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

DAVID HARRIS; CHRISTINE BOWSER; and SAMUEL LOVE, 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.	**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Defendants Patrick McCrory, in his capacity as Governor of North Carolina, the North Carolina State Board of Elections, and Joshua Howard, in his capacity as Chairman of the North Carolina State Board of Elections (collectively "Defendants"), submit this Memorandum of Law in support of their motion for summary judgment and respectfully request that the Court dismiss the claims alleged by Plaintiffs David Harris and Christine Bowser (collectively "Plaintiffs")[1] in the Complaint in this action in their entirety.

NATURE OF THE CASE

This action reflects an effort to re-litigate claims and issues regarding North Carolina's First and Twelfth Congressional Districts that have already been litigated before and decided in Defendants' favor by a three-judge panel. *See Dickson et al* v.

[1] Plaintiff Samuel Love was voluntarily dismissed from this action on March 13, 2014. (D.E. 54.)

Rucho et al, Nos 11 CVS 16896 and 11 CVS 16940 (Wake County Superior Court July 8, 2013) (three-judge panel decision previously filed with this Court as D.E. 30-1 & 30-2) (hereinafter referred to as "the *State Redistricting Cases*"). Plaintiffs should not be permitted to re-litigate these same claims and issues here because the undisputed facts show that both Plaintiffs are members of an organization that served as a lead plaintiff in the *State Redistricting Cases*. In addition, the same legal theories Plaintiffs rely upon to support their claims here have already been rejected by the three-judge panel in the *State Redistricting Cases* and by the United States Supreme Court. Accordingly, Defendants' motion for summary judgment should be granted and Plaintiffs' claims in this matter dismissed with prejudice.

STATEMENT OF FACTS

Most of the factual background relevant to this motion is recited in Defendants' Memorandum in Opposition to Plaintiffs' Motion for a Preliminary Injunction (D.E. 29, pp. 2-22) and Defendants' Memorandum of Law in Support of their Motion to Stay, Defer, or Abstain (D.E. 44, pp. 1-5) and the facts stated in these filings are therefore incorporated by reference. Defendants also rely upon the following additional undisputed facts to support this motion:

1. Plaintiff David Harris

Plaintiff David Harris ("Mr. Harris") is a resident of Durham and lives in the First Congressional District. (Deposition of David Harris ("Harris Dep.") at 12, 16.) He has been a resident of the First District since it was drawn into Durham County following the

2011 round of redistricting. (Harris Dep. 16.) Before that, Mr. Harris lived in the Fourth Congressional District. (*Id*.)

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 testified that he 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, 77, 79.) He has no responsibility for paying any attorneys' fees or costs associated with his participation in this action. (*Id.* at 69-70, 85.)

Critically, Mr. Harris could not identify any harm or injury that he personally sustained as a result of being placed in the First Congressional District. (*Id.* at 95.) As alleged in the Complaint, the First Congressional District has elected candidates of choice of African-American voters since elections were first held in it in 1992. (Compl. ¶ 16.) Instead, Mr. Harris's objection to the First District 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. (Harris Dep. 95.)

Mr. Harris is very involved in political and community activities in Durham. Among his many activities, Mr. Harris currently serves as treasurer of the Durham County Democratic Party and as a member of the state executive committee of the North Carolina Democratic Party. (*Id.* at 17, 22.) Mr. Harris served as president of the Durham People's Alliance from 2009 through 2012. (*Id.* at 24.) Though not officially part of the North Carolina Conference of Branches of the NAACP ("NC NAACP"), the Durham People's Alliance supports the NC NAACP's 14-point agenda and Mr. Harris attended at

least one NC NAACP meeting as a representative of the Durham People's Alliance. (*Id.* at 25, 48-49.)

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 testified that he completed a membership form and sent the form and his membership dues to an address in Baltimore, Maryland. (*Id.* at 45-47, Ex. 7.) Although Mr. Harris obtained the NAACP membership form he completed and sent in from the Durham chapter of the NC NAACP, he testified that he did not know whether he was also a member of the NC NAACP because he sent the membership form and dues to the Baltimore address. (*Id.* at 45- 47, 50.)

2. Plaintiff Christine Bowser

Plaintiff Christine Bowser ("Ms. Bowser") resides in the Twelfth Congressional District and has lived in the district since it was first drawn by the General Assembly in 1992. (Deposition of Christine Bowser ("Bowser Dep.") at 10-11, 22-23.) 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. (Bowser Dep. 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 but agreed with the Complaint's allegation that race, rather than political considerations, best explained the shape of the Twelfth District. (*Id.* at 21-22, 26.) Ms. Bowser bases this belief on the following: (1) her view that the district "took in the black neighborhoods and that "mostly black people"

live in the district and (2) a speech by Congressman Mel Watt at a Democratic Party district meeting in which he stated that "he felt he could win if the boundaries were not as they were" and that "we didn't need to all be included together to get blacks elected" in the district. (*Id.* at 26-27, 40.)

Just as Mr. Harris testified with respect to the First District, Ms. Bowser also testified that she objects to the current version of the Twelfth District because "it prevents us (black voters) from being in other districts." (*Id.* at 28.) Ms. Bowser, however, acknowledged that Congressman Watt is a candidate of choice of African-American voters and that he has represented the Twelfth District since its inception. (*Id.* at 11, 23, 28; Compl ¶ 25.) Moreover, during his tenure in Congress, Ms. Bowser testified that 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.)

Like Mr. Harris, Ms. Bowser is very active in state and local politics and currently serves as a member of the state executive committee of the North Carolina Democratic Party and as chair of her precinct in Mecklenburg County. (*Id.* at 12-13.) In addition to her involvement with the state Democratic Party, Ms. Bowser has been involved with several organizations that are plaintiffs in the *State Redistricting Cases*. 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.)

Despite their objections to First and Twelfth Districts, neither Mr. Harris nor Ms. Bowser have offered any proposed alternative congressional maps that could be used to remedy any of their objections while also achieving the General Assembly's legitimate political goals.

3. Plaintiffs' Membership in the NC NAACP

The NC NAACP was one of the lead plaintiffs in the *State Redistricting Cases*. To confirm Plaintiffs' membership, Defendants issued a subpoena to the NC NAACP under Federal Rules of Civil Procedure 30(b)(6) and 45 and requested that the NC NAACP designate a witness to testify regarding this subject. The NC NAACP designated Rev. Dr. William Barber II to testify. At his deposition, 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.[2] (Deposition of Rev. Dr. William Barber II ("Barber Dep.") at 17, 26-27.) Rev. Barber also confirmed that the membership form Mr. Harris

[2] Rev. Barber refused to answer specific questions regarding whether or not the NC NAACP considered either Mr. Harris or Ms. Bowser to be members. (Barber Dep. 45-48.)

acknowledged completing is the same membership form that is available on the NC NAACP's website. (Barber Dep. 33-35, Exs. 7, 20.)

Rev. Barber's testimony in this regard is consistent with the NC NAACP's complaint in the *State Redistricting Cases* which included the following allegation: "Plaintiff the North Carolina State Conference of Branches of the NAACP is a nonpartisan, nonprofit organization composed of over 100 branches and 20,000 individual members throughout the state of North Carolina."[3] (D.E. 44-1, p. 5) (NC NAACP Compl. ¶ 9).

In the *State Redistricting Cases*, all of the organizational plaintiffs, including the NC NAACP, Democracy North Carolina, and the League of Women Voters of North Carolina, repeatedly asserted that they had standing to serve as plaintiffs in those cases because they were acting as representatives of their respective members. (D.E. 44-5, p. 17) (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)).

QUESTIONS PRESENTED

I. Should this action be dismissed because the doctrines of *res judicata* and collateral estoppel bar Plaintiffs' claims in this action?

[3] It is also consistent with the NAACP's long-held position that membership in any chapter or branch of the NAACP is equivalent to membership in the national organization. *See Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 451-52 (1958) ("The National Association for the Advancement of Colored People is a nonprofit membership corporation organized under the laws of New York. Its purposes, fostered on a nationwide basis, are those indicated by its name, and it operates through chartered affiliates which are independent unincorporated associations, with membership therein equivalent to membership in petitioner.").

II. Are Defendants entitled to judgment as a matter of law on Plaintiffs' claims that the First and Twelfth Congressional Districts violate their rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

ARGUMENT

I. This action should be dismissed because Plaintiffs' claims in this action are barred by the doctrines of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion)

Plaintiffs' claims in this action are barred by the doctrines of *res judicata* and collateral estoppel because (1) this action involves the same claims and issues with respect to the First and Twelfth Congressional Districts that were decided by the three-judge state court in the *State Redistricting Cases* and that are now pending on appeal before the North Carolina Supreme Court and (2) the interests of the Plaintiffs in this litigation are aligned with and substantially similar to those presented in the *State Redistricting Cases*. Indeed, each of the Plaintiffs here were members of at least one of the plaintiff organizations in the *State Redistricting Cases*. As such, the Plaintiffs in this action are merely attempting a "second bite," which the law does not allow.

A. Applicable Legal Standards

In applying these doctrines, the Court must first determine whether the claims or issues raised by Plaintiffs in this action would be precluded by the judgment entered in the *State Redistricting Cases* under North Carolina law, and then decide whether the preclusion of these claims or issues comports with federal statutory and due process requirements. *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 375 (1996) ("When faced with a state court judgment relating to an exclusively federal claim, a

federal court must first look to the law of the rendering State to ascertain the effect of the judgment. If state law indicates that the particular claim or issue would be barred from litigation in a court of that state, then the federal court must next decide whether, 'as an exception to [the Full Faith and Credit Act, 28 U.S.C. § 1738],' it 'should refuse to give preclusive effect to [the] state court judgment.'"); *see also In re Genesys Data Technologies, Inc.*, 204 F.3d 124, 129 (4th Cir. 2000) ("[I]n a host of cases, the Supreme Court . . . has directed that the full faith and credit statute requires a federal court to apply state res judicata law in determining the preclusive effect of a state court judgment.").

Under the doctrine of *res judicata*, or claim preclusion, the North Carolina Supreme Court has held that "a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them." *Thomas M. McInnis & Assoc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986); *see also Ashton v. City of Concord*, 337 F. Supp. 2d 735, 741 (M.D.N.C. 2004) ("Under North Carolina law, a previous judgment will preclude a subsequent action if the first decision was a final judgment on the merits, involving the same parties or parties in privity with them, and the same cause of action.").

Similarly, under the doctrine of collateral estoppel, or issue preclusion, "a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies." *Hall*, 318 N.C. at 421, 349 S.E.2d at 557. In determining whether privity between parties exists, "courts will look beyond the nominal party whose name appears on the record as plaintiff and consider the legal questions

raised as they may affect the real party or parties in interest." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 36, 591 S.E.2d 870, 893 (2004).

B. Plaintiffs are bound by the judgment of the trial court in the *State Redistricting Cases*

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 the *State Redistricting Cases*. First, the ruling in the *State Redistricting Cases* 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).

Moreover, 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 the *State Redistricting Cases*. *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 even though he mailed his application form and membership dues to the NAACP's national office in Baltimore, Maryland. Similarly, the undisputed testimony of Ms. Bowser and Rev. Barber shows that, as a member of the Mecklenburg County branch of the NAACP, 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 the *State Redistricting Cases* were filed. (Harris Dep. 44-46, 49-50; Bowser Dep. 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 the *State Redistricting Cases*, and both Plaintiffs testified that they supported the NC NAACP's mission and work.

Further, there is no evidence that the NC NAACP failed to adequately represent the interests of the Plaintiffs when it asserted the same claims in the *State Redistricting Cases* with respect to the First and Twelfth Congressional Districts that the Plaintiffs assert here. Indeed, the NC NAACP's standing in the *State Redistricting Cases* was based on its contention that it was acting in a representative capacity by representing the interests of its members. Plaintiffs cannot now disown those interests in order to have a "second bite" at the same claims and issues asserted by the NC NAACP in the *State Redistricting Cases*. *See 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"). In addition, Ms. Bowser should be further bound by the judgment entered in the *State Redistricting Cases* 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 the *State Redistricting Cases*.

II. The Defendants are entitled to judgment as a matter of law on Plaintiffs' claims that the First and Twelfth Congressional Districts violate their rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution

In addition to the fact that Plaintiffs' claims in this action are barred because they are bound by the judgment of the three-judge panel in the *State Redistricting Cases*, Defendants are entitled to judgment as a matter of law on Plaintiffs' claims that the First and Twelfth Congressional Districts violate their rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The legal arguments supporting dismissal of Plaintiffs' claims in this action are detailed in Defendants' Memorandum in Opposition to Plaintiffs' Motion for a Preliminary Injunction (D.E. 29, pp. 22-36) which Defendants hereby incorporate by reference. Defendants' motion for summary judgment also should be granted for the following additional reasons:

A. Applicable Legal Standards

Under Rule 56 of the Federal Rules of Civil Procedure, Defendants are entitled to judgment as a matter of law on all of Plaintiffs' claims because no genuine issues of material fact exist. Under Rule 56(c) of the Federal Rules of Civil Procedure, the Court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See Causey v. Balog*, 162 F.3d 795, 800 (4th Cir. 1998).

Rule 56 requires the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). When a defendant properly supports its motion for summary judgment with evidence demonstrating that it is entitled to judgment as a matter of law, the plaintiff must present affirmative evidence to establish a genuine dispute of material fact in order to defeat the summary judgment motion. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255-57 (1986). If the plaintiff fails to do so, the court must grant summary judgment against the plaintiff. *Id.*

B. Plaintiffs do not assert a cognizable injury under any legal theory because no court has held that plaintiffs are entitled to a preferred level of political "influence"

As their deposition testimony makes clear, the true basis of Plaintiffs' claims in this action is that they dislike the political impact of the First and Twelfth Districts as they were enacted by the General Assembly in 2011. Plaintiffs do not contend that

African-American voters are not able to elect candidates of choice in either the First or Twelfth Districts; indeed, they admitted they can. Instead, Plaintiffs contend that the First and Twelfth Districts, as drawn, prevent African-American voters from "being in" and having the ability to "influence" the outcome of elections in *other* districts. (Harris Dep. 95; Bowser Dep. 28.)

But the United States Supreme Court has at least twice rejected the notion that the Voting Rights Act, and by extension, the Constitution, requires a legislature to enact districts that provide a particular group with political "influence." *See Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) ("This Court has held that § 2 does not require the creation of influence districts.") (citing *League of Latin American Voters ("LULAC") v. Perry*, 548 U.S. 399, 445 (2006)). Accordingly, Defendants are entitled to summary judgment on Plaintiffs' claims in this action because neither the law nor the United States Constitution required the state of North Carolina to enact congressional districts that permitted African Americans to have a preferred level of political "influence."

C. Plaintiffs have failed to demonstrate that race was the "predominant factor" used by the General Assembly in drawing the First and Twelfth Congressional Districts

Plaintiffs have failed to show that race was the "predominant factor" used by the General Assembly in drawing either the First or Twelfth Districts. Defendants incorporate by reference their argument first made in opposition to Plaintiffs' motion for a preliminary injunction in this action. (D.E. 29, pp. 22-40.) In addition, Defendants show the Court as follows:

i. First Congressional District

To prove a racial gerrymander, "race must not simply have been 'a motivation for the drawing of a majority-minority district.'" *Easley v. Cromartie*, 532 U.S. 234, 241 (2001) ("*Cromartie II*") (citing *Bush v. Vera*, 517 U.S. 952, 959 (1996)). Plaintiffs cannot prove a racial gerrymander simply because a district was drawn with a "consciousness" of race. *Vera*, 517 U.S. at 958. This is because a state must consider race when it enacts a congressional redistricting plan in order to avoid liability under the Voting Rights Act. *Id.* at 958; *Wilkins v. West*, 264 Va. 447, 462-80, 571 S.E.2d 100, 108-19 (2002) (evidence that legislature drew districts to comply with the Voting Rights Act does not prove that race was the predominant factor). Plaintiffs instead must prove that race was the "predominant factor" or that the lines of the district are "unexplainable on grounds other than race." *Cromartie II, supra.*

The statements provided by the legislative leaders supervising the redistricting process, the testimony of Dr. Thomas Hofeller, Defendants' expert, who was also engaged by the General Assembly to draw the 2011 Congressional Plans, the testimony of the plaintiffs' expert in the *State Redistricting Cases,* and the admissions of the Plaintiffs' expert in this case, demonstrate that the lines of the First Congressional District are not unexplainable for any reason other than race. *See Cromartie v. Hunt*, 133 F. Supp. 2d 407, 416 (E.D.N.C. 2000) ("*Cromartie II*"), *rev'd in part*, 532 U.S. 234 (2001) (citations omitted).

In 2011, redistricting decisions by the General Assembly were made by Sen. Bob Rucho and Rep. David Lewis, the chairs of the joint committee on redistricting (the

"Legislative Leaders"). (Deposition of Dr. Thomas Hofeller ("Hofeller Dep.") at 20.) During the redistricting process, the Legislative Leaders issued several statements explaining their criteria for congressional redistricting and the criteria used to construct the First and Twelfth Districts. (*See* D.E. 29, pp. 18-20; D.E. 32-1, pp. 11-44.) Since it was first enacted in 1991, the First District has always been designed to protect the state from liability under § 2 of the Voting Rights Act. (Hofeller Dep. 34); *Shaw v. Reno*, 509 U.S. 630, 635 (1993) ("*Shaw I*"). Following the United States Supreme Court's decision in *Bartlett v. Strickland*, any district drawn to protect the state from liability under § 2 had to be drawn with a Total Black Voting Age Population ("TBVAP") in excess of 50 percent. 556 U.S. at 17; (Hofeller Dep. 22-23, 35-36; D.E. 32-1, pp.12, 15, 23, 35, 37.) Thus, the 2011 First District necessarily had to be drawn with a "consciousness" of race.

However, many factors other than race contributed to the shape of the First District and the location of its lines. One of the directions given to Dr. Hofeller by the Legislative Leaders was to change the political dynamics of the map as compared to prior maps drawn by Democrats. As such, Dr. Hofeller was instructed to create a congressional plan in which three districts, including the First and Twelfth, were high-performing districts for Democrats and ten districts that were competitive for Republicans. (Hofeller Dep. 23-24.) In contrast, the 2001 district plan was drawn by a Democratic-controlled General Assembly with completely different political goals than the Republican-controlled General Assembly that drew the 2011 plans. (*Id.* at 73.) A congressional plan is holistic in nature because changes in the location of one district can impact all of the other districts. (*Id.* at 28.) Therefore, changes made for political reasons

in one district can have an impact on the political balance in all other districts. (*Id*. at 25-28.)

Regardless of the political goals of the Legislative Leaders, all districts had to be aligned with federal law. The "preeminent" requirement under federal law is that all districts have equal population. (Hofeller Dep. 25; D.E. 32-1, p. 27.) The plan also had to be designed so that it would be precleared under § 5 of the Voting Rights Act and to protect the state from liability under § 2 of the Voting Rights Act. (Hofeller Dep. 22, 31, 38; D.E. 32-1, p. 27-31.) The Legislative Leaders also understood that creating a majority-black district in the area encompassed by the First District would have the effect of making adjoining districts more competitive for Republicans. (D.E. 32-1, p. 22.)

The shape and location of the First District was also governed by other legitimate redistricting criteria adopted by the Legislative Leaders. The First District is based upon the core of the 2011 version of the district. (Hofeller Dep. 27, 33-34; D.E. 32-1, p. 27.) Because the First District was substantially underpopulated under the 2010 census as it was configured in 2001, the General Assembly was required to add 97,000 more people to the district. (Hofeller Dep. 25-26, 60; Deposition of Dr. Stephen Ansolabehere ("Ansolabehere Dep.") at 79-80.) Given the chronically poor population growth in the Northeastern part of the state where the First District was located after the enactment of the 1991 version, the Legislative Leaders elected to adopt a model for the district first adopted in 1991 and to add portions of the Triangle to the district. (D.E. 30-5, pp. 7, 17-19.) The Legislative Leaders selected this option for adding sufficient population to the district to ensure that the district would not become so substantially underpopulated

between the time the district was enacted in 2011 and the next round of redistricting in 2021. (Hofeller Dep. 26.)

The shape and location of the district was also heavily influenced by the desires of the incumbent. (D.E. 32-1, p. 28-29, 41-42.) The Legislative Leaders also instructed Dr. Hofeller that the First District should be configured as a high-performing Democratic district so that districts adjoining it would be more competitive for Republicans. (Hofeller Dep. 23-24.) In preparing the maps and performing his analysis, Dr. Hofeller evaluated actual election results for various proposed configurations of the First District as well as all other districts. (*Id.* at 49-51, 57-58.)

There can be no doubt that all of these factors dictated the shape and location of the 2011 First District and that the lines of the district are not "unexplainable" for any reason other than race. Even the plaintiffs' expert in the *State Redistricting Cases* agreed that race and politics played an equal role in the construction of the First District. (Deposition of David W. Peterson ("Peterson Dep.") at 100-01.) The testimony of Plaintiffs' expert in this case, Dr. Stephen Ansolabehere, bolstered this conclusion. Dr. Ansolabehere conceded that the population removed from the 2001 version of the First District was more likely to support Republican candidates than the population added to the First District under the 2011 configuration of the district. *(*Ansolabehere at 118-20.) Thus, like the plaintiffs' expert in the *State Redistricting Cases*, the Plaintiffs' expert here also has confirmed Dr. Hofeller's testimony that the Legislative Leaders intended to make the First District a stronger performing Democratic district as compared to the 2011

version, and to make other districts that adjoined the 2011 First District better performing for Republicans as compared to their 2001 equivalent districts.

Plaintiffs' expert also testified that the 2011 First District is "substantially less compact" than the 2001 version. However, whether a district is "compact" is irrelevant unless Plaintiffs first prove that race was the predominant factor for the shape of the First District and the location of its lines. *Cromartie II*, 532 U.S. at 241-42. If Plaintiffs carry this burden, Defendants must show that the legislative record contained a strong basis for concluding that a majority black district was reasonably necessary to protect the State from liability under § 2. *Shaw v. Hunt*, 517 U.S. 899, 910 (2006) ("*Shaw II*") (citing *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 274-75 (1986)). To carry this burden of production, the State must show evidence in the legislative record that a geographically compact African-American population would constitute a majority in a single-member district, that African Americans are politically cohesive, and that African-American voters do not have an equal opportunity to elect their candidates of choice because of racially polarized voting (the "*Gingles* preconditions"). *Shaw II*, 517 U.S. at 914 (citing *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986)). The findings of fact made by the three-judge panel in the *State Redistricting Cases* detail the evidence in the legislative record that gave the General Assembly a strong basis for concluding that the 2011 First Congressional District remained reasonably necessary to protect the State from § 2 liability. (D.E. 30-2, pp. 2-23, 81-83) (Findings of Fact Nos. 1-37; 165-71).

In addition to the findings by the state court, other evidence shows the presence of the *Gingles* preconditions. No one disputes that African Americans are politically

cohesive. *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) ("*Cromartie I*"); *Cromartie II*, 532 U.S. at 242, 252, 258. In their opening brief in support of a preliminary injunction, Plaintiffs argued that racially polarized voting no longer exists in the area encompassed by the First Congressional District. Plaintiffs' only argument was based upon their position that the 2001 First District was "majority white." (*See* D.E. 36, pp. 6, 14 n.1, 32, 33).[4] We explained that the 2011 First District was not a majority-white district but instead was a majority-minority coalition district. Non-Hispanic whites constituted less than a majority in the 2001 version. African Americans also constituted a super majority of the registered Democrats in the 2001 version of the First District. (*See* D.E. 29, pp. 13-16.) Moreover, as found by the three-judge panel in the *State Redistricting Cases*, the legislature had a strong basis in evidence to conclude that racially polarized voting continues to exist in this area of the State. (*See* D.E. 30-2, pp. 2-23, 81-81) (Findings of Fact Nos. 1-37, 165-71).

Therefore, even assuming Plaintiffs have demonstrated that race was the predominant factor for the shape and location of the 2011 First District, which Defendants deny, Plaintiffs are left with an argument that the 2011 First District cannot protect the State from § 2 liability because it is not based upon a reasonably compact African-American population. The only evidence offered by Plaintiffs in support of this proposition is the testimony of Dr. Ansolabehere. Dr. Ansolabehere's argument is that the 2011 version of the First District is "substantially" less compact that the 2001 version

[4] Regardless, racially polarized voting can still be present in districts that are less than majority black. *Cromartie II*, 133 F.Supp. 2d at 415 n.6, 422.

of the district.[5] (Ansolabehere Dep. 71.) Dr. Ansolabehere bases this conclusion on the fact that the Reock score[6] for the 2001 version of the First District was .390 while the Reock score for the 2011 version was .294. (*Id.* at 72.) Although it is not clear at what point a reduction in score becomes "substantial," Dr. Ansolabehere testified that a smaller reduction in a district's Reock score, such as a reduction from .32 to .29, would "probably not" be considered "substantial." (*Id.* at 74.) This testimony is significant because the 1997 version of the First District was found to be based upon a geographically compact minority population and had a Reock score of 0.317. *Cromartie II*, 133 F. Supp. at 432 & n.27. Thus, the Reock score of the legally compact 1997 version of the First District is only 0.023 higher than the current version of the First District. Dr. Ansolabehere admitted that this small difference would "probably not" be considered "substantial."[7] (*Id.* at 74.)

[5] Dr. Ansolabehere made the same assertion with respect to the Twelfth Congressional District, however, his conclusions with respect to this district need not be addressed because compactness is irrelevant since the Twelfth District was not enacted by the General Assembly as a Voting Rights Act district.

[6] The Reock scoring system is a type of "dispersion compactness" test that measures the geographic dispersion of a district. To perform the test, a circle is drawn around the district and the resulting coefficient reported is the proportion of the area of the circumscribed circle which is also included on the district. *Cromartie II*, 133 F. Supp. 2d at 415 n. 4.

[7] Dr. Ansolabehere also acknowledged that there is no bright-line test for determining when a district is legally compact and when it is not and admitted that there is a general "rule of thumb" that the threshold for a district with "low compactness" is a Reock score that is below .200. (Ansolabehere Dep. 68-70, 83.) This threshold is well below the .294 score given to the current version of the First District.

ii. Twelfth Congressional District

The three-judge panel in the *State Redistricting Cases* made extensive findings of fact regarding whether the 2011 Twelfth Congressional District constituted a racial gerrymander. (D.E. 30-2, pp. 87-89.) These findings of fact relied, in part, upon testimony by Dr. Hofeller. (*See* D.E. 30-2, pp. 87-89) (citing Dr. Hofeller Trial Testimony ["Hofeller TT"] in the *State Redistricting Cases* which is attached to Defendants Summary Judgment Motion in this matter as Exhibit R.) Dr. Hofeller testified a second time regarding the criteria he was directed to follow in drawing the Twelfth District during his deposition in this case. (*See, e.g.*, Hofeller Dep. 25-26, 38, 50-53, 76.)

In arguing that that the Twelfth District is a racial gerrymander, Plaintiffs' expert, Dr. Ansolabehere, relies upon race and registration statistics, not election results. In contrast, Dr. Hofeller did not rely upon or consider the race of voters living in a particular Voting Tabulation District ("VTD") or voter registration statistics in drawing the Twelfth District. In fact, this information was never displayed on the computer screen of the Maptitude software program Dr. Hofeller used to draw the challenged districts. (D.E. 30-2, p. 88-89) (citing Hofeller TT at pp. 18-19, 24). Dr. Hofeller instead referred only to how VTDs performed during the 2008 Presidential Election, specifically the percentage by which President Obama won or lost a particular VTD. (*Id.;* Hofeller Dep. 49-51, 57-58.)

Plaintiffs have no evidence to dispute any of this. In fact, Plaintiffs' own expert confirmed that a map-drawer using the Maptitude system can decide the type of

information he wants to use in drawing districts with the program and that a map-drawer could limit this information to VTDs and election results, including the result of a particular election. (Ansolabehere Dep. at 53-55.) As such, if the map-drawer only chooses to look at election results, the race of voters cannot be determined. (*Id.* at 58-59.) This fact alone shows that race could not have been the "predominant factor" in drawing the Twelfth District.

Dr. Ansolabehere's conclusion that race was the "predominant factor" in the First and Twelfth Districts is based upon an "envelope of counties" theory that Dr. Ansolabehere admitted has never been adopted or applied by any court in a racial gerrymandering case. (*Id.* at 91-93.) Additionally, Dr. Ansolabehere admitted that in conducting his "predominant factor" analysis, he did not look at "what individuals were doing when they drew the maps" but instead focused on the "effects" of the districts as they were drawn.[8] (*Id.* at 56.) And, unlike the actual map-drawers, Dr. Ansolabehere did not review or rely upon any decisions of the United States Supreme Court in performing his analysis of the challenged districts. (*Id.* at 60-61.) In particular, Dr. Ansolabehere did not review either the *Cromartie I* or *Cromartie II* decisions. Thus, in preparing his report, Dr. Ansolabehere relied exclusively upon comparing voter registration statistics and race, a methodology rejected on two occasions by the United

[8] To prove intentional discrimination under the Fourteenth Amendment, Plaintiffs must prove both effect *and* discriminatory intent. *See City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980). Plaintiffs' incorrect reliance on registration statistics to prove discriminatory effect falls woefully short of the evidence needed to provide discriminatory intent.

States Supreme Court in cases dealing with North Carolina's Twelfth District. *See Cromartie I*, 526 U.S. at 557; *Cromartie II*, 532 U.S. at 245.

Even assuming the correctness of Dr. Ansolabehere's methodology, when there is a high correlation between race and politics, Plaintiffs must propose a redistricting plan that is less reliant on race and that also achieves the legislature's political goals. *Cromartie II*, 532 U.S. at 258. Neither the Plaintiffs nor Dr. Ansolabehere have proposed an alternative version of either the First or Twelfth Districts that would achieve the General Assembly's political objectives or bring greater racial balance. (Ansolabehere Dep. 80-82.) This failure alone is fatal to their claims. *Cromartie II*, 532 U.S. at 258.

CONCLUSION

For the foregoing reasons, the claims alleged by Plaintiffs in the Complaint should be dismissed in their entirety.

This the 6th day of June, 2014.

ROY COOPER
ATTORNEY GENERAL OF NORTH CAROLINA

By: /s/ Alexander McC. Peters
Alexander McC. Peters
Senior Deputy Attorney General
N.C. State Bar No. 13654
apeters@ncdoj.gov
N.C. Department of Justice
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
Michael D. McKnight
N.C. State Bar No. 36932
thomas.farr@ogletreedeakins.com
phil.strach@ogletreedeakins.com
michael.mcknight@ogletreedeakins.com
4208 Six Forks Road, Suite 1100
Raleigh, North Carolina 27609
Telephone: (919) 787-9700
Facsimile: (919) 783-9412
Co-counsel for Defendants North Carolina State Board of Elections and Joshua Howard, in his capacity as Chairman of the North Carolina State Board of Elections