and 12. A comparison of these results show that the vote for each Democratic candidate (President, Governor, Senate, Lt. Governor, Attorney General, Commissioner of Agriculture, Commissioner of Labor, Auditor, Commissioner of Insurance and Superintendent of Public Instruction) sharply increased in the 2011 versions of CD 1 and CD 12 as compared to the 2001 versions and that in almost every instance the increase of the Democratic vote percentage was higher than the increase in both districts of either single black race VAP or any part black VAP. The compilation also shows that the highest increase in Democratic vote occurred in the highest turnout election, the 2008 presidential election, making it the best election for a map drawer to use if his goal was to make the 2012 CD 12 a very strong Democratic district. See Appendix A, attached.

In his second report, after he had reviewed Dr. Hofeller's first report criticizing him for using registration statistics instead of election results, Dr. Ansolabehere continued to refuse to examine election results. Instead, he performed a correlation analysis claiming that African American registration correlates better with Obama voters than does voting age population. Dr. Ansolabehere did not include his calculations with his report and therefore they could not be confirmed. Dr. Hofeller testified during cross-examination that he could not replicate Dr. Ansolabehere's correlations. (Tr. 409, 606) Regardless, Dr. Ansolabehere admitted that he did not attempt to correlate African American voting age population or registration with actual turnout. (Tr. 411) He also

admitted that his correlation could be skewed because of the number of voting age African Americans who are not registered or the number of registered African Americans who do not vote. (Tr. 411, 412)

Dr. Ansolabehere also attempted to show that race was the predominant motive for the 2011 CD 1 based upon the racial composition of only one county, Durham County, that is included in the 2011 CD 1. Unsurprisingly, a higher percentage of Durham County's African-American voters reside within the 2011 CD 1 as compared to those who reside in another district. This is the inevitable result of drawing a majority-black district. (Tr. 542) In drawing CD 1, Dr. Hofeller had to add at least 97,500 people to cure the district's under-population. He was instructed to include Durham in the 2011 version to mitigate any future under-population a completely rural district might experience once again before 2021. As discussed, Dr. Hofeller also drew the district into Durham County so that strong Democratic areas of Wake County could be included in another strong Democratic district, the 2011 version of CD 4. The enacted version of CD 1 was also modified to respond to criticisms by Congressman Butterfield that the first version of CD 1, published by the co-chairs on July 1, 2011, reduced the number of voters living within that district who also resided in counties covered by Section 5.

Dr. Ansolabehere did not analyze how the black/white population was divided in any other county in any other version of CD 1 including the 2001 version or any of the alternative 2011 proposals made by the NAACP or the Democratic leadership. (Tr. 414) Dr. Hofeller performed such an analysis. (Tr. 547-51; D-114) This analysis shows that all versions of CD 1 divided counties in the formation of the district. In almost every

instance, for every divided county, the percentage of the African American population within each version of CD 1 was higher than the percentage of the African American population residing in the county outside of the district. The largest discrepancy can be observed in the 2001 CD 1. Under that plan, in Nash County, 69.65% of the African American population resided within the district as compared to only 25.86% of the county's African American population which resided outside of the district. The 2011 CD 1 is the only plan where at least one divided county (Greene) has a larger percentage of the African American population residing outside of CD 1 as compared to inside the district.

Dr. Ansolabehere testified that he performed his envelope analysis as well as other analyses he used in this case in the *Bethune-Hill* case. (Tr. 348). The three judge court in *Bethune-Hill* thoroughly rejected Dr. Ansolabehere's testimony in that case and this Court does likewise. See *Bethune-Hill v. Virginia State Board of Elections*, No. 3:14cv852 (Oct. 22, 2015) (ECF No. 108).

C. The evidence shows that the 2011 CD 1 serves a compelling governmental interest and is narrowly tailored.

1. Districts based upon race survive strict scrutiny when a state has "good reasons" to believe that such districts protect the state from liability under the VRA.

Even assuming plaintiffs could prove that race was the predominant factor for CD 1, defendants are still entitled to judgment affirming this district. In *Alabama*, the Supreme Court clearly held that a state has a compelling reason for using race to create districts that are reasonably necessary to protect the state from liability under the VRA.

Alabama, 135 S. Ct. at 1272-73.[15] However, the Court ruled that the district court had erred in approving the only district evaluated by the Supreme Court (Alabama's Senate District 26) under Section 5 because Alabama did not provide a strong basis in evidence to support the creation of a super-majority black district with BVAP in excess of 70%. Section 5 does not mandate super-majority districts but instead only requires that states adopt racial percentages for each VRA district needed to "maintain a minority's ability to elect a *preferred candidate of choice*." *Id.* (emphasis added). The Alabama legislature's policy of maintaining super-majority black districts had no support in applicable case law and represented an improper "mechanically numerical view as to what constitutes forbidden retrogression." *Id.* at 1272. Alabama cited no evidence in the legislative record to support the need for super-majority districts. Therefore, the Court found it unlikely that the ability of African American voters to elect their preferred candidate of choice could have been diminished in this district if the percentage of BVAP had been reduced from a super-majority of over 70% to a lower super-majority of 65%. *Id.*at 1272-74.[16]

The Court qualified its ruling by stating that it was not "insist[ing] that a legislature guess precisely what percentage reduction a court or the Justice Department might eventually find to be retrogressive." *Id.* at 1273. This is because "[t]he law cannot

[15] The *Alabama* Court only considered the test for evaluating race-based districts under Section 5. It did not modify any of its prior decisions regarding how a compelling interest may be established under Section 2 and it expressly did not overrule either *Vera* or *Strickland*.

[16] Neither the *Alabama* plaintiffs nor the Court criticized VRA districts that were majority-minority with BVAP percentages in the low 50% range.

insist that a state legislature, when redistricting, *determine precisely what percent minority population § 5 demands*." *Id.* (emphasis added). Federal law cannot "lay a trap for an unwary legislature, condemning its redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place a few too many minority voters in a districts or (2) retrogressive under § 5 should the legislature place a few too few." *Id.* at 1274 (citing *Vera*, 517 U.S. at 977).

Based upon these concerns, the Court held that majority-black districts would survive strict scrutiny, including any narrow tailoring analysis, when a legislature has "a strong basis in evidence in support of the race-based choice it has made." *Id*. at 1274 (citations omitted). This standard of review "does not demand that a State's action actually is necessary to achieve a compelling state interest in order to be constitutionally valid." *Id.* Instead, a legislature "may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have *good reasons* to believe such a use is required, even if a court does not find that the actions were necessary for statutory compliance." *Id*. (emphasis in original). Nothing in the legislative record explained why Senate District 26 needed to be maintained with a BVAP in excess of 70% as opposed to a lower super-majority-minority percentage. Therefore the Court could not accept the district court's conclusion that District 26 served a compelling governmental interest or was narrowly tailored. *Id.* at 1273-74.[17]

[17] Unlike North Carolina, Alabama did not argue that politics played any role in the districts challenged in that case. Thus, nothing in *Alabama* changes the test for districts that are defended based upon partisan considerations. Nor did any of the plaintiffs in *Alabama* argue that Section 5 required states to create districts that allowed the minority

2. The legislative record contained a strong basis in evidence that racially polarized voting continues to exist in the areas encompassed by CD 1.

In *Dickson*, the state court made extensive findings that the legislative record provided a strong basis for the General Assembly to conclude that racially polarized voting continues to exist in the area of the State encompassed by the 2011 CD 1. (D-62, pp. 2-17, F.F. No. 1-35; D-62, pp. 18-21, F.F. No. 36a-h; D-62, pp. 81-83, F.F. No. 165-71).

In prior briefs filed in this case, plaintiffs argued that the state violated strict scrutiny by raising the any part black VAP of the 2011 CD 1 to a majority level (and just a few percentage points higher than the 2001 CD 1). Plaintiffs contended that racially polarized voting could not be present in the 2001 CD 1 because it was "majority-white." While the evidence shows that CD 1 was never "majority white," racially polarized voting can still exist in a majority-white district. *Cromartie II*, 133 F. Supp. 2d at 423. For example, almost all of the multi-member districts in *Gingles* were majority-white. Several were found to be illegal even though a few African American candidates in those

---

group to elect their candidate of choice with a non-majority BVAP percentage. Nor did Alabama defend its majority-black districts from claims of racial gerrymandering on the ground that the challenged districts were reasonably necessary to protect the State from liability under Section 2. In constructing its districts, Alabama did not rely upon testimony by experts and many lay witnesses on racially polarized voting or prior court decisions requiring or affirming Section 2 districts. Finally, the *Alabama* decision did not reverse the Court's prior holdings that racial gerrymandering is not established merely because "redistricting is performed with consciousness of race." *Vera*, 517 U.S. at 958; *Shaw I*, 509 U.S. at 646. Thus, plaintiffs still cannot prove a racial gerrymander merely by showing that race was "a motivation for drawing the majority-minority district," but instead must continue to prove that race was "the predominant factor" and that the district "is unexplainable on grounds other than race." *Cromartie II*, 532 U.S. at 241-42 (citations omitted).

districts had experienced some electoral success. *Thornburg, supra* (reversing only the district court's finding regarding House District 23 in Durham County).

From 1991 through 2001, no prior version of CD 1 was a "majority-white" district. All prior versions were majority-black in total population and majority-minority coalition districts in VAP. By the time of the 2010 Census, African Americans were a majority of all registered voters in the 2001 CD 1. Non-Hispanic whites have never been in the majority in past versions and none of the past versions were majority-white crossover districts. Even without equal turnout rates by black and white voters, contrary to plaintiffs' argument, whites have never been able to vote as a bloc to defeat the African-American candidate of choice because non-Hispanic whites have never enjoyed majority status in CD 1.

Nor does the fact that black incumbents have won in the district since 1992 prove the absence of racially polarized voting. Collectively, the two experts who submitted reports to the General Assembly found the existence of racially polarized voting in all of the counties encompassed by the 2011 CD 1. (D-62, pp. 7-11, 18-21, F.F. No. 10-21, 36 f and g)[18] Their findings were consistent with the twenty-year history of CD 1 being established as a Section 2 VRA district. Further, it is undisputed that the incumbent for CD 1 has won elections by margins that were less than the amount by which CD 1 was underpopulated in 2010. The Court's decision in *Strickland* allows North Carolina to use a benchmark of over 50% black voting age population to account for the impact of

[18] Counsel for the NC NAACP stated that Dr. Block's report demonstrated "significant levels" of racially polarized voting.

incumbency and issues like under-population. The Court in *Strickland* recognized that states should not be required to determine the "right type" of white voters that needed to be included in a district so that minority voters can still "control" the election with some unspecified percentage of the voting age population (presumably determined by expert witnesses) under 50%. The decision in *Alabama* re-affirmed that North Carolina is not required to establish the 2011 CD 1 with the exact right percentage of BVAP.

Nor did North Carolina adopt a "mechanical" legislative rule to determine the percentage of black VAP to include in CD 1. Instead, North Carolina followed a benchmark for Section 2 districts set by the United States Supreme Court. In *Strickland*, the Supreme Court held that establishing a bright line majority benchmark for a Section 2 district provides a judicially manageable standard for courts and legislatures alike. It also relieves the State from hiring an expert to provide opinions on the minimum BVAP needed to create a district that could be controlled by African American voters. *Strickland*, 556 U.S. at 17. Any such expert would have to predict the type of white voters that would need to be added to or subtracted from a district (to comply with one person, one vote) who would support the minority group's candidate of choice, the impact of incumbency, whether white voters retained in the district would continue to support the minority group's candidate of choice after new voters were added, and other "speculative" factors. *Id.* The holding in *Strickland* is consistent with the holding in *Alabama* that legislatures are not obligated to create majority-black districts with the exactly correct percentage of BVAP. *Alabama*, 135 S. Ct. at 1272-74. The State court in *Dickson* made specific factual findings regarding CD 1 related to all of these points and

this evidence is in the record of the instant case. (D-62, pp. 5-6, 81-83, F.F. Nos. 6, 7, 165, 166-67, 169, 170) Based upon the foregoing, plaintiffs cannot show that the General Assembly lacked a strong basis in evidence or good reasons to conclude that a VRA district should be re-enacted in 2011.

While plaintiffs now contend for litigation purposes that racially polarized voting does not exist in the areas of the state encompassed by CD 1, that was not their position prior to the enactment of the redistricting plans. During the public hearing process, counsel for the NC NAACP advised the redistricting committees that AFRAM had engaged an expert to study all congressional and legislative general elections involving an African American candidate and a white candidate from 2006 through 2010. Using these elections as a frame of reference, counsel for the NC NAACP defined racially polarized voting as follows:

> Just as an example, in 2008, the percentage of black votes for the black candidates was 88 to 89 percent. In 2012, for the black candidates, the black vote percentage was 92, 93 percent across the board. And while there are some black candidates who did get more than 50 percent white votes, in many instances they got less than 50 percent white votes, which is indicative of the fact that there is racially polarized voting in the State.

(D-5, pp. 3-4, ¶ 9; D-5.6)

Thus, counsel for the NC NAACP advised the redistricting committees that racially polarized voting is present where at least 88% of African American voting age population supports the same candidate and more than 50% of white voters support a candidate other than the African Americans' candidate of choice. Congressman Butterfield suggested a similar definition at trial. (Tr. 173-75, 199-201) This definition is consistent with the way Congress, the United States Supreme Court and other courts

have defined racially polarized voting. For example, in *Thornburg*, 478 U.S. 30 (1986), the United States Supreme Court stated that "racial polarization" exists where "there is 'a consistent relationship between [the] race of the voter and the way in which the voter votes'" or "to put it differently, where 'black voters and white voters vote differently.'" *Id*. at 53 n. 21. In *Texas v. United States*, 831 F. Supp. 2d 244 (D.D.C. 2011), the court employed this same definition. As explained by the *Texas* Court, "[p]olarized voting occurs when minority and White communities cast ballots along racial or language minority lines, voting in blocs." 831 F. Supp. 2d at 262 (quoting H.R. Rep. No. 109-478 at 34 (2006)). It cannot be disputed that a majority of North Carolina's white voters typically cast their ballots for a candidate who is not supported by African American voters and that almost all African American voters typically vote for a different candidate than the candidate preferred by a majority of white voters. (Arrington Dep. pp. 57-63, 95)

Based upon this definition of racially polarized voting, during the 2011 public hearing process, counsel for the *NC NAACP* plaintiffs in *Dickson* testified that North Carolina "still" has "very high levels of polarized voting in the State." (D-5, pp. 3-4, ¶ 9; D-5.6) Plaintiffs' counsel supported her testimony with Dr. Block's report which included an analysis of elections in all of the districts now cited by plaintiffs as showing that racially polarized voting does not exist in areas where challenged districts lie (majority-minority districts with any part black VAP between 39.99% and 49.99%). (D-5, p. 4, ¶ 11; D-5.8, pp. 2, 3, 5-10) Neither plaintiffs' counsel nor plaintiffs' expert gave testimony that racially polarized voting, as defined by plaintiffs' counsel, no longer exists in majority-minority districts with less than 50% any part black VAP. Instead, the *NC*

NAACP plaintiffs' counsel stated that Dr. Block's report showed that "we still have very high levels of polarized voting in the State," that Dr. Block's report and other evidence counsel provided were "an important part of the record to justify drawing majority-minority districts," (D-5, pp. 3-4, ¶ 9; D-5.6, pp. 12-14), and that "this data demonstrates the continued need for majority-minority districts." (D-5, p. 4, ¶ 11; D-5.7, p. 2)

After submitting their evidence on racially polarized voting, the three *NC NAACP* organizational plaintiffs and their counsel submitted a congressional map with two majority-minority congressional districts and legislative plans that included majority-any part black VAP or majority-minority districts in every area of the State in which the General Assembly enacted majority-any part black VAP districts, including almost all of the counties encompassed by the 2011 CD1. The NAACP legislative plans, as well as all of the other alternative legislative plans, even proposed majority black or majority-minority senate and house districts for Durham County. The General Assembly reasonably relied upon this testimony and evidence, including their representations that the SCSJ-AFRAM congressional plans complied with the VRA, and that the SCSJ-AFRAM legislative plans complied with "the Voting Rights Act," created "geographically compact districts," and recognized "important communities of interest." (D-5, pp. 3-4, 6-7, ¶¶ 9, 18; D-5.7, pp. 1, 2; D-5.12, p. 1; *NC NAACP* Pl. Am. Compl. ¶ 98, 99, 282, 283)[19]

[19] The Amended Complaint, and all other filings in *Dickson v. Rucho*, are contained in the Record DVD moved into evidence in this trial. The cited paragraphs of the Amended Complaint are located at pp. 62, 100 of the "Record on Appeal" PDF.

Finally, the evidence before the legislature in 2011 on racial polarization is consistent with the testimony of plaintiffs' own witness in this case, Congressman Butterfield. Congressman Butterfield explained that based on his decades of political experience in the areas covered by CD 1, racially polarized voting exists at high levels. In fact, he testified that, in his opinion, only one out of three white voters in eastern North Carolina will ever vote for a black candidate. (Tr. 199) There can be no doubt that the General Assembly had good reasons to believe that racially polarized voting continues to exist in the counties included in the 2011 CD 1.

3. The legislative record contains a strong basis for concluding that CD 1 is based upon a reasonably compact African American population.

Plaintiffs cannot cite a case that provides an accepted definition of compactness nor can they give the court a judicially manageable standard for finding CD 1 to be non-compact. For example, plaintiffs contend that the 2011 CD 1 is less compact than the 2001 version because of a test that measures "dispersion compactness," known as the Reock test. (P-17, p. 22, Table 1) "Dispersion compactness" measures the geographic dispersion of a district. *Id.*; *Cromartie II,* 133 F. Supp. 2d at 415 n. 4.

In *Cromartie II*, the district court found that the 1997 version of CD 1 satisfied the "compactness" element of *Gingles* with a dispersion or Reock score of 0.317. Plaintiffs' expert reports a Reock score of .390 for the 2001 version of CD 1 and a score of .294 for the 2011 version. Plaintiffs do not explain, nor do they cite a case that explains, why a score of .390 is compact while a score of .294 is not. Nor do they explain how the 1997 version could be legally compact with a score of .317 while the score of .294 is not legally compact (only .023 lower than the "compact" 1997 version). Moreover, plaintiff's

expert in this case has conceded that a Reock score of over .20 would not be considered non-compact.

This dilemma demonstrates why a court should hesitate before finding a VRA district to be "uncompact" because of a mathematical compactness test. *Karcher*, 462 U.S. at 756 (compactness requirements are of little use because of vague definitions and imprecise application). Defendants are aware of no cases, federal or state, that establish a judicially manageable standard by which a legislative or a court could use to measure legally acceptable compactness. In *Dickson*, plaintiffs' expert, Dr. Ted Arrington, explained the problems with mathematical compactness tests as follows:

> Courts and reformers often cite compactness as a valuable technical criterion in redistricting, but scholars do not think it should be a priority. One problem is that there are many different and partially conflicting ways to measure the compactness of a district or a district plan. And there can be no mathematical standard of compactness that can be applied across varying geography in a way that equal populations can have a mathematical standard. The most one can say is that with the use of a particular statistic, one redistricting plan for a particular jurisdiction has more or less compact districts than another plan for the same jurisdiction. But there is no standard that can tell us whether the districts in a plan are compact enough.

(Arrington Dep. p. 142-43) (D.E. 104-9, pp. 9-10)

Dr. Ted Arrington is an expert on redistricting and the legal requirements for districts. He is often hired by the United States Department of Justice to draw proposed districts that comply with the VRA and any restrictions imposed by *Shaw I* and *Shaw II*. Instead of a mathematical compactness test, Arrington relies upon an "interocular test" to determine whether a district is too irregular. Under Dr. Arrington's "interocular test," there is no meaningful difference between the shapes of the 2011 CD 1, the 1997 and

2001 versions, or all of the 2011 alternatives. (*See* D-4.2; D-4.5; D-4.6; D-4.10; D-4.11) In any case, plaintiffs' own evidence shows that the Reock score for the 2011 CD 1 is not dramatically different from the 1997 or the 2001 versions.

4. The amended version of Section 5 provided North Carolina with good reasons to draw CD 1 as a majority black district.

Plaintiffs' arguments that the 2011 CD 1 is not narrowly tailored ignore the 2006 amendments to Section 5. North Carolina had "good reasons" under Section 5 to create CD 1 (which includes 21 counties formerly covered under Section 5) with an any part black VAP in excess of 50%, even though this resulted in a slight increase of the any part black VAP as compared to the 2001 version. Plaintiffs' expert in *Dickson*, Dr. Arrington, conceded that he has been instructed by USDOJ to draw exemplar districts in Section 5 proceedings with an any part black VAP in excess of 50% to avoid any dispute on whether Section 5 should be construed as requiring majority-black districts because of the definition given to "candidate of choice" by the Court in *Strickland.* (Arrington Dep. pp. 108-14, 191, 216-17) (D.E. 104-9, pp. 4-6, 14, 20-21)[20] Good reasons for creating CD 1 as a majority-black district surely exist under Section 5, where even the Justice Department draws districts covered by Section 5 with a majority BVAP.[21]

[20] All of the districts challenged in *Alabama* were already majority-black districts under the 2001 Plan. None of the *Alabama* plaintiffs argued that these districts should have been established in 2012 as coalition districts.

[21] It is a standard principle of statutory construction for terms within the same statute to be given the same meaning. *Sorenson v. Sec'y of the Treasury*, 475 U.S. 851, 860 (1986) ("identical words used in different parts of the same act are intended to have the same meaning"). In *Strickland*, the United States Supreme Court held that, under Section 2, districts drawn to give a minority group an equal opportunity to elect "their candidate of choice," must be created with a majority of the minority groups' voting age population. Under the standard rule of statutory construction, it is irrational to give the words

The presence of a strong basis in the record here is not changed by the decision of the three-judge federal court in *Page v. Virginia State Bd. of Elections*, No. 3:13-cv-678, 2015 WL 3604029 (E.D. Va. June 5, 2015) (three-judge court). In that case, plaintiffs alleged that Virginia's 2012 Third Congressional District ("CD 3") constituted an illegal gerrymander. The previous version of this district had a BVAP of 53.1%. In the 2012 congressional redistricting plan, Virginia reenacted this district with a BVAP of 56.3%. The state's expert testified that Virginia increased the BVAP for this district because its legislature adopted a 55% BVAP floor for all VRA districts. The state defended the district on the ground that an increase in the districts' BVAP was necessary to obtain preclearance under Section 5. Relying upon the United States Supreme Court's decision in *Alabama* the three-judge court, by a 2 to 1 vote, rejected Virginia's argument and found that the district constituted an illegal racial gerrymander.

The facts and legal issues in *Page* are different from the facts and legal issues in this case. First, Virginia did not argue that its CD 3 was a political district (like North Carolina's CD 12) or constructed to make adjoining congressional districts more competitive for Republicans. Nor did Virginia argue that the challenged district had been drawn into an urban county to ameliorate population deviations during the next round of redistricting. Next, the plaintiffs in *Page* did not argue that Virginia's CD 3 was a racial gerrymander simply because it was a majority-black district. Both the 2012 version and its predecessor were majority-black and the plaintiffs did not contend that a congressional

---

"candidate of choice" under Section 5 a different interpretation than "candidate of choice" under Section 2.

coalition district should be substituted for a majority-black district. Like the Alabama legislature, the "floor" for the percentage of African American population to be included in Virginia's CD 3 was based upon a policy decision by the Virginia legislature and not on a benchmark established by a decision by the Virginia Supreme Court or the United States Supreme Court.

Further, the record in *Page* fails to show any expert testimony during the legislative redistricting process explaining the presence of racially polarized voting in the areas encompassed by Virginia's CD 3. There was no evidence concerning the size of election victories enjoyed by the African American incumbent who had been elected in CD 3, how the margin of victory compared to the amount by which the district was underpopulated or overpopulated, or comparisons between the financial resources available to the African American incumbent in prior elections as compared to challengers. In contrast, in this case the facts here show the presence of racially polarized voting in the challenged districts, and that the margins of election victories by African American incumbents over underfunded challengers were lower than the amount by which CD 1 was underpopulated. Finally, North Carolina defended its legislative districts under both Section 5 and Section 2, and used a standard for minority percentages in VRA districts that was set by the North Carolina Supreme Court and the United States Supreme Court, not a legislative committee.

D. The remedy plaintiffs seek has no support in Supreme Court decisions.

The Supreme Court has yet to find any legislative or congressional redistricting plan unconstitutional because it deprived any group, political or racial, of "influence."

Indeed, such claims may even be non-justiciable. *See LULAC,* 548 U.S. at 413-423 (plurality opinion) (plaintiffs failed to identify a judicially manageable standard to adjudicate claim of political gerrymandering); *Vieth v. Jubelirer,* 541 U.S. 267, 281(2004) (plurality opinion holding that political gerrymandering claims are nonjusticiable because no judicially discernable standards for adjudicating such claims exist); *Cromartie I,* 526 U.S. at 551 n.7. (Court has not agreed on standards to govern claims of political gerrymandering). Despite this history, plaintiffs ask this Court essentially to recognize an "influence" claim on behalf of African American Democrats by requiring the State retain a very high percentage of minority population in the Congressional districts, but only at an elevated level that plaintiffs believe is "sufficient." There is no basis whatsoever for any such claim under the Constitution.

The United States Supreme Court has warned against the constitutional dangers underlying plaintiffs' influence theories. In LULAC, the Court rejected an argument that the Section 2 "effects" test might be violated because of the failure to create a minority "influence" district. The Court held that "if Section 2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *LULAC,* 548 U.S. at 445-46 (citing *Ashcroft,* 539 U.S. at 491 (Kennedy, J., concurring)). Recognizing a claim on behalf of African American Democrats for influence or crossover districts "would grant minority voters 'a right to preserve their strength for the purposes of forging an advantageous political alliance,'" a right that is not available to any other group of voters. *Strickland,* 556 U.S. at 15 (citing *Hall v. Virginia,* 385 F.3d 421, 431 (4th Cir. 2004), *cert. denied,* 544 U.S, 961 (2005)).

This argument also raises the question of whether such a claim would itself run afoul of the equal protection guarantees of the Fourteenth Amendment. Nothing in federal law "grants special protection to a minority group's right to form political coalitions." *Strickland*, 556 U.S. at 15. Nor does federal law grant minority groups any right to the maximum possible voting strength. *Id.* at 15-16.

D. In any event, plaintiffs' claims in this action should be dismissed because they are members of organizational plaintiffs in *Dickson* and are bound by the judgment of the three-judge panel in that case dismissing the same made by plaintiffs in this case.

The claims of both plaintiffs are barred by the doctrines of *res judicata* and collateral estoppel because the same claims and issues have already been litigated and decided by the three-judge panel in *Dickson*. The ruling in *Dickson* is a "final judgment on the merits" for purposes of claim and issue preclusion. *See Pharmacia & Upjohn Co. v. Mylan Pharms., Inc.*, 170 F.3d 1373, 1381 (Fed. Cir. 1999) (suggesting that the "Fourth Circuit follows '[t]he established rule in the federal courts . . . that a final judgment retains all of its res judicata consequences pending decision of the appeal.'"); *C.F. Trust, Inc. v. First Flight Ltd. P'ship*, 140 F. Supp. 2d 628, 641 (E.D. Va. 2001) ("The established rule in the federal courts is that a final judgment retains all of its preclusive effect pending appeal."), *aff'd*, 338 F.3d 316 (4th Cir. 2003).

Where an association is a party to litigation, federal courts have held that members of the association are precluded under the doctrines of *res judicata* and collateral estoppel from re-litigating claims or issues raised in previous actions by an association in which they are a member. *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1081-84 (9th Cir. 2003) (holding that individual

members of an unincorporated association were bound by prior litigation involving the association and other members and finding that "if there is no conflict between the organization and its members, and if the organization provides adequate representation on its members' behalf, individual members not named in a lawsuit may be bound by the judgment won or lost by their organization."); *Murdock v. Ute Indian Tribe of Uintah and Ouray Reservation*, 975 F.2d 683, 688-89 (10th Cir. 1992) (finding that a member of an association was in privity with the association itself for preclusion purposes, and that the association was in privity with other members who filed a companion case because "[i]f a judgment regarding an association's status did not bind its members, then each member could relitigate the association's status until the association obtained a favorable result. This situation would undermine the very purpose of collateral estoppel."); *Meza v. Gen. Battery Corp.*, 908 F.2d 1262, 1268 (5th Cir. 1990) ("Federal courts have long recognized that individual members of labor unions and other unincorporated associations can be bound by judgments in suits brought by the union or association in their representative capacity"); *Expert Elec., Inc. v. Levine*, 554 F.2d 1227, 1235-36 (2d Cir. 1977) (finding that association members were bound by a judgment against the association where the association had standing to assert their interests, and the association adequately protected their interests); *Acree v. Air Line Pilots Ass'n*, 390 F.2d 199, 202–03 (5th Cir. 1968) (holding that members of an unincorporated association "would be bound by the first action to the extent their interests were represented"; affirming district court's dismissal on res judicata grounds); *cf. Panza v. Armco Steel Corp.*, 316 F.2d 69, 70 (3d Cir. 1963) (upholding dismissal based on res judicata where plaintiffs in second

suit sought "relitigation" of claims previously litigated by their union, "their duly constituted representative").

As members of the NC NAACP, Mr. Harris and Ms. Bowser are bound by the judgment of the trial court in *Dickson*. *See, e.g.*, *Murdock*, 975 F.2d at 688. Based upon the undisputed testimony of Mr. Harris and Rev. Barber, the NC NAACP president, Mr. Harris is a member of the NC NAACP. Similarly, the undisputed testimony of Ms. Bowser and Rev. Barber shows that Ms. Bowser is also a member of the NC NAACP. Both Mr. Harris and Ms. Bowser testified that they were members of the NAACP in 2011 when *Dickson* was filed. (D-34, pp. 44-46, 49-50; D-33, p. 48.) In fact, both plaintiffs were members of the NAACP before, during, and after 2011 when the NC NAACP filed its complaint and amended complaint in *Dickson*, and both plaintiffs testified that they supported the NC NAACP's mission and work.

Plaintiffs have produced no evidence that the NC NAACP failed to adequately represent their interests when it asserted the same claims in *Dickson* with respect to CD 1 and CD 12 that the plaintiffs assert here. Indeed, the NC NAACP's standing in *Dickson* was based on its contention that it was acting in a representative capacity by representing the interests of its members. In addition, Ms. Bowser is further bound by the judgment entered in *Dickson* because she admitted to being a member of Democracy North Carolina and making financial contributions to the League of Women Voters of North Carolina, both of which were co-plaintiffs with the NC NAACP in *Dickson*.

Allowing plaintiffs to avoid being bound by the state court's judgment when they are both members of at least one of the plaintiff organizations in *Dickson* is contrary to

law and opens the door for endless legal challenges to the districts at issue here. *See Tahoe-Sierra Preservation Council,* 322 F.3d at 1084 (internal citations and quotations omitted) ("If the individual members of the Association were not bound by the result of the former litigation, the organization would be free to attack the judgment *ad infinitum* by arranging for successive actions by different sets of individual member plaintiffs, leaving the Agency's capacity to regulate the Tahoe properties perpetually in flux. The Association may not avoid the effect of a final judgment in this fashion."); *Wood v. Borough of Lawnside*, No. 08-2914, 2009 WL 3152114, at *4 (D.N.J. Sept. 28, 2009) (plaintiff's admission that CBFL, a non-profit corporation of which she was a member, was her "representative" was "not without consequence" because "[p]rovided CBFL adequately represented her, [the plaintiff] is now bound by the [prior suit]"; holding that the plaintiff was in privity with CBFL and res judicata precluded her claims); c*f. Corp. of Charles Town v. Ligon*, 67 F.2d 238, 242 (4th Cir. 1933) (noting that one "cannot approbate and reprobate in the same breath"). Accordingly, plaintiffs' claims are dismissed.

Respectfully submitted this 26th day of October, 2015.

NORTH CAROLINA DEPARTMENT OF JUSTICE

By: /s/ Alexander McC. Peters
Alexander McC. Peters
Senior Deputy Attorney General
N.C. State Bar No. 13654
apeters@ncdoj.gov
P.O. Box 629
Raleigh, NC 27602
Telephone: (919) 716-6900
Facsimile: (919) 716-6763
Counsel for Defendants

OGLETREE, DEAKINS, NASH SMOAK & STEWART, P.C.

/s/ Thomas A. Farr
Thomas A. Farr
N.C. State Bar No. 10871
Phillip J. Strach
N.C. State Bar No. 29456
thomas.farr@ogletreedeakins.com
phil.stach@ogletreedeakins.com
4208 Six Forks Road, Suite 1100
Raleigh, North Carolina 27609
Telephone: (919) 787-9700
Facsimile: (919) 783-9412
Co-counsel for Defendants

CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day electronically filed the foregoing **DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

PERKINS COIE LLP
Marc E. Elias
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
MElias@perkinscoie.com
Attorneys for Plaintiff

POYNER SPRUILL LLP
Edwin M. Speas, Jr.
espeas@poynerspruill.com
John W. O'Hale
johale@poynerspruill.com
Carolina P. Mackie
cmackie@poynerspruill.com
301 Fayetteville St., Suite 1900
Raleigh, NC 27601
Local Rule 83.1 Attorney for Plaintiffs

This the 26th day of October, 2015.

OGLETREE, DEAKINS, NASH
SMOAK & STEWART, P.C.

/s/ Thomas A. Farr
Thomas A. Farr (N.C. Bar No. 10871)
4208 Six Forks Road, Suite 1100
Raleigh, NC 27609
Telephone: 919.787.9700
Facsimile: 919.783.9412
thomas.farr@odnss.com

Counsel for Defendants

22774697.1