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

DAVID HARRIS and CHRISTINE BOWSER, Plaintiffs, v. PATRICK MCCRORY, in his capacity as Governor of North Carolina, NORTH CAROLINA STATE BOARD OF ELECTIONS, and JOSHUA HOWARD, in his capacity as Chairman of the North Carolina State Board of Elections, Defendants.	**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' RENEWED MOTION TO STAY, DEFER, OR ABSTAIN**

Defendants Patrick McCrory, North Carolina State Board of Elections, and Joshua Howard (collectively "Defendants") submit this Memorandum of Law in support of their Renewed Motion to Stay, Defer, or Abstain from further proceedings in this action because parallel litigation involving the same claims and issues raised in this action is currently pending before the North Carolina Supreme Court on remand from the Supreme Court of the United States. In support of their motion, Defendants show the Court as follows:

STATEMENT OF FACTS

I. Summary of the pending state court proceedings regarding the First and Twelfth Congressional Districts

On July 27-28, 2011 the North Carolina General Assembly ("General Assembly") enacted three new redistricting plans for the North Carolina House of Representatives

("State House"), North Carolina Senate ("State Senate"), and the United States House of Representatives ("Congress"). *See* S.L. 2011-404 (State House); S.L. 2011-402 (State Senate); and S.L. 2011-403 (Congress); (D.E. 30-1, p. 6) (Judgment and Memorandum Decision of Three-Judge State Court in *Dickson et al* v. *Rucho et al*, Nos 11 CVS 16896 and 11 CVS 16940 [Wake County Superior Court July 8, 2013] filed as Ex. A to Def's App. in Opp. to Pls' Motion for a Preliminary Injunction). On November 1, 2011, all three redistricting plans were precleared by the United States Department of Justice under Section 5 of the Voting Rights Act ("VRA"), 42 USC § 1973c. (D.E. 30-1, pp. 6-7.)

Two separate groups of plaintiffs filed lawsuits on November 3 and 4, 2011 challenging the constitutionality of specific districts in all three plans, including the First Congressional District ("First District") and the Twelfth Congressional District ("Twelfth District") (D.E. 30-1, p. 7.) One set of plaintiffs (referred to collectively as the "NAACP Plaintiffs") included the North Carolina State Conference of Branches of the NAACP ("NC NAACP"), the League of Women Voters of North Carolina ("LWV NC"), Democracy North Carolina ("Democracy NC"), the A. Philip Randolph Institute ("Randolph Institute") and forty six individual plaintiffs. (D.E. 44-1 & 44-2, ¶¶ 9- 57). The other set of plaintiffs (referred to collectively as the "Dickson Plaintiffs") included 56 individual plaintiffs. (D.E. 44-3 & 44-4, ¶¶ 11-56). Like the Plaintiffs here, the Dickson Plaintiffs are represented by Edwin Speas, Jr., John O'Hale, and Caroline Mackey of Poyner Spruill, LLP. The three-judge state court consolidated the cases on December 19, 2011. (D.E. 30-1, p. 7.) The consolidated cases are hereinafter referred to collectively as "*Dickson.*"

In challenging the 2011 First and Twelfth Districts, both groups of plaintiffs in *Dickson* alleged that: (1) race was the predominant factor used by the General Assembly to draw both of these districts, (2) neither district was sufficiently compact, and (3) neither district was narrowly tailored to comply with either Section 5 or Section 2 of the VRA. (D.E. 44-1 & 44-2, ¶¶ 1-3, 384-98); (D.E. 44-3 & 44-4, ¶¶ 78-81, 377-83, 396-401). In addition, both sets of plaintiffs in *Dickson* asked the state court to declare the First and Twelfth Districts unconstitutional under the Fourteenth Amendment of the United States Constitution. (D.E. 44-1 & 44-2, ¶¶ 480-86); (D.E. 44-3 & 44-4, ¶¶ 515-19). The NAACP Plaintiffs also alleged that, as a result of the districts, "the individual and organizational plaintiffs suffer representational harms, impediments to their mission, activities and interests, a diminution in their ability to participate equally in the political process and inherent harm to their dignity by racial discrimination and denial of equal protection." (D.E. 44-1 & 44-2, ¶ 486).

On July 8, 2013, following a trial on whether the First Congressional District satisfied the strict scrutiny standard of review under the Fourteenth Amendment in *Dickson*, the three-judge panel unanimously ruled that the General Assembly had a strong basis in evidence for enacting the First District, and that the district was narrowly tailored. Based upon these factual findings, the three-judge court dismissed plaintiffs' challenge to the First District. (D.E. 30-1.) Also, based upon evidence presented at trial, the three-judge panel unanimously entered judgment in the favor of the defendants in *Dickson* on the plaintiffs' claims that the Twelfth District violated the Fourteenth Amendment. (*Id.*) Both sets of plaintiffs in *Dickson* appealed the ruling of the state

three-judge court to the North Carolina Supreme Court. The North Carolina Supreme Court heard oral arguments on the appeal on January 6, 2014. On December 19, 2014, the North Carolina Supreme Court issued an opinion affirming the unanimous judgment of the three-judge panel in favor of the defendants in *Dickson.*

On January 16, 2015, the plaintiffs in *Dickson* filed a petition for writ of *certiorari* with the United States Supreme Court that was granted on April 20, 2015. In granting plaintiffs' petition for writ of *certiorari,* the United States Supreme Court vacated the North Carolina Supreme Court's judgment, and remanded *Dickson* to the North Carolina Supreme Court for further consideration in light of the decision in *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. __ (2015) which was handed down on March 25, 2015, three months after the North Carolina Supreme Court's ruling.

In remanding *Dickson* to the North Carolina Supreme Court, the United States Supreme Court expressed no opinion regarding whether the North Carolina Supreme Court's ruling was correct in light of its *Alabama* decision or whether any of the districts challenged by the plaintiffs in *Dickson* were unconstitutional. *Alabama* involved an appeal from a decision by a three-judge federal district court dismissing a challenge to legislative districts enacted by the State of Alabama. *Alabama Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227 (M.D. Ala. 2013). The United States Supreme Court vacated the decision by that three-judge court and remanded the case for further proceedings consistent with its opinion. The United States Supreme Court did not declare any of the Alabama districts illegal or unconstitutional. The United States Supreme Court's holding in *Alabama* does not conflict in any respect with the North Carolina

Supreme Court's prior ruling in *Dickson*. (*See* Defendants' Brief on Remand filed in *Dickson* at pp. 3-4) (attached as D.E. 106-1). As a result, the defendants in *Dickson* have urged the North Carolina Supreme Court to once again reject the claims of the plaintiffs in *Dickson* and to affirm the constitutionality of the challenged districts.[1]

II. Plaintiffs' allegations and claims in this action regarding the First and Twelfth Districts are identical to those of the plaintiffs in *Dickson*

As stated in Defendants' previous Motion, the Plaintiffs in this action, like the plaintiffs in *Dickson*, allege that they have brought "this action to challenge the constitutionality of North Carolina Congressional Districts 1 and 12 in violation of the Equal Protection Clause of the Fourteenth Amendment." (D.E. 1, Compl. ¶ 1.) Plaintiffs contend that the First and Twelfth Districts were "drawn with race as their predominant purpose" and that the legislative leaders "indicated that race was the predominant motivating factor." (*Id*. at ¶¶ 5, 38, 54, 63-66.) Plaintiffs further allege that the General Assembly "subordinated other redistricting principles" in drawing the First District and allege that both First and Twelfth Districts are "bizarre" or "not compact." (*Id*. at ¶¶ 37, 51, 52, 61, 62.) Finally, the Plaintiffs allege here that neither district was reasonably necessary to obtain preclearance of the plans under Section 5 of the VRA or to protect the state from liability under Section 2 of the VRA. (*Id*. at ¶¶ 3, 5, 58, 59, 66, 67, 71, 72.) In

[1] In similar cases, lower courts have reaffirmed their prior position following a remand from the United States Supreme Court and the Supreme Court has declined to further review the case. *See, e.g., Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F. 3d 289 (6th Cir. 1997), *cert. denied* 525 U.S. 943 (1998).

short, the claims of the Plaintiffs in this action are identical to the claims made by the plaintiffs in *Dickson*.

QUESTION PRESENTED

Should this Court should stay or defer further proceedings in this action pending resolution of the identical state court claims brought by the plaintiffs in the *Dickson v. Rucho*?

ARGUMENT

A. Federal courts must defer to state courts and state legislatures in disputes over redistricting

The primacy of state judiciaries in redistricting disputes has been repeatedly recognized by the United States 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).

B. This Court should stay or defer proceedings in this matter pending resolution of the identical state court claims brought by the plaintiffs in *Dickson*

1. Applicable Legal Standard: The Supreme Court's decisions in *Germano* and *Growe*

In *Germano*, the United States Supreme Court considered a challenge brought in an Illinois federal district court to an Illinois State Senate redistricting plan. 381 U.S. at 408. While the plan was the subject of litigation in the state courts, a federal district court entered an order declaring the plan invalid and requiring that "any implementation, amendment or substitution of all or part of the said defective portions" of the legislation be submitted to the federal court for approval before the next election. *Id.* Thereafter, the Illinois Supreme Court issued a decision finding the plan invalid. *Id.*

Following the Illinois Supreme Court's decision, the *Germano* appellants moved the federal district court to reconsider its decision, vacate its order, and stay further proceedings but the federal court refused. *Id.* at 408-09. On appeal, the United States Supreme Court held that the federal district court erred by failing to stay its proceedings after the Illinois Supreme Court issued its ruling invalidating the reapportionment plan. *Id.* at 409-10. The *Germano* court held that the district court instead "should have stayed its hand" and remanded the case with directions to the district court to "enter an order

fixing a reasonable time within which the appropriate agencies of the State of Illinois, including its Supreme Court, may validly redistrict the Illinois State Senate." *Id.*

The United States Supreme Court reaffirmed the principles outlined in *Germano* nearly 30 years later in *Growe v. Emison*. *Growe* involved three separate groups of plaintiffs: The first group filed an action in Minnesota state court challenging the state's congressional and legislative districts. 507 U.S. at 27. A second group of plaintiffs then filed an action in federal court raising similar challenges to the congressional and legislative districts, but also objecting to the districts under Section 2 of the VRA. *Id.* at 28. The third group of plaintiffs then filed their own lawsuit in federal court raising federal and state constitutional challenges to the new legislative districts. *Id.* at 28-29. No claims under the VRA were included in the lawsuit filed by the third group of plaintiffs. *Id.*

The two federal cases were consolidated but the state court case continued separately from the consolidated federal case. *Id.* at 29. The Minnesota state court ultimately sought to enter an order approving a redistricting plan for the state. *Id.* at 30. But before the state court could do so, the federal court had adopted its own redistricting plans and entered a permanent injunction prohibiting the state court from interfering with implementation of the redistricting plans drawn by the federal court. *Id.* at 30-31. On appeal, the United States Supreme Court ruled that the district court erred in not deferring to the Minnesota state court as required by *Germano.* *Id.* at 34. The *Growe* Court noted that, in "the reapportionment context," federal judges are "required . . . to defer consideration of disputes involving redistricting where the State, through its legislative *or*

judicial branch, has begun to address that highly political task itself." *Id.* at 33 (emphasis in original).

The *Growe* Court also rejected the argument that differences between the state and federal cases supported a departure from *Germano* principles. *Id.* at 34-35. The Court found that *Germano* did not require the federal and state court complaints to be identical before the federal court was required to defer to the state court because "the primacy of the State" in the redistricting context "compels a federal court to defer." *Id.* at 35-36 (stating that "the elementary principles of federalism and comity embodied in the full faith and credit statute, 28 U.S.C § 1738" required the federal court to defer to the state court).

2. *Germano* and *Growe* continue to require this Court to stay all proceedings in this action pending final disposition of the identical claims raised by the same lawyers in *Dickson*

The requirements of *Germano* and *Growe* 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. Because the same claims raised by Plaintiffs in this action have already been addressed in *Dickson* by a three-judge state court panel and are currently pending on remand before the North Carolina Supreme Court, this Court should stay or defer further proceedings in this matter until *Dickson* is been fully resolved.

The grounds for abstention, or deferral, in this matter until *Dickson* is fully resolved, are even stronger than those in *Growe* because the Plaintiffs' counsel and Plaintiffs here have raised the same claims with respect to the First and Twelfth Districts as those currently before the North Carolina Supreme Court on remand. After the North Carolina Supreme Court issues its decision, any aggrieved party in *Dickson* will again have the right to appeal to the United States Supreme Court. Should this occur, and if the United States Supreme Court decides to hear the case, its decision would be binding on this Court. Thus, piecemeal litigation could result if this Court moves forward with a trial in this matter before *Dickson* is resolved.

3. The doctrines of *Res Judicata* and *Collateral Estoppel* likewise require this Court to stay all proceedings in this action pending final disposition of the identical claims raised in *Dickson*

When the Court hears testimony in this case, it will understand that the Plaintiffs' lawyers are directing this litigation, not Plaintiffs, who were recruited to serve as nominal Plaintiffs. In any case, even if neither party appealed the North Carolina Supreme Court's forthcoming ruling, or if the United States Supreme Court declines to hear any appeal by one of the parties in *Dickson*, the Plaintiffs in this action will be bound by the judgment in *Dickson* under the doctrines of *res judicata* (claim preclusion) or collateral estoppel (issue preclusion). In addition to the fact that Plaintiffs' claims in this action involve the same claims and issues with respect to the First and Twelfth Districts which are now before the North Carolina Supreme Court, the interests of the plaintiffs in this litigation align with, and are represented by, the plaintiffs in *Dickson*. Specifically, Plaintiffs Harris and Bowser are members of the NAACP which is one of the

organizational plaintiffs in the *Dickson*.[2] (D.E. 71-1, pp. 3-7). Both Plaintiffs admitted in their depositions that they were members of either a local branch or the national NAACP. (Bowser Dep. 45-48) (cited pages filed at D.E. 104-1); (Harris Dep. 45-50) (cited pages filed as D.E. 104-2). The president of the North Carolina Conference of the NAACP, Rev. Dr. William Barber II, confirmed at his deposition that any individual who was a member of a local branch or the national NAACP was also a member of the NC NAACP. (Barber Dep. 17, 25-27) (cited pages filed at D.E. 104-3). Rev. Dr. Barber's testimony in this regard was consistent with the NC NAACP's complaint in *Dickson* which included the following allegation: "Plaintiff the North Carolina State Conferences of Branches of the NAACP is a non-partisan, nonprofit organization composed of over 100 branches and 20,000 individual members throughout the state of North Carolina." (D.E. 44-1, p. 5) (NC NAACP Compl. ¶ 9). Thus, both plaintiffs are members of at least one organization that represents them and are bound by the state court judgment.

In *Dickson*, all of the organizational plaintiffs, including the NC NAACP and Democracy North Carolina, repeatedly asserted that they had standing to serve as plaintiffs in those cases because they were acting as representatives of their respective members. (D.E. 44-5, p. 17) (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975) (noting that an "association may be an appropriate representative of its members")). Thus, this Court should abstain, or defer, as the claims of Plaintiffs Harris and Bowser are precluded by the opinion of the three-judge panel in *Dickson* which is binding even while the appeal

[2] In addition, Ms. Bowser admitted that she was also a member of Democracy North Carolina, another of the organizational plaintiffs in *Dickson*. (Bowser Dep. 51) (cited page filed at D.E. 104-1).

of the plaintiffs in *Dickson* is pending. *See Deering Milliken, Inc. v. Fed. Trade Comm'n*, 647 F.2d 1124, 1129 n. 11 (D.C. Cir. 1978) ("it is…clear that the vitality of [a lower court] judgment is undiminished by the pendency of [an] appeal. Unless a stay is granted either by the court rendering the judgment or by the court to which the appeal is taken, the judgment remains operative")(alterations added); *SSIH Equip. S.A. v. ITC*, 718 F.2d 365, 370 (Fed Cir. 1983)("the law is well settled that the pendency of an appeal has no effect on the finality or binding effect of a trial court's holding"). *See also In re Genesys Data Technologies, Inc.*, 204 F.3d 124, 129 (4th Cir. 2000) ("[I]n a host of cases, the Supreme Court . . . has directed that the full faith and credit statute requires a federal court to apply state res judicata law in determining the preclusive effect of a state court judgment"); *Thomas M. McInnis & Assoc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986) ("a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them"); *see also Ashton v. City of Concord*, 337 F. Supp. 2d 735, 741 (M.D.N.C. 2004) ("Under North Carolina law, a previous judgment will preclude a subsequent action if the first decision was a final judgment on the merits, involving the same parties or parties in privity with them, and the same cause of action."); *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 36, 591 S.E.2d 870, 893 (2004) (With regard to collateral estoppel, "courts will look beyond the nominal party whose name appears on the record as plaintiff [in determining whether privity between parties exist] and consider the legal questions raised as they may affect the real party or parties in interest").

Because the redistricting issues Plaintiffs seek to address in this action have already been reviewed once by a three-judge North Carolina state court and are again being considered by the North Carolina Supreme Court, Plaintiffs cannot show that the North Carolina state courts have refused to address the issues raised in their Complaint. Plaintiffs should not be permitted to take a "second bite" at the same claims made by their lawyers and on behalf of members of the organizational plaintiffs in *Dickson* who argued that they were representing the interests of individual members like the Plaintiffs in this action. 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.

C. The record subsequent to this Court's denial of Defendants' Motion to Stay, Defer, or Abstain addresses this Court's previous concerns and supports Defendants' Renewed Motion.

In their May 22, 2014 Order denying Defendants' Motion to Stay, Defer, or Abstain, this Court acknowledged that "stays or deferrals of federal litigation are often appropriate when the state…is contemporaneously engaged in the process of redrawing its congressional map." (Doc. 65, p. 9). However, this Court declined to decide whether *Dickson* required a deferral of the instant plaintiffs' federal case under *Growe* and *Rice.* In their Memorandum in Opposition to Defendants' Motion to Stay, Defer, or Abstain, plaintiffs' opposed abstention or deferral because the North Carolina Supreme Court "had taken no action to put the state on a lawful course and ha[d] shown no signs of urgency in deciding the appeal from the state court's deeply flawed application…" (Doc. 47, pp. 3, 8). This Court ultimately stated that it was "not convinced the North Carolina Supreme

Court [would] issue a decision in the state litigation in a timely manner." (Doc. 65, p. 9) (*citing Growe*, 507 U.S. at 34 (noting deferral is not required when the state fails to undertake its redistricting duty in a timely fashion)).

However, the record now shows that Plaintiff's arguments are unconvincing and this Court's concern that the North Carolina Supreme Court would fail to act in a timely manner in reviewing *Dickson* is unfounded. Three months after this Court issued their Order denying Defendants' Motion to Stay, Defer, or Abstain, the Plaintiffs who had previously been solely concerned with the North Carolina Supreme Court's alleged lack of urgency in determining the constitutionality of the First and Twelfth Congressional Districts, jointly moved to continue their federal claims. (Doc. 84). Second, the North Carolina Supreme Court subsequently rendered its opinion affirming the ruling of the three-judge panel in *Dickson* and is currently reviewing that ruling on remand. After being instructed to review their decision in *Dickson* in light of the *Alabama* ruling on April 20, 2015, the North Carolina Supreme Court, on May 7, 2015, granted the *Dickson* plaintiffs' Motion for Expedited Schedule on Remand, and scheduled oral arguments. After allowing for an abbreviated period of briefing by the parties, the North Carolina Supreme Court heard arguments on August 31, 2015. There is nothing in the record to suggest that the North Carolina Supreme Court will not issue their opinion on remand in a timely manner.

In moving to continue their claims previously, Plaintiffs cannot now credibly contend that a sense of urgency, or conversely delay in *Dickson*, requires this Court to refuse to abstain or defer further action until that matter is resolved. Instead, the North

Carolina Supreme Court's timely handling of *Dickson* on remand from the United States Supreme Court, coupled with the fact that the state is no longer "hurtling toward a primary election," requires that this Court not "permit federal litigation to be used to impede" state reapportionment. (Doc. 47, p. 2); *See Growe,* 507 U.S. at 34 ("[a]bsent evidence that…state branches will fail timely to perform [their] duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it"). Therefore, in accordance with the above-cited cases and the record subsequent to this Court's original denial of Defendants' Motion, Defendants' Renewed Motion to Stay, Abstain, or Defer should be granted.

This the 17th day of September, 2015.

NORTH CAROLINA DEPARTMENT OF JUSTICE

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CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day electronically filed the foregoing **Memorandum of Law in Support of Defendants' Renewed Motion to Stay, Defer, or Abstain** with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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This the 17th day of September, 2015.

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No. 201PA12-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

MARGARET DICKSON, *et al.* *Plaintiffs,* v. ROBERT RUCHO, *et al*. *Defendants*. NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP; *et al.* *Plaintiffs,* v. THE STATE OF NORTH CAROLINA, *et al.* *Defendants*.	)	**From Wake County**

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DEFENDANTS-APPELLEES' BRIEF ON REMAND

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NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP; *et al.* *Plaintiffs,* v. THE STATE OF NORTH CAROLINA, *et al.* *Defendants*.	)	

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DEFENDANTS-APPELLEES' BRIEF ON REMAND

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INTRODUCTION

In *Dickson v. Rucho*, 367 N.C. 542, 766 S.E.2d 238 (2014), this Court rejected plaintiffs' challenges to various legislative and congressional districts. On

January 16, 2015, the plaintiffs petitioned the United States Supreme Court for a writ of *certiorari* seeking review on the following questions:

1. Can an explicit policy of racial balancing and race-based line drawing be justified under the Equal Protection Clause of the 14th Amendment by an incorrect view of the requirements of the Voting Rights Act?
2. Are race-based districts drawn as a safe harbor subject to strict scrutiny and required to use race no more than necessary to comply with the Voting Rights Act properly interpreted?

Dickson v. Rucho, Petition for a Writ of *Certiorari*, at i (Jan. 16, 2015).

On March 25, 2015, the United States Supreme Court issued its decision in *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. ___, 135 S. Ct. 1257 (2015) (hereinafter "*Alabama*"). This case involved an appeal from a decision by a three-judge federal district court dismissing a challenge to legislative districts enacted by the State of Alabama. *Alabama Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227 (M.D. Ala. 2013). The Court vacated the decision by the three-judge court and remanded the case for further proceedings consistent with its opinion. The Court did not declare any of the Alabama districts illegal or unconstitutional.

On March 20, 2015, the Supreme Court granted plaintiffs' petition for a writ of *certiorari*, vacated this Court's prior judgment, and remanded this case to this

Court "for further consideration in light of *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. ___ (2015)." The Supreme Court made no ruling whatsoever regarding whether this Court's prior ruling was incorrect or whether any of the districts challenged by the plaintiffs are unconstitutional.

The decision in *Alabama* is narrowly focused on two legal principles: (1) the test for proving that race was the predominant factor in the construction of a district where a state's only criterion other than race was a legislative rule regarding equal population; and (2) the interpretation of a state's obligation to preserve majority-black districts under Section 5 of the Voting Rights Act ("Section 5"). The Supreme Court's holding on both of these legal principles does not conflict in any respect with this Court's prior ruling in this case. Therefore, this Court should once again reject plaintiffs' claims and affirm the constitutionality of the challenged legislative and congressional districts.[1]

Plaintiffs have incorrectly analyzed the decision in *Alabama* and have asked this Court to grant them judgment and order the State to draw new plans in two weeks. Plaintiffs have failed to explain the criteria they think the General Assembly must apply and follow in two weeks following any such decision from

[1] As shown in Defendant's Response to Plaintiffs' Motion for Expedited Schedule on Remand, pp. 2-3, courts in similar situations have reaffirmed their prior position following a remand from the Supreme Court, and then been affirmed by the Supreme Court. *See Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F. 3d 289 (6th Cir. 1997), *cert. denied* 525 U.S. 943 (1998).

this Court. In truth, plaintiffs have proposed no redistricting criteria other than supporting plans that achieve a political result they favor. In contrast, the history of redistricting in North Carolina and the three-judge court's findings of fact show that the enacted plans follow lawful criteria established by this Court and the United States Supreme Court that were not modified by *Alabama*.

STATEMENT OF THE CASE

A. Background to the 2011 Redistricting Process

In 2011, forty North Carolina counties were covered by Section 5 of the Voting Rights Act ("VRA"). *Shaw v. Reno*, 509 U.S. 630, 634 (1993). North Carolina was therefore required to seek preclearance of any new redistricting plans. *Georgia v. Ashcroft*, 539 U.S. 461, 472 (2003). To obtain preclearance, North Carolina bore the burden of demonstrating that any new redistricting plans "did not have the purpose and [would] not have the effect of denying or abridging the right to vote on account of race…." 52 U.S.C. § 10304(a); *Pleasant Grove v. United States*, 479 U.S. 462 (1987). To make this determination, the United States Department of Justice ("USDOJ"), or the District Court for the District of Columbia, would have compared any newly-enacted 2011 plans against the most recent lawful plan (known as the "benchmark plan") used in prior elections. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 478 (1997) ("*Bossier I*"). In considering new redistricting plans, the 2011 General Assembly was obligated to consider

legislative and congressional plans used in the 2010 North Carolina General Election, and all relevant legal and factual developments that had occurred following the most recent redistricting.

The Congressional Plan used in the 2010 General Elections was enacted in 2001. This plan was used in all congressional elections from 2002 through 2010.[2] Under the 2010 Census, District 1 had a 48.43% Total Black Voting Age Population ("TBVAP") while District 12 had a 43.77% TBVAP.[3] Hispanics constituted 4.51% of the voting age population ("VAP") in District 1 and 10.11% of the VAP in District 12. (R pp 1355-58; Doc. Ex. 5713) Both districts were majority-minority "coalition" districts.[4]

In contrast, the legislative plans used in the 2010 General Elections were not enacted until November 25, 2003. *Stephenson v. Bartlett*, 358 N.C. 219, 222, 595 S.E.2d 112, 115 (2004) ("*Stephenson III*"). Legislative plans enacted in 2001 were declared unlawful under provisions of the North Carolina Constitution that prohibit

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[2] This map is listed in the map notebook previously provided to the Court in January 2012 as "Congress Zero Deviation" and "2001 Congressional Plan with 2010 Census Data."

[3] Total Black Voting Age Population includes individuals who represented their race to the Census Bureau as "single race black" or "any part black." (Doc. Ex. 5658) Regulations issued by the USDOJ require that the most current population data be used to measure benchmark plans and proposed redistricting plans. 28 C.F.R. 51.54(b)(2). Consistent with their past practice, for redistricting occurring after 2010, the General Assembly and the USDOJ evaluated plans using the 2010 Census, not the 2000 Census. Federal Register, Vol. 76, No. 27, Part III, p. 7472 (February 9, 2011).

[4] *See infra* n. 6.

the division of counties into separate legislative districts (known as the "Whole County Provisions" or "WCP"). *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) ("*Stephenson I*"); N.C. CONST. art. II, §§ 3(3) and 5(3). In 2003, a second set of legislative plans enacted in 2002 were found to be in violation of the WCP. Interim plans created by a superior court were used for legislative races in the 2002 General Elections. *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) ("*Stephenson II*"). The only district from the 2003 plans that was ever subject to constitutional review (House District 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, Bartlett v. Strickland*, 556 U.S. 1 (2009).[5]

On June 26, 2003, the United States Supreme Court issued its decision in *Georgia v. Ashcroft*, 539 U.S. 461 (2003). The Court articulated two strategies available to states to obtain preclearance. 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 candidates of choice." *Ashcroft*, 539 U.S. at 480. The Court also endorsed an alternative strategy under which states could make a political decision to enact a combination of districts, including majority-minority

[5] In 2009, to comply with *Strickland*, the General Assembly changed the district lines only for the 2003 version of House District 18 and its adjoining districts. References to the "2009 House Plan" in some of the supporting affidavits (such as Affidavits from Dan Frey (Doc. Ex. 1175, 5589, 6286)) refer to the 2003 House Plan as amended by the General Assembly in 2009.

districts, coalition districts, and influence districts, in the place of a plan based strictly on safe majority-minority districts. *Id*. at 480-83.[6]

Consistent with *Ashcroft*, in its 2003 legislative plans, North Carolina made the political decision to comply with Section 5 through a combination of majority-black, coalition, crossover, and influence districts. By the time of the 2010 Census, the 2003 Senate Plan included eight districts that were majority-minority coalition districts. (R pp 1288, 1362, 1364, 1365-66, 1367-68, 1369, 1390, 1393, 1394-95, 1397, 1399; Doc. Ex. 5657)[7] The TBVAP in a ninth district (Senate

[6] There are several different types of VRA districts. Majority-black districts are majority-minority districts in which African-Americans constitute a numerical majority of the VAP. Majority-minority coalition districts are districts in which two minority groups combine to constitute a majority. Crossover districts are majority-white districts in which a sufficient number of whites crossover to support and elect the minority group's candidate of choice. Influence districts are districts in which a minority group allegedly has influence in determining election outcomes but cannot control the outcome. *Bartlett*, 556 U.S. at 13.

[7] In the past, plaintiffs have described certain 2003 districts that elected African-American candidates as "majority-white." None of the findings of fact by the three-judge court below have been cited to support this characterization. Plaintiffs instead have relied on summaries prepared very early in the redistricting process by a legislative staffer. (Churchill Dep., Exs. 81, 82, 83, accessible at http://www.ncleg.net/GIS/Download/ReferenceDocs/2011/CommitteeDocs/Congressional%20Races%201992-2010%20Handouts.pdf, http://www.ncleg.net/GIS/Download/ReferenceDocs/2011/CommitteeDocs/Senate%20Races%202006-2010%20handouts.pdf, and http://www.ncleg.net/GIS/Download/ReferenceDocs/2011/CommitteeDocs/House%20Races%202006-2010%20handouts.pdf). Plaintiffs have repeatedly failed to disclose that these summaries are based upon the 2000 Census, not the 2010 Census, and that they list percentages from a "white" category reported by North Carolina that includes both Hispanics and non-Hispanic whites. Even under the 2000 Census, almost all of these districts were majority-black or majority-minority

District 40) was only 35.43% but African-Americans and Hispanics constituted a majority-minority coalition. (Doc. Ex. 5657) The 2003 Senate Plan also included six other "influence" districts with a TBVAP between 30.18% and 37.27%. (Doc. Ex. 5695)[8]

North Carolina followed the same preclearance strategy when it created its 2003 House Plan. That Plan included 10 districts that were majority-black and 10 districts with TBVAP between 40% and 50% which were also majority-minority coalition districts. (R pp 1288, 1370-71, 1372, 1373-74, 1375, 1376, 1378, 1381, 1382, 1383-84, 1403, 1405-06, 1408, 1409-10, 1411-12, 1413-14, 1416-17; Doc. Ex. 5663-65) The 2003 plan also contained four other districts in which African-Americans were less than 40% TBVAP but in which African-Americans and Hispanics constituted a VAP majority. (Doc. Ex. 5663-65) The 2003 House Plan also included 10 other crossover and influence districts with TBVAP between 30.15% and 36.90%. (Doc. Ex. 5701-02)[9] One of these districts (House District

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coalition districts in which African-Americans combined with Hispanics to form a majority. By the time of the 2010 Census, all of the districts that elected African-American candidates in 2010 were majority-black or majority-minority coalition districts. (R pp 1341-42; Defendant-Appellees' Brief, *Dickson v. Rucho*, (Dec. 3, 2012) (App. A))

[8] Senate District 40 was not an "influence" district but instead was a majority-minority coalition district. A black candidate was elected in this district in 2006 through 2010. (Doc. Ex. 5657, 5695)

[9] House Districts 29 and 100 were not influence districts but instead majority-minority coalition districts. A black Democrat was elected in District 29 from

39) operated as a crossover district in the 2006 and 2008 General Elections because an African-American Democrat was elected in each of these elections. *Id.* Nothing in the 2003 legislative history or in the record in this case explains how the 2003 General Assembly determined the number of majority-black and coalition districts that should be enacted.

The legal landscape established by *Ashcroft* changed after the 2003 legislative plans were enacted. In *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006) ("*LULAC*"), the 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 v. Bartlett*, 556 U.S. at 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

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2006 through 2010. A white Democrat was elected in District 100 from 2006 through 2010. (Doc. Ex. 5663-65, 5701-02)

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).

The final significant legal change occurred in *Pender County*. Under the 2003 House redistricting 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 of the Voting Rights Act. *Pender County*, 361 N.C. at 493-98, 649 S.E.2d at 366-68. This Court held that Section 2 did not authorize the creation of coalition districts, crossover districts, or influence districts, and that any district enacted to protect the State from Section 2 liability would need to be established with a true majority-minority population. *Id.* at 503-07, 649 S.E.2d at 372-74.

On appeal, the United States Supreme Court affirmed that crossover districts could not be required under Section 2 because districts designed to protect a state from Section 2 liability must be numerically majority-minority. *Strickland*, 556

U.S. at 12-20. While the Court did not squarely address whether coalition districts could be required by Section 2, it stated that such districts had never been ordered as a remedy for a Section 2 violation by any of the circuit courts. *Id.* at 13, 19.

With this background, and heading into the 2011 redistricting cycle, it was apparent that changes were required in the 2003 legislative plans and the 2001 Congressional Plan because of population shifts. The state constitutional standards governing one person, one vote require that legislative districts be drawn with a population deviation of no more than plus or minus 5% from the ideal population. *Stephenson I*, 355 N.C. at 383, 562 S.E.2d at 397. Following the 2010 Census, almost all of the majority-black legislative or coalition districts were underpopulated or overpopulated under this standard. (Doc. Ex. 1205, 1207) The First Congressional District was substantially underpopulated, while the Twelfth Congressional District was slightly overpopulated. (Doc. Ex. 1209)[10]

The General Assembly in 2011 was also obligated to consider the results of recent elections. In 2010, eighteen African-American candidates were elected to the State House of Representatives and seven African-American candidates were elected to the State Senate. Two African-American candidates were elected to Congress in 2010. All African-American candidates elected to the General Assembly or Congress in 2010 were elected in majority-black or majority-minority

[10] Of course, for congressional districts the applicable one person, one vote standard is governed by federal law. *Wesberry v. Sanders*, 376 U.S. 1 (1964).

coalition districts. No African-American candidate elected in 2010 was elected from a majority-white crossover district. Two African-American incumbent senators were defeated in the 2010 General Election running in majority-white districts. (R pp 1340-41)

From 2006 through 2010, no African-American candidate was elected to more than two consecutive terms in a majority-white legislative district. (R pp 1341-42) From 2004 through 2010, no African-American candidate was elected to State office in North Carolina in a partisan election. In 2000, an African-American candidate, Ralph Campbell, was elected State Auditor in a partisan election. However, in 2004, Campbell was defeated by a white Republican in a partisan election. (R p 1342; Doc. Ex. 5593-95, 5657-58, 5663-65, 5674-75, 5680-82, 5691-92, 5693-94, 5695-96, 5697-98, 5699-5700, 5701-02, 6033-6050)

B. The 2011 Redistricting Process in North Carolina

Early in the 2011 redistricting process, the Co-Chairs of the Joint Senate and House Redistricting Committee released a Legislator's Guide to Redistricting (Doc. Ex. 1720-22, accessible at http://www.ncleg.net/GIS/Download/Maps_Reports/2011RedistrictingGuide.pdf) ("Legislator's Guide"). The Legislator's Guide explained numerous cases that would govern redistricting in 2011, including *Stephenson I* and *II*; *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Pender County*; *Strickland; Shaw v. Reno* 509 U.S. 630 (1993) ("*Shaw I*"); *Shaw v. Hunt*, 517 U.S.

899 (1996) ("*Shaw II*"); *Hunt v. Cromartie*, 526 U.S. 541 (1999) ("*Cromartie I*"); *Easley v. Cromartie*, 532 U.S. 234 (2001) ("*Cromartie II*"), and other cases. The Guide also reported the decision by Congress to revise Section 5 because of the decision in *Ashcroft.*

The Joint Redistricting Committee conducted thirteen public hearings from April 13, 2011, through July 18, 2011. Hearings were conducted in twenty-four of the forty counties covered by Section 5. Proposed VRA districts were published by the Committee Chairs and a hearing conducted on these districts on June 23, 2011.[11] A public hearing was held on a proposed Congressional plan on July 7, 2011, and a hearing on proposed legislative plans was held on July 18, 2011. (R p 1343)

The Redistricting Chairs published five different statements outlining the criteria they would follow in the construction of legislative and Congressional districts. (Doc. Ex. 540-73) 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,

[11] Under the WCP requirements, VRA districts must be created first. *Dickson v. Rucho*, 367 N.C. 542, 573-74, 766 S.E.2d 238, 259 (2014).

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 Chairs also explained that based upon state-wide demographic figures, proportionality for African-American citizens "would roughly equal" twenty-four majority African-American House Districts and ten majority African-American Senate Districts. (Doc. Ex. 540-47) [12]

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 ten) because he was "unable to identify a reasonably compact majority African-American population to create a tenth majority African-

[12] Plaintiffs continue to conflate the concepts of proportionality and proportional representation. Proportionality links the number of majority-minority voting districts to the minority group's share of the relevant population. The concept 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. *De Grandy*, *supra*; *LULAC*, *supra*.

American District." (Doc. Ex. 541, 542, 543) While the House Plan published on June 23, 2011, had twenty-four majority-black house districts, based upon public opposition expressed during a public hearing, a majority-black district proposed for southeastern North Carolina (House District 18) was eliminated in the final House Plan. (Doc. Ex. 542, 543-44, 564-65)[13]

The proposed Congressional Plan was released on July 1, 2011. The Co-Chairs noted that the First Congressional District had been established in 1992 as a majority-black district designed to protect the State from liability under Section 2, that this district was still needed to protect the State from Section 2 liability, and that the 2001 version was underpopulated by 97,500 people. At no time during the legislative process or since has anyone disputed these statements. The Co-Chairs also explained that the Twelfth Congressional District would be retained as a very strong Democratic district. (Doc. Ex. 555-62) On July 19, 2011, the Co-Chairs explained that several changes had been made to their original First Congressional District in response to criticism received during the redistricting process. (Doc. Ex. 569-73)

Three groups submitted alternative maps during the 2011 redistricting process. First, counsel for the North Carolina NAACP plaintiffs in this case ("NC

[13] Plaintiffs do not cite evidence or testimony offered during the public hearing process challenging the location or percentage of TBVAP in any of the other specific proposed legislative districts.

NAACP"), appeared at public hearings on May 9, 2011, and June 23, 2011, on behalf of a group called the Alliance for Fair Redistricting and Minority Voting Rights ("AFRAM").[14] Plaintiffs' counsel submitted a proposed Congressional Plan on May 9, 2011, and proposed legislative plans for the Senate and House on June 23, 2011. All three plans were designated as the Southern Coalition for Social Justice ("SCSJ") Plans. (R pp 1343-48, 1353-54) Next, on Monday, July 25, 2011, the Democratic legislative leadership published a series of redistricting plans designated as the "Fair and Legal" Congressional, Senate, and House Plans. On that same date, the Legislative Black Caucus ("LBC") published its "Possible Senate Plan" and "Possible House Plan." (R pp 1353-54)

Political considerations played a significant role in the enacted plans and all alternatives. The Co-Chairs acknowledged that creating majority-black districts would make adjoining districts more competitive for Republicans. The uncontested evidence shows that the enacted legislative plans were constructed so that Republicans would retain their majorities.[15] The uncontested evidence also shows that all of the alternative districts were constructed to elect Democratic majorities in the Senate and House. Plaintiffs have never disputed this evidence. (Doc. Ex. 5757-58, 5771-5775, 5778, 5779, 551, 558, 561-62, 572-573)

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[14] This coalition included plaintiffs NC NAACP and the North Carolina League of Women Voters. (R pp 1343-44)

[15] The Court can take judicial notice that under the enacted plans Republicans have retained their majorities in 2012 and 2014.

The General Assembly enacted redistricting plans for the Senate and Congress on July 27, 2011. A House Plan was enacted on July 28, 2011. (R pp 1354-55) The 2011 Senate Plan included nine majority-TBVAP districts (one short of proportionality) and one majority-minority coalition district (located in Forsyth County). (R p 1288; Doc. Ex. 1205, 5659) The 2011 House Plan included twenty-three majority-black districts (one short of proportionality) and two majority-minority coalition districts. (R p 1288; Doc. Ex. 1207, 5666-67)[16] The two coalition House districts were located in Forsyth County. The enacted coalition districts located in Forsyth County are essentially identical to coalition districts proposed for Forsyth County by all of the alternative plans. (R p 1432; Doc. Ex. 1205, 1207)[17]

All of the 2011 alternative legislative plans adopted the same political formula for VRA districts followed by the 2003 Democratic-controlled General Assembly. All of the alternative 2011 house plans proposed a combination of majority-black, majority-minority coalition, and influence districts. (R pp 1288) The SCSJ House Plan proposed eleven majority-TBVAP districts, thirteen majority-minority coalition districts, and at least three influence districts. (Doc.

[16] All three plans were precleared by USDOJ on November 1, 2011. *Dickson v. Rucho*, 366 N.C. 332, 334-35, 737 S.E.2d 362, 365 (2013).

[17] Plaintiffs have not challenged the enacted Forsyth County House coalition districts.

Ex. 5685-86, 5701-02)[18] The Democratic leadership's Fair and Legal House Plan proposed nine majority-TBVAP districts, fifteen majority-minority coalition districts, and at least four influence districts. (Doc. Ex. 5687-88, 5701-02) The LBC's Possible House District Plan proposed ten majority-TBVAP districts, fourteen majority-minority coalition districts, and at least four influence districts. (Doc. Ex. 5689-90, 5701-02)

The alternative 2011 senate plans followed a similar pattern. The 2011 SCSJ Senate Plan proposed five majority-black districts, four majority-minority coalition districts, and at least two influence districts. (R p 1288; Doc. Ex. 5660, 5695-96) Notwithstanding the decisions in *Pender County* and *Strickland*, the 2011 Democratic leadership Senate Plan did not include any majority-black districts. Instead, this plan contained nine majority-minority coalition districts, and two to three influence districts. (R p 1288; Doc. Ex. 5661, 5695-96) The 2011 LBC's Senate Plan also ignored *Pender County* and *Strickland* and proposed no majority-black districts, nine majority-minority coalition districts, and at least two to three influence districts. (R p 1288; Doc. Ex. 5662, 5695-96)

All three groups who proposed alternative plans proposed some districts with higher black TBVAP than the percentage of TBVAP in corresponding 2003

[18] While the amount of TBVAP needed to create an "influence" district is not certain, Defendants are referring to districts in the alternative plans that were not majority-minority coalition districts but included TBVAP of at least 30%.

districts. (Doc. Ex. 1205, 1207) For example, the SCSJ Senate Plan increased the TBVAP in all seven senate districts that were won by a black incumbent in 2010. (Doc. Ex. 1205, 5657-58, 5660)[19] For two districts, the SCSJ Plan proposed increases of TBVAP that were higher than the percentage of TBVAP included in the 2011 enacted Senate districts, including Senate District 40. (Doc. Ex. 1205) Despite the past successes of black candidates in this district, the SCSJ Plan proposed that the TBVAP for Senate District 40 be increased from 35.42% to 52.06%. (R p 1401; Doc. Ex. 1205)[20] The 2011 SCSJ House Plan proposed seven house districts with a higher TBVAP than the percentages found in both the 2003 House Plan and the 2011 enacted House Districts despite prior success by black incumbents in these districts. (Doc. Ex. 1207, 5664-65)

Supporters of the alternative plans, including the plaintiffs, never explained why they increased the percentage of TBVAP in some of the districts that elected African-American incumbents in the past but not in other districts; how they arrived at the percentage TBVAP to include in any of their majority-black, majority-minority coalition, or influence districts; or how they determined their

[19] The SCSJ legislative plans were the only alternative plans offered during the redistricting hearings. The Democratic leadership and the Legislative Black Caucus were invited to offer plans but declined to do so until after the General Assembly convened to enact redistricting plans on July 23, 2011.

[20] The Democratic leadership and Legislative Black Caucus plans proposed that the TBVAP for this district be increased to 44.98%. (Doc. Ex. 1205) In all three alternatives, non-Hispanic whites constituted less than 37% of the voting age population. (R p 1401)

proposed numbers of majority TBVAP, majority-minority coalition, or influence districts. Supporters of the alternative plans offered no expert testimony on how their proposals contained "just the right amount" of African-American voting age population or "just the right number" of VRA districts. Instead, in general, all of the alternative plans proposed the same number of majority-black, coalition, and influence districts as were enacted by the 2003 Democratic General Assembly.

C. Trial Court Opinion

The trial court panel consisted of three Superior Court Judges appointed to hear the case by the Chief Justice of North Carolina.[21] They reviewed a voluminous record of maps, affidavits, depositions, statistics, testimony and other evidence. The unanimous decision of the panel was rendered by judges from "different geographic regions and with differing ideological and political outlooks." (R p 1268)

During the week of February 25, 2013, the trial court conducted hearings on cross-motions for summary judgment. Prior to ruling on these motions, on May 13, 2013, the trial court ordered that a trial be held on only two issues:

> (A) Assuming application of a strict scrutiny standard and, in considering whether the Enacted Plans were narrowly tailored, was each challenged Voting Rights Act ("VRA") district drawn in a place where a remedy or potential remedy for racially polarized voting was reasonable for purposes of preclearance or

[21] By statute, the Chief Justice is required to appoint a three-judge panel to hear any state court redistricting lawsuits. N.C. Gen. Stat. § 1-267.1.

protection of the State from vote dilution claims under the Constitution or under § 2 of the VRA" and;

(B) For six specific districts (Senate Districts 31 and 32, House Districts 51 and 54 and Congressional Districts 4 and 12 – none of which is identified as a VRA district), what was the predominant factor in the drawing of these districts.

(R p 1270)

The trial court found that plaintiffs had challenged a total of thirty districts (9 Senate, 18 House, and 3 Congressional) on the grounds of racial gerrymandering. (R p 1277) Twenty-six of these districts were created by North Carolina for the purpose of avoiding VRA claims. The trial court found that four other districts challenged by plaintiffs were not created by North Carolina for that purpose. (R p 1277)

The three-judge panel conducted the trial assuming the applicability of strict scrutiny. But plaintiffs ignore that the three-judge court never held a trial on the issue whether race was the predominant motive for the location of the challenged VRA legislative district lines or the First Congressional District. Instead, the trial court summarily found that North Carolina's 2011 VRA districts were subject to strict scrutiny. The sole basis for this ruling was the statement by the Co-Chairs of the Joint Redistricting Committee that substantial proportionality was one of the factors they would consider in legislative redistricting (even though neither plan maximized the number of majority-black districts or established the proportional number of majority-black districts). (R p 1277) The trial court gave no reasoning

in support of its decision to subject the 2011 First Congressional District to strict scrutiny.[22] Applying the test articulated by the United States Supreme Court in *Shaw II*, 517 U.S. at 908-910, the three-judge panel then upheld all of the challenged VRA districts as having a strong basis in the legislative record. (R pp 1279-1307)

Based upon the evidence presented at trial, the three-judge panel entered extensive findings of fact supporting its conclusion that the challenged VRA districts survived strict scrutiny. These included general findings applicable to all of the challenged districts (R pp 1339-1355) as well as detailed findings related to each challenged VRA district. (R pp 1355-1422) The trial court also held that plaintiffs had failed to provide a judicially manageable definition of the term "compact" or prove that districts they supported were any more "geographically compact" or "better looking" than the enacted districts. The trial court concluded

[22] The trial court acknowledged that "a persuasive argument can be made that compliance with the VRA [was] but one of several competing redistricting criteria balanced by the General Assembly and that a lesser standard of review might be appropriate." (R pp 1278-79) (citing *Vera v. Bush*, 517 U.S. 952, 958 (1996); *Wilkins v. West*, 264 Va. 447, 571 S.E.2d 100 (2002)). Despite these arguments, the trial court elected to apply strict scrutiny to the challenged VRA districts because "if the Enacted Plans are found to be lawful under a strict scrutiny standard of review, and the evidence considered in a light most favorable to the Plaintiffs, then, *a fortiori*, the Enacted Plans would necessarily withstand review, and therefore be lawful, if a lesser standard of review is indeed warranted . . . ." (R p 1279)

that plaintiffs had therefore failed to prove that the enacted districts violated any "compactness" requirement under federal or state law. (R pp 1320-1332)

Based upon the evidence presented at trial, the three-judge panel also concluded that race was not the predominant motive for the location of district lines established for Senate District 32, House District 54, and Congressional Districts 4 and 12 (R pp 1309-1312) and entered extensive findings of fact in support of this conclusion. (R pp 1423-1434) The trial court granted summary judgment to the defendants on all of plaintiffs' other claims, including their contention that the 2011 Senate and House Plans failed to comply with the WCP. (R pp 1312-1320)

D. Opinion by the North Carolina Supreme Court

On appeal, this Court affirmed the decision by the trial court. This Court affirmed the trial court's summary judgment that the enacted Senate and House Plans complied with the *Stephenson* county-grouping formula and that plaintiffs' alternative Senate and House plans did not. *Dickson*, 367 N.C. at 565-66, 766 S.E.2d at 254-55. This Court held that the trial court erred by applying strict scrutiny to the challenged VRA districts because summary resolution of the racial predominance element in favor of the plaintiffs is almost never appropriate. *Id.* at 551-54, 766 S.E. 2d at 246-47. However, the Court found this error to be harmless based upon its decision to affirm the trial court's findings that the challenged VRA

districts survived strict scrutiny. *Id.* This Court also affirmed the trial court's conclusion that race was not the predominant motive for the location of the district lines of Senate District 32, House District 54, and Congressional Districts 4 and 12. *Id.* at 569-70, 766 S.E. 2d at 256-57.

E. The decisions by the three-judge trial court and the United States Supreme Court in *Alabama*

1. The background to Alabama's 2011 redistricting process.

The Alabama legislature consists of members representing 105 House districts and 35 Senate districts. *Alabama*, 135 S. Ct. at 1259. Like North Carolina, in 2001 the redistricting process in Alabama was controlled by Democratic majorities in both the Alabama House and Senate. *Alabama Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1241 (M.D. Ala. 2013). The Democratic leaders admitted that their redistricting strategies were highly political and were designed to retain Democratic control of the legislature. *Id.* at 1243-44. This strategy relied upon the shifting of black population within the State to create majority-black districts while retaining enough black population in a sufficient number of districts favorable to Democratic candidates to ensure Democratic majorities in the legislature. *Id.* at 1242-43. In 2010, the Democratic redistricting strategy "collapsed" and Republicans won super-majorities in both legislative chambers. Thus, following the 2010 Census the redistricting process in 2012 was controlled by Republican majorities. *Id.* at 1242-44.

In 2012, Alabama's legislative leadership followed two overriding guidelines for legislative redistricting. First, to comply with the federal one person, one vote requirement, the legislative leadership decided that all districts would be drawn with a population deviation of plus or minus one percent from the ideal population (with an overall deviation of no more than 2 percent between the highest and lowest populated districts). *Alabama*, 135 S. Ct. at 1263; *see also* 989 F. Supp. 2d at 1245-46. This policy was not required by the Alabama Constitution. Second, to comply with Section 5, the legislative leadership directed that any new plans could not reduce the total number of majority-black districts for each house, and that any 2012 majority-black district should include as closely as possible the same percentage of black voters found in the 2001 versions. *Alabama*, 135 S. Ct. at 1263; *see also* 989 F. Supp. 2d at 1227, 1306-12. The legislature did not cite any Supreme Court authority for its Section 5 policy. The legislature also adopted two other criteria that districts should follow county lines and be based upon whole precincts. *Alabama*, 135 S. Ct. at 1263.

The 2001 Alabama House Plan included twenty-seven majority-black house districts. The 2001 Senate Plan included eight majority-black districts. Consistent with the guidelines adopted by the legislative leaders, the 2012 plans retained the

same number of majority-black districts.[23] Each of these districts was established with a percentage of black voting age population ("BVAP") that exceeded, equaled, or was as close as possible to that found in each district's corresponding 2001 majority-black district. *Alabama*, 989 F. Supp. 2d at 1254-56.

The legislature's policies regarding one person, one vote and Section 5 compliance resulted in many 2012 districts having super-majorities of BVAP. In the 2012 House Plan, three districts were established with a BVAP in excess of 70%, fourteen districts were established with a BVAP in excess of 60%, and ten districts were established with a BVAP in excess of 50%. The average BVAP for these twenty-seven majority-black house districts was 61.64%. In the 2012 Senate Plan, one district (Senate District 26) was established with a BVAP in excess of 70% (72.7%), three districts were established with a BVAP in excess of 60%, and four districts were established with a BVAP in excess of 50%. The average BVAP for these eight senate districts was 62.29%. *Id.* at 1254-56.[24]

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[23] The number of House seats established under the 2001 and 2012 plans are roughly proportional to the percentage of black population in Alabama under the 2010 Census. The number of Senate seats is one short of rough proportionality. (26.6%) (*See* http://quickfacts.census.gov/qFel/states/01000.html). None of the plaintiffs argued, nor did the lower court or the United States Supreme Court hold, that Alabama's decision to provide rough proportionality to black voters constituted evidence of racial gerrymandering.

[24] Defendants have calculated the average BVAP for Alabama House and Senate districts by adding the percentage BVAP for all districts in each plan and then dividing by 27 for the Alabama House and eight for the Alabama Senate. *Id.*

Two sets of plaintiffs challenged the 2012 Alabama legislative districts. Both alleged that the plans diluted African-American voting strength in violation of Section 2 and that the plans and certain districts constituted racial gerrymanders in violation of the Fourteenth and Fifteenth Amendments. *Id.* at 1236. Neither set of plaintiffs contended that Alabama had created too many majority-black districts. No plaintiff argued that the State should replace majority-black districts with coalition districts. At the trial court level, only six specific districts were challenged by the plaintiffs – House Districts 73 and 53 and Senate Districts 7, 11, 22, and 26. Only two of the challenged districts (House District 53 and Senate Districts 26) were majority-black. *Id.* at 1249-51.

2. The district court dismissed plaintiffs' claims for vote dilution and racial gerrymandering.

The three-judge court dismissed all of plaintiffs' claims regarding alleged vote dilution on a state-wide basis or in specific counties. The court noted that proportionality of majority-minority districts state-wide is a relevant factor for the totality of circumstances test required by Section 2. *Id.* at 1280. Plaintiffs' Section 2 claims were dismissed because plaintiffs had failed to show that the State could have created any additional majority-black districts. *Id.* at 1280-81 (citing *Johnson v. De Grandy*, *supra*).

The three-judge court also dismissed plaintiffs' Section 2 claim that black voting strength had been diluted because the State created legislative districts with

"excessive majorit[ies]," thereby diluting the voting strength of African-American voters in non-majority districts. The three-judge court ruled that Section 2 does not require a state to minimize the majorities in majority-black districts so that African-American voters may have "influence" in other districts. *Id.* at 1284-85 (citing *LULAC*, 548 U.S. at 445).

The three-judge court also rejected plaintiffs' claims that the redistricting plans as a whole, or specific districts challenged by plaintiffs, were the product of intentional discrimination. *Id.* at 1290-1312. The three-judge court held that plaintiffs had failed to prove that race was the predominant motivating factor for the lines of any of the challenged districts because the legislature's rule regarding one person, one vote "trumped every other districting principle." *Id.* at 1297. Even assuming race had been the predominant motive, the three-judge court ruled that the districts survived strict scrutiny because Alabama's policy of retaining majority-black districts at the same or higher percentage of BVAP as compared to the 2001 plan was necessary for the State to achieve preclearance of the plans under Section 5. *Id*. at 1306-12.

Both sets of plaintiffs appealed from the decision by the three-judge court. The United States Supreme Court noted probable jurisdiction only with respect to plaintiffs' racial gerrymandering claims. *Alabama*, 135 S. Ct. at 1264 (citing

Alabama Democratic Conference v. Alabama, 572 U.S. ___, 134 S. Ct. 2697 (2014)).[25]

3. The United States Supreme Court reversed the Alabama trial court's decision because of the trial court's erroneous tests for racial predominance and compliance with Section 5.

The United States Supreme Court's decision in *Alabama* relies upon *Shaw I*, and its progeny, including *Miller v. Johnson*, 515 U.S. 900 (1995), *Shaw II*, *Bush v. Vera*, 517 U.S. 952 (1996), and *Cromartie II*. Based upon these decisions, the Court in *Alabama* ruled that the three-judge district court committed three specific errors.

The Court first held that claims of racial gerrymandering must be made on a district by district basis, and that it was error for the three-judge court to evaluate plaintiffs' claims as an attack upon the redistricting plans as a whole. *Alabama*, 135 S. Ct. at 1265. Claims of racial gerrymandering require an evaluation of whether "race was improperly used in the drawing of the boundaries of one or more specific electoral districts." *Id.* The fact that "Alabama expressly adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria (save one person, one vote) provides evidence that race

[25]The Court did not note probable jurisdiction on plaintiffs' vote dilution claims.

motivated the drawing of particular lines in multiple districts . . . ." *Id.* at 1267.[26] But evidence of state-wide practices do not "transform a racial gerrymandering claim about a set of individual districts into a separate, general claim that the legislature racially gerrymandered the State as an undifferentiated 'whole.'" *Id.*

The second error committed by the three-judge court involved the standard of proof plaintiffs must meet to prove a *prima facie* claim of racial gerrymandering. Plaintiffs must prove that race was the "predominant factor motivating the legislature's decision to place a significant number of voters within or without a district." *Id.* at 1270 (citing *Miller*, 515 U.S. at 916). To do so, the "plaintiff must prove that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." *Id.* Traditional race-neutral districting principles include "compactness, contiguity, *respect for political subdivisions* or communities defined by actual shared interests, . . . *incumbency protection and political affiliation*." *Id.* (citing *Vera*, 517 U.S. at 914) (emphasis added).[27]

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

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

The United States Supreme Court observed that Alabama's Senate District 26 (BVAP of 72.7%) was "the one district that the parties . . . discussed . . . in depth." *Id.* at 1271.[28] The Court concluded that other than the legislature's rule on equal population, the record contained no evidence that any other neutral redistricting criteria played a role in the construction of this district. While the legislative leaders had adopted criteria stating that districts should follow county lines and be based upon whole precincts, neither criterion was followed in the construction of Senate District 26. *Id.* at 1271-72.

The Court then held that the state's "equal population objectives" cannot serve as a "traditional race-neutral districting principle" sufficient to defeat a claim of racial gerrymandering. *Id.* at 1270-71; *see also Shaw I*, 509 U.S. at 647. A rule adopted by a legislature setting equal population goals might explain the number of persons placed in a district but it does not necessarily explain "which persons were placed in appropriately apportioned districts." *Alabama*, 135 S. Ct. at 1271. As a result, the requirement that districts have approximately equal population is "a background rule against which redistricting takes place." *Id.* at 1271. An equal

[28] The Court focused its attention on Senate District 26 with little attention paid to any other district. North Carolina did not create a single district with TBVAP in excess of 57.33% (2011 House District 24), much less a district with 72.7% TBVAP. The highest black percentage proposed for a district was SCSJ House District 7 (58.69%). (Doc. Ex. 1207) Both of these districts are located in northeastern North Carolina. There is no dispute that this area of North Carolina continues to experience a very high level of racially polarized voting.

population goal is not a factor to be treated like other race-neutral factors when a court determines whether race predominated over other 'traditional' factors in the drawing of district boundaries." *Id.* Given the legislature's failure to follow any other neutral criteria, "once the legislature's equal population objectives are put to the side," the record contained "strong, perhaps overwhelming evidence that race did predominate as a factor when the legislature drew Senate District 26." *Id.* Thus, in the Court's view, had the district court "treated equal population goals as background factors, it might have concluded that race was the predominant boundary-drawing consideration." *Id.* at 1272.

The district court's third error concerned its conclusion that Section 5 required Alabama to maintain the 2012 districts with the same racial percentages, most of which constituted super-majorities in excess of 60%, found in the corresponding 2001 districts. The trial court cited no Supreme Court precedent in support of Alabama's interpretation of Section 5. The Court ruled that the district court had erred because Section 5 only required that states adopt racial percentages for each VRA district needed to "maintain a minority's ability to elect a *preferred candidate of choice*." *Id.* (emphasis added) The Section 5 policy of Alabama's legislature represented an improper "mechanically numerical view as to what constitutes forbidden retrogression." *Id.* at 1273. Again, the only example cited by the United States Supreme Court was Senate District 26. The Court found it

unlikely that the ability of African-American voters to elect their preferred candidate of choice could have been diminished in this district if the percentage of BVAP had been reduced from a super-majority of over 70% to a lower super-majority of 65%. *Id.*[29]

The Court qualified its ruling by stating that it was not "insist[ing] that a legislature guess precisely what percentage reduction a court or the Justice Department might eventually find to be retrogressive." *Id.* This is because "[t]he law cannot insist that a state legislature, when redistricting, *determine precisely what percent minority population § 5 demands*." *Id.* (emphasis added) Federal law cannot "lay a trap for an unwary legislature, condemning its redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place a few too many minority voters in a districts or (2) retrogressive under § 5 should the legislature place a few too few." *Id.* (citing *Vera*, 517 U.S. at 977).

Based upon these concerns, the Court held that majority-black districts would survive strict scrutiny, including any narrow tailoring analysis, when a legislature has "a strong basis in evidence in support of the race-based choice it has made." *Id*. at 1274 (citations omitted). This standard of review "does not demand that a State's action actually is necessary to achieve a compelling state interest in order to be constitutionally valid." *Id.* Instead, a legislature "may have a strong

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

basis in evidence to use racial classifications in order to comply with a statute when they have *good reasons* to believe such a use is required, even if a court does not find that the actions were necessary for statutory compliance." *Id*. (emphasis in original). Nothing in the legislative record explained why Senate District 26 needed to be maintained with a BVAP in excess of 70% as opposed to a lower super-majority-minority percentage. Therefore the Court could not accept the district court's conclusion that District 26 served a compelling governmental interest or was narrowly tailored. *Id.* at 1273-74.

F. Issues not discussed or resolved in the *Alabama* decision

None of the plaintiffs in *Alabama* argued that Alabama had violated the Fourteenth Amendment because of the number of majority-minority districts included in the two legislative plans or because the Alabama plans provided rough proportionality to African-American voters.[30] Nor did any of the plaintiffs argue that Section 5 required states to create districts that allowed the minority group to elect their candidate of choice with a non-majority BVAP percentage.[31] Nor did Alabama defend its majority-black districts from claims of racial gerrymandering on the ground that the challenged districts were reasonably necessary to protect the State from liability under Section 2. In constructing its districts, Alabama did not

[30] Nor did the Court reference proportionality as evidence that districts were racially gerrymandered.

[31] All of the majority-black districts in the 2012 Republican enacted plans had been majority-black in the 2001 Democratic enacted plans.

rely upon expert testimony on racially polarized voting or prior court decisions requiring or affirming Section 2 districts. Finally, the *Alabama* decision did not reverse the Court's prior holdings that racial gerrymandering is not established merely because "redistricting is performed with consciousness of race." *Vera*, 517 U.S. at 958; *Shaw I*, 509 U.S. at 646. Thus, plaintiffs still cannot prove a racial gerrymander merely by showing that race was "a motivation for drawing the majority-minority district," but instead must continue to prove that race was "the predominant factor" and that the district "is unexplainable on grounds other than race." *Cromartie II*, 532 U.S. at 241-42 (citations omitted). [32]

ARGUMENT

A. Summary of Argument

This Court should once again affirm the decision of the trial court and uphold the constitutionality of the challenged districts. The three-judge panel conducted a trial on whether race was the predominant motive for Congressional Districts 4 and 12, Senate Districts 31 and 32, and House Districts 51 and 54. The three-judge panel entered extensive findings of fact supporting its legal conclusions that race was not the predominant motive for these districts. Plaintiffs have never before challenged these findings of fact or argued that the findings were

[32] In *Alabama*, the district court conducted a trial on plaintiffs' racial gerrymander claims. Even in *Alabama*, the United States Supreme Court did not direct the entry of judgment for the plaintiffs but instead reversed the district court judgment and directed that it reconsider its findings in light of the Court's opinion.

not supported by competent evidence. Therefore, this Court should once again affirm the trial court's judgment regarding these districts.

As previously noted by this Court, the three-judge panel erred in ruling that the challenged VRA districts were predominantly motivated by race.[33] This decision was made without the court below conducting a trial on whether race was the predominant motive for the construction of any of these districts. However, the undisputed evidence shows that the predominant motive for the location of these districts was compliance with the WCP. The undisputed evidence also shows that politics played a major role and that the plans adopted by the Republican majority were designed to preserve (and have preserved) Republican majorities in both chambers. Therefore, as a matter of law, defendants are entitled to judgment as to all of the challenged districts because they are not "unexplainable on grounds other than race." *Cromartie II*, 532 U.S. at 241-42.

Assuming this Court decides that defendants are not entitled to judgment on the issues of racial predominance, this Court should nonetheless reaffirm the trial court's extensive factual findings showing a strong basis in evidence for any race-

[33] In *Cromartie I*, the United States Supreme Court compared racial gerrymandering cases to Title VII cases where plaintiffs must prove intentional discrimination by the employer. The Court noted that summary judgment is almost never granted in favor of the plaintiffs in Title VII cases. 526 U.S. at 553 n. 9. In contrast, defendants are often granted summary judgment in cases under Title VII or other employment statutes where plaintiffs must prove intentional discrimination. *See e.g. Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013).

based choices made by the General Assembly. Those findings were made following a trial on the strict scrutiny issues. Plaintiffs have never before challenged these factual findings or argued that they are not supported by competent evidence. These findings more than satisfy the "narrow tailoring" standard articulated in *Alabama*.

B. Plaintiffs cannot satisfy the "demanding" burden of proof applicable to claims of racial gerrymandering.

1. Plaintiffs must first show that race was the legislature's predominant motive.

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* changed these standards.

2. Even where race is the predominant motive, plaintiffs must prove that majority-minority districts were not reasonably necessary to avoid a Section 5 objection or to avoid liability under Section 2.

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 *Growe v. Emison*, 507 U.S. 25, 37-42 (1993); *Shaw II*, 517 U.S. at 915; and *Miller*, 515 U.S. at 920-21).

To make this showing, a state need only articulate a "strong basis in evidence" 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.*[34]

[34] 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

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.

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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).

3. Following a trial on the merits, the trial court's findings that race was not the predominant motive for Congressional District 12 and Senate District 32 are supported by competent evidence and must be affirmed.

The three-judge panel conducted a trial on whether race was the predominant motive for Congressional District 12 and Senate District 32.[35] It entered extensive findings of fact for these districts and found that plaintiffs have failed to prove that race was the predominant motive for the location of their district lines. Findings of fact are binding if not challenged on appeal or if they are supported by competent evidence. *Dickson*, 367 N.C. at 551, 766 S.E.2d at 246. Plaintiffs have never before argued that the trial court's factual findings below are not supported by competent evidence. Indeed, plaintiffs did not challenge any specific factual findings by the trial court below in briefs previously filed with this Court or the United States Supreme Court. Therefore, the factual findings by the trial court that race was not the predominant motive for Congressional District 12 and Senate District 32 are binding and should be reaffirmed. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

Plaintiffs' claims regarding Congressional District 12 are baseless. The 2011 Congressional District 12 was created as a very strong Democratic district. In 2000, the United States Supreme Court ruled that the 1997 version of the

[35] Plaintiffs appear to have dropped their claims that Congressional District 4, Senate District 33, and House Districts 51 and 54 are unconstitutional racial gerrymanders.

Twelfth Congressional District was not a racial gerrymander because the 1997 General Assembly had created this district to be a very strong Democratic district. Politics and not race was the predominant factor. *Cromartie II*, *supra*. The 1997 and 2001 versions of Congressional District 12 were drawn by a Democratic-controlled General Assembly while the 2011 version was drawn by a Republican-controlled General Assembly. The 2011 version was drawn by a Republican General Assembly to be an even stronger Democratic district than the 1997 and 2001 versions. This was because the 2011 General Assembly intended to create districts that adjoined the 2011 Twelfth District that were better for Republicans than the adjoining versions enacted by Democratic-controlled General Assembly in 1997 and 2001. (R pp 1424-25) While the 1997 and the 2001 General Assemblies intended to make Congressional District 12 a strong Democratic district, they also intended to make the districts adjoining District 12 more favorable for Democrats. Politics was the prime motivation for this district in 1997, 2001, and 2011, but the political interests of the 1997 and 2001 Democratic General Assemblies were different than the Republican General Assembly in 2011. (R pp 1424-26)

At trial, plaintiffs fell woefully short of proving that race was the predominant motive for the 2011 Twelfth Congressional District. But assuming they had carried this heavy burden, plaintiffs failed to offer alternative plans that achieve the political goals of the 2011 Republican-controlled General Assembly.

Cromartie II, 532 U.S. at 258. Plaintiffs' claims regarding the Twelfth Congressional District remain completely unfounded and the lower court's factual findings should once again be reaffirmed.

The lower court's detailed factual findings regarding Senate District 32 are also supported by competent evidence and should be reaffirmed. (R pp 1429-32) North Carolina's standard for equal population is far different from the population goals adopted by the legislature in *Alabama*. North Carolina's population requirement is a constitutional criterion, not a rule adopted by a legislative committee. North Carolina's constitutional criterion for equal population is a component of the Constitution's formula for grouping counties to create population pools for one or more legislative districts within a single county or group. The WCP and its equal population component is North Carolina's neutral redistricting principle for respecting "political subdivisions," i.e. counties. *Shaw I*, 509 U.S. at 647. It is not a mere "background rule against which redistricting takes place." *Alabama,* 135 S. Ct. at 1271. It would be impossible to draw districts based upon single counties or county groupings as required by the WCP absent a constitutional rule that districts within a single county or county group be based upon a constitutional standard for equal population. Thus, the WCP speaks to the identity of voters who are placed in a district and not just the number of voters. *Alabama*, 135 S. Ct. at 1271; *see also infra* at 51-55.

The lower court and this Court have found that the 2011 legislative plans comply with the *Stephenson I* formula for county groups and that none of the alternative plans comply. *Dickson*, 367 N.C. at 573-75, 766 S.E.2d at 259-60. This holding on a question of North Carolina law is law of the case. *See N.C. Nat'l Bank v. Va. Carolina Builders*, 307 N.C. 563, 566, 299 S.E.2d 629, 631 (1983). And of course it was not overruled by the United States Supreme Court because it reflects a binding interpretation of North Carolina law. This finding encompasses the county combination used in the enacted Senate Plan for Forsyth County and Senate Districts 31 and 32. The trial court found that the shape and location of the districts' lines for Senate Districts 31 and 32 were caused by the *Stephenson* county grouping formula and its requirement that all districts within a county grouping have a population deviation of plus or minus 5%. The shape and size of District 32 was predominantly caused by the amount of population in the county combination that included Forsyth County and the requirement that all districts within that county grouping have a population that was within 5% of the ideal. (R pp 1429-32)

As the trial court also found, there is no functional difference between the enacted Senate District 32 and the proposed alternatives. (R pp 1431, 1432) All proposals have essentially the same percentage of TBVAP. Further, none of the plaintiffs have challenged two similar coalition House Districts located in Forsyth

County. In fact, all three alternative House Plans proposed that these House Districts be established with a higher or similar levels of TBVAP as enacted Senate District 32. (Doc. Ex. 1207) Plaintiffs have not cited any case where a district with less than 50% TBVAP has been found to be a racial gerrymander.

4. Defendants are entitled to judgment because as a matter of law race was not the predominant motive for the challenged legislative VRA districts.

a. Compliance with the WCP was the predominant motive for the shape and location of the challenged VRA districts.

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*. This 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.

As held by the lower court and this Court in its original decision, 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.[36] In fact, several alternative VRA districts located within single counties score lower in compactness tests than enacted districts. (R pp 1331-32; Doc. Ex. 5602, 5651-52, 5653-56)[37] Plaintiffs have also never offered any plans using the enacted county

[36] The three-judge panel below found that there are no judicially manageable standards to evaluate compactness, a conclusion that is supported by plaintiffs' expert. (R pp 1325-32)

[37] For example, the Democratic leadership House Plan proposed five House Districts drawn within single counties (House Districts 29 (Durham), 33 (Wake),

grouping formulas (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 TBVAP 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

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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. (R pp 1331-32)

have an equal opportunity to elect their candidates of choice because of racially polarized voting. *Gingles*, 478 U.S. at 48-51; *Growe v. Emison*, 507 U.S. 25, 40 (1993); *Vera*, 517 U.S. at 997 (Kennedy, J., concurring).[38]

To satisfy the first *Gingles* precondition, North Carolina's map drawer relied upon exemplar maps showing the locations of reasonably compact African-American populations. (Doc. Ex. 5729-30, 5746-51 (House exemplar districts); Doc. Ex. 5739, 5752-5752 (Senate exemplar districts)) The House exemplar maps show that six compact majority-black House districts could be formed in northeastern North Carolina (Doc. Ex. 5746-48), three compact majority-black House districts in southeastern North Carolina (Doc. Ex. 5746-48, 5750), two compact majority-black House districts in Cumberland County (Doc. Ex. 5746-48, 5750), two compact majority-black House districts in Wake County (Doc. Ex. 5746-47, 5749), three compact majority-black House districts in Guilford County (Doc. Ex. 5746-47, 5749), one compact majority-black in Forsyth County (Doc. Ex. 5746, 5749), and five compact majority-black House districts in Mecklenburg County (Doc. Ex. 5746-47, 5751; *see also* Doc. Ex. 5729-30) Similarly, the Senate exemplar maps show that three compact majority-black districts could be formed in northeastern North Carolina (Doc. Ex. 5752-54), one compact majority-black

[38] 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.

district in Scotland, Hoke, and Cumberland counties (Doc. Ex. 5752-53, 5755), 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 (Doc. Ex. 5752-53, 5755) (exemplar Senate District 32) and two compact majority-black districts in Mecklenburg County (Doc. Ex. 5752-53, 5755).

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. (*See* R pp 1344-48; 1356-57; 1359; 1361; 1362-63; 1365; 1366; 1368; 1369; 1371; 1372-73; 1374; 1375; 1376-77; 1378; 1379-80; 1381; 1382-83; 1384; 1385; 1387) 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.[39] For example, exemplar House Districts 5, 7, 12, 23, 24, 27, 31, 32 are drawn into multiple enacted county groups. (Doc. Ex. 6286-87, 6292, 6293, 6294, 6295) Similarly, exemplar Senate Districts 3, 4, 5, 20, 21, and 32 are drawn into multiple county groups. (Doc. Ex. 6288-89, 6298, 6299, 6300, 6301)[40] 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 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.

[39] If the Court reviews the briefs filed in *Stephenson II*, it will recall that 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 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.

[40] 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 TBVAP and therefore violate the WCP. *Pender County, supra.*

Dickson, 367 N.C. at 572-73, 766 S.E.2d at 259-60. Plaintiffs even concede that the WCP's rule for combining counties caused the shapes of those enacted districts that plaintiffs consider as being the most bizarre. Plaintiffs' Brief on Remand, p. 15. Plaintiffs' concession and the State's 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.[41]

b. Political motivations were not subordinated to race in the enacted legislative plans.

The undisputed evidence shows that the enacted plans were designed to ensure Republican majorities in the House and Senate and that all of the alternative plans were designed to return Democratic majorities in both chambers. (*See* Doc. Ex. 5757-58, 5771-5775, 5778, 5779) 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

[41] 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.

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 *admitted* that creating the 2011 majority-minority districts would make adjoining districts better for Republican candidates. (R pp 550-51) 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.[42]

Plaintiffs have never proposed that the coalition districts they support can be replaced by crossover or influence districts or districts with only 22% black TBVAP (the state-wide percentage of TBVAP). 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

[42] No such political motivation was argued by the State in *Alabama*.

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.[43] And despite the fact that this 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

[43] 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.

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. (Doc. Ex. 6287-88, 6294-97 (exemplar House Districts); 6289, 6301-02 (exemplar Senate Districts))

c. Plaintiffs' evidence does not create a disputed factual issue on the question of racial predominance.

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 TBVAP in excess of 50%. This evidence does not create a disputed factual issue on racial predominance.

The State has shown, and plaintiffs have conceded, that application of the WCP is the predominant explanation for the shapes and locations of the VRA districts. 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. Second, the United States Supreme Court has 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.[44] 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. *See supra* at 14-17.[45]

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[44] The Court can take judicial notice that the State has been sued by the United States Department of Justice, the NC NAACP, and the NC League of Women Voters who contend that election reforms related to photo identification, the elimination of same day registration, the reduction of the number of days for early voting, and other reforms violate Section 2. (*See* Complaint at ¶¶ 95-100, *United States v. North Carolina*, Civil Action No. 13-cv-861 (M.D.N.C. Sept. 30, 2013); Second Amended Complaint at ¶¶ 109-25, *North Carolina State Conference of the NAACP, et al. v. Patrick Lloyd McCrory, et al.*, Civil Action No. 13-cv-658 (M.D.N.C. Jan. 9, 2014); and Complaint at ¶¶ 83-97, *League of Women Voters of North Carolina, et al. v. North Carolina*, Civil Action No. 13-cv-660 (M.D.N.C. August 12, 2013) (cases currently pending) In any Section 2 case, including these pending federal cases, rough proportionality under the 2011 legislative plans and the number of elected black legislators provide the State with a defense under the totality of the circumstances test. 52 U.S.C. § 10301(b)

[45] 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. (R pp 1350-51) 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. (R pp 1350-53)

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 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.

It is also significant that there was no strong basis in evidence to support Alabama's policy on 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%. As noted by this Court, the average TBVAP 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 the *Strickland* benchmark was the criterion followed by the General Assembly, as opposed to Alabama's strategy of packing districts with super-majorities of African-American voters.

d. Assuming plaintiffs had raised a disputed factual issue on whether race was a predominant motive for any districts, they have still failed to carry their burden of proof.

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 TBVAP 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.[46] 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. (Doc. Ex. 6033-34, 6035, 6045-48, 6049-50) 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 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.

[46] 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.

C. The trial court's legal conclusions that the challenged VRA districts have a strong basis in evidence are supported by competent evidence.

Following a trial on the issue of strict scrutiny, the trial court made extensive findings of fact that are unchallenged and more than show a strong basis in evidence in support of its legal conclusions. (R p 1343) The trial court's findings related to the First Congressional District are illustrative of the factual findings related to other challenged VRA districts.[47]

Plaintiffs wrongly argue that the trial court's findings were limited to the 2010 election results. In its general findings of fact, the trial court noted that 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. (R

[47] Plaintiffs have not even attempted to explain the evidence that the State would need to produce to show a strong basis in evidence, how it would be any different than the evidence presented in this case, or how the districts plaintiffs advocated were supported by a strong basis in evidence while the enacted districts were not. Defendants submit that if the extensive factual findings made in this case for each challenged district do not provide a strong basis in evidence, then it is impossible for a strong basis in evidence to ever exist. Plaintiffs can point to no case where VRA districts were ruled unconstitutional based upon extensive findings such as those made by the trial court in this case. Nor was the legislative record or factual findings by the trial courts in *Shaw II*, *Miller*, *Alabama*, or any other case where districts have been stricken as racial gerrymanders even remotely similar to the findings of fact below.

pp 1340-41) Similarly, the trial 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. (R pp 1342-43) The trial court also made findings on the number of elections won by African-American candidates in majority-black, coalition, or influence districts from 2006 through 2010 and examined the history of state-wide elections from 2000 through 2010. (Doc. Ex. 5593-95, 5657-58, 5663-65, 5674-75, 5680-82, 5691-5703; 6033-36, 6037-6050)

During the legislative process, the NC NAACP's expert 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. This report was 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. (R pp 1344-1348) At no time during the legislative process did any legislator, witness, or expert witness

question the findings by these two experts. (R p 1348)[48] 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. (R pp 1348-49)

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. (R pp 1348-54)

The trial court relied upon this evidence to make specific findings of fact related to all of the challenged VRA districts including the First Congressional District. The trial court identified all of the counties included in the 2011 enacted First District that were also included in the VRA districts affirmed in *Gingles* and

[48] Nor did any expert or witness give testimony that any specific district should be created with 51% TBVAP because 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.

Cromartie. (R p 1355) The trial court then found those counties in the 2011 First Congressional District that were included in majority-black or majority-minority coalition districts under the 2001 Congressional and the 2003 enacted legislative Plans. The trial court also identified counties included in the 2011 First Congressional District that were covered by Section 5. (R pp 1355-56)

The trial court also made findings on the number of counties in the 2011 enacted First Congressional District in which one or both experts found significant levels of racially polarized voting. (R pp 1356-57) Finally, the trial court found that all three 2011 alternative legislative plans, as well as the two alternative Congressional Plans, proposed the creation of majority-black or majority-minority coalition districts in all of the counties encompassed by the 2011 enacted First Congressional District. (R pp 1357-58)

The trial court also made findings of fact related to the United States Supreme Court's holding in *Strickland* explaining the practical considerations served by the majority-minority rule. Like this Court's decision in *Pender County*, 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 trial court followed these principles in making several findings of fact that have not been challenged. For example, the trial court found that the 2001 First Congressional District was underpopulated by 97,563 people as of the 2010 Census. In two prior elections (2004 *and* 2010), the margin of victory for the African-American candidate was below the number of people by which the district was underpopulated. (R pp 1419-20) In all contested elections in this district from 2004 through 2010, the African-American incumbent substantially outraised and spent more campaign funds than his white opponent. (R pp 1419-20) Thus, the majority-minority criteria relieved North Carolina of making difficult if not impossible judgments concerning the type of white voters that needed to be added back into the 2011 First Congressional District, as well as the impact of incumbency on prior elections. *Strickland*, *supra*.

Similar specific findings of fact were made by the trial court for all of the other challenged VRA districts. (R pp 1355-1422; *supra* at pp. 20-27) Plaintiffs have attempted to discount these findings 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 are no findings of fact by the trial court 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 (cited in the findings of fact by the three-judge panel) 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 this Court has ruled that coalition districts can not 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*.

D. Plaintiffs have failed to prove that the challenged districts are not narrowly tailored under the VRA.

1. The challenged districts are narrowly tailored under Section 5.

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 TBVAP in excess of 50%, even though that might result in an increase in the TBVAP 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 TBVAP in excess of 50%. Plaintiffs' expert further conceded that USDOJ had given him this instruction to avoid any dispute on

whether Section 5 should be construed as requiring majority-black districts because of the definition given to "candidate of choice" by the Court in *Strickland*. (Theodore Arrington Dep. pp. 108-14, 191, 216-17).[49]

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 and United States v. County of Los Angeles*, 918 F.2d 763, 778 n. 1 (9th Cir.

[49] 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.

2. The challenged districts are narrowly tailored under Section 2.

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 TBVAP 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.

Plaintiffs rely upon the proposed alternative plans as evidence that the enacted districts were not narrowly tailored. The 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 2003 districts. (Doc. Ex. 1205, 1207) They also assign a disproportionate number of African-American voters to divided precincts. (*See* Doc. Ex. 1179-81, 1197, 1199, 1201, 1203; 5591-92, 5635-5649) But unlike the enacted plans, the alternative plans do not uniformly create VRA districts with a TBVAP in excess of 50%. They instead use coalition, crossover, and influence districts in violation of the WCP, *Pender County*, and *Strickland*.

The alternative plans also treat African-American voters in the same counties or areas unequally. For example, all of the alternative house plans propose one majority-black house district for Wake County but 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 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 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 all three 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 TBVAP than the percentages found in the two enacted senate districts. (Doc. Ex. 1181, 1215)

As determined by the trial court and by this 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. In several instances, the alternative plans propose TBVAP percentages for districts at *higher levels than the percentages found in the*

enacted districts. (Doc. Ex. 1205, 1207) 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.

E. Plaintiffs make several other errors of law or fact.

In every brief filed in this case, plaintiffs have always highlighted a statement by this Court 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." Plaintiffs' Brief on Remand, p. 36 (citing *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%.

Equally telling, plaintiffs ignore the factual findings made by the three-judge panel that explain important facts regarding the district to which this Court referred in *Pender County*. (R pp 1363-64) As explained by the trial court, 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*, this 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." (R pp 1363-64) 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.

(R pp 1363-64)

This 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. In fact, the factual findings by the three-judge panel show just the opposite.

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 this 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 trial court's finding of fact show 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. Finally, North Carolina defended its legislative districts under both Section 5 and Section 2, and used a standard for minority percentages in VRA districts that was set by this Court and the Supreme Court, not a legislative committee.

In the appendix filed with their brief, plaintiffs draw visual comparisons between Alabama's Senate District 26 and the challenged enacted legislative and congressional districts. Plaintiffs' Brief on Remand, App. pp. 14-33. These visual comparisons, which were obviously not considered by the trial court, are misleading for several reasons. First, in *Alabama*, the United States Supreme Court remanded for further consideration by the district court because of the percentage of BVAP included in Senate District 26 (over 70%) and the lack of evidence showing that any other criteria besides race and equal population played any role in the construction of the district. The Supreme Court did not remand for further consideration on the grounds of the appearance of Senate District 26.

As has been shown, and as plaintiffs have conceded, the shapes and locations of North Carolina's legislative VRA districts were predominantly caused

by the WCP. North Carolina could have (and still could) enact VRA districts that are more picturesque, but to do so would require this Court to overrule the WCP criteria established in *Stephenson*. Not surprisingly, plaintiffs declined to submit maps comparing Alabama's Senate District 26 with all of the alternative plans' VRA districts. No doubt, plaintiffs omitted this comparison because many of plaintiffs' allegedly "legal districts" are more oddly shaped than the enacted districts. But in the case of plaintiffs' favored districts, there can be no argument that their shapes were caused by the WCP because plaintiffs failed to submit legislative plans that complied with the WCP. Nor did the alternative maps comply with the decisions in *Pender County* and *Strickland* that VRA districts must be established with a BVAP in excess of 50%, which also impacted their shapes and locations.

Plaintiffs' picture comparisons of Alabama Senate District 26 with North Carolina's Congressional Districts 1 and 12 are meaningless. This Court can discern that prior versions of Congressional District 1, as well as the alternative versions proposed in 2011, are no more picturesque than the 2011 enacted District 1. As already explained, the 1997 version of the First Congressional District was found to be compact by the district court in *Cromartie II*. Yet prior versions of Congressional District 1 (except the 1992 version which was majority-black) are

not exact comparisons because the prior versions and the 2011 alternatives are coalition districts and do not comply with *Strickland*.

Plaintiffs failed to include a map comparing the 1997, 2001, and 2011 alternative versions of Congressional District 12. All of these versions are located in all the same counties as the 2011 enacted version of District 12 with most of the population in all versions residing in Mecklenburg, Guilford, and Forsyth counties. In all versions of District 12, these urban counties are connected by much smaller corridors in Cabarrus, Rowan and Davidson counties. (R pp 1424-25) This "bizarre" configuration was approved by the United States Supreme Court in *Cromartie II*, on the grounds that it was enacted in 1997 as a strong Democratic district. As found by the court below, the Republican General Assembly followed the same strategy approved in *Cromartie II* but made the district even stronger for Democrats so that adjoining districts would be more competitive for Republicans. (R pp 1424-1426)

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. Plaintiffs also ignore the lengthy discussion by the court below explaining that 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. (R pp 1332-37). Plaintiffs also ignore that all of the alternative plans also disproportionately assigned minorities to divided precincts. (*Id.*; Doc. Ex. 1179-81, 1197, 1199, 1201, 1203, 5591-92, 5635-49)

CONCLUSION

Nothing in the *Alabama* decision changed or modified the legal standards used by the three-judge panel and this Court to affirm the 2011 redistricting plans. For the foregoing reasons, this Court should apply those same judicially-established standards that were adopted by the General Assembly in 2011 and re-affirm the constitutionality of all districts challenged by the plaintiffs.

Respectfully submitted this 13th day of July, 2015.

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Electronically submitted

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This the 13th day of July 2015.

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