

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

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

**DEFENDANTS' PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

TABLE OF CONTENTS

| | |
|--|-----|
| TABLE OF CONTENTS | i |
| FINDINGS OF FACT | 1 |
| I. INTRODUCTION | 1 |
| II. FACTUAL AND LEGAL BACKGROUND FACING THE 2011 GENERAL ASSEMBLY | 2 |
| A. History of North Carolina’s attempts to comply with the Voting Rights Act..... | 2 |
| B. North Carolina’s history defending claims of illegal racial gerrymandering | 14 |
| C. Federal limits on a state’s ability to construct districts with different population deviations | 18 |
| D. State Constitutional Requirement | 19 |
| E. Election Results and 2010 Census Developments Under the 2003 Legislative Plans | 21 |
| F. 2011 Legislative Committee and Public Hearing Process | 26 |
| G. Legislative Proceedings in the General Assembly..... | 40 |
| H. The process followed by the state’s map drawer | 48 |
| I. Proportionality..... | 53 |
| J. The 2011 enacted VRA districts are no less compact than the 2003 VRA districts or VRA districts in all of the 2011 alternative plans. | 57 |
| K. Split Precincts..... | 63 |
| III. FACTUAL FINDINGS RELATED TO SPECIFIC DISTRICTS | 67 |
| A. Senate Districts..... | 67 |
| B. Comparison of APBVAP in Enacted and Alternative Senate Districts | 103 |
| C. House Districts in Northeastern North Carolina | 108 |

| | |
|---|-----|
| D. House Districts in Cumberland County | 123 |
| E. House Districts in Southeastern North Carolina | 129 |
| F. Durham County House Districts | 141 |
| H. Guilford County | 153 |
| I. Mecklenburg County..... | 157 |
| J. Comparison of APBVAP in Enacted and Alternative House Districts | 165 |
| K. Divided Towns and Places | 171 |
| L. Divided Precincts (Vote Tabulation Districts)..... | 172 |
| M. The enacted plans do not “concentrate” or “pack” African American population..... | 174 |
| IV.FACTS RELATED TO PLAINTIFFS AND FACT WITNESSES | 179 |
| CONCLUSIONS OF LAW | 191 |
| A. Abstention and Res Judicata | 191 |
| B. Racial gerrymandering claims | 205 |

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FINDINGS OF FACT

I. INTRODUCTION

This case represents a classic example of plaintiffs who are disappointed with the political impact of redistricting attempting to “trap” the State of North Carolina between “competing hazards of liability.” *Bush v. Vera*, 517 U.S. 952, 977 (1996) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 291 (1986)) (O’Connor, J., concurring in part and concurring in Judgment). For the reasons shown below, the Court finds that race was not the predominant motive for any of the districts challenged in this case as illegal racial gerrymanders and that, in any case, the General Assembly had “good reasons” to believe that the challenged districts were reasonably needed to protect the state from liability under Section 2 the Voting Rights Act (“VRA”). *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1274 (2015).

II. FACTUAL AND LEGAL BACKGROUND FACING THE 2011 GENERAL ASSEMBLY

A. History of North Carolina's attempts to comply with the Voting Rights Act

1. In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court explained the burden of proof that North Carolina plaintiffs were required to meet in a case involving a Section 2 challenge to multimember districts. The Supreme Court identified the three “preconditions” to finding a violation of Section 2 under the totality of circumstances test. First, “the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.” *Id.* at 50. Second, “the minority group must be able to show that it is politically cohesive.” *Id.* Finally, the minority group “must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances – *such as and the minority candidate running unopposed* – to defeat the minority’s preferred candidate.” *Id.* (emphasis added). The term “racially polarized voting” is a synonym for the third element of the *Gingles* preconditions. *Id.* at 53 n. 21.

2. Despite this seemingly clear formula, the Supreme Court in *Gingles* expressly declined to consider “whether § 2 [of the Voting Rights Act] permits, and if it does, what standards should pertain to a claim brought by a minority group that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to *influence* elections.” *Gingles*, 478 U.S. at 46 n. 12 (emphasis in the original). Since then, courts have defined four different types of districts that have been described as “voting rights districts” or “VRA

districts.” These include: (a) “majority minority districts,” in which a specific minority group constitutes an actual majority of the voting age population (“VAP”); (b) minority “coalition” districts, in which two minority groups constitute a majority of the VAP and form a coalition to elect the coalition’s candidate of choice; (c) majority white “crossover” districts, in which minority voters make up less than a majority of the VAP but are potentially large enough to elect their candidate of choice with the help of some white “crossover” voters; and (d) “influence” districts, in which the minority group is a minority of the VAP but sufficiently large enough to influence the outcome of an election even if the preferred candidate of choice cannot be elected. *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) (“*Strickland*”).

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

4. In *Gingles*, North Carolina was ordered to create majority black legislative districts as a remedy for violations of Section 2 in the following counties: Bertie, Chowan, Edgecombe, Forsyth, Gates, Halifax, Martin, Mecklenburg, Nash, Northampton, Wake, Washington, and Wilson. *Gingles v. Edmisten*, 590 F. Supp. 345, 365-66 (E.D.N.C. 1984), *aff’d Gingles*, 478 U.S. at 80; Judgment and Memorandum Opinion, App. A, p. 77, F.F. No. 1, *Dickson v. Rucho*, Nos. 11 CVS 16896 and 11 CVS 16940 (consolidated)

(July 8, 2013)¹ (filed with the Court in this case as an attachment at D.E. 32-1). In 1991, the General Assembly preserved all of the 1984 majority black House districts enacted because of *Gingles* and added four new majority black districts. (DX 3021 [1991 Section 5 Submission, Section H 27 N, “Effect of Change on Minority Voters”]; DX 3001 [Historical House Map Notebook, Tab 1]) Similarly, the 1991 General Assembly preserved all of the majority black Senate districts established because of *Gingles*, and created two new Senate districts in which blacks were the majority of all registered voters. This resulted in five Senate districts in which African Americans represented a majority of registered voters. (DX 3002, Tab 1 [1991 Section 5 Submission, Section S-27 N “Effect of Plan on Racial Minorities”]; DX 3000 [Historical Senate Map Notebook, Tab 16]; D.E. 33-42) Following a Section 5 objection from the Attorney General to the 1991 House and Senate plans, the General Assembly modified the 1991 House plan to create three new minority House districts, including one in Guilford County and two in Southeastern North Carolina. (DX 3022 [1992 Submission, Section 2 H 127 C, “Explanation of Changes in House Plan”]; DX 3001 [Historical House Map Notebook, Tab 2]; D.E. 33-42)

5. Because the Supreme Court in *Gingles* and subsequent cases declined to address the percentage of black population that must be included in a voting rights district, states formerly used two different strategies for creating VRA districts. *See Georgia v.*

¹ The *Dickson v. Rucho* Judgment and Memorandum Opinion without the appendix is available on Westlaw at 2013 WL 3376658. Because the electronic version does not contain the appendix, citations in this memorandum to the appendix will correspond to the page numbers as they appear in the Memorandum Opinion with the two appendices and not the Westlaw version. A copy of the full *Dickson v. Rucho* Judgment and Memorandum Opinion (with appendix) has been filed in this case at D.E. 32-1. Citations to the appendix are made by reference to this docket entry.

Ashcroft, 539 U.S. 461 (2003). Under one option, states could create “a certain number of ‘safe districts’ in which it is highly likely that minority voters will be able to elect their candidate of choice.” *Ashcroft*, 539 U.S. at 480. Under an alternative strategy, states could choose to make a political decision to enact a combination of districts, including majority minority, coalition, and influence districts, in the place of a plan based upon safe majority minority districts. *Id.* at 480-83.

6. At the time of the 2001 redistricting, the General Assembly adopted the political strategy explained in *Ashcroft* and enacted a plan intended to avoid liability under the VRA with a combination of majority black, coalition, and influence districts. Following the theory articulated by Justices Souter and Ginsburg in *LULAC*, the State argued that it had “preserve[d] black voting strength” by creating strong majority Democratic districts in which blacks constituted a majority of registered Democrats. The State admitted that this was accomplished by making districts that adjoin minority districts stronger for Democratic candidates by moving white Democratic precincts out of the minority districts and replacing them with Republican voters who would be submerged in strong majority black or coalition Democratic districts and unable to vote in the Democratic primary. (DX 3023 [2001 Submission, Section H-27N “Effect of Sutton 3 on Minority Voters”; S-27N “Effect of Adoption of Senate Plan on Minority Voters”])

7. In the 2001 House Plan, the State enacted 10 majority black House districts located in Section 5 counties and increased the number of majority black districts in non-covered counties from four to five to protect the State from liability under Section 2. The State also enacted an additional House district in Cumberland County that was majority

black in the number of registered voters (House District 48). The State also argued that the plan should be precleared because it enacted four more House districts in non-covered counties, including Durham, with black majorities in the number of registered Democrats. (DX 3023 [2001 Submission H-27N, “Effect on Minority Districts”]; DX 3001 [Historical House Map Notebook, Tab 3]; D.E. 33-42)²

8. The State advocated that the 2001 Senate plan be precleared because it included two majority black districts in Section 5 counties and four districts with a black population between 40% and 50% in counties (Wake, Mecklenburg, and Forsyth) where the State was subject to liability under Section 2. The State described these districts as “effective black voting districts.” Once again, the State emphasized that African Americans represented the majority of registered Democrats in these districts. (DX 3023 [2001 Submission, Section S-27 N, “Effect on Minority Districts”])

9. The legislative plans enacted in 2001 were never used in a general election because they were declared unlawful under the provisions of the North Carolina Constitution that prohibit the division of counties into separate legislative districts (known as the “Whole County Provision” or “WCP”). *Stephenson v. Bartlett*, 355 N.C. 354, 562

² In *Gingles*, the Supreme Court held that legally significant racially polarized voting was not present in a 1984 multimember district in Durham County. As explained by the Court in *Gingles*, the absence of polarized voting in a multimember district with single-shot voting does not mean racially polarized voting is not present in single member districts that might be drawn in that county. (D.E. 32-1, App. A, pp. 100-01, F.F. No. 40(b)) The finding in *Gingles* did not prevent the State from proposing and enacting in Durham a majority black congressional district in 1991, *Shaw v. Hunt*, 517 U.S. 899, 902 (1996) (“*Shaw II*”), and majority black or coalition legislative districts in 1992, 2001, and 2003. (DX 3021 through 3024). No one challenged any of these districts as racial gerrymanders.

S.E.2d 377 (2002) (“*Stephenson I*”); N.C. Const. art. II, §§ 3(3) and 5(3). In 2002, a superior court judge found that a second set of plans enacted by the General Assembly also violated the WCP and the court implemented its own interim plan for the 2002 General Election. (DX 3001 [Historical House Map Notebook, Tabs 4, 5]; DX 3000 [Historical Senate Map Notebook, Tabs 19, 20]; D.E. 33-42) In 2003, the North Carolina Supreme Court affirmed these rulings by the superior court. *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) (“*Stephenson II*”). A third set of legislative plans were enacted in 2003 and used in every general election from 2004 through 2010. (DX 3001 [Historical House Map Notebook, Tab 6]; DX 3000 [Historical Senate Map Notebook, Tab 21]; D.E. 33-42) The only district from the 2003 plans that was ever subject to constitutional review (House District 18 or “HD 18”) was found to be in violation of the WCP. *Pender Cnty. v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (2007) (“*Pender County*”), *aff’d*, *Strickland, supra*. The 2003 House plan was slightly modified in 2009 to correct the violations associated with the 2003 HD 18. (DX 3001 [Historical House Map Notebook, Tab 7]; D.E. 33-42)

10. The 2003 legislative plans followed the same political strategy reflected in the 2001 plans and included a mixture of majority black, coalition, and influence districts. (DX 3024 [2003 Submission Sections 3H-27N, “Effect of Enactment of 2003 House Redistricting Plan on Minority Voters”; 3S-27N, “Effect of Adoption of 2003 Senate Redistricting Plan on Minority Voters”]) By the time of the 2010 Census, the 2003 House

plan contained 23 districts with an “any part black voting age” population above 40%.³ Nine of these districts were majority black. The other 14 districts were coalition districts with non-Hispanic whites representing a minority of the voting age population. In all 23 House districts, Democrats were a majority of the registered voters and African Americans were a supermajority of registered Democrats. The 2003 House plan also included nine influence districts with majority white population but with black voting age populations between 30.15% and 36.90%. The influence districts almost always elected white Democrats with the exception of House District 39 in which a black Democrat was elected in 2006 and 2008. (D.E. 32-1, p. 25; DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-39, 3018-49, 3018-59 [Second Frey Aff. Exs. 39, 49, 59]; DX 3001 [Historical House Map Notebook, Tab 8]; D.E. 33-42)

11. An identical political strategy for VRA compliance was followed by the General Assembly in the 2003 Senate plan. It included eight districts with a black voting age population between 40% and 50%. Nine districts were created as coalition districts with African Americans representing a very high plurality of the voting age population. Non-Hispanic whites were a minority group in all of these districts. In all nine districts,

³ The census categories of “white,” “black,” “Hispanic,” “total black” (or “any part black”), and “non-Hispanic white” were all reported by the General Assembly in its statistical reports published with each redistricting map for the first time in 2011. (See D.E. 3000 through D.E. 3001 [Historical House Map Notebook and Historical Senate Map Notebook]; Tr. Vol IV, pp. 61-63, 106-109, 111) The “white” category is without regard to ethnicity and includes people who are Hispanic or Latino. The category “non-Hispanic white” excludes that portion of the population. (D.E. 32-1, p. 4, F.F. No. 3; DX 3018-34 [Second Frey Aff. Ex. 34, Notes], Tr. Vol. IV, pp. 62-63, 108-109, 111) The term “total black” as used in these reports is equivalent to the census category of “any part black.” *Id.*

registered Democrats were a majority of the registered voters and African Americans were a majority of registered Democrats. The 2003 Senate plan also included six influence districts, with black voting age populations between 30.11% and 37.36% which typically elected white Democrats. A black Democrat was elected in one of the influence districts in 2008 (Senate District 5) but was defeated by a white Republican in 2010. (D.E. 32-1, p. 25; DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-34, 3018-44, 3018-56 [Second Frey Aff. Exs. 34, 44, 56]; DX 3000 [Historical Senate Map Notebook, Tab 22]; D.E. 33-42)

12. The legal landscape in support of the VRA districts enacted by the State in its 2001 and 2003 legislative plans changed dramatically after the 2003 plans were enacted. First, in 2006, the Supreme Court issued its decision in *LULAC*. The Supreme Court rejected the argument that Section 2 requires influence districts because “the opportunity ‘to elect representatives of their choice’ . . . requires more than the ability to influence the outcome between some candidates, none of whom is [the minority group’s] candidate of choice.” 548 U.S. at 445-46; *see also Strickland*, 556 U.S. at 13.

13. Another significant legal development occurred when Congress reauthorized Section 5. *See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006*, P.L. 109-246, 120 Stat. 577 (2006). Section 5 was amended to prohibit “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the *purpose* of or will have the *effect* of diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice.” *Id.* (emphasis added). One of the purposes of these amendments was to reverse any portion of *Ashcroft* which gave

states the option of selecting coalition or influence districts over districts that allow the minority group to elect their preferred candidates of choice. *See* S. REP. NO. 109-295, at 18-21 (2006) (“Preferred Candidate of Choice”); H.R. REP. NO. 109-478, at 65-72 (2006).

14. The final significant legal change occurred in *Pender County*. Under the 2003 House plan, North Carolina divided Pender County into different districts to create a majority white crossover district (House District 18). The plaintiffs contended that dividing Pender County into different districts violated the WCP. North Carolina defended the division of Pender County on the ground that majority white crossover districts served as a defense to vote dilution claims under Section 2. *Pender County*, 361 N.C. at 493-98, 649 S.E.2d at 366-68. The North Carolina Supreme Court held that Section 2 did not authorize the creation of coalition districts, crossover districts, or influence districts, and that under the WCP any district enacted to protect the State from Section 2 liability would need to be established with a true majority minority population. *Id.* at 503-07, 649 S.E.2d at 372-74.⁴

⁴ In the third racial gerrymandering case brought by plaintiffs’ counsel, they again rely upon a statement by the North Carolina Supreme Court in *Pender County* without providing context. As the three-judge panel in *Dickson* found:

In *Pender County*, “the North Carolina Supreme Court relied upon an affidavit filed by Representative Martha Alexander to make the statement that ‘[p]ast elections in North Carolina demonstrate that a legislative voting district with a total African-American population of at least 41.54 percent, or an African-American voting age population of at least 38.37 percent, creates an opportunity to elect African American candidates.’ What was not mentioned is that the district cited from Representative Alexander’s affidavit was the 1992 version of the same multi-member, Durham County, District 23 that had been reviewed in *Gingles*. (Record on Appeal at 45-63 (Aff. of Martha Alexander, ¶ 7, Att. A), *Pender County* (No. 103A06)

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

16. In *Strickland*, the Court found “support for the majority minority requirement in the need for workable standards and sound judicial and legislative administration.” *Id.* at 17. A majority minority rule “draws clear lines for courts and legislatures alike.” *Id.* Determining whether a less than majority minority district provides the minority group with an equal opportunity to elect their candidate of choice

(available at http://www.ncappellatecourts.org/show-file.php?document_id=65479)

As explained by the Supreme Court in *Thornburg* and the district court’s opinion in *Gingles*, the dynamics of racially polarized voting is completely different in a multi-member district as compared to a single-member district. For example, in a multi-member district, a black candidate may be elected when he or she is the last choice of white voters, but where the number of candidates running is identical to the number of positions to be elected. *Gingles*, 590 F. Supp. at 368 n.1, 369. Further, “bullet” or “single-shot” voting (a practice that would allow black voters to cast one vote for their candidate of choice as opposed to voting for three candidates in a three-member, multi-member district) may result in the election of a black candidate even when voting in the district is racially polarized. *Thornburg*, 478 U.S. at 38 n. 5, 57. Thus, the finding in *Thornburg* that legally significant polarized voting was absent in a multi-member district does not preclude a strong basis in evidence of racially polarized voting in Durham County as related to single-member districts.

(D.E. 32-1, F.F. No. 40(b)).

would “place courts in an untenable position of predicting many political variables and tying them to race-based assumptions.” *Id.* Courts would be required “to make predictions or adopt premises that even experienced policy analysts and political experts could not assess with certainty, particularly over the long term.” *Id.* For example,

courts would be required to pursue these inquiries: What percentage of white voters supported minority-preferred candidates in the past: How reliable would the crossover votes be in future elections? What types of candidates have white and minority voters supported together in the past and will those trends continue? Were past crossover votes based on incumbency and did that depend on race? What are the historical turnout rates among white and minority voters and will they stay the same? Those questions are speculative, and the answers (if they could be supposed) would prove elusive. A requirement to draw election districts on answers to these and like inquiries ought not to be inferred from the text or purposed of § 2.

Id. at 17.

17. The dissent in *Strickland* clearly understood that the Court’s opinion would be construed as requiring states to draw any district designed to protect the state from liability under the VRA with a minority population in excess of 50% black VAP. The dissent stated:

If districts with minority populations under 50% can never count as minority-opportunity districts to remedy a violation of the state’s obligation to provide required electoral opportunity under § 2, states will be required under the plurality’s role to pack black voters into additional majority-minority districts, contracting the number of districts where racial minorities once having success in transcending racial divisions in securing their preferred representatives.⁵

⁵ The 2003 Senate and House plans created majority black districts and coalition district in which blacks were able to elect their candidates of choice. In light of the *Strickland*

Id. at 27 (Souter, J., dissenting).

18. The dissenting opinion also explained the Court’s well-established principle that “the better benchmark for measuring opportunity to elect under § 2, although not dispositive, is the minority’s rough proportion of the relevant population.” *Id.* at 29 (citing *Johnson v. De Grandy*, 512 U.S. 997, 1016-17 (1994)).⁶ The dissent noted that “the starting point” for assessing Section 2 claims “is a comparison of the number of districts where minority voters can elect their chosen candidates with the group’s population percentage.” *Id.* (citing *LULAC*, 548 U.S. at 436). Thus, a Section 2 claim “must be assessed by looking at the overall effect of a multidistrict plan” and that a Section 2 plaintiff “must look to an entire districting plan (normally statewide) alleging that the challenged plan creates an insufficient number of minority opportunity districts in the territory as a whole.” *Id.* (citing *LULAC*, 548 U.S. at 436-37).

Court’s decision to defer ruling on whether coalition districts can be enacted to protect the state from liability under Section 2, one of the questions in this case is whether North Carolina had “good reasons” to replace coalition districts with majority black districts. *See Alabama, supra*. In *Strickland*, the court construed the requirement that minorities have an opportunity to elect their “candidate of choice” to mean that a Section 2 district must be based upon an actual majority-minority population. *Strickland, supra*. In 2006, Congress amended Section 5 to clarify that it protected the right of a minority group to elect its “preferred candidate of choice.” *See supra* F.F. No. 13. Plaintiffs’ expert, Dr. Ted Arrington, testified that he has been hired by the U.S. Department of Justice to draw redistricting plans in Section 5 proceedings and that he has been instructed to draw districts in these plans with an actual majority-minority population based upon the possibility that “preferred candidate of choice” under Section 5 will be construed by the Court to have the same meaning as “candidate of choice” under Section 2.” *Dickson*, 2013 WL 3376658, at *14, n. 19, *17, n. 22 (citing Arrington Dep. pp. 78, 191). The position taken by the U.S. Justice Department is consistent with the rule that similar or identical phrases within the same statute should be given the same meaning. *Sorenson v. Sec’y of the Treasury*, 475 U.S. 851, 860 (1986) (“identical words used in different parts of the same act are intended to have the same meaning”).

⁶ Justice Souter was the author of the Court’s opinion in *De Grandy*.

B. North Carolina's history defending claims of illegal racial gerrymandering

19. Plaintiffs' legal theories originate from North Carolina's 1992 Congressional Plan and litigation focused on two majority black districts established by that plan, the 1992 versions of Congressional Districts 1 ("CD 1") and Congressional District 12 ("CD 12"). *Shaw v. Reno*, 509 U.S. 630 (1993) ("*Shaw I*"); *Shaw v. Hunt*, 861 F. Supp. 408 (E.D. N.C. 1994) (three-judge court), *rev'd*, 517 U.S. 899 (1996) ("*Shaw II*"). In *Shaw I*, the Court found that plaintiffs could state a claim under the Fourteenth Amendment where congressional districts "separate voters into different districts on the basis of race, and that the segregation lacks sufficient justification." *Id.* at 649.

20. In *Shaw II*, the Court reversed the district court's holding affirming the constitutionality of CD 12 and found that CD 12 constituted an illegal racial gerrymander. In *Shaw II*, the Court explained that plaintiffs bore the burden of proving that race was the predominant motive for a challenged district, and that once plaintiffs carried that burden, defendants were obligated to show a strong basis in evidence for drawing the district based upon race. The Court assumed, without expressly deciding, that enacting a district to protect a state from Section 2 liability could provide a strong basis for a district predominantly based upon race, but held that North Carolina had failed to make that showing. *Shaw II*, 517 U.S. at 907-18.

21. The claim recognized in *Shaw I* and *II* is "analytically distinct" from a vote dilution claim. *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (citing *Shaw I*, 509 U.S. at 653). Under the Fourteenth Amendment, a vote dilution claim alleges that a particular

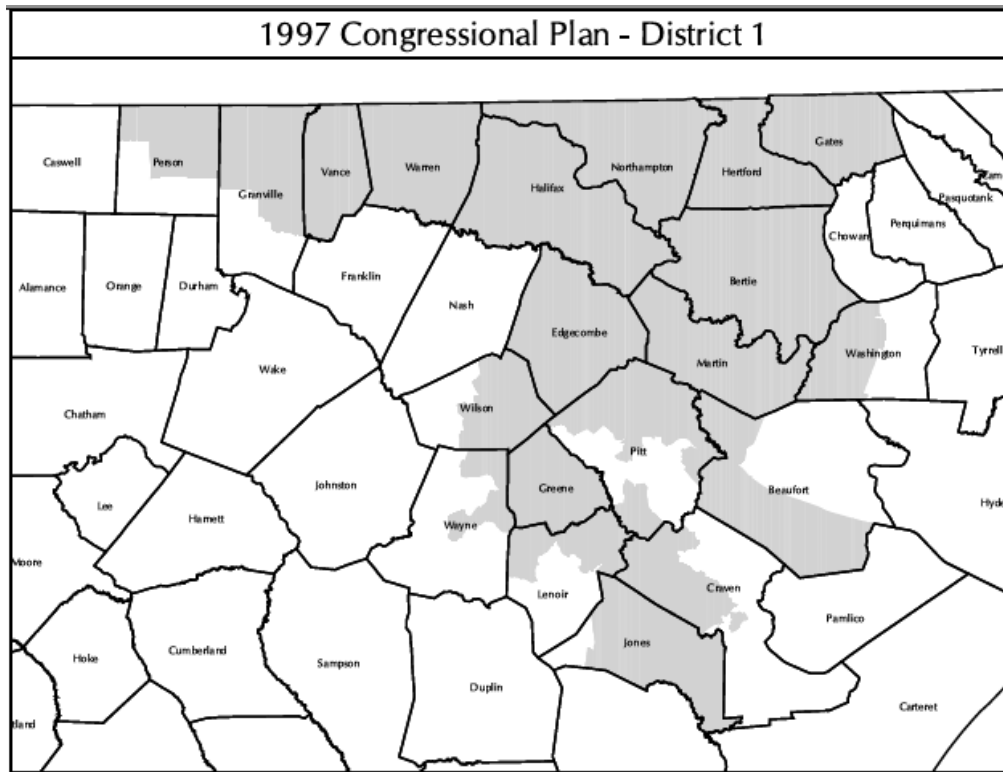
voting scheme purposefully operates to ““minimize or cancel out the voting potential of racial or ethnic minorities.”” *Id.* (citing *Mobile v. Bolden*, 446 U.S. 55, 66, (1980) (dismissing plaintiffs’ claim for vote dilution under the Fourteenth Amendment)). In contrast, in a racial gerrymandering case, the state “has used race as a basis for separating voters into districts” which is prohibited unless justified by a strong basis in evidence. *Id.*; *Shaw II*, 517 U.S. at 190. The injury in a racial gerrymandering case is not the cancelation of voting strength but instead is the “stigma” attached to voters separated into different districts because of race. *Shaw I*, 509 U.S. at 643. Based upon this precedent, absent a strong basis in evidence, the State cannot draw and, this Court cannot order, districts that are still based upon race but at a lower “quota” of something less than 50% APBVAP. Thus, if plaintiffs’ legal theories are correct, the remedy is not the replacement of majority black districts with coalition districts. Instead, the remedy is that race may not be used as a factor in the construction of districts enacted to replace any of the challenged VRA districts which the Court finds to be racial gerrymanders.⁷

⁷ Packing does not occur strictly based upon the inclusion of African Americans in a district. If this were so, then all of the alternative plans would be guilty of packing African Americans to the extent these plans created districts with a targeted percentage of African American voters. Instead, illegal packing occurs only when a redistricting plan avoids the creation of additional single member majority black districts by creating a fewer number of majority districts with super majorities of African Americans. *Voinovich v. Quilter*, 507 U.S. 146, 153-154 (1993). The Court in *Voinovich* expressly rejected claims that the redistricting plan “packed blacks” by creating majority black districts in the place of non-majority black districts in which black voters could not elect their preferred candidates but would have “influence” on who would be elected. There is no allegation in plaintiffs’ complaint that any of the three plans established super majority districts to avoid the creation of additional majority districts. Instead, plaintiffs’ allegations are identical to those made by the *Voinovich* plaintiffs, and rejected by the

22. In 1997, and in response to *Shaw II*, North Carolina enacted a new congressional plan that made substantial changes to CD 1 and CD 12. In *Hunt v. Cromartie*, 526 U.S. 541 (1999) (“*Cromartie I*”), the Court reversed the district court’s order granting plaintiffs’ motion for summary judgment that the 1997 CD 12 constituted an illegal racial gerrymander. The Court held that summary judgment was rarely appropriate in a case involving claims of illegal intent. *Id.* at 553 n. 9. In *Cromartie v. Hunt*, 133 F. Supp. 2d, 407 (E.D.N.C. 2000) (three-judge court), *rev’d*, *Easley v. Cromartie*, 521 U.S. 234 (2001) (“*Cromartie II*”), the Court reversed the district court’s judgment entered following a trial that CD 12 constituted an illegal racial gerrymander. The Court found that the district court’s factual findings were clearly erroneous because the 1997 version of CD 12 had been drawn based upon politics and not race. *Cromartie II*, 521 U.S. at 241-42, 257-58.

23. Another important development in *Cromartie II* concerned the district court’s order dismissing plaintiffs’ allegations that CD 1 constituted an illegal racial gerrymander. The 1997 version of CD 1 encompassed the following twenty counties: Beaufort, Bertie, Craven, Edgecombe, Gates, Granville, Greene, Halifax, Hertford, Jones, Lenoir, Martin, Northampton, Person, Pitt, Vance, Warren, Washington, Wayne, and Wilson. As shown below, ten of these twenty counties were divided into different Congressional districts.

Voinovich Court, i.e. defendants packed blacks by creating majority black districts in the place of influence districts. *See LULAC*, 548 U.S. at 445-46.



A larger, printable version of this map may be downloaded here: http://www.ncleg.net/GIS/Download/District_Plans/DB_1991/Congress/97_House-Senate_Plan_A/Maps/DistSimple/distsimple1.pdf; See also D.X. 3002 [Historical Congressional Maps Notebooks Tab 3]

24. In each of the ten divided counties, the percent African American population was higher in the part of the county that was inside CD 1 as compared to the part that was outside CD 1. Nine of the 13 cities and town were split between CD 1 and neighboring districts so that the African American population was higher in the part of the city located in CD 1 as compared to the part of the city located in the adjacent district. *Cromartie I*, 133 F. Supp. 2d at 415-16.

25. Under the 1990 Census, 1997 CD 1 had an African American population of 50.27% and a black voting age population of 46.54%. *Cromartie II*, 133 F. Supp at 415 n.

6. Despite being constructed with less than a majority of black VAP, the parties stipulated

and the Court found that legally significant racially polarized voting was present in CD 1. *Id.* at 422. The Court also found that CD 1 was based upon a reasonably compact minority population that could be a majority in a single number district. In support of this holding, the Court cited a mathematical test for compactness known as the Reock test showing a Reock score of 0.31.⁸ The Court found that the General Assembly had a strong basis in evidence for concluding that CD 1 was reasonably necessary to protect the state from liability under Section 2 and dismissed plaintiffs' claims as to this district. *Id.* at 422. This part of the Court's opinion was not appealed to the United States Supreme Court.

C. Federal limits on a state's ability to construct districts with different population deviations

26. Another federal "competing hazard of liability" involves the Court's restrictions on a legislature's ability to construct districts with different population deviations. Historically, the Supreme Court has been "appropriately deferential" when reviewing states' redistricting decisions. *Cox v. Larios*, 542 U.S. 947, 950 (Scalia, J. dissenting (2004)). In a number of cases, the Court has held that "'minor deviations' concerning districts – deviations of less than 10% – are insufficient to make out a *prima facie* case of invidious discrimination under the Fourteenth Amendment so as to require

⁸ The district court cited a law review article that explains compactness scores which was cited by the United States Supreme Court. *See* Pildes & Niemi, *Expressive Harms, "Bizarre Districts" and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 Mich. L. Rev. 483, 571-573, Table 6 (1993) (hereinafter, "Pildes & Niemi"); *see also* *Bush v. Vera*, 517 U.S. at 959-60. The court noted that Pildes and Niemi suggest that 0.15 constitutes a "low" Reock or dispersion compactness score. *Cromartie II*, 133 F. Supp.2d at 415.

justification by the state.” *Id.* (citing *Brown v. Thomson*, 462 U.S. 835, 842 (1983) (quoting *Gaffney v. Cummings*, 412 U.S. 735 (1973))). Despite these prior rulings, in *Cox*, the Supreme Court affirmed a ruling by a district court invalidating Georgia legislature’s reapportionment. The Court’s holding was based upon evidence that Georgia had engaged in “a deliberate and systematic policy of favoring racial and inner-city interests at the expense of the suburban areas north, east, and west of Atlanta” and “an intentional effort to allow incumbent Democrats to maintain or increase their delegation, primarily by systematically underpopulating the districts held by incumbent Democrats, by overpopulating those of Republicans, and deliberately pairing numerous Republican incumbents against one another.” *Id.* at 947 (Stevens and Breyer, J.J., concurring).

D. State Constitutional Requirement

27. The final competing hazard of liability concerns the test for compliance with North Carolina’s “whole county provision” (“WCP”) adopted by the North Carolina Supreme Court in *Stephenson I*. Under N.C. Const. art. II §§ 3 and 5, “no county should be divided in the formation of a senate or representative district.” *Id.* at 562 S.E.2d at 384. The North Carolina Supreme Court established a nine-part formula for compliance with the state’s WCP:

1. [T]o ensure full compliance with federal law, legislative districts required by the VRA shall be formed prior to creation of non-VRA districts In the formation of VRA districts within the revised redistricting plans on remand, we likewise direct the trial court to ensure that VRA districts are formed consistent with federal law and in a manner having no retrogressive effect upon minority voters. *To the maximum extent practicable, such VRA districts shall also comply with the legal requirements of the WCP, as herein established*

2. In forming new legislative districts, any deviation from the ideal population for a legislative district shall be at or within plus or minus five percent for purposes of compliance with federal "one-person, one-vote" requirements.
3. In counties having a 2000 census population sufficient to support the formation of one non-VRA legislative district, the WCP requires that the physical boundaries of any such non-VRA legislative district not cross or traverse the exterior geographic line of any such county.
4. When two or more non-VRA legislative districts may be created within a single county, . . . single-member non-VRA districts shall be formed within said county. *Such non-VRA districts shall be compact and shall not traverse the exterior geographic boundary of any such county.*
5. In counties having a non-VRA population pool which cannot support at least one legislative district . . . or, alternatively, counties having a non-VRA population pool which, if divided into districts, would not comply with the . . . "one-person, one-vote" standard, the requirements of the WCP are met by combining or grouping the *minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard. Within any such contiguous multi-county grouping, compact districts shall be formed, consistent with the at or within plus or minus five percent standard, whose boundary lines do not cross or traverse the "exterior" line of the multi-county grouping;* provided, however, that the resulting interior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard.
6. The intent underlying the WCP must be enforced to the maximum extent possible; thus, *only the smallest number of counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard shall be combined[.]*
7. . . . *[C]ommunities of interest should be considered in the formation of compact and contiguous electoral districts.*
8. . . . *[M]ulti-member districts shall not be used in the formation of legislative districts unless it is established that such districts are necessary to advance a compelling governmental interest.*
9. Finally, we direct that any new redistricting plans, including any proposed on remand in this case, *shall depart from strict compliance with the legal*

requirements set forth herein only to the extent necessary to comply with federal law.

Stephenson v. Bartlett, 357 N.C. 301, 582 S.E. 2d 247, 250-52 (2003) (“*Stephenson II*”) (citing *Stephenson I*, 562 S.E. 2d at 396-98).

E. Election Results and 2010 Census Developments Under the 2003 Legislative Plans

28. From 2004 through 2010, a few African American Democratic candidates ran for election in a majority white senate district. Only two were successful and their success was temporary. In 2008, African American Democrat Don Davis won a Democratic primary and then defeated white Republican Louis Pate in Senate District 5. Pate defeated Davis in a rematch in 2010. (*See* DX 3020-1 [*Covington* Declaration of Erika Churchill, Ex. 1]; Tr. Vol. IV, pp. 118-119) In 2006, African American Democrat Carolyn Pittman-Dorcal lost an election to Republican Harry Brown in Senate District 6. In 2004, two African American candidates ran in the Democratic primary for Senate District 7 and lost to white Democrat Doug Berger. In 2008, white Democrat Ellie Kinard defeated African American Democrat Moses Cary in the Democratic primary for Senate Districts 23. In 2004, African American Democrat Anthony Forrest was defeated in the General Election by white Republican Hugh Webster. Forrest defeated a white Democrat in the Democratic primary for this district in 2006 and 2008 and then defeated two different Republicans in the General Elections of 2006 and 2008. In 2010, Forrest was defeated by a white Republican, Richard Gunn, in the General Election. In 2008, African American Democrat Betty Gholston was defeated in the Democratic primary for Senate District 25 by white Democrat Bill Purcell. Thus, from 2004 through 2010, only seven

African Americans ran for office in majority white senate districts. Only one African American candidate, Senator Forrest, won two general elections before he was defeated. Only one other African American candidate, Don Davis, won a single general election before he was defeated. (See DX 3020-5 [*Covington*, Declaration of Erika Churchill, Ex. 5]; DX 3016 [*Dickson*, Churchill Ex. 82, “2006-2010 Senate Races in districts between 30% and 40% total minority population” and “Districts with less than 30% total minority population”])⁹

29. From 2004 through 2010, African American Democratic candidates had even worse election results in House districts that were majority white. In House District 4, African American candidate Michael Hearing lost in the Democratic primary in both 2004 and 2006. Another African American candidate in House District 4, Naverro Brown, was also unsuccessful in 2004. In House District 14, white Republican George Cleveland defeated African American Democrat Kevin Clark in the 2004 and 2006 General Elections. In House District 17, African American Democrat James Knox was defeated by white Republican Frank Iler in the 2010 General Election. In 2006, the African American Democrat candidate for House District 25, Carnell Taylor, lost to Republican candidate Bill Daughtridge. Taylor also lost the Democratic primary for House District 25 in 2008 running against white Democrat Rusty Stewart. In 2010, white Democrat Winkie Wilkins defeated African American Democrat Fred Foster in the

⁹ Black Democratic candidates were also defeated by white Democratic candidates in districts that were not majority non-Hispanic white including Senate District 3 (2006), Senate District 13 (2006), and Senate District 32 (2010). (JX 1048 [*Dickson*, Churchill Dep. Ex. 82, “Elections in districts with greater than 40% minority population”])

Democratic primary for House District 55. In 2004, white Democrat Melanie Goodwin defeated African American Democrat Anthony Copeland in the Democratic primary for House District 66. Also in 2004, African American Democrat William Manning lost to Republican candidate John Rayfield in House District 108. Finally, in 2010, in House District 111, African American Democrat Mary Accor lost to white Republican Tim Moore. (DX 3020-7 [*Covington*, Churchill Decl., Ex. 7]; JX 1049 [*Dickson*, Churchill Dep. Ex. 83, “2006-2010 House Races in Districts between 30% and 40% minority population” and “Districts with less than 30% minority population”])

30. African American Democrats won elections in only three majority white house districts from 2004 through 2008. In House District 18, African American Democrats won primary and general elections in 2004, 2006, and 2008. An African American Democratic candidate, James Utley, was defeated by a white Democrat, Susie Hamilton, in the 2010 Democratic primary. In House District 39, African American Democratic candidate Linda Coleman won a Democratic primary in 2004 and general elections in 2004, 2006, and 2008. Finally, in House District 41, African American Democratic candidate Ty Harrell won a Democratic primary in 2006 and general elections in 2006 and 2008. (*Id.*)¹⁰

31. In 2010, only 18 African American candidates were elected to the State House and seven African American candidates were elected to the State Senate. (D.E. 32-

¹⁰ Black Democrats lost primary elections to white Democrats in districts with higher than 40% minority population including HD 8 (2006, 2008, 2010) and HD 102 (2010). (JX 1049 [*Dickson*, Churchill Dep. Ex. 83, “House Races in Districts with greater than 40% minority population”]; Tr. Vol. IV, pp. 107-108).

1, p. 4, F.F. No. 3; DX 3017-10 through 3017-11 [First Frey Aff. Exs. 10, 11]; DX 3018-34, 3018-39, 3018-44, 3018-49 [Second Frey Aff. Exs. 34, 39, 44, 49]; DX 3016-6, 3016-7 [Churchill Aff. Exs. 6, 7]) Two African American candidates were elected to Congress in 2010. (D.E. 32-1, p. 4, F.F. No. 3) All African American incumbents elected to the General Assembly or Congress in 2010 were elected in districts that were either majority black VAP or coalition districts in which non-Hispanic whites were a minority of the VAP. (D.E. 32-1, p. 4, F.F. No. 4; DX 3018-34, 3018-44 [Second Frey Aff. Exs. 34, 44]; JX 1048 & 1049)

32. No African American candidate elected in 2010 was elected from a majority white crossover district. (D.E. 32-1, p. 4, F.F. No. 4; DX 3018-34, 3018-39, 3018-60 [Second Frey Aff. Exs. 34, 39, 60]; DX 3016-6, 3016-7 [Churchill Aff. Exs. 6, 7]) In fact, two African American incumbent senators were defeated in the 2010 General Election, running in majority white districts. (D.E. 32-1, p. 4, F.F. No. 4; DX 3018-56 [Second Frey Aff. Ex. 56]; DX 3016-7 [Churchill Aff. Ex. 7])[(SD 5 & 24)] From 2006 through 2010, no African American candidate was elected to more than two consecutive terms to the legislature in a majority white district. (D.E. 32-1, p. 4, F.F. No. 4; DX 3018-59 [Second Frey Aff. Ex. 59] [HD 39]; DX 3016-7 [Churchill Aff. Ex. 7] [SD 24]) From 1992 through 2010, no African American candidate for Congress was elected from a Congressional district other than Congressional District 1 (“CD 1”) or Congressional District 12 (“CD 12”). (D.E. 32-1, p. 4, F.F. No. 4)

33. From 2004 through 2010, no African American candidate was elected to state office in North Carolina in a statewide partisan election. In 2000, an African

American candidate, Ralph Campbell, was elected State Auditor in a partisan election. In 2004, Campbell was defeated by a white Republican, Les Merritt, in a partisan election for state auditor. (D.E. 32-1, p. 5, F.F. No. 5; DX 3043 [Statewide Partisan and Non-Partisan and U.S. Senate Races 2000-2010]; *see also Gingles v. Edmiston*, 590 F. Supp. at 364-65 (lack of success by African American candidates in statewide elections is relevant evidence of legally significant racially polarized voting))

34. Under the North Carolina Constitution, to satisfy the one person, one vote requirement, legislative districts must be drawn with a total population that is plus or minus 5% from the ideal population. *Stephenson I*, 355 N.C. at 383-84, 562 S.E.2d at 396-98. Legislative districts also must be drawn within a single county if the county has enough population to support one or more whole legislative districts. For all other counties, they must be grouped in the smallest combinations possible to establish a population pool that will support one or more whole legislative districts to be drawn within each county group. *Dickson v. Rucho*, 367 N.C. 542, 571-72, 766 S.E.2d 238, 257-59 (2014). The county grouping formulas in the 2003 House plan and the 2003 Senate plan are based upon the 2000 Census. Under the 2010 Census, most of the majority black or coalition districts and other non-VRA districts were either underpopulated or overpopulated by more than 5%. (DX 3017-10, 3017-11 [First Frey Aff. Exs. 10, 11]). This meant that almost all of the 2003 VRA districts would need to be redrawn and that the 2011 legislative plans would need to be based upon new county groups. Further, in most of the majority black or coalition districts that had elected African American candidates, the margin of victory for each African American candidate was less than the

amount by which the district was underpopulated or overpopulated by more than 5%. (D.E. 32-1, F.F. 63, 80, 88, 95, 104, 112, 121, 128, 136, 145, 154, 162; DX 3016-1 through 3016-3 [Churchill Aff. Exs. 1, 2, 3]) In almost all of these elections, the African American candidate was often unopposed or enjoyed the advantage of incumbency and raised substantially more money than his or her opponent. (D.E. 32-1, F.F. 64, 72, 81, 89, 96, 105, 113, 122, 129, 137, 146, 155, 163; DX 3016-1 through 3016-7 [Churchill Aff. Exs. 1-7])

F. 2011 Legislative Committee and Public Hearing Process

35. Early in the redistricting process, Senator Bob Rucho was appointed Chair of the Senate Redistricting Committee and Representative David Lewis was appointed Chair of the House Redistricting Committee. On March 24, 2011, the co-chairs advised legislators that, in their opinion, the General Assembly was obligated to comply with *Strickland* in forming VRA districts, that “political considerations” would play a role in redistricting, that the General Assembly would “consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions,” “that race cannot be the predominant factor in redistricting so that traditional redistricting principles are subordinated to race,” and that any new plans could not be “retrogressive.” (DX 3013-3 [First Rucho Aff. Ex. 3]; Tr. Vol. III, pp. 118:1-119:8)

36. During a meeting of the Joint Committee on Redistricting, on March 30, 2011, the co-chairs released a Legislator’s Guide to Redistricting. (“Legislator’s Guide”) (3069) The Legislator’s Guide explained numerous cases that would govern the criteria used by the State’s map drawer to draw districts redistricting in 2011, including, for

example, *Stephenson I* and *II*; *Thornburg*; *Pender County*; *Strickland*; *Shaw I*; *Shaw II*; *Cromartie I*; *Cromartie II*, and other cases. (DX 3069 & JX 1012, pp. 51-53 [3/30/11 Legislator's Guide to Redistricting]) The Guide also reported the decision by Congress to amend Section 5 because of the decision in *Ashcroft*. (Tr. Vol. III, pp. 126:22-25; 127:20-128:41)

37. The Legislator's Guide lists all of the North Carolina districts that were covered by Section 5. (JX 1012, p. 6; Tr. Vol III, pp. 131:8-11) It also contained sections on equal population requirements, the *Stephenson* criteria, the state's obligations under the Voting Rights Act, racial gerrymandering, politics and redistricting and political gerrymandering. The Legislator's Guide states that politics always plays a role in redistricting and that the North Carolina Supreme Court has held that the General Assembly may consider partisan advantage in its redistricting decisions. (DX 3069 & JX 1012, pp. 10, 11 [3/30/11 Legislator's Guide to Redistricting]; Tr. Vol III, pp. 128:20-133:22)

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

Legislative Black Caucus were copied on this letter. (DX 3013-4 [First Rucho Aff. Ex. 4]; Tr. Vol III, pp. 134-136)

39. During the 2011 legislative proceedings, the General Assembly conducted an unprecedented number of public hearings. (DX 3013-1 & 3013-23) During a public hearing on May 9, 2011, representatives of a coalition called “Alliance for Fair Redistricting and Minority Voting Rights” (“AFRAM”) presented a proposed Congressional plan. The NC NAACP was a member of AFRAM and AFRAM was represented by attorneys from the Southern Coalition for Social Justice (“SCSJ”). Thus, the plan was designated by General Assembly Staff as “Southern Coalition for Social Justice – Congress.” (DX 3013-6 [First Rucho Aff. ¶¶ 9-14]; Tr. Vol. III, p. 138:7-18)

40. During the public hearing, counsel for the SCSJ stated that AFRAM was responding to the letter from the co-chairs dated March 31, 2011. Counsel for the SCSJ argued that both CD 1 and CD 12 were covered by the nonretrogression principle of Section 5 and that the General Assembly was obligated to consider race in drawing both districts. Like the 2001 version of CD 1, the SCSJ proposed that the 2011 version be created as a coalition district with an any part black VAP of 47.44% and a non-Hispanic white voting age population of 46.47%. African Americans constituted 49.2% of all registered voters while whites (including Hispanic whites) constituted 47.40% of registered voters. Democrats constituted 66.89% of all registered voters with African Americans constituting 65.73% of all registered Democrats. (DX 3013 [First Rucho Aff. ¶ 11]; DX 3013-6 through 3013-7)

41. Under the 2010 Census, the any part black VAP (“APBVAP”) of North Carolina was 21.18% with African Americans representing 21.63% of all registered voters. (See, e.g., DX 3001 [Historical House Maps Notebook, Tab 8, pp. 8, 11] [charts for district and statewide voting age population and registration by race]) Neither the NC NAACP, nor the SCSJ or its counsel, proposed that CD 1 should be reduced in black VAP or in the percentage of registered black voters to levels even remotely approaching the statewide black percentages. Instead, counsel for the NC NAACP advised that North Carolina continues to “have very high levels of racially polarized voting in the state.” (DX 3013-6 [First Rucho Aff. Ex. 6, pp. 8-9]) In support of this opinion, counsel for the NC NAACP offered an expert report by Dr. Ray Block. (DX 3013-8 [First Rucho Aff. Ex. 8]) Dr. Block examined North Carolina legislative and congressional General election results for 54 elections involving a white candidate and an African American candidate in 2006, 2008, and 2010. The districts examined included most of the counties encompassed by majority black legislative districts ultimately enacted by the 2011 General Assembly. Dr. Block stated that this report was “evidence that non-blacks consistently vote against African American candidates and that blacks demonstrate high rates of racial bloc voting in favor of co-ethnic candidates.” (*Id.*, p. 1) Dr. Block stated that racially polarized voting, as that term was defined by Justice Brennan in *Thornburg*, was present because there was a “consistent relationship between the race of a voter and the way in which s/he votes.” (*Id.*, p. 3) Dr. Block stated that “in all elections examined here, such a consistent pattern emerges” and that “the evidence . . . suggests that majority-minority districts facilitate the election of African American candidates.” (*Id.*)

42. In a letter provided to the Committee on May 9, 2011, counsel for the NC NAACP stated that Dr. Block had analyzed “54 elections and [found] *significant levels of racially polarized voting*.” (emphasis added) (DX 3013-7 [First Rucho Aff. Ex. 7, p. 2]) Counsel for the NC NAACP also stated that Dr. Block’s report found that “the number of elections won by Black candidates in majority-minority districts is much higher than in other districts” and that “*this data demonstrates the continued need for majority-minority districts*.” (*Id.*) (emphasis added). She also stated that the “totality of the circumstances” test, applicable to claims under Section 2, were still present in North Carolina as demonstrated by a law review article she had co-authored. (DX 3013-9 [First Rucho Aff. Ex. 9]). The law review also contained an index of local jurisdictions in North Carolina that had been involved with voting rights litigation including cases where majority black districts had been ordered by the Court or adopted by the jurisdiction because of litigation. VRA districts enacted in 2011 were located in many, if not most, of these counties.

43. The report of the NC NAACP’s expert, Dr. Block, is highly informative in demonstrating “significant” racially polarized voting in many areas of the State. To a limited extent, it leaves a few questions in some areas. First, Dr. Block only assessed 54 Congressional and Legislative elections in the State of North Carolina in 2006, 2008, and 2010 to determine the degree to which African American candidates for political office failed to win the support of “non-blacks.” In Dr. Block’s analysis, the non-black vote for the African American candidate includes whites and minorities other than African Americans who voted for the African American candidate. Thus, any assessment of the “non-black” vote for the African American candidates in an election held in a majority

black or a majority minority coalition district does not represent the exact percentage of non-Hispanic white voters who voted for the candidate of choice of African American voters. This can be a significant issue in areas with higher percentages of Hispanic population. (DX 3035 [Dr. Thomas Brunell Decl.] ¶ 2, 3; DX 3025 [Dr. Thomas Brunell Aff.]; D.E. 32-1, pp. 9-10, F.F. No. 14; DX 3013-8 [First Rucho Aff. Ex. 8, p. 1, n.1]; DX 3018-34, 3018-39 [Second Frey Aff. Exs. 34, 39]; Tr. Vol. IV, pp. 140, 165-168)

44. Second, Dr. Block's report likely overstates the percentage of non-black voters who would vote for an African American candidate in an election with genuine opposition. This is because most of the African American candidates were incumbents or faced token opposition in the general election. (DX 3035 [Brunell Decl. ¶ 4, 27]; D.E. 32-1, p. 10, F.F. No. 15; DX 3016-1 through 3016-3 [Churchill Aff. Exs. 1, 2, 3])

45. Third, Dr. Block could not analyze a congressional or legislative election where the African American candidate had no opposition. Many of the legislative elections from 2006-2010 involved races where the African American candidate was unopposed. (D.E. 32-1, p. 10, F.F. No. 16; DX 3013-8 [First Rucho Aff. Ex. 8, pp. 1-7]; DX 3016-1 through 3016-3 [Churchill Aff. Exs. 1, 2, 3])

46. Finally, because Dr. Block only looked at contested legislative or congressional elections, his report provided no information regarding counties in eastern North Carolina that have never before been included in a majority black or coalition congressional or legislative district. (D.E. 32-1, p. 10, F.F. No. 17; DX 3013-8 [First Rucho Aff. Ex. 8])

47. Because of these limitations, the General Assembly engaged Dr. Thomas Brunell to prepare a report that would supplement the report provided by Dr. Block. (D.E. 32-1, p. 10, F.F. No. 18; DX 3013 [First Rucho Aff. ¶ 15, 10])

48. Dr. Brunell was asked to assess the extent to which racially polarized voting was present in recent elections in 51 counties in North Carolina. These counties included the 40 North Carolina counties covered by Section 5 of the VRA as well as Columbus, Duplin, Durham, Forsyth, Jones, Mecklenburg, Richmond, Sampson, Tyrell, Wake, and Warren counties. Elections analyzed by Dr. Brunell included the 2008 Democratic Presidential primary, the 2008 Presidential General Election, the 2004 General Election for State Auditor (the only statewide partisan election for a North Carolina office between African American and white candidates), local elections in Durham County, local elections in Wake County, the 2010 General Election for Senate District 5, the 2006 General Election for House District 60, local elections in Mecklenburg County, local elections in Robeson County, and the 2010 Democratic primary for Senate District 3. (D.E. 32-1, pp. 10-11, F.F. No. 19)

49. Based upon his analysis, Dr. Brunell found “statistically significant racially polarized voting in 50 of the 51 counties.” Dr. Brunell could not conclude whether statistically significant racially polarized voting had occurred in Camden County because of the small sample size. All of the counties located in the VRA districts ultimately enacted by the 2011 Senate plan and the 2011 House plan are included in Dr. Brunell’s analysis. (D.E. 32-1, p. 11, F.F. No. 20)

50. Dr. Brunell's report was presented to a meeting of the joint committee on redistricting held on June 15, 2011. Other reports showing the existence of racially polarized voting in North Carolina were also presented. The first document was a letter from counsel to the NC NAACP submitted to the House and Senate Redistricting Committees in 2001. Counsel for the NC NAACP described the 1997 version of CD 1 as a "majority-African American District" even though the black VAP for this district was under 50%. Accompanying the letter was an expert report by Dr. Richard Engstrom opining that statistically significant racially polarized voting was present in Congressional Election in CDs 1 and 12 in the 1998 and 2000 General Elections. Counsel for the NC NAACP argued that, based upon Dr. Engstrom's report, any failure by the State "to create a majority-African American district during the current round of redistricting would violate Section 2." (DX 3070 through 3073, 3033, 3077; Tr. Vol. III, pp. 154:25-162:2)

51. At no time during the public hearing or legislative process did any legislator, witness, or expert question the findings by Dr. Block or Dr. Brunell. In fact, the NC NAACP and other alternative redistricting plans offered by the General Assembly's Democratic leadership and Legislative Black Caucus ("LBC") proposed majority black or coalition districts in every region or county in which Dr. Block or Dr. Brunell found racially polarized voting and in which the General Assembly enacted majority black districts. (D.E. 32-1, p. 11, F.F. No. 21; DX 3001 [Historical House Map Notebook, Tabs 9, 12, 13]; DX 3000 [Historical Senate Map Notebook, Tabs 23, 26, 27]; D.E. 33-42)¹¹

¹¹ During the redistricting process, a staff attorney for the General Assembly, Erika Churchill, prepared reports showing elections between black and white candidates for

52. During the public hearing process, many other witnesses testified about the continuing presence of racially polarized voting, the continuing need for majority minority districts, and the continuing existence of the “*Gingles* factors” used to judge “the totality of the circumstances.” Not a single witness testified that North Carolina’s long and established history of legally significant racial polarization had vanished either statewide or in areas in which the General Assembly had enacted past VRA districts or the 2011 VRA districts.¹²

53. On April 13, 2011, several members of the Rocky Mount City Council testified, asking for majority minority districts and noting inequality in housing, elections,

Senate Legislative Races 2006-2010 (JX 1048); and House Legislative Races 2006-2010 (JX 1049). In prior redistricting cases litigated by plaintiffs’ counsel, they relied upon these reports to argue that certain districts were “majority white.” However, the census data used to analyze the districts listed in these exhibits is from the 2000 Census, not the 2010 Census. This was readily apparent to legislators because the total population reported for the districts was substantially below the ideal populations for districts under the 2010 Census. (Tr. Vol. III, pp. 129:17-130:2; Tr. Vol IV, pp. 13:10-14:25) The term “white” in these exhibits includes both Hispanic whites and non-Hispanic whites. (Tr. Vol. IV, pp. 15:1-25, 61-63, 68-69, 109, 111) None of these exhibits provide the non-Hispanic white population for these districts under the 2000 Census. Almost all of these districts were majority black or coalition districts under the 2000 Census. All of these districts that elected black candidates to the legislature in 2010 were majority black or coalition districts under the 2010 Census. None were majority non-Hispanic white under the 2010 Census. (DX 3017 [First Frey Decl. ¶¶ 9, 23]; DX 3017-7, 3017-21 [Exs. 7, 7A, Exs. 21, 21A]; DX 3018-34, 3018-39 [Second Frey Aff. Exs. 34, 39]).

¹² See *Thornburg*, 478 U.S. at 52, 56 (court noted that district court had relied on lay-witness testimony in addition to statistical evidence presented by experts); *McDaniels v. Mehfoud*, 702 F. Supp. 588, 593 (E.D. Va. 1988) (racially polarized voting can be established through both expert analysis and anecdotal evidence); *Sanchez v. Bond*, 875 F.2d 1488 (10th Cir. 1989) (finding “nothing in *Gingles* to suggest that a trial court is prohibited from considering lay testimony in deciding whether” racially polarized voting exists); see also *Carrollton Branch of the NAACP v. Stallings*, 829 F.2d 1547, 1558 (11th Cir. 1987) (plaintiffs established existence of racially polarized voting through regression analysis and the testimony of lay witnesses).

transportation, and economic development. (D.E. 32-1, pp. 12-13, F.F. No. 24; DX 3015A, pp. 2-4, 5-8, 10-13 [Selected Statements from the Public Hearing on Redistricting]) AFRAM representative Jessica Holmes stated that social science would confirm that racially polarized voting continues to occur in many areas of North Carolina and that any redistricting plan should not have the purpose or effect of making African American voters worse off. (D.E. 32-1, pp. 12-13, F.F. No. 24; DX 3015A, p. 9 [Selected Statements from the Public Hearing on Redistricting])

54. On April 20, 2011, Bob Hall, Executive Director of Democracy NC testified that race must be taken into consideration in the redistricting process, that discrimination still exists in North Carolina, and that racially polarized voting continues in some parts of the State. (D.E. 32-1, pp. 13-14, F.F. No. 25; DX 3015A, pp. 13-15 9 [Selected Statements from the Public Hearing on Redistricting]) Similar testimony was received from an AFRAM representative, a Vance County Commissioner, and the Chair of the Durham Committee on the Affairs of Black People. (D.E. 32-1, pp.13-14, F.F. No. 25; DX 3015A, pp. 16-20, 21-24, 25-28 9 [Selected Statements from the Public Hearing on Redistricting]) The Chair of the Durham Committee on the Affairs of Black People also drew attention to the fact that African Americans represent 22% of the total population of North Carolina and that fair representation would reflect that with proportional numbers of representatives in the General Assembly. (DX 3015A, pp. 25-28 9 [Selected Statements from the Public Hearing on Redistricting])

55. On April 28, 2011, witnesses warned that redistricting plans should not undermine minority voting strength, that the legislature was “obligated by law” to create

districts that provide an opportunity for minorities to elect candidates of choice, and requested that current minority districts be maintained and that other districts be created to fairly reflect minority voting strength. (D.E. 32-1, p. 14, F.F. No. 26; DX 3015A, pp. 29-32, 33-359 [Selected Statements from the Public Hearing on Redistricting])

56. On April 30, 2011, June Kimmel, a member of the League of Women Voters, told the committee that race should be considered when drawing districts and that the legislature must not “weaken” the minority vote to avoid a court challenge. (D.E. 32-1, pp. 14-15, F.F. No. 27; DX 3015A, pp. 36-399 [Selected Statements from the Public Hearing on Redistricting]) Other witnesses stated that the legislature was legally obligated to consider race and urged that any new plan fairly reflect minority voting strength. (D.E. 32-1, pp. 14-15, F.F. No. 27; DX 3015A, pp. 44-46, 50-539 [Selected Statements from the Public Hearing on Redistricting])

57. On May 7, 2011, Mary Perkins-Williams, a resident of Pitt County, testified that that Pitt County African Americans had faced disenfranchisement and that it remained hard for African Americans to be elected in her county. (D.E. 32-1, p. 15, F.F. No. 28; DX 3015A, pp. 54-57 9 [Selected Statements from the Public Hearing on Redistricting]) Taro Knight, a member of the Tarboro Town Council, expressed his opinion that wards for the Town Council drawn with 55% to 65% African American population properly strengthened the ability of minorities to be elected. (D.E. 32-1, p. 15, F.F. No. 28; DX 3015A, pp. 58-619 [Selected Statements from the Public Hearing on Redistricting])

58. On May 7, 2011, Keith Rivers, President of the Pasquotank County NAACP, stated that race must be considered, that current majority minority districts

should be preserved, and that additional majority minority districts should be drawn where possible. (D.E. 32-1, p. 15, F.F. No. 29; DX 3015A, pp. 61-639 [Selected Statements from the Public Hearing on Redistricting]) Other witnesses similarly testified to the obstacles minorities have faced in the electoral process as well as high poverty rates, disparities in employment, education, housing, health care, recreation and youth development. (D.E. 32-1, p. 15, F.F. Nos. 29-30; DX 3015A, pp. 64-66, 67-69, 70-71, 72-75 9 [Selected Statements from the Public Hearing on Redistricting])

59. The redistricting co-chairs published five different statements outlining the criteria they would follow in the construction of legislative and congressional districts. (JX 1005 through JX 1007 [Joint Statements of the Redistricting Chairs]) Consistent with their prior public statements, on June 17, 2011, the co-chairs stated that legislative plans must comply with the state constitutional criteria established in *Stephenson I* and *II*, *Pender County*, and *Strickland* to determine the appropriate “VRA districts.” The co-chairs had also sought advice during the redistricting process on the number of Section 2 districts to create, citing *Johnson v. De Grandy*, 512 U.S. 997 (1994). The co-chairs stated that they would “consider, where possible” plans that included “a sufficient number of majority African-American districts to provide North Carolina’s African-American citizens with a substantially proportional and equal opportunity to elect their preferred candidates of choice.” The co-chairs also explained that based upon statewide demographic figures, proportionality for African American citizens “would roughly

equal” 24 majority black House districts and 10 majority black Senate districts. (JX 1005 [6/17/11 Joint Statement])¹³

60. The co-chairs made it clear that proportionality was not an inflexible criterion and that majority black districts would only be created “where possible.” The Senate co-chair proposed only nine majority black districts (instead of the proportional number of 10) because he was “unable to identify a reasonably compact majority African-American population to create a tenth majority African-American District.” (*Id.*, pp. 3-4) While the House plan published on June 23, 2011 had 24 majority black House districts, based upon public opposition expressed during a public hearing, a majority black district proposed for southeastern North Carolina (proposed VRA House District 20) was eliminated in the final House plan. (*Id.*, pp. 4-8)¹⁴

¹³ Proportionality and proportional representation are different concepts. Proportionality links the number of majority minority voting districts to the minority group’s share of the relevant population. Proportionality is distinct from the concept of proportional representation, which cannot be required of a state under the express terms of Section 2. Proportional representation speaks to the success of minority candidates while proportionality only concerns equal opportunity. *De Grandy*, 512 U.S. at 1013 n. 11. The only “circumstance” listed in the statute that may be considered under the “totality of the circumstances” test is “the extent to which members of a protected class have been elected to office in the State or political subdivision.” 52 U.S.C. § 10301. To prove a Section 2 claim, plaintiffs must show that one or more majority black districts could be created as compared to an enacted plan. But they cannot meet that burden of proof if the enacted plan already provides proportionality. *LULAC*, 548 U.S. at 477. As a result, proportionality is an issue in every Section 2 case. Consideration of proportionality is not proof that race was the predominant motive for any particular district. *De Grandy*, *supra*; *LULAC*, *supra*.

¹⁴ There was no evidence or testimony offered during the public hearing process challenging the location or percentage of the any part black VAP in any of the other specific proposed legislative districts.

61. On May 17, 2011, the co-chairs once again sought input from the LBC and other interested parties and experts. (DX 3014-8 [5/17/11 letter from co-chairs to the Honorable Floyd B. McKissick and others]) One response was a letter from Professors Michael Crowell and Bob Joyce of the University of North Carolina School of Government. (JX 1027) In relevant part, Professors Crowell and Joyce advised that North Carolina remained bound by the judgment in *Gingles* and that “it appears to be commonly accepted that the legislature remains obligated to maintain districts with effective African American voting majorities in the same areas as decided in *Gingles*, if possible.” (*Id.* at p. 2) (emphasis added)

62. On June 22, 2011, the co-chairs released a joint statement to respond to criticism by Democratic elected officials to proposed legislative VRA districts released by the co-chairs on June 21, 2011. (JX 1006, pp. 9-15 [6/22/11 Joint Statement]) In that statement, the co-chairs stated that compliance with the VRA would make adjoining districts more competitive for Republican candidates. The co-chairs also noted that the 2001 CD 1 had been found to be “based upon a reasonably compact black population” by the federal district court in *Cromartie II*. Using the federal court’s decision regarding CD 1 as an example, the co-chairs stated their opinion that all of the proposed VRA districts were based upon reasonably compact black populations.

63. On June 23, 2011, counsel for the SCSJ and AFRAM provided an additional submission to the Joint Redistricting Committee. (DX 3013-11 [First Rucho Aff. ¶ 18, Ex. 12]) It included a written statement by counsel for the SCSJ and proposed North Carolina Senate and North Carolina House maps. (DX 3001 [Historical House Map

Notebook, Tab 9]; DX 3000 [Historical Senate Map Notebook, Tab 23]; D.E. 33-42) In her statement, counsel for the SCSJ stated that the two SCSJ legislative plans should be considered because they “compl[ied] with the Voting Rights Act.” (DX 3013-11 [First Rucho Aff. Ex. 12, p. 1]) More specifically, counsel stated that the SCSJ Senate and House plans complied “with the non-retrogression criteria for districts in counties covered by Section 5 of the Voting Rights Act” and “Section 2 of the Voting Rights Act in Mecklenburg, Forsyth, and Wake Counties.” (*Id.*)¹⁵

64. On July 18, 2011, Professor Irving Joyner, representing the NC NAACP, affirmed that racially polarized voting continues to exist in North Carolina. (D.E. 32-1, p. 16, F.F. No. 32; DX 3015A, pp. 76-82[Selected Statements from the Public Hearing on Redistricting])

65. The legislative plans submitted by the SCSJ were the only alternative legislative plans offered by any group or person before the General Assembly convened on July 25, 2011 to enact redistricting plans.

G. Legislative Proceedings in the General Assembly

66. The General Assembly convened on Monday, July 25, 2011 for purposes of enacting redistricting plans. On that same date, and, for the first time, Democratic leaders published their two legislative redistricting plans: Senate Fair and Legal; and House Fair and Legal. (D.E. 32-1, p. 17, F.F. No. 34) On that same date, the Legislative Black

¹⁵ The SCSJ plans that complied with Section 5 and Section 2 included majority black senate and house districts in eastern North Carolina, majority black senate districts in Guilford and Mecklenburg, and majority black house districts in Wake, Cumberland, Guilford, and Mecklenburg

Caucus (“LBC”) published, for the first time, their Possible Senate Plan and Possible House Plan. (D.E. 32-1, p. 17, F.F. No. 34; DX 3001 [Historical House Map Notebook, Tabs 12, 13]; DX 3000 [Historical Senate Map Notebook, Tabs 26, 27]; D.E. 33-42)

67. Except for districts drawn in single county groups, all of the alternative plans used different county groups than the county groups in the enacted plans. (DX 3017-2 [First Frey Aff. Ex. 2]; DX 3018-14 through 3018-15 [Second Frey Aff. Exs. 14, 15]) The Democratic leadership plans and the LBC plans mirrored the plans proposed by the SCSJ to the extent that they recommended the creation of majority black or coalition districts in all the same regions and counties. Neither the Democratic leadership nor the LBC Senate plans proposed any majority black senate districts but did recommend that the State enact nine coalition senate districts. Like the 2001 and 2003 legislative plans and the SCSJ plans, the coalition districts in the Democratic leadership and LBC plans were all constructed so that African American voters represented either a majority or a very high plurality of registered voters in each district. Further, in all the coalition districts proposed by the Democratic leadership or the LBC, Democrats represented very high majorities of all registered voters and African Americans represented supermajorities of registered Democrats. (DX 3017-2, 3017-10 through 3017-11 [First Frey Aff. Exs. 2, 10, 11]; DX 3018-14 through 3018-15, 3018-34, 3018-36, 3018-37, 3018-38, 3018-41 through 3018-44, 3018-46 through 3018-49, 3018-51 through 3018-53 [Second Frey Aff. Exs. 14, 15, 34, 36, 37, 38, 41-44, 46-49, 51-53])

68. On July 27, 2011, the General Assembly passed the 2011 Senate redistricting plan, S.L. 2011-404 (Rucho Senate 2) and the 2011 Congressional plan, S.L.

2011-403 (Rucho-Lewis Congress 3). (D.E. 32-1, pp. 17-18, F.F. No. 35; D.E. 33-20, p. 16, ¶ 65) On July 28, 2011, the General Assembly enacted the 2011 House redistricting plan, S.L. 2011-402 (Lewis-Dollar-Dockham 4). (*Id.*)

69. The redistricting co-chairs had advised all of the members of the General Assembly that politics and incumbency protection were criteria that would be considered in the construction of legislative districts. Political considerations played a significant role in the enacted plans and all alternatives. The uncontested evidence shows that the enacted legislative plans were constructed so that Republicans would retain their majorities.¹⁶ The uncontested evidence also shows that all of the alternative districts were constructed to elect Democratic majorities in the Senate and House. This evidence was not disputed in *Dickson*. (DX 3031 [*Dickson*, Sean Trende Revised Affidavit])

70. The leaders also explained that they would be governed by the county grouping formula required by *Stephenson I*. Under that formula, the State is obligated to first create VRA districts and the shape and location of VRA districts must comply with the county grouping formula to the greatest extent practicable. (JX 1005 [6/17/11 Joint Statement, pp. 1, 2]) More geographically compact majority black districts could have been proposed, but such districts could not be drawn following the *Stephenson I* formula nor could they have addressed issues related to the residences of several incumbents. (DX

¹⁶ The Court can take judicial notice that, under the enacted plans, Republicans have retained their majorities in 2012 and 2014. Moreover, following the 2014 General Elections, 11 African Americans were elected to the State Senate and 23 African Americans were elected to the State House. By comparison, under the 2003 House and Senate Plans, in 2010, only seven African Americans were elected to the State Senate and only 18 African Americans were elected to the State House. (DX 3020-13, 3020-14; Tr. Vol. IV, pp. 117-118)

3019 [Third Frey Aff. ¶¶ 2-13]; DX 3028 [Third Hofeller Aff. ¶¶ 23-68, Exs. 1-11]) Regardless, the enacted House and Senate plans are similar to the plans proposed by the SCSJ, the Democratic leaders, and the LBC to the extent that majority black districts were enacted in all of the same regions or counties for which the SCSJ, the Democratic leadership, or the LBC proposed districts that were majority black in voting age population or in which African Americans were a majority in the number of registered voters, coalition districts, or districts in which African Americans constituted a supermajority of registered Democrats. (DX 3001 [Historical House Map Notebook, Tabs 10, 12, 13]; 3 DX 000 [Historical Senate Map Notebook, Tabs 23, 26, 26]; DX 3018-34, 3018-36 through 3018-38, 3018-41 through 3018-44, 3018-46 through 3018-53 [Second Frey Aff. Exs. 34, 36-38, 41-44, 46-53]) In some cases, the alternative plans proposed districts with higher black VAP than the enacted districts. In any case, the difference in black VAP between enacted districts and the alternative districts is insignificant. (DX 3019-77 through DX 3019-78 [Third Frey Aff. Exs. 77, 78])

71. For example, in the northeastern region, the Senate plan contained three majority black VAP districts (SDs 3, 4, 5) while the SCSJ proposed two majority black districts (SDs 3 and 4). The enacted Senate plan includes a third majority black district in this area (SD 5). Under the 2003 Senate plan, SD 5 was less than majority black. In 2010, African American Democratic incumbent Senator Don Davis was defeated in the 2003 version of SD 5 because of racially polarized voting. (DX 3033, pp. 19, 20; Tr. Vol. III, pp. 89:25-90:24)

72. Both the enacted Senate plan and the SCSJ plan have one majority black Senate district in Guilford County (SD 28) and two majority black Senate districts in Mecklenburg (SDs 38 and 40). The enacted plan established a majority black SD 14 in Wake County as opposed to the SCSJ version which was established with a black voting age population of 48.05% and in which African Americans represented a majority of all registered voters. (DX 3017-10, 3018-35, 3018-36)

73. In Durham County, the SCSJ proposed that SD 20 be crafted as a majority minority coalition district in which Democrats represented a supermajority of registered voters and African Americans represented a majority of registered Democrats. In contrast, the 2011 enacted SD 20 is located in a different county group and includes portions of Durham and Granville Counties (the latter being a covered county under Section 5) but has a majority black VAP. (*Id.*)

74. Similarly, the SCSJ proposed that SD 21 be located only in Cumberland County with African Americans representing a majority of all registered voters. Enacted SD 21 is located in a different county group and includes portions of Cumberland and Hoke County (the latter being a covered county under Section 5) and was established with a majority black voting age population. (*Id.*)

75. In two instances, the SCSJ proposed Senate districts with a higher percentage of any part black voting age population (SCSJ SDs 4 and 40) than the enacted versions of those districts. (DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-35, DX 3018-36, DX 3018-45, DX 3018-46 [Second Frey Aff. Exs. 35, 36, 45, 46]); DX 3000[Historical Senate Map Notebook, Tabs 23, 25]; D.E. 33-42)

76. Similar comparisons exist between the enacted House plan and the SCSJ House plan. The SCSJ proposed four majority black House districts for northeastern North Carolina (HDs 7, 8, 24, 27) and one coalition district with an any part black VAP of 49.63% (HD 5). In contrast, the enacted House plan established six majority black districts in this area (HDs 5, 7, 23, 24, 27, 32). The APBVAP for SCSJ HD 7 (58.19%) was higher than the percentage of APBVAP established by all six of the enacted House districts. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-40, DX 3018-41, DX 3018-50, DX 3018-51 [Second Frey Aff. Exs. 40, 41, 50, 51]; DX 3000 [Historical House Map Notebook, Tabs 9, 15]; D.E. 33-42)

77. In central to southeastern North Carolina, the 2003 House plan established three coalition districts, each of which divided several counties (2003 HDs 12, 21, 48). Based upon the state constitutional criteria established in *Pender County*, these three districts could not be re-enacted as coalition VRA districts but instead needed to be drawn with a black VAP of over 50% or be eliminated as VRA districts. The enacted 2011 House plan established all three of these districts at levels of black VAP slightly above 50% while the SCSJ plan proposed that all three be re-created as coalition districts with supermajorities of registered Democrats and with African Americans constituting supermajorities of registered Democrats. (*Id.*)

78. In Cumberland County, the SCSJ proposed one majority black House district (HD 43) and a second district in which African Americans constituted a majority

of all registered voters (HD 42). In contrast, both of these districts were created with a majority APBVAP in the enacted 2011 House plan.¹⁷ (*Id.*)

79. In Wake County, the SCSJ proposed one majority black district (HD 33) while the enacted plan established two majority black districts (HDs 33 and 38). The SCSJ proposed that HD 33 be established with an any part black VAP of 56.45% which was higher than the black VAP in the enacted HDs 33 and 38. In Durham County, the SCSJ proposed one majority black House district (HD 31) and one coalition district in which Democrats were a supermajority of all voters and African Americans a majority of registered Democrats (HD 29). In contrast, the enacted House plan established two majority black House districts in Durham County (HDs 29 and 30). (*Id.*)

80. In Guilford County, the SCSJ plan proposed two majority black VAP House districts (HDs 58 and 60) compared to three majority black districts in the enacted House plan (HDs 57, 58, and 60). SCSJ HDs 58 and 60 were proposed to be established at higher levels of any part black VAP (53.47% and 54.41%) than the three majority black enacted House districts. (*Id.*)

81. In Mecklenburg County, the SCSJ plan proposed two majority black VAP House districts (HDs 101 and 107) and three coalition districts in which the percentage of registered African American voters was higher than the percentage of registered white voters (SCSJ HDs 99, 100, and 102). In contrast, the enacted House plan has five

¹⁷ SCSJ proposed that HD 43 be created with an any part black VAP of 54.70%. This was higher than the VAP in the enacted HD 43.

majority black House districts in Mecklenburg County.¹⁸ The two majority black Mecklenburg districts proposed by the SCSJ, HDs 101 and 107, have a higher percentage of any part black VAP (57.28% and 56.43%) than any of the enacted majority black Mecklenburg House districts. (*Id.*)

82. Finally, none of the supporters of the alternative legislative plans argued during the legislative process that statistically or “legally” significant racial polarization had disappeared in any of the areas in which they proposed majority black or coalition districts or where the state enacted majority black legislative districts. In fact, counsel for the NC NAACP testified that “significant levels of racially polarized voting” remains in North Carolina and that the “majority minority districts” are still needed. All of the alternative plans used race as a factor to create several types of VRA districts that had been considered acceptable for protecting the State from Section 2 liability prior to the Court’s decisions in *Strickland* and *LULAC*, including majority black districts, coalition districts, districts controlled by Democrats in which African Americans constituted a majority of registered Democrats, and influence districts.

83. The legislator witnesses at trial for the plaintiffs opposed the enacted plans. (See, e.g., Tr. Vol. I, p. 84 ([Sen. Blue]; Tr. Vol. II, p. 135 [Sen. Mansfield]). Most of the legislator witnesses did not propose alternative redistricting plans or districts. (See, e.g., Tr. Vol. I, p. 85-86 [Sen. Blue]; Tr. Vol. 2, p. 136 [Sen. Mansfield]).

¹⁸ Based on the ideal population for House and Senate districts, the population needed to create two Senate districts is nearly equivalent to five House districts. The SCSJ’s proposal to create two majority black Senate districts in Mecklenburg County therefore provides a strong basis for the five majority black enacted House districts in that county. (DX 3037, ¶ 26)

H. The process followed by the state's map drawer

84. As explained by the redistricting chairs, the state's map drawer was instructed to draw districts that comply with the formula for legislative districts explained in *Stephenson I*. (Tr. Vol. III, pp. 120:24-123:9; Tr. Vol. IV, pp. 7:16-8:21) This required that VRA districts be established that followed both federal law and, to the maximum extent practicable, the *Stephenson* formula for grouping counties to establish a pool of population from which legislative districts could be established with a population deviation of plus or minus 5% from the ideal population. (*Id.*) Long before maps were published, the criteria used by the co-chairs were explained to members of the General Assembly in several published letters as well as the Redistricting Guide provided to the Joint Committee on Redistricting on March 30, 2011. (DX 3013-3, 3013-4, 3013-5; JX 1012)

85. Based upon their understanding of the decision in *Strickland*, the chairs advised the map drawer, Dr. Hofeller, that VRA districts needed to be drawn with a black voting age population above 50%. They also advised the map drawer to consider plans that would result in a number of districts that would provide rough proportionality for African Americans based upon their percentage in the total population of North Carolina. They instructed the map drawer that each district would need to be based upon "geographically compact" black population in sufficient numbers to constitute a majority in a single-member district, consistent with the *Gingles* preconditions. But the chairs also instructed the map drawer that all VRA districts needed to follow the formula adopted in *Stephenson I*, including the rules for grouping counties and population deviations. (Tr.

Vol. III, pp. 119:15-123:9; 164:16-166:5; Tr. Vol. IV, pp. 7:16-8:21; 9:8-11:6; Tr. Vol. V, pp. 216:2-218:2)

86. To perform this task, Dr. Hofeller identified the areas of the state where African Americans could constitute a compact population capable of being a majority in a single-member district. Dr. Hofeller's "exemplar maps" represent the information that was available to him on his computer screen when he engaged in this map drawing effort. In fact, the exemplar maps still represent the areas of the state where compact populations of African Americans exist in sufficient numbers to form a majority in single-member districts. (DX 3030 ¶¶ 6-12, pp. 11 and 12) This analysis showed at least 25 compact majority black house exemplar districts could be drawn in the state and that at least 10 majority black senate districts could be drawn. (*Id.* at 22, 23; Tr. Vol V, pp. 218:23-221:22; 228:5-230:18; Tr. Vol. V, pp. 20:20-22:23)

87. One of the mathematical tests used to measure compactness is called the Reock test. This test divides the area of each district by the smallest circle which may be drawn around that district. Reock scores range between .01 to 1.00. (DX 3029 ¶¶ 25-28) In *Cromartie II*, the district court found that the 1997 CD 1 was based upon a reasonably compact minority population with a Reock score of 0.31. *Cromartie II*, 133 F.Supp.2d at 416. Phildes and Niemi have offered the opinion that a Reock score of 0.15 or lower indicates low compactness. *Id.* at 415. All of the House and Senate exemplar districts have a Reock score of 0.19 or higher. (DX 3029, Exs. 2 and 3)

88. The Legislature could not enact districts that looked like the exemplar districts and comply with the *Stephenson I* requirement that all VRA districts be based

upon the county grouping formula and deviation rules applicable to all other districts. (Tr. Vol IV, pp. 231:14-232:14) Thus, Dr. Hofeller developed another map that optimized the way in which county groups could be established to maximize the number of single counties with enough population to support a whole number of legislative districts, the number of two-county groups with enough population to support a whole number of legislative districts within the two-county group, the number of three-county groups with enough population to support a whole number of districts within the three-county group, and so forth. (DX 3030, ¶ 6) Dr. Hofeller started his county combination analysis by determining the various combinations by which counties could be combined and engaged in an iterative process to determine the combinations that maximized the smallest number of counties in groupings. (*Id.* at ¶¶ 3, 16-19, House Maps 1, 2, 3, 5, 6, 9, 12, 13, 18 and Senate Maps 3, 4, 8, 10, 15, 17; DX Tr. Vol. IV, pp. 233:2-241:7; Tr. Vol. V, pp. 25:20-30:13).

89. Dr. Hofeller then began the process of harmonizing the areas of the state with compact black populations sufficient in size to constitute a majority in single-member districts, while maintaining the best possible compliance with the county grouping formula. If the General Assembly had just enacted VRA districts based upon the locations of geographically compact populations, the State would not have complied with the *Stephenson* requirement that VRA districts fit within the optimal county grouping formula to the maximum extent practicable. This is demonstrated by Hofeller Maps 12 and 15. (DX 3030, Maps 12 and 15) Map 12 shows the House exemplar districts with an overlay of the county grouping formula found in the House Optimum County Group plan.

Map 15 shows the Senate exemplar districts with an overlay of the Senate Optimum County Group plan. Both maps show that the most compact VRA districts could not comply with the *Stephenson* county grouping formula. Where a VRA district must be based upon portions of multiple counties, these maps show that the most compact VRA districts cannot be drawn within the optimum county grouping formula.

90. As a result, Dr. Hofeller engaged in an iterative process using the *Stephenson* county group formula to massage the areas of the state with compact black populations into the best possible grouping formula. (DX 3030, ¶¶ 27-43 [House]; 44-50 [Senate]; Tr. Vol. IV, pp. 228:5-230:18; 233:2-241:1; Tr. Vol. V, 20:20-22:33; 25:20-30:22))

91. A problem developed in the formula of a 2011 House Map because of the amount of population in Mecklenburg County. Because of the *Stephenson* formula and the results of the 2010 Census, 12 house districts with acceptable, but highly negative, population deviations had to be drawn in Mecklenburg County. *Id.* ¶ 27, Table 6. The creation of 12 house districts with highly negative population deviations resulted in the need to have 12 or more districts with correspondingly high positive population deviations elsewhere in the state. Without such an offset, many county grouping formulas would result in a plan with 121 house districts instead of the required 120. The solution for this excess population was a 20-county group with 13 of its 14 districts created with high population deviations. (*Id.*) The shapes and locations of three VRA districts located in this 20-county group (House Districts 12, 21, and 48) were impacted by the relatively

larger population needed to draw almost all of the districts in this county group.¹⁹ (*Id.*; DX 3030, Map 18 and Table 6; Tr. Vol. IV, pp. 241:8-244:28; Tr. Vol. V, pp. 19:1-20:19; 44:6-45:10)

92. As a result of Dr. Hofeller's iterative process, the enacted 2011 Senate and House Plans comply to the maximum possible extent with the *Stephenson* county grouping formula. *See Dickson v. Rucho*, ___ N.C. ___, 781 S.E.2d 404, 439-40 (Dec. 18, 2015). None of the alternative plans comply with this formula. (*Id.*) Hofeller Map 13 shows the areas represented by the exemplar House districts with an overlay of the county groups used in the enacted House Plan. Map 15 shows the exemplar Senate districts with an overlay of the county groups used in the enacted Senate Plan. Both Maps 13 and 15 show that the exemplar districts do not comply with the county grouping formula to the maximum extent possible. These maps prove that the shape and location of the enacted VRA districts were predominantly caused by the state's compliance with the county grouping formula and the population requirements of the formula. Absent North Carolina's county grouping formula, more compact VRA districts could have been drawn

¹⁹ The reason this was attributable to Mecklenburg County was because Mecklenburg just had barely enough population to be a single-county grouping within the plus or minus 5% rule from *Stephenson*. Because it had barely enough population to be a single-county grouping all 12 of its districts had to be drawn close to the minus 5% deviation allowed by *Stephenson*. While there were other county groupings in the State with several districts with minus 5% deviations, none of them contained minus 5% deviations for every single district in the grouping. Thus, whether the mapmaker began drawing districts in the east and moved westward or began in the west and moved eastward, once the mapdrawer came upon Mecklenburg, the negative population deviations required by the *Stephenson* formula in that county would inevitably affect population deviations in other county groupings.

in the areas represented by the House and Senate exemplar maps. (DX 3030, Maps 13 and 15)

93. The North Carolina Supreme Court has ruled that the county groups in the enacted 2011 plans comply with the WCP. *See Dickson*, 781 S.E.2d at 439-40. Thus, the 2011 enacted VRA districts comply with the WCP to the greatest extent possible.²⁰

I. Proportionality

94. There is very little difference between the 2003 enacted plans, the 2011 enacted plans, and the 2011 alternative plans in the number of VRA districts found in each of them, if coalition districts are counted as VRA districts. *Dickson*, 2013 WL 3376658, at *11-12 (Tables 1 and 2 comparing number of 40% plus APBVAP districts in all 2011 legislative plans).

95. At the time of the 2011 redistricting, the percentage of the statewide voting age population that was APBVAP was 21.2%. Exact proportionality in the State Senate would be 10.6 senate districts. Exact proportionality in the State House would be 25.44 house seats. (PX 2037)

96. The 2003 Senate Plan had nine coalition districts in which non-Hispanic whites were a minority of the voting age population and in which the black VAP was 35.43% or higher (SDs 3, 4, 14, 20, 21, 28, 32, 38, 40). (3018 [Second Frey Aff. Ex. 34]) If the Hispanic VAP is discounted in these districts, blacks constitute a majority of the

²⁰ Nearly five years after the legislative plans were enacted, during the 2016 deposition of Dr. Hofeller, plaintiffs produced an exhibit showing a slightly better county grouping formula for the state senate in the central part of North Carolina. This proposed county group scenario was not presented during the 2011 redistricting process and is therefore irrelevant.

VAP in all of these districts except SD 3. In that district the black VAP would have been 49.56% (DX 3117; Tr. Vol. V, pp. 76:18-77:20)

97. The 2011 SCSJ Senate Plan had five Senate Districts that were majority black (SDs 3, 4, 28, 38, 40) and four coalition districts in which non-Hispanic whites were a minority (SDs 14, 20, 21, and 32) for a total of nine district majority black or coalition districts. (DX 3018-36 [Second Frey Aff. Ex. 36])

98. The 2011 enacted Senate Plan has nine majority black districts (SDs 3, 4, 5, 14, 20, 21, 28, 38, 40) and one coalition district (SD 32) for a total of nine majority black districts and one coalition district. (DX 3018-35 [Second Frey Aff. Ex. 35])

99. The 2011 Fair & Legal Senate Plan has one majority black district (SD 4) and eight coalition districts (SDs 3, 14, 20, 21, 28, 32, 38, 40) for a total of nine majority black and coalitions districts. (DX 3018-37 [Second Frey Aff. Ex. 37])

100. The 2011 LBC Senate Plan has nine coalition districts (SDs 3, 4, 14, 20, 21, 28, 32, 28, 40). (DX 3018-38 [Second Frey Aff. Ex. 38])

101. Thus, if VRA districts are defined to include coalition districts, the 2011 enacted Senate Plan has 10 VRA districts as compared to nine districts found in the 2003 Senate Plan, the 2011 SCSJ Plan, the 2011 F&L Plan, and the 2011 LBC Plan. 2011 Senate District 5 is the only additional district in the 2011 enacted plan that does not correspond to a majority black or coalition district in the other plans. An African American candidate (Don Davis) was defeated in this district in the 2010 general election but was elected under the 2011 version in the 2012 and 2014 general elections. (DX 3020-1, 3020-2, 3020-13 [*Covington*, Churchill Decl. Exs. 1, 2, 13])

102. In the 2003 House Plan, the following ten districts were majority black: HDs 7, 8, 24, 27, 33, 43, 58, 60, 71, 101. The following 13 districts were coalition districts: HDs 5, 12, 21, 29, 31, 42, 48, 72, 99, 100, 102, 106, 107. The 2003 House Plan therefore had a total of 23 districts that were either majority black or coalition districts. (DX 3018-39 [Second Frey Aff. Ex. 39]) In the 12 districts with a black VAP between 40% and 50%, if the Hispanic VAP is discounted, eleven of them would have a majority black VAP. HD 29 is the only district that would not have a black VAP of over 50% (46.86%). (DX 3116; Tr. Vol. V, pp. 62:22-71:3)

103. The 2011 SCSJ House Plan had eleven majority black house districts (HDs 7, 8, 24, 27, 31, 33, 43, 58, 60, 101, 107) and twelve coalition districts (HDs 5, 12, 21, 29, 42, 48, 71, 72, 99, 100, 102, 106). Thus, the SCSJ House Plan had a total of twenty-three majority black and coalition districts. (DX 3018-41 [Second Frey Aff. Ex. 41])

104. The 2011 enacted House Plan has 23 majority black districts (HDs 5, 7, 12, 21, 23, 24, 27, 29, 31, 32, 33, 38, 42, 43, 48, 57, 58, 60, 99, 101, 102, 106, 106). There are also two coalition districts in which African Americans are in excess of 40% APBVAP (HDs 71 and 72). Thus, the 2011 enacted House Plan has twenty-five majority black and coalition districts. (DX 3018-40 [Second Frey Aff. Ex. 40])

105. The 2011 Fair and Legal House Plan has nine majority black house districts (HDs 5, 7, 24, 27, 33, 43, 58, 60, 101) and eleven coalition districts in which the APBVAP exceeds 40% (HDs 5, 8, 12, 21, 29, 31, 42, 48, 71, 72, 94, 107). The 2011 F&L Plan has three more districts in which non-Hispanic whites are a minority of the voting age

population (HDs 96, 100, 102). Thus, the 2011 F&L Plan has a total of 23 majority black or coalition districts. (DX 3018-42 [Second Frey Aff. Ex. 42])

106. The 2011 LBC House Plan has ten majority black districts (HDs 5, 7, 8, 24, 27, 33, 43, 58, 60, 101) and thirteen districts in which non-Hispanic whites are a minority of the voting age population (HDs 12, 21, 25, 29, 31, 42, 48, 71, 72, 99, 100, 102, 107). Thus, the 2011 LBC House Plan has a total of twenty-three districts that are majority black or coalition districts.

107. Drafting districts so as to achieve “rough proportionality” is favorably endorsed by plaintiffs’ retained experts, Dr. Theodore S. Arrington and Dr. Allan Lichtman. Dr. Arrington has over 40 years in the field of districting, reapportionment, and racial voting patterns. (Tr. Vol. I, pp. 154:19-155:21; Tr. Vol. III, pp. 68:11-69:11)

108. Moreover, Dr. Arrington, who is often requested by the Department of Justice to draw illustrative redistricting maps in the Section 5 preclearance process, was not aware of a single instance “where a legislative plan has provided black voters with roughly proportional number of districts for the entire state where that plan has been found to discriminate against black voters.” (D.E. 73-5, Ex. 5 [Arrington Dep., p. 192]; *Dickson*, 2013 WL 3376658, at *13)

109. Neither the 2003 House Plan nor any of the 2011 alternatives have districts that correspond to the 2011 House Districts 23, 32, 38, and 106. These districts are new majority black districts in which an African American Democrat has been elected in the

2012 or 2014 general elections. (DX 3020-14) From this group of new majority black districts, plaintiffs have only challenged the 2011 HDs 32 and 38.

J. The 2011 enacted VRA districts are no less compact than the 2003 VRA districts or VRA districts in all of the 2011 alternative plans.

There are no Judicially Manageable Standard for Measuring Compactness.

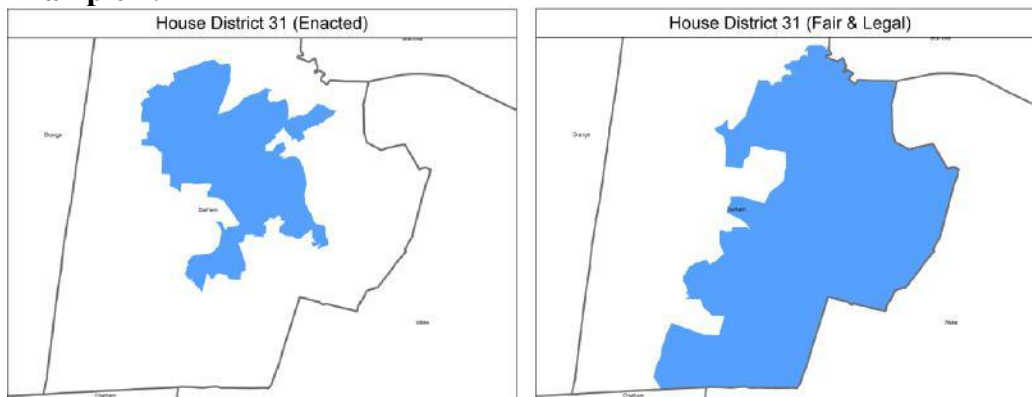
110. To the extent that lack of compactness could be viewed as an independent basis for a constitutional challenge to legislatively enacted redistricting plans, there are no uniformly adopted judicial standards by which to measure it. The absence of such standards invites arbitrary and inconsistent outcomes that should be avoided where courts are instructed to respect the inherently political nature of the redistricting process.

111. The absence of judicially manageable standards is the result of the amorphous and subjective nature of traditional redistricting principles. For example, the notion of “compactness,” which generally refers to the shape of a district, both in terms of the breadth of a district’s geographic “dispersion” and the irregularity of its “perimeter,” *see Dickson*, Anthony Fairfax Dep. p. 23, has been described as “such a hazy and ill-defined concept that it seems impossible to apply it in any rigorous sense in matters of law.” *Johnson v. Miller*, 864 F. Supp. at 1388; *see also Karcher v. Daggett*, 462 U.S. 725, 756 (1983) (stating that compactness requirements have been of limited use because of vague definitions and imprecise application). There are no United States Supreme Court or North Carolina Supreme Court opinions that define these terms and establish a standard by which a legislature could determine whether a district is “compact.”

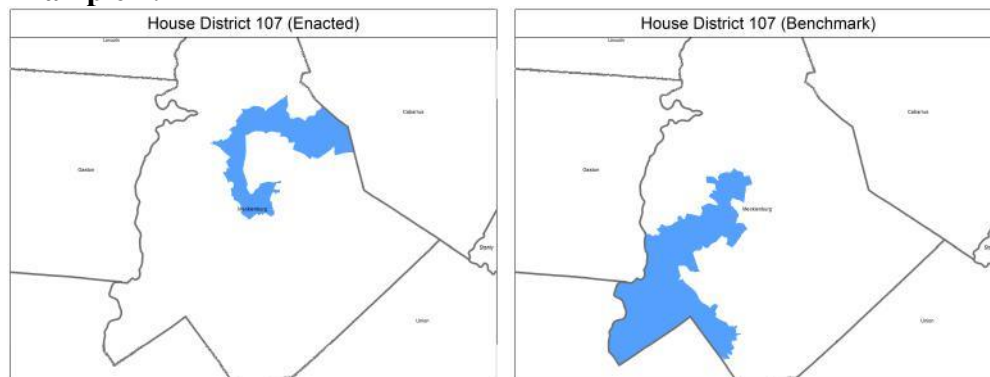
112. Plaintiffs’ expert, Dr. Arrington, testified that when he consults with the United States Department of Justice on redistricting matters, he uses what he calls an “inter-ocular test” to determine if a district is compact, presumably meaning that if the district is so irregular that it “hits him between the eyes,” it must not survive strict scrutiny. (D.E. 73-5, Ex. 5; [Arrington Dep. p. 202]; Tr. Vol I, pp. 157:11-158:13) Such a subjective test of compactness or irregularity is unsuitable for judicial review of redistricting plans in North Carolina.

113. The subjective nature of this task is illustrated by the following examples:

Example 1:



Example 2:

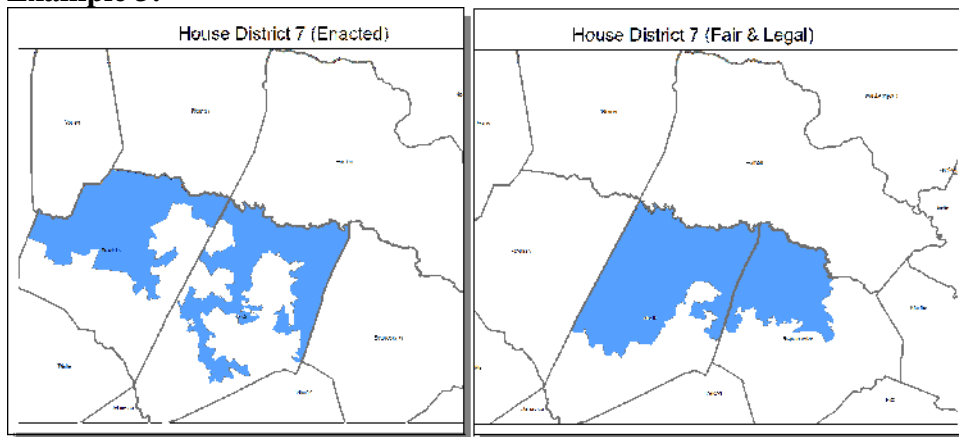


114. In each of these examples, the district on the left is a House District in the 2011 Enacted Plan (Districts 31 (Durham County) and 107 (Mecklenburg County), respectively). The districts on the right are corresponding alternative districts in the House

Fair & Legal Plan or the 2003 House Plan. In both of these examples, there is no meaningful difference in the compactness and regularity of the 2011 Enacted Plan's districts versus the proposed alternative districts. Were the court inclined to find either of these enacted districts invalid on the grounds that they were insufficiently compact or irrationally shaped, it would be unable to articulate any meaningful facts or conclusion of law in support of such a holding other than a subjective preference.

115. There are several districts in the Enacted Plan that appear to be irregularly shaped. For example, House District 7 in the Enacted Plan is one that could be described as such. And, indeed, while the alternative House District 7 proposed in the House Fair & Legal plan is not itself a model of compactness or regularity, it nonetheless could be perhaps described as “prettier.”

Example 3:



116. But, in the absence of a judicially consistent, articulable or manageable standard for viewing a district and declaring it sufficiently regular, compact, or “pretty,” it is impossible, simply on this ground alone, for a district to be declared to be in violation of law or unconstitutional.

117. Moreover, the shape of the 2011 enacted HD 7 is prompted by the *Stephenson* rules regarding the traversal of county lines within a county group. Under the *Pender County* decision, if the 2011 HD 7 was not created as a VRA district, all of Franklin County (the smaller county in the group population-wise) would be maintained wholly within a hypothetical HD 7 combined with population from the larger county (Nash County) to bring the hypothetical HD 7 within the North Carolina requirement that house districts be plus or minus 5% of the ideal populations. Both the resulting districts in the county group would have a black VAP under 40%. (Tr. Vol. V, pp. 11:1-14:14) Based upon the testimony of plaintiffs' experts, districts with black VAP under 40% are insufficient to provide black voters with an ability to elect district.

118. Mathematical or quantitative measures are not particularly helpful because even when a numerical value is assigned to "compactness," the court is still left with the subjective task of deciding whether, for example, the Reock Test compactness score of 0.45 for Enacted Plan House District 31 (see above at Example 1) versus a compactness score of 0.46 for the alternative Fair & Legal House District 31 renders the former unconstitutional, and the latter lawful. Or, similarly, whether a non-compactness score of 0.35 renders Enacted Plan District 107 unconstitutional, and the Fair & Legal alternative District 107, with a Reock score of 0.40, lawful (See above at Example 2). This is in accord with plaintiffs' own expert, Dr. Arrington, who says:

Courts and reformers often cite compactness as a valuable technical criterion in redistricting, but scholars do not think it should be a priority. One problem is that there are many different and partially conflicting ways to measure the compactness of a district or a district plan. And there can be

no mathematical standard of compactness that can be applied across varying geography in the way that equal population can have a mathematical standard. The most one can say is that with the use of a particular statistic, one redistricting plan for a particular jurisdiction has more or less compact districts than another plan for that same jurisdiction. But there is no standard that can tell us whether the districts in a plan are compact enough.

(D.E. 73-5, Ex. 5 [Arrington Dep. pp. 142-43]; Tr. Vol. I, pp. 156:1-157:17)

119. Moreover, even if the court could discern between an acceptable score versus a constitutionally defective score, the results of the quantitative tests, when applied to the 2011 Enacted Plans and the alternative plans, are decidedly non-conclusive. Consider, for example, a comparison of the Reock scores for the following districts, that are selected for comparison because they all are VRA districts located within a single county:

Table 1: Reock Scores for Enacted VRA House Districts within a Single County Compared to Alternatives

| House District | Enacted Plan (House) | SCSJ | F&L | LBC |
|----------------|----------------------|------|------|------|
| 29 | 0.47 | 0.38 | 0.24 | 0.30 |
| 31 | 0.45 | 0.49 | 0.46 | 0.41 |
| 33 | 0.47 | 0.51 | 0.24 | 0.32 |
| 38 | 0.31 | 0.45 | 0.30 | 0.44 |
| 42 | 0.44 | 0.37 | 0.37 | 0.48 |
| 43 | 0.32 | 0.41 | 0.41 | 0.32 |
| 57 | 0.39 | 0.52 | 0.51 | 0.51 |
| 58 | 0.38 | 0.61 | 0.61 | 0.65 |
| 60 | 0.22 | 0.32 | 0.33 | 0.38 |
| 99 | 0.48 | 0.58 | 0.61 | 0.45 |
| 101 | 0.47 | 0.40 | 0.28 | 0.49 |
| 102 | 0.32 | 0.47 | 0.47 | 0.27 |
| 106 | 0.49 | 0.49 | 0.40 | 0.35 |
| 107 | 0.35 | 0.31 | 0.40 | 0.52 |

120. The shaded blocks in **Table 1** represent the lowest Reock, or the “least compact” district, among all plans. This comparison illustrates that, even with a mathematical analysis of compactness, the results do not provide a judicially manageable standard by which the court can measure constitutionally permissible, or constitutionally defective, adherence to traditional redistricting principles. While the above-tabulated results of 4 of the 14 districts in the Enacted House Plan show the lowest compactness scores for those same districts across all alternative plans, each of the alternative plans, in turn, have their own set of districts that score lower than all others. In sum, in the “beauty contest” between the 2011 Enacted Plans and the “rival compact districts designed by plaintiffs’ experts,” this data suggests, at best, a tie. *Vera*, 517 U.S. at 977; *Dickson*, 2013 WL 3376658, at *19 - *21.

121. The testimony on compactness by plaintiffs’ expert Anthony Fairfax was not helpful to the Court. His analysis suffered from an admitted flaw in that he compared the compactness of the enacted plans to the benchmark plans enacted in 2003 and 2009, even though those plans were constitutionally illegal under both the United States Constitution and the WCP.²¹ (Tr. Vol. 1, p. 179) Mr. Fairfax conceded that he does not know and did not attempt to measure the extent to which compactness in the enacted plans was impacted by the enacted plans’ compliance with the WCP. (Tr. Vol. 1, p. 184) However, the State contends that the shape and location of the challenged districts were

²¹ A more probative comparison would have been to the AFRAM plans which the State held up as evidence of racial polarization justifying majority minority districts. Mr. Fairfax testified that he did not analyze those plans because he did not know about them (Tr. Vol. 1, pp. 180-81) even though the AFRAM plans were submitted to the legislature by counsel for the plaintiffs here who also retained Mr. Fairfax.

predominately caused by compliance with the WCP. As a result, Mr. Fairfax's analysis does not assist the court.

122. Moreover, the scoring scheme used by Mr. Fairfax to compare compactness among various plans is too misleading to be reliable. Under his method, as many as eight different compactness measures are reduced to two binary measures – a “1” or a “0”. This scoring scheme is not based on any scholarly research or literature. (Tr. Vol. I, p. 185) Mr. Fairfax has never used it before in other redistricting litigation. (Tr. Vol. I, p. 188) Mr. Fairfax admitted that if he had used all eight compactness measures, he would have received “false readings,” which means results of “less compact” under the enacted plans would have been far fewer than what he reported in his report. (Tr. Vol. I, p. 187) Moreover, Mr. Fairfax's binary system for comparing compactness scores does not account for the magnitude of the difference between scores for individual districts and Mr. Fairfax did not attempt to perform any sensitivity analysis to remedy this deficiency. (Tr. Vol. I, pp. 187-88)

K. Split Precincts

123. As a subset of traditional redistricting principles, the court considers the claims of the plaintiffs asserting excessive splitting of precincts. Plaintiffs contend that precincts were divided to achieve race-based goals.

124. The criteria established because of the *Stephenson* cases uses counties and the combination of counties to establish North Carolina's constitutional redistricting criteria. Nothing in *Stephenson* indicates that precinct lines are criteria under North Carolina law. The *Dickson* plaintiffs made these same arguments about precincts and they

were rejected by the North Carolina Supreme Court as a matter of state law. *Dickson*, 781 S.E.2d at 440.

125. There is no authority, state or federal, providing constitutional relief on a claim of split precincts. The precinct system is of significant value in the administration of elections in North Carolina. *James v. Bartlett*, 359 N.C. 260, 267 (2005) (enumerating “significant and numerous” advantages of the precinct system). But the respect for precincts boundaries is akin to other considerations of traditional redistricting principles such as “compactness,” that do not generally provide an independent basis for a constitutional challenge to a redistricting plan that is not otherwise based upon impermissible criteria. Rather, the splitting of precincts may be circumstantial evidence of an impermissible racial motive, or may be the harm resulting from a racial gerrymander, but is not, in and of itself, a constitutional defect. *Shaw I*, 509 U.S. at 647.

126. Precinct lines are established by each county board of elections. N.C. Gen. Stat. §163-33(4) and -128. There are no uniform, statewide criteria that must be followed by county boards of elections when they create a precinct. Many precinct lines have not been changed for 20 or more years. (D.E. 103-4 [*Dickson*, Bartlett Dep. 21-22]; D.E 103-2 [Colicutt Dep. 46-47]; D.E 103-5 [Doss Dep. 19-20]; D.E 103-1 [Poucher Dep. 39]; Tr. Vol I, pp. 96-100) There is no requirement that precincts be based upon equal population. N.C. Gen. Stat. §163-33(4), -128 and -132.1 *et seq.* There is no requirement that precincts be revised every ten years upon receipt of the Decennial Census like legislative and

Congressional districts. N.C. Gen. Stat. § 163-33(4) (providing for revision of precincts as county boards “may deem expedient.”) (Tr. Vol. I, pp. 150:3-151:21)²²

127. Nor is there any requirement that precincts be drawn compactly or that they respect communities of interest. N.C. Gen. Stat. §163-33(4), -128 and -132.1 et seq. Precinct lines divide neighborhoods. (D.E. 73-5, Ex. 5 [Arrington Dep. pp. 105-106]) When towns and municipalities annex property, precincts are split, and some voters then vote in municipal elections, while others in the same precincts vote in county elections. Ultimately, the establishment of precincts by the 100 different county boards of elections is an exercise of their discretion and based upon factors such as the amount of funding made available by their county’s board of commissioners and the availability of suitable polling places. (N.C. Gen. Stat. § 163-33(4); D.E. 103-1 [*Dickson*, Poucher Dep. p. 43]) Given the potential for disparate characteristics of precincts throughout the State, it is not surprising that there is no appellate authority affording any special constitutional status to

²² Dr. Arrington’s testimony regarding the role of divided precincts in the 2011 Enacted Plans should be rejected. He has not drawn legislative maps that comply with *Stephenson* and the 2010 Census that he could compare to the 2011 enacted districts. (Tr. Vol. I, pp. 136:23-137:3) Nor did he testify about comparisons between the 2011 Enacted Plans with the 2011 alternatives. He does not know whether to drawing all VRA districts up to 50% black VAP or increasing the number of VRA districts will create more divided precincts than a plan with fewer VRA districts or a plan with some drawn between 40% and 50% black VAP. (Tr. Vol. I, p. 137:9-14) He does not know if precincts were more likely to be divided in “mixed race” counties under the 2003 plans or the 2011 alternatives and therefore has not compared the division of precincts in mixed race counties under the 2011 plans or any other benchmarks. (*Id.* at pp. 149:18-25) Neither the 2003 plans nor the 2011 alternatives comply with the *Stephenson* formula. Thus, Dr. Arrington has no idea whether drawing districts that comply with *Stephenson* might have caused the division of precincts. (*Id.* at p. 153:4-1)

precinct lines that would limit the General Assembly's exercise of its lawful discretion in the redistricting process.

128. Like other instances of traditional redistricting principles, there is no judicially manageable standard for determining when a redistricting plan splits an “excessive” number of precincts. All of the 2011 alternative plans contain split precincts, as did the 2003 Senate Plan and the 2009 House Plan. While the 2011 Enacted Plans split more precincts, the subjective nature of what constitutes an “excessive” number of split precincts invites arbitrary and inconsistent outcomes that must be avoided, particularly when examining challenges to legislatively enacted redistricting plans, where trial courts are instructed to respect the inherently political nature of the redistricting process.

129. Of historic significance to the interplay between precinct lines and compliance with Section 2 and Section 5 of the VRA was the attempt, in 1995, of the General Assembly to enact legislation that would prohibit legislative and congressional districts from crossing precinct lines. N.C. Gen. Stat. §§ 120-2.2 and § 163-261.22 (“whole precinct statute”). When submitted for pre-clearance, the U.S. Department of Justice (“USDOJ”) objected to preclearance of the whole precinct statute because it concluded the State had failed to prove the statute was free from discriminatory purpose and that the State had failed to prove that the statute would not have a discriminatory “effect” or “lead to a retrogression in the position of . . . minorities with respect to their effective exercise of the electoral franchise.” (DX 3055 [*Dickson*, Arrington Dep. Ex. 238, at 3 [Letter of USDOJ to Charles M. Hensey, Special Deputy Attorney General (2/13/96)]) (quoting *Beer v. United States*, 425 U.S. 130, 131 (1976); Tr. Vol. I, pp. 152:10-24) The

State's responsibility to create "majority black districts" formed the basis of the USDOJ's objection to the whole precinct statute.

130. The USDOJ noted that "under existing law, county election officials may use their discretion with regard to the population size and racial composition of precincts," and noted that prior to the whole precinct requirement, "the size and composition of the precincts were of little relevance because the legislature could draw district lines through precinct lines for any number of reasons (e.g. to protect interests, to voluntarily satisfy the VRA, etc.)." *Id.* at 2. The USDOJ was concerned that, under the whole precinct statute, precincts would take on "new importance" because they would then "be used as the building blocks for each district." *Id.* The USDOJ observed that "if precincts do not fairly reflect minority voting strength, it is virtually impossible for districts to do so." *Id.*

131. Based upon this analysis, the USDOJ blocked the enforcement of the whole precinct statute because it "unnecessarily restrict[ed]" the redistricting process and made "it more difficult to maintain existing majority black districts and to create new ones." *Id.* at 3.

132. Finally, plaintiffs have not proffered any alternative plans that show that the General Assembly could have achieved its legitimate political and policy objectives in alternate ways with fewer split precincts. *Dickson*, 2013 WL 3376658, at *32-*34.

III. FACTUAL FINDINGS RELATED TO SPECIFIC DISTRICTS

A. Senate Districts

133. Senate District 4

(a) The 2003 version of Senate District 4 is located in a seven-county group consisting of Bertie, Chowan, Gates, Halifax, Hertford, Northampton, and Perquimans. There is only one district in this group, Senate District 4. Under the 2010 Census, the ideal population for the Senate District is 190,710. The 2003 Senate District 4 consisted of 163,184 and was therefore underpopulated by -27,526 (-14.43%). The APBVAP for this district was 49.70%. If Hispanic VAP is discounted from the district, the VAP would be majority black. African American voters made up 49.12% of all registered voters. Democrats constituted 66.42% of all registered voters and African American voters constituted 62.76% of all registered Democrats. Under the 2010 Census, this district was a coalition district with non-Hispanic whites representing a minority of the voting age population (46.47%). (DX 3017-10 [First Frey Aff. Ex. 10]; DX 301814, 3018-34, 3018-44 [Second Frey Aff. Exs. 14, 34, 44]; DX 3000 [Historical Senate Maps, Tab 23]; DX 3117)

(b) The 2011 SCSJ Senate District 4 is located in an 11-county group which includes Bertie, Franklin, Gates, Granville, Halifax, Hertford, Johnston, Nash, Northingham, Vance, and Warren. There are 3 districts in this county group. The SCSJ SD 4 has a APBVAP of 53.33% with African American voters constituting 53.81% of the registered voters. Democrats constitute 74.44% of registered voters and African Americans are 65.53% of all registered Democrats. (DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-14, 3018-36, 3018-46 [Second Frey Aff. Exs. 14, 36, 46]; DX 3000 [Historical Senate Maps, Tab 23])

(c) The 2011 enacted Senate District 4 is located in a 10-county group consisting of Duplin, Halifax, Harnett, Johnston, Lee, Nash, Sampson, Vance, Warren, and Wilson Counties. There are 4 districts in this group. *The only county that is located in both the 2003 and 2011 versions of SD 4 is Halifax County.* The 2011 SD 4 has a APBVAP of 52.75% which is 0.15% *lower* than the APBVAP proposed by SCSJ SD 4. (DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-14, 3018-45 [Second Frey Aff. Exs. 14, 45]; DX 3000 [Historical Senate Maps, Tab 25]) The 2011 CD 4 has a Reock score of 0.36 which is higher than the Reock scores for the 1997 version of CD 1 and all alternative 2011 versions of SD 4. (DX 3018-32 (Second Frey Aff. Ex. 32))

(d) The 2011 enacted SD 4 is substantially based upon Dr. Hofeller's exemplar Senate districts. (DX 3000 [Senate Historical Maps, Tab 25]; DX 3030 [*Covington*, Second Hofeller Report, Map 11]) In the 2011 enacted SD 4, 93.17% of the APBVAP in this districts is included in one or more of the Senate exemplar districts. (3029 [First Hofeller Decl., Table 1]; Tr. Vol. V, pp. 35:18-37:18); *see also Shaw II*, 517 U.S. at 917-18 (the 1992 version of CD 12 was not narrowly tailored because it did not encompass a substantial portion of the minority population who were the victims of vote dilution))

(e) The 2011 Democratic leadership Senate Plan ("Fair and Legal" or "F&L") Senate District 4 is located in a different county group than either the 2003 SD 4 or the 2011 SD 4. The district has an APBVAP of 50.19%. African Americans were 50.63% of all registered voters. Democrats were 71.95% of all registered voters and African Americans were 63.50% of all registered Democrats. (DX 3018-14, 3018-37, 3018-47 [Second Frey Aff. Exs. 14, 37, 47]; 3000 [Historical Senate Maps, Tab 26])

(f) The 2011 Legislative Black Caucus Senate Plan (“LBC” or “Possible Senate Districts”) SD 4 is located in a different county group than the 2003 or 2011 SD 4. The district has an APBVAP of 49.74%. The LBC SD 4 is a coalition district and non-Hispanic whites constitute a minority of the voting age population (46.07%). African Americans represent 49.56% of all registered voters. Democrats represent 71.32% of all registered voters while African Americans represent 62.92% of all registered Democrats. (DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-14, 3018-38, 3018-48 [Second Frey Aff. Exs. 14, 38, 48]; DX 3000 [Historical Senate Maps, Tab 27])

(g) All versions of SD 4 before the General Assembly in 2011 when it enacted the 2011 Senate Plan were either majority black or coalition districts in which non-Hispanic whites were in the minority. In all alternative versions, registered Democrats constitute a majority of all registered voters, and African Americans constituted a majority of all registered Democrats. The only county in the 2003 SD 4 that is included in the 2011 version is Halifax County.

(h) For the 2011 SD 4, the following counties were included in the 1997 version of CD 1, which was affirmed as a lawful Section 2 district in *Cromartie II*: Halifax, Nash, Vance, Warren

(i) For the 2011 SD 4, Section 2 liability was found in the following counties in *Gingles*: Halifax and Nash

(j) For the 2011 SD 4, the following counties were part of a 2001/2003/2009 majority black or coalition district:

2001 First Congressional District: Halifax, Nash, Vance, Warren, Wilson

2003 Senate District 4: Halifax
2009 House District 7: Halifax, Nash
2009 House District 24: Nash, Wilson

(DX 3002, [Historical Congressional Maps Notebook, Congress Zero Deviation]; DX 3000 [Historical Senate Maps Notebook, 2003 Senate]; DX 3001 [Historical House Maps Notebook, 2009 House]; DX 3017-10 through DX 3017-12 [First Frey Aff. Exs. 10, 11, 12]; DX 3018-34, 3018-39 [Second Frey Aff. Exs. 34, 39])

(k) For the 2011 SD 4, the following counties were covered by Section 5:
Halifax, Nash, Vance, Wilson

(JX 1012, p. 6)

(l) For the 2011 SD 4, the following counties were included in Dr. Block's analysis of district elections from 2006-10 finding significant levels of racially polarized voting:

2001 Congressional District 1: Halifax, Nash, Vance, Warren, Wilson
2003 SD 4: Halifax
2003 HD 24: Wilson, Nash
2009 HD 25: Nash

(DX 3013-8 [First Rucho Aff. Ex. 8, pp. 5-7])

(m) For the 2011 SD 4, the following counties were analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting: Halifax, Nash, Vance, Warren, Wilson

(DX 3033, pp. 1-4)

(n) For the 2011 SD 4, the following counties were included in majority black or coalition districts in plans proposed by SCSJ, Democratic Leaders, or Legislative Black Caucus in 2011:

SCSJ Congress CD 1: Halifax, Nash, Vance, Warren, Wilson

Congressional Fair & Legal 1: Halifax, Nash, Vance, Warren, Wilson
SCSJ SD 3: Wilson
F&L SD 3: Wilson
SCSJ SD 4: Halifax, Vance, Warren
F&L SD 4: Halifax, Vance, Warren
LBC SD4: Halifax, Warren
LBC SD 3: Nash
SCSJ HD 27: Halifax, Vance, Warren
SCSJ HD 7: Halifax, Nash
SCSJ HD 24: Halifax, Wilson
F&L HD 27: Halifax
F&L HD 7: Nash
F&L HD 24: Wilson
LBC HD 27: Nash, Warren
LBC HD 7: Halifax, Nash
LBC HD 24: Wilson

(DX 3000-3002 [Historical Map Notebooks], SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House; DX 3017-10 through DX 3017-12 [First Frey Aff Exs. 10-12]; DX 3018-36 through DX 3018-38, 3018-41, 3018-43, 3018-66 through 3018-67 [Second Frey Aff. Exs. 36-38; 41, 43, 66, 67])

(o) In the 2003 version of SD 4, African American Democrat Robert Holloman won the 2004 Democratic primary by 3,286 votes. Holloman ran unopposed in the 2004 General Election. In 2006, Holloman defeated Republican Kenneth Chandler by 10,779 votes. In 2008, African American Democrat Ed Jones was unopposed in the General Election. In 2010, Jones defeated Republican Rick Halbert by 11,705 votes. Under the 2010 Census, the 2003 version of SD 4 was underpopulated by -27,526 (-14.43%). Thus, in all contested elections from 2004 through 2010, the actual margin of victory for the successful African American candidate was substantially below the amount by which this district was underpopulated.

(p) In the 2006 General Election, incumbent Democrat Holloman raised \$60,005 and spent \$25,846. This Republican candidate did not file campaign disclosure reports with the State Board of Elections.

134. Senate District 5

(a) The 2003 version of Senate District 5 is located in a six-county group consisting of Edgecombe, Greene, Johnston, Martin, Pitt, and Wayne. Three districts were drawn in this group. SD 5 was located in Greene and parts of Pitt and Wayne Counties. Under the 2010 Census, the APBVAP was 30.99%. The non-Hispanic white population of the district was 60.05%. The 2003 SD 5 was a majority white district. (DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-14 [Second Frey Aff. Ex. 14]; DX 3000 [Historical Senate Maps, Tab 22])

(b) The 2011 SD 5 is in a four-county group consisting of Greene, Lenoir, Pitt and Wayne. Two districts are drawn in this group. A review of the 2003 and 2011 maps for this district shows that both versions include all of Greene County. (DX 3000 [Historical Senate Maps, Tabs 22, 25]) Both versions are located in Pitt and Wayne Counties but in different areas of these counties. Much of the portion of the 2011 SD 5 located in Pitt County is located in the same area as the 2003 version of Senate District 3. The 2011 version also includes a portion of Lenoir County, a county that is not located in the county group that encompasses the 2003 version. (DX 3018-14, 3018-34 [Second Frey Aff. Exs. 14, 34]; DX 3000 [Historical Senate Maps, Tabs 22, 25]) The 2011 SD 5 has a Reock score of 0.25. This score is higher or equal to Reock scores for SCSJ SD 9, Fair and Legal SDs 9, 11, and 4, and LBC SD 9 and higher than the benchmark for low

compactness supported by Phildes and Niemi (0.15). (DX 3018-14, 3018-32 [Second Frey Aff. Exs. 14, 32])

(c) The 2011 SCSJ, Fair and Legal, and LBC versions of SD 5 are all located in different county groups as compared to the county group for the 2011 SD 5. All three alternative districts create SD 5 with APBVAP of 25.25% (SCSJ), 32.94% (Fair and Legal) and 33.93% (LBC). (DX 3018-14 [Second Frey Aff. Ex. 14])

(d) The 2011 version of SD 5 has an APBVAP of 51.97%. African American Democratic candidate Don Davis has been elected in this district in 2012 and 2014. (DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-14 [Second Frey Ex. 14]; DX 3020-13 [Covington, Churchill Decl. Exs. 13])

(e) A total of 81.26% of the APBVAP found in the 2011 enacted SD 5 was from one or more of the Senate exemplar districts. (DX 3029 [First Hofeller Decl., Table 1])

(f) Neither the 2003 version of SD 5 nor any of the 2011 alternative versions (SCSJ, F&L, LBC) are located in the same county group used in the 2011 Senate Plan for SD 5 (Greene, Lenoir, Pitt, and Wayne) (DX 3018-14).

(g) The following counties in the 2011 SD5 were included the 1997 version of CD 1, which was affirmed as a lawful Section 2 districts in *Cromartie II*: Greene, Lenoir, Pitt, Wayne. (D.E. 32-1, F.F. No. 6)

(h) The following counties included in the 2011 CD 5 were part of a 2001/2003/2009 majority black or coalition district:

2001 First Congressional District: Greene, Lenoir, Pitt, Wayne

2003 SD 3: Pitt
2003 HD 8: Pitt
2003 HD 12: Greene, Lenoir
2003 HD 21: Wayne

(DX 3002 [Historical Congressional Map Notebook, Congress Zero Deviation]; DX 3000 [Historical Senate Map Notebook, 2003 Senate Plan]; DX 3001 [Historical House Map Notebook, 2009 House Plan]; DX 3017-10 through DX 3017-12 [First Frey Aff. Exs. 10, 11, 12]; DX 3018-34, 3018-39 [Second Frey Aff. Exs. 34, 39])

(i) The following counties included in the 2011 CD 5 were covered by Section 5: Greene, Lenoir, Pitt, Wayne. (JX 1012, p. 6)

(j) The following counties were included in Dr. Block's analysis of district elections from 2006-2010 finding significant racially polarized voting in these counties:

2010 CD 1: Greene, Lenoir, Pitt, Wayne
2008 & 2010 SD 5: Greene, Pitt, Wayne
2008 & 2010 HD 12: Lenoir
2008 & 2010 HD 21: Wayne

(DX 3013-8 [First Rucho Aff. Ex. 8, pp. 1-7])

(k) The following counties in the 2011 SD 5 were analyzed by Dr. Brunell and confirmed as continuing to have statistically significant racially polarized voting: Greene, Lenoir, Pitt, Wayne. (DX 3033, pp. 1-14)

(l) The following counties in the 2011 SD 5 were included in majority black or coalition districts in plans proposed by SCSJ or Democratic leaders in 2011:

SCSJ CD 1: Greene, Lenoir, Pitt, Wayne
F&L CD 1: Greene, Lenoir, Pitt, Wayne
SCSJ SD 3: Pitt
LBC SD 3: Pitt
SCSJ HD 12: Greene, Lenoir
SCSJ HD 21: Wayne
F&L HD 8: Pitt
F&L HD 12: Greene, Lenoir

F&L HD 21: Wayne
LBC HD 8: Greene, Pitt
LBC HD 12: Lenoir
LBC HD 21: Wayne

(DX 3000-3002 [Historical Map Notebooks: SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House]; DX 3017-10 through DX 3017-12 [First Frey Aff. Exs. 10, 11, 12]; DX 3018-36 through DX 3018-38, DX 3018-41 through DX 3018-43, DX 3018-66 through DX 3018-67 [Second Frey Aff. Exs. 36-38, 41-43, 66, 67])

135. Senate District 14

(a) The 2003 version of Senate District 14 is located in a single-county group consisting of Wake County. Under the 2010 Census, the ideal population for a district is 190,710. The 2003 version of SD 14 had 232,514 and was overpopulated by +41,804. The APBVAP for this district was 42.65%. Non-Hispanic whites constituted only 41.07% of the district. If the Hispanic VAP is discounted for this district it has a majority black VAP. African Americans represented 45.99% of all registered voters. Democrats were 57.13% of all registered voters and African Americans were 68.24% of all registered Democrats. (DX 3018-14, 3018-34, 3018-44 [Second Frey Aff. Exs. 14, 34, 44]; DX 3000 [Historical Senate Maps, Tab 22]; DX 3117)

(b) The 2011 SCSJ SD 14 is located in a two-county group of Durham and Wake. Six senate districts are located in this group. The district has an APBVAP of 48.05%. Non-Hispanic whites constitute only 34.84% of the district. Democrats are 62.12% of all registered voters while African Americans are 72.31% of registered Democrats. African Americans represent 52.62% of all registered voters. (DX 3017-10

[First Frey Aff. Ex. 10]; DX 3018-14, 3018-36, 3018-46 [Second Frey Aff. Exs. 14, 36, 46]; DX 3000 [Historical Senate Maps, Tab 23])

(c) The 2011 enacted version of SD 14 is in a different county group than the 2003 Senate Plan or the SCSJ plan. It includes Wake and Franklin Counties and supports only 5 districts. In 2011, SD 14 has an APBVAP of 51.28%, which is only 3.23% higher than the 2011 SCSJ SD 14. (DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-14, 3018-35, 3018-45 [Second Frey Aff. Exs. 14, 35, 45]; DX 3000 [Historical Senate Maps, Tab 25]) The 2011 SD 14 has a Reock score of 0.34, which is higher than the Reock score received by the 1997 CD 1 in *Cromartie II*. (DX 3018-14, 3018-32 [Second Frey Aff. Exs. 14, 32])

(d) In the 2011 enacted SD 14, 92.74% of the APBVAP in this district comes from one or more of the Senate exemplar districts. (DX 3029 [First Hofeller Decl., Table 1])

(e) The 2011 Fair and Legal version of Senate District 14 is located in a two-county group of Durham and Wake Counties. Six districts are drawn in this group. SD 14 is drawn with a APBVAP of 42.03%. However, non-Hispanic whites constitute only 44.36% of the district. Democrats represent 56.11% of all registered voters while African Americans represent 68.11% of all registered Democrats. (DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-14, 3018-37, 3018-47 [Second Frey Aff. Exs. 14, 37, 47]; DX 3000 [Historical Senate Maps, Tab 26])

(f) The 2011 LBC SD 14 is located in a 7-county group consisting of 8 districts. The APBVAP of this district is 42.04%. Non-Hispanic whites are only 44.53%

of the district. Democrats are 55.23% of all registered voters and African Americans constitute 68.02% of registered Democrats. (DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-14, 3018-38, 3018-48 [Second Frey Aff. Exs. 14, 38, 48]; DX 3002[Historical Maps, Tab 27])

(g) All versions of SD 14 before the General Assembly were majority black (2011 SD 14) or coalition districts (2003, SCSJ, F&L, and LBC) in which non-Hispanic whites were in the minority. In all alternative versions, Democrats represented a majority of registered voters and African Americans were a majority of all registered Democrats. None of the alternative versions are in the same county group (Wake and Franklin) used in the 2011 Senate Plan.

(h) Wake County was one of the counties where Section 2 liability was found in *Gingles*. (See D.E. 32-1, F.F. No. 1)

(i) Wake County was part of 2001/2003/2009 a majority black or coalition district

2003 Senate District 14: Wake
2009 House District 33: Wake

(DX 3000 [Historical Senate Map Notebook, 2003 Senate Plan]; DX 3001 [Historical House Map Notebook, 2009 House Plan]; DX 3017-10 through 3017-11 [First Frey Aff. Exs. 10, 11]; DX 3018-34, 3018-39 [Second Frey Aff. Exs. 34, 39])

(j) Wake County was included in Dr. Block's analysis of district elections from 2006-2010 finding significant racially polarized voting in this county:

2008-2010 SD 14: Wake
2008 HD 33: Wake

(DX 3013-8 [First Rucho Aff. Ex. 8, pp. 1-7])

(k) Wake County was analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting. (DX 3033, pp. 10-14)

(l) Wake County was included in majority black or coalition districts in plans proposed by SCSJ or Democratic leaders in 2011:

SCSJ SD 14: Wake
F&L SD 14: Wake
LBC SD 14: Wake
SCSJ HD 33: Wake
F&L HD 33: Wake
LBC HD 33: Wake

(DX 3000-3002 [Historical Map Notebooks: SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House]; DX 3017-10 through 3017-11 [First Frey Aff. Exs. 10, 11]; DX 3018-36 through 3018-38, 3018-41 through 3018-43 [Second Frey Aff. Exs. 36-38; 41-43])

(m) Wake County includes a recently enacted majority black Superior Court district.

(See : http://www.wakegov.com/gis/services/Documents/SuperiorCourt_24x24.pdf; N.C. Gen. Stat. §§ 7A-41(b)(3)-(6b))

(n) In 2004, African American candidate Vernon Malone defeated his Republican opponent 45,727 to 25,595 (+20,132); in 2006, Malone defeated his Republican opponent 26,404 to 13,644 (+12,760); and in 2008, Malone defeated his Republican opponent 67,823 to 29,835 (+37,988). In 2010, African American candidate Dan Blue defeated his Republican opponent 40,746 to 21,067 (+19,679). In each of these four elections, the actual margin of victory for the African American Democrat was less than the population deviation for the district under the 2010 Census (+41,804). (DX 3016-2 [Churchill Aff. ¶¶ 1-7, Ex. 2])

(o) In the 2004 election cycle, African American candidate Vernon Malone raised \$137,042 and spent \$165,598.84. His Republican opponent raised and spent \$4,875.00. In the 2006 cycle, Sen. Malone raised \$281,835 and spent \$276,380. His Republican opponent raised \$1,061 and spent \$1,031.85. In the 2008 cycle, Sen. Malone raised \$108,084 and spent \$74,721. His Republican opponent raised and spent \$1,692.54. Finally, in the 2010 cycle, African American candidate Dan Blue raised \$187,613 and spent \$176,464. His Republican opponent raised \$646.61 and spent \$547.66. (DX 3016-2 [Churchill Aff. ¶¶ 1-3, Ex. 2])

(p) At the time of the 2011 Session of the North Carolina General Assembly, Sen. Blue had served one term as a state Senator and 14 terms as a state Representative. (DX 3016-4 [Churchill Aff. ¶ 8, Ex. 4]) The Court takes judicial notice that Sen. Blue served as Speaker of the House from 1991 to 1995. (*See* http://projects.newsobserver.com/under_the_dome/profiles/dan_blue)

(q) Plaintiffs offered Senator Dan Blue as a witness. Senator Blue testified that being an incumbent is worth 15 percentage points in the number of votes an incumbent will receive as compared to a non-incumbent. (Tr. Vol I, p. 95)

(r) Neither of the two plaintiffs residing in SD 14, Cynthia Martin or John Verdejo, lives in a precinct that is divided between SD 14 and another senate district.

136. Senate District 20

(a) The 2003 version of SD 20 was located in a three-county group of Chatham, Durham, and Lee. There were two districts in this group. The APBVAP for this districts under the 2010 Census was 44.64%. Non-Hispanic whites constituted only

39.86% of this district. If the Hispanic population is discounted from the district it has a majority black VAP. African Americans constituted a plurality of 47.46% of all registered voters. Democrats were 64.80% of all registered voters and African Americans constituted 63.70% of all registered Democrats. (DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-14, 3018-34, 3018-44 [Second Frey Aff. Exs. 14, 34, 44]; DX 3117)

(b) The 2011 SCSJ SC 20 was located in a two-county group consisting of Wake and Durham Counties. Six districts were drawn within this group. The SCSJ SD 20 is located entirely in Durham County. The SCSJ SD 20 was drawn with an APBVAP of 42.55%. However, non-Hispanic whites constituted only 40.21% of the district. Democrats constituted 64.64% of all registered voters while African Americans represented 61.37% of all registered Democrats. (DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-14, 3018-36, 3018-46 [Second Frey Aff. Exs. 14, 36, 46]; DX 3000 [Historical Senate Map Notebook, Tab 23])

(c) The 2011 enacted SD 20 is located in a four-county group consisting of Caswell, Durham, Granville, and Person. Neither the 2003 Plan nor the SCSJ plan uses this county group. Two districts are drawn in this group. The 2003 version of SD 20 was only located in Durham County. The 2011 SD 20 is located in part of Durham and all of Granville. Neither the 2003 SD 20 nor the SCSJ SD 20 includes Granville County. The APBVAP for these districts is 51.04%. (DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-14, 3018-35 [Second Frey Aff. Exs. 14, 35]; DX 3000 [Historical Senate Maps, Tab 25]) The 2011 SD 20 has a Reock score of 0.28%. The 2011 SCSJ Senate Plan has three districts with lower Reock scores, the F&L Plan has five districts with equal or lower

scores, and the LBC Senate Plan has three districts with equal or lower scores. (DX 3018-32 [Second Frey Aff. Ex. 32])

(d) In the 2011 SD 20, 87.40% of the APBVAP in this districts comes from one or more of the Senate exemplar districts.

(e) The 2011 Fair and Legal version of SD 20 is located in a county group of Durham and Wake which includes six districts. This district is located entirely in Durham County. The district has an APBVAP of 39.69%. However, non-Hispanic whites constitute only 43.32% of the district. Democrats are 63.26% of all registered voters and African Americans are 37.97% of all registered Democrats. (DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-14, 3018-37, 3018-47 [Second Frey Aff. Exs. 14, 37, 47]; 3000 [Historical Senate Maps, Tab 26])

(f) The 2011 LBC version of SD 20 is located in a seven-county group consisting of Durham, Franklin, Granville, Orange, Person, Vance, and Wake. This district is drawn entirely within Durham County. It has an APBVAP of 44.98%. Non-Hispanic whites represent only 37.29% of the district's VAP. Blacks are a plurality of all registered voters (48.34%). Democrats are 66.49% of all registered voters and blacks are 63.29% of all registered Democrats. (DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-14, 3018-38, 3018-48 [Second Frey Aff. Exs. 14, 38, 48]; DX 3000 [Historical Senate Maps, Tab 27])

(g) All versions of SD 20 are either majority black (2011 SD 20) or coalition districts in which non-Hispanic whites are a minority (2003 SD 20, SCSJ SD 20, F and L SD 20, and LBC SD 20). The 2011 enacted version of SD 20 is in a different county

group than all other versions. Only the 2011 enacted version of SD 20 is drawn outside of Durham County and includes all of Granville County.

(h) Granville County was included in the 1997 version of CD 1 which was affirmed as a Section 2 county in *Cromartie II*. (See D.E. 32-1, F.F. No. 6)

(i) Counties that were part of a 2001/2003/2009 majority black or coalition district:

2001 CD 1: Granville

2003 SD 20: Durham

2003 HD 29: Durham

2003 HD 31: Durham

(DX 3002 [Historical Congressional Map Notebook, Congress Zero Deviation]; DX 3000 [Historical Senate Map Notebook, 2003 Senate]; DX 3001 [Historical House Map Notebook, 2009 House]; DX 3017-10 through 3017-12 [First Frey Aff. Exs. 10, 11, 12]; DX 3018-34, 3018-39, [Second Fry Aff. Exs. 34, 39])

(j) Section 5 Counties: Granville (JX 1012, p. 6)

(k) Durham County was included in Dr. Block's analysis of district elections from 2006-10 finding significant levels of racially polarized voting:

2008 2010 SD 20: Durham

2008 HD 29: Durham

2010 HD 31: Durham

(DX 3013-8 [First Rucho Aff. Ex. 8, pp. 1-7])

(l) Counties analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting: Durham, Granville (DX 3013 [DX 3033, pp. 1-16])

(m) The following counties included in majority black or coalition districts in plans proposed by SCSJ and Democratic leaders in 2011:

SCSJ Congress CD 1: Granville
Congressional F&L CD 1: Granville
SCSJ SD 20: Durham
F&L SD 20: Durham
LBC SD 20: Durham
SCSJ HD 29, 31: Durham
F&L HD 29, 31: Durham
LBC HD 29, 31: Durham

(DX 3000-3002 [Historical Map Notebooks: SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House]; DX 3017-10 through 3017-12 [First Frey Aff. Exs. 10, 11, 12]; DX 3018-36 through 3018-38, 3018-41 through 3018-43, 3018-66 through 3018-67 [Second Frey Aff. Exs. 36-38, 41-43, 66, 67])

(n) The 2003 version of District 20 was located exclusively in Durham County.

There were no prior election results for a majority-black VAP or a 40% plus black VAP district located in a portion of Durham and all of Granville County.

(o) There were contested general elections for Senate District 20 in 2004, 2008, and 2010. In each of these contests, the margin of victory for the African American Democrat was in excess of the size of the population deviation for the district under the 2010 Census (-9,086). In the 2004 election cycle, African American candidate Jeanne Lucas raised \$29,006.50 and spent \$31,861.89. Her Republican opponent did not file campaign disclosure reports because any funds raised by the Republican were below the amount that triggers a reporting obligation. There was no contested election in this district during the 2006 election cycle. In the 2008 election cycle, African American candidate Floyd B. McKissick, Jr. raised \$36,619 and spent \$21,165. He was opposed by Republican and Libertarian candidates neither of whom raised enough money to be required to file campaign disclosure reports. In the 2010 election cycle, Sen. McKissick

raised \$28,827 and spent \$35,440. His Republican opponent did not file campaign disclosure reports. (DX 3016-2 [Churchill Aff. ¶¶ 1-7, Ex. 2.])

(p) In the 2012 and 2014 elections, Sen. McKissick was elected in the 2011 SD 20. At no prior time have black voters in Granville County been given an equal opportunity to elect their candidate of choice to State Senate. (DX 3020-13 [*Covington*, Churchill Decl. Ex. 13])

137. Senate District 21

(a) The 2003 SD 21 was located in a two-county group consisting of Bladen and Cumberland Counties. This district was drawn entirely in Cumberland County. Two districts were in this group. Under the 2010 Census, this district had a population of 164,117 as compared to the ideal population of 190,710. It was underpopulated by -26,593 or -13.94%. The APBVAP for this district was 44.93%. Non-Hispanic whites were 41.63% of the VAP. If Hispanic VAP is discounted for the district, it has a majority black VAP. African Americans were 51.15% of all registered voters. Democrats were 56.59% of all registered voters and African Americans were 73.14% of all registered Democrats. (DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-14, 3018-34, 3018-44 [Second Frey Aff. Exs. 14, 34, 44]; DX 3000 [Historical Senate Maps, Tab 22]; DX 3117)

(b) The 2011 SCSJ SD 21 was located in a two-county group of Cumberland and Hoke Counties. This district was drawn entirely in a portion of Cumberland County. The APBVAP for the district was 46.17% while the non-Hispanic VAP was 40.43%. African Americans were 51.52% of all registered voters. Democrats were 56.85% of all

registered voters and African Americans were 73.41% of all registered Democrats. (DX 3017-10 [First Frey Aff Ex. 10]; DX 3018-14, 3018-36, 3018-46 [Second Frey Aff. Exs. 14, 36, 46]; DX 3000 [Historical Senate Maps, Tab 23])

(c) The 2011 enacted SD 21 is located in a two-county group of Cumberland and Hoke. This district includes all of Hoke and a portion of Cumberland. Neither the 2003 SD 21 nor the SCSJ SD 21 includes Hoke in their county group for SD 21. The APBVAP for this district is 51.57%. The Reock score for this district is 0.34 which is higher than the Reock score for the 1997 CD 1, a district that was found to be based upon a reasonably compact minority population in *Cromartie II*. The 2011 SCSJ plan has eleven districts with a Reock score of 0.34 or lower. The F&L Senate Plan has ten districts with a Reock score of 0.32 or lower. The LBC Senate Plan has 12 districts with a Reock score of 0.34 or lower. (DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-14, 3018-32, 3018-35, 3018-45 [Second Frey Aff. Exs. 14, 32, 35, 45]; DX 3000 [Historical Senate Maps, Tab 25])

(d) In the 2011 enacted SD 21, 86.59% of the APBVAP in this district comes from one or more of the Senate exemplar districts. (DX 3029 [First Hofeller Declaration, Table 1])

(e) The 2011 F&L version of SD 21 is located in a four-county combination of Cumberland, Harnett, Lee and Moore. Three districts are located in this group. F&L SD 21 district is drawn entirely in a portion of Cumberland. The APBVAP for this district was 41.62%. African Americans constituted 51.13% of all registered voters. Democrats were 56.71% of all registered voters and African Americans were 73.09% of all

registered Democrats. (DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-14, 3018-37, 3018-47 [Second Frey Aff. Exs. 14, 37, 47]; DX 3000 [Historical Senate Maps, Tab 26])

(f) The 2011 LBC version of SD 21 is located in a four-county group of Cumberland, Harnett, Lee, and Moore. LBC SD 21 is drawn in a portion of Cumberland County. The APBVAP for this district was 44.44% while non-Hispanic whites were 42.09% of the VAP. African Americans were 50.31% of all registered voters. Democrats were 56.41% of all registered voters and African Americans were 72.29% of registered Democrats. (DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-14, 3018-38, 3018-48 [Second Frey Aff. Exs. 14, 38, 48]; DX 3000 [Historical Senate Maps, Tab 27])

(g) Neither the 2003 SD 21 nor all of the 2011 alternative versions of SD 21 (SCSJ, F&L, LBC) used the same county group as the group found in the 2011 enacted SD 21 (Hoke and Cumberland). Neither the 2003 SD 21 nor all of the 2011 alternatives included Hoke County in their versions of SD 21. In all alternative versions, African Americans are a majority of all registered voters, Democrats are a majority of all registered voters, and African Americans are a majority of registered Democrats. In all alternative versions, including the 2003 version, non-Hispanic whites are a minority of the VAP.

(h) The following counties included in the 2011 SD 21 were part of a 2001/2003/2009 majority black or coalition districts:

2003 SD 21: Cumberland
2009 HD 42: Cumberland
2009 HD 43: Cumberland

(DX 3000 [Historical Senate Map Notebook, 2003 Senate]; DX 3001 [Historical House Map Notebook, 2003 House]; 3017 [First Frey Aff. Exs. 10, 11]; 3018-34, 3018-39 [Second Frey Aff. Exs. 34, 39])

(i) The following counties in the 2011 SD 21 were covered by Section 5:

Cumberland and Hoke. (JX 1012, p. 6)

(j) The following counties in the 2011 SD 21 were included in Dr. Block's analysis of district elections from 2006-2010 confirming the presence of significant racially polarized voters:

2010 SD 21: Cumberland

(DX 3013-8 [First Rucho Aff. Ex. 8, pp. 1-7])

(k) The following counties in the 2011 SD 21 were analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting: Cumberland, Hoke. (DX 3033, pp. 1-14])

(l) The following counties in the 2011 DS 21 were included in majority black or coalition district in plans proposed by SCSJ and Democratic leaders in 2011:

SCSJ SD 21: Cumberland

F&L SD 21: Cumberland

LBC SD 21: Cumberland

SCSJ HD 42, 43: Cumberland

F&L HD 42, 43: Cumberland

LBC HD 42, 43: Cumberland

(DX 3000-3002 [Historical Map Notebooks: SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House]; DX 3018-36 through 3018-38, 3018-41 through 3018-43 [Second Frey Aff. Exs. 36-38, 41-43])

(m) There are no past election results for a 40% plus black VAP-district or a majority-black VAP district that includes Hoke and Cumberland counties.

(n) In the 2004 General Election, African American Democratic candidate Larry Shaw defeated his Republican opponent 27,866 to 16,434 (+11,432) with a Libertarian candidate receiving 1,225 votes. In 2006, Sen. Shaw defeated his Republican opponent 13,412 to 8,344 (+5,068). There was no contested general election in this district in 2008. In 2010, Democratic African American candidate Eric Mansfield defeated his Republican opponent 21,004 to 10,062 (+10,942). The deviation for this district under the 2010 Census was (-26,593). Thus, in each of these contested Senate races from 2004 to 2010, the margin of victory for the African American Democrat was less than the population deviation for this district. (DX 3016-2 [Churchill Aff. ¶ 1-7, Ex. 2])

(o) In the 2004 election cycle, the African American Democratic candidate, Larry Shaw, raised \$19,800 and spent \$15,437. His Republican opponent raised \$1,311 and spent \$422. The Libertarian candidate did not file campaign reports. In 2006, Shaw raised \$39,258 and spent \$42,123. His Republican opponent raised and spent \$26,151 and spent \$26,075. In 2010, African American candidate Eric Mansfield raised \$178,878 and spent \$176,548. His Republican opponent raised \$40,559 and spent \$49,777. (DX 3016-2 [Churchill Aff. ¶¶ 1-7, Ex. 2])

(p) In the 2012 and 2014 general elections, an African American candidate from Hoke County, Robert Clark, was elected in SD 21. (*See* <http://www.ncleg.net/gascripts/members/viewMember.pl?sChamber=S&nUserID=380>)

At no prior time in history have African American voters in Hoke County been given an equal opportunity to elect their candidate of choice to the State Senate. (DX 3020-13; Tr. Vol. III, pp. 28:21-29:9)

138. Senate District 28

(a) The 2003 version of SD 28 was located in a three-county group consisting of Davidson, Guilford and Rockingham. There were four districts in this group. These districts were drawn in a portion of Guilford County. Under the 2010 Census, this district had a population of 177,037. The ideal population was 190,710. Thus, the district was underpopulated by -13,673 (-7.17%). The APBVAP for the 2003 SD 28 was 47.20%. The non-Hispanic white VAP was 42.43%. If the Hispanic VAP is discounted from the district, its VAP is majority black. African Americans were 50.11% of the registered voters in this district. Democrats were 58.24% of all registered voters and African Americans were 73.55% of all registered Democrats. (DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-14, 3018-34, 3018-38 [Second Frey Aff. Exs. 14, 34, 38]; DX 3000 [Historical Senate Maps, Tab 22]; DX 3117)

(b) The 2011 SCSJ version of SD 28 was located in a five-county group consisting of Guilford, Randolph, Rockingham and Stokes. There were 4 districts in this group. SCSJ SD 28 was drawn in a portion of Guilford County. The APBVAP for this district was 51.77%. Non-Hispanic white VAP was 36.94%. African Americans constituted 54.11% of all registered voters. Democrats were 61.39% of all registered voters and African Americans were 75.49% of all registered Democrats. (DX 3017-10

[First Frey Aff Ex. 10]; DX 3018-14, 3018-36, 3018-46 [Second Frey Aff. Exs. 14, 36, 46]; DX 3000 [Senate Maps, Tab 23])

(c) The 2011 SD 28 is located in a two-county group consisting of Guilford and Rockingham. There are three districts in this group. The 2011 SD 28 is located in a portion of Guilford County. The APBVAP for this district is 56.49%. The Reock score for this district is 0.25. This is higher than the benchmark for low compactness supported by Phildes and Niemi (0.15). The SCSJ Senate Plan has one district with a Reock score of 0.21 and two districts with scores of 0.26. The F&L Senate Plan has three districts with Reock scores of 0.25 or lower. The LBC Senate Plan has one district with a Reock score of 0.22. (DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-14, 3018-32 [Second Frey Aff. Exs. 14, 32])

(d) In the 2011 enacted SD 28, 99.60% of the APBVAP in this districts comes from one or more of the Senate exemplar districts. (DX 3029 [First Hofeller Decl., Table 1])

(e) The F&L SD 28 is located in a three-county group of Alamance, Guilford and Rockingham. There are four districts in this group. The F&L SD 28 is drawn in a portion of Guilford County. The APBVAP for this district is 48.45% of all registered voters. Democrats are 59.13% of all registered voters and African Americans are 23.62% of all registered Democrats. (DX 3017-10 [First Frey Aff, Ex, 10]; DX 3018-14, 3018-27, 3018-37 [Second Frey Aff, Exs, 14, 27, 37]; DX 3000 [Historical Senate Maps, Tab 26])

(f) The LBC version of SD 28 is located in a four-county group of Davidson, Davie, Guilford, and Rockingham. There are 4 districts in this group. The LBC SD 28 is located in a portion of Guilford County. The APBVAP for this district was 47.52%. Non-Hispanic VAP was 40.65% and African Americans were 50.26% of all registered voters. Democrats were 58.73% of all registered voters and African Americans were 72.22% of all registered Democrats. (DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-14, 3018-38, 3018-48 [Second Frey Aff. Exs. 14, 38, 48]; DX 3000 [Historical Senate Maps, Tab 27])

(g) Neither the 2003 SD 28 nor any of the 2011 alternative (SCSJ, F&L, LBC) include their versions of SD 28 in the same county group as the two-county group found in the 2011 enacted plan. In all alternative versions, African Americans are a majority of registered voters. African Americans are a majority of the VAP in the 2011 SCSJ version of SD 28. In all alternative versions, Democrats are a majority of all registered voters and African Americans are a majority of registered Democrats.

(h) Guilford County was a part of a 2001/2003/2009 majority black or coalition district:

2001 CD 12: Guilford
2009 SD 28: Guilford
2009 HD 58: Guilford
2009 HD 60: Guilford

(DX 3002 [Historical Congressional Map Notebook, Congress Zero Deviation]; DX 3000 [Historical Senate Map Notebook, 2003 Senate]; DX 3001 [Historical House Map Notebook, 2009 House]; DX 3017-10 through 3017-12 [First Frey Aff. Exs. 10, 11, 12]; DX 3018-34, 3018-39 [Second Frey Aff. Exs. 34, 39])

(i) In 2011, Guilford County was covered by Section 5. (JX 1012, p. 6)

(j) Guilford County was included in Dr. Block's analysis of district elections from 2006-2010 showing a presence of significant racially polarized voting:

2008 and 2010 CD 12: Guilford
2006 and 2010 CD 13: Guilford
2010 SD 28: Guilford
2010 HD 58: Guilford
2006 and 2010 HD 60: Guilford

(DX 3013-8 [First Rucho Aff. Ex. 8, pp. 1-7])

(k) Guilford County was one of the counties analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting:

(DX 3033, pp. 1-14])

(l) Guilford County was included in majority black or coalition districts in plans proposed by SCSJ and Democratic leaders in 2011:

SCSJ CD 12: Guilford
F&L CD 12: Guilford
SCSJ SD 28: Guilford
F&L SD 28: Guilford
LBC SD 28: Guilford
SCSJ HD 58, 60: Guilford
F&L HD 58, 60: Guilford
LBC HD 58, 60: Guilford

(DX 3000-3002 [Historical Map Notebooks: SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House]; DX 3017-10 through 3017-12 [First Frey Aff. Exs. 10, 11, 12]; DX 3018-36 through 3018-38, 3018-41 through 3018-43, 3018-66 through 3018-67 [Second Frey Aff. Exs. 36-38, 41-43, 66, 67])

(m) There were no contested general elections for this district from 2004 through 2008. In the 2010 General Election, African American candidate Gladys Robinson defeated her Republican opponent 21,496 to 17,383 (+4,113). An unaffiliated

candidate also received 6,054 votes in the 2010 General Election. The total number of votes received in 2010 by Sen. Robinson's Republican and unaffiliated opponents (23,427) exceeded the total votes received by Sen. Robinson. Under the 2010 Census, this district was underpopulated by (-13,673). Thus, the margin of victory for Sen. Robinson, when compared only to her Republican opponent was less than the total deviation for this district. (DX 3016-2 [Churchill Aff. ¶¶ 1-7, Ex. 2])

(n) In the 2010 cycle, Sen. Robinson raised \$69,748 and spent \$60,889. Her Republican opponent raised \$59,487 and spent \$57,679. Her unaffiliated opponent raised \$26,417 and spent \$24,408. (DX 3016-2 [Churchill Aff. ¶¶ 1-7, Ex. 2])

139. Senate District 32

(a) The 2003 version of SD 32 was located in a single-county group consisting of Forsyth County. Two districts were in this group. Under the 2010 Census, this district had a population of 174,270, as compared to the ideal of 190,710 and was underpopulated by -15,440 (-8.10%). The APBVAP for this district was 42.52%. The non-Hispanic white VAP was 42.11%. If the Hispanic VAP for this district is discounted, the VAP is majority black. African Americans were 47.16% of all registered voters. Democrats were 59.41% of all registered voters and African Americans were 68.71% of registered Democrats. (DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-4, 3018-34, 3018-38 [Second Frey Aff. Exs. 4, 34, 38]; 3000 [Historical Senate Maps, Tab 22]; DX 3117)

(b) The 2011 SCSJ SD 32 was part of a three-county group (Forsyth, Davidson, and Davie). There are three districts in this group. SCSJ SD 32 is located in a

portion of Forsyth County. The average population for the districts drawn in this group is 184,929. The SCSJ SD 32 was drawn with a population of only 181,685. This resulted in a deviation of -4.73% as compared to the ideal population of 190,710. The APBVAP for this district was 41.95%. The non-Hispanic white VAP for this district was 43.18%. African Americans were 46.38% of all registered voters. Democrats were 59.00% of all registered voters and African Americans were 68.05% of all registered Democrats. (DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-4, 3018-36, 3018-46 [Second Frey Aff. Exs. 4, 36, 46]; DX 3000 [Historical Senate Maps, Tab 23])

(c) The 2011 enacted SD 32 is located in a two-county group of Forsyth and Yadkin. There are two districts in this group. The district is located in a portion of Forsyth County. The average population for the two districts in this group is 194,538, or 9,609 higher than the average population in the 2011 SCSJ county group that includes the SCSJ SD 32. The 2011 enacted SD 32 has a population of 189,201 which is 7,516 higher than the 2011 SCSJ SD 32. The deviation from ideal for the 2011 enacted SD 32 is -0.79%. The APBVAP for the 2011 SD 32 is 42.53%. The non-Hispanic white VAP is 41.41%. (DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-4, 3018-35, 3018-45 [Second Frey Aff. Exs. 4, 35, 45]; DX 3000 [Historical Senate Maps, Tab 25]) The 2011 SD 32 has a Reock score of 0.38, which is higher than the Reock score for the 1997 CD 1, found to be a valid Section 2 district in *Cromartie II*.

(d) The F&L and LBC plans have identical versions of SD 32. The district is located in a two-county group consisting of Forsyth and Stokes. There are two districts in this county group. SD 32 is drawn in a portion of Forsyth County. The APBVAP for

this district was 38.28%. The non-Hispanic white VAP was 47.42%. Democrats were 56.81% of registered voters and African Americans were 64.42% of registered Democrats. (DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-4, 3018-37, 3018-38 [Second Frey Aff. Exs. 4, 37, 38]; DX 30000 [Historical Senate Maps, Tabs 20, 27])

(e) The first version of a proposed SD 32 released by the co-chairs on June 17, 2011, had an APBVAP of 38.41%. The SCSJ presented its version of SD 32 on June 23, 2011. The redistricting co-chairs instructed Dr. Hofeller to increase the APBVAP of their proposed SD 32 to match the APBVAP of the SCSJ SD 32, because of their concerns about preclearance. While Forsyth County was not covered by Section 5, the co-chairs believed that USDOJ's practice in reviewing a plan for preclearance was to look at the effect of the entire statewide plan. Moreover, Forsyth County was one of the counties in which Section 2 liability was found in *Gingles*. The shape and location of the enacted SD 32 was caused by the county combination used in the enacted plan. This resulted in districts located within that combination that had to be drawn with more population in them as compared to the districts proposed by the SCSJ in the three-county group in which SCSJ SD 32 is located. Thus, the predominant reason for the differences in shape and location of the 2011 enacted SD 32 versus the SCSJ SD 32 was the formula for grouping counties and population deviations, not race. (Tr. Vol. III, pp. 21:4-22:3; Tr. Vol. V, p. 31:13-23)

(f) There is no functional difference between the 2003 SD 32, the 2011 SD 32, and all 2011 alternative versions of SD 32. All versions are located in Forsyth County and the differences in APBVAP found in these districts is not significant: 2003 SD 32

(42.52%); 2011 SD 32 (42.53%); 2011 SCSJ SD 32 (41.95%); 2011 F&L and LBC SD 32 (38.28%).

(g) In the 2011 enacted SD 32, 73.68% of the APBVAP in this district comes from one or more of the Senate exemplar districts. (D.E. 33-28 [First Hofeller Decl., Table 1])

(h) From 2006 through 2010, white Democrat Linda Garrou was elected in SD 32. In 2012 and 2014, African American Democrat Earline Parmon was elected in SD 32. (DX 3020-13 [*Covington*, Churchill Decl. Ex. 13])

140. Senate Districts 38 and 40

(a) The 2003 versions of SD 38 and 40 were located in a two-county group consisting of Mecklenburg and Union Counties. There were five districts in this group. SD 38 and 40 were both located in portions of Mecklenburg County. Under the 2010 Census, the 2003 SD 38 had a population of 238,280, as compared to the ideal of 190,710, and was overpopulated by 47,572 (+24.94%). The 2003 SD 40 had a population of 245,233 and was overpopulated by 54,523 (+28.59%). The APBVAP for SD 38 was 46.57%. The APBVAP for SD 40 was 35.43%. The non-Hispanic white VAP was 36.64% for SD 38 and 48.87% for SD 40. If the Hispanic VAP for both of these districts is discounted, the VAP for both districts is majority black. African Americans were 50.37% of registered voters for SD 38 and 37.08% for SD 40. Democrats were 62.66% of registered voters in SD 38 and 65.21% in SD 40. African Americans were 76.63% of the registered Democrats in SD 38 and 75.11% in SD 40.

(DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-14, 3018-34, 3018-44 [Second Frey Aff. Exs. 14, 34, 44]; DX 3000 [Historical Senate Maps, Tab 22]; DX 3117)

(b) In the 2011 SCSJ Senate Map, SD 38 and SD 40 were located in a single-county group of Mecklenburg County. Five districts were in this group. The APBVAP for SD 38 was 51.68% and 52.06% for SD 40. African Americans were a majority of registered voters in SD 38 (56.22%) and SD 40 (57.85%). (DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-14, 3018-36, 3018-46 [Second Frey Aff. Exs. 14, 36, 46]; DX 3000 [Historical Senate Maps, Tab 23])

(c) The 2011 enacted SD 38 and SD 40 are located in a single-county group consisting of Mecklenburg County. Five districts are in this group. The APBVAP for SD 38 is 52.51% and 51.84% for SD 40. The APBVAP for the 2011 SD 38 is 0.83% higher than SCSJ SD 38. The APBVAP for the 2011 SD 40 is 0.22% lower than the SCSJ SD 40. The Reock score for the 2011 SD 38 is 0.42. The Reock score for the 2011 SD 40 is 0.45. The SCSJ Senate Map has 28 districts with Reock scores of 0.44 or lower. The F&L Senate map has 30 districts with Reock scores of 0.45 or lower. The LBC Senate plan has 32 districts with Reock scores of 0.45 or lower. (DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-14, 3018-32, 3018-35, 3018-45 [Second Frey Aff. Exs. 14, 32, 35, 45]; DX 3000 [Historical Senate Maps, Tab 25])

(d) The 2011 SD 38 and SD 40 are substantially based upon the exemplar Senate districts. For the 2011 SD 38, 88.73% of the APBVAP in this district comes from one or more of the exemplar Senate districts. For the 2011 SD 40, 92.99% of the

APBVAP in this district comes from one or more of the exemplar Senate districts. (DX 3029 [First Hofeller Decl., Table 1])

(e) The F&L SD 38 and SD 40 are located in a one-county group consisting of Mecklenburg County. Five districts are in this group. The APBVAP for SD 38 was 46.98% and 44.84% for SD 40. The non-Hispanic white VAP for SD 38 was 34.55% and 36.45% for SD 40. African Americans were a majority of registered voters in SD 38 (51.44%) and a very high plurality in SD 40 (49.10%). Democrats were 59.38% of registered voters in SD 38 and 58.35% in SD 40. African Americans were 73.89% of registered Democrats in SD 38 and 70.62% in SD 40. (DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-14, 3018-37, 3018-47 [Second Frey Aff. Exs. 14, 37, 47]; DX 3000 [Historical Senate Maps, Tab 26])

(f) The 2011 LBC SD 38 and SD 40 were identical to the districts proposed by the 2011 F&L Senate Plan.

(g) Both SCSJ SD 38 and SD 40 are majority black districts. Both of the F&L and LBC districts are coalition districts in which African Americans either represent a majority of all registered voters (F&L SD 38) or a very high plurality of registered voters (F&L SD 40).

(h) Mecklenburg County was part of a 2001/2003/2009 majority black or coalition districts:

2001 CD 12: Mecklenburg
2003 SD 38: Mecklenburg
2003 SD 40: Mecklenburg
2003 HD 99, 100, 101, 102; 107, Mecklenburg

(DX 3002 [Historical Congressional Map Notebook, Congress Zero Deviation]; DX 3000 [Historical Senate Map Notebook, 2003 Senate]; DX 3001 [Historical House Map Notebook, 2009 House]; DX 3017-10 through 3017-12 [First Frey Aff. Exs. 10, 11, 12]; DX 3018-34, 3018-39, [Second Frey Aff. Exs. 34, 39])

(i) Mecklenburg County was one of the counties in which liability was found under Section 2 in *Gingles*.

(j) Mecklenburg County was included in Dr. Block's analysis of district elections from 2006-2010 finding significant levels of racially polarized voting:

2008, 2010 CD 12: Mecklenburg
2006, 2008, 2010 SD 40: Mecklenburg
2008 SD 38: Mecklenburg
2008, 2010 HD 107: Mecklenburg
2010 HD 101: Mecklenburg

(DX 3013-8 [First Rucho Aff. Ex. 8, pp. 1-7])

(k) Mecklenburg County was analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting. (DX 3033, pp. 1-15, 22)

(l) Mecklenburg County was included in majority black or coalition districts in plans proposed by SCSJ and Democratic leaders:

SCSJ CD 12: Mecklenburg
F&L CD 12: Mecklenburg
SCSJ SD 38.40: Mecklenburg
F&L SD 38.40: Mecklenburg
LBC SD 38.40: Mecklenburg
SCSJ HD 99: Mecklenburg
SCSJ HD 100: Mecklenburg
SCSJ HD 101: Mecklenburg
SCSJ HD 102: Mecklenburg
SCSJ HD 107: Mecklenburg
F&L HD 99: Mecklenburg
F&L HD 101: Mecklenburg

F&L HD 102: Mecklenburg
F&L HD 107: Mecklenburg
LBC HD 25: Mecklenburg
LBC HD 99: Mecklenburg
LBC HD 100: Mecklenburg
LBC HD 101 Mecklenburg
LBC HD 102: Mecklenburg
LBC HD 107: Mecklenburg

(DX 3000-3002 [Historical Map Notebooks: SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House]; DX 3017-10 through 3017-12 [First Frey Aff. Exs. 10, 11, 12]; DX 3018-36 through 3018-38, 3018-41 through 3018-43, 3018-66 through 3018-67 [Second Frey Aff. Exs. 36-38, 41-43, 66, 67])

(m) For the 2003 SD 38, there were no contested general elections in 2004 or 2006. In 2008, the Democratic African American candidate Charles Dannelly defeated his Republican opponent 67,755 to 22,056 (+45,699). A Libertarian candidate also received 2,588 votes. In 2010, Sen. Dannelly defeated his Republican opponent 33,692 to 15,369 (+18,323). The population deviation for this district under the 2010 Census was +47,572 (+24.9%). The amount of population deviation for this district exceeded the margin of victory for the African American Democrat in both 2008 and 2010. (DX 3016-2 [Churchill Aff. ¶¶ 1-7, Ex. 2])

(n) In 2008, Sen. Dannelly raised \$24,399 and spent \$30,564. Neither of his opponents filed campaign disclosure reports. In 2010, Sen. Dannelly raised \$24,179 and spent \$28,791. His Republican opponent raised \$260 and spent \$253. (DX 3016-2 [Churchill Aff. ¶¶ 1-7, Ex. 2])

(o) At the beginning of the 2011 session, Sen. Dannelly had served nine terms in the State Senate. (DX 3016-4 [Churchill Aff. ¶ 8, Ex. 4])

(p) In the 2004 general election for SD 40, African American Democratic candidate Malcolm Graham defeated his Republican opponent 42,096 to 30,633 (+11,463). In 2006, Sen. Graham defeated his Republican opponent 21,247 to 13,314 (+7,933). In 2008, Sen. Graham defeated his Republican opponent 66,307 to 32,711 (+33,596). In 2010, Sen. Graham defeated his Republican opponent 32,168 to 23,145 (+9,023). The population deviation for this district under the 2010 Census is 54,523 (+28.59%). Thus, Sen. Graham's margin of victory for the 2004, 2006, 2008 and 2010 general elections was less than the total deviation for this district. (DX 3016-2 [Churchill Aff. ¶¶ 1-7, Ex. 2])

(q) In the 2004 cycle, Sen. Graham raised \$145,170 and spent \$123,330. His Republican opponent raised \$15,382 and spent \$15,382. In 2006, Sen. Graham raised \$52,825 and spent \$35,536. His Republican opponent did not file campaign disclosure reports. In 2008, Sen. Graham raised \$40,075 and spent \$46,841. His Republican opponent raised nothing. In 2010, Sen. Graham raised \$55,750 and spent \$38,583. His Republican opponent outraised Sen. Graham (\$70,744), and spent more funds (\$69,199). Of the four elections won by Sen. Graham, his Republican opponent in the 2010 general election received the highest percentage of the vote (41.84%) as compared to all Republican challengers from 2004 to 2010. (DX 3016-2 [Churchill Aff. ¶¶ 1-7, Ex. 2])

(r) At the time of the 2011 session, Sen. Graham had been elected to four terms in the state Senate. (DX 3016-4 [Churchill Aff. ¶ 8, Ex. 4])

(s) None of the plaintiffs residing in Senate District 38 (Marshall Ansin and Rosa Mostafa) or Senate District 40 (Dennis Mingo and Ruth Sloane) resides in a precinct that is divided between these districts and another senate district.

B. Comparison of APBVAP in Enacted and Alternative Senate Districts

141. For each of the 2003 VRA Senate districts that correspond to a 2011 VRA Senate district being challenged in this case, Table 2 below provides the following information for each district based upon the 2010 Census and election results for each election from 2004 through 2010: (1) year of election; (2) winner; (3) race of winner; (4) APBVAP %; (5) non-Hispanic white VAP %; (6) number of registered voters who were black (“RB”); (7) percentage of registered Democrats (“RD”); (8) percentage of registered Democrats who were black (“RBD”); (9) population deviation (“Dev.”); (10) margin of victory by total votes, not percentage, the 2003 plan, (“MV”); (11) whether this candidate was unopposed (“U”); and (12) difference between population deviation and margin of victory. The information shows:

(a) The 2003 SDs 4, 14, 20, 21, 28, 32, 38, and 40 were coalition districts with a non-Hispanic white population under 50%. All of these districts have a majority black VAP if the Hispanic VAP in each district is discounted.

(b) In SDs 21, 28, and 38, African Americans were a majority black by registered voters. In SD 4, 14, 20, 31, and 40, Democrats were a majority of registered voters and African Americans were a majority of registered Democrats; and

(c) In SDs 4, 14, 21, 28, 38, and 40 there were elections in which the margin of victory for the successful African American Democrats was less than the amount by which the district was underpopulated or overpopulated.

(DX 3017-10 [First Frey Aff., Ex. 10]; DX 3018-34, 3018-44 [Second Frey Aff. Exs. 34, 44]; DX 3020-1 [*Covington*, Churchill Decl. Ex. 1]; DX 3000 [Historical Senate Maps, Tab 22]; DX 3117)

Table 2
2003 Senate coalition districts/deviation/margin of victory/2010 Census

| SD 4 | | | | | | | | | | |
|------|----------|---|--------|--------|-------|-------|-------|----------|---------------|------------|
| Year | Winner | R | APBVAP | NHWPAP | RB | RD | RBD | Dev. | MV | Difference |
| 2004 | Holloman | B | 49.70 | 47.76 | 49.12 | 70.61 | 62.76 | (27,526) | 44,249 (u) | - |
| 2006 | Holloman | B | 49.70 | 47.76 | 49.12 | 70.61 | 62.76 | (27,526) | 10,779 | 16,747 |
| 2008 | Jones | B | 49.70 | 47.76 | 49.12 | 70.61 | 62.76 | (27,526) | 57,429 (u) | - |
| 2010 | Jones | B | 49.70 | 47.76 | 49.12 | 70.61 | 62.76 | (27,526) | 11,705 | 15,821 |

| SD 5 | | | | | | | | | | |
|--|--|--|--|--|--|--|--|--|--|--|
| The 2003 Senate District 5 was a white crossover district in which white candidates were elected in 2004, 2006, and 2010. A black candidate was elected in 2008. | | | | | | | | | | |

| SD 14 | | | | | | | | | | |
|-------|--------|---|--------|--------|-------|-------|-------|--------|--------|------------|
| Year | Winner | R | APBVAP | NHWPAP | RB | RD | RBD | Dev. | MV | Difference |
| 2004 | Malone | B | 42.62 | 41.07 | 45.99 | 57.43 | 68.26 | 41,804 | 20,132 | 21,072 |
| 2006 | Malone | B | 42.62 | 41.07 | 45.99 | 57.43 | 68.26 | 41,804 | 12,760 | 29,044 |
| 2008 | Malone | B | 42.62 | 41.07 | 45.99 | 57.43 | 68.26 | 41,804 | 37,988 | 3,866 |
| 2010 | Blue | B | 42.62 | 41.07 | 45.99 | 57.43 | 68.26 | 41,804 | 19,679 | 22,125 |

| SD 20 | | | | | | | | | | |
|-------|-----------|---|--------|--------|-------|-------|-------|---------|----|---------------|
| Year | Winner | R | APBVAP | NHWPAP | RB | RD | RBD | Dev. | MV | Difference |
| 2004 | Lucas | B | 44.64 | 39.86 | 47.46 | 64.80 | 63.70 | (9,086) | | exceeds dev. |
| 2006 | Lucas | B | 44.64 | 39.86 | 47.46 | 64.80 | 63.70 | (9,086) | | no opposition |
| 2008 | McKissick | B | 44.64 | 39.86 | 47.46 | 64.80 | 63.70 | (9,086) | | exceeds dev. |
| 2010 | McKissick | B | 44.64 | 39.86 | 47.46 | 64.80 | 63.70 | (9,086) | | exceeds dev. |

| SD 21 | | | | | | | | | | |
|-------|--------|---|--------|--------|----|----|-----|------|----|------------|
| Year | Winner | R | APBVAP | NHWPAP | RB | RD | RBD | Dev. | MV | Difference |

| | | | | | | | | | | |
|------|-----------|---|-------|-------|-------|-------|-------|----------|---------------|--------|
| 2004 | Shaw | B | 44.93 | 41.63 | 51.15 | 56.59 | 73.14 | (26,593) | 11,532 | 15,161 |
| 2006 | Shaw | B | 44.93 | 41.63 | 51.15 | 56.59 | 73.14 | (26,593) | 5,068 | 20,985 |
| 2008 | Shaw | B | 44.93 | 41.63 | 51.15 | 56.59 | 73.14 | (26,593) | 48,430 (u) | - |
| 2010 | Mansfield | B | 44.93 | 41.63 | 51.15 | 56.59 | 73.14 | (26,593) | 10,942 | 15,651 |

| SD 28 | | | | | | | | | | |
|-------|----------|---|--------|--------|-------|-------|-------|---------|-------|------------|
| Year | Winner | R | APBVAP | NHWWAP | RB | RD | RBD | Dev. | MV | Difference |
| 2004 | Dorsett | B | 47.20 | 42.32 | 50.16 | 58.24 | 73.55 | -13,673 | u | N/A |
| 2006 | Dorsett | B | 47.20 | 42.32 | 50.16 | 58.24 | 73.55 | -13,673 | u | N/A |
| 2008 | Dorsett | B | 47.20 | 42.32 | 50.16 | 58.24 | 73.55 | -13,673 | u | N.A |
| 2010 | Robinson | B | 47.20 | 42.32 | 50.16 | 58.24 | 73.55 | -13,673 | 4,113 | 9,560 |

| SD 32 | | | | | | | | | | |
|--|--|--|--|--|--|--|--|--|--|--|
| The 2003 and 2011 Senate District 32 are both coalition districts in which non-Hispanic white VAP under the 2010 Census was 42.11% (2003) and 41.41% (2011). | | | | | | | | | | |

| SD 38 | | | | | | | | | | |
|-------|---------|---|--------|--------|-------|-------|-------|---------|-------------|------------|
| Year | Winner | R | APBVAP | NHWWAP | RB | RD | RBD | Dev. | MV | Difference |
| 2004 | Danelly | B | 46.97 | 36.64 | 50.33 | 58.63 | 73.25 | +47,572 | 47,898 | - |
| 2006 | Danelly | B | 46.97 | 36.64 | 50.33 | 58.63 | 73.25 | +47,572 | 20,372 u | 27,200 |
| 2008 | Danelly | B | 46.97 | 36.64 | 50.33 | 58.63 | 73.25 | +47,572 | 45,699 | 1,873 |
| 2010 | Danelly | B | 46.97 | 36.64 | 50.33 | 58.63 | 73.25 | +47,572 | 18,323 | 29,249 |

| SD 40 | | | | | | | | | | |
|-------|--------|---|--------|--------|-------|-------|-------|--------|--------|------------|
| Year | Winner | R | APBVAP | NHWWAP | RB | RD | RBD | Dev. | MV | Difference |
| 2004 | Graham | B | 35.43 | 48.87 | 37.08 | 58.63 | 73.25 | 54,523 | 11,463 | 43,060 |
| 2006 | Graham | B | 35.43 | 48.87 | 37.08 | 58.63 | 73.25 | 54,523 | 7,933 | 46,590 |
| 2008 | Graham | B | 35.43 | 48.87 | 37.08 | 58.63 | 73.25 | 54,523 | 33,596 | 20,927 |
| 2010 | Graham | B | 35.43 | 48.87 | 37.08 | 58.63 | 73.25 | 54,523 | 9,023 | 45,500 |

142. As demonstrated by Table 3, there are very slight differences in the APBVAP for the 2011 enacted majority senate districts as compared to the 2011 alternative districts:

Table 3²³
Comparison of APBVAP 2003-2011 Senate Districts 2010 Census

| | 2003 | SCSJ | F&L | LBC | 2011 |
|-------|-------|--------------|--------------|--------------|--------------|
| SD 4 | 49.70 | 52.75 | 50.19 | 49.74 | 52.75 |
| SD 5 | 30.99 | 25.23 | 32.94 | 33.93 | 51.97 |
| SD 14 | 42.62 | 48.05 | 42.03 | 42.04 | 51.28 |
| SD 20 | 44.64 | 42.55 | 44.95 | 44.98 | 51.04 |
| SD 21 | 44.93 | 46.17 | 44.95 | 44.44 | 51.53 |
| SD 28 | 47.20 | 51.77 | 48.05 | 47.52 | 56.49 |
| SD 32 | 42.52 | 41.95 | 38.28 | 38.28 | 42.53 |
| SD 38 | 46.97 | 51.68 | 46.98 | 46.98 | 52.51 |
| SD 40 | 35.43 | 52.06 | 44.48 | 44.48 | 51.84 |

143. Moreover, as shown by Table 4 there are slight differences between each enacted 2011 VRA Senate districts and the 2011 alternative with the highest percentage of APBVAP.

Table 4
Enacted Senate District BLACK VAP Percentages versus Highest Alternative Plan Values 2010 Census

| District | Enacted Plan APBVAP | Highest Alternative Plan APBVAP | Corresponding Alternative Plan | Difference Between Enacted and Highest Alternative |
|----------|---------------------|---------------------------------|--------------------------------|--|
| 3 | 52.43% | 52.37% | SCSJ_S | 0.07% |
| 4 | 52.75% | 53.33% | SCSJ_S | -0.58% |
| 14 | 51.28% | 48.05% | SCSJ_S | 3.23% |
| 20 | 51.04% | 44.98% | LBC | 6.07% |
| 21 | 51.53% | 46.17% | SCSJ_S | 5.36% |
| 28 | 56.49% | 51.77% | SCSJ_S | 4.72% |
| 32 | 42.53% | 41.95% | SCSJ_S | 0.58% |
| 38 | 52.51% | 51.68% | SCSJ_S | 0.83% |
| 40 | 51.84% | 52.06% | SCSJ_S | -0.22% |

(DX 3019-79 [Third Frey Aff., Ex. 79]; DX 3017-10 [First Frey Aff., Ex. 10])

²³ All figures are based on the 2010 Census. Percentages typed in **bold** include a proposed district with higher APBVAP than the percentage APBVAP in the 2003 Senate District.

C. House Districts in Northeastern North Carolina

144. The 2011 enacted House Plan established six majority black districts in northeastern North Carolina: HD 5, 7, 23, 24, 27, and 32. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-14, 3018-40 [Second Frey Aff. Ex. 15, 40]; DX 3001 [Historical House Maps, Tab 15]) The 2001/2009 House Plan (hereafter “2003 Plan”) had four districts in this area that were majority black (2003 HD 7, 8, 24, and 27) and one coalition district with an APBVAP of 48.87%. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-30 [Second Frey Aff. Ex. 39]; DX 3001 [Historical House Maps, Tab 8]) Under the 2003 plan, white Democrats had been regularly elected from the 2003 HD 8 and 27. (DX 3018-39 [Second Frey Aff. Ex. 39]) Under the 2011 House plan, in the 2012 and 2014 general elections, white Democrat Michael Wray continued to be elected in the 2011 HD. In 2012 and 2014, African American Democrats were elected in HD 5, HD 7, HD 24, and HD 32. In 2014, a African American Democrat was elected in HD 23 which replaced the 2003 HD 8 as a majority black house district. (DX 3020-14 [*Covington*, Churchill Decl., Ex. 14])

145. All of the 2011 alternative House plans proposed a combination of four or five majority black districts for this area of the state. The SCSJ House plan proposed four majority black districts (HD 7, 8, 24, 27) and one coalition district (HD 5) with an APBVAP of 49.63%. (DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-41 [Second Frey Aff. Ex. 41]; DX 3001 [Historical House Maps, Tab 9]) The F&L proposed four majority black districts (HD 5, 7, 24, 27) and one coalition district (HD 8) with a APBVAP of 48.69%. (DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-42 [Second Frey Aff. Ex. 42]; DX 3001 [Historical House Maps, Tab 12]) Finally, the 2011 LBC plan proposed five

majority black house districts for northeastern North Carolina: HD 5, 7, 8, 24, and 27. (DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-53 [Second Frey Aff. Ex. 53]; DX 3001 [Historical House Maps, Tab 13])

146. The county grouping formula that is found on the 2011 House map complies with State law. *Dickson v. Rucho, supra*. The county grouping formula in the SCSJ, F&L, and LBC plans does not comply with State law. *Id.*

147. Plaintiffs have only challenged four of the six enacted majority black House Districts located in northeastern North Carolina: HD 5, 7, 24, and 32.

148. House District 5

(a) The 2003 version of HD 5 was located in a four-county group of Bertie, Gates, Hertford, and Perquimans. Only one district was in this group. Under the 2010 Census, the APBVAP of this district was 48.87%. The non-Hispanic white VAP was 40.20%. If the Hispanic VAP in the district is discounted, the district's VAP is majority black. African Americans were 48.17% of all registered voters. Democrats were 69.69% of all registered voters and African Americans were 62.96% of all registered Democrats. The population of the 2003 HD 5 was 71,601 as compared to the ideal of 79,462. Thus, the district was underpopulated by -7,861 (-9.98%). (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-39, 3018-49 [Second Frey Aff. Exs. 15, 39, 49]; DX 3001 [Historical House Maps, Tab 8]; DX 3116)

(b) The 2001 SCSJ HD 5 is located in a *forty-six* county group, which basically includes all of eastern North Carolina. There are 37 districts in this group. SCSJ HD 5 is located in portions of eight counties. It does not include a single whole county. The

SCSJ HD 5 had an APBVAP of 48.87%. The non-Hispanic white VAP was 47.77%. African Americans were 48.17% of registered voters. Democrats were 71.14% of registered voters and African Americans were 62.89% of registered Democrats. (DX 3017-10 [First Frey Aff. Ex. 10]; DX 3018-15, 3018-41, 3018-51 [Second Frey Aff. Exs. 15, 41, 51]; DX 3001 [Historical House Maps, Tab 9])

(c) The 2011 HD 5 is located in a nine-county group that has two districts. The 2011 HD 5 is located in all of Gates, Hertford and Bertie and a portion of Pasquotank. The APBVAP for this district is 52.41%. The Reock score for these districts is 0.46. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-33, 3018-40, 3018-50 [Second Frey Aff. Exs. 15, 33, 40, 50]; DX 3001 [Historical House Maps, Tab 15])

(d) For the 2011 HD 5, 96.09% of the APBVAP in this district comes from one or more of the House exemplar districts. (DX 3029 [First Hofeller Decl., Table 1])

(e) The 2011 F&L HD 5 is located in a four-county group that has only one district. The group includes Bertie, Gates, Hertford, and Martin. The APBVAP for this district is 51.13%. African Americans are 51.07% of all registered voters. (DX 3017-14 [First Frey Aff. Ex. 14]; DX 3018-15, 3018-42, 3018-52 [Second Frey Aff. Exs. 15, 42, 52]; DX 3001 [Historical House Maps, Tab 12])

(f) The 2011 LBC HD 5 is identical to the 2011 F&L HD 5. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-43, 3018-53 [Second Frey Aff. Exs. 15, 43, 53]; DX 3001 [Historical House Maps, Tab 13])

(g) Neither the 2003 version of HD 5 nor any of the 2011 alternatives are in the same county group as the 2011 enacted HD 5. Two of the 2011 alternative versions are

majority black (F&L and LBC) while the other alternative was a coalition district with an APBVAP of 49.31% (SCSJ).

(h) The following counties in the 2011 HD 5 were included in *Gingles* districts: Bertie, Hertford, Gates. (*See* D.E. 32-1, F.F. No. 1)

(i) The following counties in the 2011 HD 5 were included in the *Cromartie II* First Congressional District: Bertie, Hertford, Gates. (*See* D.E. 32-1, F.F. No. 6)

(j) The following counties in the 2011 HD 5 were part of a 2001/2003/2009 majority black or coalition district:

2001 CD 1: Bertie, Gates, Hertford, Pasquotank
2003 SD 4: Bertie, Gates, Hertford
2009 HD 5: Bertie, Gates, Hertford

(DX 3002 [Historical Congressional Map Notebook, Congress Zero Deviation]; DX 3000 [Historical Senate Map Notebook, 2003 Senate]; DX 3001 [Historical House Maps Notebook, 2003 House]; DX 3017-10 through 3017-12 [First Frey Aff. Exs. 10, 11, 12]; 3 DX 3018-34, 3018-39, [Second Frey Aff. Exs. 34, 39])

(k) The following counties in the 2011 HD 5 were covered by Section 5: Bertie, Hertford, Gates, Pasquotank. (JX 1012, p. 6)

(l) The following counties in the 2011 HD 5 were included in Dr. Block's analysis of district elections from 2006-10 showing that significantly racially polarized voting remained present.

2010 CD 1: Bertie, Gates, Hertford, Pasquotank
2010 SD 4: Bertie, Gates, Hertford
2006 HD 5: Bertie, Gates, Hertford

(DX 3013-8 [First Rucho Aff. Ex. 8, pp. 1-7])

(m) The following counties in the 2011 HD 5 were analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting:

Bertie, Gates, Hertford, Pasquotank. (DX 3033, pp. 1-15])

(n) The following counties in the 2011 HD 5 were included in majority black or coalition district in plans proposed by SCSJ and Democratic leaders in 2011:

SCSJ CD 1: Bertie, Gates, Hertford, Pasquotank

F&L CD 1: Bertie, Gates, Hertford, Pasquotank

SCSJ SD 4: Bertie, Gates, Hertford

F&L SD 3: Bertie

F&L SD 4: Gates, Hertford

LBC SD 4: Bertie, Gates, Hertford

SCSJ HD 5: Bertie, Hertford, Gates, Pasquotank

F&L HD 5: Bertie, Gates, Hertford

LBC HD 5: Bertie, Gates, Hertford

(DX 3000-3002 [Historical Map Notebooks: SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House]]; DX 3017-10, 3017-11 [First Frey Aff. Exs. 10, 11]; DX 3018-36, 3018-37, 3018-38, 3018-41, 3018-42 [Second Frey Aff. Exs. 36-38, 41-42])

(o) For the 2006 General Election, incumbent African American Democrat Howard Hunter defeated white Republican Kyle Jones by 3,609 votes. African American Democratic candidate Annie Ward Mobley was unopposed in the 2008 General Election. In the 2010 General Election, incumbent African American Democratic candidate Mobley defeated white Republican candidate Matthew Peeler by 3,613 votes. Under the 2010 Census, the 2003 HD 5 was underpopulated by -7,861 (-9.89%). Thus, the margin of victory for the African American incumbent Democrats elected in contested elections in 2006 and 2010 was less than the amount by which this district was underpopulated. (DX 3020, 3020-3 [*Covington*, Churchill Decl., Ex. 3])

(p) In the 2006 general election for HD 5, the successful African American Democratic candidate, Annie Ward Mobley, raised \$3,699.67 and spent \$3,799.67. Her Republican opponent did not file any campaign disclosure reports. In the 2010 general election for HD 5, Mobley raised \$39,371.81 and spent \$40,645. Her unsuccessful Republican opponent did not file any campaign disclosure reports. (DX 3020, 3020-3 [*Covington*, Churchill Decl., Ex. 3])

149. House District 7

(a) The 2003 version of HD 7 was located in a three-county group of Franklin, Nash, and Halifax. Three districts were in this group. HD 7 was in Halifax and Nash. The APBVAP for this district was 60.77%. African Americans were 58.53% of all registered voters. Under the 2010 Census, the population for this district was 59,436 as compared to the ideal of 79,462. The district was therefore underpopulated by -20,026 (-25.20%). (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-39, 3018-49 [Second Frey Aff. Exs. 15, 39, 49]; DX 3001 [Historical House Maps, Tab 8])

(b) The SCSJ HD 7 was located in a 46-county group which included 37 districts. The SCSJ HD 7 was located in portions of Edgecombe, Halifax, and Nash counties. It was created with an APBVAP of 58.69%. African Americans were 57.21% of all registered voters. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-36, 3018-46 [Second Frey Aff. Exs. 15, 36, 46]; DX 3001 [Historical House Maps, Tab 9])

(c) The 2011 enacted HD 7 is located in a two-county group of Franklin and Nash. It has an APBVAP of 50.67%. The Reock score for this district is 0.28. The SCSJ House Plan has 17 districts with a Reock score of 0.28 or lower. The F&L House

Plan has 15 districts with a Reock score of 0.28 or lower. The LBC plan has 13 districts with a Reock score of 0.28 or lower. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-33, 3018-40, 3018-50 [Second Frey Aff. Exs. 15, 33, 40, 50]; DX 3001 [Historical House Maps, Tab 15])

(d) For the 2011 HD 7, 78.66% of the district's APBVAP comes from one or more of the House exemplar districts. (DX 3029 [First Hofeller Decl., Table 1])

(e) The 2011 F&L HD 7 was in a three-county group of Edgecombe, Nash, and Wilson. There are three districts in this group. F&L HD 7 is in portions of Halifax and Edgecombe Counties. The APBVAP for this district was 52.75%. African Americans represented 52.81% of the registered voters. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-42, 3018-52 [Second Frey Aff. Exs. 15, 42, 52]; DX 3001 [Historical House Maps, Tab 12])

(f) The 2011 LBC HD 7 was located in a six-county group of Edgecombe, Halifax, Nash, Northampton, Warren and Wilson. Four districts were in this group. The 2011 LBC HD 7 was in a portion of Halifax, Nash, and Edgecombe. The APBVAP for this district was 50.14%. African Americans were 49.83% of all registered voters. Democrats were 65.70% of all registered voters and African Americans were 71.80% of all registered Democrats. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-42, 3018-52 [Second Frey Aff. Exs. 15, 42, 52]; DX 3001 [Historical House Maps, Tab 13])

(g) None of the 2011 alternative versions of HD 7 used the same two-county group of Nash and Franklin found in the enacted House plan. The 2003 HD 7, the 2011

SCSJ HD 7, and the 2011 F&L HD 7 were majority black districts with a higher percentage of APBVAP than the 2011 enacted HD 7.

(h) The following county in the 2011 HD 7 was included in *Gingles* districts:
Nash (*See* D.E. 32-1, F.F. No. 1)

(i) The following counties in the 2011 HD 7 were part of a 2001/2003/2009 majority black or coalition district:

2001 CD 1: Nash
2009 HD 7: Nash

(DX 3002 [Historical Congressional Map Notebook, Congress Zero Deviation]; DX 3001 [Historical House Maps Notebook, 2009 House Plan]; DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-39 [Second Frey Aff. Ex. 39])

(j) Franklin and Nash Counties were both covered by Section 5. (JX 1012, p.6)

(k) The following counties in the 2011 HD 7 were included in Dr. Block's analysis of district elections from 2006-2010 finding the presence of significant racially polarized voting:

2010 CD 1: Nash

(DX 3013-8 [First Rucho Aff. Ex. 8, pp. 1-7])

(l) The following counties in the 2011 HD 7 were analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting:

Franklin and Nash.

(DX 3033, pp. 1-14])

(m) The following counties in the 2011 HD 7 were included in majority black or coalition districts in plans proposed by SCSJ and Democratic leaders in 2011:

SCSJ CD 1: Franklin, Nash
F&L CD 1: Franklin, Nash
LBC SD 3: Nash
SCSJ HD 7: Nash
F&L HD 7: Nash
LBC HD 7: Nash

(DX 3000-3002 [Historical Map Notebooks: SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House]; DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-38, 3018-41, 3018-42, 3018-43 [Second Frey Aff. Exs. 38, 41-43])

(n) In the 2004 General Election, African American Democratic candidate John Hall was unopposed and received a total of 17,714 votes. In the 2006 general election African American Democratic candidate Ed Jones ran unopposed and received 7,264 votes. In the 2008 general election, African American Democratic candidate Angela Bryan ran unopposed and received a total of 22,928 votes. In the 2010 general election, incumbent African American Democratic candidate Angela Bryant was unopposed and received a total of 12,544 votes. Under the 2010 Census, the 2003 HD 7 was underpopulated by -20,026 (-25.20%). Thus, the total votes received by unopposed African American Democratic candidates in the 2004, 2006, and 2010 general elections was less than the amount by which this district was underpopulated. (DX 3020-3 [Covington, Churchill Decl., Ex. 3])

150. House District 24

(a) The 2003 HD 24 was located in a two-county group of Edgecombe and Wilson. Two districts were in this group. The 2003 HD 24 was in a portion of Edgecombe and Wilson. Under the 2010 Census, the APBVAP was 56.07%. Blacks were 59.08% of registered voters. Under the 2010 Census, the districts' population was

62,129, as compared to an ideal population of 79,462. The district was therefore underpopulated by -17,333 (-21.81%). (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-39, 3018-49 [Second Frey Aff. Exs. 15, 39, 49]; DX 3001 [Historical House Maps, Tab 8])

(b) The SCSJ HD 24 was located in a 46-county group with 37 districts. The SCSJ HD 24 was located in portions of Wilson, Edgecombe, and Halifax. The APBVAP for this district was 57.33% of all registered voters. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-41, 3018-51 [Second Frey Aff. Exs. 15, 41, 51]; DX 3001 [Historical House Maps, Tab 9])

(c) The 2011 enacted HD 24 is located in a two-county group of Pitt and Wilson. There are three districts in this group. The 2011 HD 24 is located in portions of Wilson and Pitt Counties. The APBVAP for this district is 57.33%. The Reock score for this district is 0.25. The 2011 SCSJ House plan has 10 districts with Reock scores of 0.25 or lower. The 2011 F&L House plan has 9 districts with Reock scores of 0.25 or lower. The 2011 LBC House plan has 8 districts with a Reock score of 0.25 or lower. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-33, 3018-40, 3018-50 [Second Frey Aff. Exs. 15, 33, 40, 50]; DX 3001 [Historical House Maps, Tab 15])

(d) For the 2011 HD 24, 98.12% of the district's APBVAP came from the exemplar House districts. (DX 3029 [First Hofeller Decl., Table 1])

(e) The F&L HD 24 is located in a three county group of Edgecombe, Wilson and Nash. There are 3 districts in this group. The APBVAP for this district is 50.79%. African Americans are 54.47% of all registered voters. (DX 3017-11 [First Frey Aff. Ex.

11]; DX 3018-15, 3018-42, 3018-52 [Second Frey Aff. Exs. 15, 42, 52]; DX 3001 [Historical House Maps, Tab 12])

(f) The LBC HD 24 is located in a six county group of Edgecombe, Nash, Halifax, Northampton, Warren and Wilson. Four districts are in this group. The LBC HD 24 is located in a portion of Edgecombe and Wilson. The APBVAP for this district is 50.33%. African Americans were 53.29 % of all registered voters. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-43, 3018-53 [Second Frey Aff. Exs. 15, 43, 53]; DX 3001 [Historical House Maps, Tab 13])

(g) Neither the 2003 version of HD 24 nor any of the alternatives used the same county groups for HD 24 as that used in the 2011 enacted House plan. All versions of this district are majority black. The APBVAP of the 2011 version of HD 24 is only 1.26% higher than the APBVAP in the 2003 version.

(h) The following counties in the 2011 HD 24 are included in *Gingles* districts: Wilson.

(i) The following counties in the 2011 HD 24 are included in the *Cromartie II* First Congressional District: Pitt, Wilson.

(j) Counties that were part of a 2001/2003/2009 majority black or coalition district:

2001 CD 1: Pitt, Wilson
SD 3: Pitt
2009 HD 8: Pitt
2009 HD 24: Wilson

(DX 3002 [Historical Congressional Maps Notebook, Congress Zero Deviation]; DX 3000 [Historical Senate Maps Notebook, 2003 Senate Plan]; DX 3001 [Historical House

Maps Notebook, 2009 House Plan]; DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-34, 3018-39 [Second Frey Aff. Exs. 34, 39])

(k) Pitt and Wilson counties were both covered by Section 5. (JX 1012, p. 6)

(l) The following counties in HD 24 were included in Dr. Block's analysis of district elections from 2006-2010 showing the presence of significant racially polarized voting:

2008 SD 5: Pitt
2010 SD 5: Pitt, Wilson

(DX 3016-6 [First Rucho Aff. Ex. 6, pp. 1-7])

(m) The following counties in HD 24 were analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting:

Pitt, Wilson. (DX 3033, pp. 1-15])

(n) The following counties in the 2011 HD 24 were included in majority black or coalition districts in plans proposed by SCSJ and Democratic leaders in 2011:

SCSJ CD 1: Pitt, Wilson
F&L CD 1: Pitt, Wilson
SCSJ SD 3: Pitt, Wilson
F&L SD 3: Wilson
LBC SD 3: Pitt
SCSJ HD 8: Pitt
SCSJ HD 24: Wilson
F&L HD 8: Pitt
F&L HD 24: Wilson
LBC HD 8: Pitt
LBC HD 24: Wilson

(DX 3000-3002 [Historical Map Notebooks: SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House]; DX 3017-10, 3017-11 [First Frey Aff. Exs. 10, 11]; DX 3018-36, 3018-37, 3018-38, 3018-41, 3018-42, 3018-43 [Second Frey Aff. Exs. 36-38, 41-43])

(o) The Democratic candidate for the 2003 HD 24 (Jean Farmer Butterfield) ran unopposed in the 2004 General Election and received a total of 19,501 votes. Rep. Butterfield ran unopposed in the 2006 General Election and received 7,987 votes. In 2008, Rep. Butterfield was unopposed and received 23,108 votes. In the 2010 General Election, Rep. Butterfield defeated white Republican candidate Claiborne K. Holtzman by 5,804 votes. Under the 2010 Census, this district was underpopulated by -17,333 (-21.81%). The total amount of votes received by Rep. Butterfield in 2006, when she ran unopposed, was less than the amount by which the district was underpopulated. The margin of victory for Rep. Butterfield in 2010 was less than the amount by which this district was underpopulated. (DX 3023-3 [*Covington*, Churchill Decl., Ex. 3])

(p) None of the three plaintiffs who reside in House District 24 (Herman Lewis, Crystal Johnson, and Gregory Tucker) are residents in a precinct that is divided between House District 24 and another house district.

151. House District 32

(a) The 2003 version of House District 32 was located in a four-county group of Granville, Northampton, Vance, and Wilson. There were two districts in this group. The 2003 version of HD 32 was located in Granville and Warren Counties. The black VAP for this district was 35.88%. African Americans represented only 36.48% of all registered voters. A white Democrat, Jim Crawford, was elected in this district in 2006, 2008, and 2010. (DX 3018-15, 3018-59 [Second Frey Aff. Exs. 15, 59]; DX 3001 [Historical House Maps, Tab 8])

(b) The 2011 version of HD 32 is located in a four-county group of Granville, Person, Vance, and Warren. There are two districts in this group. The 2011 HD 32 is located in a portion of Granville and all of Vance and Warren. All three of these counties were in the 2003 county group that included the 2003 HD 32, but only Granville and a portion of Vance were in the 2003 HD 32. The APBVAP for the 2011 HD 32 is 50.65. The Reock score for the 2011 HD 32 is 0.44. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-33, 3018-40, 3018-50 [Second Frey Aff. Exs. 15, 33, 40, 50]; DX 3001 [Historical House Maps, Tab 15])

(c) In the 2011 HD 32, 87.45% of the district's APBVAP comes from a House exemplar district. (DX 3029 [First Hofeller Decl., Table 1])

(d) An African American candidate, Nathan Baskerville, has been elected in this district in 2012 and 2014. (DX 3020-14 [*Covington*, Churchill Decl., Ex. 14]) He is a resident of Granville County. *See*

<http://www.ncleg.net/gascripts/members/viewMember.pl?sChamber=H&nUserID=649>

Under the 2011 House Plan, for the first time, African American voters in Granville and Vance Counties have been given an equal opportunity to elect their candidate of choice to the State House.

(e) Granville and Vance Counties were covered by Section 5. (JX 1012, p. 6)

(f) Granville, Vance, and Warren Counties were included in the 1997 version of CD 1 which was found to be a lawful Section 2 district in *Cromartie II*. (DX 3002 [Historical Congressional Maps Noteboo, Tab 3])

(g) Granville, Vance, and Warren were part of the 2001 CD 1 which was a coalition district. DX 3002 [Historical Congressional Maps Notebook, Tab Tab 4])

(h) Granville, Vance, and Warren were included in Dr. Block's analysis of district elections from 2006 and 2010 showing the presence of significant racially polarized voting. (DX 3013-8)

(i) Granville, Vance and Warren are included in the counties analyzed by Dr. Brunell and confirmed as continuing to experience significant racially polarized voting. (DX 3033, pp. 1-16)

(j) Granville, Vance, and Warren were included in majority black or coalition districts proposed by the Democratic leaders or the SCSJ in 2011:

2011 Fair and Legal Congress (Warren, Vance, Granville).
SCSJ Senate District 4 (Vance and Warren)
Fair and Legal Senate District 4 (Vance and Warren)
LBC Senate District 4 (Warren)
SCSJ House District 27 (Vance and Warren)
LBC House District 27 (Warren)

(DX 3000-3002 [Historical Map Notebooks: SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House]; DX 3017-10, 3017-11 [First Frey Aff. Exs. 10, 11]; DX 3018-36, 3018-37, 3018-38, 3018-41, 3018-42, 3018-43 [Second Frey Aff. Exs. 36-38, 41-43])

(k) None of the 2011 alternative versions of HD 32 proposed that this district be created as a majority black or a coalition district.

(l) In the 2004 Democratic primary for HD 32, white incumbent Democrat Jim Crawford defeated African American Democratic candidate James Gooch 4,281 to 3,773 (908 votes). (DX 3020-3 [*Covington*, Churchill Decl., Ex. 3])

(m) The only plaintiff residing in HD 32, Juanita Rogers, resides in a precinct that is wholly contained within HD 32.

D. House Districts in Cumberland County

152. Under the 2010 Census, Cumberland County included two districts in which blacks were the majority of registered voters (HD 42 and 43). The APBVAP in one of those districts was 47.95% (HD 42). In the other district, the APBVAP was 54.69% (HD 43). The 2011 enacted House Plan has two majority black districts in Cumberland County. Both of these districts have a lower APBVAP than the percentage in the 2003 version of HD 43. The 2011 HD 42 has an APBVAP of 52.46% while the 2011 HD 43 has a APBVAP of 51.34%. Two of the 2011 alternative versions of HD 43 were created with an APBVAP higher than the percentage found in either of the 2011 enacted House districts (SCSJ and F&L HD 43 – 54.70%). The LBC proposed that HD 43 be established with an APBVAP of 51.51%. All 2011 alternatives proposed that HD 42 be established as a coalition district. In all three alternative versions of HD 42, African Americans were a majority of all registered voters. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-39 through 3018-53; DX 3116)

153. House District 42

(a) The 2003 version of HD 42 is located in a two-county group of Cumberland and Bladen. There were five districts in this group. The 2003 HD 42 was located in a portion of Cumberland County. Under the 2010 Census, this district had an APBVAP of 47.94%. The non-Hispanic white VAP was 36.97%. If the Hispanic VAP is discounted from the district its VAP is majority black. African Americans constituted

55.12% of all registered voters. The district's population was 68,445, as compared to the ideal of 79,462. Thus, the district was underpopulated by -11,017 (-13.86%). (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-39, 3018-49 [Second Frey Aff. Exs. 15, 39, 49]; DX 3001 [Historical House Maps, Tab 8]; DX 3116)

(b) The 2011 SCSJ version of HD 42 was located in a 46-county combination with 37 districts. The district was located in a portion of Cumberland County. The APBVAP was 48.00%. The non-Hispanic white VAP was 36.71%. African Americans were 51.95% of all registered voters. Democrats were 54.63% of all registered voters and African Americans were 75.41% of all registered Democrats. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-41, 3018-51 [Second Frey Aff. Exs. 15, 41, 51]; DX 3001 [Historical House Maps, Tab 9])

(c) The 2011 enacted HD 42 is located in a one-county group of Cumberland. Four districts are in this group. The APBVAP for the 2011 HD 42 is 52.51% (which is lower than the APBVAP proposed by the SCSJ and F&L 2011 version of HD 43). The Reock score for the 2011 HD 42 is 0.44. The Reock score for the 2011 SCSJ and F&L versions of HD 42 is 0.37. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-33, 3018-40, 3018-50 [Second Frey Aff. Exs. 15, 33, 40, 50]; DX 3001 [Historical House Maps, Tab 15])

(d) For the 2011 HD 42, 99.12% of the APBVAP for this district comes from the exemplar House districts. (DX 3029 [First Hofeller Decl., Table 1])

(e) The 2011 versions of SCSJ and F&L HD 42 are identical except that the 2011 F&L version is located in a single-county group of Cumberland. (DX 3017-11

[First Frey Aff. Ex. 11]; DX 3018-15, 3018-41, 3018-42, 3018-51, 3018-52 [Second Frey Aff. Exs. 15, 41, 42, 51, 52]; DX 3001 [Historical House Maps, Tabs 9, 12])

(f) The 2011 version of the LBC HD 42 is located in a one-county group of Cumberland. The APBVAP for this district was 46.87%, but African Americans are a higher percentage of registered voters than in the SCSJ or F&L plans (52.48%). Non-Hispanic whites were 37.59% of the VAP. Democrats were 55.26% of all registered voters and African Americans were 76.08% of registered Democrats. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-43, 3018-53 [Second Frey Aff. Exs. 15, 43, 53]; DX 3001 [Historical House Maps, Tab 13])

(g) Cumberland County was part of a 2001/2003/2009 majority black or coalition district:

2003 SD 21: Cumberland
2009 HD 42: Cumberland
2009 HD 43: Cumberland

(DX 3000, 3001 [Map Notebook, 2003 Senate Plan and 2009 House Plan]; DX 3017-10, 3017-11 [First Frey Aff. Exs. 10, 11]; DX 3018-34, 3018-39 [Second Frey Aff. Exs. 34, 39])

(h) Cumberland County was covered by Section 5. (JX 1012, p. 6)

(i) Cumberland County was included in Dr. Block's analysis of district elections from 2006-2010 showing the presence of statistically significant racially polarized voting:

2010 SD 21: Cumberland
2010 SD 21: Cumberland

(DX 3013-8 [First Rucho Aff. Ex. 8, pp. 1-7])

(j) Cumberland County was analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting. (DX 3033, pp. 1-14)

(k) Cumberland County was included in majority black or coalition districts in plans proposed by SCSJ and Democratic leaders in 2011:

SCSJ HD 42: Cumberland
SCSJ HD 43 Cumberland
F&L HD 42 Cumberland
F&L HD 43 Cumberland
LBC HD 42 Cumberland
LBC HD 43 Cumberland

(DX 3000-3002 [Historical Map Notebooks: SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House]; DX 3018-36, 3018-37, 3018-38, 3018-41, 3018-42, 3018-43 [Second Frey Aff. Exs. 36-38, 41-43])

(l) In the 2004 General Election, African American Democratic candidate Marvin Lucas defeated African American Republican candidate Bob White by 5,180 votes. In the 2001 General Election, Rep. Lucas was unopposed and received 5,110 votes. In the 2008 General Election, Rep. Lucas was unopposed and received 19,137 votes. In the 2010 General Election, Rep. Lucas was unopposed and received 8,874 votes. Under the 2010 Census, this district was underpopulated by -11,017 (-13.86%). Thus, in the 2004 General Election, Rep. Lucas' margin of victory was less than the amount by which this district was underpopulated. In the 2006 and 2010 General Elections, even though Rep. Lucas was unopposed, the total vote received by the incumbent was less than the amount by which the district was underpopulated. (DX 3020-3)

154. House District 43

(a) The 2003 version of House District 43 was located in a two-county combination of Bladen and Cumberland. Five districts were in this group. The 2003 HD 43 was located in a portion of Cumberland. The APBVAP for the 2003 HD 43 was 54.69%. African Americans were 60.31% of all registered voters. Under the 2010 Census, the district's population was 50,825 as compared to the ideal of 79,462. The district was therefore underpopulated by 28,637 (-36.04%). (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-39, 3018-49 [Second Frey Aff. Exs. 15, 39, 49]; DX 3001 [Historical House Maps, Tab 8])

(b) The 2011 SCSJ HD 43 was located in a 46-county combination consisting of 37 districts. The 2011 SCSJ HD 43 was located in a portion of Cumberland County. The APBVAP for this district was 54.70%. African Americans were 53.57% of all registered voters. The 2011 F&L HD 43 is identical to the SCSJ HD 43 except that it is located in a one-county group of Cumberland. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-41, 3018-42 [Second Frey Aff. Exs. 15, 41, 42]; DX 3001 [Historical House Maps, Tabs 9, 12])

(c) The 2011 enacted HD 43 is located in a one-county group of Cumberland. Four districts are in this group. The APBVAP for this district is 51.45%, or 3.25% lower than the 2011 SCSJ and F&L HD 43. The Reock score for this district is 0.32. The 2011 SCSJ House Plan has 21 districts with Reock scores of 0.32 or lower. The F&L House Plan has 24 districts with a Reock score of 0.32 or lower. The LBC House Plan has 24 districts with a Reock score of 0.32 or lower. (DX 3017-11 [First Frey Aff. Ex. 11]; DX

3018-15, 3018-33, 3018-40, 3018-50 [Second Frey Aff. Exs. 15, 33, 40, 50]; DX 3001 [Historical House Maps, Tab 15])

(d) For this district, 81.63% of its APBVAP comes from the House exemplar districts. (DX 3029 [First Hofeller Decl., Table 1])

(e) The 2011 LBC HD 43 has an APBVAP of 50.33%. African Americans are 53.74% of all registered voters. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-43 [Second Frey Aff. Exs. 15, 43]; DX 3001[Historical House Maps, Tab 13])

(f) Cumberland County was a covered county under Section 5. (JX 1012, p. 6)

(g) Majority black or coalition districts were established in Cumberland County under the 2003 Senate and 2003 House Plans. (SCSJ, F&L and LBC: SD 21, SCSJ, F&L and LBC; HD 42, HD 43).

(h) All alternative 2011 versions of Senate and House plans proposed majority black or coalition senate and house districts for Cumberland County.

(i) In 2004, African American Democratic candidate Mary McAllister ran unopposed in HD 43. She received a total of 11,875 votes. In 2006, she again ran unopposed and received 5,645 votes. In 2008, African American Democratic candidate Elmer Floyd ran unopposed and received a total of 16,807 votes. In 2010, Rep. Floyd again ran unopposed and received 7,967 votes. Under the 2010 Census, this district was underpopulated by -28,637 (-36.64). Thus, the total votes received by unopposed candidates in this district from 2004 through 2010 were substantially below the amount by which this district was underpopulated. (DX 3020-3 [*Covington*, Churchill Decl., Ex 3])

E. House Districts in Southeastern North Carolina

155. In the 2003 House Plan, North Carolina created House districts in southeastern NC, HDs 12, 21, as 48, as coalition districts with APBVAP under 50%. All three of these 2003 districts were located in portions of multiple counties. In *Pender County*, the North Carolina Supreme Court ruled, as a matter of state law, that the WCP was violated by proposed VRA districts that divided counties within a county group when these districts were not majority black. Because of the *Pender County* decision, in 2011, the General Assembly elected to revise these districts, raising the APBVAP by slight margins, so that these districts complied with state law. Despite the ruling in *Pender County*, all of the 2011 alternative versions proposed that these three districts be established with APBVAP at levels slightly below 50%.

156. House District 12

(a) The 2003 version of HD 12 was located in a seven-county group of Craven, Greene, Johnston, Lenoir, and Pamlico. There were 7 districts in this group. The 2003 HD 12 was located in a portion of Craven and Lenoir Counties. The APBVAP for this district was 46.45%. The non-Hispanic white VAP was 46.23%. If the Hispanic VAP in the district is discounted, its VAP is majority black. African Americans were 44.83% of registered voters. Democrats were 56.25% of registered voters and African Americans were 68.36% of registered Democrats. Under the 2010 Census, the population for this district was 63,600, as compared to the ideal of 79,462. Thus, the 2003 HD 12 was underpopulated by -15,862 (-19.96%). (DX 3017-11 [Frey Aff. Ex. 11]; DX 3018-15,

3018-39, 3018-49 [Second Frey Aff. Exs. 15, 39, 49]; DX 3001 [Historical House Maps, Tab 8]; DX 3116)

(b) The 2011 SCSJ version of HD 12 was located in a 46-county group consisting of 37 districts. The 2011 SCSJ HD 12 was located in portions of Greene, Lenoir, Craven, Jones, and Carteret. Despite dividing 5 counties, the APBVAP for this district was 46.35%. The non-Hispanic white population was 47.12%. African Americans were 45.17% of all registered voters. Democrats were 59.05% of registered voters and African Americans were 66.82% of all registered Democrats. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-41, 3018-51 [Second Frey Aff. Exs. 15, 41, 51]; DX 3001 [Historical House Maps, Tab 9])

(c) The 2011 enacted version of HD 12 was in a twenty county group. The average population for districts in this group must be compared to the average population for house districts in the single county group formed by Mecklenburg County in the 2011 enacted plan. Twelve whole districts could be drawn in Mecklenburg but at relatively lower deviations from the ideal of 79,462. Thus, the average population under the 2010 Census for House Districts in Mecklenburg was 76,632, or 2,830 below the ideal. To compensate for the low deviations caused by the Mecklenburg districts, 14 districts in the county group that included the 2011 enacted HD 12 have an average population of 82,661 as compared to the ideal of 79,462. (Tr. Vol IV, pp. 241:8-244:28; Tr. Vol. V, pp. 15:1-20:19) Thus, the average population for districts in the twenty-county group is 3,199 higher than the ideal. (DX 3018-15 [Second Frey Aff. Ex. 15]) The 2011 HD 12 is

the only district in this group to be drawn with a negative deviation (-3.85%). (DX 3030 [*Covington*, Second Hofeller Report, Table 6])

(d) The 2011 version of HD 12 is located in portions of Craven, Lenoir, and Green counties. The APBVAP for this district is 50.60%. The Reock score for this district is 0.12. However, the Reock score for the LBC version of HD 12 is lower (0.10). Both the SCSJ version (0.16) and the F&L version (0.14) have comparable Reock scores. None of the alternate versions of HD 12 were created with a majority black VAP and therefore could be slightly more compressed than the 2011 enacted version. None of the alternate versions of HD 12 are located in a county grouping formula that complies with state law. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-33, 3018-40, 3018-50 [Second Frey Aff Ex. 15, 33, 40, 50]; DX 3001 [Historical House Map, Tab 15])

(e) For the 2011 HD 12, 87.90% of the APBVAP for the district is from the exemplar House districts. (DX 3029 [First Hofeller Decl., Table 1])

(f) The 2011 F&L version of HD 12 is located in a seven-county group with seven districts. The F&L HD 12 is located in portions of Craven, Lenoir and Greene Counties. This district had a APBVAP of 46.42% and a non-Hispanic white VAP of 46.14%. African Americans were 45.26% of all registered voters. Democrats were 61.29% of all registered voters and African Americans were 65.26% of all registered Democrats. (DX 3018-15, 3018-42, 3018-52 [Second Frey Aff. Exs. 15, 42, 52]; DX 3001 [Historical House Maps, Tab 12])

(g) The 2011 LBC version of HD 12 is located in a five county group which includes five districts. The LBC HD 12 is located in portions of Craven and Lenoir. The

APBVAP is 45.26% with a non-Hispanic white VAP of 45.48. African Americans were 43.86% of all registered voters. Democrats were 57.42% of all registered voters and African Americans were 66.59% of all registered Democrats. (DX 3018-15, 3018-43, 3018-53 [Second Frey Aff. Exs. 15, 43, 53]; DX 3001 [Historical House Maps, Tab 13])

(h) Neither the 2003 HD 12 nor any of the 2011 alternatives use the same county group as the county group in which the 2011 enacted HD 12 is located. All versions of HD 12 are located in portions of 2 or more counties. Only the 2011 HD 12 has a black VAP in excess of 50%. None of the alternative versions of HD 12 comply with the state law requirement that VRA districts may divide counties within a county group only when they are majority black.

(i) The following counties in the 2011 HD 12 are included in *Cromartie II* First Congressional District: Craven, Greene, Lenoir. (See D.E.32-1, F.F. No. 6)

(j) The following counties in the 2011 HD 12 were part of a 2001/2003/2009 majority black or coalition district:

2001 CD 1: Craven, Greene, Lenoir
2009 HD 12: Craven, Lenoir

(DX 3002 [Historical Congressional Map Notebook, Congress Zero Deviation]; DX 3001 [Historical House Map Notebook, 2009 House Plan]; DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-39 [Second Frey Aff. Ex. 39])

(k) Craven, Green, and Lenoir were all covered by Section 5. (JX 1012, p.6)

(l) The following counties in the 2011 HD 12 were included in Dr. Block's analysis of district elections from 2006-10 finding significant levels of racially polarized voting:

2010 CD 1: Craven, Greene, Lenoir
2006-2010 HD 12: Craven, Lenoir

(DX 3013-8 [First Rucho Aff. Ex. 8, pp. 1-7])

(m) The following counties in the 2011 HD 12 were analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting: Craven, Greene, Lenoir. (DX 3033, pp. 1-14)

(n) The following counties in the 2011 HD 12 were included in majority black or coalition districts in plans proposed by SCSJ and Democratic leaders in 2011:

SCSJ CD 1: Craven, Greene, Lenoir
F&L CD 1: Craven, Greene, Lenoir
SCSJ HD 12: Craven, Greene, Lenoir
F&L HD 12: Craven, Greene, Lenoir
LBC HD 12: Craven, Lenoir

(DX 3000-3002 [Historical Map Notebooks: SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House]; DX 3018-41, 3018-42, 3018-43 [Second Frey Aff. Exs. 41-43])

(o) In 2004, the African American Democratic candidate for HD 12, William Wainwright, defeated his Republican opponent 13,573 to 7,473 (+6,100). In 2006, Rep. Wainwright defeated his Republican opponent 7,941 to 4,040 (+3,901). In 2008, Rep. Wainwright defeated his Republican opponent 17,659 to 7,882 (+9,777). In 2010, Rep. Wainwright defeated his Republican opponent 9,390 to 6,206 (+3,184). The population deviation in this district under the 2010 Census was (-15,862). Thus, in all general elections for 2004, 2006, 2008 and 2010, Rep. Wainwright's margin of victory was less than the population deviation for this district. (DX 3016, 3016-3 [Churchill Aff. ¶¶ 1-7, Ex. 3])

(p) In 2004, Rep. Wainwright raised \$76,225 and spent \$70,171. His Republican opponent raised \$5,859 and spent \$10,629. In 2006, Rep. Wainwright raised \$134,917 and spent \$119,798. His Republican opponent raised \$19,460 and spent \$19,144. In 2008, Rep. Wainwright raised \$155,271 and spent \$97,125. His Republican opponent raised \$4,884 and spent \$4,755. In 2010, Rep. Wainwright raised \$223,051 and spent \$153,528. His Republican opponent raised \$11,252 and spent \$8,525. (DX 3016, 3016-3 [Churchill Aff. ¶¶ 1-7, Ex. 3])

(q) At the beginning of the 2011 session, Rep. Wainwright had served eleven terms in the state House. (DX 3016, 3016-5[Churchill Aff. ¶ 8, Ex. 5])

157. House District 21

(a) The 2003 version of HD 21 was located in a seven-county group consisting of seven districts. The 2003 HD 21 was located in a portion of Sampson and a portion of Wayne. The APBVAP for this district was 46.25%. The non-Hispanic white VAP was 40.31%. If the Hispanic VAP for the district is discounted, its VAP is majority black. African Americans were 50.39% of all registered voters. Democrats were 62.75% of all registered voters and African Americans were 70.55% of all registered Democrats. Under the 2010 Census, the population in this district was 69,625 as compared to the ideal of 79,462. Thus, the 2003 HD 21 was underpopulated by -9,837 (-12.38%). (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-39, 3018-49 [Second Frey Aff Exs. 15, 39, 49]; DX 3001 [Historical House Maps, Tab 8]; DX 3116)

(b) The 2011 SCSJ HD 21 was located in a 46 county group consisting of 37 districts. The 2011 SCSJ HD 21 was located in portions of Sampson, Duplin, and

Wayne. The APBVAP for this district was 46.26%. The non-Hispanic white VAP was 40.61%. African Americans were 49.44% of all registered voters. Democrats were 62.75% of all registered voters and African Americans were 70.55% of all registered Democrats. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-41, 3018-51 [Second Frey Aff. Exs. 15, 41, 51]; DX 3001 [Historical House Maps, Tab 9])

(c) The 2011 enacted HD 21 is located in a 20 county group. The 2011 HD 21 is located in portions of Sampson, Duplin, and Wayne Counties. It has an APBVAP of 51.90%. Because of the excess population in this group, resulting from the twelve districts in Mecklenburg County with negative deviations, the 2011 HD 21 has a population of 83,020 as compared to the ideal of 79,462. The population in the 2011 HD 21 is higher than the population in the SCSJ HD 21 (80,619), the F&L HD 21 (76,083) and the LBC HD 21 (75,791). Because of the higher population required in this twenty county group, the 2011 HD 21 was required to extend its boundaries to a greater extent than the 2011 alternatives. (Tr. Vol. IV, pp. 241:8-244:28; Tr. Vol. V, pp. 15:1-20:19) The Reock score for the 2011 HD 21 is 0.19. This is higher than the benchmark for low compactness cited by Phildes and Niemi (0.15). This compares to 0.13 for the 2011 LBC HD 21, 0.21 for the F&L HD 21, and 0.27 for the SCSJ HD 21. None of the 2011 alternative districts are part of a county grouping formula that complies with state law. (DX 3017-11 [First Frey Aff., Ex. 11]; DX 3018-15, 3018-33 [Second Frey Aff., Exs. 15, 33])

(d) For the 2011 HD 21, 89.87% of the APBVAP in this district comes from the House exemplar districts. (DX 3029 [First Hofeller Decl. Table 1])

(e) Neither the 2003 HD 21, nor the 2011 SCSJ HD 21, the FLL HD 21, or the LBC HD 21 is based upon a majority black voting age population. None of these districts comply with the state law requirement that VRA districts may divide counties within a county group only when they are majority black.

(f) The following counties in the 2011 HD 21 were part of a 2001/2003/2009 majority black or coalition district:

2001 CD 1: Wayne
2009 HD 21: Sampson, Wayne

(DX 3002 [Historical Congressional Map Notebook, Congress Zero Deviation]; DX 3001 [Historical House Map Notebook, 2009 House Map]; DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-39 [Second Frey Aff. Ex. 39])

(g) Wayne County was a covered county under Section 5. (JX 1012, p. 6)

(h) The following counties in the 2011 HD 21 were included in Dr. Block's analysis of district elections from 2006-2010 showing the presence of significant racially polarized voting.

2010 CD 1: Wayne
2010 HD 21: Sampson, Wayne

(DX 3013-8 [First Rucho Aff. Ex. 8, pp. 1-7])

(i) The following counties in the 2011 HD 21 were analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting: Duplin, Sampson, Wayne. (DX 3033, pp. 1-14)

(j) The following counties in the 2011 HD 21 were included in majority black or coalition districts in plans proposed by SCSJ and Democratic leaders in 2011:

SCSJ CD 1: Wayne

F&L CD 1: Wayne
SCSJ HD 21: Duplin, Sampson, Wayne
F&L HD 21: Sampson, Wayne
LBC HD 21: Sampson, Wayne

(DX 3000-3002 [Historical Map Notebooks: SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House]; DX 3018-41, 3018-42, 3018-43 [Second Frey Aff. Exs. 41-43])

(k) From 2004 through 2008, there were no contested general elections in House District 21. In 2010, African American Democrat Larry Bell defeated his Republican opponent 11,678 to 6,126 (+5,552). The population deviation for this district under the 2010 Census was (-9,837). Rep. Bell's margin of victory in the 2010 election was less than the population deviation for this district. (DX 3016, 3016-3 [Churchill Aff. ¶¶ 1-7, Ex. 3])

(l) In this 2010 election cycle, Rep. Bell raised \$23,671 and spent \$27,906. His Republican opponent raised and spent \$1,732. (DX 3016, 3016-3 [Churchill Aff. ¶¶ 1-7, Ex. 3])

(m) At the beginning of the 2011 session, Rep. Bell had been elected to six terms in the State House. (DX 3016, 3016-5[Churchill Aff. ¶ 8, Ex. 5])

158. House District 48

(a) The 2003 version of HD 48 was located in a three county group of Hoke, Robeson and Scotland. Three districts were in this group. The 2003 HD 48 was located in portions of Robeson, Scotland and Hoke, wrapping around HD 47. The APBVAP for this district was 45.56%. The non-Hispanic white VAP was only 29.63%. If the Hispanic VAP for the district is discounted, its VAP is majority black. African Americans were

50.80% of all registered voters. Democrats were 74.93% of all registered voters and African Americans were 59.81% of all registered Democrats. Under the 2010 Census the population was 66,444 as compared to the ideal of 79,462. Thus, the 2011 HD 48 was underpopulated by -13,018 or -16.38%. (DX 3018-15, 3018-39, 3018-49 [Second Frey Aff. Exs. 15, 39, 49]; DX 3001 [Historical House Maps, Tab 8];DX 3116)

(b) The 2011 SCSJ HD 48 was located in a 46 county group with 37 districts. The 2011 SCSJ HD 48 was located in portions of Robeson, Scotland, and Hoke. The APBVAP was 45.90%. The non-Hispanic white VAP was 29.90%. African Americans were 49.73% of registered voters. Democrats were 73.54% of all registered voters and African Americans were 58.82% of all registered Democrats. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-15, 3018-41, 3018-51 [Second Frey Aff. Ex. 15, 41, 51]; DX 3001 [Historical House Maps, Tab 9])

(c) The 2011 enacted HD 48 is located in a 20 county group. The 2011 HD 48 is located in portions of Robeson, Scotland, Hoke and Richmond Counties. Because of the excess population in its county group, the 2011 HD 48 has a population of 83,406 or +4.96 as compared to ideal. All of the 2011 alternative versions of HD 48 have much lower populations: SCSJ 48 (77,858 or -2.02 as compared to ideal); F&L 48 (75,502 or -4.98 as compared to ideal); LBC 48 (79,595 or +0.17 as compared to ideal). The relatively higher population of the 2011 HD 48 required that its district lines be stretched to a greater length as compared to the alternatives, none of which were located in a lawful county groups or the county group in which the 2011 HD 48 was located. (Tr. Vol. IV,

pp. 241:8-244:28; Tr. Vol. V, pp. 15:1-20:19) DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15 [Second Frey Aff. Ex. 15])

(d) The APBVAP of the 2011 HD 48 was 50.80%. The Reock score for this district was 0.23. This is higher than the benchmark cited by Pilder and Niemi (0.15). The Reock scores for the alternative versions of HD 48 are similar: LBC (0.19); F&L (0.21); SCSJ (0.26). The SCSJ House Plan has five districts with Reock scores of 0.22 or lower. The F&L Plan has four districts with Reock scores of 0.21 or lower. The LBC House Plan has six districts with Reock scores of 0.22 or lower. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-33, 3018-40, 3018-50 [Second Frey Aff. Exs. 15, 33, 40, 50]; DX 3001 [Historical House Maps, Tab 15])

(e) For the 2011 HD 48, 75.49% of the district's black VAP comes from an exemplar House district.

(f) Only the LBC HD 48 is located in the same portions of the same counties as the 2011 HD 48. Neither the 2003 version nor any of the 2011 alternatives are located in the same county group as the 2011 HD 48. Notwithstanding the holding in *Pender County*, none of the 2011 alternative versions of HD 48 have an APBVAP in excess of 50%, and illegally traverse county lines within a county group.

(g) The following counties in the 2011 HD 48 were part of a 2001/2003/2009 majority black or majority-minority district:

2009 HD 48: Hoke, Robeson, Scotland

(DX 3000, 3001 [Map Notebook, 2009 House Map]; DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-39 [Second Frey Aff. Ex. 39])

(h) Hoke, Robeson, and Scotland Counties were covered by Section 5. (JX 1012, p. 6)

(i) The following counties in the 2011 HD 48 were included in Dr. Block's analysis of district elections from 2006-10 showing the presence of significant racially polarized voting:

2010 HD 48: Hoke, Robeson, Scotland

(DX 3013-8 [First Rucho Aff. Ex. 8, pp. 1-7])

(j) The following counties in the 2011 HD 48 were analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting: Hoke, Richmond, Robeson, Scotland. (DX 3033, pp. 1-14)

(k) The following counties in the 2011 HD 48 included in majority black or coalition districts in plans proposed by SCSJ and Democratic leaders in 2011:

SCSJ HD 48: Hoke, Robeson, Scotland

F&L HD 48: Hoke, Robeson, Scotland

LBC HD 48: Hoke, Richmond, Robeson, Scotland

(DX 3000-3002 [Historical Map Notebooks: SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House]; DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-41, 3018-42, 3018-43 [Second Frey Aff. Exs. 41-43])

(l) There were no contested general elections in this district in 2004, 2006, and 2008. In 2010, African American Democrat Garland Pierce defeated his Republican opponent 9,698 to 3,267 (+6,431). The population deviation for this district (-13,018) exceeds Rep. Pierce's margin of victory for the 2010 general election. (DX 3016, 3016-3 [Churchill Aff. ¶¶ 1-7, Ex. 3])

(m) In the 2010 general election, Rep. Pierce raised \$46,557 and spent \$44,607. His Republican opponent raised \$2,982 and spent \$2,978. (DX 3016, 3016-3 [Churchill Aff. ¶¶ 1-7, Ex. 3])

(n) At the beginning of the 2011 session, Rep. Pierce had served four terms in the State House. (DX 3016, 3016-5 [Churchill Aff. ¶ 8, Ex. 5])

(o) The only plaintiff residing in HD 48, La'Tanta McCrimmon, resides in a precinct that is wholly contained within HD 48.

F. Durham County House Districts

159. In the 2003 House Plan, Durham County contained two districts (HD 29 and HD 31) that were coalition districts. The 2011 SCSJ House Plan proposed that HD 29 be re-created as a coalition district and that HD 31 should be majority black. Both the F&L and LBC House Plans proposed that both districts be re-established as coalition districts. The 2011 House Plan created both of these districts with a majority black VAP.

160. House District 29.

(a) The 2003 version of HD 29 was located in a two-county group of Durham and Person. There were four districts in this group. The 2003 HD 29 was located in a portion of Durham. The APBVAP of this district was 39.99%. The non-Hispanic white VAP was 46.05%. If the Hispanic VAP for the district is discounted, its black VAP is 46.48%. African Americans were 40.39% of all registered voters. Democrats were 63.25% of all registered voters and African Americans were 69.55% of all registered Democrats. Under the 2010 Census, the 2003 HD 29 had a population of 70,046 as compared to the ideal of 79,462. Thus, the 2003 HD 29 was underpopulated by -9,416 (-

11.85%). (DX 3017-11 [Frey Ex. 11]; DX 3018-15, 3018-39, 3018-49 [Second Frey Exs. 15, 39, 49]; DX 3001 [Historical House Maps, Tab 8]; DX 3116)

(b) The 2011 SCSJ HD 29 was located in a two-county combination of Durham and Orange. There were 4 districts in this group. The 2011 SCSJ HD 29 was located in a portion of Durham County. The APBVAP for the 2011 SCSJ HD 29 was 38.88%. The non-Hispanic white VAP was 45.85%. African Americans were 39.50% of all registered voters. Democrats were 61.25% of all registered voters and African Americans were 55.76% of all registered Democrats. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-41, 3018-51 [Second Frey Aff. Ex. 15, 41, 51]; DX 3001 [Historical House Maps, Tab 9])

(c) The 2011 enacted HD 29 is located in a two-county group of Durham and Orange. The 2011 HD 29 is located in a portion of Durham County. The APBVAP for this district was 51.34%. The Reock score for the 2011 HD 29 is 0.47, which is higher than the Reock scores for all of the 2011 alternatives. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-33, 3018-40, 3018-50 [Second Frey Aff. Exs. 15, 33, 40, 50]; DX 3001 [Historical House Maps, Tab 15])

(d) For the 2011 HD 29, 85.77% of its APBVAP comes from an exemplar House District. (DX 3029 [First Hofeller Decl. Table 1])

(e) The 2011 F&L HD 29 is located in a four-county group of Durham, Granville, Person and Vance. There are 5 districts in this group. The 2011 F&L HD 29 is located in a portion of Durham County. It has an APBVAP of 42.51% and a non-Hispanic white VAP of 41.70%. African Americans are 43.89% of all registered voters.

Democrats are 63.33% of all registered voters and African Americans are 60.06% of all registered Democrats. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-42, 3018-52 [Second Frey Aff. Exs 15, 42, 52]; DX 3001 [Historical House Maps, Tab 12])

(f) The 2011 LBC HD 29 is located in a two-county group of Durham and Person. There are 4 districts in this group. The 2011 LBC HD 29 has an APBVAP of 44.48%. The non-Hispanic white VAP is 37.83%. African Americans were 45.93% of all registered voters. Democrats were 64.30% of all registered voters and African Americans were 61.97% of all registered Democrats. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-43, 3018-53 [Second Frey Aff. Exs. 15, 43, 53]; DX 3001 [Historical House Maps, Tab 13])

(g) Durham County was included in Dr. Block's analysis of district elections from 2006-10 showing the presence of significant racially polarized voting:

2008 SD 20: Durham
2009 HD 29: Durham
2010 SD 20: Durham
2010 HD 31: Durham

(DX 3013-8 [First Rucho Aff. Ex. 8, pp. 1-7])

(h) Durham County was analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting. (DX 3033, pp. 1-14)

(i) Durham County was included in majority black or coalition districts in plans proposed by SCSJ and Democratic leaders in 2011:

SCSJ SD 20: Durham
F&L SD 20: Durham
LBC SD 20: Durham
SCSJ HD 29: Durham

SCSJ HD 31: Durham
F&L HD 29: Durham
F&L HD 31 Durham
LBC HD 29: Durham
LBC HD 31 Durham

(DX 3000-3002 [Historical Map Notebooks: SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House]; DX 3017-10, 3017-11 [First Frey Aff. Exs. 10, 11]; DX 3018-36, 3018-37, 3018-38, 3018-41, 3018-42, 3018-43 [Second Frey Aff. Exs. 36-38, 41-43])

(j) In 2008, the African American candidate, Larry Hall, defeated a Libertarian in the general election 31,524 to 3,219 (+28,305). Rep. Hall had no Republican opponent in 2008. There were no contested general elections in this district in 2004, 2006, or 2010. (DX 3016, 3016-3 [Churchill Aff. ¶¶ 1-7, Ex. 3])

(k) In the 2008 general election, Rep. Hall raised \$29,595 and spent \$22,931. The Libertarian candidate did not file any campaign disclosure reports. (DX 3016, 3016-3 [Churchill Aff. ¶¶ 1-7, Ex. 3])

(l) At the beginning of the 2011 session, Rep. Hall had been elected to three terms in the state House. (DX 3016, 3016-5 [Churchill Aff. ¶ 8, Ex. 5])

(m) Both of the plaintiffs residing in HD 29, DeDreana Freeman and Milo Pyne, reside in precincts that are contained wholly within HD 29.

161. House District 31

(a) The 2003 HD 31 was located in a two-county group of Durham and Person. There were 4 districts in this group. The 2003 HD 31 was located in a portion of Durham County. The APBVAP for the district was 47.23%. The non-Hispanic white VAP was 35.47%. If the Hispanic VAP for the district is discounted, its VAP is majority black.

African Americans were 52.13% of all registered voters. Democrats were 64.65% of all registered voters and African Americans were 69.54% of registered Democrats. Under the 2010 Census, the 2003 HD 31 had a population of 91,274 as compared to the ideal of 79,462. As a result, the 2003 HD 31 was overpopulated by 11,812 (+14.86%). (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-39, 3018-49 [Second Frey Aff. Exs. 15, 39, 49]; DX 3001 [Historical House Maps, Tab 8]; DX 3116)

(b) The 2011 SCSJ HD 31 was located in a two-county group of Durham and Person. There were 4 districts in this group. The 2011 SCSJ HD 31 was located in a portion of Durham County. The APBVAP for this district was 51.69%. The non-Hispanic white VAP was 30.13%. African Americans were 58.13% of registered Democrats. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-41, 3018-51 [Second Frey Aff. Exs. 15, 41, 51]; DX 3001 [Historical House Maps, Tab 9])

(c) The 2011 enacted HD 31 is located in a two-county group of Orange and Durham. There are 5 districts in this group. The 2011 HD 31 is located in a portion of Durham. The APBVAP for the district is 51.81% or only 0.12% higher than the SCSJ HD 31. The Reock score for the 2011 HD 31 is 0.33. The SCSJ Plan has eight districts with a Reock score of 0.33 or lower. The F&L House Plan has ten districts with a Reock score of 0.32 or lower. The LBC House Plan has ten districts with a Reock score of 0.32 or lower. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-33, 3018-40, 3018-50 [Second Frey Aff. Exs. 15, 33, 40, 50]; DX 3001 [Historical House Maps, Tab 15])

(d) For the 2011 HD 31, 97.45% of its APBVAP comes from a House exemplar district. (DX 3029 [First Hofeller Decl., Table 1])

(e) The 2011 F&L HD 31 is located in a four-county group of Durham, Granville, Person, and Vance. There are five districts in this group. The F&L HD 31 is located in a portion of Durham County. The APBVAP for this district is 48.60%. The non-Hispanic white VAP is 35.73%. African Americans are 52.81% of all registered voters. Democrats are 65.01% of all registered voters and African Americans are 70.49% of all registered Democrats. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-14, 3018-42, 3018-52 [Second Frey Aff. Exs. 14, 42, 52]; DX 3001 [Historical House Maps, Tab 12])

(f) The 2011 LBC HD 31 is located in a two-county group of Durham and Person. Four districts are in this group. The 2011 LBC 31 is located in a portion of Durham. The APBVAP for this district is 47.67%. Non-Hispanic white VAP is 34.97%. African Americans are 52.70% of all registered voters. Democrats are 64.96% of all registered voters and African Americans are 70.26% of all registered Democrats. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-43, 3018-53 [Second Frey Aff. Exs. 15, 43, 53]; DX 3001 [Historical House Maps, Tab 13])

(g) Durham County was part of a 2001/2003/2009 majority black or coalition district:

2003 SD 20: Durham
2009 HD 29: Durham
2009 HD 31: Durham

(DX 3000, 3001 [Map Notebook, 2003 Senate Plan and 2009 House Plan]; DX 3017-10, 3017-11 [First Frey Aff. Exs. 10,11]; DX 3018-34, 3018-39 [Second Frey Aff. Exs. 34, 39])

(h) Durham County was included in Dr. Block's analysis of district elections from 2006-10 finding the presence of significant racially polarized voting:

2008 SD 20: Durham
2009 HD 29: Durham
2010 SD 20: Durham
2010 HD 31: Durham

(DX 3013-8 [First Rucho Aff. Ex. 8, pp. 1-7])

(i) Durham County was analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting.

(DX 3033, pp. 1-16)

(j) Durham County was included in majority black or coalition districts in plans proposed by SCSJ and Democratic leaders in 2011:

SCSJ SD 20: Durham
F&L SD 20: Durham
LBC SD 20: Durham
SCSJ HD 29: Durham
SCSJ HD 31: Durham
F&L HD 29: Durham
F&L HD 31: Durham
LBC HD 29: Durham
LBC HD 31: Durham

(DX 3000-3002 [Historical Map Notebooks: SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House]; DX 3017-10, 3017-11 [First Frey Aff. Exs. 10, 11]; DX 3018-36, 3018-37, 3018-38, 3018-41, 3018-42, 3018-43 [Second Frey Aff. Exs. 36-38, 41-43])

(k) The Democratic African American candidate from this district faced opposition in the general election only in 2004 and 2010. In 2004, the African American candidate, H.M. ("Mickey") Michaux defeated a Libertarian candidate 23,313 to 3,802 (+19,511). In 2010, Rep. Michaux defeated a Republican candidate 18,801 to 6,102

(+12,699). The population deviation for this district under the 2010 Census was +11,812, or only 887 persons fewer than Rep. Michaux's margin of victory in 2010. (DX 3016, 3016-3 [Churchill Aff. ¶¶ 1-7, Ex. 3])

(l) In the 2004 election cycle, Rep. Michaux raised \$5,500 and spent \$5,940. His Libertarian opponent did not file campaign finance reports. In 2010, Rep. Michaux raised \$34,600 and spent \$10,564. His Republican opponent raised \$1,828 and spent \$1,798. (DX 3016, 3016-3 [Churchill Aff. ¶¶ 1-7, Ex. 3])

(m) At the beginning of the 2011 session, Rep. Michaux had served 16.5 terms in the state House. (DX 3016, 3016-5 [Churchill Aff. ¶ 8, Ex. 5])

(n) The only plaintiff residing in HD 31, Bryan Perlmutter, resides in precinct that is wholly contained within HD 31.

G. Wake County House Districts

162. In the 2003 House Plan, HD 33 was majority black. All 2011 House alternatives (SCSJ, F&L, LBC) proposed that HD 33 be reestablished as a majority black district. The 2011 House plan established two districts, HD 33 and HD 38, as majority black districts. It is irrational to conclude that conditions in Wake County support the creation of one majority black district but that a second majority black district located adjacent to the first would constitute a racial gerrymander.

163. House Districts 33 and 38

(a) The 2003 House District 33 was located in a single-county group of Wake County. There were 9 districts in this group. Under the 2010 Census, the APBVAP for this district was 51.74% black. African Americans were 56.85% of all registered voters.

The population was 94,755 as compared to the ideal of 79,462. Thus, the 2003 HD 33 was overpopulated by 15,293 (+19.25%). (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-39, 3018-49 [Second Frey Aff. Exs. 15, 39, 49]; DX 3001 [Historical House Maps, Tab 8])

(b) The 2011 SCSJ HD 33 was included in a single-county group of Wake County. Eleven districts were in this group. The APBVAP for this abstract was 56.45%, or 4.71% higher than the 2003 HD 33. African Americans were 61.73% of all registered voters or 4.88% higher than the 2003 HD 33. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-41, 3018-51 [Second Frey Aff. Exs. 15, 41, 51]; DX 3001 [Historical House Maps, Tab 9])

(c) The 2011 enacted HD 33 is located in a one-county group of Wake County. There are eleven districts in this group. The APBVAP for this district is 51.42%, or 0.32% lower than the 2003 HD 33. The Reock score of the 2011 HD 33 is 0.47. The Reock scores for all 2011 alternative versions of HD 33 are: SCSJ 33 (0.51); F&L HD 33 (0.24); LBC HD 33 (0.32). (DX 3018-15, 3018-33, 3018-40, 3018-50 [Second Frey Aff. Exs. 15, 33, 40, 50]; DX 3001 [Historical House Maps, Tab 15])

(d) For the 2011 HD 33, 91.98% of its APBVAP comes from a House exemplar district. (DX 3029 [First Hofeller Decl, Table 1])

(e) The 2011 enacted HD 38 is also located in Wake County. The APBVAP for this district is 51.37%, or 0.37% lower than the 2003 HD 33. The Reock score for this district is 0.31, or the same score measured by the 1997 CD 1 as reported in *Cromartie II*. Under the SCSJ House Plan, 18 districts have a Reock score of 0.31 or

lower. The Reock score for the 2011 HD 38 is higher than the score for F&L HD 33 and almost identical to the Reock score for LBC HD 33. The SCSJ House Plan has 20 districts with a Reock score of 0.31 or lower. The F&L House Plan has 21 districts with a Reock score of 0.31 or lower. The LBC Plan has 18 districts with a Reock score of 0.31 or lower. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-33, 3018-40, 3018-50 [Second Frey Aff. Exs. 15, 33, 40, 50]; DX 3001 [Historical House Maps, Tab 15])

(f) For the 2011 HD 38, 97.52% of its APBVAP comes from a House exemplar district. (DX 3029 [First Hofeller Decl, Table 1])

(g) The 2011 F&L HD 33 is included in a one-county group of Wake County. There are eleven districts in this group. The F&L HD 33 has an APBVAP of 52.42% which is 0.68% higher than the 2003 HD 33. African Americans were 58.73% of all registered voters. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-42, 3018-52 [Second Frey Aff. Exs. 15, 42, 52]; DX 3001 [Historical House Maps, Tab 12])

(h) The 2011 LBC HD 33 is located in a single-county group of Wake County. Eleven districts are in this group. The APBVAP for this district was 50.66%. African Americans were 55.44% of all registered voters. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-43, 3018-53 [Second Frey Aff. Exs. 15, 43, 53]; DX 3001 [Historical House Maps, Tab 13])

(i) Wake County was one of the counties in which Section 2 liability was found in *Gingles*. (See D.E. 32-1, F.F. No. 1)

(j) Wake County was part of 2001/2003/2009 majority black or coalition district.

2003 Senate District 14: Wake
2009 House District 33: Wake

(DX 3000, 3001 [Map Notebook, 2003 Senate Plan; 2009 House Plan]; DX 3017-10, 3017-11 [First Frey Aff. Exs. 10, 11]; DX 3018-34, 3018-39 [Second Frey Aff. Exs. 34, 39])

(k) Wake County was included in Dr. Block's analysis of district elections from 2006-2010 finding the presence of significant racially polarized voting:

2008-2010 SD 14: Wake
2008 HD 33: Wake

(DX 3013-8 [First Rucho Aff. Ex. 8, pp. 1-7])

(l) Wake County was analyzed by Dr. Brunell and confirmed as continuing to experience racially polarized voting. (DX 3033, pp. 10-14)

(m) Wake County was included in majority black or coalition districts in plans proposed by SCSJ or Democratic leaders in 2011:

SCSJ SD 14: Wake
F&L SD 14: Wake
LBC SD 14: Wake
SCSJ HD 33: Wake
F&L HD 33: Wake
LBC HD 33: Wake

(DX 3000-3002 [Historical Map Notebooks: SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House]; DX 3017-10, 3017-11 [First Frey Aff. Exs. 10, 11]; DX 3018-36, 3017-37, 3018-38, 3018-41, 3018-42, 3018-43 [Second Frey Aff. Exs. 36-38; 41-43])

(n) Wake County contains a majority black Superior Court district in the recently enacted Superior Court Plan.

(See http://www.wakegov.com/gis/services/Documents/SuperiorCourt_24x24.pdf; N.C. Gen. Stat. §§ 7A-41(b)(3)-(6b))

(o) In the 2010 General Election, in HD 33, African American Democratic candidate Rosa Gill defeated white Republican candidate Paul Terrell 18,426 to 5,262, or a margin of victory of 13,164. Under the 2010 Census, the 2003 HD 33 was overpopulated by 15,293. Thus, Rep. Gill's margin of victory in the 2010 General Election was less than the amount by which the 2003 HD 33 was overpopulated. (DX 3020-3 [*Covington*, Churchill Decl., Ex. 3])

(p) In the 2010 General Election, Rep. Gill raised \$62,506 and spent \$61,054. Her Republican opponent raised \$3,395 and spent \$4,045.

(q) Under the 2010 Census, the 2003 version of HD 38 had an APBVAP of 27.96%. African Americans were 31.79% of all registered voters. Democrats were 53.33% of all registered voters and African Americans were 50.56% of registered Democrats. (DX 3001 [Historical House Maps, Tab 8, pp. 5, 9]) In the 2006 Democratic primary, white Democrat Deborah Ross defeated African American Democrat Demion Dellinger. Ross was not challenged in any other Democratic primary from 2004 through 2010 and was elected in the general elections for this district from 2004 through 2010. (DX 3020-3 [*Covington*, Churchill Decl., Ex. 3]; DX 3018-39 [Second Frey Aff. Ex. 39])

(r) In the 2012 and 2014 General Elections, African American Democratic candidate Yvonne Lewis Holley was elected in each election for the 2011 HD 38. (DX 3020-14)

(s) The only plaintiff residing in HD 38, John Verdejo, resides in a precinct that is wholly contained within HD 38.

H. Guilford County

164. The 2003 House Plan included two majority black districts in Guilford County, HD 58 and HD 60. All 2011 alternative house plans proposed that each of these districts be maintained as majority black districts. The 2011 House Plan enacted HD 58 and HD 60 as majority black districts with APBVAP at lower percentages than the 2003 HD 58 and 60 and all alternative 2011 versions of HD 50 and 60. The 2011 House Plan also includes a third majority plan house district, HD 57, with an APBVAP that is lower than the 2003 HD 58 and HD 60 and all of the 2011 alternative versions of HD 58 and HD 60. Despite these facts, plaintiffs challenge all three enacted Guilford County House districts as illegal racial gerrymanders.

165. House Districts 57, 58, and 60

(a) The 2003 versions of HD 58 and HD 60 were located in a single-county group of Guilford County. There were 6 districts in this group. HD 58 had an APBVAP of 53.43%. African Americans were 56.71% of all registered voters. Under the 2010 Census, this district was overpopulated only by 4.63%. The 2003 HD 60 had an APBVAP of 54.36%. African Americans were 57.50% of all registered voters. This district was underpopulated by -11.48% (-9,123). (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-39, 3018-49 [Second Frey Aff. Exs. 15, 39, 49]; DX 3001 [Historical House Maps, Tab 8])

(b) The 2011 SCSJ HD 58 and 60 were located in a single-county group of Guilford. Six districts were in this group. The SCSJ HD 58 had an APBVAP of 53.47% which was 0.04% higher than the 2003 HD 58. African Americans were 57.31% of all registered voters. The SCSJ HD 60 had an APBVAP of 54.41% which was 0.05% higher than the 2003 HE 60. African Americans were 56.73% of all registered voters. The F&L HD 58 and HD 60 were identical to the SCSJ HD 58 and HD 60. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-41, 3018-42, 3018-51, 3018-52 [Second Frey Aff. Exs. 15, 41, 42, 51, 52]; DX 3001 [Historical House Maps, Tabs 9, 12])

(c) The enacted 2011 HD 58 and HD 60 are included in a one-county group of Guilford County. Six districts are in that group. The 2011 HD 58 has an APBVAP of 51.11% which is 2.32% lower than the 2003 HD 58. The Reock score for this district is 0.38. The 2011 HD 60 has an APBVAP of 51.36% which is 3.0% lower than the 2003 HD 60. The Reock score for this district is 0.22, which is higher than the benchmark for low compactness cited by Phildes and Niemi (0.15). This compares to the Reock score for F&L HD 33 in Wake County (0.24). The SCSJ House Plan has 5 districts with a Reock score of 0.22 or lower. The F&L House Plan has four districts with a Reock score of 0.22 or lower. The LBC Plan has six districts with a Reock score of 0.22 or lower. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-14, 3018-32, 3018-40, 3018-50 [Second Frey Aff. Exs. 14, 32, 40, 50]; DX 3001 [Historical House Maps, Tab 15])

(d) The 2011 House plan added a third majority black House District to Guilford County – HD 57. The 2011 HE 57 has an APBVAP of 50.69% which is 2.74% lower than the 2003 HD 58 and 3.67% lower than the 2003 HD 60. The Reock score for

this district is 0.39. The Reock score for the 2011 HD 57 is higher than the Reock score for the SCSJ HD 60 (0.32) and the LBC HD 60 (0.38). (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-33 [Second Frey Aff. Ex. 33]; DX 3001 [Historical House Maps, Tab 15])

(e) For the 2011 HD 57, 89.49% of all APBVAP comes from a House exemplar district. For the 2011 HD 58, 96.47% of its APBVAP comes from a house exemplar district. For the 2011 HD 60, 99.52% of its APBVAP comes from a house exemplar district. (DX 3029 [First Hofeller Decl., Table 1])

(f) The 2011 LBC HD 58 and 68 were from a one-county group of Guilford County. Six districts were in that group. LBC HD 58 was drawn with an APBVAP of 54.00% and African Americans were 57.26% of all registered voters. LBC HD 60 was drawn with black VAP of 50.43% and African Americans constituted 54.63% of all registered voters. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-42, 3018-52 [Second Frey Aff. Exs. 15, 42, 52]; DX 3001 [Historical House Maps, Tab 13])

(g) Guilford County was part of a 2001/2003/2009 majority black or coalition district:

2001 CD 12: Guilford
2003 SD 28: Guilford
2009 HD 58: Guilford
2009 HD 60: Guilford

(DX 3000, 3001 [Map Notebook, Congress Zero Deviation, 2003 Senate; 2009 House]; DX 3017-10, 3017-11 [First Frey Aff. Exs. 10, 11]; DX 3018-34, 3018-39 [Second Frey Aff. Exs. 34, 39])

(h) Guilford County was covered by Section 5. (JX 1012, p. 6)

(i) Guilford County was included in Dr. Block's analysis of district elections from 2006-2010 showing the presence of significant racially polarized voting:

2010 HD 60: Guilford
2008 CD 12: Guilford
2010 CD 12: Guilford
2010 SD 28: Guilford
2010 HD 58: Guilford
2010 HD 60: Guilford

(DX 3013-8 [First Rucho Aff. Ex. 8, pp. 1-8])

(j) Guilford County was analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting. (DX 3033, pp. 1-14, 19, 20)

(k) Guilford County was included in majority black or coalition districts in plans proposed by SCSJ and Democratic leaders in 2011:

SCSJ CD 12: Guilford
F&L CD 12: Guilford
SCSJ SD 28: Guilford
F&L SD 28: Guilford
LBC SD 28: Guilford
SCSJ HD 58: Guilford
F&L HD 58: Guilford
LBC HD 58: Guilford
SCSJ HD 60: Guilford
F&L HD 60: Guilford
LBC HD 60: Guilford

(DX 3000-3002 [Historical Map Notebooks: SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House]; DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-36, 3018-37, 3018-38, 3018-41, 3018-42, 3018-43 [Second Frey Aff. Exs. 36-38, 41-43])

(l) Under the 2010 Census, the 2003 HD 60 was underpopulated by -9,123 (-11.48%). The African American Democratic candidate for HD 60 was unopposed in

2004 and 2008. In 2006, African American Democrat Earl Jones defeated white Republican Bill Wright by 2,132 votes. In 2010, African American Democrat Marcus Brandon defeated white Republican Lonnie Wilson by 6,018 votes. Thus, the margin of victory for the African American Democratic candidate in both the 2006 and 2010 general elections was less than the amount this district was underpopulated. (DX 3020-3 [*Covington*, Churchill Decl., Ex. 3])

(m) In the 2010 general election, the winning African American Democratic candidate for HD 60, Marcus Brandon, raised \$60,812 and spent \$59,353. His unsuccessful white Republican opponent, Lonnie Wilson, raised and spent \$857. (DX 3020-3 [*Covington*, Churchill Decl., Ex. 3])

I. Mecklenburg County

166. Under the 2003 House Plan, Mecklenburg County had one majority black district and five coalition districts in which non-Hispanic whites were a minority of the population. From 2006 through 2010, only three African American candidates were elected from these six districts. During the 2011 redistricting process, the SCSJ proposed that two majority black districts (HD 101 and 107) and four coalition districts be located in Mecklenburg County.²⁴ The F&L plan proposed one majority black district (HD 101) and four coalition districts. The LBC plan proposed one majority black district (HD 101) and five coalition districts. The 2011 enacted House plan established five majority black

²⁴ The SCSJ also proposed two majority black Senate districts for Mecklenburg County (SD 38 and SD 40) which, based upon the ideal population for senate and house districts, is equivalent to five majority black house districts.

districts in Mecklenburg County: HDs 99, 101, 102, 106, and 107. Plaintiffs have only challenged three of the 2011 majority black districts: HD 99, 102, and 107.²⁵

(a) Under the 2003 House plan, Mecklenburg County was a one-county group with 10 districts. Only one of these districts was majority black: HD 101 (55.73% APBVAP). HD 99 was 41.26% APBVAP with a non-Hispanic white VAP of 39.41%. HD 100 had an APBVAP of 37.39% but a non-Hispanic white VAP of only 36.63%. HD 102 had an APBVAP of 42.79% but a non-Hispanic white VAP of only 39.98%. HD 106 had an APBVAP of only 28.16% and a non-Hispanic white VAP of 48.54%. Finally, HD 107 had an APBVAP of 47.14% and a non-Hispanic white VAP of 37.30%. If the Hispanic VAP is discounted for HD 99, 100, 102, and 107, the VAP for all of these districts is majority black. African Americans were a majority of registered voters only in HD 101. In all four of the other districts (HD 99, 100, 102, and 107), Democrats were a majority of registered voters and African Americans were a majority of registered Democrats. In HD 106, African Americans were a majority of registered Democrats. Democrats were 48.01% of registered voters. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-39, 3018-49 [Second Frey Aff. Exs. 15, 39, 49]; DX 3001 [Historical House Maps, Tab 8, pp. 7, 11 (HD 106)]; DX 3116)

²⁵ Under the 2003 House Plan, HD 101 was majority black district that had regularly elected a black Democrat. HD 106 was a coalition district that had regularly elected a white Democrat. (DX 3018-39 [Second Frey Aff. Ex. 39]) In the 2012 and 2014 general elections, black candidates were elected in both the 2011 HD 101 and the 2011 HD 106. (DX 3020-14 [Covington, Churchill Decl., Ex. 14]) There are no significant differences between these two unchallenged 2011 majority black districts versus the three Mecklenburg districts which plaintiffs challenge.

(b) From 2006 through 2010, African American candidates were only elected in HD 101 and 107. African American candidates were elected in HD 99 in 2008 and 2010. White Democratic candidates were elected from 2006 through 2010 in HD 100, 102, and 106. (DX 3018-39 [Second Frey Aff. Ex. 39]) From 2004 through 2010, no African American Democrat ran in the Democratic primary for HD 100. In HD 102, white incumbent Democrat Becky Carney defeated both a white and an African American candidate in the Democratic primary. In HD 106, the incumbent white Democrat faced no African American Democratic challengers from 2004 through 2010. (DX 3020-3 [*Covington*, Churchill Decl., Ex. 3]; DX 3018-39 [Second Frey Aff. Ex. 39])

(c) Under the 2010 Census, HD 99 was overpopulated by 32,850 (+41.34%). In the 2008 general election, African American Democratic candidate Nick Maskey won by 13,181 votes. In the 2010 general election, African American Democratic candidate Rodney Moore won by 9,532 votes. Thus, the margin of victory for the African American Democratic candidate in 2008 and 2010 was substantially less than the amount by which this district was underpopulated. (DX 3020-3 [*Covington*, Churchill Decl., Ex. 3])

(d) Under the 2010 Census, HD 107 was overpopulated by 13,998 (+17.12%). In the 2004 general election, African American Democratic candidate Pete Cunningham defeated his white Republican opponent Kenny Houck by 8,971 votes. In 2006, Cunningham ran unopposed and received a total of 7,826 votes. In the 2010 General Election, incumbent African American Democratic candidate Kelly Alexander defeated the white Republican candidate by 6,740 votes. Thus, the margin of victory for the

successful African American candidate in 2004 and 2010 general elections as well as the total votes received by the unopposed African American candidate in 2006 was less than the amount by which this district was overpopulated. (DX 3020-3 [*Covington*, Churchill Decl., Ex. 3])

167. The 2011 SCSJ House Plan included two majority black house districts and four coalition districts in which the non-Hispanic white VAP was 44.65% or less. SCSJ HD 101 had an APBVAP of 57.28%. SCSJ HD 107 had an APBVAP of 56.43%. The SCSJ HD 99 had an APBVAP of 41.75% and a non-Hispanic white VAP of 31.59%. The SCSJ HD 100 had an APBVAP of 41.75% and a non-Hispanic white VAP of 31.88%. SCSJ HD 102 had an APBVAP of 44.98% and a non-Hispanic white VAP of 44.65%. Finally, SCSJ HD 106 had an APBVAP of 30.41% and a non-Hispanic white VAP of only 28.69%. In SCSJ HD 99, 100, and 102, Democrats were the majority of registered voters and African Americans were the majority of registered Democrats. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-41, 3018-51 [Second Frey Aff. Exs. 15, 41, 51]; DX 3001 [Historical House Maps, Tab 8])

168. The 2011 enacted House Plan included five majority black districts: HD 99, 101, 102, 106, and 107. Two of these districts, HDs 101 and 106, are not challenged by the plaintiffs. Both HD 101 and HD 106 have elected African American Democratic candidates in the 2012 and 2014 general elections. From 2006 through 2010, a white Democrat has been elected in the 2003 HD 106. (DX 3020-14 [*Covington*, Churchill Decl., Ex. 14]; DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-33, 3018-40 [Second Frey Aff. Exs. 15, 33, 40]; DX 3001 [Historical House Maps, Tab 15])

(a) The black VAP of the 2011 enacted HD 99 was 54.65%. The percentage of black VAP for the 2011 HD 99 is lower than the percentage of black VAP proposed by the SCSJ House Plan for the SCSJ HD 101 (57.28%) and the SCSJ HD 107 (56.43%). The Reock score for the 2011 HD 99 is 0.48. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-33, 3018-40 [Second Frey Aff. Ex. Exs. 15, 33, 40]) For the 2011 HD 99, 96.14% of its APBVAP comes from a House exemplar district. (DX 3029 [First Hofeller Decl., Table 1])

(b) The 2011 enacted HD 102 has a black VAP of 53.33%. This is lower than the black VAP proposed by the SCSJ House Plan for SCSJ HD 101 (57.28%) and SCSJ HD 107 (56.43%). The Reock score for the 2011 HD 102 is 0.32. By comparison, the Reock score for the F&L HD 101 was 0.28. The Reock score for the SCSJ HD 107 is 0.31. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-33, 3018-40 [Second Frey Aff. Ex. Exs. 15, 33, 40]) For the 2011 HD 102, 96.64% of its APBVAP comes from a House exemplar district. (DX 3029 [First Hofeller Decl., Table 1])

(c) The 2011 enacted HD 107 has a black VAP of 52.52%. This is lower than the black VAP proposed for the SCSJ HD 101 (57.28%) and the SCSJ HD 107 (56.42%). It is only 0.11% higher than the black VAP proposed for the F&L HD 101. The Reock score for the 2011 HD 107 is 0.35. By way of comparison, the Reock score for the SCSJ HD 107 is 0.31. The Reock score for the F&L HD 101 is 0.28. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-33, 3018-40 [Second Frey Aff. Ex. Exs. 15, 33, 40]) For the 2011 HD 107, 71.47% of its APBVAP comes from a House exemplar district. (DX 3029 [First Hofeller Decl., Table 1])

169. The F&L House plan proposed one majority black district for Mecklenburg County, F&L HD 101, with an APBVAP of 52.41%. Four other districts, F&L HD 99, 100, 102, and 107, have non-Hispanic white VAP of 49% (HD 100) or lower. In F&L HD 99, 102, and 107, Democrats are a majority of registered voters and African Americans are a majority of registered Democrats. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-42, 3018-52 [Second Frey Aff. Exs. 15, 42, 52]; DX 3001 [Historical House Maps, Tab 12])

170. The LBC House Plan proposed one district (HD 101) as a majority black district with an APBVAP of 50.25%. Five other districts were coalition districts with a non-Hispanic white VAP of 42.44% (HD 25) or lower (HD 99, 100, 102, and 107). In LBC 99, 102, and 107, Democrats are a majority of registered voters and African American are a majority of registered Democrats. The LBC House Plan does not comply with the *Stephenson* formula for using a single-county group when possible because Mecklenburg is included in a three-county group with Cleveland and Gaston Counties. (DX 3017-11 [First Frey Aff. Ex. 11]; DX 3018-15, 3018-43, 3018-53 [Second Frey Aff. Exs. 15, 43, 53]; DX 3001 [Historical House Maps, Tab 13])

171. Other findings regarding Mecklenburg County House Districts.

(a) Mecklenburg was one of the counties where Section 2 liability was found in *Gingles*. (See D.E. 32-1, F.F. No. 1)

(b) Mecklenburg County was part of a 2001/2003/2009 majority black or coalition district:

2001 CD 12: Mecklenburg

2003 SD 38: Mecklenburg
2003 SD 40: Mecklenburg
2009 HD 99: Mecklenburg
2009 HD 100: Mecklenburg
2009 HD 101: Mecklenburg
2009 HD 102: Mecklenburg
2009 HD 106: Mecklenburg
2009 HD 107: Mecklenburg

(DX 3002 [Historical Congressional Map Notebook, Congress Zero Deviation]; DX 3001 [Historical House Map Notebook, 2009 House Map]; DX 3017-10, 3017-11 [First Frey Aff. Exs. 10, 11]; DX 3018-34, 3018-34 [Second Frey Aff. Exs. 34, 39])

(c) Mecklenburg County was included in Dr. Block's analysis of district elections from 2006-2010 finding significant racially polarized voting:

2006 SD 40: Mecklenburg
2008 CD 12: Mecklenburg
2008 SD 38: Mecklenburg
2008 SD 40: Mecklenburg
2008 CD 12: Mecklenburg
2010 HD 107: Mecklenburg
2010 SD 40: Mecklenburg
2010 HD 101: Mecklenburg
2010 HD 107: Mecklenburg

(DX 3013-8 [First Rucho Aff. Ex. 8, pp. 1-8])

(d) Mecklenburg County was analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting. (DX 3033, p. 1-14, 22)

(e) Mecklenburg County was included in majority black or coalition districts in plans proposed by SCSJ and Democratic leaders in 2011:

SCSJ CD 12: Mecklenburg
F&L CD 12: Mecklenburg
SCSJ SD 38: Mecklenburg
SCSJ SD 40: Mecklenburg
F&L SD 38: Mecklenburg

F&L SD 40: Mecklenburg
LBC SD 38: Mecklenburg
LBC SD 40: Mecklenburg
SCSJ HD 99: Mecklenburg
SCSJ HD 100: Mecklenburg
SCSJ HD 101: Mecklenburg
SCSJ HD 102: Mecklenburg
SCSJ HD 107: Mecklenburg
F&L HD 99: Mecklenburg
F&L HD 101: Mecklenburg
F&L HD 102: Mecklenburg
F&L HD 107: Mecklenburg
LBC HD 25: Mecklenburg
LBC HD 99: Mecklenburg
LBC HD 100: Mecklenburg
LBC HD 101: Mecklenburg
LBC HD 102: Mecklenburg
LBC HD 107: Mecklenburg

(f) There were no contested general elections for HD 107 in 2004 or 2006. In 2008, African American Democratic candidate Kelly Alexander defeated his Republican opponent 27,502 to 9,043 (+18,459). In 2010, Rep. Alexander defeated his Republican opponent 13,132 to 6,392 (+6,740). The population deviation for this district under the 2010 Census is (+13,998), which exceeds Rep. Alexander's margin of victory for the 2010 General Election. (DX 3016, 3016-3[Churchill Aff. ¶¶ 1-7, Ex. 3])

(g) In 2008, Rep. Alexander raised \$28,437 and spent \$21,664. His Republican opponent did not file campaign disclosure reports. In 2010, Rep. Alexander raised \$12,953 and spent \$9,974. His Republican opponent raised and spent \$330. (DX 3016, 3016-3 [Churchill Aff. ¶¶ 1-7, Ex. 3])

(h) At the beginning of the 2011 session, Rep. Alexander had served 2.5 terms in the state House. (DX 3016, 3016-5 [Churchill Aff. ¶ 8, Ex. 5])

(i) As shown by the chart below, there are very slight differences between the black VAP in the 2011 enacted House plan and the 2011 alternatives.

J. Comparison of APBVAP in Enacted and Alternative House Districts

172. For each of the 2003 House VRA districts that correspond to a 2011 VRA House districts being challenged in this case, Table 5 provides the following information for each districts based upon the 2010 Census and election results from 2004 through 2010: (1) year of election; (2) winner; (3) race of winner; (4) APBVAP %; (5) non-Hispanic white VAP %; (6) number of registered voters who were African American (“RD”); (7) percentage of registered Democrats (“RD”); (8) percentage of registered Democrats who were black (“RBD”); (9) population deviation (“Dev.”); (10) margin of victory by total votes (“MV”); (11) whether the candidate was unopposed (“U”); and (12) difference between population deviation and margin of victory. This information shows:

(a) The HDs 7, 24, 33, 43, 58, and 60 were majority black and that HDs 5, 12, 21, 29, 31, 42, 48, 99, 103, and 107 were coalition districts in which non-Hispanic whites were in the minority. If the Hispanic VAP coalition districts is discounted, the VAP for all of the districts is majority black (DX 3116).

(b) In HDs 7, 21, 24, 31, 33, 42, 43, 48, 58, and 60, African Americans were the majority of all registered voters. In HDs 5, 12, 29, 99, 103, and 107, Democrats were a majority of all registered voters and African Americans were a majority of registered Democrats; and

(c) In HDs 5, 7, 12, 21, 24, 33, 42, 43, 48, 60, 99, and 107, there were elections in which the margin of victory for the successful African American Democrat was less than the amount by which the district was underpopulated or overpopulated.

(DX 3017-11 [First Frey Aff., Ex. 11]; DX 3018-39, 3018-49 [Second Frey Aff. Exs. 39, 49]; DX 3020-3 [*Covington*, Churchill Decl. Ex. 3]; DX 3001 [Historical House Maps, Tab 8])

**Table 5:
2009 House majority black or coalition
districts/deviation/margin of victory 2010 Census**

| HD 5 | | | | | | | | | | |
|------|--------|---|--------|--------|-------|-------|-------|---------|---------------|------------|
| Year | Winner | R | APBVAP | NHWPAP | RB | RD | RBD | Dev. | MV | Difference |
| 2004 | Hunter | B | 48.87 | 48.20 | 48.17 | 69.69 | 62.96 | (7,861) | 14,430 | - |
| 2006 | Hunter | B | 48.87 | 48.20 | 48.17 | 69.69 | 62.96 | (7,861) | 3,604 | 4,257 |
| 2008 | Mobley | B | 48.87 | 48.20 | 48.17 | 69.69 | 62.96 | (7,861) | 23,384 (u) | - |
| 2010 | Mobley | B | 48.87 | 48.20 | 48.17 | 69.69 | 62.96 | (7,861) | 3,613 | 4,248 |

| HD 7 | | | | | | | | | | |
|------|--------|---|--------|--------|-------|-------|-------|----------|---------------|------------|
| Year | Winner | R | APBVAP | NHWPAP | RB | RD | RBD | Dev. | MV | Difference |
| 2004 | Hall | B | 60.77 | 35.14 | 58.83 | 71.25 | 72.59 | (20,026) | 17,714 (u) | 2,312 |
| 2006 | Jones | B | 60.77 | 35.14 | 58.83 | 71.25 | 72.59 | (20,026) | 7,264 (u) | 12,762 |
| 2008 | Bryant | B | 60.77 | 35.14 | 58.83 | 71.25 | 72.59 | (20,026) | 22,928 (u) | - |
| 2010 | Bryant | B | 60.77 | 35.14 | 58.83 | 71.25 | 72.59 | (20,026) | 12,544 (u) | 7,482 |

| HD 12 | | | | | | | | | | |
|-------|------------|---|--------|--------|-------|-------|-------|----------|-------|------------|
| Year | Winner | R | APBVAP | NHWPAP | RB | RD | RBD | Dev. | MV | Difference |
| 2004 | Wainwright | B | 46.45 | 46.23 | 45.26 | 56.25 | 68.36 | (15,862) | 6,100 | 9,762 |
| 2006 | Wainwright | B | 46.45 | 46.23 | 45.26 | 56.25 | 68.36 | (15,862) | 3,901 | 11,961 |
| 2008 | Wainwright | B | 46.45 | 46.23 | 45.26 | 56.25 | 68.36 | (15,862) | 9,777 | 6,085 |
| 2010 | Wainwright | B | 46.45 | 46.23 | 45.26 | 56.25 | 68.36 | (15,862) | 3,184 | 12,678 |

| HD 21 | | | | | | | | | | |
|-------|--------|---|--------|--------|-------|-------|-------|---------|---------------|------------|
| Year | Winner | R | APBVAP | NHWPAP | RB | RD | RBD | Dev. | MV | Difference |
| 2004 | Bell | B | 46.25 | 40.31 | 50.39 | 62.75 | 70.55 | (9,837) | 17,812 (u) | - |
| 2006 | Bell | B | 46.25 | 40.31 | 50.39 | 62.75 | 70.55 | (9,837) | 9,215 (u) | 625 |
| 2008 | Bell | B | 46.25 | 40.31 | 50.39 | 62.75 | 70.55 | (9,837) | 21,964 | - |

| | | | | | | | | | | |
|------|------|---|-------|-------|-------|-------|-------|---------|-------|-------|
| | | | | | | | | | (u) | |
| 2010 | Bell | B | 46.25 | 40.31 | 50.39 | 62.75 | 70.55 | (9,837) | 5,552 | 4,285 |

| HD 24 | | | | | | | | | | |
|-------|-------------------|---|--------|--------|-------|-------|-------|----------|---------------|------------|
| Year | Winner | R | APBVAP | NHWWAP | RB | RD | RBD | Dev. | MV | Difference |
| 2004 | Famer-Butterfield | B | 56.07 | 37.82 | 59.08 | 69.55 | 75.95 | (17,333) | 19,501 (u) | - |
| 2006 | Famer-Butterfield | B | 56.07 | 37.82 | 59.08 | 69.55 | 75.95 | (17,333) | 7,987 (u) | 9,346 |
| 2008 | Famer-Butterfield | B | 56.07 | 37.82 | 59.08 | 69.55 | 75.95 | (17,333) | 23,108 (u) | - |
| 2010 | Famer-Butterfield | B | 56.07 | 37.82 | 59.08 | 69.55 | 75.95 | (17,333) | 5,804 | 11,529 |

| HD 29 | | | | | | | | | | |
|-------|--------|---|--------|--------|-------|-------|-------|---------|---------------|------------|
| Year | Winner | R | APBVAP | NHWWAP | RB | RD | RBD | Dev. | MV | Difference |
| 2004 | Miller | B | 39.99 | 46.05 | 40.39 | 62.35 | 56.21 | (9,416) | 27,249 (u) | - |
| 2006 | Hall | B | 39.99 | 46.05 | 40.39 | 62.35 | 56.21 | (9,416) | 13,295 (u) | - |
| 2008 | Hall | B | 39.99 | 46.05 | 40.39 | 62.35 | 56.21 | (9,416) | 28,305 (u) | - |
| 2010 | Hall | B | 39.99 | 46.05 | 40.39 | 62.35 | 56.21 | (9,416) | 18,130 (u) | - |

| HD 31 | | | | | | | | | | |
|-------|---------|---|--------|--------|-------|-------|-------|--------|--------|------------|
| Year | Winner | R | APBVAP | NHWWAP | RB | RD | RBD | Dev. | MV | Difference |
| 2004 | Michaux | B | 47.23 | 35.47 | 52.13 | 64.65 | 69.65 | 11,812 | 19,511 | - |
| 2006 | Michaux | B | 47.23 | 35.47 | 52.13 | 64.65 | 69.65 | 11,812 | 11,555 | - |
| 2008 | Michaux | B | 47.23 | 35.47 | 52.13 | 64.65 | 69.65 | 11,812 | 34,609 | - |
| 2010 | Michaux | B | 47.23 | 35.47 | 52.13 | 64.65 | 69.65 | 11,812 | 12,699 | - |

| HD 32 | | | | | | | | | | |
|---|--|--|--|--|--|--|--|--|--|--|
| HD 32 was a majority white district under the 2003 House Plan black with a APBVAP of 35.88%. Jim Crawford, a white Democrat, won all general elections from 2004-2010. In the 2004 Democratic primary, Crawford defeated a black Democrat, James Gooch, 4,281 to 3,773. | | | | | | | | | | |

| HD 33 | | | | | | | | | | |
|-------|--------|---|--------|--------|-------|-------|-------|--------|---------------|------------|
| Year | Winner | R | APBVAP | NHWWAP | RB | RD | RBD | Dev. | MV | Difference |
| 2004 | Allen | B | 51.74 | 29.14 | 56.85 | 65.63 | 73.98 | 15,293 | 22,504 | - |
| 2006 | Allen | B | 51.74 | 29.14 | 56.85 | 65.63 | 73.98 | 15,293 | 12,566 (u) | 2,727 |
| 2008 | Blue | B | 51.74 | 29.14 | 56.85 | 65.63 | 73.98 | 15,293 | 25,267 | - |
| 2010 | Gill | B | 51.74 | 29.14 | 56.85 | 65.63 | 73.98 | 15,293 | 13,164 | 3,129 |

| HD 38 | | | | | | | | | | |
|---|--|--|--|--|--|--|--|--|--|--|
| The 2003 HD 38 was a majority white district with an APBVAP of 27.96%. White Democrats won all general elections in this district from 2004 through 2010. Ross defeated a black Democrat, Demian Dellinger, in the 2006 | | | | | | | | | | |

Democratic primary 2,197 to 105.

| HD 42 | | | | | | | | | | |
|-------|--------|---|--------|--------|-------|-------|------|----------|---------------|------------|
| Year | Winner | R | APBVAP | NHWPAP | RB | RD | RBD | Dev. | MV | Difference |
| 2004 | Lucas | B | 47.94 | 36.97 | 55.12 | 56.86 | 77.9 | (11,017) | 5,270 | 4,758 |
| 2006 | Lucas | B | 47.94 | 36.97 | 55.12 | 56.86 | 77.9 | (11,017) | 5,610 (u) | 5,407 |
| 2008 | Lucas | B | 47.94 | 36.97 | 55.12 | 56.86 | 77.9 | (11,017) | 19,137 (u) | - |
| 2010 | Lucas | B | 47.94 | 36.97 | 55.12 | 56.86 | 77.9 | (11,017) | 8,874 (u) | 2,143 |

| HD 43 | | | | | | | | | | |
|-------|------------|---|--------|--------|-------|-------|-------|----------|---------------|------------|
| Year | Winner | R | APBVAP | NHWPAP | RB | RD | RBD | Dev. | MV | Difference |
| 2004 | McAllister | B | 54.69 | 34.29 | 60.31 | 63.30 | 78.98 | (28,627) | 11,875 (u) | 16,762 |
| 2006 | McAllister | B | 54.69 | 34.29 | 60.31 | 63.30 | 78.98 | (28,627) | 5,645 (u) | 22,992 |
| 2008 | McAllister | B | 54.69 | 34.29 | 60.31 | 63.30 | 78.98 | (28,627) | 16,690 | 11,947 |
| 2010 | McAllister | B | 54.69 | 34.29 | 60.31 | 63.30 | 78.98 | (28,627) | 7,967 (u) | 20,670 |

| HD 48 | | | | | | | | | | |
|-------|--------|---|--------|--------|-------|-------|-------|----------|---------------|------------|
| Year | Winner | R | APBVAP | NHWPAP | RB | RD | RBD | Dev. | MV | Difference |
| 2004 | Pierce | B | 45.56 | 29.63 | 50.80 | 74.93 | 77.78 | (13,018) | 15,924 (u) | - |
| 2006 | Pierce | B | 45.56 | 29.63 | 50.80 | 74.93 | 77.78 | (13,018) | 8,714 (u) | 4,304 |
| 2008 | Pierce | B | 45.56 | 29.63 | 50.80 | 74.93 | 77.78 | (13,018) | 20,362 (u) | - |
| 2010 | Pierce | B | 45.56 | 29.63 | 50.80 | 74.93 | 77.78 | (13,018) | 6,431 | 6,587 |

| HD 57 | | | | | | | | | | |
|--|--|--|--|--|--|--|--|--|--|--|
| The 2003 HD 57 was a majority white district with an APBVAP of 29.93%. White Democrats won all elections in the district from 2004 through 2010. | | | | | | | | | | |

| HD 58 | | | | | | | | | | |
|-------|--------|---|--------|--------|-------|-------|-------|-------|--------------|------------|
| Year | Winner | R | APBVAP | NHWPAP | RB | RD | RBD | Dev. | MV | Difference |
| 2004 | Adams | B | 53.43 | 41.00 | 56.71 | 62.65 | 77.78 | 3,683 | 10,713 | - |
| 2006 | Adams | B | 53.43 | 41.00 | 56.71 | 62.65 | 77.78 | 3,683 | 5,441 (u) | - |
| 2008 | Adams | B | 53.43 | 41.00 | 56.71 | 62.65 | 77.78 | 3,683 | 17,423 | - |
| 2010 | Adams | B | 53.43 | 41.00 | 56.71 | 62.65 | 77.78 | 3,683 | 6,386 | - |

| HD 60 | | | | | | | | | | |
|-------|--------|---|--------|--------|-------|-------|-------|---------|---------------|------------|
| Year | Winner | R | APBVAP | NHWPAP | RB | RD | RBD | Dev. | MV | Difference |
| 2004 | Jones | B | 54.36 | 35.15 | 57.50 | 64.10 | 77.44 | (9,123) | 18,270 (u) | - |
| 2006 | Jones | B | 54.36 | 35.15 | 57.50 | 64.10 | 77.44 | (9,123) | 2,132 | 6,991 |
| 2008 | Jones | B | 54.36 | 35.15 | 57.50 | 64.10 | 77.44 | (9,123) | 23,964 | - |

| | | | | | | | | | | |
|------|---------|---|-------|-------|-------|-------|-------|---------|-------|-------|
| | | | | | | | | | (u) | |
| 2010 | Brandon | B | 54.36 | 35.15 | 57.50 | 64.10 | 77.44 | (9,123) | 6,018 | 3,105 |

| HD 99 | | | | | | | | | | |
|-------|----------|---|--------|--------|-------|-------|-------|--------|---------------|------------|
| Year | Winner | R | APBVAP | NHWWAP | RB | RD | RBD | Dev. | MV | Difference |
| 2004 | Saunders | W | 41.26 | 39.41 | 45.20 | 55.36 | 67.85 | 32,850 | 20,081 (u) | 12,769 |
| 2006 | Saunders | W | 41.26 | 39.41 | 45.20 | 55.36 | 67.85 | 32,850 | 9,463 (u) | 23,387 |
| 2008 | Mackey | B | 41.26 | 39.41 | 45.20 | 55.36 | 67.85 | 32,850 | 13,181 | 19,669 |
| 2010 | Moore | B | 41.26 | 39.41 | 45.20 | 55.36 | 67.85 | 32,850 | 9,532 | 23,318 |

| HD 103 | | | | | | | | | | |
|--------|--------|---|--------|--------|-------|-------|-------|----------|---------------|------------|
| Year | Winner | R | APBVAP | NHWWAP | RB | RD | RBD | Dev. | MV | Difference |
| 2004 | Carney | W | 44.02 | 39.98 | 46.82 | 61.14 | 65.64 | (10,148) | 17,277 (u) | - |
| 2006 | Carney | W | 44.02 | 39.98 | 46.82 | 61.14 | 65.64 | (10,148) | 7,994 (u) | - |
| 2008 | Carney | W | 44.02 | 39.98 | 46.82 | 61.14 | 65.64 | (10,148) | 16,522 | - |
| 2010 | Carney | W | 44.02 | 39.98 | 46.82 | 61.14 | 65.64 | (10,148) | 10,993 (u) | - |

| HD 107 | | | | | | | | | | |
|--------|------------|---|--------|--------|-------|-------|-------|--------|--------|------------|
| Year | Winner | R | APBVAP | NHWWAP | RB | RD | RBD | Dev. | MV | Difference |
| 2004 | Cunningham | B | 47.14 | 37.30 | 48.72 | 57.74 | 72.18 | 13,998 | 8,971 | 5,027 |
| 2006 | Cunningham | B | 47.14 | 37.30 | 48.72 | 57.74 | 72.18 | 13,998 | 7,826 | 6,172 |
| 2008 | Alexander | B | 47.14 | 37.30 | 48.72 | 57.74 | 72.18 | 13,998 | 18,459 | - |
| 2010 | Alexander | B | 47.14 | 37.30 | 48.72 | 57.74 | 72.18 | 13,998 | 6,740 | 7,258 |

173. There are slight differences in APBVAP of the 2011 enacted majority black house districts as compared to the alternative districts.

Table 6²⁶
Comparison of APBVAP 2003-2011 House Districts

| | 2003 | SCSJ | F&L | LBC | 2011 |
|--------|-------|--------------|--------------|--------------|--------------|
| HD 5 | 48.87 | 49.63 | 51.13 | 51.13 | 54.17 |
| HD 7 | 60.77 | 58.69 | 52.75 | 50.14 | 50.67 |
| HD 12 | 46.45 | 46.35 | 46.42 | 47.26 | 50.60 |
| HD 21 | 46.25 | 46.26 | 45.96 | 48.68 | 51.90 |
| HD 23 | 36.90 | 25.35 | 22.36 | 30.09 | 51.83 |
| HD 24 | 56.07 | 56.15 | 50.79 | 50.33 | 57.33 |
| HD 27 | 53.95 | 54.40 | 53.71 | 50.03 | 53.71 |
| HD29 | 39.99 | 38.88 | 42.51 | 44.48 | 51.34 |
| HD 31 | 47.23 | 51.69 | 48.60 | 47.67 | 51.81 |
| HD 32 | 35.88 | 35.85 | 11.93 | 40.51 | 50.45 |
| HD 33 | 51.74 | 56.45 | 52.42 | 50.66 | 51.42 |
| HD 38 | 27.96 | 26.75 | 34.14 | 26.75 | 51.37 |
| HD 42 | 47.94 | 48.00 | 48.00 | 46.87 | 52.56 |
| HD 43 | 54.69 | 54.70 | 54.70 | 51.51 | 51.45 |
| HD 48 | 45.56 | 45.90 | 44.22 | 47.99 | 51.27 |
| HD 57 | 29.93 | 28.50 | 28.50 | 28.41 | 50.69 |
| HD 58 | 53.43 | 53.47 | 53.47 | 54.00 | 51.11 |
| HD 60 | 54.36 | 54.41 | 54.47 | 50.43 | 51.36 |
| HD 99 | 41.26 | 42.11 | 42.17 | 49.47 | 54.65 |
| HD 102 | 42.74 | 44.98 | 38.72 | 46.16 | 51.53 |
| HD 107 | 47.14 | 56.43 | 45.12 | 49.27 | 52.52 |

²⁶ Percentages typed in **bold** include a proposed district with higher APBVAP than the percentage APBVAP in the 2003 House District.

174. Moreover, there are slight differences between each enacted 2011 House VRA districts and the 2011 alternative with the highest percentage of APBVAP:

Table 7
Enacted House District APBVAP Percentages versus Highest
Alternative Plan Values 2010 Census

| District | Enacted Plan APBVAP | Highest Alternative Plan APBVAP | Corresponding Alternative Plan | Difference Between Enacted and Highest Alternative |
|----------|---------------------|---------------------------------|--------------------------------|--|
| 5 | 54.17% | 51.13% | HFL, PHD | 3.04% |
| 7 | 50.67% | 58.69% | SCSJ_H | -8.02% |
| 12 | 50.60% | 47.36% | LBC | 3.34% |
| 21 | 51.90% | 48.68% | LBC | 3.22% |
| 23 | 51.83% | 50.79% | SCSJ_H08 | 1.04% |
| 24 | 57.33% | 56.15% | SCSJ_H | 1.18% |
| 27 | 53.71% | 54.40% | SCSH_H | -0.69% |
| 29 | 51.34% | 44.48% | LBC | 6.86% |
| 31 | 51.81% | 51.69% | SCSJ_H | 0.12% |
| 33 | 51.42% | 56.45% | SCSJ_H | -5.04% |
| 42 | 52.56% | 48.00% | SCSJ_H, HFL | 4.56% |
| 43 | 51.45% | 54.70% | SCSJ_H, HFL | -3.25% |
| 48 | 51.27% | 47.99% | LBC | 3.28% |
| 58 | 51.11% | 54.00% | LBC | -2.89% |
| 60 | 51.36% | 54.47% | HFL | -3.11% |
| 99 | 54.65% | 49.47% | LBC | 5.18% |
| 102 | 53.53% | 46.16% | LBC | 7.37% |
| 107 | 52.52% | 56.43% | SCSJ_H | -3.91% |

(DX 3019-77, 3019-78 [Third Frey Aff. Ex. 77, 78]; DX 3017-11 [First Frey Aff. Ex. 11])

K. Divided Towns and Places

175. There are 553 municipalities in the State of North Carolina. Fifty-two of these are located in multiple counties. Forty-eight are located in two counties, three (Durham, Hickory, and Sharpsburg) are located in three counties, and one (High Point) is located in four counties. In all of the 2011 proposed legislative plans, there were

examples of cities being divided into more than one district because the city is in more than one county.

176. Out of 553 municipalities, 297 (or 53%) have more than one part, exhibiting non-contiguity or contiguity by point. For example, Sharpsburg, Rocky Mount, and High Point are examples of cities located in different counties or include areas that are not contiguous.

177. The following table explains how cities or municipalities have been divided into different legislative districts.

Table 8
Split Place Counts for Enacted and Proposed Plans

| | Total Places Split | Places split within counties | Places split only along county boundaries |
|--------------------------------|--------------------|------------------------------|---|
| Lewis-Dollar-Dockham 4 | 144 | 120 | 24 |
| House Fair and Legal | 130 | 98 | 32 |
| Possible House Districts | 129 | 101 | 28 |
| SCSJ House | 132 | 108 | 24 |
| Session Law 2009-78 | 123 | 92 | 31 |
| Rucho Senate 2 | 86 | 58 | 28 |
| Senate Fair and Legal | 56 | 31 | 25 |
| Possible Senate Districts | 60 | 33 | 27 |
| SCSJ Senate | 66 | 31 | 35 |
| 2003 Senate Redistricting Plan | 60 | 23 | 27 |

(DX 3017-3, 3017-4, 3017-5, 3017-6 [First Frey Aff. Exs. 3, 4, 5, 6]; DX 3009, 3010 [*Covington*, Third Frey Decl., Exs. 9, 10])

L. Divided Precincts (Vote Tabulation Districts)

178. The 2003 plans and all of the 2011 redistricting plans divided precincts in forming districts. (DX 3007, 3008 [*Covington*, Third Frey Decl. Exs. 7 and 8]) This is demonstrated by the table below.

Table 9
Split Place Counts for Enacted and Proposed Plans

| | Release Date | VTDs Split in Section 5 Counties | VTDs Split in Non-Section 5 Counties | Total VTDs Split Statewide |
|--------------------------------|--------------|--|--|-------------------------------|
| Lewis-Dollar-Dockham 4 | 7/27/2011 | 208 | 187 | 395 |
| House Fair and Legal | 7/25/2011 | 88 | 41 | 129 |
| Possible House Districts | 7/25/2011 | 129 | 83 | 212 |
| SCSJ House | 6/23/2011 | 144 | 58 | 202 |
| Session Law 2009-78 | 6/11/2009 | 139 | 146 | 285 |
| Rucho Senate 2 | 7/20/2011 | 91 | 166 | 257 |
| Senate Fair and Legal | 7/25/2011 | 2 | 4 | 6 |
| Possible Senate Districts | 7/25/2011 | 1 | 9 | 10 |
| SCSJ Senate | 6/23/2011 | 39 | 31 | 70 |
| 2003 Senate Redistricting Plan | 11/25/2003 | 27 | 52 | 79 |

(DX 3017-7 [First Frey Aff. Ex. 7]; DX 3007, 3008 [*Covington*, Third Frey Decl., Exs. 7, 8])

179. For all of the redistricting plans offered by the 2011 legislative redistricting process, precincts with a relatively higher percentage of black voting age population were more likely to be divided.

Table 10
Split VTDs involving District with 40% or Greater Total Black VAP

| | Total Split VTDs in Plan | Split VTDs involving Districts with 40% or Greater APBVAP | Percent of Split VTDs Involving Districts with 40% or Greater APBVAP |
|---------------------------|-----------------------------|--|---|
| 2009 House Plan | 285 | 142 | 49.8% |
| Lewis-Dollar-Dockham 4 | 395 | 295 | 74.7% |
| SCSJ House | 202 | 167 | 82.7% |
| House Fair and Legal | 129 | 98 | 76.0% |
| Possible House Districts | 212 | 175 | 82.5% |
| 2003 Senate Plan | 79 | 54 | 68.4% |
| Rucho Senate 2 | 257 | 221 | 86.0% |
| SCSJ Senate | 70 | 66 | 94.3% |
| Senate Fair and Legal | 6 | 1 | 16.7% |
| Possible Senate Districts | 10 | 4 | 40.0% |

(DX 3018-16 [Second Frey Aff. Ex. 16])

180. It is typical for districts drawn to have 40% or more black VAP to include divided precincts. (DX 3018-17 through 3018-26 [Second Frey Aff. Exs. 17-26])

M. The enacted plans do not “concentrate” or “pack” African American population

181. There is no significant difference between the “concentration” of African American population in a “few” districts as shown by a comparison of the enacted 2011 Senate and House Plans with all of the 2011 alternatives. For example, 46.27% of North Carolina’s APBVAP is located in 10 enacted Senate districts as compared to 43.51% in ten SCSJ Senate Districts, 40.18% of ten F&L Senate Districts, and 41.17% of ten LBC Senate Districts. (DX 3026 [*Dickson*, First Hofeller Aff., p. 7, Chart A])

182. Similarly, in the enacted 2011 House Plan, 50.02% of the state’s APBVAP can be found in 25 house districts as compared to 45.70% in 25 SCSJ House Districts, 45.23% in 25 F&L House Districts, and 46.07% in ten LBC House Districts. (DX 3026 [*Dickson*, First Hofeller Aff., p. 11, Chart B])

183. A comparison of the so-called “bloc level density maps” for the 2011 enacted Senate and House VRA districts as compared to the VRA districts in the 2003 legislative plans and all 2011 alternative plans show no meaningful difference in the way areas of African American population was included in each district. These maps do not show density of the population in a Census block. Instead, these maps only show the percentage of African American or white population in each census bloc and not the amount of population. Many of the Census blocks shaded white are in rural areas with hardly any population whatsoever. Density maps can be misleading where the census

blocs in question consist of very small levels of population. (DX 3005, 3006 [*Covington*, Third Frey Decl., Exs. 5, 6]; Tr. Vol. V, pp. 59:9-60:17)

N. Dr. Lichtman's testimony is not credible.

184. Plaintiffs' argument that VRA districts can and should be drawn with House VAP between 40% and 50% relies upon Dr. Lichtman's First Affidavit in *Dickson*, Tables 1 and 2 titled "Electoral Analysis of Current State House Districts with 40%+ Black Voting Age Population." (PX 2088, Tables 1 and 2) Table 1 reports on elections in House Districts with black VAP in excess of 40%. Table 2 reports on elections in Senate Districts in excess of 40%. The titles for both tables include an asterisk stating "analysis of contested elections conducted through ecological regression analysis of precinct level data."

185. Plaintiffs' other expert, Dr. Arrington, testified that in making a racial polarization study, an expert must use contested elections. (Tr. Vol 1, pp. 140:17-24) Ecological regression, the technique used by Dr. Lichtman, cannot be done unless there are two candidates. (*Id.*, p. 141:2-3) Dr. Arrington also opined that experts disagree on whether it is appropriate to study an election between two black candidates when preparing a racial polarization study. (*Id.*, p141:13-18) Because, at a minimum, black versus black elections may not have as much weight as elections between a black and a white candidate, if Dr. Arrington was performing a racial polarization report using black versus black candidates, he would report the race of the candidates. (*Id.*, p. 142:8-17)

186. Under the standard explained by Dr. Arrington, Dr. Lichtman's "ecological regression" reports are not credible. Lichtman's Table 1 includes columns for the district

studied, the black VAP under the 2000 and 2010 Censuses for each district, the results for the 2008 and 2010 primaries, and the results of 2008 and 2010 general elections. For primary elections, by including the term “none,” Lichtman has indicated where a black candidate faced no opposition. (Tr. Vol. III, p. 85:6-10) Having shown when a black candidate had no opposition in a primary election, Lichtman does not identify general elections where the candidate faced no opposition, leaving the impression that all general elections were contested as represented by a chart described as showing the results of ecological regression analysis.

187. In truth, black candidates faced no opposition in ten of the 2008 general elections reported by Lichtman: HD 5, 7, 21, 24, 31, 42, 43, 48, 60, and 72. For the 2010 general election reported by Lichtman, three black candidates faced no opposition in the General Election. (DX 3020, 3020-3) In Table 2, Lichtman failed to report that two black Senate candidates faced no opposition in the 2008 General Election. (DX 3020, 3020-1) Lichtman admitted that he did not describe all of the elections that were not contested. (Tr. Vol III, pp. 87:22-88:3) As admitted by Dr. Lichtman, none of the elections listed in Tables 1 and 2 involving unopposed candidates could be used to study racially polarized voting. (*Id.*, p. 88:4-15)

188. Lichtman also failed to report on those contested primaries involving only black candidates. In Table 1, for the 2008 House Democratic primary, three of the elections represented by Lichtman as being contested only involved black candidates. (HDs 5, 43, and 107) In the 2010 Democratic primary, four of the elections shown by Lichtman as being contested only involved black candidates. (HDs 58, 60, 72, 101) (DX

3020, 3020-3) In Table 2, Lichtman failed to disclose that two Senate primaries in 2008 involved only black candidates (SD20 and SD 21). In 2010, Lichtman failed to report that the Democratic primary for SD 21 only involved black candidates. (DX 3200, 3020-1) Lichtman admitted that he failed to identify the primary elections in which both candidates were black. (Tr. Vol. III, p. 87:9-18)

189. Lichtman's inclusion of uncontested elections and elections involving only black candidates in tables purporting to show ecological regressions cast serious doubt on the credibility of Lichtman's testimony on other districts involving contested elections.

190. Lichtman's testimony on the "right amount" of black VAP needed to create an ability to elect districts is not credible for other reasons. To the extent Lichtman actually did polarization studies on contested elections, they were performed on 2003 districts which are no longer in compliance with federal and state redistricting criteria for one person, one vote, or county groups. (Tr. Vol III, p. 56:21-24; 33:7-25; 74:2-10) Lichtman admitted at trial that, other than showing how majority black districts allegedly dilute the influence of black voters, his comparisons of the black VAP in these districts should not be given "a whole lot of weight." (*Id.*, p. 170:16-23) Lichtman did not determine how much population from a 2003 district was carried over to a 2011 district. (*Id.*, p. 74:7-10) He did not study voting patterns for voters that were added or removed from a 2003 district. (*Id.*, pp. 75:21-76:1)

191. Lichtman did not account for incumbency or analyze the amount of money raised and spent by candidates or on their behalf. (*Id.*, p. 77:2-7) Nor did Lichtman discuss the amount each 2003 district was overpopulated or underpopulated, the actual

margins of victory for successful candidates, or whether a successful candidate's margin of victory was less than the amount by which the district was underpopulated or overpopulated. (*Id.*, pp. 78:2-5; 76:16-25; 77:8-11) In short, Dr. Lichtman made no assessment on any of the political variables described in *Strickland* to explain the Court's reasoning for a judicially manageable benchmark of black VAP in excess of 50%.

192. Plaintiffs' exhibits CO 1 and CO 2, as well as Lichtman's attempt to explain these exhibits, should be rejected. These exhibits are summaries, prepared by someone other than Dr. Lichtman, of information found in election reports prepared by legislative staffer Erika Churchill. (JX 1048 and 1049; Tr. Vol IV, pp. 101:23-108:9) These report provide election results from 2006 through 2010 in districts with over 40% black VAP, districts with 30% to 40% black VAP, and districts with less than 30% black VAP. It is obvious that the information for the districts is based upon the 2000 Census. (*Id.*; Tr. Vol. III, pp. 128:20-130:2; Tr. Vol IV, pp. 12:23-14:25) Yet, Lichtman testified that the Churchill election results summarized by CO 1 were based upon the 2010 Census. (Vol III, p. 95:11-23) Lichtman later opined that he did not know if CO 1 and CO 2 were based upon the 2000 Census or the 2010 Census. (Vol III, p. 10:6-11) Lichtman opined that CO 1 purported to represent that the districts summarized were "majority white." (Tr. Vol III, p 102:8-12) However, Lichtman agreed that report should be accurate but admitted that CO 1 was not his report. (*Id.*, p 102:13-15) Lichtman agreed that if he had prepared CO 1, he would have explained whether the category "white" included Hispanic or whether the white percentage reported was only non-Hispanic whites. (*Id.*, pp. 102:16-103:13) Lichtman agreed that if CO 1 was his report,

he would not represent that “majority white” was the same as non-Hispanic white if that representation were not true. (*Id.*, p. 103:18-21) It is undisputed that neither JX 1048 nor JX 1049 reported population by ethnicity and that the category “white” on these exhibits includes Hispanics. (Tr. Vol. IV, pp. 15:1-13; 106:14:107:1; 108:14-109:12)

193. During his direct examination, Dr. Hofeller presented charts showing that all of the districts relied upon by plaintiffs to argue that VRA districts did not need over 50% black districts are actually majority black VAP if the Hispanic VAP was eliminated from each district. (DX 3116, 3117) During rebuttal, Dr. Lichtman testified that Dr. Hofeller’s exhibits supported his testimony because Hispanics live in the same areas as blacks even though he conceded that most Hispanics in North Carolina are not citizens or not registered to vote. (Tr. Vol. V, pp. 61:11-63:21) Dr. Lichtman has not offered any demographic study concerning his location of minority populations showing that Hispanics live in the same areas as blacks. Nor has Dr. Lichtman offered any alternative redistricting plans showing how VRA that comply with one person, one vote, and *Stephenson*, can be drawn with less than 50% black VAP because of the proximity of Hispanics. This testimony, like the rest of Dr. Lichtman’s testimony, is not credited.

IV. FACTS RELATED TO PLAINTIFFS AND FACT WITNESSES

194. Multiple plaintiffs were recruited to participate in this case by plaintiffs’ counsel, Doug Wilson, the Deputy Executive Director of the Democratic Party, or former Democratic State Senator Margaret Dickson, all of whom were previously involved in *Dickson* as counsel or as parties. (D.E. 77-1 (Mustafa Dep. 25:10-25:24); D.E. 77-2 (Ansin Dep. 15:5-16:19); D.E. 77-4 (Mingo Dep. 14:3-14:24,15:20-15:25); D.E. 77-5

(Mann Dep. 15:3-16:21, 20:24-21:6, 21:20-22:19, 46:3-31); D.E. 77-8 (Figueroa Dep. 19:18-21:4); D.E. 77-11 (Tucker Dep. 17:2-17:10, 17:25-18:10, 18:19-18:22); D.E. 77-17 (Perlmutter Dep. 12:24-13:1); D.E. 77-16 (Harris Dep. 12:17-23, 13:10-14); D.E. 77-20 (Freeman Dep. 19:4-21, 45:1-9, 23:15-24:12, 47:13-48:14); D.E. 77-26 (McCrimmon Dep. 24:21-25:23); D.E. 77-25 (Kimel Dep. 11:10-21); D.E. 77-28 (Arrington Dep. 16:21-17:16); D.E. 77-12 (Verdejo Dep. 13:16-15:4); D.E. 77-6 (Lewis Dep. 23:5-23:16, 23:24-24:8); D.E. 77-9 (Johnson Dep. 14:22-15:22, 16:13-16:16); D.E. 77-10 (Mayo Dep. 23:5-23:24, 24:4-24:18, 25:4-25:6); D.E. 77-13 (Pyne Dep. 14:13-14:22/15:10-15:25); D.E. 77-21 (Appelwhite Dep. 16:11-17:10); D.E. 77-30 (Sloane Dep. 18:4-18:15, 45:22-46:16))

195. Other Plaintiffs were recruited to participate in the case by a current Democratic member of the General Assembly. (D.E. 77-33 (Alston Dep. 13:23-14:11, 14:17-15:11, 16:14-19); D.E. 77-11 (Tucker Dep. 16:25-19:8); D.E. 77-14 (V. Martin Dep. 15:3-17:6); D.E. 77-23 (Fox Dep. 11:16-12:2))

196. Plaintiffs' interests in this case are strongly aligned with the Democratic Party, Democratic members of the General Assembly, and the *Dickson* plaintiffs. Multiple plaintiffs hold an office in either their state or local Democratic Party organization. (D.E. 77-1 (Mustafa Dep. 38:2-39:6); D.E. 77-4 (Mingo Dep. 15:12-19); D.E. 77-5 (Mann Dep. 14:16-23); D.E. 77-6 (Lewis Dep. 19:6-22); D.E. 77-16 (Harris Dep. 16:23-17:10); D.E. 77-22 (Thomas Dep. 19:2-15, 16:3-14, 39:1-9); D.E. 77-2-0 (Freeman Dep. 14:13-22, 15:19-16:2); D.E. 77-24 (James Dep. 28:24-29:19, 31:7-18); D.E. 77-33 (Alston, 26:4-19); D.E. 77-32 (Rogers Dep. 27:15-19); D.E. 77-12 (Verdejo Dep. 27:5-28:19); D.E. 77-8 (Figueroa Dep. 16:15-16:22, 35:7-36:9); D.E. 77-28

(Arrington Dep. 24:15-25:13, 32:18-33:7, 33:11-20, 33:24-34:4); D.E. 77-15 (Campbell Dep. 32:24-33:8, 44:19-45:7); D.E. 77-13 (Pyne Dep. 35:11-37:11); D.E. 77-30 (Sloane Dep. 27:80-29:25, 30:22-32:6)) Several plaintiffs admitted that their concerns with the districts drawn by the General Assembly in 2011 are that they perceive them to have negative political consequences for Democrats. (D.E. 77-1 (Mustafa Dep. 41:2-6); D.E. 77-2 (Ansin Dep. 19:4-17); D.E. 77-4 (Mingo Dep. 33:13-34:3); D.E. 77-5 (Mann Dep. 24:18-25:13); D.E. 77-6 (Lewis Dep. 47:20-49:6); D.E. 77-25 (Kimel Dep. 19:7-16, 20:1-7); D.E. 77-18 (Pridgen Dep. 45:11-21); D.E. 77-15 (Campbell Dep. 41:14-43:19); D.E. 77-13 (Pyne Dep. 50:21-51:12)) Multiple plaintiffs are members of, have financially contributed to, or otherwise supported one or more of the *Dickson* organizational plaintiffs. (D.E. 77-4 (Mingo Dep. 34:22-36:25); D.E. 77-16 (Harris Dep. 18:4-9); D.E. 77-32 (Rogers Dep. 31:4-9); D.E. 77-25 (Kimel Dep. 25:2-7); D.E. 77-28 (Arrington Dep. 27:9-27:23); D.E. 77-7 (Covington Dep. 31:1-31:16); D.E. 77-11 (Tucker Dep. 37:10-37:22, 38:15-39:21, 46:17-48:3); D.E. 77-6 (Lewis Dep. 42:21-23); D.E. 77-18 (Pridgen Dep. 42:1-13); D.E. 77-15 (Campbell Dep. 34:5-34:12, 35:8-35:21); D.E. 77-14 (V. Martin Dep. 32:7-32:17); D.E. 77-21 (Applewhite Dep. 49:7-50:11); D.E. 77-23 (Fox Dep. 35:23-37:20); D.E. 77-30 (Sloane Dep. 13:3-13:16))

197. Multiple plaintiffs admitted that they would not have filed a lawsuit about their districts had they not been asked to do so. (D.E. 77-2 (Ansin Dep. 16:20-16:25, 20:14-20:24); D.E. 77-5 (Mann Dep. 45:15-45:18); D.E. 77-6 (Lewis Dep. 39:16-39:21); D.E. 77-3 (Englander Dep. 33:18-33:21); D.E. 77-19 (C. Martin Dep. 29:18-30:4); D.E. 77-27 (Medlock-Walton Dep. 26:20-25); D.E. 77-18 (Pridgen Dep. 28:9-20))

198. Plaintiffs are not actively involved in controlling this litigation. Multiple plaintiffs testified that they had never seen copies of the complaint filed on their behalf before their depositions. (D.E. 77-2 (Ansin Dep. 21:10-21:19); D.E. 77-4 (Mingo Dep. 31:17-32:4); D.E. 77-6 (Lewis Dep. 24:16-25:9); D.E. 77-8 (Figueroa Dep. 30:5-31:8); D.E. 77-20 (Freeman Dep. 26:12-37:1); D.E. 77-19 (C. Martin Dep. 37:2-7); D.E. 77-33 (Alston Dep. 24:11-21); D.E. 77-32 (Rogers Dep. 25:8-16); D.E. 77-28 (Arrington Dep. 22:2-22:21); D.E. 77-9 (Johnson Dep. 31:22-32:12); D.E. 77-10 (Mayo Dep. 11:23-13:3); D.E. 77-18 (Pridgen Dep. 20:7-21)) Other plaintiffs erroneously believed this litigation is challenging their United States Congressional District or could not say what districts are being challenged in this lawsuit. (D.E. 77-1 (Mustafa Dep. 31:20-32:6, 33:16-33:23); D.E. 77-4 (Mingo Dep. 16:17-17:4); D.E. 77-11 (Tucker Dep. 9:5-9:21, 10:6-10:16)) Still others testified that they had not received regular updates about the case or that the first time they talked to a lawyer since joining the suit was within a month before their deposition. (D.E. 77-17 (Perlmutter Dep. 42:8-25); D.E. 77-16 (Harris Dep. 47:24-48:1); D.E. 77-22 (Thomas Dep. 62:16-18); D.E. 77-20 (Freeman Dep. 49:13-16); D.E. 77-19 (C. Martin Dep. 53:10-20); D.E. 77-33 (Alston Dep. 17:9-12, 48:24-49:6); D.E. 77-9 (Johnson Dep. 30:23-25); D.E. 77-30 (Sloane Dep. 18:20-19:9))

199. None of the plaintiffs are responsible for legal fees and costs incurred in this litigation and all testified that they did not know who was responsible for these fees and costs. (D.E. 77-1 (Mustafa Dep. 67:22-69:14); D.E. 77-2 (Ansin Dep. 30:22-32:11); D.E. 77-4 (Mingo Dep. 19:9-20:2); D.E. 77-5 (Mann Dep. 44:18-20, 47:6-8); D.E. 77-6 (Lewis Dep. 39:22-40:4, 31:10-32:3); D.E. 77-15 (Campbell Dep. 15:24-16:14); D.E. 77-8

(Figueroa Dep. 23:11-25); D.E. 77-11 (Tucker Dep. 20:1-13, 22:10-12); D.E. 77-3 (Englander Dep. 31:10-32:3); D.E. 77-17 (Perlmutter Dep. 37:24-38:7); D.E. 77-16 (Harris Dep. 44:23-45:5); D.E. 77-22 (Thomas Dep. 24:18-25:14, 62:3-15); D.E. 77-20 (Freeman Dep. 26:22-27:2, 56:15-20); D.E. 77-19 (C. Martin Dep. 50:5-10); D.E. 77-27 (Medlock-Walton Dep. 20:20-21:23); D.E. 77-26 (McCrimmon Dep. 30:13-31:1); D.E. 77-25 (Kimel Dep. 23:12-24:12); D.E. 77-24 (James Dep. 32:18-24); D.E. 77-32 (Rogers Dep. 40:12-18); D.E. 77-28 (Arrington Dep. 21:10-22:1); D.E. 77-12 (Verdejo Dep. 15:14-15:22); D.E. 77-9 (Johnson Dep. 30:4-22); D.E. 77-10 (Mayo Dep. 52:5-18, 53:6-25); D.E. 77-18 (Pridgen Dep. 43:12-16); D.E. 77-15 (Campbell Dep. 16:8-16:14); D.E. 77-14 (V. Martin Dep. 35:17-36:2); D.E. 77-13 (Pyne Dep. 41:23-42:14); D.E. 77-21 (Applewhite Dep. 52:11-52:25, 53:22-53:25); D.E. 77-23 (Fox Dep. 37:21-38:15); D.E. 77-30 (Sloane Dep. 24:12-25:15, 25:22-26:7))

200. Plaintiff Valencia Applewhite testified that she successfully ran for the Fayetteville City Council on three separate occasions in District 7, a minority-majority district. (D.E. 77-21 (Applewhite Dep. 24:10-25:14)) As a member of the Fayetteville City Council, plaintiff Applewhite voted to approve redistricting plans in 2011 which contained four majority-minority districts and split multiple precincts both in her district and in others. (*Id.*, 28:17-31:33, 36:4-40:7, 41:18-42:15) Applewhite testified that, based on her past experience as an African American candidate in Cumberland County, she would not run in Senate District 19 which she believes to be overwhelmingly white and did not know if white voters in Senate District 19 would vote for an African American candidate. (*Id.*, 18:19-20:22)

201. Plaintiffs Lewis, Mayo, and Pyne testified that, contrary to the allegations in the First Amended Complaint, their contention in this suit is not that the number of African American voters in their district is too high, but that the percentage in an adjoining district is too low. (D.E. 77-6 (Lewis Dep. 34:20-35:11); D.E. 77-10 (Mayo Dep. 56:19-59:17); D.E. 77-13 (Pyne Dep. 23:12-24:11))

202. Plaintiff Susan Sandler Campbell has been tracking the redistricting process since it began in 2011 and shared the Complaint filed by the plaintiffs in *Dickson* with members of the Forsyth County Democratic Party shortly after it was filed. (D.E. 77-15 (Campbell Dep. 21:1-32:10, 25:18-26:11)) Despite her awareness in November 2011 that *Dickson* was challenging the constitutionality of her district, Senate District 32, she chose not to join that lawsuit. (*Id.*, 27:13-28:22) Campbell feels that she was harmed because the 2011 redistricting plan drew State Senator Linda Garrou, who is white, out of her district. (*Id.*, 22:14-25:17) In 2011, before she became a plaintiff in this case, Campbell published an editorial in which she questioned how the newly drawn Senate District 32 would increase the ability of African Americans to obtain elected office since only 45 percent of the voters in the district were African American rather than at least 50 percent as was the case in other districts. (*Id.*, 39:13-41:13)

203. Plaintiff Jamal Fox is a Greensboro City Councilman from District 2 and believes that his district is “fair” despite the fact that it is a majority-minority district like the legislative districts he is challenging here. (D.E. 77-23 (Fox Dep. 18:1-19:14, 25:20-26:1, 26:16-27:22)) In his deposition, Mr. Fox testified that, in his opinion, any African American population less than fifty percent in a district was “low” and any African

American population greater than fifty percent was “too high.” (*Id.*, 15:24-16:15) Mr. Fox does not believe his city council district is “packed” with an unconstitutionally high African American population even though it is a majority-minority district like the legislative districts he is challenging here. (*Id.*, 28:2-31:7) He admitted that African American city council candidates in Greensboro have more success running in a district than they do running as an at-large candidate. (*Id.*, 22:3-23:11) Mr. Fox had conversations about the constitutionality of the General Assembly’s redistricting plan with Democratic State Representative Pricey Harrison after the maps were approved in 2011 but did not decide to challenge his district until four years later when this case was filed. (*Id.*, 40:12-41:21)

204. At trial, Plaintiffs called Yvonne Johnson as a fact witness. Ms. Johnson is currently an at-large member of the Greensboro City Council and former mayor of Greensboro who testified primarily about her success as an African-American candidate for offices in the City of Greensboro. Ms. Johnson, however, admitted that elections for Greensboro City Council are held in odd-numbered years when, according to her, “turnout is dismal.” (Tr. Vol. I, p. 202:19-23)

205. Despite Ms. Johnson’s previous electoral success, in the election held in 2009, which immediately preceded the 2011 legislative redistricting, she was defeated in the Greensboro Mayor’s race by a white candidate, Bill Knight. (Tr. Vol. I, p. 201:22-24) Additionally, Ms. Johnson testified that the current mayor of Greensboro, Nancy Vaughn, is also white and defeated an African-American candidate, Devin King, in the Greensboro mayor’s race in 2015. (Tr. Vol. I, p. 202:2-13)

206. Ms. Johnson did not provide any of the testimony she gave at trial at any public hearing before the General Assembly in 2011 when the maps were being considered nor did she submit any comments in writing to the General Assembly at that time. (*Id.* at 203:19-23).

207. To the extent Plaintiffs contend that racially polarized voting no longer exists in Guilford County and that majority-African American districts are not needed there for African-American voters to elect a candidate of their choice, the testimony of Ms. Johnson and Mr. Fox does not support this conclusion. The electoral results Ms. Johnson testified to occurred during low-voter turnout elections and the fact that Ms. Johnson admitted that African-American candidates were defeated by white candidates in city-wide elections in Greensboro support the opposite conclusions. In addition, Mr. Fox admitted that he had been elected in a majority-African American Greensboro city council district that he thought was “fair” and further admitted in his deposition that two of the five Greensboro City Council Districts are majority African-American. (D.E. 77-23 (Fox Dep. 27:17-28:1)). Mr. Fox could not explain why his majority-African American city council district was “fair” while the majority-African American House and Senate districts he resides in were unconstitutional. (*Id.* at 28:2-18; 30:19-31:7).

208. Plaintiffs called former Mecklenburg County Commissioner and former Charlotte City Councilman Harold Cogdell at trial to testify about successes he and other African-American candidates had achieved in Mecklenburg County elections. Mr. Cogdell, however, testified that in 2008, the same year he ran and won a county-wide race for county commissioner, there “was a very escalated racial tension that was emerging

over the outcome of a intraparty sheriff's election that involved Nick Mackey.” (Tr. Vol. II, pp. 31:2-5). Specifically, Mr. Cogdell testified that he observed that people “were either very supportive or very opposed to Mr. Mackey being sheriff based on . . . racial lines.” (Id. at p. 31:7-9)

209. Mr. Cogdell's trial testimony about the racial tensions in the 2008 Mecklenburg County Sheriff's race is consistent with the testimony of two plaintiffs, Rosa Mustafa and Antionette Mingo, both of whom testified in depositions that they believe racially polarized voting exists in Mecklenburg County. (D.E. 77-1 (Mustafa Dep. 23:12-24:24); D.E. 77-4 (Mingo Dep. 28:6-29:22)).

210. To the extent Plaintiffs contend that racially polarized voting no longer exists in Mecklenburg County and that majority-minority districts are not needed there for African-American voters to elect a candidate of their choice, Mr. Cogdell's testimony, along with that of Ms. Mustafa and Ms. Mingo, does not support this conclusion. In addition to these witnesses' testimony about the racial tensions that existed in Mecklenburg County in 2008, Mr. Cogdell further testified that it “would not surprise” him if two of six districts in the current Mecklenburg County Commissioner map were majority-minority and that he was not aware of any legal challenges to those districts. (Tr. Vol. II, p. 39:10-40:23). The fact that unchallenged majority-minority districts exist in Mecklenburg County undermine Plaintiffs' opposition to the inclusion of such districts in the 2011 legislative plan in Mecklenburg County.

211. Plaintiff Ruth Sloane's daughter, Aisha Dew, was a plaintiff in *Dickson*. (D.E. 77-30 (Sloane Dep. 33:8-35:24)) Although Sloane was aware that her daughter was

the head of a committee the Mecklenburg County Commissioners formed in 2011 to discuss redistricting issues, she did not challenge the constitutionality of her district until four years later in 2015. (*Id.*, 43:6-44:16)

212. Plaintiff Claude Harris, who resides in Pasquotank County, testified at trial that he was harmed by the way House District 5 was drawn because the district does not contain all of five adjacent counties located north of the Albemarle Sound that Mr. Harris described as the “finger counties.” (Tr. Vol. II, p. 86:8-22) Before the 2011 redistricting, Mr. Harris lived in House District 1, which he conceded also did not include all of the five “finger counties.” (*Id.* at 87:9-13; PX 1035) After comparing a map of the version of House District 1 in which he lived before 2011 with a map of the 2011 version House District 1, Mr. Harris admitted that, with the exception of the part of Pasquotank County that he lives in, the version of House District 1 enacted by the General Assembly into 2011 contained all five of the “finger counties” while the previous version of the district did not. (*Id.* at pp. 91-92; JX 1004)

213. Plaintiffs called fact witness Albert Kirby to provide testimony about House District 21. (Tr. Vol. II, p. 143:11-144:15) Mr. Kirby is one of two African-Americans elected to the Sampson County Commission. (Tr. Vol. II, p. 147:20-23) Both Mr. Kirby and the other African-American Sampson County Commissioner are elected from majority-minority districts. (Tr. Vol. II, p. 148:24-149:17) Mr. Kirby testified that there is a consent decree currently in effect that that affects how county commissioner districts are drawn in Sampson County. (*Id.* at p. 149:2-6) In that consent decree, attorneys for the U.S. Department of Justice and Sampson County stipulated that, “With few exceptions,

elections in Sampson County have been characterized by racially polarized voting” and agreed that elections for Sampson County Commissioner would be conducted in single-member districts. *See* Joint Motion for Entry of Consent Decree in *United States of America v. Sampson County, North Carolina et al.*, Civil Action No. 88-121-CIV-3 (E.D.N.C. 1989).

214. Mr. Kirby did not give any testimony or submit any comments to the North Carolina General Assembly that included the election results or other items he testified about at trial. (Tr. Vol. II, p. 149:10-17)

215. At trial, Mr. Kirby admitted he was a plaintiff in the *Dickson v. Rucho* case in which House District 21 was challenged just as it is here, and that he had been contacted by plaintiffs’ counsel, Edwin Speas, to be a plaintiff in that case. (Tr. Vol. II, p. 147:10-13) Mr. Kirby was not responsible for paying his attorneys fees in the *Dickson* litigation and did not know who was. (*Id.*)

216. Doug Wilson, who recruited multiple Plaintiffs for this case, is the Deputy Executive Director of the North Carolina Democratic Party and became a plaintiff in *Dickson* after being asked to join the suit by Jay Parmley, who was then the Executive Director of the State Democratic Party. (D.E. 77-31 (Wilson Dep. 12:19-12:21, 15:22-16:19)) Wilson testified that he did not know what districts he challenged in *Dickson* or who represented him in that case. (*Id.* at 17:18-18:11, 60:5-60:21) In fact, Wilson did not have any contact with his attorneys while he was a plaintiff in *Dickson* and admitted that he simply allowed his name to be used on the Complaint and that he never heard anything from his attorneys in *Dickson* after that. (*Id.* at 95:14:96:7)

217. Wilson was asked by Scott Falmlen, a former executive director of the State Democratic Party, to identify and recruit plaintiffs for this action. (*Id.* at 22:22-23:8, 30:12-35:9) Falmlen provided Wilson with the criteria for selecting plaintiffs in an email that he sent to Mr. Wilson's official North Carolina Democratic Party email address. (*Id.* at 35:17-36:18, 61:10-64:11) At the direction of Falmlen, Wilson recruited at least seven plaintiffs to the present case, including Plaintiffs Marvin Arrington, Viola Figueroa, John Verdejo, Dedreana Freeman, Susan Campbell, Antoinette Mingo, and Ruth Sloane. (*Id.* at 38:25-59:13) Falmlen told Wilson that he could tell potential plaintiffs that members of the Democratic legislative leadership were supporting the effort to file the lawsuit. (*Id.* at 64:12-64:25, 65:1-65:25) Falmlen sent Wilson an email on April 29, 2015 in which he stated that he "wanted to check in and see if [he had] had any luck in beginning the effort to identify plaintiff [because] the attorneys [were] hoping to file the suit in the next 10 days." (*Id.* at 73:3-73:12; DX 3102)

218. In an email before this case was filed, in which Wilson was attempting to recruit a potential plaintiff, Wilson told the potential plaintiff that this case was being brought by a group called "Democracy Partners." (D.E. 77-31 (Wilson Dep. 80:9-81:18)) In the same email, Mr. Wilson told the prospective plaintiff that "Democracy Partners," along with Democratic legislators, had actively targeted key state House and Senate Districts to challenge. (*Id.* at 81:19-83:4) Falmlen told Wilson that "Democracy Partners" was working with Democratic legislators to bring this lawsuit. (*Id.* at 83:5-83:10)

219. Defendants called Falmlen as an adverse witness at trial. Falmlen testified that he formed an organization called Democracy Project II under Section 501(c)(4) of the Internal Revenue Code in February 2011, before any redistricting maps were ever enacted by the General Assembly. (Tr. Vol. V, p. 135:1-22). Falmlen solicited funds on behalf of that group that were used to pay legal fees associated with both *Dickson* and this redistricting litigation. (*Id.* at p. 135:7-11, 139:6-18)

220. Falmlen filed a tax return on behalf of the Democracy Project II with the Internal Revenue Service for tax year 2011 in which he stated, under penalty of perjury, that “The Democracy Project II, through its counsel, organized, prepared, and is supporting this nonpartisan litigation.” (*Id.* at p. 138:13-19; DX 3119) Falmlen testified that the litigation he was referring to in that statement was the *Dickson* case and the counsel he was referring to was the Poyner Spruill law firm. (Tr. Vol. V, p. 139:1-9)

221. In April 2015, Falmlen met with North Carolina Democratic Party Chairwoman Patsy Keever and Wilson to discuss identifying plaintiffs for this action, including criteria for identifying plaintiffs and the districts to be targeted. (*Id.* at p. 146:3-147:10) Falmlen testified that Edwin Speas of the Poyner Spruill law firm provided him with the districts that were to be targeted and the criteria for identifying plaintiffs for this case. (*Id.* at pp. 147:11-148:3)

CONCLUSIONS OF LAW

A. Abstention and Res Judicata

The primacy of state judiciaries in redistricting disputes has been repeatedly recognized by the Supreme Court. *See Scott v. Germano*, 381 U.S. 407 (1965); *Chapman*

v. Meier, 420 U.S. 1, 27 (1975); *Growe v. Emison*, 507 U.S. 25, 34 (1993). In *Germano*, the Court observed that “the power of the judiciary of a state to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the states in such cases has been specifically encouraged.” 381 U.S. at 409; *see also Chapman*, 420 U.S. at 27 (“We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.”) Moreover, the Court has held that “[a]bsent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it.” *Growe*, 507 U.S. at 34. Although “[i]n other contexts, a federal court’s decision to decline to exercise jurisdiction is disfavored and thus exceptional . . . in the reapportionment context, when parallel State proceedings exist, the decision to refrain from hearing the litigant’s claims should be the routine course.” *Rice v. Smith*, 988 F. Supp. 1437, 1439 (M.D. Ala. 1997) (citations omitted). In *Rice*, as here, a state court found the challenged redistricting plans valid and plaintiffs’ claims without merit. *Id.* at 1438. The *Rice* court applied *Growe* to “stay [its] hand” as to similar claims by a different set of plaintiffs known as the “Thompson plaintiffs.” *Id.* at 1440. The court recognized the teaching from *Growe* that, absent evidence the state was abdicating its redistricting duty, “a federal court should not interject itself into the State’s matter.” *Id.* So long as the state court “is willing or able to hear [the plaintiffs’ redistricting] claims,” then the federal court should at the least defer consideration of the claims until the state court has been allowed to consider them.

Otherwise, the federal courts may be used to “impede” or “obstruct” the state process. *Grove*, 507 U.S. at 34.

Where the state courts have taken on the “highly political” task of considering redistricting, the federal court’s role is as a “last-minute federal court rescue of” the state electoral process. It is decidedly not a “race to beat [the state court process] to the finish line.” *Grove*, 507 U.S. at 37. The North Carolina state courts began the task of considering North Carolina redistricting over four years ago when *Dickson* was filed. The state trial court entered a judgment upholding the plans in July 2013. It was only after this judgment in favor of the state and the affirmance of this judgment by the North Carolina Supreme Court that the plaintiffs in this case, represented by the same lawyers who represented the plaintiffs in the *Dickson* case, filed this action.

Nothing in the current circumstances indicates a need for this Court to “rescue” the North Carolina electoral process. A three-judge panel of the Superior Court of Wake County has upheld the legality of the North Carolina House and Senate plans under both state and federal law. The North Carolina Supreme Court has done the same. Following remand by the Supreme Court for additional consideration in light of *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015), the North Carolina Supreme Court affirmed again.

The requirements of *Germano* and *Grove* are clear: where a state court has “begun to address” a redistricting dispute, a federal court should “stay its hand” and defer consideration of any parallel redistricting challenge filed in federal court. This argument

applies with even greater force in this case where the same lawyers elected to first pursue relief in state court and only sought relief in federal court after losing in state court.

The grounds for abstention or deferral in this matter until *Dickson* is fully resolved are even stronger than those in *Grove* because the plaintiffs' counsel and Plaintiffs here have raised the same claims with respect to the North Carolina House and Senate districts here as those currently before the North Carolina Supreme Court on remand. In addition, determining whether any of the districts challenged here are illegal racial gerrymanders involves analyzing whether they comply with state law requirements that impact the shapes, lines, and compactness of each district including Whole County Provision of the North Carolina Constitution and the county grouping formula found in *Stephenson I* and *II*.

Deferral is further warranted in light of the possibility that the United States Supreme Court may render a decision that is binding on this Court on one or more of the claims or issues in this litigation. Knowing the final outcome of *Dickson* at the United States Supreme Court level is essential to a fair and efficient resolution of the plaintiffs' claims here because one or more of the claims in this action may be barred by the doctrines of *res judicata* or collateral estoppel if the plaintiffs in *Dickson* adequately represented the interests of the plaintiffs here.

In addition to the reasons outlined in *Germano* and *Grove*, this Court should abstain from further proceedings in this matter under the United States Supreme Court's decision in *Younger v. Harris*, 401 U.S. 37 (1971). Abstention is proper in a civil action under *Younger* where three conditions are met: (1) there is an "ongoing judicial

proceeding” in a state court; (2) the ongoing proceedings implicate “important state interests”; and (3) there is an “adequate opportunity in the state proceedings to raise constitutional challenges.” *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).

This three-part test is met here. As established above, *Dickson* involves the same claims and issues with respect to the North Carolina House and Senate districts challenged in this action. Second, the Supreme Court, along with other federal courts, has repeatedly recognized that redistricting involves “important state interests.” *See Germano*, 381 U.S. at 409; *Chapman*, 420 U.S. at 27; *Grove*, 507 U.S. at 34; *see also Miller v. Johnson*, 515 U.S. 900, 915 (1995) (“Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions.”). This is especially so with respect to the North Carolina House and Senate districts at issue here where application of the *Stephenson* criteria and Whole County Provision impacted the shapes and lines of the challenged districts.²⁷ Finally, the same constitutional challenges to the North Carolina House and Senate districts that plaintiffs seek to raise here have already been raised in *Dickson* by the same counsel representing the plaintiffs in this action. Accordingly, plaintiffs cannot contend that there has been no opportunity to raise constitutional challenges with respect to these districts in *Dickson*.

²⁷ The presence of these state law criteria and the fact that state law is intertwined with the federal issues raised by the plaintiffs here distinguishes this case from *Harris v. McCrory*, Civil Action No. 1:13-cv-949 (M.D.N.C.) in which the three-judge panel denied without prejudice defendants’ motion to stay, defer, or abstain. (*See* D.E. 65) (filed May 22, 2014). These criteria were not a factor in the drawing of the congressional districts that were at issue in *Harris*.

While *Younger* is most frequently applied in criminal proceedings, the Supreme Court has held that the *Younger* doctrine can also apply to “civil proceedings involving certain orders that are uniquely in furtherance of the state courts’ ability to perform their judicial functions.” *Sprint Commc’s v. Jacobs*, 134 S. Ct. 584, 588 (2013); *see also S.C. Ass’n of School Adm’rs v. Disabato*, 460 Fed. App’x 239, 240 (4th Cir. 2012) (finding that “the district court did not abuse its discretion in determining that abstention in favor of an earlier-filed state suit was appropriate under *Younger*” in case where a party later challenged the constitutionality of a state public records law in federal court).

Even though the plaintiffs in this case are nominally different from those in *Dickson*, this Court may still abstain from this action under *Younger*. *See, e.g., Hicks v. Miranda*, 422 U.S. 332, 348 (1975) (finding federal district court should have abstained under *Younger* from a federal lawsuit brought by owners of a movie theater where employees of theater were charged with violating state obscenity laws on grounds that the owners’ “interests and those of their employees were intertwined”); *S.P. ex rel. Parks v. Native Vill. Of Minto*, 443 Fed. App’x 264, 265-66 (9th Cir. 2011) (“Although the federal and state cases involve different parties and initially appear to implicate different issues, the federal questions presented in this case are unquestionably intertwined with the questions posed in the state case. . . .[A] decision on the merits by a federal court . . . would prevent the state court from reaching different legal conclusions. Thus, the district court’s decision to abstain under *Younger* was appropriate.”); *Citizens for a Strong Ohio v. Marsh*, 123 Fed. App’x 630, 636-37 (6th Cir. 2005) (rejecting argument that *Younger* abstention does not apply to parties who are not subject to pending state court

proceedings and affirming dismissal of three parties to federal lawsuit who were not parties to pending state administrative action involving the same issues); *Spargo v. N.Y. State Comm’n on Judicial Conduct*, 351 F.3d 65, 84 (2d Cir. 2003) (finding that legal interests of a judge and his political supporters who were plaintiffs in federal lawsuit were “sufficiently intertwined” and that circumstances presented in case where such that *Younger* could “bar claims of third-parties who are not directly involved in the pending state action”); *Cedar Rapids Cellular Tel., L.P. v. Miller*, 280 F.3d 874, 881-82 (8th Cir. 2002) (finding that, under *Younger*, “the parties in federal and state court need not be identical where the interests of the parties seeking relief in federal court are closely related to those of [the] parties in pending state proceedings and where the federal action seeks to interfere with pending state proceedings”).

Plaintiffs’ interests in this action are clearly “intertwined” with those of the plaintiffs in *Dickson*. The plaintiffs in both cases share the same ultimate goals of having a court: (1) declare that the challenged North Carolina House and Senate Districts violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; (2) enjoin the further use of these districts; and (3) order the state to adopt a new redistricting plan. (Compare D.E. 11, pp. 92-93 [Prayer for Relief] with D.E. 32-4, pp.45-47 [Prayer for Relief] and D.E. 32-21, pp. 45-47 [Prayer for Relief]) Unlike in other contexts, if the relief sought by the plaintiffs in *Dickson* is ultimately granted, after possible review by the United States Supreme Court, then the plaintiffs here will receive the same “relief” as the plaintiffs in *Dickson*. In other words, the decision in *Dickson* will have the same impact on the plaintiffs here as it does the plaintiffs in *Dickson* and all

other residents of the challenged districts. Given the significant state interests at issue here, the relief plaintiffs seek here, if granted, would directly interfere with *Dickson* because North Carolina can only have one set of legislative districts and a federal injunction would interfere with the “state courts’ ability to perform their judicial functions” and create an “undue interference” with the state proceeding. *See Jacobs*, 134 S. Ct. at 586; *see also Growe*, 507 U.S. at 35 (noting that a state “can have only one set of legislative districts”). Accordingly, abstain from this action is proper under *Younger*.

Plaintiffs’ claims here are also barred by the doctrine of res judicata. The U.S. Supreme Court has held that the Full Faith & Credit Clause requires a federal court to look to state preclusion laws in determining the preclusive effects of a previous state court judgment. *See Marrese v. Am. Acad. Of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985). In North Carolina, under the doctrine of *res judicata*, a final judgment on the merits in a prior action precludes the parties or their privies from relitigating issues that were, or could have been, raised in that action. *See Lawson v. Toney*, 169 F. Supp.2d 456, 462 (M.D.N.C. 2001) (citing *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986)). This protects litigants from having to relitigate previously decided matters and promotes judicial economy by preventing repetitive litigation. *Little v. Hamel*, 134 N.C. App. 485, 487, 517 S.E.2d 901, 902 (1999).

In North Carolina, there is no definition of “privity” for purposes of *res judicata* that is applied in all cases. While recognizing that a universal definition for the term has “proven to be elusive,” in determining whether privity 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) (citations omitted). As this Court has recognized, one way that privity between parties may be shown is through the *Lassiter* exception. See *Thompson v. Lassiter*, 246 N.C. 34, 97 S.E.2d 492 (1957). There are essentially three elements to the *Lassiter* exception: (1) control of both the original and present lawsuit; (2) a proprietary or financial interest in the prior judgment; (3) an interest in the determination of a question of fact or a question of law regarding the same subject matter or transactions. *Id.* at 39, 97 S.E.2d at 496. In applying this exception, North Carolina courts have not always required a showing of all elements to establish privity. See *Cline v. McCullen*, 148 N.C. App. 147, 151, 557 S.E.2d 588, 591 (2001) (“Although there is insufficient evidence to show that plaintiff controlled the prior litigation . . . the court’s findings do establish that plaintiff had a substantial interest, which in light of the fifty-fifty sharing of commission, constituted a proprietary interest in the judgment. Thus, these findings can be used to support our earlier determination that plaintiff and [the plaintiff in prior action] were in privity.”).

By its terms, the *Lassiter* exception cannot squarely fit within the context of redistricting litigation like that at issue here and in *Dickson* since there will never be a “proprietary or financial interest” in the judgment in these types of cases as those terms have been traditionally construed in other contexts. Were this court to find that *Lassiter* is the only means by which a redistricting defendant could show privity for purposes of proving a *res judicata* defense, any person or entity who opposes a redistricting plan enacted by the legislature could organize, prepare, and support a lawsuit seeking to have

the maps declared invalid, file their claims in the court of their choosing and, if the court issues a decision that the person or entity does not like, there is nothing to prevent that person or entity from filing a subsequent lawsuit raising the same claims in another court to obtain a different result.

If the *Lassiter* exception by its current terms is the only means by which Defendants could show privity here between the plaintiffs in *Dickson* and the plaintiffs here, then there is nothing to prevent The Democracy Project II, in conjunction with Mr. Falmlen and its counsel, from identifying a new set of plaintiffs and filing a third lawsuit involving the same claims and the same districts at issue here in the event they are not satisfied with the disposition of this case. Accordingly, the Court finds that the record here supports a finding that the plaintiffs in this action are in privity with the plaintiffs in the *Dickson* litigation and that their claims are barred for the reasons stated below.

At trial, Mr. Falmlen denied that he had the authority to “control” this this or the *Dickson* litigation. Surely such a self-serving disclaimer of “control” alone cannot give license for an entity such as The Democracy Project II, which the evidence shows is involved in the planning, filing, financing, and maintenance of this action and *Dickson*, to endlessly litigate the same claims against the State of North Carolina. Instead, a fact-specific inquiry into whether The Democracy Project II is the real party in interest in both cases is warranted. If this is true, whether all elements of the *Lassiter* exception are present is irrelevant because the real party in both *Dickson* and this case are the same.

With respect to *Dickson*, Mr. Falmlen filed a tax return in which he stated that The Democracy Project II, “through its counsel, organized, prepared and is supporting” the

Dickson litigation. The record contains testimony from two plaintiffs in *Dickson*²⁸ showing that their participation in that case was nominal. Mr. Wilson testified that he did not know what districts he challenged in *Dickson* or who represented him in that case. (Wilson Dep. 17:18-18:11, 60:5-60:21) Mr. Wilson did not have any contact with his attorneys while he was a plaintiff in *Dickson* and admitted that he simply allowed his name to be used on the Complaint and that he never heard anything from his attorneys in *Dickson* after that. (*Id.* at 95:14-96:7) Mr. Wilson was not responsible for paying his attorneys' fees in *Dickson* and testified that he did not know who was responsible. (*Id.* at 29:1-17) Similarly, at trial in this case, Plaintiffs called Albert Kirby to provide testimony about the same House district he challenged in *Dickson*. Mr. Kirby did not initially recall whether he had been a *Dickson* plaintiff but admitted that he had been asked to join that case by Mr. Speas, who also had asked him to testify as a fact witness in this action. Mr. Kirby also was not responsible for paying his attorneys' fees in *Dickson* and could not say who was responsible for them. It is clear from Mr. Kirby's testimony that, like Mr. Wilson, he was a nominal plaintiff in *Dickson* and that The Democracy Project II is the real party in interest there.

Mr. Wilson's emails and deposition testimony make clear that The Democracy Project II is also the real party in interest here. In an email to a potential plaintiff, Mr. Wilson inquired as to whether the plaintiff "would be interested in being part of a

²⁸ Lead *Dickson* plaintiff Margaret Dickson was also deposed, however, her testimony was not made part of the record by either plaintiffs or defendants through deposition designations and therefore is not relied upon by the Court here.

redistricting federal lawsuit *that Democracy Partners²⁹ is bringing against the state.*” (Wilson Dep. 80:9-17; DX 3103) (emphasis added) Mr. Wilson continued, in the same email that, “[t]hey along with our Democratic Legislators have targeted key House and Senate districts.” (*Id.* at 82:12-83:6) Mr. Wilson, in yet another email, introduced himself as the “Deputy Executive Director for the North Carolina Democratic Party” and states that the “The State party along with other democratic organizations in Raleigh are participating in [sic] redistricting case.” (Wilson Dep. 88:20-91:15; DX 3105) When asked at his deposition what other “Democratic organizations” he was referring to, he responded that the only one he could think of was “Democracy Partners.” (Wilson Dep. 90:20 – 91:9) Tellingly, in describing who was “bringing” the lawsuit, Mr. Wilson never mentions any of the named plaintiffs nor does he suggest that the lawsuit is being or will be brought on behalf of any of these plaintiffs.

In addition, Plaintiffs’ own testimony support the Court’s conclusion that the Plaintiffs here were plaintiffs in name only. There is no evidence on the record to indicate that any of the Plaintiffs here made or had responsibility for making strategic decisions related to this litigation. Every Plaintiff testified that her or she was not responsible for the payment of their legal fees in this action and none knew who was responsible. This fact alone undermines Plaintiffs’ claims that they actually controlled the litigation. Although it is permissible for a third party to assist a litigant with his or her legal fees,

²⁹ This is obviously a reference to The Democracy Project II as Mr. Falmlen testified at trial that he was not aware that of any organization named “Democracy Partners” that had a role in this case. (Tr. Vol. V, p. 148:8-12) Mr. Wilson confirmed that his only knowledge of the involvement of “Democracy Partners” in the case came from Mr. Falmlen. (Wilson Dep. 82:12 – 83:10)

Plaintiffs' lack of knowledge of the arrangements between The Democracy Project II and their counsel regarding the payment of these fees or The Democracy Project II's role in this litigation demonstrates that they were not controlling this case.

Moreover, multiple Plaintiffs testified that they had never seen copies of the complaint filed on their behalf before their depositions. Others erroneously believed this litigation is challenging their United States Congressional District or could not say what districts are being challenged in this lawsuit. Multiple plaintiffs testified that they had not received regular updates about the case or that the first time they talked to a lawyer since joining the suit was within a month before their deposition. Still others testified that they could not recall how they became involved with this case. Although Plaintiffs' counsel has blamed this testimony on "memory lapses," even if that is true, it demonstrates a lack of meaningful involvement by Plaintiffs in controlling this action.

In reaching these conclusions, the Court does not question the sincerity of the named plaintiffs in this action. It does not need to. And there can be no doubt that some of the plaintiffs in this case, such as Ms. Covington, genuinely disagree with the manner in which their districts were drawn. But sincerity, no matter how abundant, does not change the fact that Plaintiffs are named in an action brought by an entity that organized, prepared, and supported a nearly identical case in 2011 that has been dismissed in its entirety.

Although, as stated above, proving that all elements of the *Lassiter* exception is not necessary in the context of these cases, it is clear that the goals and interests of The Democracy Partnership II in both *Dickson* and this case are the same: to have the districts

at issue invalidated and new redistricting maps that are more favorable for Democrats adopted. Mr. Wilson admitted that he was recruited to participate in *Dickson* by the then-executive Director of the N.C. Democratic Party (“NCDP”). In turn, Mr. Wilson recruited multiple Plaintiffs in this action in his capacity as Deputy Executive Director of the NCDP and admitted in an email that the NCDP “along with other democratic organizations in Raleigh” were “participating” in this case. Thus, the NCDP was involved in both cases. At trial, at least two witnesses who were members of the NCDP’s executive committee admitted that the purpose of the NCDP was to get Democrats elected to office, including to the General Assembly. Given this stated organizational purpose, it makes no logical sense for the NCDP to have been involved with both the *Dickson* litigation and this action if increasing Democratic electoral prospects in the General Assembly was not the goal of these lawsuits. Indeed, every plaintiff in this case who could recall how they became involved was contacted by either Mr. Wilson, a current or former Democratic member of the North Carolina General Assembly, Plaintiffs’ counsel (who was also counsel for the *Dickson* plaintiffs), or an employee of a progressive-leaning public policy organization.

Considering the totality of the circumstances and in light of all of the relevant facts, the Court finds that there is sufficient evidence to conclude that the Democracy Project II was the real party in interest in both the *Dickson* case and in this action. Further, the goals and interests of that organization is the same in both cases. Accordingly, the claims of the Plaintiffs in this action are barred by the doctrine of *res judicata* because this action involves the same claims, districts, and issues that either were, or could have been, litigated in *Dickson*.

B. Racial gerrymandering claims

Laws based upon racial classifications are “inherently suspect and thus call for the most exacting judicial examination.” *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (citing *Univ. of California Regents v. Bakke*, 438 U.S. 265, 991 (1978)). This test, often known as “strict scrutiny,” has two prongs. First, any racial classification “must be justified by a compelling governmental interest.” *Wygant*, 476 U.S. at 274 (citations omitted). Second, “the means chosen by the State to effectuate its purpose must be ‘narrowly tailored to the achievement of that goal.’” *Id.* (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 489 (1980)).

The United States Supreme Court has adopted guidelines for determining whether the strict scrutiny test applies to legislative and congressional districts challenged as racial gerrymanders. The Court has made “clear” that “the underlying districting decision is one that ordinarily falls within a legislature’s sphere of competence.” *Cromartie II*, 532 U.S. at 242 (citing *Miller*, 515 U.S. at 915). Therefore, the “legislature ‘must have discretion to exercise the political judgment necessary to balance competing interests.’” *Id.* (citing *Miller*, 515 U.S. at 916). Because redistricting is ultimately based upon political judgment, “courts must ‘exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race.’” *Id.* (quoting *Miller*, 515 U.S. at 916). Strict scrutiny does not automatically apply even where race was “a motivation for the drawing of a majority-minority district.” *Id.* at 241 (citing *Vera*, 517 U.S. at 959). Instead, plaintiffs alleging an illegal racial gerrymander must show that “‘other, legitimate districting principles were subordinated’ to race . . . and that race [was] the

predominant factor motivating the legislature's redistricting decision." *Vera*, 517 U.S. at 959 (quoting *Miller*, 515 U.S. at 916); *Cromartie II*, 532 U.S. at 241-42. This burden of proof is a "demanding one." *Cromartie II*, 532 U.S. at 241 (citing *Miller*, 515 U.S. at 928).

Plaintiffs' burden is even more demanding where a legislature has defended its districts on the grounds of partisan advantage. "[E]vidence that blacks constitute even a supermajority in one congressional district while amounting to less than a plurality in a neighboring district will not, by itself, suffice to prove that a jurisdiction was motivated by race in drawing its district lines when the evidence also shows a high correlation between race and party preference." *Cromartie I*, 526 U.S. at 551-52. Courts must exercise "caution" where "the State has articulated a legitimate political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated." *Cromartie II*, 532 U.S. at 242. Therefore, to prove that race was the predominant motive, "in a case . . . where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation," plaintiffs must prove: (1) "that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles;" and (2) that "those districting alternatives would have brought about significantly greater racial balance." *Id.* at 258. Nothing in *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1274 (2015), changed these standards.

Even assuming plaintiffs prove that race was the predominant motive for the drawing of district lines, a state may still defend any challenged district where the district furthers a compelling governmental interest and is “narrowly tailored.” *Alabama*, 135 S. Ct. at 1262; *Shaw II*, 517 U.S. at 908 (citing *Miller*, 517 U.S. at 920). A challenged district furthers a compelling interest if it was “reasonably necessary” to obtain preclearance of the plan under Section 5 of the VRA. *Shaw I*, 509 U.S. at 655; *see also Alabama* 135 S. Ct. at 1274. A challenged district also survives strict scrutiny when it was reasonably established to avoid liability under Section 2 of the VRA. *Vera*, 517 U.S. at 977 (citing *Grove v. Emison*, 507 U.S. 25, 37-42 (1993); *Shaw II*, 517 U.S. at 915; and *Miller*, 515 U.S. at 920-21).

To make this showing, a state need only articulate a “strong basis in evidence” that challenged districts were enacted to avoid preclearance objections or liability for vote dilution under Section 2. *Alabama*, 135 S. Ct. at 1274; *Shaw II*, 517 U.S. at 910 (citing *Wygant*, 476 U.S. at 277). Whether a state had a “strong basis” for drawing districts predominantly based upon race depends upon the evidence before the legislature when the plans were enacted. *Id.* (expert testimony prepared after the lawsuit was filed and which, therefore, could not have been considered by the legislature when it enacted the redistricting plan, is irrelevant); *Cromartie v. Hunt*, 133 F. Supp. 2d 407, 422-23 (E.D.N.C. 2000), *rev’d on other grounds sub nom, Cromartie II*, 532 U.S. 234 (finding by district court that the legislature had a strong basis in the legislative record to conclude that the 1997 version of the First Congressional District was reasonably necessary to avoid Section 2 liability).

Legislatures “may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have *good reasons to believe such use is required, even if a court does not find that the actions were necessary for statutory compliance.*” *Alabama*, 135 S. Ct. at 1274 (emphasis added). “[D]eference is due to [states’] reasonable fears of, and to their reasonable efforts to avoid, § 2 liability.” *Vera*, 517 U.S. at 978. Indeed, the General Assembly retains “flexibility” that courts enforcing the VRA lack, “both insofar as they may avoid strict scrutiny altogether by respecting their own traditional districting principles, and insofar as deference is due to their reasonable fears of, and to their reasonable efforts to avoid, § 2 liability.” *Id.*

The “narrow tailoring” requirement of strict scrutiny allows a state a limited degree of “leeway.” *Vera*, 517 U.S. at 977; *Alabama*, 135 S. Ct. at 1273-74. Narrow tailoring does not require that North Carolina pick just the right percentage of African-American population for a majority black district. *Alabama*, 135 S. Ct. at 1274. Nor does narrow tailoring require that “a district” have the “least possible amount of irregularity in shape, making allowances for traditional districting criteria.” *Vera*, 517 U.S. at 977 (quoting *Wygant*, 476 U.S. at 291 (O’Connor, concurring in part and concurring in judgment) (state actors should not be “trapped between the competing hazards of liability” by the imposition of unattainable requirements under the rubric of strict scrutiny))). Thus, a Section 2 majority black district that is based on a reasonably compact majority-minority population, “may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs’ experts in endless ‘beauty contests.’” *Vera*, 517 U.S. at 977.

The burden of proving the unconstitutionality of any challenged district remains at all times with the plaintiff. Plaintiffs are wrong in suggesting otherwise and they cite no redistricting cases in support of this proposition. The burden of proof formula adopted in *Shaw I*, 509 U.S. at 656, and *Shaw II*, 517 U.S. at 909, comes from the Court’s decision in *Wygant*. Under these standards, once the government articulates a strong basis in evidence, “[t]he ultimate burden remains with the [plaintiff] to demonstrate the unconstitutionality of an affirmative-action program.” *Wygant*, 476 U.S. at 277-78. Mere allegations by the plaintiffs of reverse discrimination do “not automatically impose upon” the legislature “the burden of convincing the court” that its decision to adopt race-based measures had a strong basis in evidence. *Id.* at 292 (O’Connor, J., concurring). In “reverse discrimination suits . . . it is the plaintiffs who must bear the burden of demonstrating that their rights have been violated.” *Id.*³⁰

³⁰ The obligation of the state to show a strong basis in evidence to support the creation of a majority-minority district is similar to the “burden of production” required of employers in employment disputes. See *NC Dep’t of Corr. v. Gibson*, 308 N.C. 131, 138, 301 S.E.2d 78, 83 (1983) (wrongful discharge case by state employee) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (standard of proof under Title VII of the Civil Rights Act)); *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981). Under these employment cases, plaintiffs must first show a *prima facie* case (for example, evidence that a black employee was discharged under circumstances that resulted in retention of white employee). *Gibson*, 308 N.C. at 137, 301 S.E.2d at 83. If the plaintiff proves a *prima facie* case, the employer has the burden of producing a legitimate non-discriminatory reason for its action. The employer is not required to prove that its actions were actually motivated by a non-discriminatory reason. *Id.* Instead, a plaintiff must prove that the employer’s stated reason is a pretext for intentional discrimination. *Id.* at 139, 301 S.E.2d at 84. This is because “[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.” *Id.* at 138, 301 S.E.2d at 83 (citing *Burdine*, 450 U.S. at 253).

Neither *Alabama* nor the decision in *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013), altered the standard burden of proof which rests upon every plaintiff in a case under the Fourteenth Amendment. The burden of proof does not shift to the defendants even assuming plaintiffs have established a *prima facie* case that race was the predominant motive for the lines of a specific district. *Johnson v. Miller*, 864 F. Supp. 1354, 1378-79 (S.D. Ga. 1994), *aff'd*, *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Hunt*, 861 F. Supp. 408, 436 (E.D.N.C. 1994), *rev'd on other grounds*, *Shaw II*, 517 U.S. at 909-910 (citing *Wygant*, 476 U.S. at 277). Plaintiffs in *Shaw II* prevailed not because the Supreme Court changed the traditional standards for burden of proof from plaintiffs to defendants but instead because plaintiffs carried their burden of proof that the 1992 version of the Twelfth Congressional District was not supported by a strong basis in evidence or narrowly tailored. *Shaw II*, 517 U.S. at 910, 916-18. The decision in *Fisher*, an affirmative action case, did not overrule *Wygant*, another affirmative action case, regarding the plaintiffs' burden of proof in all cases alleging violations of the Fourteenth Amendment.

The failure of the legislature in *Alabama* to follow any neutral state criteria highlights the fact that in this case compliance with the WCP was the predominant reason for the location of district lines for all legislative districts, including the VRA districts. The 2011 General Assembly was obligated to create legislative districts in accordance with the multistep formula articulated in *Stephenson I*. The North Carolina Supreme Court, in its original decision in this case, outlined these steps as follows:

First, “legislative districts required by the VRA shall be formed” before non-VRA districts. *Stephenson I*, 355 N.C. at 383, 562 S.E.2d at 396-97.

Second, “in forming new legislative districts any deviation from the ideal population for a legislative district shall be at or within plus or minus five percent” to ensure “compliance with federal ‘one person, one vote’ requirements.” *Id.* at 383, 562 S.E.2d at 397.

Third, “in counties having a population sufficient to support the formation of one non-VRA legislative district,” “the physical boundaries” of the non-VRA district shall “not cross or traverse the exterior geographic line of” the county. *Id.*

Fourth, “[w]hen two or more non-VRA legislative districts may be created within a single county,” “single-member non-VRA districts should be formed within” the county, “shall be compact,” and “should not traverse” the county’s exterior geographic line. *Id.*

Fifth, for non-VRA counties that “cannot support at least one legislative district” or counties “having a non-VRA population pool” that “if divided into” legislative “districts would not comply with” one person, one vote requirements, the General Assembly should combine or group “the minimum number of whole contiguous counties necessary to comply with the at or within plus or minus five percent ‘one person, one vote’ standard. Within any such contiguous multi-county groupings, compact districts shall be formed, consistent with the [one person, one vote] standard, whose boundary lines do not cross or traverse the ‘exterior’ line of the multi-county grouping.” *Id.* at 383-84, 562 S.E.2d at 397. “The resulting interior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the at or within plus or minus five percent ‘one person, one vote standard.’” *Id.* at 384, 562 S.E.2d at 397.

Sixth, “only the smallest number of counties necessary to comply with the at or within plus or minus five percent ‘one person, one vote’ standard shall be combined.” *Id.*

Seventh, “communities of interest should be considered in the formation of compact and contiguous [legislative] districts.” *Id.*

Eighth, “multi-member districts shall not be” created “unless it is established that such districts are necessary to advance a compelling governmental interest.” *Id.*

Ninth, “any new redistricting plans . . . shall depart from strict compliance with” these criteria “only to the extent necessary to comply with federal law.” *Id.*

Dickson, 367 N.C. at 571-72, 766 S.E.2d at 258.

This formula for compliance with the WCP also applies to VRA districts. Thus, “to the maximum extent practicable,” VRA districts must also “comply with the legal requirements of the WCP, as herein established for all redistricting plans and districts throughout the State.” *Stephenson I*, 355 N.C. at 383, 562 S.E.2d at 397.

The state courts of North Carolina have held conclusively that the 2011 legislative plans comply with the *Stephenson* formula for creating districts in single counties and creating districts in county combinations. *Dickson*, 367 N.C. at 573-74, 766 S.E.2d at 259-60. VRA districts drawn within a single county comply with the *Stephenson* requirement that districts must be drawn within a county where the population within one county would support one or a whole number of districts. To the extent plaintiffs contest the shape of districts drawn within a county, they have not offered any judicially manageable standard that would explain why their proposed alternative districts are compact while the enacted districts are not.³¹ In fact, several alternative VRA districts located within single counties score lower in compactness tests than enacted districts.³² Plaintiffs have also never offered any plans using the enacted county grouping formulas

³¹ There are no judicially manageable standards to evaluate compactness, a conclusion that is supported by plaintiffs’ expert.

³² For example, the Democratic leadership House Plan proposed five House Districts drawn within single counties (House Districts 29 (Durham), 33 (Wake), 42 (Cumberland) and 101 (Mecklenburg)) that were the least compact districts under the Reock compactness test, as compared to the corresponding enacted House Districts and all alternatives.

(or another county grouping formula that complies with the WCP) showing how majority black districts could be drawn more compactly than the enacted VRA districts. These facts demonstrate that the district lines for the challenged districts are not “unexplainable on grounds other than race.” *Cromartie II*, 532 U.S. at 242.

The fact that the *Stephenson* formula, and not race, predominated in the construction of these districts is further demonstrated by exemplar maps relied upon the General Assembly’s map drawer, Dr. Thomas Hofeller. Early in the redistricting process, the redistricting Co-Chairs announced that they would recommend that VRA districts be created with a black VAP of at least 50%. North Carolina’s criterion was based upon this Court’s decision in *Pender County* and affirmed in *Strickland*. Following *Pender County*, the General Assembly could no longer attempt to protect the State from liability under Section 2 through the creation of coalition, or crossover, or influence districts. The General Assembly also needed to rely upon evidence of the three *Gingles* preconditions, i.e., the presence of a geographically compact minority populations that could constitute majorities in single-member districts, that the minority group was politically cohesive, and that absent a majority black district, African-Americans would not have an equal opportunity to elect their candidates of choice because of racially polarized voting. *Gingles*, 478 U.S. at 48-51; *Grove v. Emison*, 507 U.S. 25, 40 (1993); *Vera*, 517 U.S. at 997 (Kennedy, J., concurring).³³

³³ The compactness of the minority population is also relevant to claims for racial gerrymandering because traditional districting principles like compactness “may serve to defeat a claim that a district has been gerrymandered on racial lines.” *Stephenson I*, 335 N.C. at 371, 562 S.E.2d at 389 (citing *Shaw I*, 509 U.S. at 647).

To satisfy the first *Gingles* precondition, North Carolina's map drawer relied upon exemplar maps showing the locations of reasonably compact African-American populations. The House exemplar maps show that six compact majority black House districts could be formed in northeastern North Carolina, three compact majority black House districts in southeastern North Carolina, two compact majority black House districts in Cumberland County, two compact majority black House districts in Wake County, three compact majority black House districts in Guilford County, one compact majority black in Forsyth County, and five compact majority black House districts in Mecklenburg County. Similarly, the Senate exemplar maps show that three compact majority black districts could be formed in northeastern North Carolina, one compact majority black district in Scotland, Hoke, and Cumberland counties, one compact majority black district in Wake and Durham counties, one compact majority black district in Guilford County, one compact majority black district in Guilford and Forsyth counties and two compact majority black districts in Mecklenburg County. (Tr. Vol. IV, pp. 228:5-232:23; Tr. Vol. V, pp. 20:20-25:13)

All of the State's exemplar districts (as well as all of the enacted districts) are at least as visually compact as the 1997 version of the First Congressional District, which the district court found to be in compliance with the *Gingles* compactness element. *Cromartie II*, 133 F. Supp. 2d. at 422-23. There is no dispute that past General Assemblies believed that racially polarized voting existed in counties in which majority black or coalition districts were enacted prior to 2011. It is also undisputed that one or both experts who testified during the legislative process found the presence of racially

polarized voting in counties included in the exemplar VRA districts and the enacted VRA districts. There is no dispute that all alternative plans proposed majority black or coalition districts in all of the counties or areas included in the exemplar districts and the enacted districts. There is also no dispute that African-Americans are politically cohesive. *Cromartie I*, 526 U.S. at 550-51. Therefore, none of the compact exemplar districts would be considered racial gerrymanders and all of them satisfy the three *Gingles* preconditions. *Id.* at 547.

While the exemplar districts provide evidence of the *Gingles* preconditions, they do not satisfy the *Stephenson* criteria that VRA districts comply with the WCP to the maximum extent practicable.³⁴ For example, exemplar House Districts 5, 7, 12, 23, 24, 27, 31, 32 are drawn into multiple enacted county groups. (Tr. Vol. IV, pp. 232:12-241:1; DX 3030, Maps 1, 2,5,6,9, 11,12, 18) Similarly, exemplar Senate Districts 3, 4, 5, 20, 21, and 32 are drawn into multiple county groups. (Tr. Vol. V, pp. 20:20-30:22; DX 3030, Maps, 14, 3,4,7,8,10,15,17)³⁵ Thus, had the General Assembly enacted the exemplar districts, the number of counties in the county group required to encompass a particular exemplar district and all adjoining non-VRA districts would have been much

³⁴ The 2002 legislative plans did not create county groups that included the VRA districts. Plaintiffs in that case argued that VRA districts must be nested within county configurations. By finding the 2002 legislative plans violated the WCP, the North Carolina Supreme Court adopted plaintiffs' argument that VRA districts must be drawn within a single county or county group. The parties to this case recognized this impact of *Stephenson II*. All 2011 VRA districts are nested within a single county or county group in the enacted plans and all alternatives.

³⁵ All of the coalition districts proposed in the alternative plans (such as House Districts 12, 21, and 48) that are located in multiple counties are similar to House District 18 under the 2003 House Plan. They are not majority black VAP and therefore violate the WCP. *Pender County*, *supra*.

larger. The General Assembly would have been unable to comply with its obligation to maximize the number of two-county groups, three-county groups, etc. *Dickson*, 367 N.C. at 572-73, 766 S.E.2d at 259-60. This is demonstrated by a comparison of Dr. Hofeller's optimum county grouping maps for house and senate districts with the House and Senate exemplar maps. The optimum group and exemplar maps prove that the predominant reason for the shape and location of the enacted VRA districts, as well as the adjoining non-VRA districts, was the State's application of the First, Second, Third, Fourth, Fifth, Sixth, and Ninth Criteria listed in *Stephenson I*. The shapes and locations of the challenged districts are therefore not "unexplainable" but for race.³⁶

The undisputed evidence shows that the redistricting chairs considered politics and partisan advantage and that the 2011 enacted plans were designed to protect Republican majorities in the House and Senate. All of the alternative plans were designed to return Democratic majorities in both chambers. (DX 3031) It is undisputed that African-American voters in North Carolina support Democratic candidates in very high percentages. *Cromartie I*, 526 U.S. at 550-51. Evidence that African-Americans "constitute even a super-majority" in a district while "amounting to less than a plurality in a neighboring district will not, by itself, suffice to prove that a jurisdiction was motivated by race in drawing district lines when the evidence also proves a high correlation between race and party preference." *Id.* at 551-52. The legislative leaders

³⁶ The Alabama legislature cited no similar constitutional formula for the creation of legislative districts. In fact, as to the only district fully discussed by the *Alabama* parties and the United States Supreme Court (Alabama Senate District 26), the evidence showed that the Alabama legislature did not follow any non-racial criteria other than the legislature's committee's policy on equal population. *Alabama*, 135 S. Ct. at 1271-72.

admitted that creating the 2011 majority-minority districts in compliance with *Strickland* would make adjoining districts better for Republican candidates. As defendants have demonstrated from the beginning of this case, there is unrefuted evidence that the 2011 redistricting plans were drawn to maintain Republican majorities in the General Assembly and increase the number of Republican leaning congressional seats.³⁷

Plaintiffs have never proposed that the coalition districts they support can be replaced by crossover or influence districts or districts with only 22% black VAP (the state-wide percentage of black VAP). This is because plaintiffs do not believe that racially politicized voting has vanished in the areas where the State enacted majority black districts. Their own expert testified during the legislative process that racially polarized voting was present in elections held in these areas from 2006 through 2010. Plaintiffs' real objection is the political impact of the State's decision to comply with the VRA and the WCP and replace coalition and influence districts with majority black districts while adding a few majority black districts where legally required.

Without citing any authority, plaintiffs take the position that no new majority black districts can ever be created in any county or area as compared to the 2003 plan. Plaintiffs make this argument even when they agree that one or more majority black or coalition districts are constitutional for the same county or areas for which they oppose any new majority black district.³⁸ And despite the fact that the North Carolina Supreme

³⁷ No such political motivation was argued by the State in *Alabama*.

³⁸ In just one example, all of the alternative maps agree that two majority black house districts in Guilford County were constitutional, but that a third Guilford majority black district that adjoins the two constitutional districts is unconstitutional.

Court has ruled that coalition districts can no longer protect the State from Section 2 liability, plaintiffs also argue that black population should be “cracked” from majority black districts to create coalition districts and adjoining influence districts. Plaintiffs’ “criteria” for legislative redistricting is that the Voting Rights Act bars North Carolina from enacting any new majority black districts and instead requires North Carolina to replace some (but not all) majority black districts with coalition districts, crossover, or influence districts. There is no basis for arguing, as plaintiffs argue, that the VRA requires states to enact standardless plans that favor the Democratic Party.

Finally, the related concept of incumbency protection is another race-neutral districting principle that can be used by a state to defeat claims that race was the predominant motive. *Alabama*, 135 S. Ct. at 1270. The State exemplar maps show that the protection of incumbents played a significant role in the location of House and Senate VRA District lines.

Plaintiffs contend that race was the predominant motive for the lines of the challenged districts for three reasons: (1) the shapes of the challenged districts; (2) statements by the redistricting Co-Chairs that they would consider plans that provided rough proportionality; and (3) the decision by the redistricting Chairs that districts designed to protect the State from liability under Section 2 should be established with a black VAP in excess of 50%. This evidence does not create a disputed factual issue on racial predominance.

The State has shown that application of the WCP is the predominant explanation for the shapes and locations of the VRA districts. Plaintiffs have not offered maps

showing how more picturesque VRA districts could be created that also complied with *Stephenson*. Throughout this case, they have relied on comparisons between the now illegal 2003 plans with 2011 plans. Moreover, plaintiffs' argument regarding the legislative leadership's proportionality criteria is groundless. State-wide criteria cannot be used to prove that a particular district was racially gerrymandered. *Alabama*, 135 S. Ct. at 1265. The United States Supreme Court has also held that proportionality is part of the totality of the circumstances test applicable to claims for vote dilution under Section 2. *See LULAC*, 548 U.S. 427; *Strickland*, 556 U.S. at 30 (Souter, J. dissenting). In order to prove a case for vote dilution, plaintiffs must show an alternative plan that creates one or more majority black districts than the number found in the enacted plan. *De Grandy*, 512 U.S. at 1008. Vote dilution plaintiffs cannot meet this standard of proof when a particular minority group has achieved proportionality in a redistricting plan. *Id.* at 1015-16. Plaintiffs' argument that a defense established by the United States Supreme Court also can constitute evidence that districts were racially gerrymandered is illogical. In any case, proportionality was not a hard rule for the North Carolina legislative leaders and neither legislative plan enacted a proportional number of majority black districts.³⁹ Nor did either 2011 plan enact the maximum number of possible VRA districts. (Tr. Vol. III, pp. 166:6-167:10; Tr. Vol IV, pp. 9:8-11:6, 19:15-21:3)

³⁹ A prominent leader of the African-American community in Durham, North Carolina, urged that the State provide proportionality to African-Americans in the number of districts that would give them an equal opportunity to elect their candidates of choice. Other witnesses urged the creation of new majority-minority districts and that districts designed to elect candidates of choice should be created with true majorities of African-Americans.

Plaintiffs' third argument is equally groundless. Plaintiffs contend that North Carolina used the same type of "mechanical" racial formula rejected by the Supreme Court in *Alabama*. In doing so, plaintiffs incorrectly equate Alabama's interpretation that Section 5 required new districts be kept at the same super-majority racial percentages as former districts with statements by North Carolina's legislative leaders that districts created to protect the State from liability under the VRA should be created with majority black voting age populations. This comparison fails for numerous reasons.

First, Alabama's decision to retain super-majority black districts was based upon the State's incorrect interpretation of preclearance requirements under Section 5. If the United States Supreme Court had agreed with Alabama's interpretation of Section 5, then it is highly unlikely that the Supreme Court would have remanded the case for further proceedings. But of course, in *Alabama*, the Court found that the Alabama legislature's interpretation of Section 5 was wrong. In contrast, the North Carolina leaders followed decisions by this Court and the United States Supreme Court on the percentage of minority voting age population that must be included in a district designed to protect the State from liability under Section 2. Again, it is hard to fathom how compliance with a decision by the North Carolina Supreme Court that has been affirmed by the United States Supreme Court could be construed as evidence of an illegal motive. The "benchmark" followed by the Alabama legislature was something it unilaterally adopted based upon its incorrect interpretation of Section 5. The benchmark followed by North Carolina is the judicial standard for VRA districts.

Unlike the evidence available to the North Carolina General Assembly, it is also significant that there was no strong basis in evidence to support Alabama's policy on super majority racial percentages for VRA districts. The only district fully discussed by the parties and the Supreme Court (Alabama Senate District 26) was reestablished in 2012 with a super-majority in excess of 70%. As noted by the Supreme Court, nothing in the legislative record indicated why the ability of blacks to elect their preferred candidate of choice would be diminished if Alabama had created Senate District 26 with a BVAP of 65%. *Alabama*, 135 S. Ct. at 1273.

Finally, the average BVAP in Alabama's 2012 legislative districts exceeded 60%. The average BVAP for the challenged North Carolina VRA districts was in the low 50% range. *Dickson*, 367 N.C. at 564, 766 S.E.2d at 254. While each district must be evaluated on its own merit, the average percentage of North Carolina districts as compared to Alabama districts is proof that compliance with *Stephenson* and the *Strickland* benchmark were the criteria followed by the General Assembly, as opposed to Alabama's strategy of enacting districts with super-majorities of African-American voters.

Even assuming plaintiffs had raised a disputed factual issue on racial predominance, they have still failed to carry their burden of proof. In cases where there is a high correlation between race and politics, plaintiffs must offer plans that follow the applicable redistricting criteria, achieve the legislature's political goals, and bring better racial balance. *Cromartie II*, 532 U.S. at 258. Plaintiffs have failed to meet this burden in several respects.

Plaintiffs have not offered plans that comply with the WCP or that establish VRA districts with black VAP population in excess of 50%. Therefore, plaintiffs have not offered alternative plans based on the applicable criteria established by this Court and the United States Supreme Court. *Id.* Regardless, it is undisputed that all alternative plans were drawn to result in Democratic majorities. The drafters of these plans achieved their political goals by limiting the number of majority black districts. Instead of creating any new majority black districts, the alternative plans cracked majority black populations into coalition, crossover, or influence districts to maximize the Democratic vote. These are not the legislative goals of a Republican-controlled General Assembly.

Nor would the alternative plans result in greater racial balance. None of the alternative plans are designed to provide equal opportunity for African-Americans to elect their preferred candidates of choice.⁴⁰ The plans enacted in 2011 have resulted in a larger number of elected African-Americans in the General Assembly as compared to the number elected under the 2003 legislative plans. All of the alternative plans mirror the 2003 legislative plans and would decrease the number of districts that provide African-American voters an equal opportunity to elect their candidates of choice. Based upon the

⁴⁰ Plaintiffs seem to assume that North Carolina is forever locked into the number of majority black or coalition districts created by a 2003 Democratic-controlled General Assembly to maintain Democratic control. Just as plaintiffs never explain why the alternative plans' proposed majority black districts are legal while the enacted majority black districts are not or why coalition districts are legal but majority black districts in the same locations are not, they give no explanation for the number of majority black or coalition districts that are legal or why the State violated the law simply because it slightly increased the number of VRA districts. Plaintiffs' only possible answer is that the number of acceptable majority black or coalition districts depends how many can be created without jeopardizing the political interests they seek to further.

historical record, and as found by the trial court, implementation of any of the alternative plans would result in the defeat of African-American incumbents whose districts would be transformed by the alternative plans into influence districts. Plaintiffs' proposed plans would therefore create greater racial imbalance in the membership of the General Assembly.

Plaintiffs wrongly argue that the trial court's findings in *Dickson* were limited to the 2010 election results. The United States Supreme Court in *Gingles* imposed majority black districts as a remedy for Section 2 violations in numerous North Carolina counties. During the legislative process, the Redistricting Co-Chairs were advised by the University of North Carolina's School of Government that North Carolina remained obligated to maintain effective voting majorities for African-Americans in these counties. Similarly, the trial *Dickson* court found that under the decision by the district court in *Cromartie II*, legally significant racially polarized voting had been found present in elections in all of the counties that were included in the 1997 version of the First Congressional District and that the 1997 First Congressional District was reasonably necessary to protect the State from vote dilution claims.⁴¹ There was also evidence on the number of elections won by African-American candidates in majority black, coalition, or influence districts from 2006 through 2010 and the lack of success by black candidates in state-wide partisan elections from 2000 through 2010. (DX 3020-1, 3, 5, 7; DX 3043)

Plaintiffs contend that defendants failed to make what they call a "particularized" study of racially polarized voting. Plaintiffs have borrowed this concept from a test that

⁴¹ The 1997 CD 1 was a coalition district with a black VAP of 47%.

applies to Section 5 by the USDOJ. This ignores the benchmark, judicially manageable standard set in *Strickland*. Regardless, during the legislative process, the NC NAACP's expert did a "particularized study." He provided testimony that significant levels of racially polarized voting were present in 54 elections between African-American and white candidates for North Carolina legislative or congressional elections from 2006 through 2010. Plaintiffs counsel in this case testified that the expert report demonstrated that "significant racially polarized voted" continues to exist in North Carolina (presumably in the legislative districts analyzed by the expert) and that "majority-minority" districts were still needed. This report was then supplemented by an expert retained by the State who found significant levels of racially polarized voting in elections involving both African-American and white candidates in fifty-one counties in North Carolina in 2008 and other elections. At no time during the legislative process did any legislator, witness, or expert witness question the findings by these two experts.⁴² This expert testimony was supplemented by a law review article by one of plaintiffs' counsel. This article detailed evidence of racially polarized voting as alleged or established in voting rights lawsuits filed during the decades prior to the 2010 election. These lawsuits encompassed many of the counties included in majority black or coalition legislative districts enacted prior to 2011 and in 2011.

⁴² Nor did any expert or witness give testimony that any specific district should be created with less than 50% BVAP or that BVAP between 51% and 53% was too much. Nor did any expert testify that VRA districts – whether designated as majority black or coalition districts – were no longer needed because the white bloc voting had disappeared.

During the public hearing process, many witnesses testified about the continuing presence of racially polarized voting in legislative and local elections through the past decade, the continuing need for majority-minority districts, and the continuing existence of the *Gingles* factors used to judge the totality of the circumstances. Not a single witness testified that racial polarization had vanished in any county or state-wide in any election during the past decade including any elections in any of the areas where the General Assembly had enacted VRA districts.

Additional evidence demonstrates the strong basis in evidence for each challenged district. Almost all of the counties included in each 2011 district were covered under by Section 5 or included in the VRA districts affirmed in *Gingles* and *Cromartie*. Most counties in each challenged district were also included in majority black or majority-minority coalition districts under the 2001 Congressional and the 2003 enacted legislative Plans.

This evidence also includes the number of counties in each district in which one or both experts found significant levels of racially polarized voting. It also includes evidence where all three 2011 alternative legislative plans proposed the creation of majority black or majority-minority coalition districts in all of the counties encompassed by these districts.

The United States Supreme Court found “support for the majority-minority requirement in the need for workable standards and sound judicial and legislative administration.” *Strickland*, 556 U.S. at 17. The bright line established by a majority-minority rule also addresses difficult questions about the type of white voters who need to

be added or subtracted during the redistricting of underpopulated or overpopulated districts. Moreover, a majority-minority rule alleviates questions regarding the power of incumbency in past elections. *Id.* at 17.

The evidence at trial is in line with these principles. This includes the extent to which each challenged district was underpopulated or overpopulated. It also includes evidence regarding fundraising of African-American incumbents in all contested elections in this district from 2004 through 2010. As noted by Senator Blue, incumbency is worth up to 15% in total vote for the incumbent. The majority-minority criteria relieved North Carolina of making difficult if not impossible judgments concerning the impact of incumbency, the type of white voters that needed to be added back into the challenged districts, as well as the impact of incumbency on prior elections. *Strickland, supra.*

Plaintiffs have attempted to discount this evidence by ignoring the margin of victory for African-American incumbents and instead relying upon the percentage of voters who supported the African-American incumbent versus their underfunded white challengers. There is no evidence on the percentage of voters who voted for African-American incumbents. Plaintiffs' reliance on percentage of the vote received by African-American incumbents does not dispel the fact that the actual margins of victory for African-American incumbents in elections were less than the amount by which their districts were underpopulated or overpopulated. Because no one contends that racially polarized voting had vanished in the areas where even the plaintiffs proposed majority black or coalition districts, and because the North Carolina Supreme Court has ruled that

coalition districts cannot be used to avoid Section 2 liability, North Carolina had “good reasons” to follow the *Pender County* and *Strickland* benchmarks, replace coalition districts with majority black districts, and to add a few new majority black districts in areas of the State (in northeastern North Carolina) or single counties (Cumberland, Wake, Durham, Guilford, and Mecklenburg) where all of the alternative maps and all the evidence in the legislative record supported the creation of one or more majority black districts. *Alabama, supra*.

Plaintiffs’ narrow tailoring arguments ignore the 2006 amendments to Section 5. At that time Section 5 was amended to provide that “any voting qualification or prerequisite to voting, or standard practice or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race . . . to elect their *preferred candidates of choice*” violates Section 5. 52 U.S.C. § 10304(b) (emphasis added). It is a standard principle of statutory construction for terms within the same statute to be given the same meaning. *Sorenson v. Sec’y of the Treasury*, 475 U.S. 851, 860 (1986) (“identical words used in different parts of the same act are intended to have the same meaning”). In *Strickland*, the United States Supreme Court held that, under Section 2, districts drawn to give a minority group an equal opportunity to elect “their candidate of choice,” must be created with a majority of the minority groups’ voting age population. Under the standard rule of statutory construction, it is irrational to give the words “candidate of choice” under Section 5 a different interpretation than “candidate of choice” under Section 2.

Thus, North Carolina had “good reasons” to create majority black districts in Section 5 counties with a BVAP in excess of 50%, even though that might result in an increase in the BVAP in a district that had formerly been created as a coalition district. Even plaintiffs’ expert, who also serves as an expert for USDOJ, conceded that he had been instructed by USDOJ to draw exemplar districts in Section 5 proceedings with a BVAP in excess of 50% to avoid any legal dispute.⁴³

Plaintiffs’ narrow tailoring arguments ignore that in 2006 Congress amended Section 5 to prohibit redistricting plans that have “any purpose” “of diminishing” a minority group’s ability to elect their candidate of choice. 52 U.S.C. § 10304(b). With this amendment, Congress intended to incorporate into Section 5 the constitutional standards established by the Supreme Court in cases such as *City of Mobile v. Bolden*, 446 U.S. 55 (1980), *Washington v. Davis*, 426 U.S. 229 (1976) and *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1997); S. REP. NO. 109-295, at 16-18 (2006); H.R. REP. NO. 109-478, at 65-72 (2006). A discriminatory purpose may exist where a legislature intentionally refuses because of political reasons to create districts that allow minority voters to elect their preferred candidates of choice. Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7471 (Feb. 9, 2011) (citing *Busbee v. Smith*, 549 F. Supp. 494, 508 (D.D.C. 1982), *aff’d* 459 U.S. 1166 (1983) and *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 778 n. 1 (9th Cir.

⁴³ All of the districts challenged in *Alabama* were already majority black districts under the 2001 Plan. None of the *Alabama* plaintiffs argued that these districts should have been established in 2012 as coalition districts.

1990) (Kozinski, J., concurring and dissenting in part), *cert. denied*, 498 U.S. 1028 (1991).

Plaintiffs ask this Court to force North Carolina to eliminate majority black districts and replace them with coalition, crossover, and influence districts. Plaintiffs' strategy was rejected by Congress when it amended Section 5 in 2006. In fact, Congress expressly repudiated the argument that states could adopt coalition or influence districts in the place of districts that allow minorities to elect their preferred candidates of choice, particularly when the motive behind such a strategy was to aide a political party. Senate Report at 16. Both the Senate and House Reports explained that Section 5 was designed to prevent legislatures from "unpacking a majority-minority district and chang[ing] them into influence or coalition districts." Senate Report p. 19; House Report pp. 68-71. Congress made clear that Section 5 did not "lock into place coalition or influence districts" or "the competitive position of a political party." Senate Report p. 21.

Plaintiffs ask this Court to "unpack" majority black districts, replace them with coalition districts, crossover districts, and influence districts, so that the Democratic political advantage established in the 2003 plans can be "locked in." Thus, plaintiffs ask that this Court order the State to do exactly what Congress prohibited when it amended Section 5.

As already shown, under Section 2, the standards established by *Pender County* and *Strickland* provide guidelines for narrow tailoring under Section 2. As noted by the Court in *Alabama*, there is no obligation to get the percentage of black VAP for a VRA district precisely right. Narrow tailoring under Section 2 also focuses on whether the

remedy of a potential vote dilution claim is substantially provided to the minority group that is a victim of vote dilution. In *Shaw II*, the minority group subject to potential vote dilution lived in an area starting in Charlotte and moving into eastern North Carolina, including minority populations in the cities of Fayetteville and Wilmington. Creating a district that started in Charlotte and then connected dispersed areas of African-American population in Gastonia, Greensboro, Winston-Salem and Durham (the 1992 version of Congressional District 12) did not provide a remedy to the voters living in eastern North Carolina who were part of the geographically compact minority population upon which any Section 2 claim would be based. *Shaw II*, 517 U.S. at 902, 917-18. In contrast, a comparison of the State's exemplar maps with the enacted VRA districts shows that the enacted districts substantially encompass the geographically compact African-American populations who are the subjects of potential claims for vote dilution. (Tr. Vol. V, pp. 50:15-54:22; DX 3029, Table 1)

Plaintiffs rely upon the illegal 2003 districts as evidence that the enacted districts were not narrowly tailored. The 2003 districts and all of the 2011 alternative plans suffer from the same defects plaintiffs claim to exist under the enacted plans. The alternative plans proposed 2011 districts with higher African-American percentages than the 2003 districts. They also assign a disproportionate number of African-American voters to divided precincts. But unlike the enacted plans, the alternative plans do not uniformly create VRA districts with a BVAP in excess of 50%. They instead use coalition, crossover, and influence districts in violation of the WCP, *Pender County*, and *Strickland*.

The 2003 districts and the 2011 alternative plans also treat African-American voters in the same counties or areas unequally. For example, under the 2033 House plan and all of the alternative house plans there is only one majority black house district for Wake County. These plans do not propose a second majority black district that can be established in an area of Wake County that adjoins their proposed majority black district. The exemplar maps and the enacted House Plan show that six majority black house districts can be created in northeastern North Carolina. But the 2003 House plan and all of the alternative plans propose only five majority black or coalition districts in that part of the State. Similar discrepancies may be found in the number of exemplar and enacted majority black house districts in Cumberland, Guilford, and Mecklenburg counties versus a lower number of majority black districts proposed for each of these counties by the alternative plans.

The same comparisons can be drawn between the exemplar and enacted senate districts versus the 2003 districts and the 2011 alternative senate plans. The exemplar and the enacted senate districts show that three majority black senate districts can be drawn in northeastern North Carolina while the 2003 plan and all three 2011 alternative plans propose only two majority black or coalition districts in this area of the State. The exemplar and enacted Senate Plans show that majority black senate districts can be established in Cumberland and Hoke counties, Wake County, Durham and Granville counties, Guilford County, and Mecklenburg County. With one exception, alternative senate plans propose majority-minority coalition districts for Cumberland, Wake, Durham, Guilford, and Mecklenburg counties. In the case of the SCSJ Senate Plan, two

majority black senate districts were proposed for Mecklenburg County both of which have higher percentages of BVAP than the percentages found in the two enacted senate districts.

As conclusively established by the North Carolina Supreme Court, plaintiffs' alternative plans do not comply with the WCP. They follow no uniform criteria for the percentage of African-American population included in their proposed majority black or coalition districts. But in several instances, the alternative plans propose BVAP percentages for districts at *higher levels than the percentages found in the enacted districts*. Plaintiffs agree that all of the conditions required for VRA districts under *Gingles* are present in the same areas or counties in which VRA districts have been enacted, but plaintiffs oppose the creation of any new majority black districts even in those areas or counties where they have agreed that VRA districts are proper. Plaintiffs' "standards" and their use of race in the construction of districts is driven in all respects by political considerations, not by any consistent legal criteria.

Plaintiffs claim that "past election results in North Carolina demonstrate that a legislative voting district with a total African-American population of at least 41.54% or an African-American voting age population of at least 38.27% creates an equal opportunity to elect African-American candidates." *Pender County* 361 N.C. at 494, 649 S.E.2d at 366. If plaintiffs genuinely believe that this statement is an accurate description of North Carolina electoral realities, then under *Strickland* this would mean that racially polarized voting no longer exists and that majority black or coalition districts are illegal. However, all of the plaintiffs' alternative maps proposed majority black districts and

coalition districts with African-American voting age populations well in excess of 38.27%. Moreover, with only two exceptions (2003 HD 29 and 2003 SD 3) all of the 2003 legislative districts with black VAP between 40% and 50% are actually majority black VAP districts when the Hispanic VAP is removed. (DX 3116, 3117) Much of the Hispanic VAP in North Carolina are either not citizens or are not registered to vote. (Tr. Vol V, pp. 72:10-76:14) It is inaccurate to describe these districts as slightly less than majority black VAP when removing a portion of the population that is not registered shows that blacks are a true majority of all eligible voters in the district.

In *Gingles*, because of the sustained success of African-American candidates, the Supreme Court reversed the federal district court's decision that racially polarized voting was present in the 1982 version of multi-member District 23 located in Durham County. In *Pender County*, the North Carolina Supreme Court relied upon an affidavit filed by Representative Martha Alexander which states that "past elections in North Carolina demonstrate that a legislative voting district with a total African-American population of at least 41.54 percent, or an African-American voting age population of at least 38.37 percent, creates an equal opportunity to elect African-American candidates." What was not explained to the *Pender County* Court is that the district cited by Representative Alexander to support her statement was the 1992 version of the same multi-member district (Durham County's District 23) that was the subject of the Supreme Court's reversal in *Gingles*. *Id.* And:

[a]s explained by the Supreme Court in *Thornburg* [*Gingles*], the dynamics of racially polarized voting is completely different in a multi-member district as compared to a single-member district. For example, in a multi-

member district a black candidate may be elected when he or she is the last choice of white voters but where the number of candidates is identical to the number of positions to be elected. *Gingles*, 590 F. Supp. at 368 n. 1, 369. Further, “bullet” or “single shot” voting (a practice that would allow black voters to cast one vote for their candidate of choice as opposed to voting for three candidates in a three member, multi-member district) may result in the election of a black candidate even when voting in the district is racially polarized. *Thornburg*, 478 U.S. at 38 n. 5, 57. Thus, the finding in *Thornburg* that legally significant voting was absent in a multi-member district does not preclude a strong basis in evidence of racially polarized voting in Durham County as related to single-member districts.

The court’s statement in *Pender County* was therefore based upon an affidavit by a Democratic Representative that was filed in support of the state’s argument in *Pender County* that a single-member district (House District 18) could be established as a crossover district to protect the State from liability under Section 2. The district relied upon by Representative Alexander to make this statement was a multi-member district. Voting patterns in a multi-member district cannot explain voting patterns in single-member districts like House District 18. In the 1982 and 1992 versions of District 23, African-Americans could circumvent racially polarized voting by casting single shot votes in a multi-member district. In contrast, not a single black candidate was elected in North Carolina 2010 General Elections in any single-member district that was not majority black or a majority-minority coalition district. And very few African-American candidates were elected in single-member crossover districts in 2006 or 2008. Representative Alexander’s affidavit is not evidence that African-Americans in North Carolina can be elected in a majority white “crossover” single-member district where African-Americans constitute less than 40% of the voting age population.

Plaintiffs incorrectly rely upon the decision by the three-judge federal court in *Page v. Virginia State Bd. of Elections*, No. 3:13-cv-678, 2015 WL 3604029 (E.D. Va. June 5, 2015) (three-judge court). In that case, plaintiffs alleged that Virginia's 2012 Third Congressional District constituted an illegal gerrymander. The previous version of this district enjoyed a BVAP of 53.1%. In the 2012 congressional redistricting plan, Virginia reenacted this district with a BVAP of 56.3%. The state's expert testified that Virginia increased the BVAP for this district because its legislature adopted a 55% BVAP floor for all VRA districts. The state defended the district on the ground that an increase in the districts' BVAP was necessary to obtain preclearance under Section 5. Relying upon the United States Supreme Court's decision in *Alabama* the three-judge court, by a 2 to 1 vote, rejected Virginia's argument and found that the district constituted an illegal racial gerrymander.

The facts and legal issues in *Page* are completely different from the facts and legal issues in this case. First, there was no evidence that Virginia's Third Congressional District was constructed based upon neutral redistricting criteria even remotely similar to the WCP formula applicable to North Carolina legislative districts. Nor did Virginia argue that its Third District was a political district (like North Carolina's Twelfth Congressional District) or constructed to make adjoining Congressional Districts more competitive for Republicans (like North Carolina's legislative districts). Next, the plaintiffs in *Page* did not argue that Virginia's Third Congressional District was a racial gerrymander simply because it was a majority black district. Both the 2012 version and its predecessor were majority black and the plaintiffs did not contend that a congressional

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

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

Finally, in *Alabama*, the United States Supreme Court noted that the legislature divided precincts in forming Senate District 26 in violation of the legislature’s policy that

precincts should not be divided. Plaintiffs focus on the number of divided precincts in North Carolina's VRA districts and argue that African-American voters are disproportionately assigned to divided precincts. This argument is misleading for many reasons. Unlike the Alabama legislature, the 2011 North Carolina General Assembly never adopted a policy that precincts should not be divided in the formation of districts. Moreover, there are no uniform state standards for the creation of precincts and that the size, shape, and location of each precinct is mainly determined by each county's board of elections. Plaintiffs also ignore that all of the alternative plans also disproportionately assigned minorities to divided precincts.

This the 6th day of May, 2016.

NORTH CAROLINA DEPARTMENT OF
JUSTICE

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CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day emailed the foregoing **DEFENDANTS' REVISED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** to the following:

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This the 6th day of May, 2016.

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