No. 16-649

In The
Supreme Court of the United States

STATE OF NORTH CAROLINA, *et al.*,

Appellants,

v.

SANDRA LITTLE COVINGTON, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MOTION TO AFFIRM

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QUESTIONS PRESENTED

I. Whether any of the district court's extensive findings of fact regarding the twenty-eight racially gerrymandered legislative districts at issue here are clearly erroneous.

II. Whether the district court correctly applied *Alabama Legislative Black Caucus v. Alabama* in holding that race predominated in the drawing of twenty-eight legislative districts in North Carolina, and correctly applied this Court's rulings in *Johnson v. De Grandy* and *Bartlett v. Strickland* in holding that those districts were not narrowly tailored to the compelling governmental interest of compliance with the Voting Rights Act.

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OTHER AUTHORITY

Appellees in the above-captioned case move to affirm on the ground that the questions presented are so insubstantial as not to need further argument. The unanimous ruling of the three-judge panel below is a straightforward application of this Court's precedents to the facts of the 2011 legislative redistricting process in North Carolina. Large numbers of citizens were intentionally moved in and out of districts because of their race in order to create many more majority-black districts than ever before deemed necessary by the North Carolina General Assembly, or any court, to comply with the Voting Rights Act. The districts resulting from this race-based process are highly irregular in shape and disregard all traditional redistricting principles. The trial court's ruling is amply supported by largely uncontested evidence, and correctly interprets and applies *Alabama Legisislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015); *Johnson v. De Grandy*, 512 U.S. 997 (1994); and *Bartlett v. Strickland*, 556 U.S. 1 (2009).

Appellants repeatedly misrepresent the holding of the court below, omit key facts, and assert other facts directly contrary to what the court found to be true without explaining why the trial court's findings are erroneous. Appellants further misrepresent this Court's interpretations of Section 2 and Section 5 of the Voting Rights Act, arguing incorrectly that *De Grandy* authorizes states to use racial proportionality as a "safe harbor" from liability and that *Strickland* freezes in place majority-black districts in perpetuity without reference to current electoral realities.

The Jurisdictional Statement creates a caricature of the district court's ruling, and relies on fantasy rather than fact to make the brazen claim that this Court should summarily reverse the unanimous opinion below. The opposite is warranted here. There are no clear errors of fact and no difficult legal questions raised by this appeal. In these circumstances, further briefing and argument is not required; the Court should summarily affirm the trial court's ruling.

STATEMENT OF THE CASE

1. The extraordinary legislative redistricting process that occurred in North Carolina in 2011 involved a more extreme use of race than that of any other state in this decade.[1] The chief architect of the state house and senate maps, Dr. Thomas Hofeller, following directions from Senator Robert Rucho and Representative David Lewis, started with two explicit racial criteria that could not be compromised: 1) that any redistricting plan must have a racially proportionate number of majority-black districts and 2) that each district must be 50% or greater in black voting age population. J.S.App.

[1] In neither of the two other states where one or more districts drawn after the 2010 census has been found by a court to be an unconstitutional racial gerrymander, did the legislature dramatically increase the number of majority-black districts, or use an explicit racial proportionality quota. *See Ala. Legis. Black Caucus v. Alabama,* 135 S. Ct. at 1266-67, 1271; *Page v. Va. State Bd. of Elections,* No. 13-cv-678, 2015 U.S. Dist. LEXIS 73514 at *3 (E.D. Va. June 5, 2015), appeal dismissed *sub nom. Wittman v. Personhuballah,* 136 S. Ct. 1732 (2016).

17[2]. Senator Rucho and Representative Lewis, the redistricting committee chairs who pushed these plans through the legislature, issued public statements explicitly saying that alternative plans that failed to meet these race-based criteria would not be considered by the legislature. J.S.App. 30. Application of these goals increased the total number of majority-black districts in the state house from nine to twenty-three and the number of majority-black districts in the senate from zero to nine, J.S.App. 26-27 & n.15, and resulted in bizarrely shaped districts in which traditional redistricting criteria were subordinated to race. J.S.App. 36-40.

2. At the time of the 2011 redistricting, twenty-five years after this Court decided *Thornburg v. Gingles*, 478 U.S. 30 (1986), the number of majority-black legislative districts in the state was decreasing while the number of African-American legislators in the General Assembly was simultaneously increasing. J.S.App. 6-7. Since the *Gingles* decision, there has been no Section 2 challenge to the state house and senate districts filed, and no liability for vote dilution ever established, even though, as the district court noted, the number of majority-black districts in the house decreased from a high of thirteen in 1991 to only nine in 2002; and the number of majority-black districts in the senate decreased from four in 1991 to zero in 2003. *Id.* Data readily available to the redistricting chairmen, J.S.App. 130-31 n.54, showed

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[2] Appellees include two maps and three charts as appendices to this Motion. References to the Appendix to this Motion are denoted "App."; references to the Appendix to the Jurisdictional Statement are denoted "J.S.App."

that in the three election cycles immediately preceding the 2011 redistricting, "African-American candidates for the North Carolina House won thirty-nine general elections in districts without a majority BVAP (including eleven such elections in 2010 alone), and African-American candidates for the North Carolina Senate won twenty-four such elections (including seven elections in 2010)." J.S.App. 7. Yet none of this basic information was considered by the map drawer or the Redistricting Chairs as they constructed the twenty-eight districts challenged here. J.S.App. 119-21, 130-33.

3. No member of the legislature had any substantive role in drawing the challenged districts other than the redistricting chairs Rucho and Lewis. J.S.App. 9. The challenged districts were not drawn by legislative staff and were not made available to the redistricting committees prior to their release to the public. They were drawn for Rucho and Lewis by Dr. Hofeller, a consultant engaged by their private counsel. J.S.App. 8. These three individuals "substantially carried out North Carolina's 2011 statewide redistricting effort." J.S.App. 11.

Thus, public statements made at the time of the redistricting process by Rucho and Lewis, and their subsequent testimony are the primary sources of direct evidence about the rationale behind the challenged districts. It is uncontroverted that Rucho and Lewis gave Dr. Hofeller three primary instructions: draw "VRA districts" first; draw each at more than 50% BVAP; and draw them in numbers proportional to the State's BVAP population. J.S.App. 17-31. Dr. Hofeller created a racial

proportionality chart in March 2011 as one of his first tasks to determine how many majority-black districts would be needed to satisfy the proportionality requirement and testified that he proceeded to draw VRA districts "without reference to any communities of interest or geographic subdivisions, such as county lines and precinct lines." J.S.App. 31-2.

4. Maps showing only the VRA districts drawn by Dr. Hofeller were first made public on June 17, 2011, J.S.App. 10 and App. A (maps of VRA districts), and were enacted six weeks later essentially as first made public. J.S.App. 11. Overall, these plans more than tripled the number of majority BVAP districts from nine in 2003 to thirty-two in 2011. App. 26-7. Third Joint Stipulations, *Covington v. North Carolina*, 1:15-cv-399, ECF No. 90 (M.D.N.C. Mar. 30, 2016). During the legislative debate, several African-American legislators questioned why increasing the BVAP in the challenged districts to more than 50% was necessary to allow African-American voters an equal opportunity to elect their candidates of choice when historically there has been "no problem" electing African-American candidates, and no African-American legislator voted for either the house or senate plan. J.S.App. 131-32.

5. To create these districts Dr. Hofeller had to split counties, cities, towns and precincts on racial lines, assigning disproportionate numbers of black voters to the challenged districts and disproportionate numbers of white voters to adjoining districts. J.S.App. 37-8. The boundaries of

these districts are irregularly shaped and non-compact, whether measured visually or quantitatively. J.S.App. 39-40. Racial density maps for each challenged district reveal that the contorted lines of the challenged districts are explained by Dr. Hofeller's need to exclude largely white communities from the challenged districts and include largely black communities in the districts in order to reach the racial goals set by Rucho and Lewis. J.S.App. 50, 53, 55, 59, 62, 65, 74, 76, 80, 84, 87, 93, 95, 102, 104, 109, 112.

6. Appellees are thirty-one individual voters who live in the twenty-eight districts challenged in this case. J.S.App. 13. They filed suit after this Court's decision in *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015) (hereinafter "*ALBC*"), clarified the standard for determining when a state's use of race in redistricting is unconstitutional. None of them were parties in the earlier state court litigation now pending in this Court, *Dickson v. Rucho*, 368 N.C. 481, 781 S.E.2d 404 (2015), *petition for cert. filed*, (U.S. June 30, 2016) (No. 16-24).

Each district plaintiffs challenged was included as a purported "VRA district" in the House and Senate VRA maps released on June 17, 2011. J.S.App. 13. Appellees, however, did not challenge five majority-black districts that were enacted in 2011 because those districts are either: 1) composed of whole counties and therefore consistent with traditional redistricting criteria, (Senate District 3, House Districts 23 and 27); or 2) located within a single county where the black population is large

enough to constitute a majority in one or more geographically compact majority-black districts (House Districts 101 and 106). *See* App. 1-2. *See also*, J.S.App. 145-46 (noting that enacted House VRA Districts 23 and 27 were not challenged as racial gerrymanders and "are reasonably compact majority-black districts that follow county lines").

7. Following a five-day bench trial on all issues, J.S.App. 14, the three-judge panel unanimously ruled that race predominated in the drawing of the twenty-eight districts challenged by plaintiffs and that the State had failed to demonstrate that their predominant use of race was narrowly tailored to further a compelling governmental interest. J.S.App. 3. On the question of whether race was the predominant factor in drawing the challenged districts, the district court acknowledged that while redistricting legislatures will "almost always" be aware of racial demographics, that alone does not prove racial predominance. J.S.App. 14. To determine whether Appellees had carried their burden to prove racial predominance, the court looked to both direct and circumstantial evidence of legislative intent, and to both statewide and district-specific evidence. The court considered 1) statements by legislators identifying race as a chief districting criterion; 2) indications that attaining a specific racial percentage within a given district was nonnegotiable; 3) bizarre or non-compact district shape; 4) whether district lines cut through traditional geographic boundaries or local election precincts; and 5) whether there was a "policy of prioritizing mechanical racial targets above all other

districting criteria (save one-person, one-vote)". J.S.App. 16 (citing *ALBC*, 135 S. Ct. at 1267).

Finding that the Redistricting Chairs' redistricting criteria and instructions to Dr. Hofeller amounted to a requirement to maximize the number of majority-black districts in the state; and based on the public statements issued by the redistricting chairs as well as their testimony at trial, the court concluded there was strong evidence of all relevant factors, all of which pointed unambiguously to the predominance of racial considerations above all others. The district court found that race-neutral districting criteria, including recognizing political subdivisions and communities of interest, geographic compactness, and the state constitution's whole county provision, were all sacrificed to the goal of drawing a racially proportionate number of majority-black districts wherever possible and at 50% BVAP or greater. J.S.App. 36-42. Finally, there was no evidence that political considerations explained the VRA districts, "indeed, the evidence suggests the opposite." J.S.App. 42.

8. The district court then analyzed the district-specific evidence of racial predominance in each of the twenty-eight challenged districts. The court considered (1) the extent to which the districts divided precincts, cities and counties; (2) the BVAP of the portion of split precincts, cities and counties kept in the challenged districts compared to the portion of the split precincts, cities and counties excluded from the districts, (3) the relative geographic compactness of each individual district, and (4) how the district compared in geography and

demographics to the prior district. Finally, the court took into account evidence about the extent to which the district encompasses or divided communities of interest and considered direct evidence of statements made during the legislative process concerning the particular district. J.S.App. 44-113.

For example, Senate District 20 ("SD 20") was previously entirely within Durham County and had a BVAP of 44.64%. The enacted SD 20 combines Granville and highly irregular parts of the City of Durham, connected by a "bridge" to Granville County. The district contains 53.29% of the city of Durham but grabs 76.94% of Durham's African-American population. It is less compact than the prior district visually, and less compact on seven of eight mathematical compactness measures. The enacted district splits thirty-five of the forty-nine precincts contained in the Durham County part of the district, while the benchmark district split only four precincts. In the split precincts, 63.8% of the BVAP is assigned to SD 20. Dr. Hofeller testified that splitting 35 precincts in District 20 was necessary to increase SD 20's BVAP from 44.64% to 51.04% and meet Rucho and Lewis' 50% plus one BVAP goal. J.S.App. 56-59. Similar evidence supported the court's findings for the other twenty-seven districts.

9. Having concluded that race was the predominant factor, the court assumed that compliance with Section 2 or Section 5 of the Voting Rights Act constitutes a compelling state interest and examined whether the state had a strong basis in evidence to conclude that each of the challenged

districts, as drawn, was required to comply with the VRA and whether each district was drawn in such a way as to actually remedy the potential VRA violation. J.S.App. 113-14. Turning first to Section 2 of the VRA, the court found that the defendants never analyzed the third prong of *Gingles* to determine whether "the white majority votes sufficiently as a bloc to enable it … usually to defeat the minority's preferred candidate." J.S.App. 115. Because "a general finding regarding the existence of any racially polarized voting, no matter the level, is not enough" to establish a strong basis in evidence, a legislature must consider the actual effect of bloc voting on electoral outcomes. J.S.App. 118.

The court also considered the evidence Appellants offered to suggest that Section 2 required the challenged districts. The flaws in the racially polarized voting studies by Drs. Block and Brunell were significant, but most crucially, neither expert examined the third *Gingles* prong to determine whether candidates preferred by African-American voters were winning elections. J.S.App. 122-27. The data available to the General Assembly on election outcomes made clear that increasing the BVAP in the challenged districts to more than 50% was not required to give African-American voters an equal opportunity to elect candidates of their choice in the areas of the state where the challenged districts were drawn. J.S.App. 123-33 & n.54.

10. The court further concluded that the challenged districts were not narrowly tailored to comply with Section 5 of the VRA. Eleven of the twenty-eight districts did not include any part of a

county covered by Section 5 of the Voting Rights Act, in force in 40 of North Carolina's 100 counties at the time. J.S.App. 136. Of the remaining districts, a straightforward application of the principles articulated in *ALBC* demonstrated that applying a mechanical racial target that, in the case of the challenged districts, nearly always resulted in an *increase* in the BVAP, sometimes by large margins, was not required by Section 5's non-retrogression principle. J.S.App. 136-141.

The district court concluded emphatically that despite its finding that the twenty-eight challenged districts were racial gerrymanders that are not narrowly tailored, its decision "should in no way be read to imply that majority-black districts could not be drawn – lawfully and constitutionally – in some of the same locations as the districts challenged in this case." J.S.App. 145. The state's unconstitutional plans were the result of the mechanical application of racial targets to the drawing of districts without appropriate regard for traditional redistricting principles and without strong, district specific evidence of a potential Section 2 violation. In these circumstances, the court held that plaintiffs' right to be assigned to legislative districts without excessive regard to their race was violated and ordered that the legislature draw new districts after the 2016 elections. J.S.App. 149.

REASONS FOR GRANTING THE MOTION

This is not even a close case. In enacting the twenty-eight bizarrely shaped legislative districts challenged here, the legislature assigned voters to

districts based on nothing other than their race, assuming that white North Carolinian voters refuse to vote for African-American state legislators and that African-American voters never prefer white candidates, and actually turning a blind eye to the results of recent legislative elections that conclusively demonstrated that those assumptions are false. The jigsaw puzzle of majority-black districts that resulted from the imposition of a racial proportionality quota and a 50% plus one BVAP floor divide neighbors into separate districts solely because of their race.

The three-judge panel in this case was the first tribunal to hear evidence on all issues.[3] Its factual findings are fully supported by competent, and indeed, "copious" evidence in the record, J.S.App. 44. The evidence comes from written statements issued by the Redistricting Chairs themselves, or their own sworn testimony; from census data and election returns, over which there are no disputes; and from extensive stipulations describing in detail the redistricting process and the racial, demographic and geographic characteristics of each challenged district. J.S.App. 49-113.

The district court correctly applied the following legal principles which are squarely established by this Court's precedents:

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[3] *Dickson v. Rucho,* the state court proceeding concerning an overlapping but somewhat different set of legislative districts, was primarily decided on summary judgment, with a limited two-day trial on two discrete issues. *See Dickson,* 368 N.C. at 492-93, n.7; 781 S.E.2d at 414-15, n.7.

1. "[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 in the state." *ALBC*, 135 S. Ct. at 1267.

2. Rough proportionality between the number of majority-black districts and the statewide black voting age population percentage is not a "safe harbor" from Section 2 liability and "should not be sought if it requires destroying 'communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice.'" J.S.App. 25-26 (quoting *De Grandy*, 512 U.S. at 1020.

3. Section 2 of the Voting Rights Act does not "force the states to perpetuate race-based districts simply because they may have been necessary in the past." J.S.App. 134 (citing *Strickland*, 556 U.S. at 23-24).

4. Section 5 of the Voting Rights Act "does not require a covered jurisdiction to maintain a particular numerical minority percentage." *ALBC*, 135 S. Ct. at 1272.

Regardless of how this Court decides the two cases currently pending before it involving racial gerrymandering claims, *see Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505 (E.D. Va. 2015), *prob. juris. noted*, No. 15-680, 2016 U.S. LEXIS 3653

(U.S. June 6, 2016); *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016), *prob. juris. noted*, No. 15-1262, 2016 U.S. LEXIS 4112 (U.S. June 27, 2016) (both argued Dec. 6, 2016), the guidance this Court has already issued in redistricting cases was correctly followed by the district court. When the basic principles outlined above are applied to the redistricting process for legislative districts in North Carolina in 2011, it is readily apparent that the individual districts challenged here are unconstitutional.

I. THE DISTRICT COURT CORRECTLY HELD THAT RACE WAS THE PREDOMINANT FACTOR IN DRAWING THE CHALLENGED DISTRICTS

The evidence relied upon by the district court is precisely the kind of evidence that this Court has identified as relevant to determining whether race has predominated in the drawing of a district. *See ALBC*, 135 S. Ct. at 1267 ("the plaintiff's burden in a racial gerrymandering case is 'to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor. . . .'") (*quoting Miller v. Johnson*, 515 U.S. 900, 916 (1995)). The court evaluated direct evidence--contemporaneous as well as subsequent statements by the redistricting chairs and the map drawer--and indirect evidence of the extent to which race neutral redistricting principles were subordinated to achieve race-based targets. J.S.App. 16.

In this case the strongest evidence that race predominated in the drawing of the challenged districts includes:

1. The fact that the primary criteria "articulated repeatedly and with little variation by the Chairs throughout the redistricting process" were explicitly race-based targets mechanically applied. J.S.App. 17. Their rules were to draw a proportional number of VRA districts, draw them first, and make them at least 50% plus-one BVAP. *Id.* Indeed, calculation of the racial proportionality number was the first step taken by Dr. Hofeller. J.S.App. 31-2.

2. The 50% BVAP requirement and the racial proportionality criterion for the number of majority-black districts in the plan overall were explicitly stated to be non-negotiable requirements of any plan submitted to the legislature for its consideration. J.S.App. 29-30.

3. Meeting the Chair's racial goals required dividing counties, cities and precincts on racial lines, moving black voters into the districts and white voters out.

4. The fact that the challenged districts subordinated all other race-

neutral districting criteria. J.S.App. 36-43.

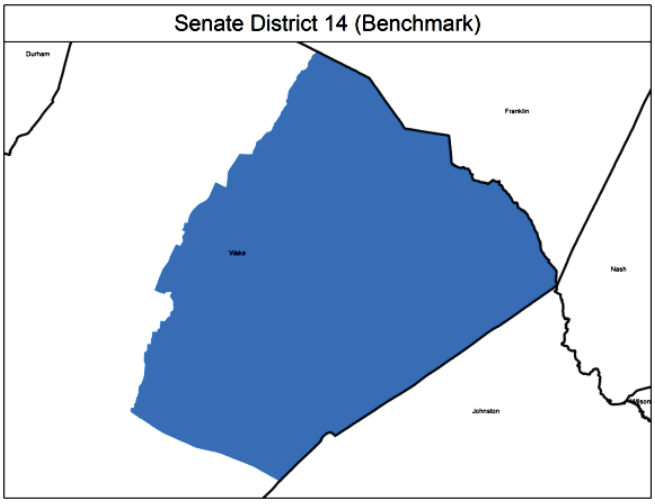
The Redistricting Chairs' criteria were a mechanical racial target used to determine the number of majority-black districts to draw in the plan overall and to determine the minimum percentage black population for each district. *See ALBC*, 135 S. Ct. at 1267 (requiring each majority-black district to remain at the same percentage BVAP is a mechanical racial target); *Page v. Va. State Bd. of Elections*, No. 13-cv-678, 2015 U.S. Dist. LEXIS 73514, at *30 (E.D. Va. June 5, 2015), *appeal dismissed sub nom. Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016) (legislator's statement that the percentage of African-American voters in Congressional District 3 must remain the same as under existing lines is evidence of race as a predominant motive). This is strong evidence that race predominated.

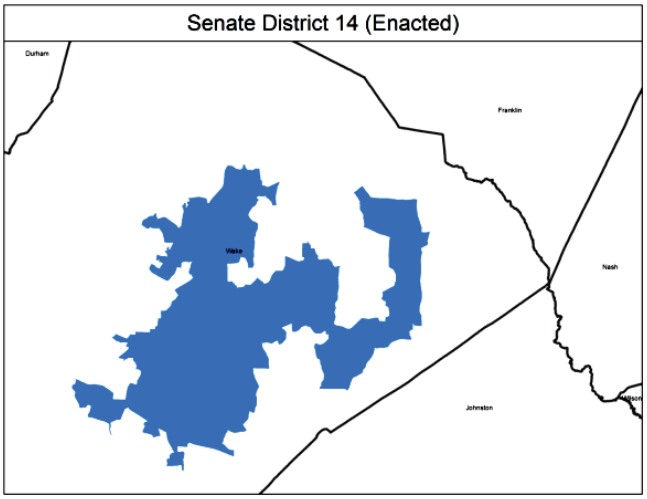
The fact that those criteria could not be compromised is further evidence that race was the predominant factor in the construction of the resulting district. *See Shaw v. Hunt*, 517 U.S. 899, 907 (1996) (race predominated where "[r]ace was the criterion that, in the State's view, could not be compromised."); *Miller*, 515 U.S. at 918 (where the state sought to maximize the number of majority-black districts "we fail to see how the District Court could have reached any conclusion other than that race was the predominant factor in drawing Georgia's Eleventh District.")

Moreover, it is well-established that "'compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests,' incumbency protection, and political affiliation" are the traditional race-neutral districting principles that states may employ. *ALBC*, 135 S. Ct. at 1270 (quoting *Bush v. Vera*, 517 U.S. 952, 964, 968 (1996)). The district court examined each of these and found that towns and cities were not kept whole, communities of interest were not preserved, a high number of precincts were split, generally such that "the portions that were more heavily African-American in population were systematically assigned to predominantly black districts, and the predominantly white portions to white districts." J.S.App. 38.

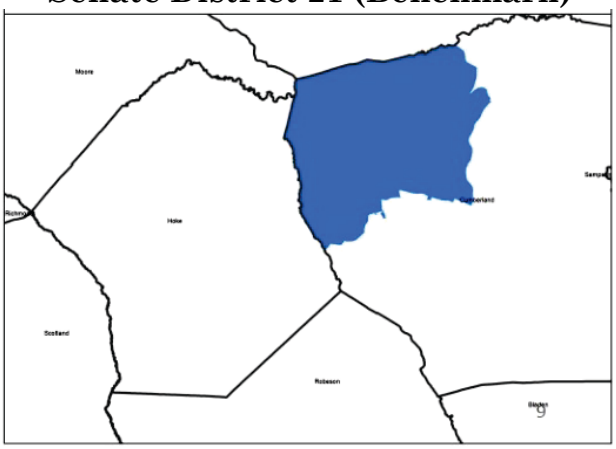
The extensive "district specific evidence… supports and confirms" the decisive statewide evidence and "provides concrete, illustrative examples of how" traditional redistricting criteria "were compromised in order to meet" Appellants' overriding race-based priorities. For each district, this evidence included the district's lack of compactness, particularly when compared to prior districts in the same area. In addition, the court examined each district's racial demographic data, including information about the race of individuals who were added to or removed from the original district to create the enacted district being challenged. J.S.App. 44-8 and App. B (charts summarizing data showing that the unconstitutional districts were constructed by moving white voters out of the existing districts and moving black voters in; and by splitting counties and precincts along racial lines).

For example, in the prior (benchmark) plan, Senate Districts 14 and 21 were geographically compact districts that followed county lines. However, in order to bring the BVAP of the districts above 50%, it was necessary to make them highly non-compact, as shown below:

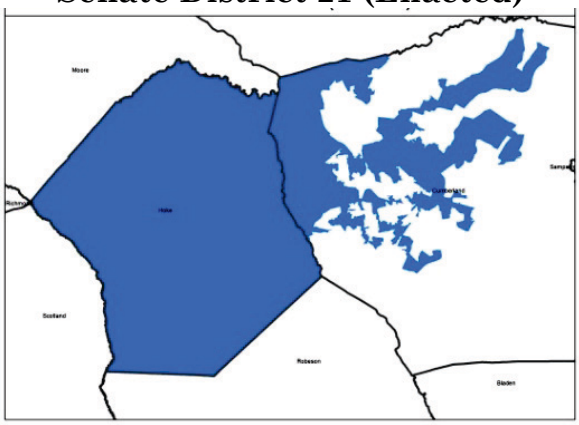




Senate District 21 (Benchmark)



Senate District 21 (Enacted)



Each of the districts held unconstitutional by the court below was bizarrely shaped. *See* App. 1-2. This is clear evidence that the shape of these districts "rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 649 (1993).

Appellants' racial intent is confirmed by reviewing the race of the residents moved in and out of the districts. *See* App. 3. Benchmark Senate District 14 was overpopulated by 41,804 people. To approach the ideal district size, 38,040 whites but only 2,145 African-Americans were removed from the district. J.S.App. 54-5. The benchmark district's BVAP was 41.01%; the enacted district has a BVAP of 51.25%. J.S.App. 53. Similarly, the benchmark version of Senate District 21 was underpopulated by 25,593. App. 3. Appellants removed 6,297 whites and added 20,285 black residents to the district, increasing the BVAP in the district from 44.93% to 51.53%. *Id.*, and J.S.App. 59-62. There simply is no evidence in the record to suggest that the court was wrong to conclude, as it did, "that race was the predominant motive in drawing Senate District 21." J.S.App. 63. Similar district-specific evidence supported the trial court's conclusions with regard to each of the districts held unconstitutional. J.S. 49-113.

Appellants assert that the district court erred in finding race predominated in Senate Districts 14, 21 and every other challenged district because it applied the wrong legal standard, ignoring the distinction between a legislature that creates a majority-black district "to serve explicitly race based goals in defiance of traditional principles" and the creation of a majority-black districts "in the pursuit of race-neutral goals" consistent with traditional redistricting principles. J.S. 18. Appellants characterize the district court's opinion as "focusing myopically on the legislature's mere decision to draw majority-minority districts." *Id.* However, as

detailed above, the district court did not base its finding of racial predominance solely on the mere fact that the legislature created a majority-black district. Indeed, not every majority-black district drawn by the legislature in 2011 was challenged as a district in which race predominated. J.S.App. 145-46.

Instead the district court recognized the very distinction Appellants make, and examined in detail whether race subordinated traditional redistricting principles in each of the challenged districts. J.S.App. 49-113. The district court correctly applied this Court's clear direction in *ALBC* that "a legislature's 'policy of prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote)' provides particularly strong evidence of racial predominance." J.S.App. 16 (quoting *ALBC*, 135 S. Ct. at 1267). Thus, while statewide evidence of the twin racial criteria of drawing a proportionate number of majority-BVAP districts all at 50% plus-one or higher appropriately was strong evidence that race predominated, other district specific evidence made abundantly clear that race was the factor determining which residents would be moved in and out of the particular districts the trial court held unconstitutional.

Appellants' assertion that the legislature "drew majority-minority districts only in areas where traditional districting criteria supported that endeavor," J.S. 13, 18, and that the district court "assumed that the districts complied" with the state constitution's whole county provision (WCP) requirements is wrong, as a cursory look at the

opinion below reveals. Moreover, districts that honored the whole county provision requirement were not challenged. For example, Senate District 3 in the northeastern part of the state, composed entirely of whole counties and with a BVAP of 52.43%, was not challenged. There is, in short, no evidentiary support for the proposition that the districts held to be unconstitutional by the district court in this case complied with any traditional redistricting principles. They are non-compact, they split counties, cities, towns and precincts, and, most fundamentally, they are unexplainable on any grounds other than race.

The district court also carefully examined Appellants' argument that race did not predominant in the drawing of the challenged VRA districts because those districts were "harmonized" with the requirements of the WCP to keep counties whole. J.S.App. 32-36; 40-42. First, this rationale makes no sense with regard to the sixteen majority-black districts wholly contained with single counties. J.S.App. 40. For the remainder, the evidence showed that compliance with the WCP "came into play only after the race-based decision[s] had been made." J.S.App. 42, quoting *Shaw v. Hunt*, 517 U.S. at 907.

Appellants' distortion of the trial court's ruling then forms the basis of the oft-heard lament that the racial gerrymandering jurisprudence creates an unavoidable conflict with the State's duty to comply with the Voting Rights Act. *See* J.S. 3-4, 20. In fact, there is much light and a clear path between the twin principles that race should not be

the predominant factor determining how voters are assigned to election districts and that the voting strength of previously excluded racial minority voters now protected by the Voting Rights Act should not be diluted by at-large systems or districting schemes that operate to prevent them from being able to elect candidates of choice to the governments who control their destinies. That clear path has been taken by most jurisdictions this past redistricting cycle, in racially diverse states such as New York, South Carolina, and California, where redistricting plans were drawn that included majority-minority districts, plans that were tested in court and upheld as fully compliant with governing legal standards. *See*, *e.g.*, *Favors v. Cuomo*, No. 1:11-cv-05632, 2014 U.S. Dist. LEXIS 70783 (E.D.N.Y. May 22, 2014); *Backus v. South Carolina*, 857 F. Supp. 2d 553 (D.S.C. Mar. 9, 2012); *Vandermost v. Bowen*, No. S196493, 2011 Cal. LEXIS 11036 (Cal. Oct. 26, 2011); *see also DeWitt v. Wilson*, 856 F. Supp. 1409, 1411, 1415 (E.D. Cal. 1994), summarily aff'd in part and dismissed in part, 515 U.S. 1170 (1995) (discussing how VRA compliance is compatible with racial gerrymandering jurisprudence).

Where there is evidence that racially polarized voting is strong enough to prevent a politically cohesive racial minority group from electing their candidate of choice, districts drawn to remedy that vote dilution will survive strict scrutiny. Where majority-minority districts are drawn but race is not the predominant factor in the district, those districts do not need to be justified in the first place. But where, as here, racial targets are the criteria that

cannot be compromised, further scrutiny is warranted. Where the legislature mechanically applies two racial targets, subordinates all other non-racial redistricting principles and draws non-compact districts that in move voters in and out of the district because of their race, race has predominated in the drawing of the district.

II. THE DISTRICT COURT CORRECTLY HELD THAT THE CHALLENGED DISTRICTS FAIL TO SATISFY STRICT SCRUTINY

Having found that race predominated in the drawing of the districts at issue here, the district court began its strict scrutiny analysis by assuming that compliance with Section 2 and Section 5 of the Voting Rights Act, the two state interests advanced by Appellants, would constitute a compelling state interest. J.S.App. 113-14 (citing *Bush v. Vera*, 517 U.S. at 977; *Shaw v. Hunt*, 517 U.S. at 911); *see also ALBC*, 135 S. Ct. at 1274 (declining to decide whether continued compliance with Section 5 is a compelling interest in light of *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), but nevertheless holding that to survive strict scrutiny a state must narrowly tailor its districts to Section 5 as currently understood).

Therefore the central question is whether the districts at issue were narrowly tailored to a correct understanding of the Voting Rights Act's requirements. "[C]ompliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not

reasonably necessary under a constitutional reading and application of those laws." *Miller*, 515 U.S. at 921. When specifically addressing narrow tailoring, this Court instructed that "[a] reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw v. Reno*, 509 U.S. at 655; Finally, while states do not need to determine precisely the percentage minority population that might be required to comply with the Voting Rights Act, there must be a strong basis in evidence for the race-based choice made by the legislature. *ALBC*, 135 S. Ct. 1273-74, (*citing Ricci v. DeStefano*, 557 U.S. 557, 585 (2009)).

1. The Racially Gerrymandered Districts Are Not Necessary to Comply with Section 2 of the Voting Rights Act.

Reasoning that a failure to establish any one of the threshold factors required to prove vote dilution under Section 2 of the VRA is fatal to the claim that the districts at issue are narrowly tailored, the trial court focused on whether the challenged districts satisfied the third prong of the *Gingles* test.[4] J.S.App. 116. That prong asks

[4] To establish a Section 2 violation, a plaintiff must prove three threshold factors: (1) that the minority group in question is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) that the minority group is "politically cohesive"; and (3) that the majority votes "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50-51. These are necessary preconditions, and the absence of any one element is fatal to a Section 2 claim, even if other conditions have been met. *Strickland*, 556 U.S. at 11. To survive strict

whether the majority votes sufficiently as a bloc "usually to defeat the minority's preferred candidates." *Gingles*, 478 U.S. at 56. The nature of the court's findings here are significant. The uncontroverted factual finding by the district court is that the map drawers never analyzed *Gingles'* third factor. J.S.App. 116-21. It is not that they got the numbers wrong, or that the court would have chosen to analyze that factor differently. The fundamental fact is that Senator Rucho, Representative Lewis and Dr. Hofeller did not even take into account the extent to which white bloc voting defeats the candidates of choice of black voters. J.S.App. 119-20. Moreover, Appellants continue to argue to this Court that the mere presence of racially polarized voting, without more, is sufficient to justify the creation of majority-black districts to avoid Section 2 liability, without any reference to whether the third prong of *Gingles* is satisfied. *See*, J.S. 28, 30-31.

The evidence that African-American legislators were winning elections in majority-white districts was before the legislature. J.S.App. 128-130 & n.54. Indeed, they only needed to look around the legislative chamber and speak briefly to the members sitting next to them. The evidence offered by Appellants and relied upon by the district court showed that African-American candidates repeatedly won election in districts without a majority BVAP in the three years leading up to the 2011 round of redistricting. J.S.App. 7.

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scrutiny, "[t]he State must have a 'strong basis in evidence' for finding that the threshold conditions for § 2 liability are present." *Bush v. Vera*, 517 U.S. at 978.

More importantly, the trial court carefully reviewed the record of success of black candidates in the individual districts challenged here and found that in the benchmark Senate Districts 4, 14, 20, 28, 38 and 40, and benchmark House Districts 5, 12, 21, 29, 31, 42 and 48, each with a BVAP below 50%, African-American candidates were elected in 2004, 2006, 2008 and 2010. J.S.App. 130. In addition, the Defendants made the faulty assumption "that the African-American voters' candidate of choice will always be African-American." J.S.App. 129 & n.53.

The trial court found as fact that "the 50%-plus-one rule was applied to create majority-black districts, including the challenged districts, 'when[ever] it [was] possible to do so' without any district-specific determination that racially polarized voting was significant enough to enable the majority to usually defeat the candidate of choice of African-American voters." J.S.App. 133 (quoting Defendants' exhibits and citing trial testimony). This is the very definition of what it means to fail to narrowly tailor the use of race in redistricting.[5]

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[5] The court below focused on the third prong of *Gingles,* but the State also must demonstrate that the districts it drew satisfy the first prong of *Gingles,* namely that the minority population is sufficiently large and geographically compact to constitute a majority in a single-member district. *Gingles,* 478 U.S. at 50. If the remedial district is not compact, the plaintiffs have not established their burden under the first prong of *Gingles. Id.* at 51, fn.17. Non-compact "characteristics defeat any claim that the districts are narrowly tailored to serve the State's interest in avoiding liability under § 2, because § 2 does not require a State to create, on predominantly racial lines, a district that is not '"reasonably compact."' *Bush v. Vera,* 517 U.S. at 979. *See also, Shaw v. Reno,* 517 U.S. at 916, 918 (rejecting Section 2 defense for CD 12 on non-compactness grounds). The evidence

Appellants' most glaring factual misstatement is their repeated assertion that the court below came to the "startling," "remarkable," "unprecedented" and "astounding conclusion" that North Carolina is "so utterly devoid of racially polarized voting that a viable Section 2 claim is no longer even a reasonably likely prospect." J.S. 12, 20, 21, 24. And similarly, that the court concluded the legislature "lacked good reasons to draw any ability-to-elect districts at all." J.S. 17, 21, 30. That is not what the court held. J.S.App. 145-46. Based on the uncontroverted facts before it, the court concluded that the General Assembly's mechanical approach to maximizing the number of majority-BVAP legislative districts failed to satisfy the constitutional requirement that such districts be narrowly tailored, and the fact that candidates of choice of African-American voters have been winning election in legislative districts that are less than 50% BVAP was strong evidence that majority-black districts were not needed in those areas.

However, the court also made clear that "[e]vidence of a potential Section 2 violation may exist in some parts of the state, and if such evidence is *properly* examined and demonstrated, it certainly could justify future majority-minority districts." J.S.App. 146. Appellants' caricature of the lower court's decision as an "extreme outlier" that

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in the record here, including the maps themselves and the evidence of the mathematical compactness measures for the challenged districts as compared to the prior benchmark districts, shows that these particular districts were not narrowly tailored to comply with Section 2 because they were not geographically compact districts.

threatens to eliminate all efforts by states to voluntarily comply with the Voting Rights Act bears little resemblance to the actual opinion.

Appellants' argument that they were required to employ the two race-based criteria they set in stone is based on an erroneous statement of this Court's holdings in *De Grandy*, 512 U.S. 997, and *Strickland*, 556 U.S. 1. *De Grandy*, they contend, authorizes the state to create the number of majority-black district proportionate to the BVAP percentage as a "safe harbor" from Section 2 liability. The court below correctly rejected this as a legal misconception, since *De Grandy* actually clarified that "under no circumstances is proportionality to be considered a 'safe harbor' from Section 2 litigation." J.S.App. 25. Nevertheless, the proportional goal was applied in the 2011 redistricting process to achieve a near-maximization of the number of majority-BVAP districts in both plans. Only when the VRA is misinterpreted does purported compliance with the Act lead to the impermissible use of racial criteria in redistricting.

Strickland, they argue, requires each VRA district to be at least 50% plus one in voting age population, whether the district is being drawn to satisfy Section 2 or Section 5 of the VRA. First, with regard to Section 5 of the VRA, this conflicts with the court's holding in *ALBC* that Section 5, by its plain language and by the Guidelines issued by the Department of Justice, has never required a jurisdiction to maintain a particular numerical minority percentage. With regard to Section 2, in *Strickland* decision itself, this court was clear that

the 50% requirement only applied if all the *Gingles* factors were present.

> Our holding also should not be interpreted to entrench majority-minority districts by statutory command, for that, too, could pose constitutional concerns. … In areas with substantial crossover voting it is unlikely that the plaintiffs would be able to establish the third *Gingles* precondition--bloc voting by majority voters. In those areas majority-minority districts would not be required in the first place; and in the exercise of lawful discretion States could draw crossover districts as they deemed appropriate. States can--and in proper cases should--defend against alleged § 2 violations by pointing to crossover voting patterns and to effective crossover districts.

Strickland, 556 U.S. at 23-24 (citations omitted). Rather than heed this clear guidance in *Strickland* regarding a state's obligation under Section 2 of the Voting Rights Act, the Defendants mechanically applied a 50% plus-one BVAP percentage floor to every district they could possibly draw as a majority-black district anywhere in the state. That is not what the Voting Rights Act requires and it constitutes an excessive governmental use of race that violates the equal protection rights of North Carolina's citizens.

2. Section 5 of the Voting Rights Act Does Not Require a State to Increase the Number of Majority-Black Districts, Increase the BVAP in Any District Covered under Section 5, or Maintain a Certain Numerical Percentage BVAP.

The district court also correctly concluded that the challenged districts were not narrowly tailored to comply with Section 5 as properly interpreted. Prior to the *Shelby County* decision, Section 5 prevented retrogression in the ability of black voters to elect their candidate of choice in a district—that is, the intent or effect of making black voters worse off. *Beer v. United States*, 425 U.S. 130, 141 (1976). This Court has made clear that as compared to Section 2, Section 5 has a "limited substantive goal: to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Bush v. Vera*, 517 U.S. at 982-83 (internal quotations omitted). That directive was reaffirmed in *ALBC* last year. *ALBC*, 135 S. Ct. at 1272-74.

This Court's jurisprudence makes clear that Section 5 does not require states to increase the number of majority-black districts in a statewide plan, and it does not require states to increase the BVAP to or maintain the BVAP at any mechanically predetermined number. First, in *Miller*, the Supreme Court rejected efforts by the Department of Justice to condition preclearance on Georgia increasing the number of majority-black congressional districts, stating that the non-

retrogression standard under Section 5 does not require ostensibly ameliorative goals such as increasing the number of majority-minority districts without regard to local communities' different needs and interests. *See* 515 U.S. at 924-25. In that same case, the Court also made clear that Section 5 does not require proportionality between the percentage of African Americans in the jurisdiction and the percentage of districts in which African Americans are a majority of the voting age population. *Id.* at 906-07, 910.

Second, this Court has emphatically rejected Section 5's use to "justify not maintenance, but substantial augmentation, of the African-American population percentage" in districts challenged as a racially gerrymanders. *Bush v. Vera*, 517 U.S. at 983. Indeed, in *Vera*, the Court concluded that Texas had "shown no basis for concluding that the increase to a 50.9% African-American population in 1991 was necessary to ensure nonretrogression," particularly in a district where the candidate of choice of African-American voters was already being elected at 35.1% BVAP. *Id.* Significantly, the Court reached this conclusion even though the plan containing the unconstitutional racial gerrymander was precleared by the Department of Justice. *Id.* at 956.

Finally, in *ALBC*, the Court emphasized the fact that "Section 5…does not require a covered jurisdiction to maintain a particular numerical minority percentage. It requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice." *ALBC*, 135 S. Ct. at 1272. As

the Court explained, the relevant question for the state to ask with respect to Section 5 compliance is: "[t]o what extent must we preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?" *Id.* at 1274. Thus, the Court declared legally erroneous any redistricting policy that relies "heavily upon a mechanically numerical view as to what counts as forbidden retrogression." *Id.* at 1273.

In this case, the court below correctly noted compliance with Section 5 cannot constitute a compelling governmental interest in districts that were never covered by Section 5. J.S.App. 136. No portions of Senate Districts 14, 32, 38, and 40 (in Wake, Forsyth and Mecklenburg Counties) and no portions of House Districts 29, 31, 33, 38, 99, 102 and 106 (in Durham, Wake and Mecklenburg Counties) are in formerly covered counties and thus cannot plausibly be justified by a state interest in complying with Section 5.

The legislature enacted nine senate districts as majority-black districts where previously none of the state's senate districts were majority-black. Section 5 did not compel the maximization of the number of majority-black districts. *Miller*, 515 U.S. at 924-25. As demonstrated by the chart below, in each of the challenged senate districts, the black voting age population was not just maintained, but "substantially augment[ed]"—Section 5 likewise does not compel such dramatic augmentation. *Bush v. Vera*, 517 U.S. at 983.

Senate District	Benchmark BVAP	Enacted District BVAP	Difference
4	49.70%	52.75%	3.05%
5	30.99%	51.97%	20.98%
14	42.62%	51.28%	8.66%
20	44.64%	51.04%	6.40%
21	44.93%	51.53%	6.60%
28	47.20%	56.49%	9.29%
32	41.42%	42.53%	1.11%
38	46.97%	52.51%	5.54%
40	35.43%	51.84%	16.41%

With respect to the House, the legislature enacted twenty-three majority-black state house districts where previously only ten of those districts were majority-black. Section 5 did not compel that dramatic increase in the number of majority-black districts. *Miller*, 515 U.S. at 924-25. The data show that in the enacted districts first, the State "substantial[ly] augment[ed]" the BVAP in a majority of the districts, contrary to what Section 5 compels, *Bush v. Vera*, 517 U.S. at 983, and second, in the small number of districts where the BVAP was not augmented, it was mechanically maintained at a minimum of 50% BVAP without regard to whether that BVAP level was necessary. *ALBC*, 135 S. Ct. at 1273.

House District	Benchmark BVAP	Enacted District BVAP	Difference
5	48.87%	54.17%	5.30%
7	60.77%	50.67%	-10.10%
12	46.45%	50.60%	4.15%
21	46.25%	51.90%	5.65%
24	56.07%	57.33%	1.26%
29	39.99%	51.34%	11.35%
31	47.23%	51.81%	4.58%
32	35.88%	50.45%	14.57%
33	51.74%	51.42%	-0.32%
38	27.96%	51.37%	23.41%
42	47.94%	52.56%	4.62%
43	54.69%	51.45%	-3.24%
48	45.56%	51.27%	5.71%
57	29.93%	50.69%	20.76%
58	53.43%	51.11%	-2.32%
60	54.36%	51.36%	-3.00%
99	41.26%	54.65%	13.39%
102	42.74%	53.53%	10.79%
107	47.14%	52.52%	5.38%

Thus, on the basis of the evidence in this record, the district court properly concluded that the challenged districts were not narrowly tailored to advance the state's interest in complying with Section 5, properly interpreted.

III. CLAIM PRECLUSION DOES NOT APPLY

The panel below rightly rejected Appellants' claims that its consideration of this matter was barred by claim preclusion and collateral estoppel.[6] J.S.App. 13-4, n. 9. Correctly recognizing that this Court directs federal courts to first look to state preclusion law in determining the preclusive effects of a state court judgment, *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985), the court below identified *Williams v. Peabody*, 217 N.C. App. 1, 7, 719 S.E.2d 88, 94 (2011) and *Thompson v. Lassiter*, 97 S.E.2d 492, 246 N.C. 34, (1957) as establishing the state preclusion law.

Under state law, the term privity, in the context of collateral estoppel and res judicata,[7]

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[6] Before issuing its final judgment, the court below twice rejected Appellants' res judicata arguments after both extensive briefing and oral argument on the issue. *See* Defendants' Motion to Stay, Defer or Abstain, *Covington v. North Carolina*, No. 1:15-cv-00399, ECF 31 (M.D.N.C., Nov. 9, 2015), denied in Order, ECF No. 39 (Nov. 25, 2016); Defendants' Motion for Leave to Modify Scheduling Order and To Expedite, ECF 67 (Feb. 24, 2016), denied by Text Order (Mar. 9, 2016).

[7] In addition to identical parties or privity, there also must be a final judgment for claim preclusion or collateral estoppel to apply. *Peabody*, 217 N.C. App. at 5-6, 719 S.E.2d at 93. The decision of the North Carolina Supreme Court which the State seeks to use as a bar in this litigation is not final. The first *Dickson* decision was summarily reversed by this Court and remanded for consideration in light of *ALBC*. *Dickson v. Rucho,* 135 S. Ct. 1843 (2015). Its second decision, declining to apply principles made plain in *ALBC*, is again before this Court for review, with a writ of certiorari fully briefed. *Dickson,* 368 N.C. 481, 781 S.E.2d 404, *petition for cert. filed* (U.S. June 30, 2016) (No. 16-24).

indicates a mutual or successive relationship to the same property rights. *Moore v. Young*, 260 N.C. 654, 133 S.E.2d 510 (1963). There is a state law exception to the general rule requiring shared identity or privity of parties, known as the *Lassiter* exception, but there are no grounds for the application of that exception here. *Lassiter* holds that "[a] person who is not a party but who controls an action, individually or in cooperation with others, is bound by the adjudications of litigated matters" if a three part test is satisfied: 1) does a non-party to the original action, against whom res judicata is being asserted, exercise "control" of the original lawsuit and the present lawsuit; 2) does the non-party to the original action have "a proprietary interest or financial interest in the judgment;" and (3) does the non-party to the original action have an interest "in the determination of a question of fact or a question of law with reference to the same subject matter, or transactions[?]" *Lassiter*, 246 N.C. at 39, 97 S.E.2d at 496; *see also*, *Peabody*, 217 N.C. App. at 10, 719 S.E.2d at 95. All three elements must be satisfied in order to establish the applicability of the *Lassiter* exception and therefore bar a second suit. *Peabody*, 217 N.C. App. at 14, 719 S.E.2d at 97-98.

Following that law, the three-judge panel unanimously found that (1) "none of the Plaintiffs in this action was either a plaintiff in the Dickson litigation or in privity with one," J.S.App. 13-4 n. 9; and (2) "Defendants have not produced sufficient evidence to prove the elements of the *Lassiter* exception." *Id.* This holding is correct as a matter of fact and law.

It is beyond dispute that none of the parties in the two consolidated state court cases are parties in this case. *See Dickson* at 481, 781 S.E.2d at 404 (listing all plaintiffs in the consolidated state court cases). Also, the facts presented by Appellants do not support a conclusion that any of the plaintiffs in this action are in privity with any of the plaintiffs in *Dickson.*[8] Moreover, Appellants' argument that because a small number of plaintiffs in this action are members of organizations that were plaintiffs in *Dickson* per se establishes privity has no support in state law—the relevant universe of precedent in this situation. Indeed, the only case cited in support of that proposition is one from the Ninth Circuit. J.S. 15. In fact, Appellants' theory of virtual representation also has been unanimously rejected by this Court. *See Taylor v. Sturgell*, 553 U.S. 880, 904 (2008) (unanimously rejecting the doctrine of preclusion by "virtual representation"); *Smith v. Bayer Corp.*, 564 U.S. 299, 312-13 (2011) (describing the narrowness of exceptions to the premise that a judgment binds only the parties to a suit).

This Court should deny Appellants the legally and factually unjustified preclusive effect they seek, and instead affirm the decision of the court below, including the finding that claim preclusion and

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[8] The district court heard testimony from Scott Falmlen, who Appellants alleged was financing and controlling both the state court and federal court litigation. He denied those allegations on the stand. The district court, after assessing the credibility of the witness on the stand, rejected Appellants' arguments that Falmlen somehow created any privity between the state court and federal court parties. J.S.App. 13-14 n. 9.

collateral estoppel do not bar the plaintiffs in this case from obtaining a fair resolution of their claims.

CONCLUSION

Appellees respectfully request that this Court summarily affirm the unanimous judgment of the three-judge panel.

Respectfully submitted, this the 16th day of December, 2016.

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APPENDIX

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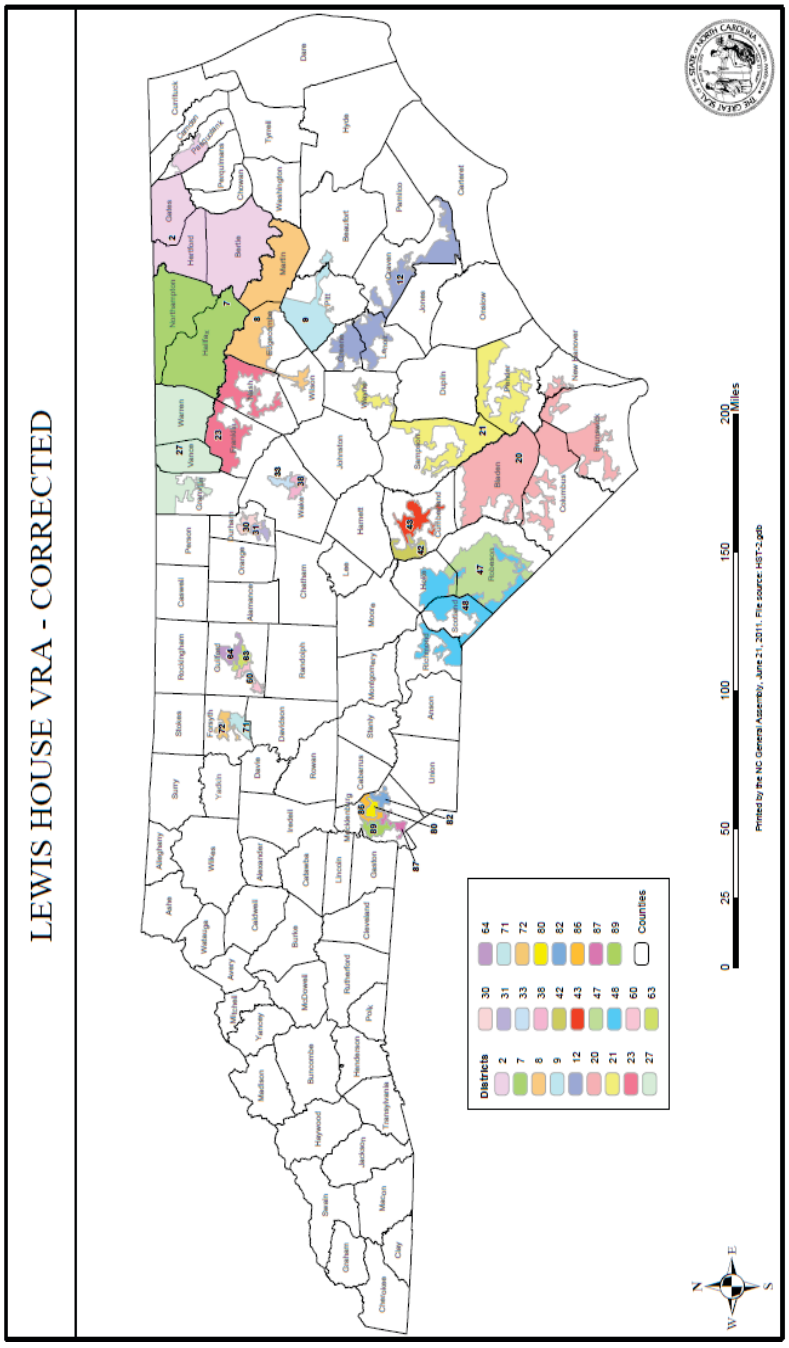
APPENDIX A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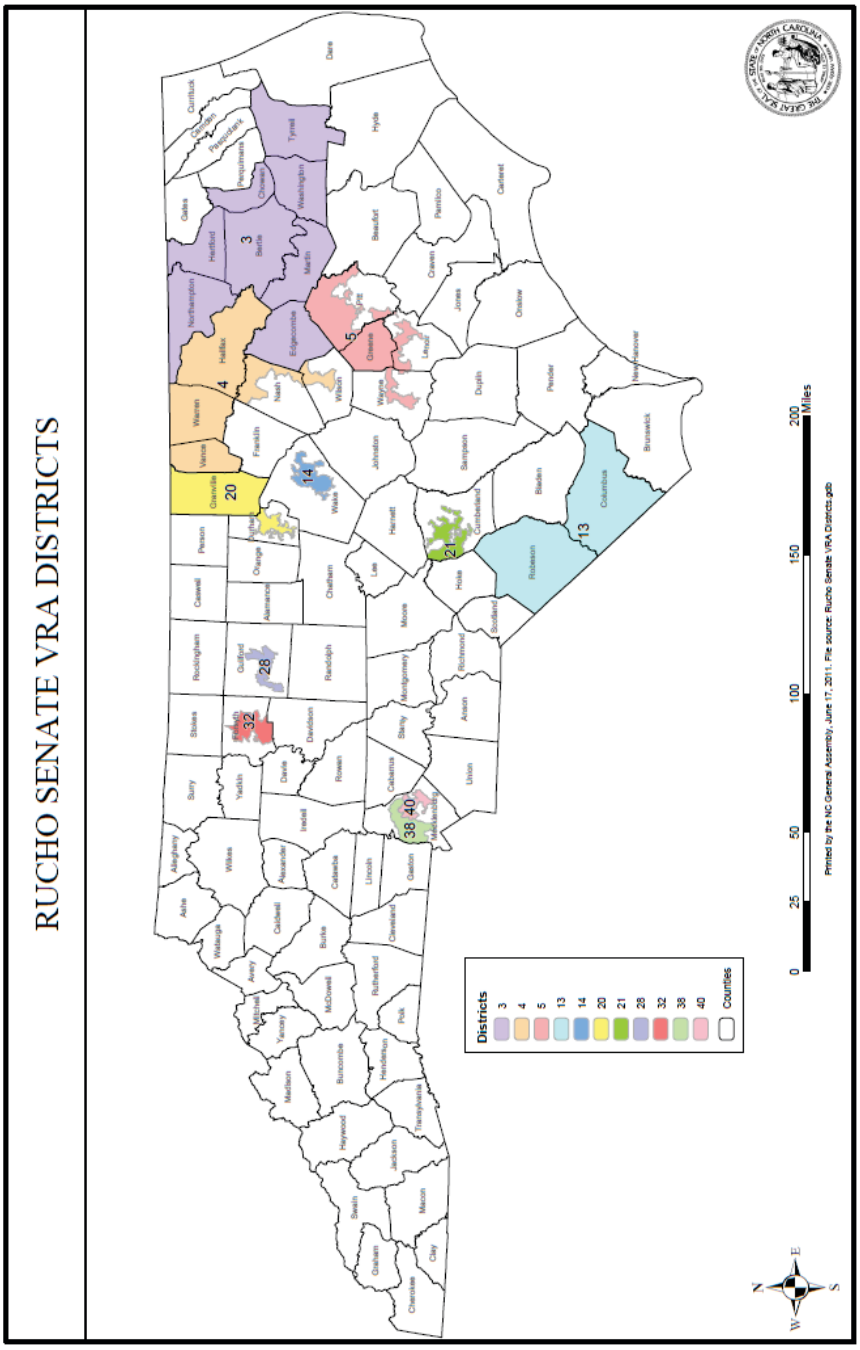
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APPENDIX B

Numbers of White and Black Residents Added or Removed from Unconstitutional Districts*

District (2011 BVAP)	District Population Deviation After 2010 Census	Number of White Residents Added or Removed	Number of Black Residents Added or Removed
SD 4 (52.75%)	27,256 underpopulated	916 added	20,577 added
SD 5 (51.97%)	6,811 underpopulated	38,250 removed	38,181 added
SD 14 (51.28%)	41,804 overpopulated	38,040 removed	2,145 removed
SD 20 (51.04%)	9,086 underpopulated	3,576 removed	15,008 added
SD 21 (51.53%)	25,593 underpopulated	6,297 removed	20,285 added
SD 28 (56.49%)	13,673 underpopulated	12,508 removed	30,773 added
SD 32 (42.53%)	15,440 underpopulated	5,279 added	5,738 added
SD 38 (52.51%)	47,572 overpopulated	31,521 removed	15,477 removed
SD 40 (51.84%)	54,523 overpopulated	67,858 removed	10,592 added
HD 5 (54.17%)	7,861 underpopulated	383 added	9,362 added
HD 12 (50.6%)	15,862 underpopulated	2,994 added	8,784 added
HD 21 (51.9%)	9,837 underpopulated	1,848 added	11,217 added
HD 24 (54.76%)	17,333 underpopulated	3,487 added	13,586 added

HD 29 (51.34%)	9,416 underpopulated	6,502 removed	13,286 added
HD 31 (51.81%)	11,812 overpopulated	9,097 removed	2,596 removed
HD 32 (50.45%)	78 overpopulated	11,147 removed	14,346 added
HD 38 (51.37%)	4,813 overpopulated	24,294 removed	19,027 added
HD 42 (52.56%)	11,017 underpopulated	137 removed	9,681 added
HD 43 (51.45%)	28,637 underpopulated	13,449 added	13,653 added
HD 48 (51.27%)	13,018 underpopulated	6,751 added	12,908 added

*Only challenged districts that maintained some core of the prior district were included in this chart (districts not included: HD 7, HD 33, HD 57, HD 58, HD 60, HD 99, HD 102, HD 107)

Source: District Court Opinion and Third Joint Stipulations, *Covington v. NC*, 1:15-cv-399, ECF No. 90 (M.D.N.C. Mar. 30, 2016)

Unconstitutional Districts that Split Counties – Black Voting Age Population in Portions Included/Excluded from the Unconstitutional District

District	County Split in District	BVAP % of County Portion Included in District	BVAP % of County Portion Excluded from District
SD 4	Nash	51.03%	25.78%
	Wilson	63.32%	24.10%
SD 5	Pitt	49.28%	16.07%
	Lenoir	64.49%	16.16%
	Wayne	55.95%	16.17%
SD 20	Durham	59.18%	17.73%
SD 21	Cumberland	56.92%	22.49%
HD 5	Pasquotank	52.64%	17.33%
HD 7	Nash	52.92%	15.02%
	Franklin	45.07%	17.17%
HD 12	Craven	44.70%	12.93% - HD 3 13.66% - HD 10
	Lenoir	59.84%	15.74%
	Greene	42.52%	24.49%
HD 21	Duplin	45.75%	15.13%
	Sampson	53.71%	21.28%
	Wayne	54.08%	16.91% - HD 4 13.83% - HD10
HD 24	Pitt	54.74%	34.13%
	Wilson	61.58%	23.42%

HD 32	Granville	54.26%	26.57%
HD 48	Hoke	45.51%	27.51%
	Richmond	50.91%	15.16%
	Robeson	57.97%	13.69% - HD 46 17.36% - HD 47 29.53% - HD 66
	Scotland	49.84%	16.62%

Sources: District Court Opinion; Defendants' Answer, *Covington v. NC*, 1:15-cv-399, ECF No. 14 (M.D.N.C. Aug. 14, 2015); Plaintiffs' Amended Complaint, ECF No. 11 (M.D.N.C. July 24, 2015).

2011 Split Precincts – Black Voting Age Population (BVAP) of Portions of Split Precincts Included in Unconstitutional Districts

District	# of Split Precincts	BVAP % of Portions of Split Precincts Included in District
SD 4	2	82.2%
SD 5	40	70.6%
SD 14	29	64.1%
SD 20	35	63.8%
SD 21	33	60.3%
SD 28	15	70.4%
SD 32	43	79.5%
SD 38	8	89.6%
SD 40	16	72.2%
HD 5	6	74.5%
HD 7	22	83.1%
HD 12	34	65.99%
HD 21	25	60.6%
HD 24	12	52.35%
HD 29/31	21	75%
HD 32	5	82%
HD 33	13	64.14%
HD 38	13	65.28%
HD 42/43	27	67.4%
HD 48	31	77.9%
HD 57/58/60	37	77.7%
HD 99	7	65.5%
HD 102	13	62.4%
HD 107	9	55.7%

Sources: District Court Opinion and Third Joint Stipulations, *Covington v. NC*, 1:15-cv-399, ECF No. 90 (M.D.N.C. Mar. 30, 2016)