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

SANDRA LITTLE COVINGTON, *et al.,*	)
	)
Plaintiffs,	)
	)
v.	)
	)
STATE OF NORTH CAROLINA, *et al.*	)
	)
Defendants.	)

DEFENDANTS' EMERGENCY MOTION TO STAY REMEDIAL ORDER PENDING DISPOSITION OF JURISDICTIONAL STATEMENT

Defendants respectfully move this Court to stay its 29 November 2016 order imposing a 15 March 2017 deadline for enactment of remedial legislative districts and imposing a special election in the Fall of 2017 ("Remedial Order") (D.E. 140) pending final disposition of the Jurisdictional Statement filed with the United States Supreme Court on 15 November 2016. Because of the exigent nature of the circumstances, defendants request an expedited ruling on this motion so that defendants can immediately seek relief in the United States Supreme Court if necessary. In support of this motion, defendants show the Court:

1. A special election is an extraordinary remedy that warrants extraordinary caution. While unconstitutional districts surely impose harm on voters within those districts, abrogating the results of a majority of elections across the state by halving legislative terms and replacing duly elected legislators in off-schedule elections with historically low turnout would impose harm on every single voter in the state of North

Carolina. And where the special election is ordered notwithstanding the fact that the state supreme court has twice upheld the constitutionality of the very same districts, requiring a special election also imposes sovereign harms on the State itself. In light of those irreparable harms, as well as the massive cost to taxpayers of holding special elections, such a drastic remedy should be imposed only when the constitutional violation is unmistakable and finally adjudicated. That is not the case here.

2. The Supreme Court of the United States has yet to consider this case on the merits, but is likely to do so in the next few months. On November 15, defendants filed a jurisdictional statement in the Supreme Court. *See* Exhibit A. Unlike in the discretionary certiorari process, the Supreme Court has direct appellate jurisdiction over redistricting decisions by three-judge panels, requiring it to review this Court's decision on its merits. When it does, for the reasons explained in defendants' jurisdictional statement, there is at least the requisite "fair prospect" to warrant a stay, *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010), that the Court will note probable jurisdiction and reverse, thereby eliminating the need for the new maps and special election that this Court has ordered.

3. Moreover, there are numerous other redistricting cases now pending at the Supreme Court that involve issues closely related to those in this case and may ultimately require this Court to reconsider its merits ruling. For instance, in *Harris v. McCrory*, 159 F. Supp. 3d 600 (2016), defendants filed a jurisdictional statement with the Supreme Court. *See* Supreme Court Docket 15-1262. On June 27, 2016, the Court noted probable jurisdiction and ordered briefing on the merits. *Id*. The case has been scheduled for oral argument before the Supreme Court on 5 December 2016. *Id*. In addition, on 30 June

2016, the plaintiffs in *Dickson v. Rucho*, 368 N.C. 481, 485-86, 781 S.E.2d 404, 410-11 (2016), filed a petition for a writ of *certiorari*, which was circulated for a conference of the Supreme Court on 26 September 2016. *See* Supreme Court Docket 16-24. It is highly likely that all three decisions regarding North Carolina's 2011 redistricting will be reviewed by the Supreme Court, and any one of them may well produce an opinion that significantly impacts this case. Therefore, staying the imposition of any remedy in this case will ensure that the State and its residents do not suffer the harm of undergoing the burdensome tasks of drawing new maps and preparing for a special election before the Supreme Court can determine whether the North Carolina Supreme Court or this Court correctly applied the law on racial gerrymandering.

4. Even apart from the merits of plaintiffs' racial gerrymandering claims, defendants also are reasonably likely to receive interim relief from the Supreme Court because the Remedial Order is not supported by law. The Remedial Order identified only two out-of-state district court decisions for the proposition that this Court has the authority to grant such relief. (D.E. 140 at 2) (citing *Butterworth v. Dempsey*, 237 F. Supp. 302, 306 (D. Conn. 1965) (per curiam); *Smith v. Beasley*, 946 F. Supp. 1174, 1212-13 (D.S.C. 1996)) But the authority to grant relief does not justify overreaching relief. And unlike this Court, the court in *Smith* warned the defendants and voters in its initial merits order that it would be shortening legislative terms and ordering a new election. *Smith*, 946 F. Supp. at 1212-13. The *Smith* decision also involved far fewer districts and therefore did not involve the specter of a court invalidating *millions* of validly cast votes. *Id.* at 1213.

5. On the other hand, ample authority cautions lower federal courts against overreaching injunctive relief in cases involving state election laws, including redistricting plans. *See, e.g., Hunt v. Cromartie*, 529 U. S. 1014 (2000); *Voinovich v. Quilter*, 503 U.S. 979 (1992); *Wetherell v. DeGrandy*, 505 U.S. 1232 (1992); *Louisiana v. Hays*, 512 U.S. 1273 (1994); *Miller v. Johnson*, 512 U.S. 1283 (1994); see also *Watkins v. Mabus*, 502 U.S. 952 (1991) (summarily affirming in relevant part *Watkins v. Mabus*, 771 F. Supp. 789, 801, 802-805 (S.D. Miss. 1991) (three judge court)); *Republican Party of Shelby County v. Dixon*, 429 U.S. 934 (1976) (summarily affirming *Dixon v. Hassler*, 412 F. Supp. 1036, 1038 (W.D. Tenn. 1976) (three-judge court)); *Growe v. Emison*, 507 U.S. 25, 35 (1993) (noting that elections must often be held under a legislatively enacted plan prior to any appellate review of that plan). Accordingly, there is a reasonable likelihood that the Remedial Order will be stayed or vacated by the Supreme Court even if defendants do not succeed on the ultimate merits of this case.

6. Without a stay of the Remedial Order, irreparable injury is certain to occur. At the outset, forcing the State to redistrict and hold a special election imposes obvious injuries on the State and the legislators who were elected to serve two-year terms. Moreover, if, as is likely, most of the 120 legislative districts have to be redrawn to comply with this Court's orders, irreparable injuries will be suffered by the State's residents as well. The evidence submitted by defendants (D.E. 136-3, ¶¶ 50-51) suggests that the turnout in a November 2017 special election will be abysmal, and likely at least 50% to 75% lower than the number of voters who voted in the November 2016 general election (4,769,592 voters as of today). And if this Court's decision is reversed or

modified after the court-ordered special election, it will not be possible to replace the representational rights lost by the millions of November 2016 voters whose votes likely will be eliminated by the shortened terms imposed by the Remedial Order. That harm, which is no fault of those voters, should at a minimum be weighed against the alleged "injury caused by allowing citizens to continue to be represented by legislators elected pursuant to a racial gerrymander." (D.E. 140 at 2-3) Respectfully, the supposed injury caused by allowing legislators (including many African American legislators in affected districts) to serve the final year of a two-year term "pales in comparison" to the harm of eliminating millions of votes validly cast (with the express permission of this Court) for those legislators to serve a two-year term. (*Id.*) The injury to these millions of voters by the Remedial Order compounds the injury already caused by a separate federal appellate decision enjoining North Carolina election law reforms. While that decision criticized the State for enacting election laws the court contended would reduce African American turnout, it was only after the appellate court imposed a regime of election laws for the 2016 presidential election that African American participation was suppressed in a presidential election to levels not seen since 2004. It is counterintuitive that the Court would order a special election ostensibly to protect African American voting rights but order that the special election occur under a court-ordered election regime which suppressed African American participation to levels not seen in a decade. Thus, the irreparable harm to North Carolina voters alone warrants a stay of the Remedial Order pending review by the Supreme Court.

7. In addition, by the time of Supreme Court review, the electoral disruption described by defendants in opposition to plaintiffs' special election request likely will have already occurred and cannot be taken back. (D.E. 136-3). Under these circumstances it is neither equitable nor fair to the voters of North Carolina to compel the irreparable injury that will flow from holding special elections in 2017.

WHEREFORE, the Court should stay the Remedial Order pending final disposition of the Jurisdictional Statement filed with the United States Supreme Court in this matter on 15 November 2016.

Respectfully submitted this 2nd day of December, 2016.

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CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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This the 2nd day of December, 2016.

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EXHIBIT A

NO. ___

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

JURISDICTIONAL STATEMENT

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November 14, 2016

QUESTION PRESENTED

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), this Court invalidated North Carolina's state legislative districting plan under Section 2 of the Voting Rights Act for failure to include majority-minority districts in several regions of the State. In every plan since, the legislature has included majority-minority districts where feasible to ensure that politically cohesive and geographically compact minority groups have an equal opportunity to elect their candidates of choice. Those districts have consistently elected minority-preferred candidates, while districts elsewhere in the State have rarely done so. Based on those election results and a wealth of other evidence confirming the continued reality of racially polarized voting, the legislature in 2011 again included several majority-minority districts in its state legislative redistricting plan. Shortly thereafter, two groups of plaintiffs filed suit in state court challenging most of those districts as unconstitutional racial gerrymanders. The court rejected their claims in full. Dissatisfied, the same individuals and groups that organized and funded the first lawsuit then organized and funded this second lawsuit challenging the same districts on the same grounds. The district court invalidated the plan, holding that the challenged districts were based predominantly on race, and that the legislature lacked good reasons to draw *any* of them as ability-to-elect districts.

The question presented is:

Whether the district court erred by invalidating North Carolina's 2011 state legislative districting plan as an unconstitutional racial gerrymander.

PARTIES TO THE PROCEEDING

The following were parties in the court below:

Plaintiffs:

James Edward Alston; Marshall Ansin; Valencia Applewhite; Marvin Cornelous Arrington; Susan Sandler Campbell; Sandra Little Covington; Mark R. Englander; Viola Ryals Figueroa; Jamal Trevon Fox; Dedreana Irene Freeman; Claude Dorsey Harris, III; Channelle Darlene James; Crystal Graham Johnson; Catherine Wilson Kimel; Herman Benthle Lewis, Jr.; David Lee Mann; Cynthia C. Martin; Vanessa Vivian Martin; Marcus Walter Mayo; Latanta Denishia McCrimmon; Catherine Orel Medlock-Walton; Antoinette Dennis Mingo; Rosa H. Mustafa; Bryan Olshan Perlmutter; Julian Charles Pridgen, Sr.; Milo Pyne; Juanita Rogers; Ruth E. Sloane; Mary Evelyn Thomas; Gregory Keith Tucker; John Raymond Verdejo

Defendants:

The State of North Carolina; North Carolina State Board of Elections; Rhonda K. Amoroso, in her official capacity; Philip E. Berger, in his official capacity; Paul J. Foley, in his official capacity; Joshua B. Howard, in his official capacity; Maja Kricker, in her official capacity; David R. Lewis, in his official capacity; Joshua D. Malcolm, in his official capacity; Timothy K. Moore, in his official capacity; Robert A. Rucho, in his official capacity

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INTRODUCTION

The North Carolina state legislative districts, both Senate and House, invalidated by the decision below were created and enacted as part of the same redistricting cycle as the federal congressional districts at issue in *McCrory v. Harris*, No. 15-1262, in which this Court has already noted probable jurisdiction. And racial gerrymandering challenges to both the state and the federal districts were rejected in the same state court litigation, *Dickson v. Rucho*, 781 S.E.2d 404 (N.C. 2015), *petition for cert. pending*, No. 16-24. Undeterred by their state-court loss, the backers of the unsuccessful state-court litigation found members of the organizational plaintiffs in the state-court case and funded a second lawsuit in federal court. As in *Harris*, the three-judge federal court essentially ignored the prior state-court decision and reach diametrically opposed conclusions based on the same facts.

On the merits, the court below reached the astonishing conclusion that the legislature had no strong basis in evidence to create majority-minority districts *at all*. Never mind that this Court found a violation of Section 2 of the Voting Rights Act (VRA) based on failure to draw majority-minority districts in many of the same parts of North Carolina in *Thornburg v. Gingles*, 478 U.S. 30 (1986). Never mind that it was common ground among the parties that ability-to-elect districts needed to be drawn, and the principal dispute was only over what kind of districts—majority-minority versus coalition or crossover—should be drawn. Never mind any of that, the district court concluded that the legislature had

no basis to draw VRA-compliant districts at all, and therefore deemed every single one of the challenged districts an impermissible racial gerrymander. And the court did so even though it should not have been applying strict scrutiny in the first place because traditional districting criteria predominated in the design of the challenged districts.

The decision below cannot stand. It grants no deference to the state court's contrary findings; it reflects no appreciation for *Gingles* and the subsequent history of redistricting in North Carolina; and it flatly disregards this Court's admonition that state legislatures cannot be trapped between the competing hazards of liability under the VRA and the Equal Protection Clause. The only difficult question is whether the Court should summarily reverse or note probable jurisdiction, as the decision below is an outlier that cannot stand.

OPINION BELOW

The opinion of the Middle District of North Carolina is reported at 316 F.R.D. 117 and reproduced at App.1-147.

JURISDICTION

The district court issued its judgment on August 15, 2016. Appellants filed their notice of appeal on September 13, 2016. This Court has jurisdiction under 28 U.S.C. §1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause and the relevant provisions of the VRA are reproduced at App.151-56.

STATEMENT OF THE CASE

A. Legal Background

State legislative redistricting in North Carolina is subject to an array of oft-conflicting state and federal requirements. First and foremost, "[t]he Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis," *Reynolds v. Sims*, 377 U.S. 533, 568 (1964), meaning that North Carolina must redraw its state legislative districts after each decennial census to ensure continued population equality. N.C. Const. art II, §§3, 5.

In doing so, North Carolina must also comply with the VRA, which requires States to take race into account to avoid violations and, where necessary, to obtain preclearance. For example, Section 2 requires States to draw majority-minority districts where a minority group is "politically cohesive" and "sufficiently large and geographically compact to constitute a majority in a single-member district," and the majority group votes sufficiently "as a bloc" to prevent the minority group from electing its preferred candidate. *Gingles*, 478 U.S. at 50-51. And under Section 5, a covered jurisdiction (which several North Carolina counties were in 2011) cannot draw districts that would lead to "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976).

But while the legislature must consider race to some degree to comply with the VRA, it simultaneously must comply with the Equal Protection Clause's prohibition on racial

gerrymandering. Strict scrutiny under that Clause applies, however, only if race was "the 'dominant and controlling' or 'predominant' consideration in deciding 'to place a significant number of voters within or without a particular district.'" *Ala. Legislative Black Caucus v. Alabama* (*ALBC*), 135 S. Ct. 1257, 1264 (2015). Because of the conflicting demands of the VRA and the Equal Protection Clause, this Court has long assumed that compliance with the VRA is a compelling interest sufficient to satisfy strict scrutiny. *See, e.g.*, *Shaw v. Hunt* (*Shaw II*), 517 U.S. 899, 915 (1996). Moreover, to survive strict scrutiny, a State need not prove that its use of race was *necessary* to achieve VRA compliance. *ALBC*, 135 S. Ct. at 1274. Instead, it need only show that it had "good reasons" or a "strong basis in evidence" to fear VRA liability and that the districts it drew are "narrowly tailored" to address the potential violation. *Shaw II*, 517 U.S. at 915.

In addition to balancing those not-always-harmonious federal requirements, the legislature must obey state redistricting law. Most relevant here, the North Carolina Constitution's "Whole County Provision" (WCP) directs that "[n]o county shall be divided" in the formation of a state legislative district. N.C. Const. art. II, §§3(3), 5(3); *See Stephenson v. Bartlett* (*Stephenson I*), 562 S.E.2d 377 (N.C. 2002); *Stephenson v. Bartlett* (*Stephenson II*), 582 S.E.2d 247 (N.C. 2003). The WCP reflects "the historical importance of counties as vital 'political subdivisions'" in North Carolina by "establish[ing] a framework to address the neutral redistricting requirement that 'political subdivisions' be respected." *Dickson*, 781 S.E.2d at 412 & n.4.

Taken literally, the WCP would require all state legislative districts to be composed of whole counties. In practice, however, simultaneous compliance with the WCP, the VRA, and one-person, one-vote is impossible. Accordingly, the North Carolina Supreme Court has sought to harmonize the WCP and federal law by "set[ting] forth an enumerated, hierarchical list of steps to guide the enactment of 'any constitutionally valid redistricting plan.'" App.21 (quoting *Stephenson II*, 582 S.E.2d at 250).

The first of those nine steps is that "districts required by the VRA shall be formed prior to creation of non-VRA districts." *Stephenson II*, 582 S.E.2d at 250. This requires the legislature to begin the redistricting process by deciding whether there are areas where race must be considered to avoid a potential VRA violation—*i.e.*, whether there are covered jurisdictions or areas where a "politically cohesive" minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district," and where the majority might vote "sufficiently as a bloc to enable it … usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50-51. If so, then the legislature must draw districts in those areas first. In doing so, it must form as many single-district, one-county groups as possible; then form as many multi-district, single-county groups as possible; and then use multi-district, multi-county groups for the remaining districts. *Stephenson II*, 582 S.E.2d at 250. After drawing those districts, the legislature must follow the same steps in creating the remaining districts.

B. Factual Background

1. The 2011 Redistricting Process

In early 2011, the legislature selected Senator Bob Rucho as Chair of the Senate Redistricting Committee and Representative David Lewis as Chair of the House Redistricting Committee. App.7-8. Because the North Carolina Supreme Court's interpretation of the WCP required the Chairmen to begin by drawing any districts necessary to avoid VRA violations, they began the process by soliciting input about the extent of racially polarized voting throughout the State, and in particular in covered jurisdictions and areas with significant minority populations. App.21-23. The Chairmen sent letters to numerous individuals and organizations, including the North Carolina NAACP and the University of North Carolina School of Government, requesting information about racially polarized voting, the implications of this Court's decision in *Bartlett v. Strickland*, 556 U.S. 1 (2009), and several other matters related to VRA compliance. All members of the Legislative Black Caucus were copied on those letters. Def.Exh.3013-4, 3013-5; Tr.Vol.III at 135-36.

The Chairmen also organized an unprecedented number of public hearings across the State, at which individuals unanimously confirmed that significant racially polarized voting continues. Def.Exh.3013-1. One of those witnesses was Anita Earls, the Executive Director for the Southern Coalition for Social Justice (SCSJ), who now represents plaintiffs in this case. Def.Exh.3013-6 at 6-11. Ms. Earls supplied an expert report prepared by Dr. Ray Block, who had examined election results in North Carolina

and concluded that "non-blacks consistently vote against African-American candidates and that blacks demonstrate high rates of racial bloc voting in favor of co-ethnic candidates." Def.Exh.3013-8. Ms. Earls testified that the report proved that "we still have very high levels of racially polarized voting throughout the state." Def.Exh.3013-6 at 9-10.

The Chairmen also retained their own expert, Dr. Thomas Brunell, who reviewed and agreed with Dr. Block's findings. He also conducted his own analysis of polarization in 51 counties, including all 40 covered counties and all counties where majority-minority districts were later drawn. He found "statistically significant racially polarized voting in 50 of the 51 counties"; the fifty-first was omitted only because of insufficient data. Def Exh.3033 at 3. At no time during the legislative process did anyone question either expert's conclusions.

The Chairmen then hired Dr. Thomas Hofeller to draw the 2011 maps and gave him three primary instructions. App.8. First, they informed him that the North Carolina Supreme Court's interpretation of the WCP required districts drawn to avoid a VRA violation to be drawn before other districts. App.20-23. Second, they told him that, pursuant to the North Carolina Supreme Court's decision in *Pender County v. Bartlett,* 649 S.E.2d 364 (N.C. 2007), and this Court's *Strickland* decision affirming *Pender*, he should endeavor to draw those districts as majority-minority districts. App.19-20. Third, the Chairmen instructed him to attempt to draw majority-minority districts in a number roughly

proportional to the statewide minority population. App.24-29.

Dr. Hofeller "closely followed" those instructions. App.31. He began by identifying regions with "sufficiently populous, compact minority populations" to form "districts containing minority population percentages in excess of 50%." App.32. He then drew an exemplar map creating districts in those regions, without regard to the WCP. *Id.* Next, he created a second exemplar map containing the optimal county groupings under the WCP criteria outlined in *Stephenson*, without regard to the VRA. App.33. Then, because many of the exemplar majority-minority districts were not contained within an optimal county grouping, Dr. Hofeller engaged in a "long, complex, [and] very time-consuming" iterative process to harmonize the two maps "to the maximum extent practicable." Tr.Vol.IV at 240; Tr.Vol.V at 29; *see* App.33. The harmonized map contained 23 majority-minority House districts and nine majority-minority Senate districts, all within the county groupings required by the WCP.

Three groups submitted alternative maps to the legislature. The first plan was prepared by the Alliance for Fair Redistricting and Minority Voting Rights and presented to the legislature by Ms. Earls. App.66-67 n.26. The second plan was submitted by Democratic members of the General Assembly, *see* Def.Exh.3000 at 199; Def.Exh.3001 at 422, and the third was submitted by the Legislative Black Caucus, *see* Def.Exh.3000 at 210; Def.Exh.3001 at 446. All three alternative plans included either majority-minority or coalition districts in roughly the same

regions and counties in which the enacted Senate and House plans included majority-minority districts.

The Chairmen publicly released Dr. Hofeller's harmonized House and Senate maps in July 2011 and, after minor modifications, both were enacted. App.10-11. The maps were then precleared by the Department of Justice, App.11, and were used during the 2012 and 2014 elections.

2. Initial State Court Litigation

In November 2011, two groups of plaintiffs filed suit in North Carolina state court alleging that 27 state legislative districts (including most of the majority-minority districts) and three federal congressional districts were unconstitutional racial gerrymanders. After a two-day bench trial, the three-judge panel unanimously rejected all their claims in a 74-page opinion supported by a 96-page appendix with detailed factual findings. *Dickson v. Rucho*, Nos. 11 CVS 16896, 11 CVS 16940 (N.C. Super. Ct. July 8, 2013). The plaintiffs appealed, and the North Carolina Supreme Court affirmed. *Dickson v. Rucho*, 766 S.E.2d 238 (N.C. 2014). The plaintiffs petitioned this Court for a writ of certiorari, and the Court granted, vacated, and remanded in light of *ALBC*. *Dickson v. Rucho*, 135 S. Ct. 1843 (2015). After further briefing and oral argument, the North Carolina Supreme Court affirmed again. *Dickson*, 781 S.E.2d 404. Plaintiffs' petition for a writ of certiorari from that decision is pending. *Dickson v. Rucho*, No. 16-24.

3. Federal Court Litigation

After the North Carolina Supreme Court's first affirmance in *Dickson*, plaintiffs—organized, funded,

and represented by the same individuals and groups that organized, funded, and represented the state-court plaintiffs—filed suit in the District Court for the Middle District of North Carolina. Like the *Dickson* plaintiffs, they alleged that most of the majority-minority districts in the Senate and House plans were unconstitutional racial gerrymanders. App.13.[1] They did not claim that the legislature should not have taken racial demographics into account *at all* in drawing these districts; instead, they claimed that Section 2 required the legislature to draw fewer majority-minority districts and more coalition districts. The court granted their request for a three-judge district court and, after a five-day bench trial, the district court invalidated the House and Senate plans. App.14.

The court began by disclaiming any suggestion that "the General Assembly acted in bad faith or with discriminatory intent in drawing the challenged districts." App.3 n.1. Then, in a footnote, it tersely dismissed Appellants' argument that plaintiffs' claims were barred by *res judicata* or collateral estoppel in light of *Dickson*, stating only that "Defendants have not produced sufficient evidence to prove the elements" of one state-law privity doctrine. App.13-14 n.9.

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[1] One of the challenged Senate districts—District 32—is not actually a majority-minority district. App.28. After the legislature concluded that the district could not be drawn as a majority-minority district without violating traditional districting principles, it left the district's BVAP nearly unchanged, increasing only from 42.52% to 42.53%. App.65-66.

Turning to the merits, the court held that "race was the predominant factor motivating the drawing of all challenged districts." App.2. The court then addressed whether the districting legislation was narrowly tailored to serve the State's compelling interest in complying with Sections 2 and 5 of the VRA. App.113-42. The court rejected North Carolina's Section 2 defense, holding that the legislature lacked a strong basis in evidence to draw any of the challenged districts as majority-minority districts. App.121-35. In so holding, however, the court expressly declined to resolve plaintiffs' argument that the legislature should have drawn the districts as coalition districts rather than majority-minority districts. App.18 n.10. Instead, the court held that the legislature "failed to demonstrate a strong basis in evidence for *any* potential Section 2 violation," *id.* (emphasis added), and thus should not have considered race *at all* in drawing the districts. As for Section 5, the court "conclude[d] that Defendants have not put forth a strong basis in evidence that any of [the districts in covered counties] were narrowly tailored to avoid retrogression." App.136.

REASONS FOR NOTING PROBABLE JURISDICTION

According to the decision below, the legislature did not have the requisite "good reasons" for drawing a single ability-to-elect district in the State of North Carolina. Thus, not only did the State lack a compelling interest in drawing majority-minority districts; it lacked a compelling interest in drawing coalition or crossover districts as well. Instead,

according to the district court, the same regions in which this Court *ordered* North Carolina to draw majority-minority districts, and in which DOJ demanded more such districts before granting preclearance, are now so utterly devoid of racially polarized voting that a viable Section 2 claim is no longer even a reasonably likely prospect.

That startling conclusion is both legally and factually indefensible. Indeed, even plaintiffs have never advanced the extraordinary argument that the legislature did not need to draw ability-to-elect districts *at all*. And with good reason, as plaintiffs do not really want the Republican-controlled legislature freed up to re-draw maps without the looming specter of VRA liability. Moreover, a wealth of evidence confirms that the racially polarized voting that unfortunately has plagued much of the State for decades persists. Instead, plaintiffs' only quarrel is with the legislature's decision to draw the challenged districts as majority-minority districts instead of coalition or crossover districts. Yet according to the decision below, the legislature could not intentionally do *either*, because it had no reason to fear VRA liability at all.

That decision is so obviously wrong that it merits summary reversal. Indeed, left standing, it threatens to halt voluntary efforts at compliance with the VRA in their tracks. But that is just the most egregious of the problems with the decision. This case never should been allowed to proceed in the first place, as it was barred by a state-court decision that rejected all the same claims and arguments as to the same districts, and did so at the behest of the same

groups that funded and organized this case. Moreover, even if the case could proceed, plaintiffs failed to meet their demanding burden of proving racial predominance, as they largely ignore the fact that the legislature's assiduous compliance with North Carolina Supreme Court's instructions for reconciling federal and state law ensured that it drew majority-minority districts only in areas where traditional districting criteria supported that endeavor. And in all events, plaintiffs are wrong in their core submission that a State cannot remedy what everyone agrees is a looming Section 2 violation by employing the straightforward and simple solution of drawing a majority-minority district. Accordingly, this Court should summarily reverse or, in the alternative, note probable jurisdiction and correct the outlying decision below.

I. The District Court Erred In Not Deferring To The Earlier-Filed State Court Case Rejecting The Same Claims.

This second-in-time, federal-court case should never have been able to proceed. Before this case was filed, a three-judge panel of the North Carolina state trial court had already decided every relevant legal and factual issue. *See Dickson v. Rucho*, Nos. 11 CVS 16896, 11 CVS 16940 (N.C. Super. Ct. July 8, 2013). In *Dickson*, numerous individuals and organizations brought racial gerrymandering claims identical to those brought here and challenging essentially the same districts challenged here. The trial court considered much of the same evidence presented in this case and rejected those claims in full. Applying the same standards that governed the

decision below, the court found that the legislature had a strong basis in evidence for drawing the challenged districts to avoid a possible Section 2 violation, and that its decision to draw those districts as majority-minority districts was a permissible means of remedying that possible violation. The North Carolina Supreme Court has since affirmed that decision twice, holding that "the enacted House and Senate plans … satisfy state and federal constitutional and statutory requirements." *Dickson*, 781 S.E.2d at 441. The district court in this case, however, addressed the same claims and reached precisely the opposite conclusion.

As in *Harris*, the *Dickson* case should have foreclosed this follow-on federal case as a matter of claim preclusion and collateral estoppel. Under the doctrine of claim preclusion, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). And "[u]nder collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case" or its privies. *Id.* Where the first court to resolve a claim was a state court, these doctrines "not only reduce unnecessary litigation and foster reliance on adjudication, but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Id.* at 95-96.

There is no question that *Dickson* involved the same claims and issues and was litigated to final

judgment before this suit was filed. Moreover, as in *Harris*, there should not be any serious question about privity: Several plaintiffs here are members of the plaintiff organizations in *Dickson*,[2] and multiple courts have recognized that members of an "organization … may be bound by the judgment won or lost by their organization," so long as the organization adequately represented their interests and no due process violation results. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1082 (9th Cir. 2003) (emphasis omitted).

Moreover, the same groups that funded and organized the *Dickson* litigation funded and organized this case. The *Dickson* lawsuit was organized and funded by The Democracy Project II, a 501(c)(4) organization formed by Scott Falmlen, the former executive director of the North Carolina Democratic Party. Tr.Vol.V at 135, 139. Many of the individual *Dickson* plaintiffs were affiliated with the North Carolina Democratic Party, including Doug Wilson, who was the Deputy Executive Director of the North Carolina Democratic Party, and Margaret Dickson, who was a Democratic state senator.

Here, too, The Democracy Project II is paying the plaintiffs' legal fees (to the same counsel that represented the *Dickson* plaintiffs). Def.Exh.3118 at ¶3. Falmlen worked closely with members of the North Carolina Democratic Party to formulate the strategy for this lawsuit, and he recruited Wilson and

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[2] *See, e.g.*, Harris Dep. (ECF 77-16) at 18; Rogers Dep. (ECF 77-32) at 31; Covington Dep. (ECF 77-7) at 31-33; Tucker Dep. (ECF 77-11) at 37-38, 42.

Dickson to seek out potential plaintiffs for this case. Def.Exh.3102. They, in turn, ultimately recruited about a dozen of the plaintiffs, none of whom is responsible for legal fees and most of whom admitted that they have no control over this litigation.[3] In short, *Dickson* involved the same claims and sought the same relief; was funded by the same organization; was organized by the same individuals; was litigated by the same counsel; and was filed by plaintiffs who recruited the plaintiffs in this case.

To allow plaintiffs and the organizations behind this litigation to take a second bite at the apple not only would be unfair to the State as a *litigant*, but also would be immensely disrespectful to the State as a *sovereign*, as it would allow a federal court to ignore the factual findings of a co-equal state court. At a bare minimum, concerns for comity and federalism should have led the district court to grant a significant measure of deference to those directly on-point findings, lest plaintiffs circumvent the clear error standard that should apply to any effort to undo those findings. Instead, the court hardly even mentioned the square conflict with *Dickson* that its decision created, let alone attempted to explain how it made flatly contrary factual findings on a nearly identical record.

In all events, the decision below directly conflicts with the state court's findings and conclusions on the exact same issues in *Dickson*. Accordingly, at a minimum, this Court should note probable

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[3] *See, e.g.*, Mustafa Dep. (ECF 77-1) at 67-69; Ansin Dep. (ECF 77-2) at 21, 30-32; Mingo Dep. (ECF 77-4) at 19-20, 31-32.

jurisdiction to resolve the clear split between two co-equal courts applying the same law to the same facts, and yet reaching opposite conclusions.

II. The District Court Erred In Finding That Race Predominated In The Design Of The Challenged Districts.

The decision below is most egregiously wrong for its unprecedented conclusion that the legislature lacked good reasons to draw *any* ability-to-elect districts at all. But the decision is all the more indefensible because the court erred on the threshold question of whether strict scrutiny should apply. This Court has repeatedly explained that strict scrutiny does not apply simply because the legislature sets out to comply with, *inter alia*, the VRA. Rather, challengers must surmount a far more difficult burden to trigger strict scrutiny: They must prove that "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Miller v. Johnson*, 515 U.S. 900, 913 (1995).

In light of States' need to comply with multiple competing legal obligations, "application of these principles to electoral districting is a most delicate task." *Id.* at 905. Accordingly, this Court has never treated the mere intent to create VRA-compliant districts or majority-minority districts *vel non* as sufficient to trigger strict scrutiny. Instead, the relevant inquiry is not *whether* the legislature created majority-minority districts, but rather *why* and *how* it did so. If it did so to serve explicitly race-based goals, and in defiance of traditional principles, then strict scrutiny applies. *See Miller*, 515 U.S. at

916. But if the legislature created majority-minority districts in pursuit of race-neutral goals, and did so consistent with traditional principles, then its consideration of race does not trigger strict scrutiny.

The district court disregarded that distinction here, failing to recognize that the legislature created majority-minority districts *only* where doing so was consistent with traditional districting principles, and pursuant to a state-court legal regime that expressly incorporates respect for those traditional principles. When the Chairmen instructed Dr. Hofeller to create majority-minority districts, they did not tell him to pursue that goal at all costs. Instead, they instructed him to create majority-minority districts only in areas with "geographically compact" and "politically cohesive" minority populations—in other words, only in areas where traditional principles actually *supported* drawing majority-minority districts. App.9. Likewise, they instructed Dr. Hofeller to comply with the WCP by confining districts to a single county or the minimum grouping of contiguous counties—in other words, to place paramount importance on drawing majority-minority districts that actually complied with state law's "neutral redistricting requirement that political subdivisions be respected." *Dickson*, 781 S.E.2d at 489.

The district court glossed over all of this, instead focusing myopically on the legislature's mere decision to draw majority-minority districts. But the court's own findings and assumptions reveal that the legislature did not pursue that goal at all costs. For instance, the court assumed that the Chairmen "had a strong basis in evidence for the first two *Gingles*

factors regarding each challenged district," App.117, but it failed to realize that those two *Gingles* factors incorporate in significant respects the very traditional districting principles that the court believed were disregarded. If, as the court assumed, each challenged district included a geographically compact and politically cohesive minority group, then including that compact and cohesive community in a single district was fully consistent with traditional principles. Likewise, the court assumed (as the North Carolina Supreme Court held in *Dickson*) that the districts complied with the WCP's requirements as interpreted by *Stephenson*. App.22. But it failed to realize that compliance with state law is itself strong evidence that race did not predominate, and that the WCP furthers the traditional districting principles of "compactness, contiguity, and respect for political subdivisions." *Stephenson I*, 562 S.E.2d at 389; *cf. Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1308 (2016) (finding that "legitimate considerations" predominated where redistricting commission used iterative process to harmonize state law requirements with VRA).

The district court also drew the wrong conclusion from the Chairmen's preliminary goal of providing minority voters with electoral power in proportion to their statewide population. The court viewed that proportionality goal as proof of racial predominance. App.24-31. That is wrong in its own right, *see Johnson v. De Grandy*, 512 U.S. 997, 1020-21 (1994), but also fails to recognize that the legislature expressly *subordinated* that goal to traditional districting principles. For instance, the Chairmen initially endeavored to create 24 majority-minority

House districts, App.24, but they abandoned that plan upon receiving testimony that minority populations in the southeastern part of the State were not politically cohesive, App.27. Likewise, the Chairmen initially planned to create ten majority-minority Senate districts, but they cast aside that plan when they were unable to identify a tenth region with a "reasonably compact majority African-American population." App.28. In both cases, traditional districting principles prevailed over racial considerations.

The district court's determination that race nonetheless predominated exemplifies the impossible bind that legislatures face when drawing district lines. The Chairmen expressly instructed Dr. Hofeller to draw majority-minority districts *only* where doing so complied with traditional principles and *only* where doing so was required by state and federal law. By reflexively applying strict scrutiny just because majority-minority districts were involved, the district court failed to hold plaintiffs to their "demanding" burden of proving that race "*predominantly* explains [a] District['s] boundaries." *Easley v. Cromartie*, 532 U.S. 234, 241, 243 (2001).

III. The District Court Erred In Holding That The Challenged Districts Did Not Satisfy Strict Scrutiny.

Even assuming strict scrutiny applied, the district court plainly erred in reaching its astounding conclusion that the legislature did not have good reasons for fearing "any potential Section 2 violation," App.18 n.10, and thus should not have considered race *at all*. Even plaintiffs have never

made the extraordinary argument that there is no longer a single region in North Carolina where the legislature must draw ability-to-elect districts. Indeed, plaintiffs surely did not bring this litigation to free up the Republican-controlled legislature to redistrict entirely unconstrained by the VRA. To the contrary, plaintiffs want to further constrain the legislature by forcing it to draw coalition or crossover districts instead of majority-minority districts, which will produce the fully intended side-effect of requiring the Republican-controlled legislature to maximize Democratic partisan advantage. But the district court went far beyond plaintiffs' actual claims and concluded that the legislature lacked good reasons to fear any Section 2 liability *at all*, and thus lacked good reasons to draw *either* majority-minority *or* coalition or crossover districts in any of the regions that have had one or the other for decades. App.2.

That extreme outlier decision is so erroneous as to warrant summary reversal. Not only does it threaten to halt voluntarily efforts at VRA compliance in their tracks; it also reflects a fundamental misunderstanding of the law and an unsupportable analysis of the record. And plaintiffs fare no better with the argument they *actually* made, as the legislature's decision to address the obvious potential Section 2 violations by aiming to draw majority-minority districts was fully consistent with, if not compelled by, this Court's decision in *Strickland*.

A. States Are Entitled to Leeway in Deciding Whether and How to Draw Ability-To-Elect Districts.

Even when strict scrutiny applies to districting legislation, the legislation will still be upheld if it was "narrowly tailored to serve a compelling state interest." *Shaw II*, 517 U.S. at 902. Evaluating whether a districting plan is narrowly tailored to further the State's interest in complying with the VRA[4] entails a two-part inquiry: (1) whether the State had good reasons to fear VRA liability if it did not consider racial composition; and, if so, (2) whether the district the State drew was an appropriate means of remedying the potential violation. *Id.* at 915-16.

The two distinct prongs of this inquiry are clear from *Shaw II*, in which this Court assumed arguendo that the legislature had "a strong basis in evidence" to believe that consideration of race "was needed in order not to violate §2," but nonetheless held that the challenged plan "does not survive strict scrutiny" because it was not an appropriate means to serve "the asserted end." *Id.* at 915; *see also Bush v. Vera*, 517 U.S. 952, 978-79 (1996) ("The State must have a 'strong basis in evidence' for finding that the threshold conditions for §2 liability are present … [and] the district drawn in order to satisfy §2 must not subordinate traditional districting principles to race substantially more than is 'reasonably necessary' to avoid §2 liability."); *cf. Wygant v.*

[4] This Court has repeatedly assumed that compliance with the VRA is a compelling interest, *see, e.g., Shaw II*, 517 U.S. at 915, and the district court correctly did the same here.

Jackson Bd. of Educ., 476 U.S. 267, 277-78 (1986) (a State must have "evidence that remedial action is warranted" and must select a "legally appropriate" remedy).

At both steps of the inquiry, States engaged in good-faith efforts to comply with the VRA are entitled to substantial leeway. *Vera*, 517 U.S. at 977. At the first step, a State need not prove that it *certainly* would have violated the VRA had it not considered race. *See ALBC*, 135 S. Ct. at 1274. Instead, it need show merely that it had "good reasons" or a "strong basis in evidence" to believe that preclearance would have been denied, or that a hypothetical plaintiff could have established the preconditions to a Section 2 claim, had the State not done so. *Id.* Likewise, at the second step, a State need not "determine *precisely* what percent minority population" the VRA requires in a district. *Id.* at 1273. Rather, districts are narrowly tailored so long as they "substantially address" the potential statutory violation. *Shaw II*, 517 U.S. at 915; *Vera*, 517 U.S. at 977. And when a legislature sets out to address a potential Section 2 violation, "the best way to avoid suit under §2" is by creating a district in which the minority group composes a majority of voters. *Strickland*, 556 U.S. at 43 (Souter J., dissenting).

B. The District Court Erred in Holding That the Legislature Lacked Good Reasons to Draw Any Ability-To-Elect Districts.

The North Carolina legislature had exceedingly good reasons to maintain ability-to-elect districts in the same counties and regions in which they have

appeared for decades. Indeed, plaintiffs have never suggested otherwise. Plaintiffs did not allege that the legislature should have drawn its districts without *any* consideration of race, and they never denied that the legislature would have been vulnerable to VRA liability if it eliminated the pre-existing ability-to-elect districts. Plaintiffs instead took issue with the legislature's decision to draw those districts as majority-minority districts instead of as coalition districts. They are mistaken, but the district court erred even more fundamentally in reaching its remarkable conclusion that the legislature lacked "good reasons" to draw any ability-to-elect districts in the first place.

1. The legislature had good reasons to include ability-to-elect districts.

The three preconditions to a Section 2 claim are: (1) the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority group is "politically cohesive"; and (3) the white 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 latter two requirements are often discussed in tandem, under the rubric of "racially polarized voting." *See, e.g., League of United Latin Am. Citizens v. Perry (LULAC)*, 548 U.S. 399, 427 (2006). When minority voters cohesively vote one way and majority voters cohesively vote the other way, a sufficiently large group of majority voters may be able to thwart the minority group's efforts to elect its preferred candidates.

There is no question that the first factor was satisfied here, as all of the challenged districts were drawn as single-member, majority-minority districts that complied with the WCP to the greatest extent possible. As to the remaining two factors, the Chairmen had more than enough evidence of racially polarized voting to justify their conclusion that Section 2 continued to require ability-to-elect districts in the same counties and regions in which they had long appeared.

At the outset, the Chairmen were not working from a blank slate in determining whether and where a VRA violation was reasonably likely. The State has faced both Section 2 liability and Section 5 objections for failure to draw majority-minority districts multiple times over the past three decades. In *Gingles*, North Carolina was *ordered* to create majority-minority districts in 13 different counties to remedy fully adjudicated Section 2 violations. *Gingles v. Edmisten*, 590 F. Supp. 345, 365-66 (E.D.N.C. 1984), *aff'd Gingles*, 478 U.S. at 80. The legislature complied with that order and then, in the 1991 redistricting cycle, preserved all of those districts and added four more majority-minority House districts and two more majority-minority Senate districts. Def.Exh.3021. After a Section 5 objection from the Attorney General in 1991, the legislature added three more majority-minority House districts. Def.Exh.3022.

In 2001, the legislature enacted a similar set of ability-to-elect districts, using a combination of majority-minority, coalition, and crossover districts to comply with Section 2. Def.Exh.3023. The 2001

plans were invalidated on state law grounds, *Stephenson I*, 562 S.E.2d 377, so the legislature enacted new plans in 2003. Those plans also included a combination of majority-minority, coalition, and crossover districts. Def.Exh.3024. Using 2010 Census numbers, the 2003 House plan included 24 ability-to-elect districts that were either majority-minority or coalition districts, Def.Exh.3018-39, and the 2003 Senate plan included ten ability-to-elect districts, all of which were coalition districts, Def.Exh.3018-34.

Working against this backdrop, and required by *Stephenson* to create districts necessary to avoid possible VRA violations before creating other districts, the Chairmen began the 2011 redistricting process by evaluating whether significant racially polarized voting still existed in the areas that had traditionally supported majority-minority or coalition districts. Every single piece of evidence confirmed that it did. That included two expert reports—one commissioned by SCSJ and one commissioned by the General Assembly itself—that found consistently high levels of racially polarized voting. Dr. Block, the SCSJ's expert, examined election results for 54 congressional and legislative elections between a white candidate and a black candidate in 2006, 2008, and 2010—including in almost every majority-minority or coalition district in the benchmark plan. He concluded that "non-blacks consistently vote against African-American candidates and that blacks demonstrate high rates of racial bloc voting in favor of co-ethnic candidates." Def.Exh.3013-8 at 1. Dr. Block also found a "consistent relationship between the race of a voter and the way in which s/he votes."

Id. at 3. According to the executive director of the SCSJ—who is counsel for the plaintiffs in this case—Dr. Block's study "demonstrate[d] the continued need for majority-minority districts." Def.Exh.3013-7 at 2.

The General Assembly's own expert, Dr. Brunell, reviewed and agreed with Dr. Block's findings. *See* Def.Exh.3033. Dr. Brunell also conducted his own analysis, focusing on polarization at the county level. He studied the results of several federal, state, and local elections, including the 2008 Democratic Presidential primary, the 2008 Presidential election, and the 2004 General Election for State Auditor (the only statewide partisan election between a black and a white candidate). *Id.* His study estimated both the proportion of black voters that can be expected to favor a black candidate and the proportion of white voters that can be expected to favor a white candidate. Dr. Brunell found "statistically significant racially polarized voting in 50 of the 51 counties" he studied, including all 40 covered counties and every county in which the 2011 plan included a majority-minority or coalition district. *Id.* at 3. Not a single legislator, witness, or expert questioned the findings of either expert during the legislative process.

The Chairmen also organized an unprecedented number of public hearings, at which individuals from across the State confirmed that racially polarized voting remains prevalent in North Carolina. The executive director of Democracy North Carolina testified that race must be considered in the redistricting process and that discrimination and racially polarized voting continues in much of the State. A member of the League of Women Voters told

the committee that race should be considered when drawing districts and that the legislature must not "weaken" the minority vote. The president of the Pasquotank County NAACP testified that the existing majority-minority districts should be preserved and that additional majority-minority districts should be drawn. *See* Def.Exh.3015A at 9-13, 29-30, 62.

The Chairmen also reviewed election results over the previous decade. Those results revealed a clear pattern: While minority-preferred candidates had substantial success in majority-minority and coalition districts, they had almost no success in majority-white districts. In 2010, for instance, *all* 18 African-American candidates elected to the House and *all* seven African-American candidates elected to the Senate were from ability-to-elect districts. Not a single African-American candidate was elected in 2010 from a majority-white district. Def.Exhs.3016-6, 3016-7. Previous elections were similar. From 2004 to 2008, for example, African-American candidates ran for a House seat 23 times in majority-white districts and won only three times. Def.Exh.3020-7. Those results were consistent with the results of statewide elections: From 2002 through 2010, no African-American candidate was elected to state office in a statewide partisan election. Def.Exh.3043.

Throughout the redistricting process, not a single individual or organization argued that North Carolina's long history of racial polarization had vanished or that the legislature should eschew all consideration of race in drawing its districts. In fact,

all three of the alternative plans that were submitted during the redistricting process—including one submitted on behalf of SCSJ by counsel for plaintiffs in this case—included either majority-minority or coalition districts in essentially the same regions as the 2011 plan. *See* Def.Exh.3000 at 166, 169, 188, 191, 199, 202, 210, 213.

With all that information, the Chairmen reached the only reasonable conclusion: that the 2011 state legislative plans should continue to include the ability-to-elect districts that had existed in previous plans. In light of the Section 2 violations found in *Gingles*; the lack of electoral success for minority candidates in majority-white districts; the expert reports finding significant racially polarized voting throughout the State; the testimony from numerous individuals and organizations in support of ability-to-elect districts; and the three alternative plans submitted to the legislature, the Chairmen had the requisite strong basis in evidence to fear that minority voters would experience vote dilution if the 2011 plans abandoned ability-to-elect districts.[5]

[5] That evidence also strongly supported the conclusion that several districts had to be drawn as majority-minority districts to avoid a potential Section 5 violation, as several of the 40 then-covered counties were part of districts that already were majority-minority districts under the benchmark plan. *See* Def.Exh.3018-15. The district court thus also erred in rejecting the State's Section 5 defense.

2. The district court erred in holding that the legislature lacked good reasons to fear Section 2 liability.

Notwithstanding this wealth of evidence, the district court concluded that the State failed to satisfy strict scrutiny. The court did not reach that conclusion for the reasons plaintiffs pressed; in fact, the court expressly declined to decide whether drawing majority-minority districts was a permissible means of remedying the looming Section 2 violations. App.18 n.10. Instead, the court went beyond anything plaintiffs ever argued and held that the legislature "failed to demonstrate a strong basis in evidence for *any* potential Section 2 violation" *at all*. *Id.* (emphasis added). In effect, then, the court's decision precludes the legislature not only from drawing majority-minority districts, but also from drawing coalition or crossover districts, anywhere in the State—even though plaintiffs concede that the State was all but certain to face Section 2 claims if it followed that course.

The court based that remarkable holding on the third *Gingles* factor, concluding that the State "failed to demonstrate that, for any challenged district," racially polarized voting "would enable the majority usually to defeat the minority group's candidate of choice." App.117. That conclusion is inexplicable. As just detailed, the legislature received uncontradicted evidence confirming the existence of racially polarized voting in all of the regions in which ability-to-elect districts had long appeared. That evidence would have sufficed to prove that racially polarized voting *actually* exists, and it plainly

sufficed to prove that the legislature had a "strong basis" for reaching that conclusion.

The district court nonetheless believed that there was no longer any prospect of a Section 2 violation because "African-American candidates were elected in 2004, 2006, 2008 and 2010 … in benchmark Senate Districts 4, 14, 20, 28, 38 and 40 and benchmark House Districts 5, 12, 21, 29, 31, 42 and 48." App.130. But every single one of those districts was consciously drawn as a coalition district under the benchmark plan. Def.Exhs.3018-34, 3018-39. It is precisely because past legislatures took that step that minority groups have been able to elect their candidates of choice. Requiring the legislature to eliminate those districts because they have been performing as designed "is like throwing away your umbrella in a rainstorm because you are not getting wet." *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2650 (2013) (Ginsburg, J., dissenting).

Moreover, the relevant question is not whether *earlier* versions of the districts violated the VRA; it is whether the State had good reasons for believing that drawing *new* districts without regard to race would have given rise to *future* VRA liability. *Cf. Perry v. Perez*, 132 S. Ct. 934, 941 (2012) ("In areas where population shifts are so large that no semblance of the existing plan's district lines can be used, [a previous] plan offers little guidance."). The right question for the legislature, then, was: If the districts were drawn based solely on the optimum county grouping criteria under the WCP, would the resulting districts have violated Section 2?

The answer was plainly yes. Indeed, Dr. Hofeller created that exact map, using it as the "starting point from which [he engaged] in the harmonization process between the VRA districts and the county groupings." Tr.Vol.V at 25-26. On that map, all but two of the optimum county groupings for House districts were majority-white, Def.Exh.3030 at 44-48, and all but three of the groupings for Senate districts were majority-white, *id.* at 49-53. Had districts been drawn in those groupings without regard to race, hardly any of them would have avoided a potential Section 2 violation (let alone survived preclearance), especially given the dismal electoral results under the benchmark plan for minority-preferred candidates running in majority-white districts. Def.Exhs.3020-7, 3043; Tr.Vol.V at 121-22.

Perhaps recognizing this, the court suggested that the legislature did not need to draw the pre-existing *coalition* districts as *majority-minority* districts. App.131-32. But that question—whether the legislature's use of majority-minority districts instead of coalition districts was permissible—is entirely separate from the one on which the court purported to rule. The court expressly *reserved* the question of whether the legislature retained the flexibility to choose majority-minority districts rather than crossover districts as its prophylactic remedy for potential VRA problems, instead purporting to address only whether the legislature had a reasonable fear of "a potential Section 2 violation" at all. App.18 n.10. As to that question, the relevant comparison is not between a coalition district and a majority-minority district, but between a district drawn without *any* consideration of race and a

district consciously designed to achieve VRA compliance. By improperly conflating the two prongs of the narrow-tailoring inquiry, the court arrived at the utterly indefensible conclusion that the legislature cannot even *consider* racial demographics in regions where it had previously been *ordered* to draw majority-minority districts.

The court also levied a series of unconvincing criticisms at the expert reports on which the Chairmen relied, faulting those reports for studying "statistically significant" instead of "legally significant" racially polarized voting. App.124-25. In the court's view, polarization could be "statistically significant" even where "there is only a 'minimal degree of polarization,' such as when 51% of a minority group's voters prefer a candidate and 49% of the majority group's voters prefer that same candidate." App.125. Setting aside whether that is correct as a statistical matter, the racially polarized voting in North Carolina bears no resemblance to the hypothetical. Dr. Brunell's report estimated that in the average county in the relevant districts, less than 30% of white voters supported the minority-preferred candidate in the 2008 Democratic presidential primary, compared to approximately 90% of black voters. Def.Exh.3033 at 5-8. Those percentages are even worse than those that led this Court to find a Section 2 violation in *Gingles*, 478 U.S. at 59. It would have been irresponsible for the legislature to look at that data and conclude that all risk of a Section 2 violation had evaporated.

Indeed, if the Chairmen had eliminated the ability-to-elect districts entirely (yet somehow

managed to obtained preclearance), there is no doubt that a Section 2 lawsuit would have followed. And the Chairmen would have lacked any basis on which to justify their abandonment of ability-to-elect districts that were included in every alternative map; were supported by two expert reports; were endorsed by every witness who testified during the legislative process; and were the only districts in which minority-preferred candidates achieved sustained electoral success under the benchmark plan. And while it might be tempting for the legislature to simply accept the three-judge court's unexpected conclusion and declare itself free from any need to comply with the VRA, that path would be irresponsible. Not only do state legislators take an oath to uphold the Constitution and laws of the United States, but the three-judge panel's conclusion would be non-binding and indefensible in any court where the inevitable Section 2 lawsuit followed. The district court's decision thus places North Carolina in precisely the untenable position that this Court has sought to avoid: "trapped between the competing hazards of liability" under the VRA and the Constitution. *Vera*, 517 U.S. at 977.

C. The Legislature's Decision to Draw Majority-Minority Districts Was a Permissible and Narrowly Tailored Means of Avoiding the Looming Section 2 Claims.

At a minimum, the decision below should be summarily reversed for its astounding holding that the legislature lacked good reasons to fear *any* Section 2 liability at all. But the Court should note

probable jurisdiction to consider (and reject) the argument that plaintiffs *actually* made—*i.e.*, that Section 2 required the legislature to draw the challenged districts as coalition or crossover districts instead of majority-minority districts. In fact, the legislature's decision to avert the looming Section 2 violations by drawing majority-minority districts was entirely permissible under, if not compelled by, this Court's decision in *Strickland*.

Strickland, like this case, involved the interplay of the WCP and the VRA. The plaintiffs alleged that the North Carolina legislature violated the WCP by splitting portions of a county. *Strickland*, 556 U.S. at 8. The legislature claimed that federal law compelled it to violate that state-law command, arguing that "[f]ailure to do so … would have diluted the minority group's voting strength in violation of §2" because the resulting district would have had a BVAP of 35.33% instead of 39.36%. *Id.* The question before this Court was whether Section 2 can require a State to draw a crossover district when a minority group is "not sufficiently large to constitute a majority" in a single district. *Id.* at 12.

This Court answered that question in the negative. According to the plurality opinion, Section 2 provides a remedy only to "a geographically compact group of minority voters [that] could form a *majority* in a single-member district." *Id.* at 26 (emphasis added). That bright-line rule was rooted "in the need for workable standards and sound judicial and legislative administration." *Id.* at 17. Allowing Section 2 claims to proceed when a minority group composes something less than a numerical

majority "would place courts in the untenable position" of "determining whether potential districts could function as crossover districts," which would require "elusive" answers to a whole host of "speculative" questions. *Id.* In contrast, "the majority-minority rule relies on an objective, numerical test," and it "provides straightforward guidance to courts and to those officials charged with drawing district lines to comply with §2." *Id.* at 18.

From the outset of the 2011 redistricting process, the Chairmen recognized that *Strickland* gives States clear guidance on how best to avoid a potential Section 2 violation: draw a majority-minority district. While a coalition or crossover district *might* suffice, making that determination involves inquires far too speculative to assess prospectively with any real degree of certainty. And while a legislature may have good reasons to believe that a BVAP of 46% would avoid vote dilution, if it proves mistaken, its good-faith basis for choosing 46% instead of 50% may not save it from the inevitable Section 2 claim. Accordingly, the best way a legislature can be sure that it is avoiding a Section 2 violation in a region where the *Gingles* factors are satisfied is by drawing a district in which the "minority group composes a numerical, working majority of the voting-age population." *Id.* at 13.

Indeed, that is arguably the *only* way to avoid a Section 2 violation given *Strickland*'s holding that "§2 does not mandate creating or preserving crossover districts." *Id.* at 23 (plurality opinion); *see also id.* at 43 (Souter, J., dissenting). After all, if coalition and crossover districts are not available

remedies for an *actual* Section 2 violation, then it is not obvious that they can be used as prophylactic remedies for a *potential* Section 2 violation.[6] But even if *Strickland* does not *compel* States to address potential Section 2 violations by drawing majority-minority districts, surely it at least entitles States to select that option as the safest course.

Accordingly, where, as here, there is no real dispute (at least by the parties) that Section 2 required *some* prophylactic measure on the State's part, the State should be free to select the logical option of targeting a BVAP of at least 50%-plus-one. Any other conclusion would put States in the impossible position of being condemned for "unconstitutional racial gerrymandering should [they] place a few too many minority voters in a district," but condemned under the VRA should they "place a few too few." *ALBC*, 135 S. Ct. at 1274. This Court thus should reject again, as it has done before, plaintiffs' untenable contention that States must "determine *precisely* what percent minority population" would best enable to minorities to elect their candidate of choice. *Id.* at 1273.

[6] The North Carolina Supreme Court reached that conclusion in the decision this Court affirmed in *Strickland*, holding that "when a district must be created pursuant to Section 2, it must be a majority-minority district." *Pender*, 649 S.E.2d at 372.

CONCLUSION

This Court should summarily reverse or note probable jurisdiction.

Respectfully submitted,

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