No. _____

In The
Supreme Court of the United States

MARGARET DICKSON, *et al.*,

Petitioners,

v.

ROBERT RUCHO, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

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Dated: January 16, 2015

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QUESTIONS PRESENTED

It is undisputed that in drawing legislative and congressional redistricting plans in 2011, the North Carolina General Assembly employed two race-based criteria as "safe harbors" and explicitly refused to consider any alternative plan that did not meet those criteria. The two criteria were: a racial proportionality goal for the number of majority-black districts that must be drawn in each plan and a requirement that each such district must have greater than 50% black voting age population. Plaintiffs challenged some of the resulting individual districts as racially gerrymandered. A divided North Carolina Supreme Court upheld the districts on the grounds that they legitimately were drawn to inoculate the plans from challenge under the Voting Rights Act, despite this Court's precedents holding that the Voting Rights Act compels neither racial proportionality nor majority-black districts where black voters are already electing candidates of their choice. The questions presented are:

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 federal 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?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The Petitioners in the *Dickson* civil action are Margaret Dickson; Alicia Chisolm; Ethel Clark; Matthew A. McClean; Melissa Lee Rollizo; C. David Gantt; Valeria Truitt; Alice Graham Underhill; Armin Jancis; Rebecca Judge; Zettie Williams; Tracey Burns-Vann; Lawrence Campbell; Robinson O. Everett, Jr.; Linda Garrou; Hayes McNeill; Jim Shaw; Sidney E. Dunston; Alma Adams; R. Steve Bowden; Jason Edward Coley; Karl Bertrand Fields; Pamlyn Stubbs; Don Vaughan; Bob Etheridge; George Graham, Jr.; Thomas M. Chumley; Aisha Dew; Geneal Gregory; Vilma Leake; Rodney W. Moore; Brenda Martin Stevenson; Jane Whitley; I.T. ("Tim") Valentine; Lois Watkins; Richard Joyner; Melvin C. McLawhorn; Randall S. Jones; Bobby Charles Townsend; Albert Kirby; Terrence Williams; Norman C. Camp; Mary F. Poole; Stephen T. Smith; Philip A. Baddour; and Douglas A. Wilson.

The Petitioners in the *NAACP* civil action are the North Carolina State Conference of Branches of the NAACP; League of Women Voters of North Carolina; Democracy North Carolina; North Carolina A. Philip Randolph Institute; Reva McNair; Matthew Davis; Tressie Stanton; Anne Wilson; Sharon Hightower; Kay Brandon; Goldie Wells; Gray Newman; Yvonne Stafford; Robert Dawkins; Sara Stohler; Hugh Stohler; Octavia Rainey; Charles Hodge; Marshall Hardy; Martha Gardenhight; Ben Taylor; Keith Rivers; Romallus O. Murphy; Carl White; Rosa Brodie; Herman Lewis; Clarence Albert; Evester Bailey; Albert Brown; Benjamin Lanier;

Gilbert Vaughn; Avie Lester; Theodore Muchiteni; William Hobbs; Jimmie Ray Hawkins; Horace P. Bullock; Roberta Waddle; Christina Davis-McCoy; James Oliver Williams; Margaret Speed; Larry Laverne Brooks; Carolyn S. Allen; Walter Rogers Sr.; Shawn Meachem; Mary Green Bonaparte; Samuel Love; Courtney Patterson; Willie O. Sinclair; Cardes Henry Brown Jr.; and Jane Stephens.

The Respondents in the *Dickson* civil action are Robert Rucho, in his official capacity only as the Chairman of the North Carolina Senate Redistricting Committee; David Lewis, in his official capacity only as the Chairman of the North Carolina House of Representatives Redistricting Committee; Nelson Dollar, in his official capacity only as the Co-Chairman of the North Carolina House of Representatives Redistricting Committee; Jerry Dockham, in his official capacity only as the Co-Chairman of the North Carolina House of Representatives Redistricting Committee; Philip E. Berger, in his official capacity only as the President Pro Tempore of the North Carolina Senate; Thom Tillis, in his official capacity only as the Speaker of the North Carolina House of Representatives; The State Board of Elections; and The State of North Carolina.

The Respondents in the *NAACP* civil action are The State of North Carolina; The North Carolina State Board of Elections; Thom Tillis, in his official capacity as Speaker of the North Carolina House of Representatives; and Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioners who are non-governmental non-profit corporations state that no parent or publicly held company owns 10% or more of their stock or interest.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of North Carolina in this consolidated case.

OPINIONS BELOW

The December 19, 2014, final judgment of the North Carolina Supreme Court (Pet. App. 1a.) is reported at *Dickson v. Rucho*, No. 201PA12-2, ___ N.C. ___, ____ S.E.2d ____, 2014 NC LEXIS 1208 (2014).

The Judgment and Memorandum of Decision (Pet. App. 87a.) of the three-judge panel of the Superior Court Division of the General Court of Justice for Wake County, North Carolina dated July 8, 2013, is unreported.

JURISDICTION

The final judgment of the North Carolina Supreme Court was entered on December 19, 2014. (Pet. App. 1a.) The Mandate issued on January 8, 2015. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the United States Constitution, which states that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves Sections 2 and 5 of the Voting Rights Act of 1965, 52 U.S.C. § 10301 *et seq*. Section 2 states:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to

> nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. § 10301.

The provisions of Section 5 of the Voting Rights Act, 52 U.S.C. § 10304 are set out in Petitioners' Appendix at 316a.

INTRODUCTION

In holding that the coverage formula of Section 4 of the Voting Rights Act ("VRA") unconstitutionally subjected certain jurisdictions to the preclearance requirement in light of current conditions, this Court reaffirmed that "a statute's 'current burdens' must be justified by 'current needs,' and … must be 'sufficiently related to the problem that it targets.'" *Shelby Cnty v. Holder*, 133

S. Ct. 2612, 2627 (2013) (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203-04 (2009)). Despite decades of increased participation by African-American voters, and the repeated success of candidates of choice of African-American voters, even in election districts that were majority-white in voting age population, the court below held in a final judgment that the North Carolina legislature is justified in using racial criteria to a significantly greater extent than ever before in the state's history, resting on the erroneous legal proposition that achieving racial balance inoculates the state's redistricting plans from challenge under Sections 2 and 5 of the Voting Rights Act. This is a dangerous and odious misreading of this Court's precedents.

These consolidated actions challenge specific individual majority-African-American congressional and state legislative districts that were enacted by the North Carolina General Assembly in 2011 as unconstitutionally race-based districts. At the start of the redistricting process, the legislative leadership imposed a racial proportionality target for the number of majority-black districts they would draw first and required every district to meet a specific black population percentage target, asserting that these fixed racial targets are required by the Voting Rights Act. The legislative leadership made these decisions before reviewing any data relevant to the current political realities in the state.

To meet these racial targets, the North Carolina legislature enacted nine state senate districts as majority-black districts where previously

none of the state's senate districts were majority-black; twenty-three majority-black state house districts where previously only ten of those districts were majority-black; and two majority-black congressional districts where previously there were none. Collectively, the Plaintiffs challenged 27 of these 34 majority black districts as racial gerrymanders. (Pet. App. 104a.) Plaintiffs also challenged as impermissibly race-based three additional districts that were not majority-black in voting age population. (Pet. App. 104a.)

In upholding the challenged districts, the North Carolina Supreme Court assumed that this Court's equal protection and VRA precedents do not necessarily require the use of strict judicial scrutiny where the state legislature has employed racially proportionate redistricting and an inflexible 50%-plus population requirement in order to guarantee preclearance under Section 5 of the VRA and to create a safe harbor under Section 2 of the Act. (Pet. App. 17a.) The court asserted that it would nonetheless apply strict scrutiny and held that the districts created using these racially-determined criteria survived strict scrutiny because the proportionality criterion and racial population targets were a "safe harbor" that jurisdictions are entitled to employ to "inoculate the redistricting plans" from legal challenge. (Pet. App. 39a, 42a.)

In *Bartlett v. Strickland*, this Court cautioned that "[o]ur holding also should not be interpreted to entrench majority-minority districts by statutory command, for that, too, could pose constitutional concerns." *Bartlett*, 556 U.S. at 23-24 (citing *Miller*

v. Johnson, 515 U.S. 900 (1995); and *Shaw v. Reno*, 509 U.S. 630 (1992)). Yet the North Carolina Supreme Court interpreted the Voting Rights Act to command not only the entrenchment of existing majority-black districts, but the creation of vastly more majority-black districts than ever before. Racial proportionality, as precise as the state's demographics would permit, was the substantive metric—and the only substantive metric—that the legislature employed to determine how many majority-black districts to create in order to pursue its goals. The legislature employed an equally rigid racial criterion (a 50%-plus black population goal) in creating districts that it described as intended to satisfy the Voting Rights Act.

The choice of these two criteria was not based on current conditions: the decision was made at the outset of the redistricting process without reference to any information about the extent to which African-American voters were able to elect their candidates of choice. In fact, from 2006 to 2011, African-American candidates won fifty-six election contests for state legislative office in districts that were not majority black in voting age population. The state's fear of litigation likewise was not based on any recent Section 2 claims involving state legislative districts, since none had been brought since *Thornburg v. Gingles*, 478 U.S. 30 (1986). No African-American legislators, leaders or community members were demanding such a dramatic increase in the number of majority black districts.

Just as "[f]ear of litigation alone cannot justify an employer's reliance on race," *Ricci v. DeStefano*, 557 U.S. 557, 592 (2009), fear of litigation alone cannot justify drawing race-based election districts. Yet the North Carolina Supreme Court held that the legislature's desire to "inoculate" its redistricting plans from litigation was sufficient justification to survive strict scrutiny.

When applying strict scrutiny to a University's admissions procedures, "[t]he University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference." *Fisher v. Univ. of Tex. at Austin*, 570 U.S. ___, 133 S. Ct. 2411, 2420 (2013). Yet when applying strict scrutiny to the challenged districts here, the North Carolina Supreme Court completely deferred to the legislature and concluded that so long as the districts were providing "a safe harbor for the redistricting process," they were narrowly tailored. (Pet. App. 34a-39a.)

The purpose of the narrow tailoring requirement is to ensure that the legislature has come to a considered and appropriate judgment that race is necessary to achieve a compelling interest and also that it is using race no more broadly than is truly necessary. Nevertheless, the North Carolina Supreme Court approved the legislature's assumption that its use of outright racial balancing in its redistricting plan could provide a safe harbor against statutory liability and thus achieve its goal of avoiding litigation. In doing so, the court upheld what amounts to a racial quota system in

redistricting without requiring the legislature to give any consideration to alternative means of satisfying the Voting Rights Act, or to make any judgment as to the necessity of the racial criteria the legislature adopted.

This Petition must be granted to correct North Carolina's misuse of the Voting Rights Act to perpetuate what amounts to a system of segregation in redistricting, and to prevent other jurisdictions across the country from adopting and following this fundamental misconstruction of equal protection and voting rights jurisprudence. Unlike the Alabama redistricting case currently before the Court, *Alabama Democratic Conference v. Alabama*, Nos. 13-895 and 13-1138 (argued Nov. 12, 2014), and the Virginia case in which a notice of appeal is pending, *Page v. Virginia State Bd. of Elections*, No. 3:13cv678, 2014 U.S. Dist. LEXIS 142981 (E.D. Va. 2014), *appeal pending sub nom. Cantor v. Personhuballah*, No. 14-518 (docketed Nov. 4, 2014), this case is about more than the proper interpretation of Section 5 of the Voting Rights Act. In those cases, the Alabama and Virginia state legislatures justified their racial redistricting policies based solely on their interpretations of what was required under Section 5 of the Voting Rights Act. In contrast, this case also implicates what is required by Section 2 of the Voting Rights Act, which is still in full force and effect and applies to the entire country rather than only certain states.

If the North Carolina Supreme Court is right that any jurisdiction can inoculate itself from Section 2 liability by pursuing the explicit goal of enacting

redistricting plans with a racially proportionate number of majority-black districts, all of which are greater than 50% black in voting age population, regardless of the history of successful election of candidates of choice of black voters, then jurisdictions around the country are free to follow the same formula. This is not what the Voting Rights Act was intended to foster, and it is not what the equal protection guarantees of the Fourteenth Amendment will permit. Absent this Court's intervention, North Carolina's dangerous interpretation of the Voting Rights Act could take hold in many other states.

STATEMENT

A. The 2011 Redistricting Process in North Carolina.

It is undisputed in this case that the legislature employed a racial proportionality target and greater than 50% black voting age population ("BVAP") requirement from the very beginning of the redistricting process. (Pet. App. 16a, 37a-38a, 104a.) The legislature concluded that since blacks are 21.2% of the state's voting age population, to achieve racial proportionality, approximately 10 of the state's 50 senate districts should be majority-black districts and approximately 24 of the state's 120 house districts should be majority-black districts. These districts were drawn first, and all remaining districts were thereafter filled in. Maps showing the majority-black districts were released first for public comment before the entire plans were made public.

(Pet. App. 193a, 319a (House VRA), 322a (Senate VRA).)

The chairmen of the legislature's redistricting committees, Senator Rucho and Representative Lewis, issued joint written public statements on June 17, June 21, and July 12 describing the factors that had determined the number, location, and shape of the "VRA districts" challenged here. (Doc. Ex. 540-53, 563-68).[1] These public statements reflect the oral instructions previously given to their consultant, Tom Hofeller, to apply in drawing the districts. (Pet. App. 61a-62a; Doc. Ex. 1921-22, 2306, 3078-79, 3184-85). Those instructions were:

> 1. Draw "VRA Districts" in numbers equal to the African American proportion of the State's population.
>
> 2. Draw each "VRA District" such that African American citizens constitute at least a majority of the voting age population in the district.

The Chairmen also made clear in these written public statements that these criteria could not be compromised and that any alternative plan

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[1] Pursuant to Rule 9(d) of the North Carolina Rules of Appellate Procedure, evidence properly admitted in the trial court was included in the Record on Appeal in the North Carolina Supreme Court as documentary exhibits submitted by Petitioners. References to those documentary exhibits in this petition are in the format (Doc. Ex. ____).

that strayed from strict adherence to these instructions would be rejected. In their June 21, 2011 public statement, Senator Rucho and Representative Lewis said:

> We would entertain any specific suggestions from the Black Caucus or others identifying more compact majority black populations to form the core of alternative majority black districts, *provided* the total districts proposed provide black voters with a substantially proportional state-wide opportunity to elect candidates of their choice. *Moreover*, any such districts must comply with *Strickland v. Bartlett*, and be drawn at a level that constitutes a true majority of black voting age population.

(Doc. Ex. 554) (emphasis added).

The racial proportionality and majority BVAP requirements were implemented without any reference to the extent to which candidates of choice of black voters were elected to house, senate and congressional districts in various parts of the state, and without any examination of the extent of legally significant racially polarized voting throughout the state. Instead, the goal of substantial proportionality was adopted in order to "expedite the preclearance of each plan pursuant to Section 5 of the Voting Rights Act" and to "further the State's obligation to comply with Section 2 of the Voting Rights Act." (Doc. Ex. 543).

African-American legislators did not share these views about the state's VRA obligations or potential liability. Numerous African-American legislators spoke out against all plans proposed by the Chairmen. (T p 114, lines 12-21).[2] No African-American Senator or Representative voted in favor of any of the plans proposed by Senator Rucho and Representative Lewis, including the enacted plans. (T pp 30, 114).

In addition, once the VRA maps were introduced, citizens from around the state testified at public hearings that the districts went beyond what was required for compliance with the Voting Rights Act. (Doc. Ex. 7726). Well before the final plans were enacted, the Defendants were specifically informed in written testimony that the VRA districts they were proposing were premised on a fundamental misunderstanding of constitutional and civil rights law. (Doc. Ex. 7726). The Defendants were aware, prior to enacting the VRA districts, that the NAACP and many other citizens were opposed to those districts being created as majority-black districts.

Senator Rucho and Representative Lewis followed a similar process in developing the congressional redistricting plan. As Chairs of the House and Senate Redistricting Committees, they were jointly responsible for developing the

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[2] Pursuant to Rule 9(c) of the North Carolina Rules of Appellate Procedure, Petitioners submitted the transcript from the June 5-6, 2013 trial in the lower court as part of the Record on Appeal in the North Carolina Supreme Court. References to that trial transcript in this petition are in the format (T p ____).

Congressional Plan. They issued public statements on July 1, 2011 and July 19, 2011 describing the factors that shaped the challenged congressional districts, CD 1, 4, and 12. (Doc. Ex. 555-68). With regard to CD 1, Senator Rucho and Representative Lewis stated that CD 1 had been drawn in 1992 "to comply with the Section 2 of the Voting Rights Act." (Doc. Ex. 557). With regard to CD 12, they stated that "because of the presence of Guilford County in the Twelfth District, we have drawn our proposed Twelfth District at a Black voting age level that is above the percentage of Black voting age population found in the current Twelfth Districts." (Doc. Ex. 559). The stated purpose for drawing CD 12 at this level was to "ensure preclearance of the plan." *Id.*

B. Number and Composition of Majority-Black Districts in the Enacted Legislative Plans.

The 2011 plans contain an unprecedented number of majority-black districts. Following this Court's decision in *Thornburg v. Gingles*, 478 U.S. 30, the General Assembly enacted a redistricting plan creating ten majority-black single-member districts and one majority-black two-member district for the state house; and three majority-black senate districts.[3] Between 1990 and 2010, the number of majority-black districts for each body decreased by three, while the number of African-American legislators in the General Assembly steadily

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[3] Research Division, N.C. General Assembly, *Legislator's Guide to North Carolina Legislative and Congressional Redistricting* 28 (March 2011), *available at* http://www.ncleg.net/GIS/Download/Maps_Reports/2011RedistrictingGuide.pdf.

increased from 18 to 25 in that same period.[4] All of these plans were precleared by the United States Department of Justice, and none were challenged on Section 2 grounds.

With only one exception in the House plan, all of the districts Plaintiffs claim are racially gerrymandered were drawn at or above the black population percentage they had previously, using 2010 census data. While the General Assembly in 2011 required that all Voting Rights Act districts be greater than 50% BVAP, some of the challenged districts were increased significantly above that threshold. For example, House District 24 in the benchmark plan was 50.25% BVAP, and in the enacted plan it was increased to 57.3% BVAP; Senate District 28 was increased from 47.2% BVAP to 56.49% BVAP.[5]

The General Assembly attempted to defend only two VRA districts on the ground that "politics, not race" was the predominant motivation. Specifically, legislative leaders said that Congressional District 12 was intended both to ensure Section 5 preclearance and to preserve the incumbency of then-Representative Mel Watt. Senate District 32, an original VRA district, but not

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[4] Charts showing the number of House and Senate Districts where the total black voting age population was greater than 50% from 1992 to the present are contained in the Appendix. (Pet. App. 325a.)

[5] Charts comparing the percentage black voting age population in each of the individual districts challenged as racially gerrymandered districts and the "benchmark" or prior districts are contained in the Appendix. (Pet. App. 327a.)

a majority-BVAP district, was redrawn in significant part, to remove white incumbent Sen. Linda Garrou because she was white. (Pet. App. 322; Doc. Ex. 545).

C. Record of Past Electoral Success of Black Candidates.

Even as the number of majority-black districts was decreasing prior to 2011, the number of black legislators in the General Assembly steadily increased. By 2011, the record as developed by the General Assembly showed that fifty-six times between 2006 and 2011, black candidates won election contests in state house and senate districts that were not majority-black, and twenty-two times those candidates were running in majority-white districts. (Pet. App. 329a-344a.) Most of these elections involved candidates of different races in which the black candidate defeated the white candidate, some of whom were incumbents. *Id*. While the legislative record did include studies showing that racially polarized voting is still present in some areas of North Carolina, no study examined whether the level of racially polarized voting in a particular area means that the white bloc vote usually defeats the candidate of choice of black voters.

D. Geographic Compactness.

The redistricting record compiled by the General Assembly contained the results of 8 separate mathematical measures of the geographic compactness of each of the enacted plans and alternate plans filed in the General Assembly. (Doc.

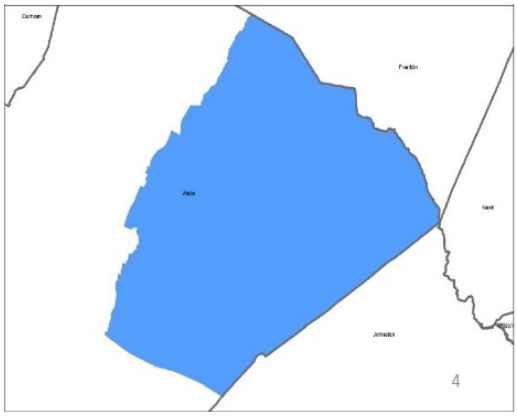
Ex. 900, 4913). The Defendants did not use these mathematical measures in evaluating the degree to which a potential plaintiff in a Section 2 lawsuit could meet the compactness requirement of a Section 2 claim or whether the districts complied with the state Constitutional compactness requirement as established by the North Carolina Supreme Court in *Stephenson v. Bartlett*, 355 N.C. 354, 371, 562 S.E.2d 377, 389 (2002). (Doc. Ex. 2141-2142). Indeed, neither Senator Rucho or Representative Lewis made any focused or independent effort to evaluate the compactness element of a Section 2 claim for the challenged districts. (Doc. Ex. 2997, 3027). Defendants stated that the highly irregular shapes of the challenged districts were due to their effort to comply with the proportionality quota. (Doc. Ex. 540-54).

E. Specific Examples of Districts Enacted in 2011.

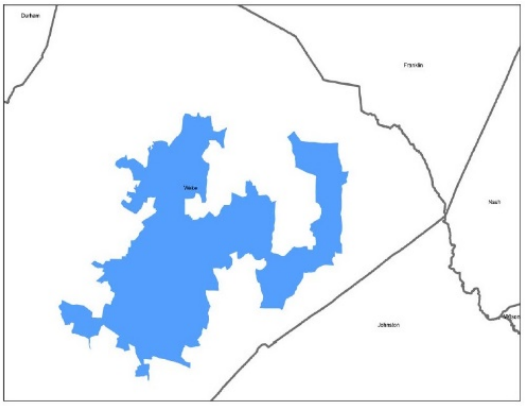
A few examples from the current (2011) and benchmark (2003) North Carolina redistricting maps show the impact of the General Assembly's racial proportionality and racial composition safe harbor criteria.

First, below are two maps of Senate District 14, which is located in central and eastern Wake County (including parts of the city of Raleigh):

Benchmark Map (2003)



Current Map (2011)

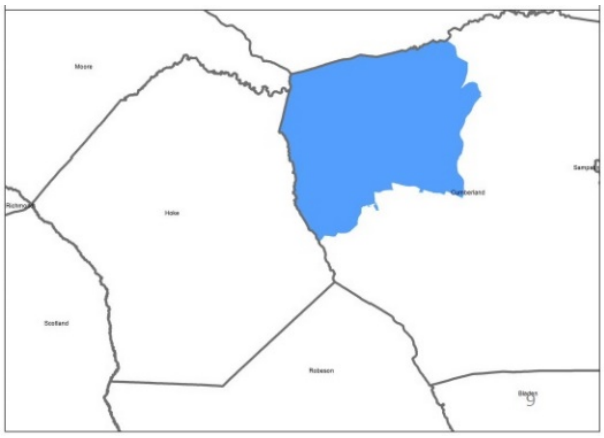


The 2011 version of SD 14 is substantially less compact than its predecessor version in the 2003 benchmark plan. Defendants increased the BVAP from 44.93% in the 2003 benchmark plan to 51.28% in the 2011 enacted plan, despite the fact that black voters' candidate of choice won in 2004, 2006, 2008, and 2010. In the last election conducted under the benchmark plan in 2010, the black candidate of

choice won with 65.92% of the vote. After the current map was enacted in 2011, the seat was not contested in 2012.

Second, below are two maps of Senate District 21, which is located in parts of Cumberland County (including parts of the city of Fayetteville) and in neighboring Hoke County:

Benchmark Map (2003)

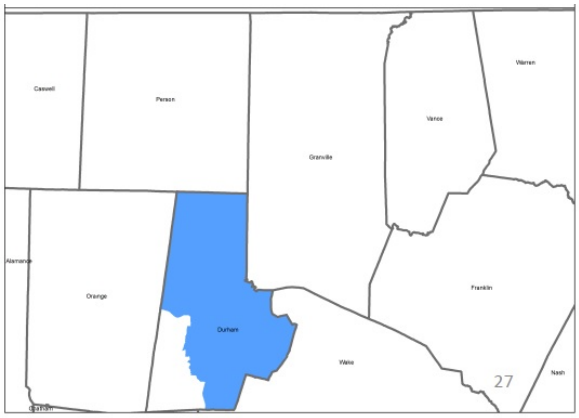


Current Map (2011)

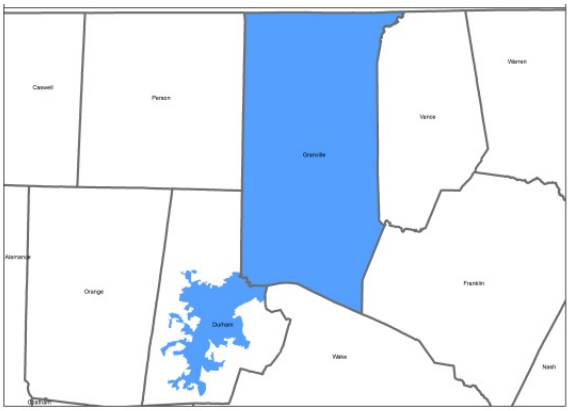
The 2011 version of SD 21 is substantially less compact than its predecessor version in the 2003 benchmark plan; the portion located in Cumberland County is mostly composed of pieces of precincts. Defendants increased the BVAP from 44.93% in the 2003 benchmark plan to 51.53% in the 2011 enacted plan, despite the fact that black voters' candidate of choice won in 2004, 2006, 2008, and 2010. In the last election conducted under the benchmark plan in 2010, the black candidate of choice won with 67.61% of the vote. After the current map was enacted in 2011, the seat was not contested in 2012.

Third, below are two maps of Senate District 20, which is located in Durham County (including large parts of the city of Durham; the 2011 version of SD 20 also extends northeast to Granville County):

Benchmark Map (2003)



Current Map (2011)

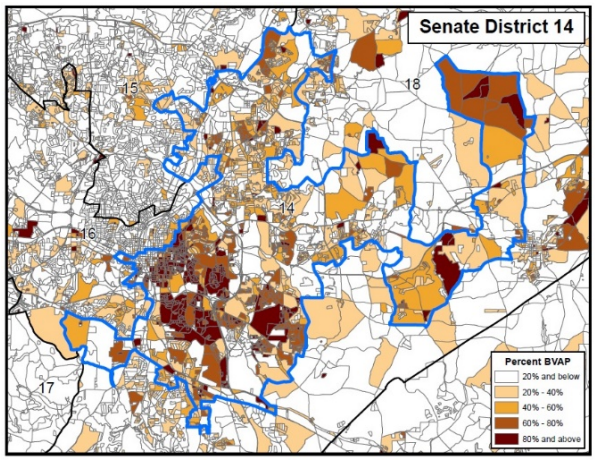


The 2011 version of SD 20 is substantially less compact than its predecessor version in the 2003 benchmark plan. Defendants increased the BVAP from 44.64% in the 2003 benchmark plan to 51.04% in the 2011 enacted plan, despite the fact that black voters' candidate of choice won in 2004, 2006, 2008, and 2010. In the last election conducted under the benchmark plan in 2010, the black candidate of

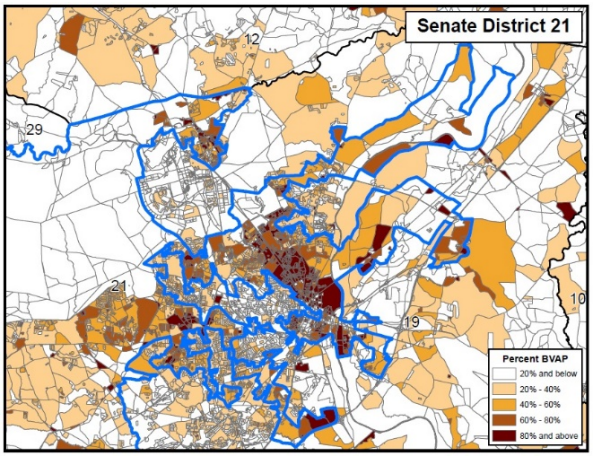
choice won with 73.11% of the vote. After the current map was enacted in 2011, the seat was not contested in 2012.

The fact that each of the foregoing Senate Districts was drawn for the purpose of containing an increased percentage of BVAP is starkly illustrated by superimposing the boundaries of those districts shown in blue below, over demographic maps showing the percentage of black voters in the districts' respective census blocks:

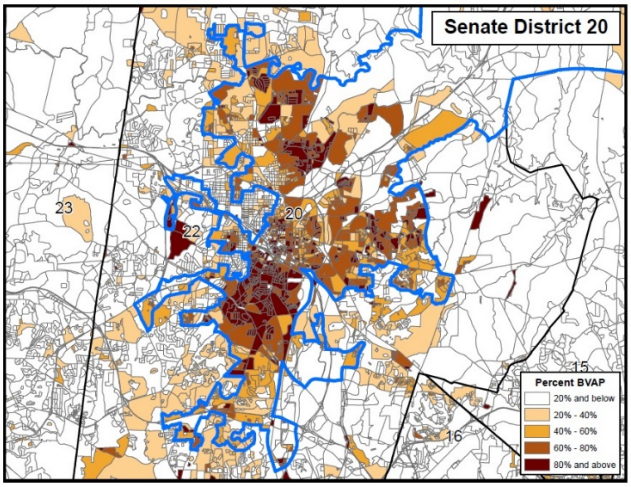
SD 14 - Wake County
(Raleigh)



SD 21 – Portion in Cumberland County
(Fayetteville)



SD 20 – Portion in Durham County
(Durham)



In each of these maps, the senate districts' meandering boundary lines clearly track census blocks containing a greater percentage of BVAP than

neighboring census blocks. In view of the fact that black candidates of choice were already winning elections by large margins in the substantially-more-compact 2003 benchmark versions of these districts, it was unnecessary and inappropriate for Defendants to assign *even more* black voters to these districts in 2011. (These are, of course, only three examples of many.)

F. Trial Court's Opinion.

On July 8, 2013, the trial court entered its Judgment and Memorandum of Decision. (Pet. App. 87a.) Most of the trial court's 171-page decision addressed Plaintiffs' racial gerrymandering claims under the Equal Protection Clause of the 14th Amendment. The trial court first concluded that the Plaintiffs had, for 26 of the 30 legislative and congressional districts challenged, proved that "the shape, location and racial composition of each VRA district was predominately determined by a racial objective and was the result of a racial classification sufficient to trigger the application of strict scrutiny as a matter of law." (Pet. App. 105a.)

Applying strict scrutiny, the court observed that the "[Defendants] assert that the VRA Districts in the Enacted Plans were drawn to protect the State from liability under § 2 of the VRA, and to ensure preclearance of the Enacted Plans under § 5 of the VRA." (Pet. App. 107a.) The court held that it was "required to defer to the General Assembly's 'reasonable fears of, and their reasonable efforts to avoid, § 2 liability.'" (Pet. App. 109a.) In further

considering Defendants' potential § 2 liability, the trial court concluded:

> [T]hat the General Assembly had a strong basis in evidence to conclude that each of the *Gingles* preconditions was present in substantial portions of North Carolina and that, based upon the totality of circumstances, VRA districts were required to remedy against vote dilution.

(Pet. App. 113a.) With respect to the Defendants' § 5 obligations, the trial court concluded:

> [T]hat the General Assembly had a strong basis in evidence to conclude that the Enacted Plans must be precleared, and that they must meet the heightened requirements of preclearance under the 2006 amendments to § 5 of the VRA.

(Pet. App. 115a-116a.)

Having held that Plaintiffs had failed to carry their burden to prove that the Defendants did not have a compelling interest in avoiding § 2 liability and in obtaining § 5 preclearance, the trial court then considered whether Plaintiffs had carried their burden to prove that the Defendants had not narrowly tailored the challenged districts to meet their interest in avoiding liability under § 2 and § 5 of the Voting Rights Act. The trial court held that Plaintiffs failed to satisfy that burden because rough

proportionality was endorsed by this Court as a means of ensuring compliance with § 2 of the Voting Rights Act. (Pet. App. 70a) (citing *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 429-30 (2006), *Shaw v. Hunt*, 517 U.S. 899, 916 n. 8 (1996) (*Shaw II)*, and *Johnson v. DeGrandy*, 512 U.S. 997, 1000 (1994).

In addition, the court concluded that the "ultimate holding" of the U.S. Supreme Court in *Bartlett v. Strickland*, 556 U.S. 1 (2009) is that where there is racially polarized voting and the state has a reasonable fear of Section 2 liability, the state "must be afforded the leeway to avail itself of the 'bright line rule' and create majority-minority districts." (Pet. App. 131a.) Since the state opted for the safe harbor from § 2 liability, the districts are narrowly tailored. (Pet. App. 133a-134a.) The trial court's opinion does not address the extensive and undisputed history of black electoral success for state legislative seats in North Carolina.

G. Opinion of the North Carolina Supreme Court.

In a four-to-two decision with one Justice abstaining, the North Carolina Supreme Court held that the three-judge trial court erred by "prematurely" concluding that race was the predominant factor in the 26 districts that the lower court found were racial classifications "without first performing adequate fact finding." (Pet. App. 43a.) Rejecting the dissent's argument that the case should be remanded for further proceedings, the majority explained that "the basis for our reversal

would be that the trial court erred in applying strict scrutiny before making adequate findings of fact." (Pet. App. 18a.)[6] Nevertheless, the North Carolina Supreme Court determined that there were sufficient facts in the record for it to conclude that this was harmless error because the districts survive strict scrutiny. (Pet. App. 43a.) Therefore, the court issued a final judgment upholding all of the challenged districts. (Pet. App. 54a.)

The first 43 pages of the 51-page slip opinion are devoted to the court's analysis of Plaintiffs' equal protection claims. (Pet. App. 1a-46a.) The court proceeded "on the presumption that strict scrutiny is appropriate." (Pet. App. 19a.) The court first concluded that compliance with Sections 2 and 5 of the Voting Rights Act (even though Section 5 is no longer applicable to North Carolina) is a compelling governmental interest. (Pet. App. 22a.) In analyzing whether, under the facts of this case, the North Carolina General Assembly had a compelling government interest in complying with Section 2 of the Voting Rights Act, the court did not examine each district individually, but instead relied entirely on the trial court's wholesale adoption of the Defendants' proposed Findings of Fact as an

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[6] This determination is inconsistent with the established rule in North Carolina that "the trial court is not generally permitted to make factual findings at the summary judgment stage." *Moore v. Proper*, 366 N.C. 25, 32, 726 S.E.2d 812, 818 (2012); *see also Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 261, 400 S.E.2d 435, 440 (1991) (stating that "ordinarily, findings of fact and conclusions of law are not required in the determination of a motion for summary judgment, and if these are made, they are disregarded on appeal").

appendix to its opinion. (Pet. App. 25a.) The court concluded that "we are satisfied that the trial court correctly found that the General Assembly identified past or present discrimination with sufficient specificity to justify the creation of VRA districts in order to avoid Section 2 liability." (Pet. App. 31a.)

The court held that compliance with Section 5 of the Voting Rights Act was a compelling government interest in these circumstances because some of the challenged districts include parts or all of counties previously covered by Section 5, and for those majority-black districts challenged by the Plaintiffs that do not contain any part of a previously-covered county, they "contain areas that previously have been part of majority-minority districts," and therefore "may become subject to nonretrogression analysis." (Pet. App. 33a.) With no further discussion, the court "conclude[s] from the totality of the evidence that a history of discrimination justified the General Assembly's concern about retrogression and compliance with Section 5." (Pet. App. 34a.) Therefore, "race-based remedial action was necessary." *Id.*

The court's central holding on strict scrutiny is contained in its analysis of whether the challenged districts were narrowly tailored. On the question of whether the legislature enacted districts that relied on racial classifications more than necessary to comply with the Voting Rights Act, the court held that since enacting districts with more than 50% black voting age population gives the General Assembly "a safe harbor for the redistricting process," (Pet. App. 37a.) (quoting *Pender Cnty. v.*

Bartlett, 361 N.C. 491, 505, 649 S.E.2d 364, 373 (2007)), it is therefore permissible for the state to do so and it satisfies strict scrutiny. *Id.*

With regard to the racial proportionality criterion, the court acknowledged that "such an effort, seeking to guarantee proportional representation, proportional success, or racial balancing, would run afoul of the Equal Protection Clause." (Pet. App. 42a.) Nevertheless, the court reasoned, the record here shows that the General Assembly considered rough proportionality "as a means of inoculating the redistricting plans against potential legal challenges under section 2's totality of the circumstances test." *Id.* Therefore, the court held, rough proportionality was merely a means of avoiding Section 2 liability and not unconstitutional racial balancing. The court further found that since racial proportionality was a safe harbor, strict scrutiny was satisfied. None of the Plaintiffs' other arguments concerning the reasons why the challenged districts were not narrowly tailored, including the undisputed sustained electoral success of black candidates prior to 2011 and the lack of geographic compactness of the enacted majority-black districts were addressed.

REASONS FOR GRANTING THE PETITION

The North Carolina Supreme Court has created a precedent of federal constitutional and statutory law that is binding on the state's legislature and courts in future redistricting including county commissions, school boards, city councils and other bodies, and is available for

consideration and potential adoption throughout the United States. That precedent (1) suggests that even the most explicit use of race (at least in redistricting) may not trigger strict scrutiny, (2) holds that even under strict scrutiny a state legislature may constitutionally adopt a redistricting plan with numerical racial goals intended to create as precise a racial balance in legislators as demographically possible, and do so as a means of avoiding Voting Rights Act litigation without any consideration of less-rigid uses of race or non-racial criteria as means of satisfying the Act's requirements; (3) holds that the courts should defer to the legislature's understanding of those statutory requirements without asking whether the legislature's understanding is a permissible construction of the Act or whether its fear of VRA liability is genuinely reasonable; (4) assumes that the Act can properly be construed to make racial proportionality and racial population goals in redistricting a safe harbor, and that so construing it does not render the Act itself unconstitutional under the Supreme Court's equal protection precedents; and (5) implicitly holds, in order to avoid the otherwise patent errors in its reasoning, that the general principles governing race and equal protection do not apply in the context of redistricting despite this Court's express statements to the contrary. All five aspects of the state court's decision are patently erroneous, and if the decision is allowed to stand, will create confusion, at best, not only about the constitutional law of redistricting but about the permissibility of using race as a classification more generally.

The North Carolina legislature's use of racial targets to ensure preclearance under Section 5 of the Voting Rights Act, as upheld by the Court below, (Pet. App. 40a.) makes this case similar to the Alabama legislative redistricting case argued earlier this term. *See Alabama Democratic Conference v. Alabama*, Nos. 13-895 and 13-1138. However, the Alabama case turns solely on the Alabama legislature's invocation of Section 5 as a justification for its racial redistricting criteria. Given that this Court's decision in *Shelby County v. Holder* invalidated the coverage formula by which Section 5 was applied to covered jurisdictions, a holding in the Alabama case as to the proper interpretation of Section 5 would necessarily be of limited reach. By contrast, this case involves the proper interpretation of Section 2, which is currently in effect in every jurisdiction in the country. This Court's review is urgently needed to ensure that North Carolina's interpretation of Section 2 does not become the law of the land.

Moreover, to the extent that the North Carolina legislature relied on Section 5 as a justification for increasing the percentage BVAP in many of the challenged districts, the opinion of the North Carolina Supreme Court conflicts with the decision of a three-judge panel in the Virginia Congressional redistricting case, *Page v. Virginia State Bd. of Elections*, No. 3:13cv678, 2014 U.S. Dist. LEXIS 142981 (E.D. Va. 2014). In *Page*, unlike here, the lower court concluded that by using a fixed percentage requirement to ensure preclearance under Section 5, race did predominate in the drawing of the district, and the district did not

survive strict scrutiny because increasing the percentage BVAP is not narrowly tailored to avoid retrogression "when the district had been a safe majority-minority district for two decades." *Page*, 2014 U.S. Dist. LEXIS 142981 at *50. Thus, the *Page* holding conflicts with the holding of the North Carolina Supreme Court in this case.

Although the cases raise similar questions concerning the requirements of Section 5 of the Voting Rights Act, resolution of either the Alabama or Virginia cases will not put to rest the issues raised in this case. Most importantly, many of the districts challenged in this case are not in areas of the state that previously were covered by Section 5 of the Voting Rights Act, and this case raises the different and additional question of whether the Equal Protection Clause permits the safe harbor proportionality and 50% BVAP criteria that were employed by the legislature here.

I. THE NORTH CAROLINA SUPREME COURT'S HOLDING THAT RACIAL PROPORTIONALITY AND RACIAL POPULATION TARGETS ARE CONSTITUTIONALLY PERMISSIBLE SAFE HARBORS OPENS THE FLOOD GATES FOR INCREASED RACE-BASED REDISTRICTING.

The court below read this Court's opinions in *DeGrandy* and *Bartlett* to justify the legislature's decision to use a racial proportionality target and racial population requirement as safe harbors that inoculate their plans from potential Section 2

litigation and guarantee Section 5 preclearance. This Petition should be granted to make clear that using racial proportionality and racial population targets to inoculate a redistricting plan against theoretical legal challenges without reference to current conditions is outright racial balancing that runs afoul of the Equal Protection Clause of the Fourteenth Amendment. It is crucial that this Court reverse the ruling of the North Carolina Supreme Court to ensure that no other jurisdiction uses a proportionality target and a greater than 50% minority voting age population requirement as safe harbors, without examining whether those explicit uses of racial criteria are narrowly tailored, including those jurisdictions that are bound by the decision, as are all North Carolina counties, cities and school boards who redraw district lines and as will be future North Carolina legislatures, and jurisdictions from other states that may follow the North Carolina Court's reasoning.

At the heart of the North Carolina Supreme Court's equal-protection analysis of the racially gerrymandered districts it upheld is the conclusion that "the General Assembly's consideration of rough proportionality was merely a means" to serve its compelling interest in "avoiding voter dilution and potential section 2 liability," and therefore the court was "required to defer to the General Assembly's 'reasonable fears of; and their reasonable efforts to avoid, § 2 liability.'" (Pet. App. 20a, 109a.) (quoting *Bush v. Vera*, 517 U.S. 952, 978 (1996) Acting on this supposed duty to defer to the legislature's use of race, the court gave no weight to the undisputed fact that the legislature employed strict numerical goals

in the interest of achieving a redistricting plan as racially balanced as the state's demographics would allow—or to this Court's long-held view that "outright racial balancing … is patently unconstitutional." *Fisher*, 133 S. Ct. at 2419.

This analysis rests on a patent misunderstanding of both the compelling interest and the narrow tailoring requirements that strict scrutiny demands. We may "assume *arguendo*," as this Court observed in *Shaw v. Hunt*, "that a State may have a compelling interest in complying with the properly interpreted VRA. But a State must have a strong basis in evidence for believing that it is violating the Act. It has no such interest in avoiding meritless lawsuits." *Shaw v. Hunt*, 517 U.S. at 908 n.4 (internal citations omitted). In contrast, the court below treated the legislature's "reasonable fears" of litigation as a compelling interest, the position Justice Stevens advocated in *Shaw* but this Court rejected as "sweep[ing] too broadly." *Id.* The state court deferred to the legislature's "fears" of litigation without itself determining whether those fears reflect the proper interpretation of the Act or rest on a strong basis in evidence. Such deference is proper only where strict scrutiny is not triggered because race has not predominated in the redistricting process. The Court in *Bush v. Vera* emphasized that once a state, in the course of avoiding § 2 liability, subordinates traditional redistricting principles to race, a serious constitutional issue arises and "[s]trict scrutiny remains, nonetheless, strict." 517 U.S. at 978. The court below failed to recognize that "the mere recitation of a benign, compensatory purpose is not

an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975). Indeed, once strict scrutiny applies, "the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight." *Richmond v. J.A. Croson Co*, 488 U.S. 469, 500 (1989).

The state court also clearly misconstrued the nature of strict scrutiny's narrow tailoring requirement. It ignored this Court's insistence that the legislature is required to consider non-racial means, or less extensive uses of race, to achieve a proper compelling interest before the Constitution permits it to employ racial criteria. *See*, *e.g.*, *Croson*, 488 U.S. at 507-08 (striking down a minority set-aside for city hiring as not narrowly tailored because city did not consider "the use of race-neutral means to increase minority business participation in city contracting" and because a "30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing"); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283-84 (1986) (holding a school board's layoff plan was not narrowly tailored because "[o]ther, less intrusive means" of attaining the same goal were available); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 726 (2007) (holding that school assignment plans were not narrowly tailored because the districts failed to show they considered other race-neutral alternatives and because the assignment plans, in design and operation, were "directed only to racial balance, pure and simple, an

objective this Court has repeatedly condemned as illegitimate").

Moreover, the court treated its (erroneous) conclusion that the state legislature had a compelling interest in avoiding litigation as obviating any need to determine whether the racial criteria the legislature adopted could be distinguished from the outright racial balancing that the Constitution prohibits. As this Court has admonished, using "some specified percentage of a particular group merely because of its race or ethnic origin" as a means to any end is unconstitutional, and "[r]acial balancing is not transformed from patently unconstitutional to a compelling state interest simply by relabeling it 'racial diversity'." *Fisher*, 133 S. Ct. at 2419. Nor is it transformed by relabeling it a "safe harbor" from litigation as the North Carolina Supreme Court did in this case. (Pet. App. 37a.)

Strict scrutiny is necessary to ferret out racial classifications that are motivated by "simple racial politics," *Croson*, 488 U.S. at 493, or a desire to achieve political goals such as to "placate a politically important racial constituency." *Ricci v. DeStefano*, 557 U.S. 557, 597 (2009) (Alito, Scalia & Thomas, JJ. concurring). Strict scrutiny does not become less strict because the legislature is engaged in redistricting or asserts that its purpose involves the Voting Rights Act: there is no special rule insulating outright racial balancing in that context from the general principle that such balancing "is patently unconstitutional." *Fisher*, 133 S. Ct. at 2419.

Allowing this ruling to stand would send the very real message to other states, and to the thousands of local jurisdictions that draw redistricting plans, that so long as they are seeking to inoculate their plans from legal challenge, they are free to draw a racially-proportionate number of majority-minority districts even where candidates of choice of minority voters have been consistently successful in elections in districts that are not majority-minority in voting age population. It would likewise give states license to pack minority voters into districts in numbers far greater than what is required for minority voters to elect their candidate of choice and thus perpetuate racially segregated districts in which there is no opportunity to "pull, haul and trade". *DeGrandy*, 512 U.S. at 1020. This is contrary to the precept that ""[t]he purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race." *Georgia v. Ashcroft*, 539 U.S. 461, 490 (2003). The practice condoned as constitutional in this case may be attractive to and easily followed by other jurisdictions unless this Court grants this Petition.

II. THE NORTH CAROLINA SUPREME COURT'S DECISION SETS A DANGEROUS PRECEDENT EVISCERATING STRICT SCRUTINY REVIEW.

The North Carolina Supreme Court's holding in this case is also particularly dangerous for equal protection law generally. To conclude that districts

drawn to meet a racial proportionality requirement are narrowly tailored because they permissibly have a total voting age population that exceeds 50% black and therefore are simply a safe harbor, (Pet. App. 34a-39a.) is to invite future courts around the country to abandon any true evaluation of whether race is used in the redistricting process in the most limited way necessary to meet the constitutional requirements of the Voting Rights Act. It also invites courts to relax their review under strict scrutiny generally, so long as a jurisdiction is using considerations of race to avoid potential liability under any civil rights provision.

The trial court erroneously held that *Fisher* does not apply in the redistricting context, (Pet. App. 101a-102a.) and the North Carolina Supreme Court not only failed to correct that error, (Pet. App. 65a-66a.) but compounded it by employing a standard of virtually complete deference to the legislature's use of racial classifications once the decision is made to seek a "safe harbor."

The court also erred by placing the burden on Plaintiffs to prove that the racially gerrymandered districts were not narrowly tailored. Plaintiffs argued that the challenged districts were not narrowly tailored because they were drawn to satisfy a racial proportionality requirement without reference to current conditions; were severely geographically non-compact; were packed with more Black voters than was necessary to comply with the Voting Rights Act; and in many instances were sited in places in the state where a VRA remedy was not needed. It is fundamental that once the court

establishes the existence of a racial classification, as the trial court properly concluded here, the burden then shifts to Defendants to demonstrate the challenged districts were narrowly tailored to satisfy a compelling state interest. *Shaw v. Hunt*, 517 U.S. at 908 ("North Carolina, therefore, must show…its districting legislation is narrowly tailored"); *Miller*, 515 U.S. at 920 ("the State must demonstrate that its districting legislation is narrowly tailored"); *see also Adarand Constructors v. Pena*, 515 U.S. 200, 224 (1995) (Court will demand "any governmental actor subject to the Constitution justify any racial classification "as narrowly tailored); *Grutter v. Bollinger*, 539 U.S. 306, 391 (2003) ("[t]he Law School has the burden of proving, in conformance with the standard of strict scrutiny, that it did not utilize race in an unconstitutional way.") (Kennedy, J., dissenting); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 744 (2007) (Roberts, C.J.) ("We put the burden on state actors to demonstrate their race-based policies are justified."); *Fisher*, 133 S. Ct. at 2420 ("[I]t remains at all times the University's obligation to demonstrate" narrow tailoring.).

Defendants have never articulated why they rejected alternatives that were less focused on race. With regard to every challenged district, the court accepted, without subjecting to critical questioning, Defendants' assertions that the district was narrowly tailored and instead concluded that Plaintiffs had not disproved that the districts were narrowly-tailored. For example, on the question of whether racial polarization was so strong as to necessitate the extreme and affirmative remedy of a

majority Black district, the Court said "[t]he fact that incumbent black candidates or strong black candidates have won elections in majority-minority coalition districts with TBVAP between 40% and 49.99% does not prove the absence of racially polarized voting." (Pet. App. 262a.) Of course it was the Defendants' burden to prove the presence of legally-significant racially polarized voting in each particular place where they sited a majority Black district, rather than Plaintiffs' burden to prove its absence. Additionally, the court was required to subject the Defendants' proof to non-deferential, independent review, which it failed to do.

Most glaring, for example, was the General Assembly's conclusion, and the North Carolina Supreme Court's endorsement of it without examination, that majority-black districts were required in Durham County in 2011. Two House Districts, a Senate District and Congressional District 1 were all drawn as majority-black districts including all or parts of Durham County. Despite this Court's holding in *Shelby County* that use of the Voting Rights Act's remedies must be explicitly tied to current conditions, 133 S. Ct. at 2629, the North Carolina Supreme Court apparently believed that the state is "still bound by the 1986 holding in *Gingles*" ordering the State to create majority African-American districts in certain parts of the state. (Pet. App. 28a.) The North Carolina Supreme Court upheld the drawing of majority-BVAP districts in Durham County, the very county where this Court concluded in 1986 that the previous electoral success of candidates of choice of black voters was fatal to a Section 2 claim. *Gingles*, 478 U.S. at 77. In every

element of the court's narrow tailoring analysis, the court relieved Defendants of their burden to demonstrate that they used race only to the extent required by current conditions.

These fundamental errors in the North Carolina Supreme Court's narrow tailoring analysis are errors that potentially impact every other equal protection claim brought in the State of North Carolina. This decision is a precedent that sows confusion as to the correct application of strict scrutiny and that puts into question the bedrock principle that racial balancing and race-based governmental classifications are unconstitutional unless narrowly tailored to meet a compelling governmental interest. Just as the *Fisher* case was important to correct the lower court's undue deference to the University in applying strict scrutiny, *see* 133 S. Ct. at 2420, this case is vital to correct the North Carolina Supreme Court's wholesale abandonment of the correct standard for evaluating, under strict scrutiny, whether a governmental use of race is narrowly tailored.

III. ALLOWING RACIALLY-SEGREGATING DISTRICTS TO STAND WOULD BE MANIFESTLY UNJUST.

Finally, this Petition must be granted and the decision of the North Carolina Supreme Court reversed because the challenged districts collectively represent a monumental and most egregious use of racial classifications in redistricting in violation of Petitioners' rights. The racial proportionality and greater than 50% BVAP criteria used here

unreasonably take no account of current conditions which reflect the important progress ameliorating the history of racial discrimination in voting that has been made in North Carolina. Instead of continuing the gradual transition to a system without racial roadblocks, they set a clear course in exactly the other direction, re-entrenching racial divisions in voting and the democratic process. *See Shaw v. Reno*, 509 U.S. at 657.

The millions of voters of this state who live in these districts are harmed by the explicit racial divisions the districts create. District lines that go street-by-street to divide whites from blacks, based only on their race, and that do so in areas of the state such as Wake County, Durham County, and Mecklenburg County, that were not previously covered by Section 5 of the Voting Rights Act, send the message that it is acceptable to use racial classifications on the flimsiest of pretexts. The legislature had passed redistricting plans in 1990, 2000 and 2001 with far fewer majority-black districts and was not sued on vote dilution grounds under Section 2 of the Voting Rights Act.

In the most recent election cycles before the 2011 redistricting, in all state legislative and congressional districts, the candidate of choice of black voters prevailed in 28 of 31 districts with 40%+ black voting age population, for a win rate of 90%. African-American candidates have also been winning in districts ranging from 21% to 41% black in voting age population. (Pet. App. 329a-344a.) Since *Gingles*, examples include Dan Blue's ascent to the position of Speaker of the House in 1991, Ralph

Campbell's statewide election as State Auditor in 2004, Senator Malcolm Graham's defeat of the well-regarded white incumbent Fountain Odom in Mecklenburg County in 2006, and Dr. Eric Mansfield's election to the Senate from Fayetteville in 2010. These candidates garnered strong support from black and white voters alike, and achieved winning margins in contested elections as high as 70 to 80% of the vote. Black and white voters have seen their common interests united behind the values they share, and they have seen their elected leaders, honorable and capable men and women of color, ably represent black and white voters together. Voters should not be burdened with highly irregular election districts drawn to meet racial targets where there is no legitimate justification for doing so. The Court must grant this petition and strike down the ruling of the North Carolina Supreme Court to end this unjust governmental imposition of racial classifications.

IV. THE COURT SHOULD RESOLVE THIS CASE AS QUICKLY AS POSSIBLE.

Plaintiffs filed their complaints on November 3 and 4, 2011, just two days after the challenged districts became legally enforceable, and immediately sought a preliminary injunction, which was denied by the trial court on February 6, 2012. The trial of issues not resolved by summary judgment was held on June 5 & 6, 2013 and the trial court issued its ruling on July 8, 2013. (Pet. App. 87a.) Plaintiffs sought a stay of that ruling and further injunction in the state Supreme Court, which was denied. The case was argued to the North

Carolina Supreme Court on January 6, 2014. That court did not issue its opinion until December 19, 2014.

Two of the five election cycles for which these districts will be used have already passed. Unless new, race-neutral election districts are enacted by the fall of 2015, to replace the unjustified racially gerrymandered districts challenged here, there will be insufficient time to implement the new districts before the 2016 elections. By state law, the filing period for state legislative and congressional offices opens "on the second Monday in February," N.C. Gen. Stat. § 163-106(c), which, in 2016, will be noon on Monday, February 8, 2016. To vindicate Plaintiffs' rights and to implement districts in which racial considerations are not predominant, new district lines must be established well in advance of that date.

In light of these time constraints, because the basic legal errors contravene well-established precedent concerning the constitutional infirmity of racial balancing by governmental actors, and because the operative facts are undisputed including information contained in the written, public statements of the legislative leadership themselves, the best course is for this court to grant this petition and summarily reverse the judgment below. *See*, *e.g.*, *Tolan v. Cotton*, 134 S. Ct. 1861, 1867–68 (2014) (summary reversal appropriate to "correct a clear misapprehension" of the Court's precedents); *American Tradition P'Ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (where "[t]here can be no serious doubt" about the constitutional infirmity of the

Montana Supreme Court's opinion, summary reversal is appropriate); *KPMG, LLP, v. Cocchi*, 132 S. Ct. 23, 26 (2011) (per curiam opinion reversing state court that "failed to give effect to the plain meaning" of a federal law); *Upham v. Seamon*, 456 U.S. 37, 40–41 (1982) (per curiam) (granting summary reversal in redistricting case); *Lance v. Dennis*, 546 U.S. 459, 462–63 (2006) (per curiam) (same). Alternatively, we respectfully request that the Court grant the petition and establish an expedited briefing and argument schedule.

In enacting the 2011 redistricting plans, Defendants turned the Voting Rights Act on its head and used it to justify the subversion of the rights of North Carolina's citizens under the United States Constitution. They used a law designed to protect the voting rights of the country's most vulnerable citizens to in fact segregate those voters by race. Their explicit goal of increasing the number of majority-Black Senate and House districts to match the Black percentage of the state's population meant that race predominated in those districts but such a drastic use of racial classifications was not justified by current political realities or required by law. Petitioners respectfully request this Court to grant this Petition and to reverse the ruling of the North Carolina Supreme Court in time for new, constitutional districts to be implemented for the 2016 elections.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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[ENTERED DECEMBER 19, 2014]

IN THE SUPREME COURT OF
NORTH CAROLINA

No. 201PA12-2

MARGARET DICKSON, ALICIA CHISOLM, ETHEL CLARK, MATTHEW A. McLEAN, MELISSA LEE ROLLIZO, C. DAVID GANTT, VALERIA TRUITT, ALICE GRAHAM UNDERHILL, ARMIN JANCIS, REBECCA JUDGE, ZETTIE WILLIAMS, TRACEY BURNS-VANN, LAWRENCE CAMPBELL, ROBINSON O. EVERETT, JR., LINDA GARROU, HAYES McNEILL, JIM SHAW, SIDNEY E. DUNSTON, ALMA ADAMS, R. STEVE BOWDEN, JASON EDWARD COLEY, KARL BERTRAND FIELDS, PAMLYN STUBBS, DON VAUGHAN, BOB ETHERIDGE, GEORGE GRAHAM, JR., THOMAS M. CHUMLEY, AISHA DEW, GENEAL GREGORY, VILMA LEAKE, RODNEY W. MOORE, BRENDA MARTIN STEVENSON, JANE WHITLEY, I.T. ("TIM") VALENTINE, LOIS WATKINS, RICHARD JOYNER, MELVIN C. McLAWHORN, RANDALL S. JONES, BOBBY CHARLES TOWNSEND, ALBERT KIRBY, TERRENCE WILLIAMS, NORMAN C. CAMP, MARY F. POOLE, STEPHEN T. SMITH, PHILIP A. BADDOUR, and DOUGLAS A. WILSON

v.

ROBERT RUCHO, in his official capacity only as the Chairman of the North Carolina Senate Redistricting Committee; DAVID LEWIS, in his

official capacity only as the Chairman of the North Carolina House of Representatives Redistricting Committee; NELSON DOLLAR, in his official capacity only as the Co-Chairman of the North Carolina House of Representatives Redistricting Committee; JERRY DOCKHAM, in his official capacity only as the Co-Chairman of the North Carolina House of Representatives Redistricting Committee; PHILIP E. BERGER, in his official capacity only as the President Pro Tempore of the North Carolina Senate; THOM TILLIS, in his official capacity only as the Speaker of the North Carolina House of Representatives; THE STATE BOARD OF ELECTIONS; and THE STATE OF NORTH CAROLINA

NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, DEMOCRACY NORTH CAROLINA, NORTH CAROLINA A. PHILIP RANDOLPH INSTITUTE, REVA McNAIR, MATTHEW DAVIS, TRESSIE STANTON, ANNE WILSON, SHARON HIGHTOWER, KAY BRANDON, GOLDIE WELLS, GRAY NEWMAN, YVONNE STAFFORD, ROBERT DAWKINS, SARA STOHLER, HUGH STOHLER, OCTAVIA RAINEY, CHARLES HODGE, MARSHALL HARDY, MARTHA GARDENHIGHT, BEN TAYLOR, KEITH RIVERS, ROMALLUS O. MURPHY, CARL WHITE, ROSA BRODIE, HERMAN LEWIS, CLARENCE ALBERT, EVESTER BAILEY, ALBERT BROWN, BENJAMIN LANIER, GILBERT VAUGHN, AVIE LESTER, THEODORE MUCHITENI, WILLIAM HOBBS, JIMMIE RAY HAWKINS, HORACE P. BULLOCK,

ROBERTA WADDLE, CHRISTINA DAVIS-McCOY, JAMES OLIVER WILLIAMS, MARGARET SPEED, LARRY LAVERNE BROOKS, CAROLYN S. ALLEN, WALTER ROGERS, SR., SHAWN MEACHEM, MARY GREEN BONAPARTE, SAMUEL LOVE, COURTNEY PATTERSON, WILLIE O. SINCLAIR, CARDES HENRY BROWN, JR., and JANE STEPHENS

v.

THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; THOM TILLIS, in his official capacity as Speaker of the North Carolina House of Representatives; and PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate

Appeal pursuant to N.C.G.S. § 120-2.5 from orders entered on 6 February 2012 and 8 July 2013 by a three-judge panel of the Superior Court, Wake County appointed by the Chief Justice under N.C.G.S. § 1-267.1. Heard in the Supreme Court on 6 January 2014.

Poyner Spruill LLP, by Edwin M. Speas, Jr., John W. O'Hale, and Caroline P. Mackie, for Dickson plaintiff-appellants; and Southern Coalition for Social Justice, by Anita S. Earls and Allison Riggs, and Tin Fulton Walker & Owen, PLLC, by Adam Stein, for NC NAACP plaintiff-appellants.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Thomas A. Farr and Phillip J. Strach, for legislative defendant-appellees; and Roy Cooper, Attorney General, by Alexander McC.

Peters, Special Deputy Attorney General, for all defendant-appellees.

Jenner & Block LLP, by Paul M. Smith, pro hac vice, Jessica Ring Amunson, pro hac vice, and Michelle R. Singer, pro hac vice; and Smith Moore Leatherwood LLP, by Mark Anderson Finkelstein and Matthew Nis Leerberg, for Election Law Professors Guy-Uriel Charles, Gilda R. Daniels, Lani Guinier, Samuel Issacharoff, Justin Levitt, Janai S. Nelson, Spencer Overton, Richard H. Pildes, and Franita Tolson, amici curiae.

H. Jefferson Powell for North Carolina Law Professors Michael Curtis, Walter Dellinger, William P. Marshall, and H. Jefferson Powell, amici curiae.

Terry Smith, pro hac vice, and Ferguson, Chambers & Sumter, P.A., by Geraldine Sumter, for North Carolina Legislative Black Caucus, amicus curiae.

EDMUNDS, Justice.

Following the 2010 Decennial Census, the General Assembly of North Carolina enacted redistricting plans for the North Carolina Senate and House of Representatives, and for the North Carolina districts for the United States House of Representatives. Plaintiffs challenge the legality of these plans, arguing that they violate the constitutions of the United States and of North Carolina, controlling federal statutes, and applicable

decisions of the Supreme Court of the United States and the Supreme Court of North Carolina. The three-judge panel reviewing the plans unanimously concluded that the General Assembly applied traditional and permissible redistricting principles to achieve partisan advantage and that no constitutional violations resulted. After a careful and exhaustive review of the record in this case and the pertinent law, we conclude that, as to the twenty-six districts deliberately drawn to comply with the federal Voting Rights Act of 1965, the trial court erred when it applied strict scrutiny prematurely. However, plaintiffs were not prejudiced because even if strict scrutiny is not appropriate, these districts survive this most demanding level of review. As to the remaining challenged districts, we affirm the ruling of the trial court.

I. Procedural Background

The Constitution of North Carolina requires decennial redistricting of the North Carolina Senate and North Carolina House of Representatives, subject to several specific requirements. The General Assembly is directed to revise the districts and apportion Representatives and Senators among those districts. N.C. Const. art. II, §§ 3, 5. Similarly, consistent with the requirements of the Constitution of the United States, the General Assembly establishes North Carolina's districts for the United States House of Representatives after every decennial census. U.S. Const. art. I, §§ 2, 4; 2 U.S.C. §§ 2a, 2c (2012).

Following the census conducted with a date of 1 April 2010, leaders of the North Carolina House of Representatives and the North Carolina Senate independently appointed redistricting committees. Each committee was responsible for recommending a plan applicable to its own chamber, while the two committees jointly were charged with preparing a redistricting plan for the United States House of Representatives North Carolina districts. These committees sought information and suggestions from numerous sources, including the North Carolina Legislative Black Caucus and the North Carolina delegation to the United States Congress. In addition, these committees solicited input from various constituencies; invited public comment and conducted public hearings in multiple counties, including twenty-four of the forty counties then covered by section 5 of the Voting Rights Act of 1965 (hereinafter "the Voting Rights Act" or "VRA");[1] heard both lay and expert testimony regarding such matters as racially polarized voting; solicited and received advice from the University of North Carolina School of Government; commissioned reports from independent experts to fill gaps in the evidence; and considered written submissions.

The General Assembly convened on 25 July 2011 to deliberate the redistricting plans drawn by the House and Senate committees. That same day, alternative maps were submitted by leaders of the Democratic Party and by the Legislative Black Caucus. On 27 July, the General Assembly ratified

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[1] Effective 1 September 2014, section 5 of the VRA is codified at 52 U.S.C.S. § 10304 (LexisNexis 2014). Section 5 previously was codified at 42 U.S.C.S. § 1973c.

the 2011 North Carolina Senate redistricting plan and the 2011 plan for the federal House of Representatives districts. On 28 July, the General Assembly ratified the 2011 North Carolina House of Representatives redistricting plan. On 2 September 2011, the three plans were submitted to the United States Department of Justice for preclearance under section 5 of the Voting Rights Act, and preclearance was received on 1 November 2011.[2] Also on 2 September, a suit seeking preclearance was filed in the United States District Court for the District of Columbia. That action was dismissed on 8 November 2011.

On 3 November 2011, Margaret Dickson and forty-five other registered voters filed a complaint, seeking to have the three redistricting plans declared invalid on both constitutional and statutory grounds. These plaintiffs filed an amended complaint on 12 December 2011. On 4 November 2011, the North Carolina State Conference of Branches of the NAACP joined by three organizations and forty-six individuals filed a complaint seeking similar relief. These plaintiffs filed an amended complaint on 9 December 2011. Following the filing of the original complaints, the Chief Justice of the Supreme Court of North Carolina appointed a panel of three superior court judges to hear these actions, pursuant to N.C.G.S. § 1-267.1. On 19 December 2011, the three-judge

[2] Because a software glitch caused the State's initial submission to the Department of Justice to be incomplete, the General Assembly enacted curative statutes on 7 November 2011. These statutes were precleared on 8 December 2011.

panel ("the trial court") consolidated both cases for all purposes.

On 6 February 2012, the trial court allowed in part and denied in part defendants' motion to dismiss. Plaintiffs filed a motion for partial summary judgment on 5 October 2012, and defendants filed a motion for summary judgment on 10 December 2012. The trial court heard arguments on these motions on 25 and 26 February 2013.

While a ruling on the motions for summary judgment was pending, the trial court issued an order determining that genuine issues of material fact existed as to two issues that could not be resolved by summary judgment. Accordingly, the court ordered a trial on these two issues, which it identified as:

> 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 protection of the State from vote dilution claims under the Constitution or under § 2 of the VRA?
>
> 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 those districts?

The court conducted the trial on 4 and 5 June 2013. On 8 July 2013, the trial court issued its unanimous "Judgment and Memorandum of Decision" denying plaintiffs' motion for partial summary judgment and entering summary judgment for defendants on all remaining claims. Plaintiffs entered timely notice of appeal pursuant to N.C.G.S. § 120-2.5.

II. Plaintiffs' Federal Claims

We begin by considering plaintiffs' claims brought under federal law. If a redistricting plan does not satisfy federal requirements, it fails even if it is consistent with the law of North Carolina. *See* U.S. Const. art. VI, § 2; N.C. Const. art. I, § 3. Plaintiffs argued first to the trial court, and now to us, that the redistricting plans violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States because they impermissibly classify individuals based upon their race. In other words, plaintiffs contend that the redistricting plans constitute impermissible racial gerrymandering that has denied them equal protection under the law.

A. Standards Applicable upon Review

A court considering allegations of racial gerrymandering first must determine the appropriate standard of review. Strict scrutiny, the highest tier of review, applies "when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *White v. Pate*, 308 N.C. 759, 766, 304 S.E.2d 199, 204 (1983) (citations omitted). "Race is unquestionably a 'suspect class,'" *Phelps v. Phelps*, 337 N.C. 344, 353, 446 S.E.2d 17, 23 (1994), and if a court finds that race is the "predominant, overriding factor" behind the General Assembly's plans, the plans must satisfy strict scrutiny to survive, *Miller v. Johnson*, 515 U.S. 900, 920, 115 S. Ct. 2475, 2490, 132 L. Ed. 2d 762, 782 (1995). "Under strict scrutiny [review], a challenged governmental action is unconstitutional if the State cannot establish that it is narrowly tailored to advance a compelling governmental interest." *Stephenson v. Bartlett*, 355 N.C. 354, 377, 562 S.E.2d 377, 393 (2002) (hereinafter "*Stephenson I*") (citation omitted). If, on the other hand, the plans are not predominantly motivated by improper racial considerations, the court defaults to the rational basis test. *See Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S. Ct. 2326, 2331, 120 L. Ed. 2d 1, 12 (1992) ("[U]nless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification" satisfy rational basis review.). Under rational basis review, "[t]he general rule is that

legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313, 320 (1985) (citations omitted).

A party challenging a redistricting plan has the burden of establishing that race was the predominant motive behind the state legislature's action. *Miller*, 515 U.S. at 916, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779-80. In *Miller*, the Supreme Court stated that

> [t]he plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can

> "defeat a claim that a district has been gerrymandered on racial lines."

Id. (quoting *Shaw v. Reno*, 509 U.S. 630, 647, 113 S. Ct. 2816, 2827, 125 L. Ed. 2d 511, 529 (1993) (hereinafter "*Shaw I*")).

As a court considers which standard of review is appropriate, it should be mindful of the Supreme Court's observation that "courts must 'exercise *extraordinary caution* in adjudicating claims that a State has drawn district lines on the basis of race.' " *Easley v. Cromartie*, 532 U.S. 234, 242, 121 S. Ct. 1452, 1458, 149 L. Ed. 2d 430, 443 (2001) (hereinafter "*Cromartie II*") (quoting *Miller*, 515 U.S. at 916, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779 (emphasis added)). At least three factors lie behind this admonition. First, in light of the interplay detailed below between the Fourteenth Amendment, which virtually forbids consideration of race, and the VRA, which requires consideration of race, the Supreme Court has acknowledged that the existence of legislative consciousness of race while redistricting does not automatically render redistricting plans unconstitutional. *Miller*, 515 U.S. at 916, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779 ("Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process."); *see also Shaw I*, 509 U.S. at 646, 113 S. Ct. at 2826, 125 L. Ed. 2d at 528 ("[T]he legislature always is *aware* of race when it draws district lines . . . . That sort of race consciousness does not lead inevitably to impermissible race discrimination."). Second, the Supreme Court has recognized the

importance of States' own traditional districting principles, holding that States can adhere to them without being subject to strict scrutiny so long as those principles are not subordinated to race. *Bush v. Vera*, 517 U.S. 952, 978, 116 S. Ct. 1941, 1961, 135 L. Ed. 2d 248, 269 (1996) (plurality). Finally, the Supreme Court has accepted that some degree of deference is due in light of the difficulties facing state legislatures when reconciling conflicting legal responsibilities. *Id.* at 1038, 116 S. Ct. at 1991, 135 L. Ed. 2d at 308 (Stevens, Ginsburg & Breyer, JJ., dissenting); *see also Page v. Va. State Bd. of Elections*, No. 3:13cv678, 2014 WL 5019686, at *6-7 (E.D. Va. Oct. 7, 2014) (determination by three-judge court in accordance with 52 U.S.C.S. § 10304(2)) (recognizing that redistricting is "possibly 'the most difficult task a legislative body ever undertakes' " (citation omitted)).

A court's determination of the predominant motive underlying a redistricting plan is factual in nature. *Hunt v. Cromartie*, 526 U.S. 541, 549, 119 S. Ct. 1545, 1550, 143 L. Ed. 2d 731, 740 (1999) (hereinafter "*Cromartie I*" (citations omitted)). Factual findings are binding on appeal if not challenged at trial or on appeal, *e.g.*, *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991), or if supported by competent evidence found by the trial judge, *e.g.*, *In re Estate of Trogdon*, 330 N.C. 143, 147-48, 409 S.E.2d 897, 900 (1991). Conclusions of law are reviewed de novo. *E.g.*, *N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc.*, 366 N.C. 505, 512, 742 S.E.2d 781, 786 (2013) (citation omitted). Here, of the thirty challenged House, Senate, and Congressional

districts, the trial court concluded that twenty-six were predominantly motivated by race and thus subject to strict scrutiny review. The trial court concluded that the remaining four challenged districts were not predominantly motivated by race and thus were subject to rational basis review. We consider each group in turn.

B. The VRA Districts

We turn first to the twenty-six districts that the trial court subjected to strict scrutiny. As to these districts, the trial court reached two significant conclusions. First, the court unanimously found that "it is undisputed that the General Assembly intended to create 26 of the challenged districts to be 'Voting Rights Act districts' " that would include a Total Black Voting Age Population of at least fifty percent. This unchallenged finding of fact is binding on us. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. The trial court then reached a second unanimous conclusion that drawing such districts "necessarily requires the drafters of districts to classify residents by race," that the "shape, location and racial composition of each VRA district was predominantly determined by a racial objective," and that the process of creating such districts resulted in "a racial classification sufficient to trigger the application of strict scrutiny as a matter of law." Although this second determination by the trial court is neither purely factual nor purely legal, we are mindful that federal precedent cited above instructs that the General Assembly's consideration of race to the degree necessary to comply with section 2 does not rise to the level of a "predominant motive" as a

matter of course. Accordingly, before reviewing the trial court's application of strict scrutiny, we believe it necessary to review its conclusion as to the General Assembly's predominant motive.

1. Predominant Motive

The challenges faced by the General Assembly while redistricting are easy to express but persistently difficult to resolve. The Fourteenth Amendment, by guaranteeing equal protection for all citizens regardless of race, virtually prohibits consideration of race during redistricting. U.S. Const. amend. XIV, § 1. Yet the Voting Rights Act, passed "to help effectuate the Fifteenth Amendment's guarantee that no citizen's right to vote shall 'be denied or abridged . . . on account of race, color, or previous condition of servitude,' " *Voinovich v. Quilter*, 507 U.S. 146, 152, 113 S. Ct. 1149, 1154-55, 122 L. Ed. 2d 500, 510 (1993) (alteration in original) (citations omitted), specifically requires consideration of race. For instance, section 2 "prohibits the imposition of any electoral practice or procedure that 'results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color.' " *Id.* at 152, 113 S. Ct. at 1155, 122 L. Ed. 2d at 510 (quoting 42 U.S.C. § 1973(a) (alteration in original) (effective 1 September 2014, recodified as 52 U.S.C.S. § 10301(a) (LexisNexis 2014)). At the same time, the General Assembly must ensure that each district complies with federal and state "one-person, one-vote" standards, *see* N.C. Const. art. II, §§ 3(1), 5(1); *Reynolds v. Sims*, 377 U.S. 533, 565-66, 84 S. Ct. 1362, 1383-85, 12 L. Ed. 2d 506, 529-30 (1964);

Baker v. Carr, 369 U.S. 186, 207-08, 82 S. Ct. 691, 705, 7 L. Ed. 2d 663, 680 (1962) and that, to the greatest extent allowed under federal law, the redistricting plans comply with the Whole County Provision of our state constitution, *Stephenson I*, 355 N.C. at 382-84, 562 S.E.2d at 395-97. Moreover, the Supreme Court of the United States has acknowledged other legitimate considerations, such as compactness, contiguity, and respect for political subdivisions, *see Miller*, 515 U.S. at 916, 115 S. Ct. at 2488, 132 L. Ed. 2d at 780; *Shaw I*, 509 U.S. at 646, 113 S. Ct. 2826, 125 L. Ed. 2d at 528; *Reynolds*, 377 U.S. at 578, 84 S. Ct. at 1390, 12 L. Ed. 2d at 537; political advantage, *see Cromartie I*, 526 U.S. at 551, 119 S. Ct. at 1551, 143 L. Ed. 2d at 741; and accommodation of incumbents, *see Karcher v. Daggett*, 462 U.S. 725, 740, 103 S. Ct. 2653, 2663, 77 L. Ed. 2d 133, 147 (1983). Thus, "[t]he courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus." *Miller*, 515 U.S. at 915-16, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779.

Despite this cat's cradle of factors facing the General Assembly, the trial court found that no factual inquiry was required regarding the General Assembly's predominant motivation in forming the twenty-six VRA districts beyond the General Assembly's concession that the districts were drafted to be VRA-compliant. In light of the many other considerations potentially in play, we do not believe that this concession established that race *ipso facto* was the predominant motive driving the General Assembly. Because of the trial court's truncated

findings of fact on this issue, we do not know which other factors may have influenced the creation and shape of these twenty-six districts and the extent of any such influence. As a result, we do not know whether race fairly can be described as the predominant factor in the formation of these districts and whether, in turn, strict scrutiny was the appropriate standard of review. Moreover, in future cases such an assumption—that deliberate creation of VRA-compliant districts equates to race as the predominant motive in creating the districts—may well shortcut the fact-finding process at which trial courts excel, resulting in scanty records on appeal. Accordingly, we hold that the trial court erred in concluding as a matter of law that, just because the twenty-six districts were created to be VRA-compliant, the General Assembly was motivated predominantly by race.

Nonetheless, this error is not fatal and does not invalidate the trial court's order. A similar scenario played out in *Cromartie I*, in which the courts reviewed the General Assembly's creation of North Carolina's Twelfth Congressional District. 526 U.S. at 543, 119 S. Ct. at 1547, 143 L. Ed. 2d at 736. The plaintiffs filed suit in federal court, arguing that the district was the result of an unconstitutional racial gerrymander. *Id.* at 544-45, 119 S. Ct. at 1548, 143 L. Ed. 2d at 737. The three-judge panel of the United States District Court heard arguments pertaining to pending motions, but did not conduct an evidentiary hearing. *Id.* at 545, 119 S. Ct. at 1548, 143 L. Ed. 2d at 737. The panel majority, finding that the General Assembly used race-driven criteria in drawing the district and that doing so

violated the Equal Protection Clause of the Fourteenth Amendment, granted the plaintiffs' motion for summary judgment and entered an injunction. *Id.* On appeal, the Supreme Court reversed, finding that the General Assembly's motivation in drawing district lines is a factual question that, when contested, should not be resolved by summary judgment. 526 U.S. at 549, 553, 119 S. Ct. at 1550, 1552, 143 L. Ed. 2d at 740, 742.

The posture of the litigants here is distinguishable because plaintiffs, unlike their counterparts in *Cromartie I*, lost at summary judgment and are the appealing party. However, even if we were to follow *Cromartie I*'s lead and reverse, plaintiffs could gain nothing on remand. The basis for our reversal would be that the trial court erred in applying strict scrutiny before making adequate findings of fact. As the trial court noted in its order, if defendants' plans survived strict scrutiny, they would surely survive a less rigorous review. On the other hand, if the trial court on remand found facts and determined once more that strict scrutiny is proper, the panel has already conducted its analysis under that standard. Although the dissent argues that the case should be remanded for additional findings, the record on which it would base those findings—which we have reviewed in detail—would not have changed. As a result, reversing and remanding to the trial court to make findings of fact and conclusions of law would achieve nothing but delay. *See e.g.*, *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6, 89 S. Ct. 1426, 1430 n.6, 22 L. Ed. 2d 709, 715 n.6 (1969)

(plurality) (stating that, when reviewing an agency decision that was based upon an incorrect standard, "it would be useless to remand" because "[t]here is not the slightest uncertainty" that the outcome would remain unchanged). Accordingly, as we review the voluminous record and the trial court's exhaustive analysis, we will proceed on the presumption that strict scrutiny is appropriate and apply that standard as we review the trial court's analysis. If these plans survive strict scrutiny, they survive rational basis review.

2. Compelling Governmental Interest

We begin this analysis by considering the factors that defendants contend constitute a "compelling governmental interest." *See Stephenson I*, 355 N.C. at 377, 562 S.E.2d at 393 (citation omitted). Defendants argue that the General Assembly drafted the twenty-six districts both to avoid liability under section 2 of the VRA and to obtain preclearance under section 5 of the VRA by avoiding retrogression, which has been defined as "a change in voting procedures which would place the members of a racial or language minority group in a less favorable position than they had occupied before the change with respect to the opportunity to vote effectively." *Id.* at 363-64, 562 S.E.2d at 385 (citations omitted). Defendants' brief acknowledges that three principles guided the General Assembly: (1) Compliance with the Whole County Provision of the Constitution of North Carolina, as set out in *Stephenson I* and *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) (hereinafter "*Stephenson II*"); (2) Where possible, establishment of VRA

districts having a Total Black Voting Age Population above fifty percent, in accord with *Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (2007) (hereinafter "*Pender County*"), *aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1, 129 S. Ct. 1231, 173 L. Ed. 2d 173 (2009) (hereinafter "*Strickland*") (plurality); and (3) Exploration of "the possibility of establishing a sufficient number of VRA legislative districts to provide African American voters with rough proportionality in the number of VRA districts in which they have a reasonable opportunity to elect their candidates of choice."

Although the Supreme Court of the United States has never held outright that compliance with section 2 or section 5 can be a compelling state interest, the Court has issued opinions that expressly assumed as much. To be specific, the Supreme Court in *Shaw v. Hunt* assumed *arguendo* that compliance with section 2 could be a compelling state interest, 517 U.S. 899, 915, 116 S. Ct. 1894, 1905, 135 L. Ed. 2d 207, 225 (1996) (hereinafter "*Shaw II*"), and adopted a similar approach in *Miller*, where the issue was the State's desire to comply with section 5 of the Voting Rights Act, 515 U.S. at 921, 115 S. Ct. at 2490-91, 132 L. Ed. 2d at 783. In addition, the Supreme Court has observed that "deference is due to [States'] reasonable fears of, and to their reasonable efforts to avoid, § 2 liability." *Vera*, 517 U.S. at 978, 116 S. Ct. at 1961, 135 L. Ed. 2d at 269 (plurality). The trial court here, footnoting several federal cases addressing the issue, stated that "[i]n general, compliance with the Voting Rights Act can be a compelling governmental interest." Faced squarely with the issue, we agree with the

trial court. The Equal Protection Clause of the Fourteenth Amendment requires equal treatment regardless of race, while the Voting Rights Act requires consideration of race. Because the Constitution of the United States trumps any federal statute, a State's efforts to comply with the Voting Rights Act creates tension with the Fourteenth Amendment. Any violation of the latter triggers strict scrutiny, mandating that the State demonstrate a compelling interest. Because the Supreme Court of the United States and the United States Congress have indicated without ambiguity that they expect States to comply with the Voting Rights Act, state laws passed for the purpose of complying with the Act must be capable of surviving strict scrutiny, indicating that such compliance is a compelling state interest.[3] This analysis applies equally to a State's efforts to comply with sections 2 and 5 of the Voting Rights Act.

Moreover, the General Assembly's desire to comply with the Voting Rights Act is justifiable for other reasons. Holding elections is a core State function, fundamental in a democracy. Establishing voting districts is an essential component of holding elections. In doing so, a State is subject to federal mandates in addition to those found in the Voting Rights Act and the Fourteenth Amendment, such as

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[3] "If compliance with § 5 were not a compelling state interest, then a State could be placed in the impossible position of having to choose between compliance with § 5 and compliance with the Equal Protection Clause." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 518, 126 S. Ct. 2594, 2667, 165 L. Ed. 2d 609, 694 (2006) (hereinafter "*LULAC*") (Scalia, J., Thomas, J., Roberts, C.J. & Alito, J., dissenting in part)

the "one-person, one-vote" requirement. *Stephenson I*, 355 N.C. at 363-64, 383, 562 S.E.2d at 384-85, 397. A determination that the State does not have a compelling interest in complying with federal mandates would invite litigation by those claiming that the State could never satisfy the requirements of strict scrutiny, undermining the General Assembly's efforts to create stable districts between censuses and citizen expectations that existing election districts are valid. On a level no less practical, we also assume that North Carolina, and all States for that matter, would prefer to avoid the expense and delay resulting from litigation. Accordingly, we hold that compliance with sections 2 and 5 of the Voting Rights Act may be a compelling state interest.

We next consider whether compliance with either section 2 or section 5 constitutes a compelling state interest under the facts presented here. Those goals may reach the level of a compelling state interest if two conditions are satisfied. First, the General Assembly must have identified past or present discrimination with some specificity before it could turn to race-conscious relief. *Shaw II*, 517 U.S. at 909, 116 S. Ct. at 1902, 135 L. Ed. 2d at 221 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 504, 109 S. Ct. 706, 727, 102 L. Ed. 2d 854, 889 (1989)). Second, before acting, the General Assembly must also have "had 'a strong basis in evidence' " on which to premise a conclusion that the race-based remedial action was necessary. *Id.* at 910, 116 S. Ct. at 1903, 135 L. Ed. 2d at 222 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277, 106 S. Ct. 1842, 1849, 90 L. Ed. 2d 260, 271 (1986) (plurality)).

a. Compelling Interest Under Section 2 of the Voting Rights Act

Before we turn our attention to consideration of individual districts, we consider the application of section 2 of the VRA in the instant case. "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47, 106 S. Ct. 2752, 2764, 92 L. Ed. 2d 25, 44 (1986); *see* 52 U.S.C.S. §§ 10301-10702 (LexisNexis 2014). The question of voting discrimination *vel non*, including vote dilution, is determined by the totality of the circumstances. *Gingles*, 478 U.S. at 43-46, 106 S. Ct. at 2762-64, 92 L. Ed. 2d at 42-44 (discussing section 2(b) of the VRA, now codified at 52 U.S.C.S. § 10301(b)). However, under *Gingles*, a reviewing court does not reach the totality of circumstances test unless the challenging party is able to establish three preconditions, *id.* at 50-51, 106 S. Ct. at 2766-67, 92 L. Ed. 2d at 46-47. First, a "minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* at 50, 106 S. Ct. at 2766, 92 L. Ed. 2d at 46. Second, the minority group must "show that it is politically cohesive." *Id.* at 51, 106 S. Ct. at 2766, 92 L. Ed. 2d at 47. Finally, the minority group must "be able to demonstrate that the majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.* at 51, 106 S. Ct. at 2766-67, 92 L. Ed. 2d at 47. Although *Gingles* dealt with multi-member districts,

the same preconditions must be met when a claim of vote dilution is made regarding a single-member district. *Growe v. Emison*, 507 U.S. 25, 40-41, 113 S. Ct. 1075, 1084, 122 L. Ed. 2d 388, 403-04 (1993); *see also Johnson v. De Grandy*, 512 U.S. 997, 1006-07, 114 S. Ct. 2647, 2654-55, 129 L. Ed. 2d 775, 788 (1994).

Unlike cases such as *Gingles*, in which minority groups use section 2 as a sword to challenge districting legislation, here we are considering the General Assembly's use of section 2 as a shield. Defendants argue that, because the *Gingles* test considers race, the State has a compelling interest in preemptively factoring race into its redistricting process to ensure that its plans would survive a legal challenge brought under section 2. To establish that this state interest is legitimate, defendants must show a strong basis in evidence that the possibility of a section 2 violation existed at the time of the redistricting. *See Shaw II*, 517 U.S. at 910, 916, 116 S. Ct. at 1903, 1905-06, 135 L. Ed. 2d at 222, 225-26. However, because this inquiry addresses only the possibility of a section 2 violation, and because a totality of the circumstances inquiry is by its nature fact-specific, defendants' evidence need only address "the three *Gingles* preconditions" to establish a compelling governmental interest. *See Vera*, 517 U.S. at 978, 116 S. Ct. at 1961, 135 L. Ed. 2d at 269 (citing *Growe*, 507 U.S. at 40, 113 S. Ct. at 1084, 122 L. Ed. 2d at 403-04).

Thus, to establish a compelling interest in complying with section 2 when the redistricting plans were developed, the legislature at that time

must have had a strong basis in evidence that the Total Black Voting Age Population in a geographically compact area was fifty percent plus one of the area's voting population. Such evidence would satisfy the first *Gingles* precondition. *Pender Cnty.*, 361 N.C. at 503, 649 S.E.2d at 372. In addition, a strong basis in evidence of racially polarized voting in that same geographical area would satisfy the second and third preconditions set out in *Gingles*. *LULAC*, 548 U.S. at 427, 126 S. Ct. at 2615, 165 L. Ed. 2d at 637 (majority). Against this background, we consider the trial court's application of these standards in discerning whether defendants here could legitimately claim a compelling interest in complying with section 2.

The trial court's order included several extensive appendices. In the body of the order, the trial court described the legislative record that existed when the plans were enacted, then referred to Appendix A, where this information was presented in detail. Appendix A, titled "Findings of Fact Relevant to the Issue of Racial Polarization in Specific Locations where Voting Rights Act Districts were Placed in the Enacted Plans," is incorporated by reference into the trial court's order.

Appendix A is broken into three parts. Part I, titled "General Findings of Fact," opens with a summary of the background of the case, then notes results of recent elections. For instance, the trial court observed that all African-American incumbents elected to the North Carolina General Assembly or the United States Congress in 2010 were elected in districts that were either majority

African-American or majority-minority coalition districts. In addition, no African-American candidate elected in 2010 was elected from a majority white crossover district, and two African-American incumbent state senators running in majority white districts were defeated in that election. No African-American candidate for the United States Congress was elected in a majority white district between 1992 and 2010, while from 2004 through 2010, no African-American candidate was elected to office in a statewide partisan election.

In this Part I of Appendix A, the court also considered an academic study of racially polarized voting conducted by Ray Block, Jr., Ph.D. This study, prepared for the Southern Coalition of Social Justice, is titled "Racially Polarized Voting in 2006, 2008, and 2010 in North Carolina State Legislative Contests." Dr. Block employed Justice Brennan's conclusion in *Gingles* that racially polarized voting occurs when there is a consistent relationship between the race of the voter and the way in which that person votes, and found that such a relationship existed in the areas examined. He added that he also found evidence that "majority-minority districts facilitate the election of African American candidates." The court determined that Dr. Block's study provided "substantial evidence regarding the presence of racially polarized voting in almost all of the counties[4] in which the General Assembly enacted the 2011 VRA districts."

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[4] These counties were Beaufort, Bertie, Chowan, Craven, Cumberland, Durham, Edgecombe, Gates, Guilford, Granville, Greene, Halifax, Hertford, Hoke, Jones, Lenoir, Martin, Mecklenburg, Nash, Northampton, Pasquotank,

Nevertheless, the trial court observed that the North Carolina General Assembly identified a few limitations in Dr. Block's study. For instance, the study did not pinpoint the percentage of white voters in majority African-American or majority-minority districts who voted for the candidate of choice of African-American voters. In addition, his study could analyze a legislative election only when the African-American candidate had opposition. As a result, the General Assembly commissioned Thomas L. Brunell, Ph.D. to prepare a supplementary report. Dr. Brunell's study, titled "Report on Racially Polarized Voting in North Carolina," examined the forty North Carolina counties covered by section 5 of the Voting Rights Act, plus Columbus, Duplin, Durham, Forsyth, Jones, Mecklenburg, Richmond, Sampson, Tyrrell, Wake, and Warren Counties. Dr. Brunell found "statistically significant racially polarized voting" in fifty of these fifty-one counties.

The trial court made additional findings of fact in Part I of Appendix A that we believe would be pertinent to a *Gingles* totality of circumstances test and that, by extension, indicate a strong basis in evidence that the *Gingles* preconditions existed. At the beginning of the redistricting process, the General Assembly noted that North Carolina had been ordered to create majority African-American districts as a remedy for section 2 violations in Bertie, Chowan, Edgecombe, Forsyth, Gates, Halifax, Martin, Mecklenburg, Nash, Northampton, Wake, Washington, and Wilson Counties. *See Gingles v. Edmisten*, 590 F. Supp. 345, 365-66, 376

Perquimans, Pitt, Robeson, Sampson, Scotland, Vance, Wake, Warren, Washington, Wayne, and Wilson.

(E.D.N.C. 1984), *aff'd in part, rev'd in part sub nom., Thornburg v. Gingles*, 478 U.S. at 80, 106 S. Ct. at 2782, 92 L. Ed. 2d at 65. Faculty at the North Carolina School of Government advised the chairs of the General Assembly's redistricting committees that North Carolina is still bound by the holding in *Gingles*. In addition, the United States District Court noted on remand from the decision in *Cromartie I* that the parties there had stipulated that legally significant racially polarized voting was present in North Carolina's First Congressional District. *Cromartie v. Hunt*, 133 F. Supp. 2d 407, 422-23 (E.D.N.C. 2000), *rev'd, Cromartie II*, 532 U.S. 234, 121 S. Ct. 1452, 149 L. Ed. 2d 430. The trial court found that consideration of race in the construction of the First District was reasonably necessary to protect the State from liability under the Voting Rights Act. *Id.* at 423. This finding by the trial court was not appealed and thus is not affected by the holding in *Cromartie II* and remains good law.

In addition, the trial court found as fact that the documents submitted by plaintiffs included a law review article prepared by an attorney for the North Carolina NAACP. Anita S. Earls et al., *Voting Rights in North Carolina 1982-2006*, 17 S. Cal. Rev. L. & Soc. Just. 577 (2008). The court observed that this article "also provided evidence of racially polarized voting as alleged or established in voting rights lawsuits filed in many of the counties[5] in which

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[5] The article included references to cases involving the following counties: Beaufort, Bladen, Cumberland, Duplin, Forsyth, Franklin, Granville, Halifax, Lenoir, Montgomery, Pasquotank, Person, Pitt, Richmond, Sampson, Scotland, Tyrrell, Vance, Wayne, and Washington.

2011 VRA districts were enacted." The court added as a finding of fact that no witness testified that racial polarization had disappeared either statewide or in those areas in which the General Assembly previously had created VRA districts.

In Part II of Appendix A, the trial court conducted an individualized analysis of each of the VRA districts created by the General Assembly in 2011. Generally, each finding of fact relates to one district. While four of the findings of fact deal with more than one district, in each such instance those districts are situated within the same county. Each finding of fact in this Part II follows a similar pattern. The finding of fact begins with data that explain how the information in Part I of the Appendix applies to the district under examination. The finding of fact lists the counties included in the district, along with that district's Total Black Voting Age Population. This information is pertinent to the first *Gingles* precondition, that the minority group is able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. *See Pender Cnty.*, 361 N.C. at 503, 649 S.E.2d at 372 (discussing *Gingles*, 478 U.S. at 50, 106 S. Ct. at 2766, 92 L. Ed. 2d at 46). Subsequent sections of each finding of fact set out how racially polarized voting was found in many of the counties contained within the district or districts, under either Dr. Block's analysis or Dr. Brunell's analysis, or both. This information is pertinent to both the second and third *Gingles* preconditions: that the minority group is politically cohesive and that the majority votes sufficiently as a bloc to enable it usually to defeat the minority's

preferred candidate. *LULAC*, 548 U.S. at 427, 126 S. Ct. at 2615, 165 L. Ed. 2d at 637. Additional information in the finding of fact conveys how many counties within the district or districts are affected by *Gingles* or *Cromartie II*, or both. This information is useful in determining the totality of circumstances.

Plaintiffs have not challenged any of the trial court's findings of fact relating to the twenty-six VRA districts, and thus those findings are binding on appeal. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. The trial court's findings of fact indicate that each of the challenged districts had a Total Black Voting Age Population exceeding fifty percent, thus satisfying the first *Gingles* precondition. *See Pender Cnty.*, 361 N.C. at 503, 649 S.E.2d at 372. The facts found by the trial court also indicate that the maps are sufficient to satisfy the second and third *Gingles* preconditions, as each district demonstrates racially polarized voting according to Dr. Brunell's analysis. *See LULAC*, 548 U.S. at 427, 126 S. Ct. at 2615, 165 L. Ed. 2d at 637. Although Dr. Block's analysis did not cover some of the counties in some of the challenged districts, where the two studies overlapped, they reached the same conclusions.

Moreover, the trial court made additional findings of fact, recited above, that would be relevant to the *Gingles* totality of circumstances test for twenty-two of the challenged VRA districts.[6] Specifically, of the twenty-six VRA districts challenged here, fifteen include counties lying within

[6] The districts not affected by this evidence are Senate 28, House 29, House 31, and House 57.

the area where the *Gingles* court found section 2 violations; nine include counties lying within the area which the parties in the *Cromartie* litigation stipulated to have racially polarized voting; and thirteen included counties that were subject to various section 2 lawsuits filed between 1982 and 2006 in which plaintiffs alleged or established racially polarized voting.[7] While we assume from the Supreme Court's language in *Vera*, 517 U.S. at 978, 116 S. Ct. at 1960-61, 135 L. Ed. 2d at 269, that satisfaction of the *Gingles* preconditions is sufficient to trigger a State's compelling interest in avoiding section 2 liability, we believe that this additional evidence, while pertaining to only some of the covered districts, is consistent with and reinforces the trial court's conclusions of law.

Based upon the totality of this evidence, we are satisfied that the trial court correctly found that the General Assembly identified past or present discrimination with sufficient specificity to justify the creation of VRA districts in order to avoid section 2 liability. *See Shaw II*, 517 U.S. at 909, 116 S. Ct. at 1902, 135 L. Ed. 2d at 221. In addition, we see that the General Assembly, before making its redistricting decisions, had a strong basis in evidence on which to reach a conclusion that race-based remedial action was necessary for each VRA district. *Id.* at 910, 116 S. Ct. at 1903, 135 L. Ed. 2d at 222. Accordingly, we conclude that the trial court's findings of fact as to these VRA districts support its conclusion of law that defendants

[7] The only districts not affected by at least one of these three pieces of evidence are Senate 28, House 29, House 31, and House 57.

established a compelling state interest in creating districts that would avoid liability under section 2 of the Voting Rights Act.

b. Compelling Governmental Interest under Section 5 of the Voting Rights Act

As noted above, forty of North Carolina's one hundred counties were covered by section 5 at the time of redistricting. This section, which prevents retrogression, forbids "[a]ny voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice." 52 U.S.C.S. § 10304(b).[8] Section 5 requires preclearance, either by the United States Department of Justice or by a three-judge panel of the United States District Court for the District of Columbia, of any election procedure that is different from that in force on the relevant coverage date. *See Perry v. Perez*, ___ U.S. ___, ___, 132 S. Ct. 934, 939, 181 L. Ed. 2d 900, 904 (2012) (per curiam) (citing *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S 193, 198, 129 S. Ct. 2504, 2509, 174 L. Ed. 2d 140, 147 (2009)). The Supreme Court has left no doubt, however, that in fashioning its redistricting plans, a State must comply with the substantive requirements of section 5, not merely obtaining preclearance from the Department of Justice. *Miller*, 515 U.S. at 922, 115 S. Ct. at 2491,

[8] This statute no longer applies in North Carolina. *Shelby Cnty. v. Holder*, ___ U.S. ___, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013).

132 L. Ed. 2d at 783. As the Supreme Court intimated in *Miller*, the Department of Justice is not infallible, so courts have "an independent obligation in adjudicating consequent equal protection challenges to ensure that the State's actions are narrowly tailored to achieve a compelling interest." *Id.* Section 5 does not "give covered jurisdictions *carte blanche* to engage in racial gerrymandering in the name of nonretrogression. A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw I*, 509 U.S. at 655, 113 S. Ct. at 2831, 125 L. Ed. 2d at 534.

We concluded above that compliance with section 5 is a compelling state interest. Turning then to the facts of this case, we take into account the evidence recited above in our discussion regarding the State's concern about possible section 2 liability. In addition, the appendices to the trial court's order indicate that all of North Carolina Senate Districts 5, 21, and 28, and all of North Carolina House Districts 5, 7, 12, 24, 42, and 57, are in counties covered by section 5. Also, section 5 covers most of the territory contained in United States Congressional District One, Senate Districts 4 and 20, and House Districts 21, 32, and 48. Moreover, all of the twenty-six challenged districts contain areas that previously have been part of majority-minority districts. As a result of their connection with counties covered under section 5, these districts may become subject to nonretrogression analysis. *Georgia v. Ashcroft*, 539 U.S. 461, 479, 123 S. Ct. 2498, 2511, 156 L. Ed. 2d 428, 451 (2003) ("[I]n examining

whether the new plan is retrogressive, the inquiry must encompass the entire statewide plan as a whole. Thus, while the diminution of a minority group's effective exercise of the electoral franchise in one or two districts may be sufficient to show a violation of § 5, it is only sufficient if the covered jurisdiction cannot show that the gains in the plan as a whole offset the loss in a particular district." (internal citations omitted)). Accordingly, we conclude from the totality of the evidence that a history of discrimination justified the General Assembly's concern about retrogression and compliance with section 5. We further conclude that the General Assembly had a strong basis in evidence on which to reach a conclusion that race-based remedial action was necessary.

3. Narrow Tailoring

Having determined that defendants had a compelling interest both in avoiding section 2 liability and in avoiding retrogression under section 5, we now consider whether the redistricting was sufficiently narrowly tailored to advance those state interests as to the twenty-six districts created to comply with the Voting Rights Act. *See Stephenson I*, 355 N.C. at 377, 562 S.E.2d at 393. In the context of redistricting,

> the "narrow tailoring" requirement of strict scrutiny allows the States a limited degree of leeway in furthering such interests [as VRA compliance]. If the State has a "strong basis in evidence" for concluding that creation of

> a majority-minority district is reasonably necessary to comply with § 2, and the districting that is based on race "substantially addresses the § 2 violation," it satisfies strict scrutiny.

Vera, 517 U.S. at 977, 116 S. Ct. at 1960, 135 L. Ed. 2d at 268 (internal citations omitted). Thus, while a State does not have a free hand when crafting districts with the intent of avoiding section 2 liability, the Supreme Court has acknowledged that "[a] § 2 district that is *reasonably* compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries, may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts in endless 'beauty contests.' " *Id.* at 977, 116 S. Ct. at 1960, 135 L. Ed. 2d at 269.

As discussed above, the trial court found that the General Assembly designed each of the challenged districts to consist of a Total Black Voting Age Population exceeding fifty percent of the total voting age population in that district. We have held that doing so is permissible as a method of addressing potential liability under section 2. *Pender Cnty.*, 361 N.C. at 503, 649 S.E.2d at 372. Unlike redistricting plans that have been faulted for setting arbitrary thresholds for Total Black Voting Age Population*, see, e.g., Page*, 2014 WL 5019686, at *6 (citing and quoting *Smith v. Beasley*, 946 F. Supp. 1174, 1207 (D.S.C.) (1996)), the target of fifty percent plus one of the Total Black Voting Age Population chosen by North Carolina's General Assembly is

consistent with the requirements of the first *Gingles* precondition. Nevertheless, because section 2 limits the use of race in creating remedial districts by allowing race to be considered only to the extent "reasonably necessary" for compliance, the question arises whether the percentages of Total Black Voting Age Population in each of North Carolina's challenged districts are higher than "reasonably necessary" to avoid the risk of vote dilution. *See Vera*, 517 U.S. at 979, 116 S. Ct. at 1961, 135 L. Ed. 2d at 269.

The Total Black Voting Age Population percentage ranges from a low of 50.45% to a high of 57.33% in the twenty-six districts in question. However, the *average* Total Black Voting Age Population of the challenged districts is only 52.28%. Twenty-one of the twenty-six districts have Total Black Voting Age populations of less than 53%, and only two of these districts, Senate 28 and House 24, exceed 55% Total Black Voting Age Population. We are mindful that a host of other factors were considered in addition to race, such as the Whole County Provision of the Constitution of North Carolina, protection of incumbents, one-person, one-vote requirements and partisan considerations. As a result, we are satisfied that these districts are sufficiently narrowly tailored. They do not classify individuals based upon race to an extent greater than reasonably necessary to comply with the VRA, while simultaneously taking into account traditional districting principles.

Plaintiffs argue that creating districts with a Total Black Voting Age Population percentage

exceeding fifty percent constitutes impermissible racial packing, citing *Vera*, 517 U.S. at 983, 116 S. Ct. at 1963, 135 L. Ed. 2d at 272; *Missouri v. Jenkins*, 515 U.S. 70, 88, 115 S. Ct. 2038, 2049, 132 L. Ed. 2d 63, 80 (1995); and *Shaw I*, 509 U.S. at 655, 113 S. Ct. at 2831, 125 L. Ed. 2d at 534. Plaintiffs also argue that districts with a Total Black Voting Age Population exceeding fifty percent are not automatically necessary because minority voters in crossover and coalition districts have elected candidates of their choice where the Total Black Voting Age Population was between forty and fifty percent. However, this Court previously has considered, but declined to adopt, similar arguments. *Pender Cnty.*, 361 N.C. at 502-04, 649 S.E.2d at 371-73. We concluded in that case that applying a bright line rule—that the presence of more than fifty percent of the Total Black Voting Age Population satisfied the first *Gingles* prong—was logical and gave the General Assembly "a safe harbor for the redistricting process." *Id.* at 505, 649 S.E.2d at 373.

Although the burden is upon the State under strict scrutiny, the parties challenging the redistricting must also make a showing.

> In a case such as this one where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate

> political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance.

Cromartie II, 532 U.S. at 258, 121 S. Ct. at 1466, 149 L. Ed. 2d at 453. Here, when the evidence is undisputed that racial identification correlates highly with party affiliation, plaintiffs have failed to meet this obligation. The General Assembly's plans fall within the safe harbor provisions of *Pender County* while respecting, to the extent possible, the Whole County Provision, as mandated by *Stephenson I*. In contrast, plaintiffs' proposals would effectively invite the type of litigation over section 2 claims envisioned in *Pender County*, *see* 361 N.C. at 505-06, 649 S.E.2d at 373, while failing to provide for the legitimate political goals pursued by the General Assembly in its plans.

We are aware of the Supreme Court's warning that "if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments." *Strickland*, 556 U.S. at 24, 129 S. Ct. at 1249, 173 L. Ed. 2d at 190 (plurality) (citations omitted). In addressing this possibility, we note that the average Total Black Voting Age Population in the twenty-six VRA districts is 52.28% of the total voting age population. This figure indicates that minority voters were

moved out of crossover districts only to the extent necessary to meet *Pender County*'s safe harbor provision, while simultaneously pursuing other legitimate political goals, including those mentioned above. Where racial identification correlates highly with party affiliation, placing additional Democratic voters in districts that already vote Democratic is not forbidden as long as the motivation for doing so is not primarily racial. *See Cromartie I*, 526 U.S. at 551-52, 119 S. Ct. at 1551, 143 L. Ed. 2d at 741. Accordingly, we conclude that plaintiffs have failed to demonstrate improper packing or gerrymandering based upon race.

4. Proportionality

Finally, because plaintiffs challenge the General Assembly's consideration of proportionality, the trial court analyzed whether the legislature used proportionality in the enacted plans improperly to "link[ ] the number of majority-minority voting districts to minority members' share of the relevant population." *See De Grandy*, 512 U.S. at 1014, 114 S. Ct. at 2658 n.11, 129 L. Ed. 2d at 792 n.11. The trial court found as fact that "the General Assembly acknowledges that it intended to create as many VRA districts as needed to achieve a 'roughly proportionate' number of Senate, House and Congressional districts as compared to the Black population in North Carolina," adding that each VRA district had to be at least fifty percent African-American in voting age population. The trial court specifically found that the General Assembly's enacted plans

> endeavored to create VRA districts in roughly the same proportion as the ratio of Black population to total population in North Carolina. In other words, because the 2010 census figures established that 21% of North Carolina's population over 18 years of age was 'any part Black,' the corresponding rough proportion of Senate seats, out of 50 seats, would be 10 seats, and hence 10 VRA Senate districts. Likewise, of the 120 House seats, 21% of those seats would be roughly 25 House seats, and hence 25 VRA districts.

Based on these and other findings, the trial court concluded that "the General Assembly had a strong basis in evidence for concluding that 'rough proportionality' was reasonably necessary to protect the State from anticipated liability under § 2 of the VRA and ensuring preclearance under § 5 of the VRA."

Plaintiffs now argue that this conclusion is erroneous as a matter of law because racial proportionality is neither a compelling governmental interest nor a requirement of the VRA. They contend that, because "[t]he VRA was not designed to guarantee majority-minority voting districts, but to guarantee that the processes, procedures, and protocols would be fair and free of racial discrimination," the legislature's redistricting was based upon an unconstitutional premise. Plaintiffs contend that, by focusing on proportionality at the

statewide level, the General Assembly necessarily predetermined how many VRA districts to draw without first considering where potential liability existed for section 2 violations. Plaintiffs maintain that, as a result, the General Assembly's process sought " 'outright racial balancing,' " which is "patently unconstitutional" under such cases as *Fisher v. University of Texas at Austin*, ___ U.S. ___, ___, 133 S. Ct. 2411, 2419, 186 L. Ed. 2d 474, 486 (2013), *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 729-30, 127 S. Ct. 2738, 2757, 168 L. Ed. 2d 508, 529 (2007) (plurality), and *Grutter v. Bollinger*, 539 U.S. 306, 330, 123 S. Ct. 2325, 2339, 156 L. Ed. 2d 304, 333 (2003), and thus can neither be required by section 2 nor constitute a compelling state interest.

The VRA provides that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C.S. § 10301(b). Consistent with this proviso, the Supreme Court has repeatedly held that proportionality does not provide a safe harbor for States seeking to comply with section 2. *LULAC*, 548 U.S. at 436, 126 S. Ct. at 2620, 165 L. Ed. 2d at 642 (citing *De Grandy*, 512 U.S. at 1017-21, 114 S. Ct. at 2660-62, 129 L. Ed. 2d at 794-97). Such a rule "would be in derogation of the statutory text and its considered purpose . . . and of the ideal that the Voting Rights Act of 1965 attempts to foster," *De Grandy*, 512 U.S. at 1018, 114 S. Ct. at 2660, 129 L. Ed. 2d at 795, and could allow "the most blatant racial gerrymandering . . . so long as proportionality was the bottom line," *id.* at 1019, 114 S. Ct. at 2661,

129 L. Ed. 2d at 796. Even so, the Court has also held that proportionality can be an element of the "totality of circumstances" test under *Gingles*. *Id.* at 1000, 114 S. Ct. at 2651, 129 L. Ed. 2d at 784. When considered in this manner, the Court has instructed that the "probative value assigned to proportionality may vary with other facts" and "[n]o single statistic provides courts with a shortcut to determine whether a set of single-member districts unlawfully dilutes minority voting strength." *Id.* at 1020-21, 114 S. Ct. at 2661-62, 129 L. Ed. 2d at 797; *see also LULAC*, 548 U.S. at 436, 126 S. Ct. at 2620, 165 L. Ed. 2d at 642.

In light of these standards, the record here demonstrates that the General Assembly did not use proportionality improperly to guarantee the number of majority-minority voting districts based on the minority members' share of the relevant population. We believe that such an effort, seeking to guarantee proportional representation, proportional success, or racial balancing, would run afoul of the Equal Protection Clause. *See De Grandy*, 512 U.S. at 1017-22, 114 S. Ct. at 2658-62, 129 L. Ed. 2d at 794-98. Instead, the General Assembly considered rough proportionality in a manner similar to its prophylactic consideration of the *Gingles* preconditions, as a means of inoculating the redistricting plans against potential legal challenges under section 2's totality of the circumstances test. Proportionality was not a dispositive factor, but merely one consideration of many described in the materials and other contributions from numerous organizations, experts, and lay witnesses. The General Assembly's consideration of rough

proportionality was merely a means of avoiding voter dilution and potential section 2 liability, not an attempt to trade "the rights of some minority voters under § 2 . . . off against the rights of other members of the same minority class." *Id.* at 1019, 114 S. Ct. at 2661, 129 L. Ed. 2d at 796. Accordingly, we conclude that this factor does not constitute grounds for a violation of section 2.

Thus, with regard to the VRA districts, we hold that, while the General Assembly considered race, the trial court erred by concluding prematurely that race was the predominant factor motivating the drawing of the districts without first performing adequate fact finding. However, because we held above that the trial court correctly found that each of the twenty-six districts survives strict scrutiny, we need not remand the case for reconsideration under what may be a less demanding standard of review.

C. Non-VRA districts

We now turn to the four districts that the trial court found were not drawn as VRA districts but which were challenged by plaintiffs as being the result of racial gerrymandering. These were the Fourth and Twelfth Congressional Districts, North Carolina Senate District 32, and North Carolina House District 54.

The trial court made numerous specific findings of fact as to whether race was the General Assembly's predominant motive in drafting these districts. For example, the court found that race was not a factor in drawing Congressional District

Twelve, Congressional District Four, and House District 54. In fact, the record indicates that the drafters of these three districts did not consider racial data. The trial court found that political goals were a factor in drawing Congressional Districts Twelve and Four, and that protection of incumbents was a factor in drawing Congressional District Twelve and House District 54. The trial court found that the drafting of Senate District 32 was compelled by the need to comply with the population distribution requirements set out in *Stephenson I*. In addition, the drafters were instructed to comply with *Cromartie II* in drawing Congressional District Twelve and Congressional District Four, and with *Gingles* in Senate District 32. The drafters considered the Whole County Provision of the North Carolina Constitution in drawing Senate District 32 and House District 54. Based on these findings, the trial court determined that the "shape, location and composition" of each of these districts was dictated not only by such factors as a desire to avoid liability under section 2 of the Voting Rights Act and attaining preclearance under section 5 of that Act, but also by other "equally dominant legislative motivations," such as complying with the North Carolina Constitution, equalizing population among districts, protecting incumbents in both parties, and fashioning districts "that were more competitive for Republican candidates than the plans used in past decades or any of the alternative plans."

Once the trial court found that race was not a predominant motive in drafting these four districts, it applied the rational basis test. Under this test, a court considers whether the drawing of the districts

bears " '*some* rational relationship to a conceivable legitimate governmental interest.' " *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004) (quoting *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980) (emphasis added)). Concluding that "the General Assembly has articulated a reasonably conceivable state of facts, other than a racial motivation, that provides a rational basis for creating the non-VRA districts," the trial court found that plaintiffs' challenge to these districts failed.

Plaintiffs argue to us that the trial court erred in its findings of fact and conclusions of law regarding Congressional District Twelve and North Carolina Senate District 32, contending that race manifestly was the predominant factor in the construction of these districts. As detailed above, the trial court found both racial and non-racial motivations, with neither category predominant. When a trial court sits without a jury, "the trial court's findings of fact have the force and effect of a jury verdict and are conclusive on appeal if there is competent evidence to support them, even though the evidence could be viewed as supporting a different finding." *Bailey v. State*, 348 N.C. 130, 146, 500 S.E.2d 54, 63 (1998) (citation omitted). Although plaintiffs argue that the evidence cited by the trial court was pretextual and implausible and contend that we should consider and be persuaded by other evidence more favorable to their position that was also presented to the trial court, plaintiffs do not contend that the evidence credited and cited by the trial court was not competent.

We conclude that the trial court did not err either in its determination that the rational basis test was appropriate or in its application of that test to the evidence it credited. The Supreme Court of the United States has recognized that compliance with federal law, incumbency protection, and partisan advantage are all legitimate governmental interests. *See Shaw I*, 509 U.S. at 654, 113 S. Ct. at 2830, 125 L. Ed. 2d at 533 (compliance with federal law); *Karcher*, 462 U.S. at 740, 103 S. Ct. at 2663, 77 L. Ed. 2d at 147 (incumbency protection); *Cromartie I*, 526 U.S. at 551, 119 S. Ct. at 1551, 143 L. Ed. 2d at 741 (partisan interests). In light of this authority and the trial court's findings of fact, we agree that plaintiffs failed to establish that race was the dominant factor in drafting these districts and conclude that the trial court's application of the rational basis test was appropriate. The court's findings of fact support its conclusions of law. The General Assembly's actions in creating these districts were rationally related to all its expressed goals. Accordingly, we affirm the trial court as to these non-VRA districts.

III. Plaintiffs' State Claims

We now consider plaintiffs' claims brought under state law. Plaintiffs argue that the trial court erred when it failed to find that the enacted Senate and House plans violate the Whole County Provision of the North Carolina Constitution. Article II, Section 3(3) of the Constitution of North Carolina provides that "[n]o county shall be divided in the formation of a senate district," while Article II, Section 5(3) contains a similar provision with regard

to each representative district. These prohibitions against dividing counties in the creation of General Assembly districts collectively are called the Whole County Provision.

The tension between the Whole County Provision and federal requirements is apparent. In 1983, a three-judge panel of the United States District Court for the Eastern District of North Carolina held that the Whole County Provision was unenforceable anywhere in the State. *Cavanagh v. Brock*, 577 F. Supp. 176, 181-82 (E.D.N.C. 1983). However, this Court subsequently rejected *Cavanagh*'s analysis and held that the Whole County Provision remained enforceable to the extent that it could be harmonized with federal law. *Stephenson I*, 355 N.C. at 374, 562 S.E.2d at 391. As a result, the Whole County Provision remains in effect but must accommodate both the one-person, one-vote mandate and the requirements of the VRA. Since the Constitution of North Carolina provides that each senator and each representative shall represent "as nearly as may be" an equal number of inhabitants, N.C. Const. art. II, §§ 3(1), 5(1), the former federal requirement is met by definition. Thus, we consider plaintiffs' contentions that the challenged House and Senate districts violate the Whole County Provision, as harmonized with the VRA.

This Court has set out nine criteria for ensuring that House and Senate districts satisfy both the Whole County Provision and the Voting Rights Act. *Stephenson I*, 355 N.C. at 383-84, 562 S.E.2d at 396-97. These criteria may be summarized

as follows: First, "legislative districts required by the VRA shall be formed" before non-VRA districts. *Id.* at 383, 562 S.E.2d at 396-97. Second, "[i]n 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 shall be formed within" the county, "shall be compact," and "shall 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 grouping, 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." 355 N.C. at 383-84, 562 S.E.2d at 397. "[T]he 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.*

In their discussion of the Whole County Provision, plaintiffs contend that the test of a plan's compliance with *Stephenson I*'s fifth and sixth criteria is the number of counties left undivided. They argue that the current plan violates *Stephenson I* because it divides counties and traverses county lines to an unnecessary extent. In support of their argument, plaintiffs submit charts indicating that their suggested "House Fair and Legal" plan results in five fewer divided counties and six fewer county line traversals than the enacted House plan, while maintaining the same number of groupings. Similarly, plaintiffs' charts indicate that their suggested "Senate Fair and Legal" plan divides five fewer counties and contains eleven fewer traversals of county lines than the enacted Senate plan.

Defendants respond that plaintiffs have misinterpreted the requirements of *Stephenson I*. According to defendants, *Stephenson I* is satisfied by minimizing the number of counties contained within each multi-county grouping. In other words, a proper plan maximizes the number of possible two-county groupings before going on to create three-county groupings, maximizes the number of possible three-county groupings before creating four-county groupings, and so on. Defendants argue that plaintiffs have misread *Stephenson I* because, under *Stephenson I*, divisions of counties and traversals of county lines are relevant only if plaintiffs' alternative maps are comparable to the State's maps in terms of the number of counties within each grouping. In support of its argument, the State provides charts showing that the enacted House and Senate plans result in a greater number of groupings that contain fewer counties, as compared with the various proposed alternative plans, all of which create groupings that contain more counties than the enacted plans. To illustrate, the enacted House district plan contains eleven groupings consisting of one county and fifteen groupings consisting of two counties. The closest comparable alternative plan proposed by plaintiffs, House Fair and Legal, also contains eleven groupings consisting of one county but only nine groupings consisting of two counties. Similarly, while both the enacted Senate plan and plaintiffs' proposed Senate Fair and Legal contain one grouping consisting of one county and eleven groupings consisting of two counties, the enacted plan contains four districts consisting of three counties while Senate Fair and Legal contains only three groupings consisting of three counties.

While we are conscious of the efforts of the litigants to interpret *Stevenson I*'s requirements faithfully, after careful review of our opinions in *Stephenson I* and *Pender County*, we are satisfied that defendants' interpretation is correct. *Stephenson I*'s fifth factor states that, when combining two or more counties to comply with the one-person, one-vote standard, "the requirements of the WCP are met by combining or grouping the minimum number of whole, contiguous counties necessary" for compliance. 355 N.C. at 384, 562 S.E.2d at 397. Only after these groupings have been established does *Stephenson I* state that "the resulting interior county lines . . . may be crossed or traversed . . . only to the extent necessary to comply with the . . . 'one-person, one-vote' standard." *Id*. Thus, the process established by this Court in *Stephenson I* and its progeny requires that, in establishing legislative districts, the General Assembly first must create all necessary VRA districts, single-county districts, and single counties containing multiple districts. Thereafter, the General Assembly should make every effort to ensure that the maximum number of groupings containing two whole, contiguous counties are established before resorting to groupings containing three whole, contiguous counties, and so on. As shown by the charts provided by defendants, plaintiffs have not produced an alternative plan that better complies with a correct reading of *Stephenson I*'s fifth and sixth factors than the plans enacted by the General Assembly. Because the enacted plans result in groupings containing fewer whole, contiguous counties than do any of plaintiffs' plans,

we need not discuss the number of counties divided or county lines traversed.

In addition, the maps that plaintiffs employ to support their arguments regarding the Whole County Provision are not helpful because they are premised upon a flawed understanding of our holding in *Pender County*. In that case, we held that the first *Gingles* precondition can be shown only where the minority population is fifty percent plus one of the Total Black Voting Age Population. *Pender Cnty.*, 361 N.C. at 502, 649 S.E.2d at 371 (The "minority group must constitute a numerical majority of the voting population in the area under consideration before Section 2 of the VRA requires the creation of a legislative district to prevent dilution of the votes of that minority group."). Here, as did the plaintiffs in *Pender County*, *see id.* at 502-03, 649 S.E.2d at 371-72, plaintiffs argue that we should adopt a standard that allows VRA requirements to be satisfied by other forms of minority districts, such as coalition and crossover districts. Not only is plaintiffs' argument inconsistent with our holding in *Pender County*, this flawed approach adversely affects the first step of the process required by *Stephenson I*, the formation of VRA districts. As a result, plaintiffs' maps are distorted *ab initio* and the distortion is compounded at each subsequent step. Consequently, even if plaintiffs' proposed alternative plans were comparable to the enacted plans in terms of the number and composition of county groupings, their incompatibility with *Pender County* means that they cannot serve as an adequate basis for comparison with the enacted plans.

Plaintiffs have also compared the General Assembly's enacted plans with earlier redistricting plans approved in North Carolina. However, those plans were tailored to a particular time and were based upon then-existing census numbers and population concentrations. The requirement that the State maintain its one-person, one-vote standard as populations shift makes comparisons between current and previous districting plans of limited value. The utility of prior plans is further diminished by subsequent clarifications of the legal standards in effect when these earlier plans were promulgated. *See, e.g.*, *Pender Cnty.*, 361 N.C. at 503-04, 649 S.E.2d at 372 (explaining the requirements of the first *Gingles* precondition). As a result, no meaningful comparisons can be made in this case.

Separately, plaintiffs argue that this Court should consider the purported lack of compactness of the districts created by the General Assembly and the harm resulting from splitting precincts. While these are valid considerations and may be evidence of other legal infirmities, neither constitutes an independent legal basis for finding a violation, and we are unaware of any justiciable standard by which to measure these factors.

Finally, plaintiffs argue that the enacted plans violate the "Good of the Whole" clause found in Article I, Section 2 of the Constitution of North Carolina. We do not doubt that plaintiffs' proffered maps represent their good faith understanding of a plan that they believe best for our State as a whole. However, the maps enacted by the duly elected General Assembly also represent an equally

legitimate understanding of legislative districts that will function for the good of the whole. Because plaintiffs' argument is not based upon a justiciable standard, and because acts of the General Assembly enjoy "a strong presumption of constitutionality," *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (per curiam) (citation omitted), plaintiffs' claims fail.

We agree with the unanimous three-judge panel that the General Assembly's enacted plans do not violate plaintiffs' constitutional rights. We hold that the enacted House and Senate plans satisfy state and federal constitutional and statutory requirements. Accordingly, we affirm the trial court.

AFFIRMED.

Justice HUNTER did not participate in the consideration or decision of this case.

Justice BEASLEY concurring in part and dissenting in part.

I agree with the majority's holding with respect to plaintiffs' challenge under the "Good of the Whole" Clause in Article I, Section 2 of the Constitution of North Carolina. Nonetheless, because the twenty-six VRA districts at issue and two of the four non-VRA districts were created in direct contradiction to federal and state provisions, this Court should vacate the trial court's judgment and remand the matter to the lower court for proper findings of fact and conclusions of law. I therefore respectfully dissent. Furthermore, there are several points of error, any of which would warrant vacating and remanding. With respect to the VRA districts, the record supports the trial court's conclusions that the VRA districts were drawn with race as the predominant motive and that strict scrutiny applies. Contrary to the conclusions reached by the trial court and the majority, however, these districts fail strict scrutiny. With respect to the non-VRA districts, the trial court's findings do not support its conclusions that race was not the predominant motive for the drafting of Senate District 32 and Congressional District 12. Because the shape and composition of invalid districts necessarily affect other districts, the redistricting plan at issue violates the Whole County Provisions set forth in Article II, Sections 3(3) and 5(3) of the Constitution of North Carolina.

I.

Though this honorable Court wishes to achieve finality in this appeal, the citizens of this

state would be better served by this Court if we held our usual course and vacated and remanded the case to the trial court for proper findings of fact and conclusions of law based upon a correct interpretation of the law. I disagree with the majority's assertion that doing so "would achieve nothing but delay" because "the panel has already conducted its analysis under th[e] [strict scrutiny] standard." In its analysis the trial court incorrectly stated and applied the standard. At a minimum, proper findings, once made, would better illuminate defendants' actions in view of the appropriate constitutional tests and would provide a better basis for proper review by this Court, potential consideration by the Supreme Court of the United States, and assessment by the citizens of North Carolina of our General Assembly's actions and this Court's decision.

In reaching its conclusions, the trial court misapplied precedent from this Court and the Supreme Court of the United States. The majority compounds the error by ignoring altogether the trial court's explicit findings of fact and by too generously characterizing the General Assembly's enacted plan. The majority's departure from this Court's usual course of adherence to our settled principles of appellate review could create a stain of suspicion among the citizens of the state regarding the actions of their elected officials and bodies of government—both legislative and judicial. *See, e.g.*, *State v. Carter*, 322 N.C. 709, 722, 370 S.E.2d 553, 560 (1988) ("[W]e regard the crucial matter of the integrity of the judiciary . . . to be [a] paramount consideration[ ].").

II.

Contrary to the majority's opinion, the trial court correctly concluded that strict scrutiny applies; however, the trial court incorrectly articulated the standard and therefore improperly applied its findings of fact to the standard. Of particular concern is the trial court's finding that the General Assembly's use of "rough proportionality" as a redistricting "benchmark" survives strict scrutiny. This misstep is fatal to the VRA districts and consequently affects the legitimacy of non-VRA districts drawn in view of the Whole County Provisions. Although this Court should vacate and remand for reconsideration in light of correct principles, the majority attempts to cure the trial court's errors and prematurely affirm an incomplete and incorrect judgment. As stated above, it would be impractical to vacate and remand piecemeal because the invalidity of at least one House, Senate, or Congressional district would necessarily compromise the shape and composition of the remaining districts in the affected group or groups.

A.

It is well established that "all laws that classify citizens on the basis of race, including racially gerrymandered districting schemes, are constitutionally suspect and must be strictly scrutinized." *Hunt v. Cromartie*, 526 U.S. 541, 546, 119 S. Ct. 1545, 1548-49, 143 L. Ed. 2d 731, 737-38 (1999) ("*Cromartie I*") (citations omitted). "This is true whether or not the reason for the racial classification is benign or the purpose remedial."

Shaw v. Hunt, 517 U.S. 899, 904-05, 116 S. Ct. 1894, 1900, 135 L. Ed. 2d 207, 218 (1996) ("*Shaw II*") (citations omitted). Yet, "[a]pplying traditional equal protection principles in the voting-rights context is 'a most delicate task' . . . because a legislature may be conscious of the voters' races without using race as a basis for assigning voters to districts." *Id*. at 905, 116 S. Ct. at 1900, 135 L. Ed. 2d at 218 (quoting *Miller v. Johnson*, 515 U.S. 900, 905, 115 S. Ct. 2475, 2483, 132 L. Ed. 2d 762, 772 (1995)). Only "when race becomes the 'dominant and controlling' consideration" is the right to equal protection jeopardized. *Id*. (quoting *Miller*, 515 U.S. at 913, 115 S. Ct. at 2486, 132 L. Ed. 2d at 777).

The burden to make this showing falls to the plaintiff:

> The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations.

Miller, 515 U.S. at 916, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779-80.

If the plaintiff satisfies this initial burden of production, the redistricting legislation "cannot be upheld unless it satisfies strict scrutiny, [the] most rigorous and exacting standard of constitutional review."[9] *Id*. at 920, 115 S. Ct. at 2490, 132 L. Ed. 2d at 782. Once strict scrutiny review is triggered, the burden shifts to the State to "show not only that its redistricting plan was in pursuit of a compelling state interest, but also that 'its districting legislation is narrowly tailored to achieve [that] compelling interest.' " *Shaw II*, 517 U.S. at 908, 116 S. Ct. at 1902, 135 L. Ed. 2d at 220-21 (alteration in original) (quoting *Miller*, 515 U.S. at 920, 115 S. Ct. at 2490, 132 L. Ed. 2d at 782).

Here, while acknowledging the fact-intensive nature of the examination into whether race was the predominant factor motivating the legislature's redistricting decision, the trial court believed that it was "able to by-pass this factual inquiry" for the twenty-six VRA districts:

> The Plaintiffs collectively challenge as racial gerrymanders 9 Senate, 18 House

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[9] "If, however, [the] plaintiff[ ] cannot show that race was the 'predominant factor' to which traditional districting principles were 'subordinated,' and thus cannot meet the threshold for triggering strict scrutiny, it follows that the facially neutral classification (the electoral district) will be subject, at most, to rational basis review." *Quilter v. Voinovich*, 981 F. Supp. 1032, 1050 (N.D. Ohio 1997) (citing *Miller*, 515 U.S. at 915-16, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779-80), *aff'd*, 523 U.S. 1043, 118 S. Ct. 1358, 140 L. Ed. 2d 508 (1998).

> and 3 U.S. Congressional districts created by the General Assembly in the Enacted Plans. Of those 30 challenged districts, it is undisputed that the General Assembly intended to create 26 of the challenged districts to be "Voting Rights Act districts" [hereinafter "VRA districts"] and that it set about to draw each of these VRA districts so as to include at least 50% Total Black Voting Age Population [hereinafter "TBVAP"]. Moreover, the General Assembly acknowledges that it intended to create as many VRA districts as needed to achieve a "roughly proportionate" number of Senate, House and Congressional districts as compared to the Black population in North Carolina. To draw districts based upon these criteria necessarily requires the drafters of districts to classify residents by race so as to include a sufficient number of black voters inside such districts, and consequently exclude white voters from the districts, in an effort to achieve a desired racial composition of >50% TBVAP and the desired "rough proportionality." This is a racial classification.

(footnote call numbers omitted). Accordingly, the trial court "conclude[d] . . . that in drawing [the] VRA districts . . . [,] the shape, location and racial composition of each VRA district was predominantly determined by a racial objective and was the result

of a racial classification sufficient to trigger the application of strict scrutiny as a matter of law."

The majority explains that

> [b]ecause of the trial court's truncated findings of fact [as to whether race was "the General Assembly's predominant motivation in forming the twenty-six VRA districts"], we do not know which other factors may have influenced the creation and shape of these twenty-six districts and the extent of any such influence. As a result, we do not know whether race fairly can be described as the predominant factor in the formation of these districts and whether, in turn, strict scrutiny was the appropriate standard of review.

The majority then analyzes the case as if strict scrutiny applies. This Court should remand for the trial court to clarify the full basis for its conclusion that plaintiffs have met their burden to show that race was the predominant factor. The record provides substantial evidence and the Supreme Court of the United States provides clear guidance on this point. Furthermore, as discussed below, the trial court's subsequent findings with regard to proportionality inescapably lead to the conclusion that race was the predominant factor, thereby requiring strict scrutiny.

Plaintiffs and *amici* point to evidence showing that State Senator Robert Rucho and State

Representative David Lewis, the respective chairs of the Senate and House Redistricting Committees, instructed Dr. Thomas Hofeller, the "chief architect" of the redistricting plans, to draw the plans to provide "substantial proportional[ity]" between the percentage of the state's population that is Black and the percentage of districts that would be majority Black. Dr. Hofeller was also told to "draw a 50% plus one district wherever in the state there is a sufficiently compact black population" to do so. The public statements released by Senator Rucho and Representative Lewis also reflect these legislative goals, saying that, in order to comply with VRA section 2, the VRA districts are designed to provide Black voters with "substantial proportionality" and "must be established with a BVAP of 50% plus one." As stated particularly well by the *amici* election law professors, this "undisputed, direct evidence" demonstrates the legislature's intent to "creat[e] a certain number of majority-minority districts and then pack[ ] the maximum number of black voters possible into the districts."[10] This evidence and the

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[10] "Packing" is one means of diluting minority voting strength. For example, "[a] minority group . . . might have sufficient numbers to constitute a majority in three districts. So apportioned, the group inevitably will elect three candidates of its choice, assuming the group is sufficiently cohesive. But if the group is packed into two districts in which it constitutes a super-majority, it will be assured only two candidates." *Voinovich v. Quilter*, 507 U.S. 146, 153-54, 113 S. Ct. 1149, 1155, 122 L. Ed. 2d 500, 511 (1993). In contrast to packing, minority voting strength may also be diluted by what is known as "cracking": "A politically cohesive minority group that is large enough to constitute the majority in a single-member district has a good chance of electing its candidate of choice, if the group is placed in a district where it constitutes a majority. Dividing the minority group among various districts so that it

arguments advanced by plaintiffs and *amici* underscore the trial court's error in "by-pass[ing] [its] factual inquiry."

The Supreme Court of the United States has found similar evidence to be sufficient to trigger strict scrutiny of the redistricting plans. *See, e.g.*, *Bush v. Vera*, 517 U.S. 952, 958-59, 116 S. Ct. 1941, 1951-52, 135 L. Ed. 2d 248, 257 (1996) (plurality) (explaining that strict scrutiny applies when race is "the predominant factor" in a legislature's redistricting plan) (citation, emphasis, and quotation marks omitted); *Id.* at 1002, 116 S. Ct. at 1974, 135 L. Ed. 2d at 286 (Thomas & Scalia, JJ., concurring in the judgment) (explaining that Texas's admission that "it intentionally created majority-minority districts" to comply with the VRA was "enough to require application of strict scrutiny in this suit"); *Shaw II*, 517 U.S. at 906, 116 S. Ct. at 1901, 135 L. Ed. 2d at 219 (applying strict scrutiny after "fail[ing] to see how" a court could "reach[ ] any conclusion other than that race was the predominant factor in" the General Assembly's drawing of redistricting lines when the State admitted that its "overriding" purpose was to obtain preclearance from DOJ (citation, emphasis, and quotation marks omitted)); *Miller*, 515 U.S. at 919, 115 S. Ct. at 2490, 132 L. Ed. 2d at 781 (concluding that Georgia's express desire to obtain preclearance was "powerful evidence that the legislature subordinated traditional districting principles to race when it ultimately enacted a plan creating three majority-black

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is a majority in none may prevent the group from electing its candidate of choice . . . ." *Id.* at 153, 113 S. Ct. at 1155, 122 L. Ed. 2d at 511.

districts" and thus strict scrutiny applied). Accordingly, in view of *Vera*, *Shaw II*, and *Miller*, the trial court in this case correctly concluded that strict scrutiny is the appropriate level of review to apply to the enacted plans.

Nonetheless, the trial court improperly applied the standard. In its decision the trial court states that if plaintiffs meet the threshold burden of establishing that "race was the overriding consideration behind a redistricting plan,"

> the state then has the burden of "producing evidence that the plan's use of race is narrowly tailored to further a compelling state interest, and the plaintiffs bear the ultimate burden of persuading the court either that the proffered justification is not compelling or that the plan is not narrowly tailored to further it." *Shaw v. Hunt*, 861 F. Supp. 408, 436 (E.D. N.C. 1994).

In support of this proposition, the trial court quotes the district court's decision in *Shaw II*. In *Shaw II*, however, the Supreme Court of the United States reversed the trial court and, in doing so, held that under strict scrutiny, "*North Carolina . . . must show* not only that its redistricting plan was in pursuit of a compelling state interest, but also that 'its districting legislation is narrowly tailored to achieve [that] compelling interest.' " 517 U.S. at 908, 116 S. Ct. at 1902, 135 L. Ed. 2d at 220-21 (alteration in original) (emphasis added) (quoting *Miller*, 515 U.S. at 920, 115 S. Ct. at 2490, 132 L. Ed. 2d at 782). This

language from *Shaw II* clearly places the burden of proof on the State once strict scrutiny is triggered.

This conclusion is bolstered by the Supreme Court's earlier statement in *Miller* that, "[t]o satisfy strict scrutiny, *the State must demonstrate* that its districting legislation is narrowly tailored to achieve a compelling interest." 515 U.S. at 920, 115 S. Ct. at 2490, 132 L. Ed. 2d at 782 (emphasis added) (citations omitted). More recently, in the affirmative action context, the Supreme Court has been more explicit on this point: Under strict scrutiny, "*it remains at all times the [government]'s obligation to demonstrate*, and the Judiciary's obligation to determine" that the challenged action is narrowly tailored to achieve a compelling governmental interest. *Fisher v. Univ. of Tex. at Austin*, ___ U.S. ___, ___, 133 S. Ct. 2411, 2420, 186 L. Ed. 2d 474, 486-87 (2013) (emphasis added).

Here the trial court attempted to distinguish *Fisher* on the ground that the General Assembly is entitled to some degree of deference given that redistricting is "an inherently political process." The Supreme Court, however, has declined to defer to political decision makers and apply something less than strict scrutiny to race-based classifications:

> But we have refused to defer to state officials' judgments on race in . . . areas where those officials traditionally exercise substantial discretion. For example . . . . in the redistricting context, despite the traditional deference given to States when they

> design their electoral districts, we have subjected redistricting plans to strict scrutiny when States draw district lines based predominantly on race.

Johnson v. California, 543 U.S. 499, 512, 125 S. Ct. 1141, 1150, 160 L. Ed. 2d 949, 962-63 (2005) (citations omitted); *accord Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 744, 127 S. Ct. 2738, 2766, 168 L. Ed. 2d 508, 539 (2007) (plurality) (explaining that "deference is fundamentally at odds with our equal protection jurisprudence" and that courts "put the burden on state actors to demonstrate that their race-based policies are justified" (citations and quotation marks omitted)). Moreover, to whatever extent the legislature may be entitled to deference, that "limited degree of leeway in furthering [its] interests" in complying with the VRA relates to whether the State has met its burden of establishing "the 'narrow tailoring' requirement of strict scrutiny." *Vera*, 517 U.S. at 977, 116 S. Ct. at 1960, 135 L. Ed. 2d at 268 (plurality). Nonetheless, the State is not relieved of "the *burden to prove* 'that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate.' " *Fisher*, ___ U.S. at ___, 133 S. Ct. at 2419, 186 L. Ed. 2d at 485 (alterations in original) (emphasis added) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505, 109 S. Ct. 706, 728, 102 L. Ed. 2d 854, 889 (1989)).

Thus, the trial court's misunderstanding and misapplication of the strict scrutiny analytical framework should warrant this Court's vacating the

trial court's decision and remanding for reconsideration in light of correct principles. *See id.* at ___, 133 S. Ct. at 2421, 186 L. Ed. 2d at 488 (remanding after determining that the trial court and court of appeals misapplied strict scrutiny standard to enable challenged admissions policy to "be considered and judged under a correct analysis"). Failure to apply properly the operative constitutional test is, in itself, a sufficient basis for overturning the trial court's decision. *See id.*

B.

I turn next to address the invalidity of the twenty-six VRA districts. In view of the appropriate strict scrutiny standard, assuming that the state had a compelling interest in avoiding liability under VRA section 2 and obtaining preclearance under VRA section 5,[11] and assuming that the factors set forth in *Thornburg v. Gingles* are met, the trial court's findings with respect to proportionality do not support its ultimate conclusion that the redistricting plans pass strict scrutiny. Therefore, this Court should vacate and remand regarding the twenty-six VRA districts.

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[11] The United States Supreme Court has repeatedly assumed without deciding that compliance with the VRA can be a compelling state interest in the strict scrutiny context, but the Court has not expressly decided the issue. *See Shaw II*, 517 U.S. at 915, 116 S. Ct. at 1905, 135 L. Ed. 2d at 225 ("We assume, *arguendo*, for the purpose of resolving this suit, that compliance with § 2 could be a compelling interest . . . ."); *Miller*, 515 U.S. at 921, 115 S. Ct. at 2490-91, 132 L. Ed. 2d at 782 (assuming that satisfying "the Justice Department's preclearance demands" can be a compelling interest).

In *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986), the Supreme Court set forth three "necessary preconditions" for a vote-dilution claim brought under VRA section 2: the minority group must be able to demonstrate that (1) it is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) it is "politically cohesive"; and (3) the majority votes "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id*. at 50-51, 106 S. Ct. at 2766-67, 92 L. Ed. 2d at 46-47 (citations omitted). "In a § 2 case, only when a party has established the *Gingles* requirements does a court proceed to analyze whether a violation has occurred based on the totality of the circumstances." *Bartlett v. Strickland*, 556 U.S. 1, 11-12, 129 S. Ct. 1231, 1241, 173 L. Ed. 2d 173, 182 (2009) (plurality) (citations omitted). "While . . . proportionality is not dispositive in a [districting challenge], it is a relevant fact in the totality of circumstances to be analyzed . . . ." *Johnson v. De Grandy*, 512 U.S. 997, 1000, 114 S. Ct. 2647, 2651, 129 L. Ed. 2d 775, 784 (1994).

Here, in considering whether the General Assembly's plan was narrowly tailored, the trial court reviewed, *inter alia*, defendants' Memorandum of Law in Support of their Motion for Summary Judgment. Defendants' Memorandum states:

> [d]efendants freely admit three principles followed by them in drawing the enacted legislative plans:
>
> . . . .

> 3. that the General Assembly would explore the possibility of establishing a sufficient number of VRA legislative districts to provide African-American voters with rough proportionality in the number of VRA districts in which they have reasonable opportunity to elect their candidates of choice.

Defendants further state that they "increased the number of VRA districts to provide African American voters with rough proportionality in the number of districts in which they can elect candidates of choice."

After reviewing defendants' Memorandum and other materials, the trial court entered its judgment explaining the General Assembly's use of proportionality in redrawing its district plans as follows:

> *The undisputed evidence establishes that the General Assembly, in drafting the Enacted Plans, endeavored to create VRA districts in roughly the same proportion as the ratio of Black population to total population in North Carolina.* In other words, because the 2010 census figures established that 21% of North Carolina's population over 18 years of age was "any part Black," the corresponding rough proportion of Senate seats, out of 50 seats, would be

10 seats, and hence 10 VRA Senate districts. Likewise, of the 120 House seats, 21% of those seats would be roughly 25 House seats, and hence 25 VRA districts.

The General Assembly, in using "rough proportionality" as a *benchmark* for the number of VRA districts it created in the Enacted Plans, relies upon Supreme Court precedent that favorably endorses "rough proportionality" as a means by which a redistricting plan can provide minority voters with an equal opportunity to elect candidates of choice. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 429-30 (2006) [hereinafter *LULAC*]; *Shaw II*, 517 U.S. at 916 n.8; *De Grandy*, 512 U.S. at 1000. In *De Grandy*, the Supreme Court said that "no violation of § 2 can be found . . . , where, in spite of continuing discrimination and racial bloc voting, minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population." 512 U.S. at 1013-1015. Where a State's election districts reflect substantial proportionality between majority and minority populations, the Supreme Court explained, such districts would "thwart the historical tendency to exclude [the minority

> population], not encourage or perpetuate it." *Id.* at 1014. It is reasonable for the General Assembly to rely upon this unequivocal holding of the Supreme Court in drafting a plan to avoid § 2 liability. When the Supreme Court says "no violation of § 2 can be found" under certain circumstances, prudence dictates that the General Assembly should be given the leeway to seek to emulate those circumstances in its Enacted Plans.

(ellipsis in original) (emphases added) (footnote call number omitted). The trial court concluded that achieving rough proportionality was "not inconsistent with the General Assembly's obligation to narrowly tailor the plans under strict scrutiny." Although the trial court correctly cited the holding in *De Grandy*, the case does not support the trial court's conclusion.

In *De Grandy* the Florida legislature drew majority-minority districts roughly proportionate in number to the minorities' share of the total Florida population. While the Supreme Court held that such redistricting did not violate VRA section 2, the Court explicitly rejected the state's proposed rule that "rough proportionality" would always immunize the state from VRA section 2 liability, stating:

> [W]e reject the safe harbor rule because of . . . a tendency to promote and perpetuate efforts to devise majority-minority districts even in circumstances

> where they may not be necessary to achieve equal political and electoral opportunity. Because in its simplest form the State's rule would shield from § 2 challenge a districting scheme in which the number of majority-minority districts reflected the minority's share of the relevant population, the conclusiveness of the rule might be an irresistible inducement to create such districts. It bears recalling, however, that for all the virtues of majority-minority districts as remedial devices, they rely on a quintessentially race-conscious calculus aptly described as the "politics of second best."

Id. at 1019-20, 114 S. Ct. at 2661, 129 L. Ed. 2d at 796 (citation omitted); *see also id.* at 1025, 114 S. Ct. at 2664, 129 L. Ed. 2d at 799 (O'Connor, J., concurring) (Proportionality, while "*always* relevant," is "*never* itself dispositive."). Further, "the most blatant racial gerrymandering in half of a county's single-member districts would be irrelevant under § 2 if offset by political gerrymandering in the other half, so long as proportionality was the bottom line." *Id*. at 1019, 114 S. Ct. at 2661, 129 L. Ed. 2d at 796 (majority) (citations omitted). Thus, the Supreme Court admonished that an "inflexible rule" permitting the use of rough proportionality as a safe harbor "would run counter to the textual command of § 2, that the presence or absence of a violation be assessed 'based on the totality of circumstances.' The need for such 'totality' review springs from the demonstrated ingenuity of state and local

governments in hobbling minority voting power . . . ." *Id.* at 1018, 114 S. Ct. at 2660, 129 L. Ed. 2d at 795 (citations omitted).

A state legislature is thus required to determine whether *each* majority-minority district is reasonably necessary to afford minorities equal political and electoral opportunity. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 437, 126 S. Ct. 2594, 2620-21, 165 L. Ed. 2d 609, 643 (2006) (explaining that "proportionality" may not "displace" the "intensely local appraisal" of each challenged district (internal quotation marks omitted) (quoting *Gingles*, 478 U.S. at 79, 106 S. Ct. at 2781, 92 L. Ed. 2d at 65)). Here, however, defendants' public statements undermine their adherence to the applicable standards and demonstrate the central role proportionality played in the 2011 redistricting plan. On 17 June 2011, defendants announced a public hearing on the matter, in which defendants sought redistricting plans with a sufficient number of majority-minority districts to provide substantial proportionality. Defendants recommended "that each plan include 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 candidate of choice." Defendants explained that "proportionality for the African American citizens in North Carolina means the creation of 24 majority African American House districts and 10 majority Senate districts. . . . Unlike the 2003 benchmark plans, the Chairs' proposed 2011 plans will provide

substantial proportionality for North Carolina's African American citizens."

Notwithstanding, based on its misreading of *De Grandy*, the trial court cites approvingly defendants' use of proportionality as the "benchmark" for creating the enacted plan—beginning with proportionality as the goal and then working backwards to achieve that goal. Similarly, the trial court reasoned: "When the Supreme Court says 'no violation of § 2 can be found' under certain circumstances, prudence dictates that the General Assembly should be given the leeway to seek to emulate those circumstances in its Enacted Plans." (quoting *De Grandy*, 512 U.S. at 1000, 114 S. Ct. at 2651, 129 L. Ed. 2d at 784). But this is precisely what the Supreme Court rejected in *De Grandy*: proportionality is relevant as a *means* to an end (compliance with the VRA), but it is not an *end* in itself and it does not—contrary to the trial court's reasoning—provide a safe harbor for redistricting plans premised on race. The trial court's misunderstanding of the applicable law permeates its analysis of the narrow tailoring requirement and leads it incorrectly to conclude that defendants' use of proportionality as an end is constitutionally permissible.

The majority states that "the trial court analyzed whether the legislature used proportionality in the enacted plans improperly to 'link[ ] the number of majority-minority voting districts to minority members' share of the relevant population.' " (alteration in original) (citation omitted). After setting forth various standards and

principles, the majority summarily concludes that "the record here demonstrates that the General Assembly did not use proportionality improperly to guarantee the number of majority-minority voting districts based on the minority members' share of the relevant population." The majority is only able to draw this conclusion by ignoring the trial court's determination—based upon "the undisputed evidence"—that the General Assembly used proportionality as a "benchmark." The majority's conclusion becomes more confusing when the majority states, "We believe that such an effort, seeking to guarantee proportional representation, proportional success, or racial balancing, would run afoul of the Equal Protection Clause." (citing *De Grandy*, 512 U.S. at 1017-22, 114 S. Ct. at 2660-62, 129 L. Ed. 2d at 794-98). I agree "that such an effort . . . would run afoul of the Equal Protection Clause," and it does here. In view of defendants' public statements, defendants' Memorandum of Law to the trial court, the undisputed evidence before the trial court, and the trial court's unqualified finding that the legislature used proportionality as a "benchmark" for its redistricting plans, the majority's attempt to explain otherwise is unconvincing and runs afoul of the United States Supreme Court's warnings in *De Grandy*.

By characterizing the General Assembly's consideration of race as a "prophylactic consideration" used "as a means of inoculating the redistricting plans against potential legal challenges under section 2's totality of the circumstances test," the majority compounds the trial court's error and purports to establish the use of race as a legislative

safe harbor in derogation of the clear prohibition against such use set forth by the Supreme Court of the United States. *De Grandy*, 512 U.S. at 1018-20, 114 S. Ct. at 2660-61, 129 L. Ed. 2d at 795-97. In light of these errors, this Court should vacate the trial court's order and remand the case for reconsideration under a correct understanding of the law.

C.

With respect to the four non-VRA districts, plaintiffs challenge the trial court's determination that "race was not the predominant motive in the creation of" Senate District 32 and Congressional District 12. "The legislature's motivation is itself a factual question," *Cromartie I*, 526 U.S. at 549, 119 S. Ct. at 1550,143 L. Ed. 2d at 740, and a trial court's findings resolving factual issues in a nonjury trial are binding on appeal "if there is competent evidence to support them, even though the evidence could be viewed as supporting a different finding," *Stephenson v. Bartlett*, 357 N.C. 301, 309, 582 S.E.2d 247, 252 (2003) ("*Stephenson II*") (citation and quotation marks omitted).

i.

Looking first at Senate District 32, plaintiffs contend that the trial court's findings actually undermine its conclusion that strict scrutiny does not apply because the districts are not race-based. The trial court found the following relevant facts:

204. As was true under the 2000 Census, under the 2010 Census there is insufficient TBVAP in Forsyth County to draw a majority-TBVAP Senate district in Forsyth County. However, because of concerns regarding the State's potential liability under § 2 and § 5, Dr. Hofeller was instructed by the redistricting chairs to base the 2011 Senate District 32 on the 2003 versions of Senate District 32.

. . . .

207. The first version of Senate District 32 that was released by the General Assembly had a TBVAP of 39.32%. Subsequently, the SCSJ plan was released. Its version of District 32 was located in a three-county and three-district group (Forsyth, Davie, Davidson). The SCSJ District 32 had a TBVAP of 41.95%. The SCSJ District 32 was a majority-minority coalition district with a non-Hispanic white population of 43.18%.

208. The redistricting chairs were concerned that any failure to match the TBVAP % found in the SCSJ District 32 could potentially subject the state to liability under § 2 or § 5 of the VRA. Therefore, Dr. Hofeller was instructed by the Redistricting Chairs to re-draw the State's version of Senate

> District 32 so that it would at least equal the SCSJ version in terms of TBVAP.

As discussed above, the Supreme Court of the United States has held that when redistricting plans drawn in an attempt to preempt VRA section 2 litigation or obtain VRA section 5 preclearance are predominantly race-based, such plans attract strict scrutiny. *See Vera*, 517 U.S. at 959, 116 S. Ct. at 1951-52, 135 L. Ed. 2d at 257; *Shaw II*, 517 U.S. at 906-07, 116 S. Ct. at 1901, 135 L. Ed. 2d at 219-20; *Miller*, 515 U.S. at 920, 115 S. Ct. at 2490, 132 L. Ed. 2d at 782.

The trial court acknowledged that compliance with the VRA was a motivating factor behind the enacted plans, but concluded that "comply[ing] with the Whole County Provision, . . . equaliz[ing] population among the districts, . . . protect[ing] incumbents, and . . . satisfy[ing] the General Assembly's desire to enact redistricting plans that were more competitive for Republican candidates" were "equally dominant legislative motivations." Notwithstanding, in the section of its fact-finding order addressing Senate District 32, the trial court made no findings regarding these other considerations. While the evidence might support such a conclusion, the trial court's actual findings do not. Accordingly, this Court should vacate and remand on the issue of whether race was the predominant motivation behind the shape, location, and composition of Senate District 32.

ii.

With respect to Congressional District 12, the trial court's findings belie a fundamental problem with redistricting, particularly in North Carolina, the importance of which cannot be overstated. In *Easley v. Cromartie*, 532 U.S. 234, 121 S. Ct. 1452, 149 L. Ed. 2d 430 (2001), the Supreme Court of the United States observed that "racial identification correlates highly with political affiliation" in North Carolina. *Id.* at 258, 121 S. Ct. at 1466, 149 L. Ed. 2d at 453. As such, the plaintiffs in that case "ha[d] not successfully shown that race, rather than politics, predominantly account[ed] for" the shape, location, and composition of the 1997 version of Congressional District 12. *Id.* at 257, 121 S. Ct. at 1466, 149 L. Ed. 2d at 453. Because race and politics historically have been and currently remain intertwined in North Carolina, I cannot escape my conviction that politics are a pretext for this excruciatingly contorted race-based district. Therefore, the trial court incorrectly concluded that "the shape, location and composition of [this district] . . . included equally dominant legislative motivations . . . to protect incumbents[ ] and to . . . enact redistricting plans that were more competitive for Republican candidates." To allow this serpentine district, which follows the I-85 corridor between Mecklenburg and Guilford Counties, to be drafted for political advantage is a proxy for racial disenfranchisement and effectively creates a "magic words" threshold. Upholding this district's tortured construction creates an incentive for legislators to stay "on script" and avoid mentioning race on the record, and in this instance, it is disingenuous to suggest that race is not the predominant factor. As

such, this Court should vacate and remand as to Congressional District 12.

iii.

With respect to House District 54 and Congressional District 4, the trial court also found that race was not the predominant motivating factor. Plaintiffs do not contest these determinations, and they are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). As stated above, however, because the shapes and compositions of the four non-VRA districts are necessarily affected by the VRA districts, it would be impossible to vacate and remand piecemeal.

D.

With respect to the Whole-County Provisions ("WCP"), plaintiffs contend that the trial court erred in concluding that the enacted house and senate plans do not violate the provisions of the state constitution, which dictate that "[n]o county shall be divided in the formation of a senate district," N.C. Const. art. II, § 3(3), and "[n]o county shall be divided in the formation of a representative district," *id.* art. II, § 5(3). In *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) ("*Stephenson I*"), this Court construed the WCP in light of federal law and "mandated that in creating legislative districts, counties shall not be divided except to the extent necessary to comply with federal law, including the 'one-person, one-vote' principle and the VRA." *Stephenson II,* 357 N.C. at 309, 582 S.E.2d at 251-52 (citing *Stephenson I*, 355 N.C. at 363-64, 562 S.E.2d

at 384-85). To ensure complete compliance with federal law and to provide maximum enforcement of the WCP, this Court "outlined in *Stephenson I* the following requirements that must be present in any constitutionally valid redistricting plan:"

> [1.] . . . [T]o ensure full compliance with federal law, legislative districts required by the VRA shall be formed prior to creation of non-VRA districts. . . . In the formation of VRA districts within the revised redistricting plans on remand, we likewise direct the trial court to ensure that VRA districts are formed consistent with federal law and in a manner having no retrogressive effect upon minority voters. *To the maximum extent practicable, such VRA districts shall also comply with the legal requirements of the WCP, as herein established* . . . .
>
> [2.] In forming new legislative districts, any deviation from the ideal population for a legislative district shall be at or within plus or minus five percent for purposes of compliance with federal "one-person, one-vote" requirements.
>
> [3.] In counties having a 2000 census population sufficient to support the formation of one non-VRA legislative district . . . , the WCP requires that the physical boundaries of

any such non-VRA legislative district not cross or traverse the exterior geographic line of any such county.

[4.] When two or more non-VRA legislative districts may be created within a single county, . . . single-member non-VRA districts shall be formed within said county. *Such non-VRA districts shall be compact and shall not traverse the exterior geographic boundary of any such county*.

[5.] In counties having a non-VRA population pool which cannot support at least one legislative district . . . or, alternatively, counties having a non-VRA population pool which, if divided into districts, would not comply with the . . . "one-person, one-vote" standard, the requirements of the WCP are met by combining or grouping the *minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard. Within any such contiguous multi-county grouping, compact districts shall be formed, consistent with the at or within plus or minus five percent standard, whose boundary lines do not cross or traverse the "exterior" line of the multi-county grouping*; provided, however, that the resulting interior county lines

created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard.

[6.] The intent underlying the WCP must be enforced to the maximum extent possible; thus, *only the smallest number of counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard shall be combined*[.]

[7.] . . . *[C]ommunities of interest should be considered in the formation of compact and contiguous electoral districts*.

[8.] . . . [M]ulti-member districts shall not be used in the formation of legislative districts unless it is established that such districts are necessary to advance a compelling governmental interest.

[9.] Finally, we direct that any new redistricting plans, including any proposed on remand in this case*, shall depart from strict compliance with the legal requirements set forth herein only* to the extent necessary to comply with federal law.

Stephenson II, 357 N.C. at 305-07, 582 S.E.2d at 250-51 (alterations in original) (quotation marks omitted) (quoting *Stephenson I*, 355 N.C. at 383-84, 562 S.E.2d at 396-97 (emphasis added)).

In view of my analysis concerning plaintiffs' equal protection claim, the WCP issue also warrants remanding the case because the General Assembly, in attempting to comply with *Stephenson I's* Rule 1, drew the VRA districts before applying Rules 2 through 9. Because I conclude that the VRA districts are unconstitutional, this Court should instruct the General Assembly to redraft its redistricting plans. The unconstitutional VRA districts would necessarily affect the result of the General Assembly's application of the rubric set forth in *Stephenson I*. *See Pender Cnty. v. Bartlett*, 361 N.C. 491, 508-09, 649 S.E.2d 364, 375 (2007) (concluding that a house district, created with the intent to comply with VRA section 2, was not required by the VRA and thus "must be drawn in accordance with the WCP and the *Stephenson I* requirements"), *aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1, 129 S. Ct. 1231, 173 L. Ed. 2d 173 (2009). As such, I would vacate and remand on this issue.

E.

Having carefully considered the precedent established by the Supreme Court of the United States, the decisions of this Court, and the record on appeal, it is important to recognize that race can be used as a factor fairly, but it equally important to emphasize that race must not be used punitively. To this end, it is important to be cognizant of race, not

only in view of the historical record of our state and our nation, but also taking into account modern realities and future possibilities. It is for this reason that I note my concern with the majority's statement that "no meaningful comparisons can be made" with "earlier redistricting plans approved in North Carolina" because "those plans were tailored to a particular time and were based upon then-existing census numbers and population concentrations." Some comparisons may be of limited value, but increasingly sophisticated data processing and modes of visual representation may provide helpful comparisons among past, present, and proposed districts in view of past and present population concentrations. It would be a disservice to North Carolina's citizens and our courts if the majority's statements are read to foreclose without qualification any meaningful comparisons with earlier approved plans.

III.

As discussed above, the trial court erred by making incomplete findings of fact and conclusions of law. Further, even using the findings as made by the trial court, the court's judgment discloses several serious misapplications of law, which led the court to erroneous conclusions of law. There can be no serious debate that strict scrutiny applies in view of the General Assembly's use of race as a benchmark for measuring the redistricting plan. The VRA districts are fatally defective in view of the legislature's use of racial proportionality as a safe harbor, and the invalidity of these districts necessarily renders invalid the entire plan under

settled federal constitutional standards announced by the Supreme Court of the United States. Similarly, the trial court's findings regarding the non-VRA districts do not support its conclusions. Furthermore, these impermissibly racially gerrymandered districts fail under the Whole County Provision of the North Carolina Constitution. For any of these errors, this Court would do well to vacate and remand rather than prematurely affirm a defective and ultimately undemocratic districting plan.

Accordingly, I concur in that part of the majority's opinion regarding plaintiffs' remaining state claims related to the "Good of the Whole" Clause in Article I, Section 2 of the Constitution of North Carolina, and respectfully dissent from those parts of the opinion affirming the trial court's erroneous judgment.

Justice HUDSON joins in this opinion.

[ENTERED JULY 8, 2013]

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

MARGARET DICKSON, *et al.*,	)
	)
Plaintiffs,	)
	)
v.	)
	)
ROBERT RUCHO, *et al.*,	)
	)
Defendants.	)

11 CVS 16896

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

11 CVS 16940

(Consolidated)

JUDGMENT and MEMORANDUM OF DECISION

OUTLINE OF THE JUDGMENT OF THE TRIAL COURT

more Voting Rights Act districts than reasonably necessary to comply with the Act?

b. Did the General Assembly fail to narrowly tailor the Enacted Plans by "packing" the Voting Rights Act districts?

c. Did the General Assembly fail to narrowly tailor the Enacted Plans by placing the Voting Rights Act districts in geographic locations where there is insufficient evidence of a reasonable threat of § 2 liability?

d. Did the General Assembly fail to narrowly tailor the Enacted Plans by crafting irregularly shaped and non-compact Voting Rights Act districts or by otherwise disregarding traditional redistricting principles such as communities of interest and precinct boundaries?

3. NC-NAACP Plaintiffs' Equal Protection claim of diminution of political influence.

D. Did racial motives predominate in the creation of the Non-Voting Rights Act districts?

SHAPES AND LOCATIONS OF DISTRICT LINES FOR CONGRESSIONAL DISTRICT 4 OR 12, SENATE DISTRICTS 31 OR 32 OR HOUSE DISTRICTS 51 OR 54.

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I. INTRODUCTION

Redistricting in North Carolina is an inherently political and intensely partisan process that results in political winners and, of course, political losers. The political party controlling the General Assembly hopes, through redistricting legislation, to apportion the citizens of North Carolina in a manner that will secure the prevailing party's political gain for at least another decade. While one might suggest that there are more expedient, and less manipulative, methods of apportioning voters, our redistricting process, as it has been for decades, is ultimately the product of democratic elections and is a compelling reminder that, indeed, "elections have consequences."

Political losses and partisan disadvantage are not the proper subject for judicial review, and those whose power or influence is stripped away by shifting political winds cannot seek a remedy from courts of law, but they must find relief from courts of public opinion in future elections. Our North Carolina Supreme Court has observed that "we do not believe the political process is enhanced if the power of the courts is consistently invoked to second-guess the General Assembly's redistricting decisions." *Pender County v. Bartlett*, 361 N.C. 491,

506 (2007) [hereinafter *Pender County*] *aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1 (2009). Rather, the role of the court in the redistricting process is to ensure that North Carolinians' constitutional rights – not their political rights or preferences -- are secure. In so doing, this trial court must apply prevailing law, consider arguments, and examine facts dispassionately and in a manner that is consistent with each judge's oath of office -- namely "without favoritism to anyone or to the State."

This case has benefited from exceptionally well-qualified legal counsel who have zealously represented their clients and their respective positions. The court has benefited from thorough briefing, a well-developed factual record, and persuasive arguments. The court has carefully considered the positions advocated by each of the parties and the many appellate decisions governing this field of law, and the court has pored over thousands of pages of legal briefs, evidence and supporting material. The trial court's judgment, as reflected in this memorandum of decision, is the product of due consideration of all arguments and matters of record.

It is the ultimate holding of this trial court that the redistricting plans enacted by the General Assembly in 2011 must be upheld and that the Enacted Plans do not impair the constitutional rights of the citizens of North Carolina as those rights are defined by law. This decision was reached unanimously by the trial court. In other words, each of the three judges on the trial court --appointed by

the North Carolina Chief Justice from different geographic regions and each with differing ideological and political outlooks -- independently and collectively arrived at the conclusions that are set out below. The decision of the unanimous trial court follows.

II. PROCEDURAL HISTORY

On July 27 and 28, 2011, following the 2010 Decennial Census, the North Carolina General Assembly enacted new redistricting plans for the North Carolina House of Representatives,[1] North Carolina Senate,[2] and United States House of Representatives[3] pursuant to Article II, §§ 3 and 5 of the North Carolina Constitution and Title 2, § 2a and 2c of the United States Code. On September, 2, 2011, the North Carolina Attorney General sought administrative preclearance from the United States Attorney General as required by § 5 of the Voting Rights Act ("VRA"). 42 U.S.C. § 1973c (2013). The redistricting plans were pre-cleared administratively by the United States Attorney General on November 1, 2011.

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[1] Session Law 2011-404 (July 28, 2011) also known as "Lewis-Dollar-Dockham 4 [hereinafter "Enacted House Plan"].

[2] Session Law 2011-402 (July 27, 2011) also known as "Rucho Senate 3 [hereinafter "Enacted Senate Plan"]."

[3] Session law 2011-403 (July 28, 2011) also known as "Rucho-Lewis Congress 3 [hereinafter "Enacted Congressional Plan"]. Collectively, the 2011 plans are referred to as the "Enacted Plans."

On November 1, 2011, the General Assembly also alerted the United States Department of Justice that an error in the computer software program used to draw the redistricting plans had caused certain areas of the state to be omitted from the original plans. The General Assembly passed legislation on November 1, 2011 to cure this technical defect. The United States Attorney General pre-cleared the revised plans on December 8, 2011.

Meanwhile, Plaintiffs filed separate suits on November 3 and 4, 2011, challenging the constitutionality of the redistricting plans and seeking a preliminary injunction to prevent Defendants[4] from conducting elections using the Enacted Plans. In accordance with N. C. Gen. Stat. § 1-267.1, the Chief Justice appointed a three-judge panel to hear both actions [hereinafter the "trial court"].

On December 19, 2011, the trial court consolidated the cases. On the same day Defendants filed their answers and moved to dismiss the suit. Thereafter, on January 20, 2012, the trial court entered an order denying Plaintiffs' motion for a preliminary injunction. The trial court also entered an order on February 6, 2012 allowing in part and denying in part Defendants' motion to dismiss.[5]

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[4] The Defendants are the State of North Carolina, the State Board of Elections and various members of the North Carolina General Assembly named only in their official capacity. The Defendants are collectively referred to in this Memorandum as "the Defendants" or "the General Assembly."

[5] The Court, in its February 6, 2012 order, allowed Defendants' Motions to Dismiss as to claims for relief 6, 7, 8, 12 and 13 of

On April 20, 2012, the trial court entered an order compelling the production of certain documents. The trial court's order was appealed as a matter of right to the North Carolina Supreme Court ("N.C. Supreme Court"). On January 25, 2013, the N.C. Supreme Court issued its ruling on that interlocutory matter.

During the week of February 25, 2013, the trial court conducted hearings on cross-motions for summary judgment filed by the parties. Following the hearings, the trial court took those matters under advisement.

On May 13, 2013, the trial court, pursuant to Rule 42(b)(1) of the North Carolina Rules of Civil Procedure, ordered that two issues be separated from the remaining pending issues and that a bench trial be held on those two issues.[6] A bench trial was

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the *NC State Conference of the Branches of the NAACP et al. v. The State of North Carolina et al.* complaint and claims for relief 1, 2, 3, 4, 5, 6, 7, 8, 17 and 18 of the *Dickson et al. v. Rucho et al.* complaint.

[6] The two issues separated for trial in the May 13, 2013 order were: "(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 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 those districts?"

held on June 5 and 6, 2013, before the three judges of the trial court, who received evidence through witnesses and designations of the record.

The trial court, having considered all matters of record and the arguments of counsel, now enters this Judgment.

III. SUMMARY JUDGMENT STANDARD

Summary judgment must be granted when the "pleadings, depositions, answers to interrogatories, and the admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. R. Civ. P. 56(c). The rule is "designed to eliminate the necessity of a formal trial where only questions of law are involved and a fatal weakness in the claim of a party is exposed." *Dalton v. Camp*, 353 N.C. 647, 650 (2001). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the non-moving party. Moreover the party moving for summary judgment bears the burden of establishing the lack of any triable issue." *Id.* at 651 (citation omitted).

Pending before the trial court is the Defendants' Motion for Summary Judgment seeking judgment in Defendants' favor on each of Plaintiffs' claims. Also pending is the Plaintiffs' Motion for Partial Summary Judgment seeking judgment in Plaintiffs' favor on many of their claims against the Defendants. The trial court, in considering these

cross-motions for summary judgment, has concluded that certain discrete issues present genuine issues of material fact and thus, as to those issues, summary judgment would be inappropriate. In the trial court's May 13, 2013 order (*supra.* at fn. 6), those discrete issues were identified and separated from the remaining issues in the case and, in accordance with that order, a bench trial, limited to evidence on those issues, has occurred. The trial court's findings of fact and conclusions of law with respect to those discrete issues are set out and incorporated into this Judgment.

As for the remaining issues raised by the parties' cross-motions for summary judgment, the trial court concludes that no genuine issues of material fact exist, and that the remaining issues present only issues of law.[7] Therefore, all remaining issues can be resolved through summary judgment. The trial court's conclusions of law on each of these issues are also set forth in this Judgment.[8]

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[7] See further, fn. 12, *infra.*

[8] Traditionally, in granting or denying summary judgment, trial courts' written orders are general and nons-pecific, and trial courts often refrain from elaborating upon their reasoning. In this matter, perhaps ignoring the advice of Will Rogers to "never miss a good chance to shut up," the trial court has opted to share its reasoning because the issues presented are ones of important public concern. The trial court has not endeavored to address all arguments supporting the results set out herein, fully recognizing that any appellate review of this matter, with the exception of matters of evidence, is *de novo*. Rather, the trial court has set out its reasoning on the issues it has concluded are salient and essential to the outcome.

IV. ARE THE CHALLENGED DISTRICTS A RACIAL GERRYMANDER THAT VIOLATES THE EQUAL PROTECTION GUARANTEES OF THE UNITED STATES OR NORTH CAROLINA CONSTITUTIONS? (*Dickson amended complaint, Claims 19-24; NAACP amended complaint Claims 1-3 & 9-11)*

Plaintiffs contend that the challenged districts of the Enacted Plans violate the equal protection clauses of the North Carolina and United States constitutions by unlawfully classifying voters and otherwise discriminating against voters on the basis of race. The trial court has concluded that the determination of this issue is a mixed question of law and fact.

A. Burden of Proof

With respect to redistricting, because the task is one that ordinarily falls within a legislature's sphere of competence, the United States Supreme Court (hereinafter "Supreme Court") has made it clear that the legislature must have discretion to exercise political judgment necessary to balance competing interests. Thus, in reviewing the legality of a redistricting plan, "courts must 'exercise extraordinary caution' in adjudicating claims that a State has drawn district lines on the basis of race." *Easley v. Cromartie*, 532 U.S. 234, 242 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)) [hereinafter *Cromartie II*].

The Plaintiffs bear the burden of proof of establishing that the Enacted Plans violate equal

protection guarantees. This remains true even in the context of the strict scrutiny analysis discussed below. Under strict scrutiny, the burden of proof as to whether race was the overriding consideration behind a redistricting plan "rests squarely with the Plaintiffs." *Johnson v. Miller*, 864 F. Supp. 1354, 1378-79 (S.D. Ga. 1994) *aff'd* 515 U.S. 900 (1995). If the Plaintiffs meet that burden, the state then has the burden of "producing evidence that the plan's use of race is narrowly tailored to further a compelling state interest, and the plaintiffs bear the ultimate burden of persuading the court either that the proffered justification is not compelling or that the plan is not narrowly tailored to further it." *Shaw v. Hunt*, 861 F. Supp. 408, 436 (E.D. N.C. 1994). The state's burden of production is a heavy burden because "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the [government] is pursuing a goal important enough to warrant use of a highly suspect tool." *Richmond v. J.A. Croson*, 488 U.S. 469, 493 (1989). Racial classifications are "presumptively invalid and can be upheld only upon an extraordinary justification" by the state. *Shaw v. Reno*, 509 U.S. 630, 643-44 (1993) [hereinafter *Shaw I*] (quoting *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979)).

The heavy duty of production upon the state was affirmed in the Supreme Court's most recent equal protection analysis in *Fisher v. University of Texas,* 570 U.S. __ (2013) where, in the context of an affirmative action plan at an academic institution, the Court said:

> the University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference. . . . it is for the courts, not the university administrators, to ensure that "the means chosen to accomplish the government's asserted purpose must be specifically and narrowly framed to accomplish that purpose."

Id. at No. 11-345, slip op. at 10, (citing *Grutter v. Bollinger*, 539 U.S. 306, 333, 337 (2003)). The Court summarized the respective burdens as follows: "[a] plaintiff, of course, bears the burden of placing the validity of a university's adoption of an affirmative action plan in issue. But strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice." *Id*. at 11.

The *Fisher* Court also provides instructive language to the trial court for the judicial review of an equal protection claim by explaining that "narrow tailoring also requires that the reviewing court verify that it is 'necessary' for a university to use race to achieve the educational benefits of diversity. . . . Although 'narrow tailoring does not require exhaustion of every *conceivable* race-neutral alternative,' strict scrutiny does require a court to examine with care, and not defer to, a university's 'serious good faith consideration of workable race neutral alternatives.'" *Id.* at 10 (emphasis original).

There are, however, two important distinctions that must be noted between the *Fisher* holding, which relates to strict scrutiny of university enrollment policies, and judicial review of claims of racial gerrymandering. The first has already been noted: redistricting, unlike university enrollment, is an inherently political process delegated to the legislative branch of government. Second, unlike academic admission policies, where a university can create affirmative action plans on the basis of relatively easily measured current and historic enrollment data, in redistricting, a legislature must, to a certain extent, tailor its redistricting plans according to its best predictions of how a future court or the U.S. Department of Justice will, at a future date after enactment, view those plans if challenged in litigation or when submitted for preclearance. A legislature must, in legislative redistricting, peer into the future somewhat because it must take into account the compelling governmental interests of avoiding *future* liability under § 2 of the VRA and ensuring *future* preclearance of the redistricting plans under § 5 of the VRA. *See*, *Shaw v. Hunt*, 517 U.S. 899, 916 (1996) [hereinafter *Shaw II*] ("the legislative action must, at a minimum, remedy the *anticipated* violation or achieve compliance to be narrowly tailored." (emphasis added)). Consequently, any judicial standard of review that requires the reviewing court to strike a racial classification that is not "necessary," in absolute terms, to avoid some yet unknown liability or yet unknown objection to preclearance would be an impossibly stringent standard for both the legislature to meet or the court to apply. Recognizing this, the Supreme Court has instructed, with respect to redistricting plans

designed to avoid future § 2 liability or to ensure § 5 preclearance, "that the 'narrow tailoring' requirement of strict scrutiny allows the States a limited degree of leeway in furthering such interests. If the State has a 'strong basis in evidence' for concluding that creation of a majority-minority district is reasonably necessary to comply with § 2, and the districting that is based on race 'substantially addresses the § 2 violation,' it satisfies strict scrutiny." *Bush v. Vera*, 517 U.S. 952, 977 (1996) (citations omitted) (rejecting as "impossibly stringent" the lower court's view of the narrow tailoring requirement that "a district must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria") (citing *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 291 (1986) ("state actors should not be 'trapped between the competing hazards of liability' by the imposition of unattainable requirements under the rubric of strict scrutiny.")).

B. Level of Scrutiny

Generally, all racial classifications imposed by a government must be analyzed by a reviewing court under strict scrutiny, even if the laws are "remedial" or "benign" in nature. *Johnson v. California,* 543 U.S. 499, 505 (2005); *Shaw I*, 509 U.S. at 656; *Wygant,* 476 U.S. 267. However, strict scrutiny does not apply to redistricting plans merely because the drafters prepared plans with a "consciousness of race." Nor does it apply to all cases of intentional creation of majority-minority districts, or where race was a motivation for the drawing of such districts. *Vera*, 517 U.S. at 958. Indeed, because of the VRA,

race is "obviously a valid consideration in redistricting, but a voting district that is *so* beholden to racial concerns that it is inexplicable on other grounds becomes, *ipso facto*, a racial classification." *Johnson v. Miller*, 864 F. Supp. at 1369.

Rather, in redistricting cases, strict scrutiny is an appropriate level of scrutiny when plaintiffs establish that "all other legislative districting principles were subordinated to race and that race was the predominant factor motivating the legislature's redistricting decision." *Cromartie v. Hunt*, 133 F. Supp. 2d 407 (2000) (citing *Miller v. Johnson*, 515 U.S. 900, 916 (1995)); *Vera,* 517 U.S. at 959 (citing *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). The districts must be unexplainable on grounds other than race, and it must be established that the legislature neglected all traditional redistricting criteria such as compactness, continuity, respect for political subdivisions and incumbency protection. *Cromartie v. Hunt*, 133 F. Supp. 2d 407; *Vera*, 517 U.S. at 959.

Unless the legislature acknowledges that race was the predominant factor motivating redistricting decisions, the determination by the trial court of the legislature's motive and, hence, the appropriate level of scrutiny, is an inherently factual inquiry requiring "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). In the absence of direct evidence of racial motivation, circumstantial evidence, such as dramatically irregular shapes of districts, may serve as a "proxy for direct evidence of

a legislature's intentions." *Johnson v. Miller*, 864 F. Supp. at 1370 (citing *Shaw I,* 509 U.S. at 647). Indeed, a dramatically irregular shaped district has been called the "smoking gun," revealing the racial intent needed for an Equal Protection claim. *Id.*

In this litigation, however, the trial court concludes that it is able to by-pass this factual inquiry for some, but not all, of the challenged districts. The Plaintiffs collectively challenge as racial gerrymanders 9 Senate, 18 House and 3 U.S. Congressional districts created by the General Assembly in the Enacted Plans.[9] Of those 30 challenged districts, it is undisputed that the General Assembly intended to create 26 of the challenged districts to be "Voting Rights Act districts" [hereinafter "VRA districts"] and that it set about to draw each of these VRA districts so as to include at least 50% Total Black Voting Age Population [hereinafter "TBVAP"].[10] Defs.' Mem. Supp. Summ. J. 3. Moreover, the General Assembly acknowledges that it intended to create as many VRA districts as needed to achieve a "roughly proportionate" number of Senate, House and Congressional districts as compared to the Black population in North Carolina. *Id.* To draw districts based upon these criteria necessarily requires the

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[9] Plaintiffs collectively challenge as racial gerrymanders Senate Districts 4, 5, 14, 20, 21, 28, 32, 38 and 40, House Districts 5, 7, 12, 21, 24, 29, 31, 32, 33, 38, 42, 48, 54, 57, 99, 102, 106 and 107, and Congressional Districts 1, 4 and 12.

[10] Of the challenged districts listed in fn. 9, *supra*, all but Senate District 32, House District 54 and Congressional Districts 4 and 12 were created by the General Assembly as VRA Districts.

drafters of districts to classify residents by race so as to include a sufficient number of black voters inside such districts, and consequently exclude white voters from the districts, in an effort to achieve a desired racial composition of >50% TBVAP and the desired "rough proportionality." This is a racial classification.

Racial and ethnic classifications of any sort are "inherently suspect and call for the most exacting judicial scrutiny." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (Powell, J., 1978). "Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, *Korematsu* v. *United States*, 323 U.S. 214 (1944), but the standard of justification will remain constant. . . . When [classifications] touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Bakke, supra* at 299. Thus, the trial court concludes, for the purpose of this analysis, that in drawing VRA districts -- even though legislative intent may have been remedial and the districts may have been drawn to conform with federal and state law to provide Black voters in those districts with an opportunity to elect their preferred candidate of choice -- the shape, location and racial composition of each VRA district was predominantly determined by a racial objective and was the result of a racial classification sufficient to trigger the application of strict scrutiny as a matter of law.

In choosing to apply strict scrutiny, the trial court acknowledges that a persuasive argument can be made that compliance with the VRA is but one of several competing redistricting criteria balanced by the General Assembly and that a lesser standard of review might be appropriate. *See, e.g.*, *Vera*, 517 U.S. at 958; *Wilkins v. West*, 264 Va. 447 (2002). Nonetheless, the trial court employs the strict scrutiny standard of review for two additional reasons: (1) the methodology developed by our appellate courts for analysis of constitutional claims under the strict scrutiny standard provides a convenient and systematic roadmap for judicial review, *see, e.g.*, *Fisher v. Univ. of Tex.,* 631 F.3d 213, 231 (5th Cir. Tex. 2011) *vacated and remanded* 570 U.S. __ (2013); and (2) 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 and a less exacting level of scrutiny applied.

As for the remaining four challenged districts, namely those not created by the General Assembly as VRA Districts, the trial court has received and examined evidence regarding the General Assembly's motive so as to ascertain whether race was the predominant factor motivating the shape and composition of these districts. The trial court's findings of fact and conclusions are set out below at § IV(D).

C. *Analysis of the Voting Rights Act Districts created in the Enacted Plans under the Strict Scrutiny Standard of Review*

Under the strict scrutiny analysis, the trial court must determine (1) whether the Enacted Plans further a "compelling governmental interest" and (2) whether the Enacted Plans are "narrowly tailored" to further that interest. *Wygant,* 476 U.S. at 274. In this case, the Defendants assert that the VRA Districts in the Enacted Plans were drawn to protect the State from liability under § 2 of the VRA, and to ensure preclearance of the Enacted Plans under § 5 of the VRA.

1. Compelling Governmental Interest

In general, compliance with the Voting Rights Act can be a compelling governmental interest.[11] A redistricting plan furthers a compelling governmental interest if the challenged districts are "reasonably established" to avoid liability under § 2 of the VRA or the challenged districts are

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[11] In *Vera*, five members of the Court "assumed without deciding" that compliance with § 2 of the Voting Rights Act is a compelling state interest. 517 U.S. at 977 (plurality opinion); *Id*. at 1003 (concurring opinion of Thomas, J., joined by Scalia, J.). Justice O'Connor, however, who authored the plurality opinion, also wrote a separate concurring opinion in which she expressed her opinion that compliance with the Act is a compelling state interest, *Id*. at 992 (concurring opinion of O'Connor, J.), a view that seems to be shared by the four dissenting justices as well, *Id*. at 1004 (dissenting opinion of Stevens, J., joined by Ginsberg and Breyer, JJ.); 517 U.S. at 1065 (Souter, J., dissenting, joined by Ginsberg and Breyer, JJ.). *See further, Cromartie v. Hunt*, 133 F. Supp. 2d at 423 (finding compliance with VRA § 2 and § 5 to be compelling state interests).

"reasonably necessary" to obtain preclearance of the plan under § 5 of the VRA. *Shaw I*, 509 U.S. at 655; *Vera*, 517 U.S. at 977; *Cromartie v. Hunt,* 133 F. Supp. 2d at 423.

To determine whether, as a matter of law, the Enacted Plans further compelling governmental interests, the trial court must examine evidence before the General Assembly at the time the plans were adopted and determine, from that evidence, whether the General Assembly has made a showing that it had a "strong basis in evidence" to conclude that the districts, as drawn, were reasonably necessary to avoid liability and obtain preclearance under the VRA. *Cromartie v. Hunt*, 133 F. Supp. 2d 407; *Shaw II*, 517 U.S. at 910.[12]

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[12] The Plaintiffs and Defendants are in agreement that substantially all of the issues in this litigation can be determined as a matter of law through summary judgment. The Plaintiffs' inform the trial court that: "[i]n applying strict scrutiny, this court should examine the evidence that the legislature had before it when drawing each of the challenged districts and determine: (1) whether *as a matter of law* that evidence constitutes strong evidence that the districts created were necessary to meet the identified compelling public interest; and (2) whether *as a matter of law* that evidence constitutes strong evidence that the legislature used race in drawing the districts only to the extent necessary to achieve some compelling goal." The Plaintiffs further acknowledge that "*there is no material dispute* here over the *process* that the legislature used in drawing the challenged districts or the *information* upon which the legislature says it relied to justify the districts it drew." Plts' Supp. Mem. Summ. J. 3 (emphasis added). The Defendants likewise agree that substantially all issues in this litigation are appropriately resolved by summary judgment, although the Defendants further suggest that the "strong basis in evidence" test resembles the "substantial evidence based upon the whole record" standard used by the

a. *Avoiding Voting Rights Act §2 Liability*

Avoiding liability under § 2 of the VRA can be a compelling governmental interest. *Vera*, 517 U.S. at 977; *Cromartie v. Hunt*, 133 F. Supp. 2d at 423. The General Assembly is not required to have proof of a certain § 2 violation before drawing districts to avoid § 2 liability but, rather, the trial court is required to defer to the General Assembly's "reasonable fears of, and their reasonable efforts to avoid, § 2 liability." *Vera*, 517 U.S. at 978.

The General Assembly's "reasonable fears" must be based upon strong evidence in the legislative record that three factors, known as the

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North Carolina Supreme Court and federal courts to review agency decisions. See, e.g. *N.C. Dep't of Env't and Natural Res. v. Carroll,* 358 N.C. 649, 660 (2004). Defs.' Memo in Response to the Court's Inquiry of April 5, 2013, p. 3. This analogy is helpful – while the "strong basis in evidence" test certainly implies a more critical, and less deferential, standard of review than the "substantial evidence test," the substantial evidence test is a question of law for the reviewing court, as Defendants argue should be the case here. This suggestion has some support in persuasive authority. *See, e.g. Contractors Ass'n v. City of Philadelphia*, 91 F.3d 586, 596 (3d Cir. 1996) ("ultimately, whether a strong basis in evidence of past or present discrimination exists, thereby establishing a compelling state interest for the municipality to enact a race-conscious ordinance, is a question of law, subject to plenary review. The same is true of the issue of whether there is a strong basis in evidence for concluding that the scope of the ordinance is narrowly tailored to remedy the identified past or present discrimination")(citations omitted). In any event, whether applying the Plaintiffs' rationale or the Defendants', both reach the same conclusion, as does the trial court, that the issues before the trial court are predominantly issues of law appropriate for summary judgment.

Gingles factors, existed in North Carolina when the Enacted Plans were adopted. The *Gingles* factors, which are a mandatory precondition to any § 2 claim against the State, are (1) that a minority group exists within the area affected by the Enacted Plans, and that this group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) that the group is politically cohesive; and (3) that racial bloc voting usually will work to defeat the minority's preferred candidate. *Vera*, 517 U.S. at 978; *Johnson v. De Grandy*, 512 U.S. 997, 1006-09 (1994); *Growe v. Emison,* 507 U.S. 25, 40, 41 (1993); *see also Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). In a §2 lawsuit, once the three *Gingles* factors are established, the trial court must consider the "totality of the circumstances" to determine whether a majority-minority district is appropriate to remedy vote dilution. *Shaw II,* 517 U.S. at 914.[13] In judicial review of the Enacted Plans, the trial court must examine the record before the General Assembly to determine, as a matter of law,14 whether this strong basis in evidence exists.

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[13] None of the Supreme Court's racial gerrymandering decisions have imposed the "totality of the circumstances" requirement upon a state legislature, which suggests that the legislature has discretion to enact majority-minority districts if there is a strong basis in the legislative record of just the three *Gingles* factors. However, in reviewing the record before the General Assembly at the time of the enactment of the Enacted Plans, the trial court has considered whether there was a strong basis in evidence to conclude not only that the *Gingles* factors existed, but also whether there was a strong basis in evidence to conclude that the "totality of the circumstances" would support the creation of majority-minority districts. 14 *See* fn. 12, *supra.*

The legislative record that existed at the time of the enactment of the Enacted Plans included:

- testimony from lay witnesses at numerous public hearings conducted throughout the state both before and after draft redistricting plans were proposed by the General Assembly;

- testimony and correspondence from representatives of interest groups and advocacy organizations, including the Southern Coalition for Social Justice ("SCSJ"), the Alliance for Fair Redistricting and Minority Voting Rights ("AFRAM") , the NC NAACP, Democracy NC, and the League of Women Voters;

- Legal opinions from faculty from the UNC School of Government;

- Scholarly writings regarding voting rights in North Carolina;

- Law review articles submitted to the General Assembly's Redistricting Committee by various individuals or entities;

- Election results for elections conducted through and including 2010;

- An American Community Service survey of North Carolina household incomes, education levels, employment and other demographic data by county based upon race;

- An expert report from Dr. Ray Block offered by SCSJ and AFRAM;

- An expert report from Dr. Thomas Brunell, retained by the General Assembly;

- Prior redistricting plans; and

- Alternative redistricting plans proposed by SCSJ and AFRAM, Democratic leaders, and the Legislative Black Caucus ("LBC").[15]

A partial listing of the categories of evidence before the General Assembly is referenced in greater detail in **Appendix A** of this Judgment. This listing illustrates both the scope and detail of the information before the General Assembly at the time of the passage of the Enacted Plans, as well as the evidentiary strength of the record.

The trial court concludes, as a matter of law, based upon a review of the entire record before the General Assembly at the time of the passage of the Enacted Plans, that the General Assembly had a strong basis in evidence to conclude that each of the *Gingles* preconditions was present in substantial portions of North Carolina and that, based upon the totality of circumstances, VRA districts were required to remedy against vote dilution. Therefore, the trial court concludes, the General Assembly had a compelling governmental interest of avoiding § 2

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[15] The alternative plans received by the General Assembly prior to the enactment of the Enacted Plans were as follows: Congressional Fair and Legal, Senate Fair and Legal and House Fair and Legal, all entered into the Legislative Record during floor debate on July 25, 2011 (also referred to as "Fair and Legal" or "F&L"), the Possible Senate Districts and the Possible House Districts, also entered into the Legislative Record during the floor debate on July 25, 2011 (also referred to as "PSD" and "PHD" plans or, alternatively "Legislative Black Caucus Plans" or "LBC" plans), and Senate, House and Congressional Possible Maps prepared by the AFRAM and the SCSJ, presented at public hearings held on May 9 and June 23, 2011 (also referred to as "SCSJ" maps).

liability and was justified in crafting redistricting plans reasonably necessary to avoid such liability.

b. Ensuring Voting Rights Act §5 Preclearance

Ensuring preclearance of redistricting plans under § 5 of the VRA can also be a compelling governmental interest. *Vera,* 517 U.S. at 982.[16] Forty counties in North Carolina are "covered jurisdictions" under § 5 of the VRA. Section 5 suspends all changes to a covered jurisdiction's elections procedures, including changes to district lines by redistricting legislation, until those changes are submitted to and approved by the United States Attorney General or a three-judge panel of the United States District Court for the District of Columbia. *Perry v. Perez*, 132 S. Ct. 934, 939 (2012).

A newly-enacted redistricting plan may not be used until the jurisdiction has demonstrated that the plan does not have a discriminatory purpose or

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[16] In its June 25, 2013 opinion in *Shelby Co. v. Holder,* 570 U.S. ___ (2013), the Supreme Court struck down § 4 of the Voting Rights Act, holding that its formula could no longer be used as a basis for subjecting jurisdictions to preclearance. This holding has no practical effect upon the outcome of this case because the measure of the constitutionality of the Enacted Plans depends upon the compelling governmental interests *at the time of the enactment* of the Enacted Plans. At the time of enactment in 2011, preclearance by the USDOJ was required of all North Carolina legislative and congressional redistricting plans. Moreover, *Shelby County*, in *dicta,* reaffirms that "§ 2 is permanent, applies nationwide, and is not at issue in this case." *Id*, at No. 12-96, slip op. at 3. Thus, regardless of any retroactive application of *Shelby County* to § 5, the legitimate governmental interest of avoiding § 2 liability remains.

effect, and the newly-enacted plan may not undo or defeat rights afforded by the most recent legally enforceable redistricting plan in force or effect in the covered jurisdiction (the "benchmark" plan). *Riley v. Kennedy*, 553 U.S. 406 (2008); 28 C.F.R. § 51.54(b)(1).

A legislature's efforts to ensure preclearance must be based upon its reasonable interpretation of the legal requirements of § 5 of the VRA, including the effect of a 2006 amendment that clarified that § 5 expressly prohibits "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 citizens of the United States on account of race or color . . . *to elect their preferred candidate of choice*." Pub. L. No. 109-246, § 5, 120 Stat. 577, 580-81 (2006) (emphasis added). This amendment aligned the language of § 5 with the same language in § 2 of the VRA to the extent that both now refer to the ability of minority groups to "elect their preferred candidate of choice." The Supreme Court has recently recognized that the effect of the 2006 amendment to § 5 is that "the bar that covered jurisdictions must clear has been raised." *Shelby County*, *supra* note 13, at 16-17 (citing *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 (2000)).

The trial court concludes, as a matter of law, based upon the review of the entire record before the General Assembly at the time of the passage of the Enacted Plans, that the General Assembly had a strong basis in evidence to conclude that the Enacted Plans must be precleared, and that they must meet

the heightened requirements of preclearance under the 2006 amendments to § 5 of the VRA. Therefore, the General Assembly had a compelling governmental interest in enacting redistricting plans designed to ensure preclearance under § 5 of the VRA.[17]

2. Narrow Tailoring

The trial court now considers, in light of the foregoing conclusions regarding the existence of compelling governmental interests, whether the Enacted Plans were narrowly tailored to avoid § 2 liability and ensure § 5 preclearance. In other words, in responding to these compelling interests, the General Assembly is not granted "*carte blanche* to engage in racial gerrymandering." *Shaw I,* 509 U.S. at 655. The trial court must "bear in mind the difference between what the law permits, and what it requires." *Id.* at 654. The VRA cannot justify all actions taken in its name, but only those narrowly tailored to give effect to its requirements.

The Plaintiffs contend that the Enacted Plans are not narrowly tailored because:

1. The Enacted Plans contain significantly more VRA districts (i.e. districts intentionally created by the General Assembly as majority-minority districts

[17] It has been observed that a compelling interest of a jurisdiction subject to § 5 preclearance is "initially assumed" since the plan cannot be enacted without compliance. The more relevant question is that of narrow tailoring. *See Johnson v. Miller,* 864 F. Supp. at 1382-83.

to avoid § 2 liability or to ensure § 5 preclearance) than reasonably necessary to comply with the VRA (Pl.'s Mem. Supp. Partial Summ. J. 82);

2. The VRA districts are unnecessarily "packed" with Black voters (Pl.'s Mem. Supp. Partial Summ, J. 84);

3. The VRA districts are placed in geographic locations where there is insufficient evidence of a reasonable threat of § 2 liability (Pl.'s Mem. Supp. Partial Summ. J. 77); and

4. The shape of the VRA districts are non-compact and irregular (Pl.'s Mem. Supp. Partial Summ. J. 85).

The trial court considers each of these contentions in turn.

a. Did the General Assembly fail to narrowly tailor the Enacted Plans by creating more Voting Rights Act districts than reasonably necessary to comply with the Act?

Purportedly to avoid VRA § 2 liability and to ensure VRA § 5 preclearance, the General Assembly created majority-minority districts throughout the State. The Plaintiffs draw the trial court's attention to the increased number of such districts compared to prior enacted plans. The Enacted House Plan contains 23 districts with a TBVAP in excess of 50%

as compared to 10 such districts in the 2009 House Plan – the last plan in effect before the Enacted House Plan. The Enacted Senate Plan contains 9 districts with a TBVAP in excess of 50% as compared to zero in its predecessor, the 2003 Senate Plan. This seemingly dramatic increase in the number of VRA districts, Plaintiffs contend, would suggest that "one would assume that race relations in North Carolina had to be among the worst in the country, if such extreme racial remedies were required." Pl.'s Mem. Opp'n 44.

However, a closer look at the data is warranted. The following tables compares the Enacted Plans with the alternative plans proffered or supported by the Plaintiffs and, in addition to focusing on the number of districts in prior or competing plans with TBVAP > 50%, also considers the number of districts in each plan where TBVAP is greater than 40%.

Table 1: ***Comparison of Number of Senate Districts > 40% TBVAP among all plans***

	Enacted Plan	2003 Plan	SCSJ	F&L	LBC
# of Districts > 50% TBVAP	9	0	5	1	0
# of Districts >40% but <50% TBVAP	1	8	4	6	8
Total # Districts >40 TBVAP	10	8	9	7	8

Table 2: ***Comparison of Number of House Districts > 40% TBVAP among all plans***

	Enacted Plan	2003 Plan	SCSJ	F&L	LBC
# of Districts > 50% TBVAP	23	10	11	9	10
# of Districts >40% but <50% TBVAP	2	10	10	11	13
Total # Districts >40 TBVAP	25	20	21	20	3

These tables show that when comparing the aggregate number of districts with TBVAP > 40% in the Enacted Plan with all other plans, the difference between the plans is not as dramatic. This is significant when taken in the context of the parties' disagreement over what constitutes a lawful VRA district. *(See further infra* § IV(C)(2)(b), discussion regarding cross-over districts (i.e. districts with TBVAP >40%) and majority-minority districts (districts with TBVAP >50%)). All parties, this data suggests, agree that a significant number of VRA districts – however that term is defined – are required in North Carolina. For example, in the proposed SCSJ Senate Plan, the drafters would

create 9 VRA Senate districts, compared to 10 in the Enacted Senate Plan. Likewise, in the proposed LBC plan, the drafters would create 23 VRA districts compared to 25 in the Enacted House Plan. In the trial court's consideration of the strong basis of evidence that existed in the legislative record at the time of the enactment of the Enacted Plans, it is compelling that all of the alternative plans propounded or endorsed by the Plaintiffs contain a large number of voting districts created to increase TBVAP so as to provide minority voters with the opportunity to elect their candidate of choice.

The undisputed evidence establishes that the General Assembly, in drafting the Enacted Plans, endeavored to create VRA districts in roughly the same proportion as the ratio of Black population to total population in North Carolina. In other words, because the 2010 census figures established that 21% of North Carolina's population over 18 years of age was "any part Black," the corresponding rough proportion of Senate seats, out of 50 seats, would be 10 seats, and hence 10 VRA Senate districts. Likewise, of the 120 House seats, 21% of those seats would be roughly 25 House seats, and hence 25 VRA districts.

The General Assembly, in using "rough proportionality" as a benchmark for the number of VRA districts it created in the Enacted Plans, relies upon Supreme Court precedent that favorably endorses "rough proportionality" as a means by which a redistricting plan can provide minority voters with an equal opportunity to elect candidates of choice. *League of United Latin Am. Citizens v.*

Perry, 548 U.S. 399, 429-30 (2006) [hereinafter *LULAC*]; *Shaw II*, 517 U.S. at 916 n.8; *De Grandy,* 512 U.S. at 1000. In *De Grandy,* the Supreme Court said that "no violation of § 2 can be found …, where, in spite of continuing discrimination and racial bloc voting, minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population." 512 U.S. at 1013-1015. Where a State's election districts reflect substantial proportionality between majority and minority populations, the Supreme Court explained, such districts would "thwart the historical tendency to exclude [the minority population], not encourage or perpetuate it."[18] *Id*. at 1014. It is reasonable for the General Assembly to rely upon this unequivocal holding of the Supreme Court in drafting a plan to avoid § 2 liability. When the Supreme Court says "no violation of § 2 can be found" under certain circumstances, prudence dictates that the General

[18] The Supreme Court distinguishes "rough proportionality," as it is used here to "link[] the number of majority-minority voting districts to minority members' share of the relevant population" from the constitutionally-suspect concept of "proportional representation" which suggests a "right to have members of a protected class elected in numbers equal to their proportion in the population." *De Grandy*, 512 U.S. at 1013-1015 ("The concept is distinct from the subject of the proportional representation clause of § 2, which provides that 'nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.' 42 U.S.C. § 1973(b). This proviso speaks to the success of minority candidates, as distinct from the political or electoral power of minority voters. (citations omitted.) And the proviso also confirms what is otherwise clear from the text of the statute, namely, that the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." *Id.* at n.11).

Assembly should be given the leeway to seek to emulate those circumstances in its Enacted Plans.

Drafting districts so as to achieve "rough proportionality" is also favorably endorsed by Plaintiffs' retained expert, Dr. Theodore S. Arrington, an expert with over 40 years in the field of districting, reapportionment and racial voting patterns. In deposition testimony, Dr. Arrington said:

> [I]f I'm sitting down and somebody asks me to draw districts for North Carolina that will be good districts, I would want to draw districts in such a way as blacks have a reasonable opportunity to get something close to proportion of the seats in the General Assembly to reflect their proportion of the population.

Arrington Dep., 30-31. Moreover, Dr. Arrington, who is often requested by the Department of Justice to draw illustrative redistricting maps in the § 5 preclearance process, was not aware of a single instance "where a legislative plan has provided black voters with roughly proportional number of districts for the entire state where that plan has been found to discriminate against black voters." Arrington Dep., 192.

As such, based upon the law and the undisputed facts, and allowing for the limited degree of leeway that permits the General Assembly to exercise political discretion in its reasonable efforts to address compelling governmental interests, the

trial court finds that the General Assembly had a strong basis in evidence for concluding that "rough proportionality" was reasonably necessary to protect the State from anticipated liability under § 2 of the VRA and ensuring preclearance under § 5 of the VRA. The trial court further finds that, notwithstanding the racial classification inherent in "rough proportionality," the Enacted Plans substantially address the threat of anticipated § 2 liability and challenges to preclearance under § 5 of the VRA. The trial court therefore concludes that the number of VRA districts created by the General Assembly in the Enacted Plans is not inconsistent with the General Assembly's obligation to narrowly tailor the plans under strict scrutiny.

b. Did the General Assembly fail to narrowly tailor the Enacted Plans by "packing" the Voting Rights Act Districts?

The trial court next considers whether the majority-minority districts created in the Enacted Plans are "packed" with Black voters to a greater degree than would be necessary under a narrow tailoring of the Plans to meet the compelling governmental interests of avoiding § 2 liability and obtaining preclearance under § 5 of the VRA. This issue is best understood by re-examining **Tables 1** and **2** above, and noting that one of the most significant differences between the Enacted Plans and all other plans is the greater frequency of districts in the Enacted Plans with TBVAP > 50%, whereas the predecessor plans, as well as all proposed plans, have significantly fewer districts with TBVAP >50%, but significantly greater

numbers of districts with TBVAP between 40% and 50%.

Plaintiffs cast this issue as follows: "Does § 2 or § 5 of the VRA require the challenged districts to be drawn as majority-minority districts in which more than 50% of the population in the district was Black?" Pls.' Mem. Opp'n 31. Plaintiffs urge the trial court to answer this question "no" and find, on the contrary, that the General Assembly's insistence that 23 of the House districts and 9 of the Senate districts in the Enacted Plans have >50% TBVAP exceeds the narrow tailoring required to address compelling governmental interests.

Specifically, the Plaintiffs further argue that the General Assembly should have been more exacting in determining whether a district created to avoid VRA liability should be populated with >50% TBVAP, or whether liability could be avoided, and the minority-preferred candidate elected, by instead creating the same district with less than 50% TBVAP. The Plaintiffs argue that while a remedy of > 50% TBVAP may be necessary in certain places where polarization between the races is particularly acute, there are some locales – notably those areas where some percentage of white voters consistently "cross-over" and vote for Black candidates – where some VRA remedy is still necessary, but the remedy need not be a district with >50% TBVAP. Rather, the Plaintiffs urge that the General Assembly should have determined some appropriate lesser concentration of Black voters – enough to permit Black voters the opportunity to elect the candidates of their choice, but not too many – and that the

General Assembly's failure to do so renders the Enacted Plans unconstitutional.

Plaintiffs' argument on this point is not in accord with the appellate court precedents that bind this trial court.[19] Specifically, in *Pender County*, 361 N.C. 491, the N.C. Supreme Court considered the 2003 version of House District 18. House District 18 was drawn by the General Assembly in its 2003 redistricting plan with 39.36% Black voting age population. The district included portions of Pender County and an adjoining county. Keeping Pender County whole would have resulted in a Black voting age population of 35.33%. The legislators' rationale was that splitting Pender County gave Black voters a greater opportunity to join with white voters to elect the minority group's candidate of choice, while leaving Pender County whole would have violated § 2 of the Voting Rights Act. Pender County and others filed suit against the State (and other officials), alleging that the redistricting plan violated the Whole County Provision of the N.C. Constitution.[20] The State answered that dividing Pender County was required by § 2. *Bartlett v.*

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[19] Dr. Theodore Arrington, an expert retained by Plaintiffs, explained his view on this topic as follows: "Some court decisions seem to indicate that a remedy for a violation of Section 2 or an attempt to avoid retrogression under Section 5 requires the construction of districts in which a majority of the voting age population or registered voters are minority – a so-called 'minority-majority' district. I do not believe that this is the best standard." Arrington Dep. 78. Dr. Arrington also testified that: "Of course, to make it different the Congress would need to change it." *Id.* at 80.

[20] *See further infra* § V.

Strickland, 556 U.S. 1, 7-8 (2009) [hereinafter *Strickland*].

The State's position, in defending House District 18 as drawn, was that the language of both *Gingles* and § 2 did not necessarily require the creation of majority-minority districts, but allowed for other types of legislative districts, such as coalition, crossover, and influence districts. The State considered House District 18 to be an "effective minority district" that functioned as a "single-member crossover district" in which the total Black voting age population of 39.36% could predictably draw votes from a white majority to elect the candidate of its choice, and argued that as such, the district, as drawn, was permitted by § 2 and *Gingles*. *Pender County, supra* at 502.

The plaintiffs in *Pender County*, on the other hand, contended that a minority group must constitute a numerical majority of the voting population in the area under consideration before § 2 of the VRA requires the creation of a legislative district to prevent dilution of the votes of that minority group. They pointed to the wording of the first *Gingles* precondition, that says a minority group must be "sufficiently large and geographically compact to constitute a *majority* in a single-member district," *Gingles*, 478 U.S. at 50 (emphasis added), and claimed this language permits only majority-minority districts to be formed in response to a § 2 claim. *Pender County*, 361 N.C. at 501.

The N.C. Supreme Court agreed with the *Pender County* plaintiffs, and found their position to

be "more logical and more readily applicable in practice." *Id.* at 503. The Court concluded that "when a district must be created pursuant to Section 2, it must be a majority-minority district."[21] *Id*. Recognizing that the majority-minority requirement could be considered a "bright-line" rule, the Court reasoned as follows:

> This bright line rule, requiring a minority group that otherwise meets the *Gingles* preconditions to constitute a numerical majority of citizens of voting age, can be applied fairly, equally, and consistently throughout the redistricting process. With a straightforward and easily administered standard, Section 2 legislative districts will be more uniform and less susceptible to ephemeral political voting patterns, transitory population shifts, and questionable predictions of future voting trends. A bright line rule for the first *Gingles* precondition "promotes ease of application without distorting the statute or the intent underlying it."
>
> In addition, a bright line rule provides our General Assembly a safe harbor for the redistricting process. Redistricting should be a legislative responsibility for the General Assembly, not a legal

[21] A "majority-minority" district was defined by the Court as "a district in which >50% of the population in the district are voting age citizens of a specific minority group." *Id.* at 501

> process for the courts. Without a majority requirement, each legislative district is exposed to a potential legal challenge by a numerically modest minority group with claims that its voting power has been diluted and that a district therefore must be configured to give it control over the election of candidates. In such a case, courts would be asked to decide just how small a minority population can be and still claim that Section 2 mandates the drawing of a legislative district to prevent vote dilution.

Id. at 504-505 (citation omitted).

The Court concluded its opinion with this directive to future General Assemblies:

> Any legislative district designated as a Section 2 district under the current redistricting plan, and any future plans, must either satisfy the numerical majority requirement as defined herein, or be redrawn in compliance with the Whole County provision of the Constitution of North Carolina and with *Stephenson I* requirements.

Id. at 510.

The United States Supreme Court affirmed the N.C. Supreme Court's *Pender County* ruling. In its plurality opinion, the Supreme Court held that

the General Assembly's contention that § 2 of the VRA required that House District 18 be drawn as a crossover district with a minority population of 39.26% must be rejected. *Strickland*, 556 U.S. at 14. Rather, districts created to avoid § 2 liability must be majority-minority districts that contain a numerical, working majority of the voting age population of a minority group. *Id.* at 13, 15. The Court went on to note that this majority-minority rule found support not only in the language of § 2 of the VRA, but also in the need for workable standards and sound judicial and legislative administration:

> The [majority-minority] rule draws clear lines for courts and legislatures alike. The same cannot be said of a less exacting standard that would mandate crossover districts under § 2. Determining whether a § 2 claim would lie – i.e. determining whether potential districts could function as crossover districts – would place courts in the untenable position of predicting many political variables and tying them to race-based assumptions. The judiciary would be directed to make predictions or adopt premises that even experienced polling analysts and political experts could not assess with certainty.

Id. at 17-18. The Supreme Court continued:

> The majority-minority rule relies upon an objective, numerical test: Do

> minorities make up more than 50 percent of the voting-age population in the relevant geographic area? That rule provides straightforward guidance to courts and to those officials charged with drawing district lines to comply with § 2. Where an election district could be drawn in which minority voters form a majority but such a district is not drawn, or where a majority-minority district is cracked by assigning some voters elsewhere, then--assuming the other *Gingles* factors are also satisfied--denial of the opportunity to elect a candidate of choice is a present and discernible wrong . . . .

Id. at 18 (citations omitted).

The Supreme Court added that its "holding that § 2 does not require crossover districts does not consider the permissibility of such districts as a matter of legislative choice or discretion." The Court cautioned that its ruling "should not be interpreted to entrench majority-minority districts by statutory command, for that, too, could pose constitutional concerns. *See Miller* v. *Johnson,* 515 U.S. 900 (1995); *Shaw I*, 509 U.S. 630. States that wish to draw crossover districts are free to do so where no other prohibition exists." *Strickland, supra* at 23-24. But the ultimate holding of the Court is inescapable – when the State has a strong basis in evidence to have a reasonable fear of § 2 liability, the State must be afforded the leeway to avail itself of the "bright line rule" and create majority-minority districts,

rather than cross-over districts, in those areas where there is a sufficiently large and geographically compact minority population and racial polarization exist.

Plaintiffs express grave concerns regarding the public policy implications of a bright-line 50% rule that they fear "balkanizes" Black voters and white voters and discourages cross-over coalitions among the races. The Plaintiffs' concerns parallel the same concerns voiced by the dissenting justices in the *Strickland* case. Justice Souter, writing for the dissenters, said that "the plurality has eliminated the protection of § 2 for the districts that best vindicate the goals of the State, and has done all it can to force the States to perpetuate racially concentrated districts, the quintessential manifestations of race consciousness in American politics." *Strickland*, 556 U.S. at 44 (Souter, J., dissenting). Justice Ginsberg, also dissenting, succinctly summed up her views by stating that: "The plurality's interpretation of § 2 of the Voting Rights Act of 1965 is difficult to fathom and severely undermines the statute's estimable aim. Today's decision returns the ball to Congress' court." *Id*. (Ginsberg, J., dissenting).

But even in these dissents, the position of the General Assembly in defending the Enacted Plans is strengthened. Justice Souter, in his dissent, predicted that based upon the *Strickland* plurality opinion:

> A State like North Carolina faced with the plurality's opinion, whether it wants to comply with § 2 or simply to

> avoid litigation, will, therefore, have no reason to create crossover districts. Section 2 recognizes no need for such districts, from which it follows that they can neither be required nor be created to help the State meet its obligation of equal electoral opportunity under § 2. And if a legislature were induced to draw a crossover district by the plurality's encouragement to create them voluntarily, . . . it would open itself to attack by the plurality based upon that the pointed suggestion that a policy favoring crossover districts runs counter to *Shaw*. The plurality has thus boiled § 2 down to one option: the best way to avoid suit under §2, and the only way to comply with § 2, is by drawing district lines in a way that packs minority voters into majority-minority districts, probably eradicating crossover districts in the process.

Id. at 43 (Souter, J., dissenting) (emphasis added) (citations omitted). The undisputed evidence establishes that the General Assembly, in crafting the Enacted Plans, interpreted the law of the land just as Justice Souter did – in its effort to avoid liability under § 2 of the VRA, the General Assembly eschewed crossover districts and, applying the bright line test endorsed by the N.C. Supreme Court in *Pender County* and the U.S. Supreme Court in *Strickland*, opted for the safe-harbor from § 2 liability by creating majority-minority districts with >50% TBVAP. In the context of narrow tailoring, the

General Assembly's understanding of the law – as reflected in the Enacted Plans it created -- cannot be considered unreasonable, and the trial court is required to give leeway to the General Assembly's "reasonable efforts to avoid § 2 liability." *Vera*, 517 U.S. at 977.

As such, based upon the law and the undisputed facts, and allowing for the limited degree of leeway that permits the General Assembly to exercise political discretion in its reasonable efforts to address compelling governmental interests, the trial court finds that the General Assembly had a strong basis in evidence for concluding that it was reasonably necessary to endeavor to create all VRA districts within the Enacted Plans with 50% TBVAP to protect the state from anticipated liability under § 2 of the VRA and to ensure preclearance under § 5 of the VRA.[22] The trial court further finds that, notwithstanding the racial classification inherent in the creation of >50% TBVAP VRA districts, the Enacted Plans substantially address the threat of anticipated § 2 liability and challenges to preclearance under § 5 of the VRA. The trial court therefore concludes that the creation of >50% TBVAP VRA districts by the General Assembly in the Enacted Plans is not inconsistent with the

[22] With respect to ensuring § 5 preclearance, Plaintiffs' retained expert, Dr. Arrington, testified that when he consults on behalf of the USDOJ and draws illustrative plans in their preclearance process, "[the USDOJ] ask me to draw it specifically at more than 50%, and the reason for that is that that means there's no question . . . so that eliminates one legal question about satisfying *Gingles* one, the first *Gingles* prong." Arrington Dep. 191.

General Assembly's obligation to narrowly tailor the plans under strict scrutiny.

c. ***Did the General Assembly fail to narrowly tailor the Enacted Plans by placing the Voting Rights Act districts in geographic locations where there is insufficient evidence of a reasonable threat of § 2 liability?***

As the trial court concluded above in § IV(C)(1)(a), at the time of the enactment of the Enacted Plans, the General Assembly had strong evidence in the legislative record that each of the *Gingles* factors was present in substantial portions of North Carolina and that, based upon the totality of circumstances, majority-minority voting districts were required to remedy against vote dilution. Narrow tailoring requires that, to the extent that the General Assembly created VRA districts as part of its efforts to avoid § 2 liability, the VRA districts be located only in those geographic areas where a remedy against votedilution would be reasonably required. Plaintiffs challenge the geographic location of some VRA districts in the Enacted Plan, arguing that "for defendants to justify any majority black district as being required by Section 2, they must satisfy the third prong of *Gingles* by establishing that white voters in that district - not somewhere else or in the state at large - vote 'sufficiently as a bloc to enable [them]…usually to defeat the minority's preferred candidate.'" *Gingles*, 478 U.S. at 50-51; *see also*, *Shaw II*, 517 U.S. at 917 ("if a § 2 violation is proved for a particular area,… [t]he vote-dilution injuries suffered by these persons are not

remedied by creating a safe majority-black district somewhere else in the State."); Pl.'s Mem. Supp. Partial Summ. J. 77. To consider this issue, the trial court must consider whether the area affected by each VRA district displays a sufficient degree of "racial polarization" to justify a narrowly tailored remedy of a safe majority-black district at that location.

"Racial polarization" refers to the combined effect of the second and third *Gingles* factors, that is, political cohesion by the minority and white bloc voting by the white majority. *Old Person v. Cooney*, 230 F.3d 1113, 1123 (9th Cir. 2000) (citing *Ruiz v. City of Santa Maria*, 160 F.3d 543, 551 (1998) (citing *Gingles*, 478 U.S. at 56)). Polarized voting occurs when minority and white communities cast ballots along racial or language minority lines, voting in blocs. *Texas v. United States*, 831 F. Supp. 2d 244 (D.D.C. 2011) (quoting H.R. Rep. No. 109-478, at 34 (2006)). An expert relied upon by the Plaintiffs, Dr. Ray Block, whose report *Racially Polarized Voting in 2006, 2008 and 2010 in North Carolina State Legislative Contests* was proffered to the General Assembly at its public hearings prior to the enactment of the Enacted Plans, defines "racial polarization" as:

> The proportion of black voters who prefer a black candidate is noticeably higher in an electoral contest as compared to those of non blacks, and the proportion of black candidates who win elections is noticeably higher in majority minority districts than in non

> majority minority districts. . . . Racially polarized voting can be identified as occurring when there is a consistent relationship between the race of a voter and the way in which she/he votes.

Rucho Aff. Ex. 8, at 3 (Jan. 19, 2012) It is undisputed that racially polarized voting continues to be a "pervasive pattern" of North Carolina politics. Arrington Dep. 93.

Using these definitions, the trial court has concluded that the determination of whether there is a "consistent relationship between the race of a voter and the way in which she/he votes" sufficient to "usually defeat the minority's preferred candidate" in each of the locations selected by the General Assembly for the establishment of a VRA district is an issue of fact that must be determined by the trial court through an evaluation of evidence, and not as a matter of law through summary judgment. *East Jefferson Coalition for Leadership & Dev. v. Parish of Jefferson* 926 F.2d 487, 491 (5th Cir. 1991) ("Each *Gingles* precondition is an issue of fact. . . An ultimate finding of vote dilution is a question of fact . . ."). To determine this factual issue, the trial court received evidence through witness testimony and designation of the record at a bench trial conducted June 5-6, 2013, on the issue of:

> Assuming application of a strict scrutiny standard and, in considering whether the Enacted Plans were narrowly tailored, was each challenged VRA district drawn in a place where a

> remedy or potential remedy for racially polarized voting was reasonable for purposes of preclearance or protection of the State from vote dilution claims under the Constitution or under § 2 of the VRA?

Order of the Trial Ct., May 13, 2013.

The Findings of Fact of the trial court on this issue are set out in **Appendix A** attached hereto and incorporated by reference.

Based upon the law and the facts as found by the trial court, and allowing for the limited degree of leeway that permits the General Assembly to exercise political discretion in its reasonable efforts to address compelling governmental interests, the trial court finds that the General Assembly had a strong basis in evidence for concluding that the each of the VRA districts in the Enacted Plans were placed in a location that was reasonably necessary to protect the State from anticipated liability under § 2 of the VRA and ensuring preclearance under § 5 of the VRA. The trial court further finds that, notwithstanding the racial classification inherent in the creation and placement of VRA districts, the Enacted Plans substantially address the threat of anticipated § 2 liability and challenges to preclearance under § 5 of the VRA. The trial court therefore concludes that the placement of the VRA Districts by the General Assembly in the Enacted Plans is not inconsistent with the General Assembly's obligation to narrowly tailor the plans under strict scrutiny.

d. ***Did the General Assembly fail to narrowly tailor the Enacted Plans by crafting irregularly shaped and non-compact Voting Rights Act districts or by otherwise disregarding traditional redistricting principles such as communities of interest and precinct boundaries?***

The Plaintiffs contend that VRA districts in the Enacted Plans, even if justified by the compelling governmental interests of avoiding § 2 liability or ensuring preclearance under § 5 of the VRA, are not narrowly tailored because they are drawn with a disregard of traditional redistricting principles resulting in lack of compactness, irregular shapes, and too many split counties and split precincts.

The Supreme Court has held that a "district drawn in order to satisfy § 2 must not subordinate traditional districting principles to race substantially more than is 'reasonably necessary' to avoid § 2 liability." *Vera*, 517 U.S. at 979. On the other hand, the same Court said that narrow tailoring does not require a district have the "least possible amount of irregularity in shape, making allowances for traditional districting criteria" because that standard would be "impossibly stringent." *Id.* at 977. "Districts not drawn for impermissible reasons or according to impermissible criteria may take any shape, even a bizarre one," provided that the bizarre shapes are not "attributable to race-based districting unjustified by a compelling interest." *Id.* at 999 (Kennedy, J. concurring). In sum, a VRA district that is based on

a reasonably compact minority population, that also takes into account traditional redistricting principles, "may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts in endless 'beauty contest.'" *Id.* at 977. The General Assembly, even under strict scrutiny, must be accorded a "limited degree of leeway" in tailoring its redistricting plan. *Id.*

Another three-judge panel, in considering this same legal issue in Georgia, said that:

> We agree with the North Carolina court that the Supreme Court will probably not adopt a definition of "narrow tailoring" in the redistricting context that requires consideration of whether the challenged plan deviates from "traditional" notions of compactness, contiguity, and respect for political subdivisions to a greater degree than is necessary to accomplish the state's compelling purpose. *Shaw v. Hunt,* supra, at 87. Such a standard would elevate to constitutional status that which was intended only as a barometer for determining whether a district adequately serves its constituents. Observance of those traditional principles is also difficult to judge at the exacting level required for a narrow tailoring determination, and such judging would force the judiciary to meddle with legislative prerogatives to an undesirable degree. Nothing,

> however, precludes the Court from considering traditional districting principles as guideposts in a narrow tailoring analysis; while not required, they are potentially useful indicators of where the legislature could have done less violence to the electoral landscape.

Johnson v. Miller, 864 F. Supp. at 1387.

The judicial determination of whether the degree to which a redistricting plan comports with "traditional notions of redistricting" such as compactness, contiguity, and respect for political subdivisions is a difficult task because of the subjective nature of each of these concepts. There is no litmus test for these concepts; for example, "compactness" has been described as "such a hazy and ill-defined concept that it seems impossible to apply it in any rigorous sense in matters of law." *Id.* at 1388. *See also Karcher v. Daggett,* 462 U.S. 725, 756 (1983) (stating that compactness requirements have been of limited use because of vague definitions and imprecise application). (See further, discussion *infra* in § VI regarding equal protection claims associated with compactness and split precincts).

The trial court is cognizant of its duty, under a narrow tailoring analysis, to examine the "fit" of a remedy against the "ends" to ensure that the Enacted Plans are the least restrictive means of advancing legitimate governmental interests. *Boos v. Barry*, 485 U.S. 312, 329 (1988); *Wygant,* 476 U.S. at 280 n.6. In so doing, the trial court is obligated to consider whether lawful alternatives and less

restrictive means could have been used, regardless of whether the General Assembly considered those alternatives. *Boos v. Barry*, 485 U.S. at 329; *Wygant*, 476 U.S. at 280 n.6. But the obligation of the trial court to consider all lawful alternatives must be harmonized with the Plaintiffs' burden of persuasion; even with the heavy burden of production resting upon the General Assembly, the Plaintiffs have some obligation to persuade the trial court that lawful alternatives in fact exist that could be compared in some meaningful way to the Enacted Plans and that, after such comparison, do "less violence to the electoral landscape." *Johnson v. Miller,* 864 F. Supp. at 1387 n.40. The trial court cannot exhaust "every conceivable race-neutral alternative," *Fisher v. Univ. of Texas, supra.* at slip op. p. 10, to discern whether a hypothetical alternative plan exists that better conforms with traditional notions of redistricting, and the Plaintiffs have failed to persuade the trial court that one exists.

Plaintiffs' arguments are not persuasive because Plaintiffs have not produced alternative plans that are of value to the trial court for comparison in this narrow tailoring analysis.[23] None

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[23] To the extent that the trial court's application of strict scrutiny of the Enacted Plans is too stringent a standard of review (see, *supra* § IV(B)) and if the trial court accepted as fact, as the Supreme Court has done previously done, and the Plaintiffs admit, a high degree of correlation between black votes and Democratic votes in North Carolina (*See Hunt v. Cromartie*, 526 U.S. 541, 549-50 (1999) [hereinafter *Cromartie I*]; *Cromartie II*, 532 U.S. at 251, 257-58; Arrington Dep. 58-60), this issue would be foreclosed by the Supreme Court's ruling in *Cromartie II*, that held:

of the alternative plans proposed or endorsed by the Plaintiffs contain VRA districts in rough proportion to the Black population in North Carolina. None of the alternative plans seek to comply with the General Assembly's reasonable interpretation of *Strickland* by populating each VRA district with >50% TBVAP. None of the alternative plans comply with the N.C. Supreme Court's mandate in *Stephenson v. Bartlett* to "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." 355 N.C. 354, 384 (2002) [hereinafter *Stephenson I*], (see § V, *infra,* regarding the Whole County Provisions). As such, the trial court is left to speculate that a redistricting plan exists – one that protects the State from § 2 liability, ensures § 5 preclearance, and accomplishes all of the legitimate legislative objectives of the General Assembly, including political gain, protection of incumbency, and population equalization – yet appears, on some

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> We can put the matter more generally as follows: In a case such as this one where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the General Assembly could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance.

532 U.S. at 258.

subjective measure, to be more "compact" or less "irregular."

Moreover, Plaintiffs' retained expert, Dr. Arrington, seems to suggest that traditional notions of redistricting have little practical relevance, or little real benefit, in considering whether legislative districts are narrowly tailored. He says, in deposition testimony:

> There is no evidence from political science research that the shape of the district makes any difference at all. . . It doesn't increase the extent to which voters know who they're voting for. It doesn't affect the extent to which candidates can campaign effectively. It doesn't . . . necessarily affect either the campaigning or the voting. It simply has no effect as such. Shape has little or nothing to do with that. That has to do with other things. And so to make the decision that a district is okay or not okay on the basis of shape is leading us in the wrong direction.

Arrington Dep. 119. Likewise, regarding respecting communities of interest as a traditional notion of redistricting, Dr. Arrington says:

> Anyone who wants districts drawn differently than they were or is advocating a particular set of districts will undoubtedly argue, whether they have good reason to do so or not, that

> their districts define a community of interest. Because community of interest can mean almost anything one chooses, it is rarely operationalized in a fashion to make it useful in either drawing or evaluating districts.

Id. at 99-100. Simply put, the trial court is not persuaded, and cannot itself discern, that a lack of respect for traditional notions of redistricting can be shown in the Enacted Plans, or even if present to some extent, is sufficient to defeat the obligation of the General Assembly to narrowly tailor the VRA districts.

As such, based upon the law and the undisputed facts, and allowing for the limited degree of leeway that permits the General Assembly to exercise political discretion in its reasonable efforts to address compelling governmental interests, the trial court finds that the General Assembly had a strong basis in evidence for concluding that the VRA districts in the Enacted Plans, as drawn, were reasonably necessary to protect the State from anticipated liability under § 2 of the VRA and ensuring preclearance under § 5 of the VRA. The trial court further finds that, notwithstanding the racial classification inherent in the VRA districts, as drawn, the Enacted Plans substantially address the threat of anticipated § 2 liability and challenges to preclearance under § 5 of the VRA. The trial court therefore concludes that the VRA districts, as drawn in the Enacted Plans, are sufficiently compact and regular, and are not inconsistent with the General

Assembly's obligation to narrowly tailor the plans under strict scrutiny.

3. *NC-NAACP Plaintiffs' Equal Protection claim of diminution of political influence.*

In Claims for Relief 9 through 11 of the NAACP Plaintiffs' Amended Complaint, the Plaintiffs allege that in voting districts adjoining to those created in the Enacted Plans as VRA Districts, Black voters suffer a diminution of political influence. The Plaintiffs contend that by creating VRA districts with >50% TBVAP, Black voters were siphoned from adjoining counties, thereby lessening the political influence of the Black voters in those adjoining counties. The NAACP Plaintiffs contend this is a denial of equal protection under the United States and North Carolina constitutions.

The trial court concludes that this claim is not supported by prevailing law. No N.C. Supreme Court or United States Supreme Court decision has ever found a legislative or congressional redistricting plan unconstitutional because it deprived a group of plaintiffs of political influence. Indeed, the United States Supreme Court has warned against the constitutional dangers underlying Plaintiffs' influence theories. In *LULAC*, the Court rejected an argument that the § 2 "effects" test might be violated because of the failure to create a minority "influence" district. The Court held that "if Section 2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *LULAC*, 548 U.S. at 445-46 (citing

Georgia v. Ashcroft, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring)). Recognizing a claim on behalf of Black voters for influence or crossover districts "would grant minority voters 'a right to preserve their strength for the purposes of forging an advantageous political alliance,'" a right that is not available to any other voters. *Strickland*, 556 U.S. at 15 (citing *Hall v. Virginia*, 385 F.3d 421, 431 (4th Cir. 2004), *cert. denied*, 544 U.S. 961 (2005)). This argument also raises the question of whether such a claim would itself run afoul of the equal protection guarantees of the Fourteenth Amendment and of the North Carolina Constitution. Nothing in federal law "grants special protection to a minority group's right to form political coalitions." *Strickland*, 556 U.S. at 15. Nor does federal law grant minority groups any right to the maximum possible voting strength. *Id.* at 15-16.

Thus, as a matter of law, the trial court concludes that the Plaintiffs' claims of denial of equal protection premised upon diminished influence of Black voters in districts adjoining VRA districts must be denied.

D. Did racial motives predominate in the creation of the Non-Voting Rights Act districts?

As discussed above by the trial court in § IV(B), strict scrutiny is only the appropriate level of scrutiny for legislatively enacted redistricting plans when Plaintiffs establish that "all other legislative 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. The districts must be unexplainable on grounds other than race, and it must be established that the legislature neglected all traditional redistricting criteria such as compactness, continuity, respect for political subdivisions and incumbency protection. *Id.* For the 26 VRA districts created in the three Enacted Plans, the trial court concluded, for the purposes of analysis, that strict scrutiny was appropriate because the General Assembly's predominant motive was to create each of those VRA districts with >50% TBVAP and to create a sufficient number of VRA districts to achieve "rough proportionality." However, four districts that were not created by the General Assembly as VRA districts were also challenged by the Plaintiffs as being the product of racial gerrymander – the 12th and 4th Congressional Districts, Senate District 32, and House District 54. As to each of these four districts, for strict scrutiny to apply the trial court must make inquiry into whether race was the General Assembly's predominant motive.

"The legislature's motivation is itself a factual question." *Hunt v. Cromartie*, 526 U.S. 541, 549 (U.S. 1999) [hereinafter *Cromartie I*] (citing *Shaw II*, 517 U.S. at 905); *Miller v. Johnson*, 515 U.S. at 910. As such, determination of this issue is not appropriate for summary judgment, but instead requires the consideration and weighing of evidence by the trial court. To determine this factual issue, the trial court received evidence through witness testimony and designation of the record at a bench trial conducted June 5-6, 2013, on the issue of:

> 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 those districts?[24]

Order of the Trial Ct., May 13, 2013.

The Findings of Fact of the trial court on this issue are set out in **Appendix B** attached hereto and incorporated by reference.

Based upon these findings of fact, the trial court concludes that the shape, location and composition of the four non-VRA districts challenged by the Plaintiffs as racial gerrymanders was dictated by a number of factors, which included a desire of the General Assembly to avoid § 2 liability and to ensure preclearance under § 5 of the VRA, but also included equally dominant legislative motivations to comply with the Whole County Provision, to equalize population among the districts, to protect incumbents, and to satisfy the General Assembly's desire to enact redistricting plans that were more competitive for Republican candidates than the plans used in past decades or any of the alternative plans.

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[24] Although Senate District 31 and House District 51 were not challenged by the Plaintiffs as racial gerrymanders, they adjoin the non-VRA districts that were challenged by the Plaintiffs, and hence the trial court received evidence on the General Assembly's motivation in creating these two districts as well.

Based upon the foregoing, the trial court concludes that the appropriate standard of review for the trial court's consideration of the four non-VRA districts is not strict scrutiny, but instead the "rational relationship" review. *Wilkins v. West,* 264 Va. 447, 467 (2001). Under the rational relationship test, the challenged governmental action must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the action.'" *See generally, e.g. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 544 (3d Cir. 2011). The trial court also concludes that the General Assembly has articulated a reasonably conceivable state of facts, other than a racial motivation, that provides a rational basis for creating the non-VRA districts as drawn in the Enacted Plans.

The trial court further concludes, based upon the undisputed record,[25] that in North Carolina, racial identification correlates highly with political affiliation. *Cromartie II*, 532 U.S. at 242. The Plaintiffs have not proffered, as they must in this instance, *Id.* at 258, any alternative redistricting plans that show that the General Assembly could have met its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles, and that any such alternative plan would have brought about significantly greater racial balance. *Id.* (emphasis added). The Plaintiffs have failed to meet their burden of persuasion that alternative plans could achieve the same lawful objectives. Therefore, the Plaintiffs' challenge to the non-VRA districts must fail.

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[25] *See* fn. 23, *supra.*

Thus, to summarize, in considering the overarching issue of whether the challenged districts are a racial gerrymander that violate the equal protection clauses of the United States Constitution or the North Carolina Constitution, the trial court has reviewed each district created by the General Assembly. For those districts created as VRA districts, the trial court has applied strict scrutiny, and has found as a matter of law that a strong basis in evidence supported the enactment of redistricting plans designed to protect the State from § 2 liability and to ensure preclearance under § 5. Further, the trial court has found, based upon a strong basis in evidence in the record, and according the General Assembly a limited degree of leeway, that the Enacted Plans are narrowly tailored to meet these compelling governmental interests. To the extent that the most exacting level of review, strict scrutiny, is not warranted by the facts of this case, the trial court concludes that under a lesser standard of review, such as a rational relationship test, the creation of the VRA districts as drawn was supported by a number of rational bases. For those districts in the Enacted Plans that are not VRA districts, the trial court finds, based upon the evidence before it, that race was not the predominant motive in the creation of those districts and thus, under a rational relationship standard of review, the trial court finds that the General Assembly had a rational basis for creating the non-VRA districts as drawn. Therefore, the trial court concludes that the Plaintiffs' equal protection claims associated with racial gerrymandering must fail.

V. DO THE ENACTED SENATE AND HOUSE PLANS VIOLATE THE WHOLE COUNTY PROVISIONS OF THE NORTH CAROLINA CONSTITUTION?

(*Dickson amended complaint, Claims 11-16; NAACP amended complaint Claims 4-5)*

The Plaintiffs contend that the Enacted Senate and House Plans violate the Whole County Provisions ("WCP") of the North Carolina Constitution. The language of the WCP is alluringly simple: Article II, § 3(3) simply says "no county shall be divided in the formation of a senate district, and Article II, § 5(3) similarly says "no county shall be divided in the formation of a representative district." However, because an inflexible application of the plain language of the WCP would violate federal law mandates that pre-empt state law – notably the Voting Rights Act and the one-person, one-vote principle – the N.C. Supreme Court, in *Stephenson I,* 355 N.C. 354, harmonized the WCP with controlling federal law so as "to give effect to the intent of the framers of the organic law and of the people adopting it." *Id.* at 370.

The undisputed evidence of record establishes that the General Assembly, in its Enacted Senate and House Plans, endeavored to "group the minimum number of counties necessary to comply with the one person, one vote standard into clusters of counties." Pl.'s Mem. Supp. Partial Summ. J. 82. The Plaintiffs, on the other hand, endorsed and proposed alternative House and Senate plans that yielded a fewer number of split counties, and consequently more counties kept whole, than the Enacted Plans. However, the Plaintiffs' plans did not

adhere strictly to the rubric of creating clusters with minimum numbers of counties. Plaintiffs urge that the number of counties split ought to be the standard by which compliance with the WCP is measured.

In *Stephenson I,* the N.C. Supreme Court articulated the criteria that must be followed by the General Assembly to give effect to the requirements of the WCP while reconciling them with the requirements of superseding federal law. These criteria are set out by the Supreme Court as a hierarchy of constitutional rules that are to be followed in sequence in the drafting of legislative districts. Specifically, rules 3, 5, 6 and 7 are most relevant to this issue, and they are as follows:

> . . .
>
> [3.] In counties having a census population sufficient to support the formation of one non-VRA legislative district falling at or within plus or minus five percent deviation from the ideal population consistent with "one-person, one-vote" requirements, the WCP requires that the physical boundaries of any such non- VRA legislative district not cross or traverse the exterior geographic line of any such county.
>
> . . .
>
> [5.] In counties having a non-VRA population pool which cannot support at least one legislative district at or within plus or minus five percent of the ideal population for a legislative district or,

alternatively, counties having a non-VRA population pool which, if divided into districts, would not comply with the at or within plus or minus five percent "one-person, one-vote" standard, *the requirements of the WCP are met by combining or grouping the minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard.* Within such contiguous multi-county groupings, compact districts shall be formed, consistent with the at or within plus or minus five percent standard, whose boundary lines do not cross or traverse the "exterior" line of the multi-county grouping, provided, however, that the resulting interior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard.

[6.] The intent underlying the WCP must be enforced to the maximum extent possible; thus, *only the smallest number of counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard shall be combined.*

> [7.] Communities of interest should be considered in the formation of compact and contiguous electoral districts.

Stephenson v. Bartlett, 357 N.C. 301, 305-07 (2003) [hereinafter *Stephenson II*]. *See further*, *Stephenson I*, at 383-84 (emphasis added).

The crux of the Plaintiffs' argument is whether the WCP and the *Stephenson I* and *II* decisions require the division of the fewest counties possible or do they require that counties be grouped into the smallest groupings possible. Plaintiffs urge that compliance with the WCP is measured by the former, namely the number of counties kept whole, and not by the grouping of minimum number of whole, contiguous counties necessary to comply with the one person, one vote standard.

The following table illustrates the county groupings contained within the Enacted Plan compared with all other alternative plans suggested by the Plaintiffs:[26]

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[26] Direct comparison between the Enacted Plans and each of the alternative plans proposed or endorsed by the Plaintiffs cannot be made because the alternative plans diverge from the Enacted Plans in not creating as many VRA districts as were created by the General Assembly in the Enacted House and Senate Plans. See *supra* at § IV(C)(2)(a). The trial court has concluded that the creation of these VRA districts by the General Assembly is consistent with narrow tailoring requirements. The Plaintiffs have proffered no alternative plan that adopts the General Assembly's VRA districts yet shows that greater compliance with the WCP could have been achieved.

Table 3: ***Number of Counties in Groupings – Comparison of Enacted Plan with Alternatives***

Number of Counties in Grouping	1	2	3	4	5	6	7	8	9	10	11	20	46	Total
Enacted House Plan	11	15	4	2	2	0	0	0	1	0	0	1	0	36
House Fair & Legal	11	9	6	4	3	1	1	0	1	0	0	0	0	36
LBC	10	8	4	5	6	2	0	0	0	0	0	0	0	35
SCSJ House	8	8	3	4	1	0	0	0	0	0	0	0	1	25
Enacted Senate Plan	1	11	4	3	1	1	1	2	1	1	0	0	0	26
Senate Fair & Legal	1	11	3	7	1	2	2	0	1	0	0	0	0	28
Possible Senate Districts	1	5	4	5	4	1	2	1	1	0	0	0	0	24
SCSJ Senate	1	4	7	2	3	2	1	1	1	0	1	0	0	23

In examining the data in **Table 3**, comparison of the Enacted House Plan and the House Fair & Legal Plan rows illustrates the difference between the approaches advocated by the Plaintiffs and General Assembly in the Enacted Plans. Both the House Fair & Legal Plan and the Enacted House Plan contain 11 one-county groupings – namely counties where the population is sufficient within one county to permit one or more districts to be drawn wholly within the county lines. The Enacted House Plan contains 15 two-county groupings, while the House Fair and Legal plan contains only 9 two-county groupings.

At issue is the mandate of the N.C. Supreme Court in *Stephenson I*, as set out above in rule 5: ". . . the requirements of the WCP are met by combining or grouping the minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard." *Stephenson II*, 357 N.C. at 306. The undisputed evidences establishes that in seeking to comply with this mandate, the drafters of the Enacted House and Senate plans did the following, in sequence: (1) drew the VRA districts; (2) from the remaining counties after the first step, identified all counties whose population would support one or more districts wholly within the county lines; (3) from the remaining counties after the second step, identified all possible contiguous two-county combinations whose combined populations would support one or more districts wholly within the borders of the two-county groups; (4) from the remaining counties after the third step, identified all possible contiguous three-county combinations

whose combined populations would support one or more districts wholly within the borders of the three-county groups; (5) and so on until all counties were included. By combining counties into groups by starting first with two-county groups, and combining all possible two-county groups, and then next considering three-county groups, and so on, the Enacted Plan drafters met the requirements of the WCP, as articulated in *Stephenson I* and *II,* "by combining or grouping the minimum number of whole, contiguous counties necessary to comply with the plus or minus five percent 'one-person, one-vote' standard." 355 N.C. at 383-84; 357 N.C. at 306.

The drafters of the House Fair & Legal Plan, rather than creating as many two-county groupings as possible, made only 9 two-county groupings (compared to 15 two county groupings in the Enacted House Plan), which resulted in more three-county groupings than the Enacted House Plan (6 compared to 4). Likewise, in the Senate Fair & Legal Plan, the drafters created an equal number of two-county groups as the Enacted Senate Plan, but failed to create as many three-county groups as possible (3 compared to 4 in the Enacted Senate Plan) which resulted in a greater number of four-county groups in the Senate Fair & Legal Plan (7 compared to 3 in the Enacted Senate Plan). The Plaintiffs, in advocating for the Fair & Legal Plans, and the grouping methodology contained therein, argue that their methodology resulted in fewer divided counties than the Enacted Plans. Under the House Fair & Legal Plan, 44 counties are divided compared to 49 in the Enacted House Plan; under the Senate Fair & Legal Plan, 14 counties are divided compared to 19

under the Enacted Senate Plan. Plaintiffs urge that the intent of the WCP is best met by comparing the number of counties kept whole in competing plans.

The intent and interpretation of Rule 5 of *Stephenson I* was addressed in *Stephenson II*, where the defendants in that case, in connection with the 2002 revised redistricting plans, urged, like the Plaintiffs in this case, that compliance with the WCP is measured by the number of counties kept whole. The N.C. Supreme Court rejected this argument in the 2003 opinion in *Stephenson II* and, after reiterating the *Stephenson I* methodology, affirmed the trial court's findings that, among other things:

> 8. The General Assembly's May 2002 Fewer Divided Counties Senate and Sutton 5 House Plans fail to comply with the requirement that in forming districts, only the smallest number of counties necessary to comply with the one-person, one-vote requirement should be combined in forming multi-county groupings.
>
> 9. The General Assembly's failure to create the maximum number of two-county groupings in the May 2002 House Plan violates *Stephenson I*.

Stephenson II, 357 N.C. at 308. In affirming the trial court, the N.C. Supreme Court, in *Stephenson II,*

repeated the directive it gave in *Stephenson I* that "we direct that any new redistricting plans . . . shall depart from strict compliance with the legal requirements set forth herein only to the extent necessary to comply with federal law." *Stephenson II*, 357 N.C. at 309 (citing *Stephenson I,* 355 N.C. at 384).

As seen in **Table 3** above, each of the alternative House plans proposed or endorsed by the Plaintiffs, like the House Fair & Legal Plan discussed above, suffers from the same defect described in *Stephenson II*, namely each alternative plan fails to create the maximum number of two-county groupings. Indeed, the LBC and SCSJ House alternative plans have fewer one-county groupings than the Enacted House Plan, which departs from strict compliance with another *Stephenson I* requirement that districts not traverse county boundaries of a county that has sufficient population to support one or more House districts solely within the county boundaries (*Stephenson II,* Rule 3, above). Likewise, as seen in **Table 3** above, each of the alternative Senate plans proposed or endorsed by the Plaintiffs does not comport with the strict requirements of *Stephenson I*. The LBS and SCSJ alternative Senate plans fail to create the maximum number of two-county groups when compared to the Enacted Senate Plan.

The divergence between the requirements of the *Stephenson I* and *II* methodology employed by the General Assembly in crafting the Enacted Plans and the approach Plaintiffs urge is further revealed by the affidavit and deposition testimony of Dr.

David Peterson, a statistician employed as an expert witness by the Plaintiffs. Notably, Dr. Peterson did not opine or suggest that the General Assembly's county groupings in the Enacted Plans did not conform to the methodology set out in the prevailing law of *Stephenson I* and *II,* but rather, he opined that he disagreed with the N.C. Supreme Court on what the law ought to be. Dr. Peterson testified, by affidavit, that:

> [T]o make maximum use of county boundaries in constructing voting districts, and thereby minimizing the need to split counties, one should focus on dividing the state into many county groups each having small numbers of representatives rather than each having small numbers of counties. In particular, choosing county groups first by finding all possible single county groups, then all possible two-county groups, and so forth, is unlikely to lead to the most complete use of county boundaries, and the smallest number of divided counties.

Fifth Aff. of Pls.' Statistical Expert, David W. Peterson, PhD, ¶ 3. Later, in deposition testimony, Dr. Peterson conceded that:

> Q. In the third paragraph, the first sentence [of a letter marked Deposition Exhibit 295], it says, "Second, it seems to me that to implement the 'Whole County

Principle' of the North Carolina Constitution, one has to proceed in a manner different from that attributed to *Stephenson II*." What did you mean by that?

A. I don't know how I could express it more clearly.

Q. All right. That's what I assumed. I assume that it is your belief that the court's process in *Stephenson II* does not implement the Whole County Principle as well as you believe your process does?

A. I think there's a better way of doing it, yes.

Q. So to the extent that this court in *Stephenson II* was implementing the Whole County Principle, you disagree with the way they chose to go about doing it?

A. I think they start off correctly. I think there's a better way of following on to step 2.

Q. Which is where they go into maximizing twos and threes, et cetera?

A. Yes.

Id.

Based upon the foregoing, and all matters of record, this trial court, being bound by the precedent established by the N.C. Supreme Court in *Stephenson I* and *Stephenson II*, concludes that as a matter of law the Enacted House Plan and the Enacted Senate Plan conform to the WCP set out in Article II, § 3 and §5, of the North Carolina Constitution, and that the Defendants are entitled to summary judgment in their favor on these claims. For the same reasons, the trial court further finds that the alternative plans proposed or endorsed by the Plaintiffs, namely the House and Senate Fair & Legal Plans, the House and Senate LBC Plans, and the SCSJ House and Senate Plans, each fail to comport with the WCP of the North Carolina Constitution as those provisions have been interpreted and applied by the N.C. Supreme Court. The Plaintiffs have not met their burden of persuasion that the General Assembly could have achieved greater compliance with the requirements of the WCP than it did in the Enacted Plans.

VI. DO THE ENACTED PLANS VIOLATE THE EQUAL PROTECTION GUARANTEES OF THE UNITED STATES OR NORTH CAROLINA CONSTITUTIONS BY DISREGARDING TRADITIONAL REDISTRICTING PRINCIPLES BY FAILING TO BE SUFFICIENTLY COMPACT OR BY EXCESSIVELY SPLITTING PRECINCTS?

(*Dickson amended complaint, Claims 9-10; NAACP amended complaint Claims 9-11)*

A. Lack of Compactness and Irregular Shapes

The adherence to "traditional redistricting principles," such as compactness, regularity of shape, continuity, protecting communities of interest and political subdivisions, geographic barriers and protection of incumbents, is relevant in judicial scrutiny of redistricting plans on several levels. First, as noted above, the lack of adherence to traditional redistricting principles and a high degree of irregularity may provide circumstantial evidence that racial considerations have predominated in the redistricting process. Second, "compactness," a traditional redistricting principle, takes on special significance when considering whether a compelling governmental interest exists because, under the *Gingles* factors discussed above, if an enacted VRA district is not significantly compact, one might conclude the absence of the first *Gingles* requirement that a "minority group exists within the area affected by the Enacted Plans, and that this group is sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* 478 U.S. at 50-51. Third, traditional redistricting

principles may be relevant when comparing alternative plans under a narrow tailoring analysis to determine whether an enacted plan is the least restrictive alternative to accomplish legitimate governmental objectives. Fourth, the *Stephenson I* and *II* Courts each held in Rule 7 of their WCP hierarchy that "communities of interest should be considered in the formation of compact and contiguous electoral districts." 355 N.C. at 383-84; 357 N.C. at 306. Fifth, lack of adherence to traditional redistricting principles, if applied disproportionately, could be viewed as a violation of Equal Protection requirements of the state and federal constitutions.

In the trial court's consideration above of the level of scrutiny,[27] the compelling governmental interests,[28] and narrow tailoring,[29] some discussion can be found regarding the analysis of traditional redistricting principles relevant to each of those topics. In this section, the trial court considers in greater detail the overall concepts of "compactness," "irregularity" and splitting of precincts and then considers the Plaintiffs' contentions that the Enacted Plans, by not adhering to traditional redistricting principles, fail to conform with the *Stephenson I* and *II* mandates or violate equal protection requirements.

With respect to traditional redistricting principles, the Supreme Court has said that:

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[27] See, *supra* at § IV(B).

[28] See, *supra* at § IV(C)(1)(a).

[29] See, *supra* at § IV(C)(2)(d).

> [w]e believe that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group -- regardless of their age, education, economic status, or the community in which they live -- think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.

Shaw I, 509 U.S. at 647. But, the *Shaw I* Court hastened to explain, that although "appearances do matter":

> [w]e emphasize that these criteria are important not because they are constitutionally required – they are not – but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines.

Id. (citations omitted.). Indeed, the Supreme Court has said that "districts not drawn for impermissible

reasons or according to impermissible criteria may take any shape, even a bizarre one." *Vera*, 517 U.S. at 999 (Kennedy, J., concurring). In other words, lack of adherence to traditional redistricting principles is relevant because (1) it is circumstantial evidence of an improper racial motive and (2) if a district is drawn for impermissible reasons, the disregard for traditional redistricting principles is part of the harm suffered by the citizens within an improper district. *See, Johnson v. Miller*, 864 F. Supp. at 1370. However, the failure to adhere to traditional redistricting principles, standing alone, is not a sufficient basis for a federal constitutional challenge to legislative redistricting.

The N.C. Supreme Court, in its hierarchy of rules harmonizing the WCP with federal law, directs that "communities of interest should be considered in the formation of compact and contiguous electoral districts." *Stephenson I*, 355 N.C. at 384. But, read in context, this rule does not elevate compactness and contiguity to an independent constitutional requirement under the North Carolina Constitution. Rather, the Court explains:

> We observe that the State Constitution's limitations upon redistricting and apportionment uphold what the United States Supreme Court has termed "traditional districting principles." These principles include such factors as compactness, contiguity, and respect for political subdivisions. The United States Supreme Court has "emphasized that these criteria are

> important not because they are constitutionally required – they are not – but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines."

Id. at 371 (emphasis omitted).

The *Stephenson II* decision of the N.C. Supreme Court is also instructive on this issue. In that case, the Court found the 2002 legislative redistricting plans to be in violation of the WCP. Among the other findings of the trial court that were adopted by the N.C. Supreme Court was a finding that:

> The 2002 House and Senate plans enacted by the General Assembly contain districts that are not sufficiently compact to meet the requirements of the equal protection clause in that the requirements of keeping local governmental subdivisions or geographically based communities of interest were not consistently applied throughout the General Assembly's plan producing districts which were a crazy quilt of districts unrelated to a legitimate governmental purpose.

357 N.C. at 308. Reading this in accord with the *Stephenson I* Court's instruction that traditional redistricting principles are "not constitutionally

required," this trial court concludes that under North Carolina law, legislative districts that comply with the WCP, and are not otherwise based upon impermissible criteria, cannot fail constitutional scrutiny merely because they are bizarrely shaped or not sufficiently compact. However, when the WCP is violated, because one of its purposes is to embody traditional redistricting principles, the harm suffered by the citizens of affected counties and districts include those ills associated with bizarre shapes and divided communities of interest. Because, in *Stephenson II*, the requirements of the WCP were not complied with and districts were not compact, some citizens of North Carolina were disproportionately burdened by a "crazy quilt of noncompact districts." 357 N.C. at 308. However, nothing in *Stephenson II* suggests that, standing alone, without a WCP violation, the failure to achieve compliance with traditional redistricting criteria would be sufficient to defeat a legislatively enacted redistricting plan. As succinctly stated in Justice Parker's dissent in *Stephenson II*:

> [D]ecisions as to communities of interest and compactness are best left to the collective wisdom of the General Assembly as the voice of the people and should not be overturned unless the decisions are "clearly erroneous, arbitrary, or wholly unwarranted."

Stephenson II, 357 N.C. at 315 (Parker, J., dissenting) (citations omitted) (Justice Parker urged, in her dissent, that the challenged legislative plans complied with the WCP and were therefore lawful).

B. *Absence of a Judicially Manageable Standard for Measuring Compliance, or Lack Thereof, with Traditional Redistricting Principles*

To the extent that lack of adherence to traditional redistricting principles could be viewed as an independent basis for a constitutional challenge to legislatively enacted redistricting plans, the trial court finds no uniformly adopted judicial standard by which to measure compliance. The absence of such standards invites arbitrary and inconsistent outcomes of the court that must be avoided, particularly when examining challenges to legislatively enacted redistricting plans where the trial court is instructed to respect the inherently political nature of the redistricting process.

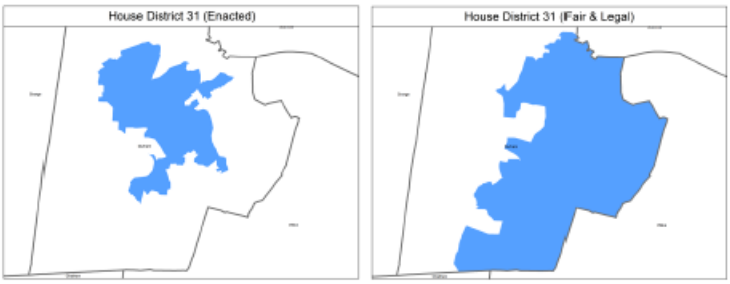
The absence of judicially manageable standards is the result of the amorphous and subjective nature of traditional redistricting principles. For example, the notion of "compactness," which generally refers to the shape of a district, both in terms of the breadth of a district's geographic "dispersion" and the irregularity of its "perimeter," *see,* Fairfax Dep. 23, has been described as "such a hazy and ill-defined concept that it seems impossible to apply it in any rigorous sense in matters of law." *Johnson v. Miller,* 864 F. Supp. at 1388. *See also Karcher v. Daggett,* 462 U.S. 725, 756 (1983) (stating that compactness requirements have been of limited use because of vague definitions and imprecise application). The trial court is unaware of any North Carolina or United States Supreme Court opinion that has defined these terms and established a

standard by which a legislature could determine whether a district comports thereto.

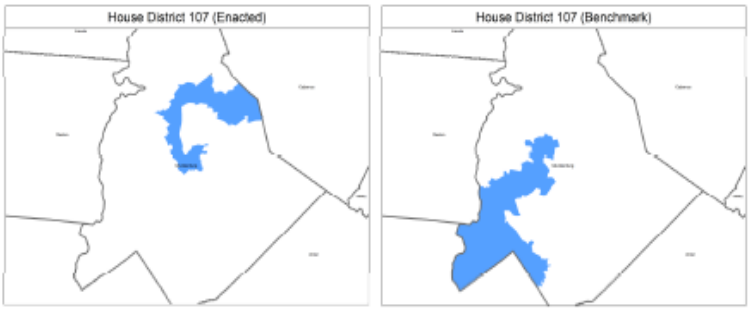
Plaintiffs' expert, Dr. Arrington, testified that when he consults with the United States Department of Justice on redistricting matters, he uses what he calls an "interocular test" to determine if a district is compact, presumably meaning that if the district is so irregular that it "hits him between the eyes" it must not survive strict scrutiny. Arrington Dep. 202. Such a subjective test of compactness or irregularity is particularly unsuitable for judicial review of redistricting plans in North Carolina because, among other reasons, were this trial court to declare that a certain district was unlawful for lack of compactness or regularity, the law obligates the trial court to further "find with specificity all facts supporting that declaration, [ ] state separately and with specificity the court's conclusions of law on that declaration, and [the trial court] shall, with specific reference to those findings of fact and conclusions of law, identify every defect found by the court." N.C. Gen. Stat. § 120-2.3. A trial court's finding of fact or conclusion of law that a district "appears to be excessively irregular" would, in this court's view, be insufficient to comply with the requirement of N.C. Gen. Stat. §120-2.3.

Still, Plaintiffs argue that the N.C. Supreme Court's holding in *Stephenson II* requires this trial court to compare alternative plans to see if more compact alternatives are available. The subjective nature of this task is illustrated by the following examples.

Example 1:



Example 2:



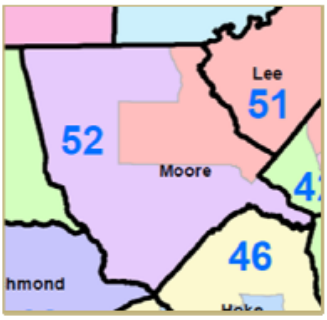
In each of these examples, the district on the left is a House District in the Enacted Plan (Districts 31 (Durham County) and 107 (Mecklenburg County), respectively). The districts on the right are corresponding alternative districts proposed by the Plaintiffs in the House Fair & Legal Plan. The Plaintiffs contend that House Districts 31 and 107 in the Enacted Plan are each "non-compact and irrationally shaped." Conversely, the Plaintiffs suggest that their alternative Districts 31 and 107 are sufficiently compact and rationally shaped.

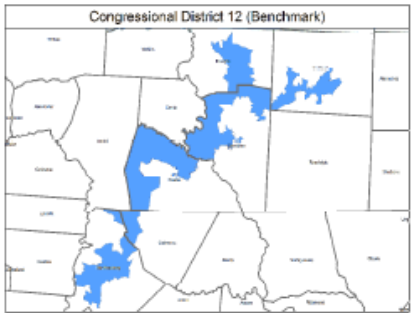
In both of these examples, the trial court is unable to discern any meaningful difference in the

compactness and regularity of the Enacted Plan's districts versus the Plaintiffs' proposed alternative districts. Were the trial court inclined to find either of these enacted districts invalid on the grounds that they were insufficiently compact or irrationally shaped, the trial court believes it would be unable to articulate any meaningful facts or conclusion of law in support of such a holding other than a subjective preference.

The subjective task of determining whether a district is not compact enough or too irregular is made more complicated by the wide variety of court precedent on this topic. Consider, for example the following two districts:

Example 3:





The district on the left is House District 52 as proposed a decade ago. In looking at this district, one might concluded, according to the "inter-ocular" test, that it appears "tidy" and compact. However, this district was rejected by the *Stephenson II* trial court, whose decision was affirmed by the N.C. Supreme Court, as having a "substantial failure in

compactness." *See, Stephenson II,* 357 N.C. 301, 309-313 (because it "is shaped like a 'C' rather than being compact, and leaves out the county seat.").

The district on the right is North Carolina's 12th Congressional District, a district perhaps most frequently associated with the lay person's understanding of "gerrymandering."[30] However, when the 12th Congressional District faced a legal challenge in the Supreme Court in *Cromartie II*, 532 U.S. 234, even though the Court had previously labeled it as a "bizarre configuration" with a "'snakelike' shape and continues to track Interstate-85," *Cromartie I*, 526 U.S. at 544, n.3, the district's irregular shape and lack of compactness did not, as a matter of law, render the district unconstitutional or unlawful. This same district has persisted as a template for all iterations of the 12th Congressional District that have followed in two subsequent decennial redistricting efforts and persists even in the Enacted Congressional Plans under consideration today.

To be sure, there are several districts in the Enacted Plan that are "ugly" and that would appear to most to be bizarrely shaped, irregular and non-compact. For example, House District 7 in the Enacted Plan is one that could be described as such.

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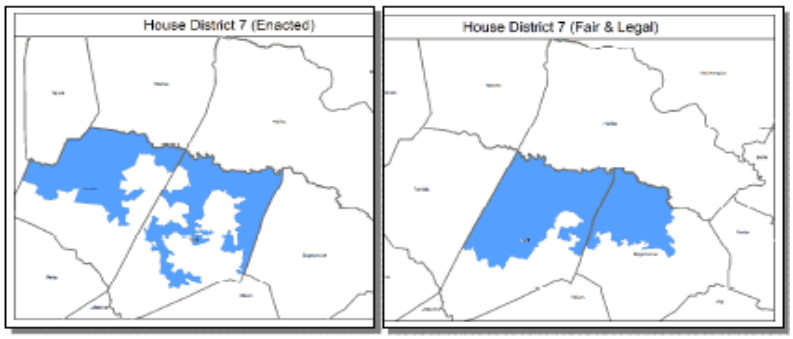
[30] As a rough measure of District 12's universal notoriety as a non-compact district, the Wikipedia article on the term "gerrymandering" has an image of the 2007 version of the 12th Congressional District as its very first image under "examples of gerrymandered districts." *Gerrymandering*, Wikipedia.com, http://en.wikipedia.org/wiki/Gerrymandering (last modified June 30, 2013).

And, indeed, while the alternative House District 7 proposed in the House Fair & Legal plan is not itself a model of compactness or regularity, it nonetheless could be perhaps described as "prettier."

Example 4:



But, in the absence of a judicially consistent, articulable or manageable standard for viewing a district and declaring it sufficiently regular, compact or "pretty," the trial court cannot find that any district, simply on this ground alone, can be declared to be in violation of law or unconstitutional.

The Plaintiffs also urge that mathematical or quantitative measures of compactness or regularity can aid the trial court in determining whether districts in the Enacted Plan should be rejected for lack of adherence to traditional redistricting principles. But these quantitative measures are not, the trial court finds, particularly helpful in this task because even when a numerical value is assigned to "compactness," the trial court is still left with the subjective task of deciding whether, for example, the

Roeck Test[31] compactness score of 0.45 for Enacted Plan House District 31 (see above at **Example 1**) versus a compactness score of 0.46 for the alternative Fair & Legal House District 31 renders the former unconstitutional, and the latter lawful. Or, similarly, whether a non-compactness score of 0.35 renders Enacted Plan District 107 unconstitutional, and the Fair & Legal alternative District 107, with a Roeck score of 0.40, lawful (See above at **Example 2**). This is in accord with Plaintiffs' own expert, Dr. Arrington, who says:

> Courts and reformers often cite compactness as a valuable technical criterion in redistricting, but scholars do not think it should be a priority. One problem is that there are many different and partially conflicting ways to measure the compactness of a district or a district plan. And there can be no mathematical standard of compactness that can be applied across varying geography in the way that equal population can have a mathematical standard. The most one can say is that

[31] The "Roeck Test" is one of several tests employed by experts considering the compactness of voting districts. It measures a district's "dispersion" by circumscribing the district with the smallest circle within which the district will fit, and comparing the area of the circle to the area of the district. A "perfectly compact" district would itself be a circle with a Roeck Score of 1, whereas a completely noncompact district would have a Roeck score of 0. (Fairfax Dep. 24). Whether any given score resulting from the Roeck test, or the other quantitative tests employed, is itself an indication of lack of compactness is "a judgment call." (Fairfax Dep. 76-77).

> with the use of a particular statistic, one redistricting plan for a particular jurisdiction has more or less compact districts than another plan for that same jurisdiction. But there is no standard that can tell us whether the districts in a plan are compact enough.

Arrington Dep. 142-43.

Moreover, even if the trial court could discern between an acceptable score versus a constitutionally defective score, the results of the quantitative tests, when applied to the Enacted Plan and the alternative plans, are decidedly non-conclusive. Consider, for example, a comparison of the Roeck Scores for the following districts, that are selected for comparison because they all are VRA districts located within a single county:[32]

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[32] Districts contained wholly within a county are selected for this comparison because, as the trial court has concluded above, none of the alternative plans proposed or endorsed by the Plaintiffs complies with the hierarchy of rules established by the *Stephenson I* and *II* courts for compliance with the WCP, and none of the alternative plans are drawn to provide VRA districts in "rough proportionality to the Black population in North Carolina" or populate each VRA district with >50% TBVAP as is done in the Enacted Plans. Because of these differences, each of which could have a dramatic effect on the shape of any given district, comparison among the plans is akin to comparing "apples to oranges." By limiting the comparison to only those districts contained wholly within a county, the comparison becomes, perhaps, more instructive.

Table 4: ***Roeck Scores for Enacted VRA House Districts within a Single County Compared to Alternatives***

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

The shaded blocks in **Table 4** represent the lowest Roeck, or the "least compact" district, among all plans. This comparison illustrates that even with a mathematical analysis of compactness, the results provide a no better judicially manageable standard by which the trial court can measure constitutionally permissible, or constitutionally defective, adherence to traditional redistricting principles. While the above-tabulated results of 4 of the 14 districts in the Enacted House Plan show the lowest compactness scores for those same districts across all alternative plans, each of the alternative plans, in turn, have

their own set of districts that score lower than all others. In sum, in the "beauty contest" between the Enacted Plans and the "rival compact districts designed by plaintiffs' experts," this data suggests, at best, a tie. *Vera*, 517 U.S. at 977.

C. Excessive Split Precincts

As a subset of traditional redistricting principles, the trial court considers the claims of the Plaintiffs asserting excessive splitting of precincts.[33] Plaintiffs assert that the excessive splitting of precincts impermissibly infringes on voters' right to vote on equal terms in two ways. First, Plaintiffs contend that the division of an excessive number of precincts deprives North Carolinians of the fundamental right to vote on equal terms by creating two classes of voters: a class that is burdened by the problems of split precincts, and a class that is not. Second, the Plaintiffs contend, the way in which the precincts were divided to achieve a race-based goal disproportionately disenfranchises Black voters because Black voters are more likely to live in precincts split in the Enacted Plan. Split precincts, the Plaintiffs contend, inherently cause voter confusion and a possibility of receiving the wrong ballot at the polls. In both instances, the Plaintiffs contend that the trial court must consider these alleged equal protection violations under a strict scrutiny standard because of the fundamental nature of one's right to vote and the impermissibility of raced-based classifications.

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[33] For the purposes of this discussion, the term "VTD" (Voter Tabulation District), as defined by the U.S. Census Bureau and the term "precinct" are used interchangeably.

Plaintiffs' claims of equal protection violations must fail as a matter of law for several reasons. First, the trial court is aware of no authority, state or federal, providing constitutional relief on a claim of split precincts. While undoubtedly, the precinct system is of significant value in the administration of elections in North Carolina, *James v. Bartlett*, 359 N.C. 260, 267 (2005) (enumerating "significant and numerous" advantages of the precinct system), the respect for precincts boundaries is akin to other considerations of traditional redistricting principles that, as discussed above, do not generally provide an independent basis for a constitutional challenge to a redistricting plan that is not otherwise based upon impermissible criteria. Rather, the splitting of excessive precincts may be circumstantial evidence of an impermissible racial motive, or may be the harm resulting from a racial gerrymander, but is not, in and of itself, a constitutional defect. *Shaw I*, 509 U.S. at 647.

Precinct lines are established by each county board of elections. N.C. Gen. Stat. §163-33(4) and -128. There are no uniform, statewide criteria that must be followed by county boards of elections when they create a precinct. Many precinct lines have not been changed for 20 or more years. Bartlett Dep. 21-22; Colicutt Dep. 46-47; Doss Dep. 19-20; Poucher Dep. 39. There is no requirement that precincts be based upon equal population. N.C. Gen. Stat. §163-33(4), -128 and -132.1 *et seq*. There is no requirement that precincts be revised every ten years upon receipt of the Decennial Census like legislative and Congressional districts. N.C. Gen. Stat. § 163-33(4) (providing for revision of precincts as county boards

"may deem expedient.") There is no requirement that precincts be drawn compactly or that they respect communities of interest. N.C. Gen. Stat. §163-33(4), -128 and -132.1 *et seq*. Precinct lines divide neighborhoods. Arrington Dep. 105-106. When towns and municipalities annex property, precincts are split, and some voters then vote in municipal elections, while others in the same precincts vote in county elections. Ultimately, the establishment of precincts by the 100 different county boards of elections is an exercise of their discretion and based upon factors such as the amount of funding made available by their county's board of commissioners and the availability of suitable polling places. N.C. Gen. Stat. § 163-33(4); Poucher Dep. 43. Given the potential for disparate characteristics of precincts throughout the State, it is not surprising that there is no appellate authority affording any special constitutional status to precinct lines that would limit the General Assembly's exercise of its lawful discretion in the redistricting process.

Second, like other instances of traditional redistricting principles, there is no judicially manageable standard for determining when a redistricting plan splits an "excessive" number of precincts. Each alternative plan proposed or endorsed by the Plaintiffs contains split precincts, as did the 2003 Senate Plan and the 2009 House Plan. To be sure, the Enacted Plans split more precincts, and affect more citizens, than the predecessor or alternative plans. But again, the trial court concludes that the subjective nature of what constitutes an "excessive" number of split precincts invites arbitrary and inconsistent outcomes of the

trial court that must be avoided, particularly when examining challenges to legislatively enacted redistricting plans, where the trial court is instructed to respect the inherently political nature of the redistricting process.

Third, accepting the Plaintiffs' contention that the splitting of precincts impairs the fundamental right of a split precinct's voters disproportionately to other voters, and that the splitting of precincts was done for a predominantly racial motive, the equal protection analysis that would then follow is identical to that set out above with respect to racial gerrymandering. (*See, supra,* § IV.) As the trial court concluded above, the Enacted Plans were drafted to achieve compelling governmental interests of avoiding § 2 liability and to ensure preclearance under § 5 of the VRA, and the plans were narrowly tailored to accomplish those goals. Where precincts must to be divided to achieve those goals, the General Assembly must be given the leeway to do so.

Of historic significance to the interplay between precinct lines and compliance with § 2 and § 5 of the VRA was the attempt, in 1995, of the General Assembly to enact legislation that would prohibit legislative and congressional districts from crossing precinct lines. N.C. Gen. Stat. §§ 120-2.2 and § 163-261.22 ("whole precinct statute"). When submitted for pre-clearance, the U.S. Department of Justice ("USDOJ") objected to preclearance of the whole precinct statute because it concluded the State had failed to prove the statute was free from discriminatory purpose and that the State had failed to prove that the statute would not have a

discriminatory "effect" or "lead to a retrogression in the position of . . . minorities with respect to their effective exercise of the electoral franchise." Arrington Dep. Ex. 238, at 3 (Letter of USDOJ to Charles M. Hensey, Special Deputy Attorney General (2/13/96)) (quoting *Beer v. United States*, 425 U.S. 130, 131 (1976)). The State's responsibility to create "majority-black districts" formed the basis of the USDOJ's objection to the whole precinct statute. The USDOJ noted that "under existing law, county election officials may use their discretion with regard to the population size and racial composition of precincts," and noted that prior to the whole precinct requirement, "the size and composition of the precincts were of little relevance because the legislature could draw district lines through precinct lines for any number of reasons (e.g. to protect interests, to voluntarily satisfy the VRA, etc.)." *Id.* at 2. The USDOJ was concerned that, under the whole precinct statute, precincts would take on "new importance" because they would then "be used as the building blocks for each district." *Id.* The USDOJ observed that "if precincts do not fairly reflect minority voting strength, it is virtually impossible for districts to do so." *Id.* Based upon this analysis, the USDOJ blocked the enforcement of the whole precinct statute because it "unnecessarily restrict[ed]" the redistricting process and made "it more difficult to maintain existing majority-black districts and to create new ones." *Id.* at 3. Just as the USDOJ did, the trial court concludes the tool of splitting of precincts to achieve a narrowly tailored redistricting plan designed to avoid § 2 liability and ensure § 5 preclearance must

be left available to the General Assembly, and an arbitrary constraint would be ill-advised.

Finally, in connection with the equal protection analysis of the claims challenging excessive split precincts, because the Plaintiffs have not proffered any alternative plans that show that the General Assembly could have achieved its legitimate political and policy objectives in alternate ways with fewer split precincts, the Plaintiffs have failed to persuade the trial court that the Enacted Plans are not narrowly tailored.[34] Thus, in considering all of the factors regarding traditional redistricting principles, including the claim of excessive split precincts, the trial court cannot conclude, as a matter of law, that (1) the failure to comport with "traditional redistricting principles," standing alone, renders the Enacted Plans unlawful under the North Carolina or United States constitutions, (2) that, even if such a cause of action exists, that the Enacted Plans deviate from traditional redistricting principles by any meaningful justiciable measure or (3) that a violation of any cognizable equal protection rights of any North Carolina citizens, or groups thereof, will result.

VII. CONCLUSIONS

Upon review of the entire record, consideration of all arguments of counsel, and being bound by the prevailing authority of the North

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[34] See *supra* IV(C)(2)(d) and cases cited therein regarding the Plaintiffs' burden when asserting a lack of narrow tailoring under an Equal Protection analysis

Carolina Supreme Court and the United States Supreme Court, the trial court finds that the Plaintiffs' Motion for Partial Summary Judgment must be DENIED and, with respect to the claims asserted by the Plaintiffs challenging the 2011 Enacted Plans, the Defendants are entitled to JUDGMENT IN THEIR FAVOR on each claim.

So ordered, this the 8th day of July, 2013.

/s/ Paul C. Ridgeway

_____

Paul C. Ridgeway, Superior Court Judge

/s/ Joseph N. Crosswhite

_____

Joseph N. Crosswhite, Superior Court Judge

/s/ Alma L. Hinton

_____

Alma L. Hinton, Superior Court Judge

Certificate of Service

The undersigned certifies that the foregoing Judgment and Memorandum of Decision, as well as Appendices A and B, were served upon all parties by e-mail and first class mail addressed to the following:

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This the ___ day of July, 2013.

_____

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

MARGARET DICKSON, *et al.*,	)
	)
Plaintiffs,	)
	)
v.	)
	)
ROBERT RUCHO, *et al.*,	)
	)
Defendants.	)

11 CVS 16896

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

11 CVS 16940

(Consolidated)

APPENDIX A TO THE

JUDGMENT AND MEMORANDUM OF DECISION

FINDINGS OF FACT RELEVANT TO THE ISSUE OF RACIAL POLARIZATION IN SPECIFIC LOCATIONS WHERE VOTING RIGHTS ACT DISTRICTS WERE PLACED IN THE ENACTED PLANS

See § IV(C)(2)(c) of Judgment and Memorandum of Decision

Contents

I. General Findings of Fact

1. In *Thornburg*, North Carolina was ordered to create majority-black districts as a remedy to § 2 violations in the following counties: Bertie, Chowan, Edgecombe, Forsyth, Gates, Halifax, Martin, Mecklenburg, Nash, Northampton, Wake, Washington, and Wilson. *Gingles*, 590 F.

Supp. at 365-66, *aff'd*, *Thornburg*, 478 U.S. at 80; Churchill Dep. Ex. 57, pp. 1, 2 (6/3/11 Memorandum from Michael Crowell and Bob Joyce, UNC School of Government); Churchill Dep. Ex. 60, p. 1 (6/14/11 Memorandum to Senator Bob Rucho from O. Walker Regan, Attorney, Research Division Director)

2. During the legislative process, the two redistricting chairs, Senator Robert Rucho and Representative David Lewis, sought advice from many parties on a variety of issues, including whether North Carolina remained bound by *Gingles*. On May 27, 2011, faculty of North Carolina's School of Government advised the redistricting chairs that North Carolina remained "obligated" to comply with *Gingles*. (Churchill Dep. Ex. 57, pp. 1, 2) ("[I]t appears to be commonly accepted that the legislature remains obligated to maintain districts with effective African American voting majorities in the same areas decided in *Gingles*, if possible.")

3. In 2010, eighteen African American candidates were elected to the State House and seven African American candidates were elected to the State Senate. (First Frey Aff. Exs. 10, 11; Churchill Aff. Ex. 6, 7) Two African American candidates were elected to Congress in 2010. (Churchill Dep. Ex. 81; Churchill Aff. Ex. 1; Second Frey Aff. Ex. 62) All African American incumbents elected to the General Assembly in 2010 or the Congress in 2010 were elected in districts that were either majority-African American or majority-minority coalition districts. (minority-white districts including Hispanics in the category of "white" and

one minority non-Hispanic white district) (Second Frey Aff. Exs. 34, 39, 60)[35]

4. No African American candidate elected in 2010 was elected from a majority-white crossover district. (Churchill Dep. Ex. 81, 82, 83 [2010 elections]; Churchill Aff. Exs. 1-3, 6, 7; Map Notebook Stat Pack 2003 Senate Plan, 2009 House Plan, 2001 Congressional Plan) In fact, two African American incumbent senators were defeated in the 2010 General Election, running in majority-white districts. (Churchill Dep. Ex. 82 [2010 Election for SD 5, 2010 Election in Districts with less than 30% Minority Population, SD 24]; Churchill Aff. Ex. 7; Map Notebook, 2003 Senate Plan, Districts 5 and 24 statistics) From 2006 through 2010, no African American candidate was elected to more than two consecutive terms to the legislature in a majority-white district. (Churchill Dep. Ex. 81 [Congressional Races with Minority Candidates, 1992-2010]; Ex. 82 [Senate Races with Minority Candidates 2006-2010]; Ex. 83 [House Legislative Races with Minority Candidates 2006-2010]; Churchill Aff. Exs 6, 7) From 1992 through 2010, no black candidate for Congress was elected in a majority-white district. (Churchill Dep. Ex. 81)

5. From 2004 through 2010, no African American candidate was elected to state office in

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[35] The census categories of "white," "black," "Hispanic," "total black," and "non-Hispanic white" are included for each district with the "stat packs" attached to all of the various plans in the Map Notebook. The "white" category is without regard to ethnicity and includes people who are Hispanic or Latino. The category "Non-Hispanic white" excludes that portion of the population. (Second Frey Aff. Ex. 34, Notes)

North Carolina in a statewide partisan election. In 2000, an African American candidate, Ralph Campbell, was elected State Auditor in a partisan election. In 2004, Campbell was defeated by a white Republican, Les Merritt, in a partisan election for state auditor. Churchill Dep. Ex. 94, 2004 Partisan Elections; *see also Gingles*, 590 F. Supp. at 364-65 (lack of success by black candidates in statewide elections is relevant evidence of legally significant racially polarized voting).

6. In *Cromartie*, the 1997 version of the First Congressional District was challenged as a racial gerrymander. *Cromartie v. Hunt*, 133 F. Supp. 2d 407, 408 (E.D.N.C. 2000) *rev'd on other grounds*, *Easley v. Cromartie*, 532 U.S. 234 (2001) ("*Cromartie II*"). The First Congressional District encompassed the following counties: Beaufort, Bertie, Craven, Edgecombe, Gates, Granville, Greene, Halifax, Hertford, Jones, Lenoir, Martin, Northampton, Person, Pitt, Vance, Warren, Washington, Wayne, Wilson. (*See* http://www.ncga.state.nc.us/GIS/Download/District_Plans/DB_1991/Congress/97_House-Senate_Plan_A/Maps/DistSimple/distsimple1.pdf)

7. The First Congressional District had a total black population of 50.27% and a black voting age population of 46.54%. *Cromartie*, 133 F. Supp. 2d at 415 n.6. Thus, the 1997 First District was not a majority-TBVAP district. Nevertheless, the parties in *Cromartie* stipulated that legally significant racially polarized voting was present in the First District. *Cromartie*, 133 F. Supp. 2d at 422. The district court in *Cromartie* ruled that the First District was reasonably necessary to protect the

State from liability under the VRA. *Cromartie*, 133 F. Supp. 2d at 423. That part of the district court's opinion in *Cromartie* was not appealed and remains binding on the State of North Carolina. (Churchill Dep. Ex. 57; *see also* Opinion Letter from UNC School of Government Faculty stating that findings in *Gingles* remain binding on North Carolina)

8. The General Assembly conducted a number of public hearings prior to the legislative session at which redistricting plans were enacted, which provided additional evidence in the record supporting enactment of the VRA districts. There were 13 different public hearing dates running from 13 April 2011, through 18 July 2011. Hearings were often conducted simultaneously in multiple counties and included 24 of the 40 counties covered by § 5. Proposed legislative VRA districts were created before non-VRA districts and the General Assembly conducted a hearing on VRA districts on 23 June 2011. A public hearing on a proposed congressional plan was held on 7 July 2011, and a hearing on proposed legislative plans (including both VRA and non-VRA districts) was held on 18 July 2011. (Affidavit of Robert Rucho [January 19, 2012] ("First Rucho Aff.") Exs. 1 and 2)) Ample testimony was given during these hearings to provide a strong basis in evidence to support the enacted VRA districts.

9. Evidence was presented by counsel for the *NC NAACP* plaintiffs, Anita Earls, and her colleague, Jessica Holmes, on 9 May 2011, and 23 June 2011. On 9 May 2011, both Ms. Earls and Ms. Holmes stated that they were appearing on behalf of the Alliance for Fair Redistricting and Minority

Voting Rights ("AFRAM"). (First Rucho Aff. Ex. 6, pp. 7, 8) Ms. Holmes explained that AFRAM was a "network of organizations" that included the Southern Coalition of Social Justice ("SCSJ"), and at least three of the organizational plaintiffs: Democracy NC, the NC NAACP, and the League of Women Voters. (First Rucho Aff. Ex. 6, p. 6) Ms. Holmes stated that a proposed congressional map would be presented by the SCSJ following her statement. (First Rucho Aff. Ex. 6, p. 8) During her presentation on May 9, 2011, Ms. Earls stated that she was speaking on behalf of the SCSJ. (First Rucho Aff. Ex. 6, p. 9)

10. In addition to her testimony, on May 9, 2011, Ms. Earls provided the joint committee with other documents. One of these was her written statement. (Rucho Aff. Ex. 7) Another was a racial polarization study by AFRAM's expert, Dr. Ray Block. (Rucho Aff. Ex. 8) In his study, Dr. Block analyzed the presence of racial polarization in all of the black candidate versus white candidate elections for the General Assembly and Congress (a total of 54 elections) for the 2006, 2008, and 2010 general elections. (Rucho Aff. Ex. 6, p. 12; Rucho Aff. Ex. 7, p. 2; Rucho Aff. Ex. 8, p. 1)[36] Ms. Earls also

[36] The following relevant counties were included in the districts studied by Dr. Block: (a) First Congressional District: Beaufort, Bertie, Chowan, Craven, Edgecombe, Gates, Granville, Greene, Halifax, Hertford, Jones, Lenoir, Martin, Northampton, Pasquatank, Perquimins, Pitt, Vance, Warren, Washington, Wayne, Wilson; (b) Twelfth Congressional District: Guilford and Mecklenburg; (c) 2003 SD 4: Bertie, Chowan, Gates, Halifax, Hertford, Northampton, Perquimins; 2003 SD5: Greene, Lenoir, Pitt; 2003 SD 14: Wake; 2003 SD 20: Durham; 2003 SD 21: Cumberland; 2003 SD 28: Guilford; 2003 SD 38

submitted a law review article prepared by her. *See* Earls *et al.*, *Voting Rights in North Carolina 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 577 (2008) (attached to Rucho Aff. as Ex. 9) Finally, Ms. Earls presented a proposed congressional map that is listed in the map notebook provided to the Court as "SCSJ Congress Plan."

11. Through her testimony and the documents she submitted, Ms. Earls gave her opinion that "we still have very high levels of racially polarized voting in the State." (Rucho Aff. Ex. 6, pp. 12-13) Referencing Dr. Block's report, Ms. Earls testified that racially polarized voting is present when 88 to 93 percent of black voters vote for "the black candidate" and "less than 50" percent of the white voters vote for the black candidate. *Id.* Ms. Earls confirmed her testimony in her written statement which provides:

> Existence of racially polarized voting in North Carolina elections. We asked a political scientist, Ray Block, Jr., to

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and 40: Mecklenburg; (d) 2009 HD 5: Bertie, Gates, Hertford, Perquimins; 2009 HD 12: Craven, Lenoir; 2009 HD 21: Sampson, Wayne; 2009 HD 24: Edgecombe, Wilson; 2009 HD 25: Nash; 2009 HD 29 and 31: Durham; 2009 HD 33: Wake; 2009 HD 48: Hoke, Robeson, Scotland; 2009 HD 58 and 60: Guilford; and 2009 HD 101 and 107: Mecklenburg. (*See* First Rucho Aff. Ex. 8, pp. 5-7; Map Notebook provided to the Court ["Map Notebook"], Congress Zero Deviation, 2003 Senate Plan and 2009 House Plan). According to Dr. Block, from 2006-2010, there were no contested general elections between black and white candidates in SD 3, HD 7, 8, 27, 42, 43, 99 and 102. (First Rucho Aff. Ex. 8, pp. 5-7) However, it appears that a contested election between a black and white candidate occurred in 2010 in HD 99. (Churchill Aff. Ex. 3, p. 1)

> conduct an analysis of the extent to which voting in North Carolina's legislative and congressional elections continue to be characterized by racially polarized patterns. We asked him to examine every black vs. white contest in 2006, 2008, and 2010 for Congress and the State Legislature . . . . The report analyzes 54 elections *and finds significant levels of racially polarized voting. The report also finds that the number of elections won by black candidates in majority minority districts is much higher than in other districts. The data demonstrates the continued need for majority-minority districts.*

(First Rucho Aff. Ex. 7, p. 2) (emphasis added)

12. Dr. Block's report provides substantial evidence regarding the presence of racially polarized voting in almost all of the counties in which the General Assembly enacted the 2011 VRA districts. In his report, Dr. Block attempted to address the following questions:

> 1. Is there a relationship between the number of Blacks who vote in a particular district and the amount of votes that an African American candidate receives?
>
> 2. Is there evidence of racial polarization in the preferences of voters

> who participate in electoral contests involving African American candidates running against non-Black candidates?
>
> 3. Is the number of elections won by Black candidates higher in majority-minority districts than in other districts?

13. Dr. Block's analysis answers all three of these questions in the affirmative. (Rucho Aff. Ex. 8, pp. 1-3) Dr. Block concluded his report with the following summary:

> I offer several different analytical approaches that each tell a similar story about the degree to which polarized voting exists in 2006, 2008 and 2010 North Carolina congressional district elections.[37] Recall that, paraphrasing Justice Brennan's opinion in *Gingles*, racially polarized voting can be identified as occurring when there is a consistent relationship between the race of the voter and the way in which s/he votes. In *all* elections examined here, such a consistent pattern emerges. Furthermore, the evidence in Figure 2 suggests that *majority-*

[37] Dr. Block's total report strongly indicates that his examination and conclusions apply to all of the districts he analyzed, not just congressional districts as stated in this sentence. Certainly, given her testimony, written statement, and maps proposed by SCSJ, it appears that Ms. Earls understood that Dr. Block's study applied to all the districts he studied.

> *minority districts facilitate the election of African American candidates.*

(Rucho Aff. Ex. 8, pp. 3-11) (emphasis added)

14. Dr. Block's report is highly informative in demonstrating racially polarized voting in many areas of the State. To a limited extent, it leaves a few questions in some areas. First, Dr. Block assessed 54 elections in the State of North Carolina in 2006, 2008, and 2010 to determine the degree to which African American candidates for political office failed to win the support of "non-blacks" in the event they were the preferred candidate among black voters. In Dr. Block's analysis, the non-black vote for the black candidate includes whites and minorities other than blacks who voted for the black candidate. Thus, any assessment of the "non-black" vote for the black candidates in an election held in a majority-black or a majority-minority district does not represent the exact percentage of white voters who voted for the candidate of choice of black voters. (Rucho Aff. Ex. 8, p. 1 n. 1; Second Frey Aff. Exs. 34, 39, 60)

15. Second, Dr. Block's report likely overstates the percentage of non-black voters who would vote for a black candidate in an election with genuine opposition. This is because most of the black candidates were incumbents or faced token opposition in the general election. (Churchill Dep. Exs. 81, 82, 83; Churchill Aff. Exs. 1-7; Defendants' Resp. to Pls. "Undisputed Facts" [Jan. 4, 2013], ¶¶ 68-82); *see also Thornburg*, 478 U.S. at 57, 60, 61.

16. Third, Dr. Block could only analyze a legislative election where the black candidate had opposition. Many of the legislative elections from 2006-2010 involved races where the black candidate was unopposed. (First Rucho Aff. Ex. 8, pp. 1-7; Churchill Dep. Exs. 81, 82, 83; Churchill Aff. Exs. 1-7)

17. Finally, because Dr. Block only looked at contested legislative elections, his report provided no information regarding counties in eastern North Carolina that have never before been included in a majority-black or majority-minority district.

18. Because of these limitations, the General Assembly engaged Dr. Thomas Brunell to prepare a report that would supplement the report provided by Dr. Block. (First Rucho Aff. ¶ 15, Ex. 10)

19. Dr. Brunell was asked to assess the extent to which racially polarized voting was present in recent elections in 51 counties in North Carolina. (First Rucho Aff. Ex. 10, p. 3) These counties included the 40 North Carolina counties covered by Section 5 of the VRA and Columbus, Duplin, Durham, Forsyth, Jones, Mecklenburg, Richmond, Sampson, Tyrell, Wake, and Warren counties. *Id.*[38]

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[38] The forty counties covered by Section 5 include: Anson, Beaufort, Bertie, Bladen, Camden, Caswell, Chowan, Cleveland, Craven, Cumberland, Edgecombe, Franklin, Gaston, Gates, Granville, Greene, Guilford, Halifax, Harnett, Hertford, Hoke, Jackson, Lee, Lenoir, Martin, Nash, Northampton, Onslow, Pasquotank, Perquimans,Person, Pitt, Robeson, Rockingham, Scotland, Union, Vance, Washington, Wayne, and Wilson. (Churchill Dep. Ex. 46, Legislator's Guide to Redistricting p. 6)

Elections analyzed by Dr. Brunell included the 2008 Democratic Presidential primary, the 2008 Presidential General Election, the 2004 General Election for State Auditor (the only statewide partisan election for a North Carolina office between black and white candidates), local elections in Durham County, local elections in Wake County, the 2010 General Election for Senate District 5, the 2006 General Election for House District 60, local elections in Mecklenburg County, local elections in Robeson County, and the 2010 Democratic primary for Senate District 3. (First Rucho Aff. Ex. 10, pp. 5-25)

20. Based upon his analysis, Dr. Brunell found "statistically significant racially polarized voting in 50 of the 51 counties." (First Rucho Aff. Ex. 10, p. 3) Dr. Brunell could not conclude whether statistically significant racially polarized voting had occurred in Camden County because of the small sample size. *Id.* All of the counties located in the 2011 First Congressional District, VRA districts in the 2011 Senate Plan, and VRA districts in the 2011 House Plan are included in Dr. Brunell's analysis.

21. At no time during the public hearing or legislative process did any legislator, witness, or expert question the findings by Dr. Block or Dr. Brunell. It was reasonable for the General Assembly to rely on these studies.

22. The law review article submitted by Ms. Earls also provided evidence of racially polarized voting as alleged or established in voting rights lawsuits filed in many of the counties in which 2011

VRA districts were enacted. (Rucho Aff Ex. 9, App. B) These cases included: *Ellis v. Vance County, Fayetteville; Cumberland County Black Democratic Caucus v. Cumberland County; Fussell v. Town of Mt. Olive* (Wayne), *Hall v. Kennedy* (Clinton City Council and City Board of Education) (Sampson); *Harry v. Bladen County, Holmes v. Lenoir County; Johnson v. Halifax County; Lewis v. Wayne County; McClure v. Granville County; Montgomery County Branch of the NAACP v. Montgomery County Board of Election; Moore v. Beaufort County; NAACP v. Duplin County; NAACP v. Elizabeth City* (Pasquatank)*; NAACP v. Forsyth County; NAACP v. Richmond County; NAACP v. Roanoke Rapids* (Halifax County); *Pitt County Concerned Citizens for Justice v. Pitt County; Rowson v. Tyrell County; Speller v. Laurinburg* (Scotland County)*; United States v. Lenoir County; Webster v. Person County; White v. Franklin County;* and *Wilkers v. Washington County*. (First Rucho Aff Ex. 9, App. B, pp. 4-27)

23. During the public hearing process, many witnesses besides Ms. Earls testified about the continuing presence of racially polarized voting, the continuing need for majority-minority districts, and the continuing existence of the *Gingles* factors used to judge "the totality of the circumstances." Not a single witness testified that racial polarization had vanished either statewide or in areas in which the General Assembly had enacted past VRA districts.

24. On 13 April 2011, Lois Watkins, a member of the Rocky Mount City Council, asked the legislature to draw majority-minority districts and

stated that there was a desire in the City of Rocky Mount to elect and keep representatives of choice. (NC11-S-28F-3(a), pp. 13-15)[39] Another member of the Rocky Mount City Council, Reuben Blackwell, testified that there was inequality in housing, elections, transportation, and economic development. (NC11-S-28F-3(a), pp. 20-23) AFRAM representative Jessica Holmes testified that many historical factors, including racial appeals in campaigns, had conspired to exclude African American voters from the political process. (NC11-S-28F-3(a), pp. 24-27) Ms. Holmes further stated that social science would confirm that racially polarized voting continues to occur in many areas of North Carolina and that any redistricting plan should not have the purpose or effect of making African American voters worse off. (NC11-S-28F-3(a), p. 26) Finally, Andre Knight, another member of the Rocky Mount City Council and President of the local branch of the NAACP, testified about the historical exclusion of African Americans from the electoral process in Rocky Mount, that race and economic class continued to be divisive issues in regard to school systems, and that racially polarized voting still exists and is demonstrated by the negative attitude toward the African American majority on the Rocky Mount City Council. (NC11-S-28F-3(a), pp. 28-30)

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[39] Citations beginning "NC11-S-28F" refer to a portion of the preclearance submission to USDOJ of the enacted Senate Plan dealing with public input. Pages cited herein were attached to Defendants' Response to "Plaintiffs' Undisputed Material Facts" as "Attachment B." Moreover, an electronic copy of the State's complete Section 5 submission was provided to the Court with Defendants' Motion for Summary Judgment.

25. On 20 April 2011, Bob Hall, Executive Director of plaintiff Democracy NC and a proffered expert for plaintiffs, testified that race must be taken into consideration in the redistricting process, that discrimination still exists in North Carolina, and that racially polarized voting continues in some parts of the State. (NC11-S-28F-3(b), pp. 29-31) Toye Shelton, an AFRAM representative, testified that African Americans and other protected groups must be afforded an equal opportunity to participate in the political process. (NC11-S-28F-3(b), pp. 33-37) Terry Garrison, a Vance County Commissioner, urged the legislature to be cognizant of race as they drew districts. (NC11-S-28F-3(b), pp. 41-44) Lavonia Allison, Chair of the Durham Committee on the Affairs of Black People, testified that racial minorities have faced discrimination in voting, that race must be taken into account when drawing redistricting plans to serve the goal of political participation, and that the VRA requires the General Assembly to draw districts in which minorities are afforded the opportunity to elect a candidate of choice. (NC11-S-28F-3(b), pp. 71-74) Ms. Allison also drew attention to the fact that African Americans represent 22% of the total population of North Carolina and that fair representation would reflect that with proportional numbers of representatives in the General Assembly. *Id.*

26. On 28 April 2011, Bill Davis, Chair of the Guilford County Democratic Party, testified that redistricting plans should not undermine minority voting strength. (NC11-S-28F-3(d), pp. 17-20) James Burroughs, Executive Director of Democracy at Home, advised that the legislature was "obligated by

law" to create districts that provide an opportunity for minorities to elect candidates of choice. He asked that current minority districts be maintained and that other districts be created to fairly reflect minority voting strength. (NC11-S-28F-3(d), pp. 26-28)

27. On 30 April 2011, June Kimmel, a member of the League of Women Voters, told the committee that race should be considered when drawing districts and that the legislature must not "weaken" the minority vote to avoid a court challenge. (NC11-S-28F-3(f), pp. 9-12) Mary Degree, the District 2 Director of the NAACP, stated that the legislature was legally obligated to consider race, asked that current majority-minority districts be preserved, and asked that new majority-minority districts be added based upon new census data. (NC11-S-28F-3(f), pp. 17-19) Maxine Eaves, a member of the League of Women Voters, urged that any new plan fairly reflect minority voting strength. (NC11-S-28F-3(f), pp. 28-31)

2. On 7 May 2011, Mary Perkins-Williams, a resident of Pitt County, testified that the VRA was in place to give minorities a chance to participate in the political process. She stated that Pitt County African Americans had faced disenfranchisement and that it remained hard for African Americans to be elected in her county. (NC11-S-28F-3(j), pp. 23-26) Taro Knight, a member of the Tarboro Town Council, expressed his opinion that wards for the Town Council drawn with 55% to 65% African American population properly

strengthened the ability of minorities to be elected. (NC11-S-28F-3(j), pp. 40-42)

29. On 7 May 2011, Keith Rivers, President of the Pasquotank County NAACP, stated that race must be considered, that current majority-minority districts should be preserved, and that additional majority-minority districts should be drawn where possible. (NC11-S-28F-3(k), pp. 9-11) Kathy Whitaker Knight, a resident of Halifax County, stated that race must be considered to enfranchise all voters. (NC11-S-28F-3(k), pp. 35-37) Nehemiah Smith, editor of the *Weekly Defender*, a publication in Rocky Mount, North Carolina, testified that minorities have faced many obstacles to being involved in the electoral process throughout history. (NC11-S-28F-3(k), pp. 39-41) David Harvey, President of the Halifax County NAACP, stated that communities in eastern North Carolina are linked by high poverty rates, disparities in employment, education, housing, health care, recreation and youth development, and that these communities have benefitted from majority-minority districts. (NC11-S-28F-3(k), pp. 47-48)

30. On 23 June 2011, Florence Bell, a resident of Halifax County, testified that northeastern North Carolina continued to lag behind in the "*Gingles* factors" including "high poverty rates, health disparities, high unemployment, community exclusion, lack of recreational and youth development and that these are contributing factor to juvenile delinquency, issues of racial injustice, inequality of education and economic development." (NC11-S-28F-3(m), pp. 97-100)

31. On June 23, 2011, Ms. Earls and AFRAM provided an additional submission to the Joint Redistricting Committee. (First Rucho Aff. ¶ 18 Ex. 12) This submission included a written statement by Ms. Earls and proposed North Carolina Senate and North Carolina House maps. (*Id.*; Map Notebook, SCSJ Senate Plan and SCSJ House Plan) In her statement, Ms. Earls stated that the two SCSJ plans should be considered because they "compl[ied] with the Voting Rights Act." (First Rucho Aff. Ex. 12, p. 1) More specifically, Ms. Earls stated that the SCSJ Senate and House Plans complied "with the non-retrogression criteria for districts in counties covered by Section 5 of the Voting Rights Act" and "Section 2 of the Voting Rights Act in Mecklenburg, Forsyth, and Wake Counties." *Id.*

32. On 18 July 2011, Professor Irving Joyner, representing the NAACP, affirmed that racially polarized voting continues to exist in North Carolina. (NC11-S-28F-3(o), pp. 68-76))

33. In summary, during the public hearing process, many witnesses presented testimony that majority-minority districts are still needed, that racially polarized voting still exists throughout North Carolina and in the areas where the General Assembly created VRA districts, and that new majority-black districts should be created when possible.

34. The General Assembly convened in legislative session on Monday, 25 July 2011, for purposes of enacting Senate, House, and Congressional redistricting plans. (NC11-S-27H) On

that same date, Democratic Leaders published their three redistricting plans: Congressional Fair and Legal; Senate Fair and Legal; and House Fair and Legal. (http://www.ncleg.net/representation/Content/Plans/PlanPage_DB_2011.asp?Plan=Congressional_Fair_and_Legal&Body=Congress), (http://www.ncleg.net/representation/Content/Plans/PlanPage_DB_2011.asp?Plan=Senate_Fair_and_Legal&Body=Senate), (http://www.ncleg.net/representation/Content/Plans/PlanPage_DB_2011.asp?Plan=House_Fair_and_Legal&Body=House) On that same date, the Legislative Black Caucus published, for the first time, their Possible Senate Plan and Possible House Plan. (http://www.ncleg.net/representation/Content/Plans/PlanPage_DB_2011.asp?Plan=Possible_Senate_Districts&Body=Senate), (http://www.ncleg.net/representation/Content/Plans/PlanPage_DB_2011.asp?Plan=Possible_House_Districts&Body=House)

35. On 27 July 2011, the General Assembly passed the 2011 Senate Redistricting Plan, 2011 S.L. 404 (Rucho Senate 2) and the 2011 Congressional Plan, 2011 S.L. 403 (Rucho-Lewis Congress 3). (*NAACP* Pl. Am Compl. ¶ 65) On 28 July 2011, the General Assembly enacted the 2011 House Redistricting Plan, 2011 S.L. 402 (Lewis-Dollar-Dockham 4). *Id.* As will be shown below, all of the enacted VRA districts are located in areas of the State where Democratic leaders and the Legislative Black Caucus recommended the enactment of majority-black districts or majority-minority coalition districts.

II. District-by-District Evidence of Racial Polarization in the Areas Where the General Assembly Created 2011 VRA Districts.

36. 2011 First Congressional District

TBVAP: 52.65 (First Frey Aff. Ex. 12)

Counties: Beaufort, Bertie, Chowan, Craven, Durham, Edgecombe, Franklin, Gates, Granville, Greene, Halifax, Hertford, Lenoir, Martin, Nash, Northampton, Pasquatank, Perquimins, Pitt, Vance, Warren, Washington, Wayne, Wilson.

(Map Notebook, Rucho-Lewis Congress 3)

a. Which group of plaintiffs have challenged this district?

Both sets of plaintiffs alleged that this district is a racial gerrymander. (*Dickson* Pls. Am. Compl. ¶¶ 501-04, 515-19; *NAACP* Pls. Am. Compl. ¶¶ 435-42; 480-86)

b. Counties included in *Gingles* districts:

Bertie, Chowan, Edgecombe, Gates, Halifax, Martin, Nash, Northampton, Washington, Wilson

(*See* General Findings of Fact, No. 1)

c. Counties included in *Cromartie* First Congressional District:

Beaufort, Bertie, Craven, Edgecombe, Gates, Granville, Greene, Halifax, Hertford, Lenoir, Martin, Northampton, Pitt, Vance, Warren, Washington, Wayne, Wilson

(*See* General Findings of Fact, No. 6)

d. Counties that were part of a 2001/2003/2009 majority-black or majority-minority district:

2001 First Congressional District: Granville, Vance, Warren, Northampton, Hartford, Gates, Pasquatank, Perquimins, Chowan, Bertie, Halifax, Edgecombe, Martin, Washington, Wilson, Pitt, Beaufort, Wayne, Greene, Lenoir, Craven

2003 SD 3: Edgecombe, Martin, Pitt
2003 SD 4: Bertie, Chowan, Gates, Halifax, Northampton, Hertford, Perquimans
2009 HD 5: Bertie, Gates, Hertford, Perquimons
2009 HD 7: Halifax, Nash
2009 HD 8: Martin, Pitt
2009 HD 12: Craven, Lenoir
2009 HD 24: Edgecombe, Wilson

2009 HD 27: Northampton, Vance, Warren
2009 HD: 21; Wayne

(Map Notebook, Congress Zero Deviation, 2003 Senate, 2009 House; First Frey Aff. Exs. 10, 11, 12; Second Frey Aff. Exs. 34, 39, 60)

e. Section 5 Counties:

Bertie, Chowan, Craven, Edgecombe, Franklin, Gates, Granville, Greene, Halifax, Hertford, Lenoir, Martin, Nash, Northampton, Pasquatank, Perquimons, Pitt, Vance, Washington, Wayne, Wilson

(Churchill Dep. Ex. 45, p. 6)

f. Counties included in Dr. Block's analysis of district elections from 2006-2010:

2006 HD 5: Bertie, Gates, Hertford, Perquimons
2006 HD 12: Craven, Lenoir
2008 SD 5: Greene, Lenoir, Pitt, Wayne
2008 HD 12: Craven, Lenoir
2010 CD 1: See above 1d
2010 SD 4: Bertie, Chowan, Halifax, Hertford, Northampton
2010 SD. 5: Greene, Lenoir, Pitt, Wayne
2010 HD 12: Craven, Lenoir
2010 HD. 21: Wayne
2010 HD 24: Edgecombe, Wilson

(First Rucho Aff. Ex. 8, pp. 5-7; Map Notebook, Congress Zero Deviation, 2003 Senate, 2003 House)

g. Counties analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting:

Counties: Beaufort, Bertie, Chowan, Craven, Durham, Edgecombe, Franklin, Gates, Granville, Greene, Halifax, Hertford, Lenoir, Martin, Nash, Northington, Pasquatank, Perquimins, Pitt, Vance, Warren, Washington, Wayne, Wilson.

(First Rucho Aff. Ex. 10, pp. 1-14)

h. Counties included in majority-black or majority-minority districts in plans proposed by SCSJ or Democratic Leaders:

SCSJ CD 1: Beaufort, Bertie, Chowan, Craven, Edgecombe, Franklin, Gates, Granville, Greene, Halifax, Hertford, Lenoir, Martin, Nash, Northampton, Pasquatank, Perquimons, Pitt, Vance, Warren, Washington, Wayne, Wilson.

Congressional F&L CD 1: Beaufort, Bertie, Chowan, Craven, Edgecombe, Franklin, Gates, Granville, Greene, Halifax, Hertford, Lenoir, Martin, Nash, Northampton, Pasquatank,

Perquimons, Pitt, Vance, Warren, Washington, Wayne, Wilson.

SCSJ SD 3: Edgecombe, Martin, Pitt, Wilson, Washington

F&L SD 3: Bertie, Edgecombe, Martin, Wilson

PSD SD 3: Edgecombe, Nash, Pitt

SCSJ SD 4: Bertie, Gates, Halifax, Hertford, Northampton, Vance, Warren

F&L SD 4: Chowan, Gates, Halifax, Hertford, Northampton, Vance, Warren

PSD SD 4: Bertie, Chowan, Gates, Halifax, Hertford, Warren, Northampton, Perquimans, Washington

SCSJ HD 5: Bertie, Chowan, Gates, Hertford, Pasquatank, Perquimans, Washington

SCSJ HD 7: Edgecombe, Halifax, Nash

SCSJ HD 8: Bertie, Martin, Pitt

SCSJ HD 24: Edgecombe, Halifax, Wilson

SCSJ HD 27: Gates, Halifax, Hertford, Northampton, Vance, Warren

SCSJ HD 12: Craven, Greene, Lenoir

SCSJ HD 21: Wayne

F&L HD 5: Bertie, Gates, Hertford, Martin

F&L HD 7: Edgecombe, Nash

F&L HD 8: Pitt

F&L HD 24: Edgecombe, Wilson

F&L HD 27: Halifax, Northampton

F&L HD 12: Craven, Greene, Lenoir

F&L HD 21: Wayne

PHD HD 5: Bertie, Gates, Hertford, Martin

PHD HD 7: Halifax, Nash

PHD HD 8: Greene, Pitt

PHD HD 24: Edgecombe, Wilson

PHD HD 27: Northampton, Warren

PHD HD 12: Craven, Lenoir

PHD HD 21: Wayne

(Map Notebook; SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House; First Frey Aff Exs. 10, 11, 12; Second Frey Aff. Exs. 36-38, 41-43, 66, 67)

37. 2011 Senate District 4

TBVAP 52.75 (First Frey Aff. Ex. 10)

Counties: Halifax, Vance, and Warren, and portions of Nash and Wilson (Map Notebook, Rucho Senate 2)

a. Which group of plaintiffs have challenged this district?

Only the *Dickson* plaintiffs have alleged that the district is a racial gerrymander. (*Dickson* Pls. Am. Compl. ¶¶ 497-500, 510-14) The *NAACP* plaintiffs did not challenge this district. (*NAACP* Pls. Am. Compl. ¶¶ 422-34, 472-79)

b. Counties included in *Gingles* districts: Halifax, Nash, Wilson

(*See* General Findings of Fact, No. 1)

c. Counties included in *Cromartie* First Congressional District:

Halifax, Nash, Vance, Warren

(*See* General Findings of Fact, No. 6)

d. Counties that were part of a 2001/2003/2009 majority-black or majority-minority district:

2001 First Congressional District: Halifax, Nash, Vance, Warren, Wilson
2003 Senate District 4: Halifax
2009 House District 7: Halifax, Nash
2009 House District 24: Nash, Wilson

(Map Notebook, Congress Zero Deviation, 2003 Senate, 2009 House; First Frey Aff. Exs. 10, 11, 12; Second Frey Aff. Exs. 34, 39, 60)

e. Section 5 Counties: Halifax, Nash, Vance, Wilson

(Churchill Dep. Ex. 46, p. 6)

f. Counties included in Dr. Block's analysis of district elections from 2006-2010:

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

(First Rucho Aff. Ex. 8, pp. 5-7)

g. Counties analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting:

Halifax, Nash, Vance, Warren, Wilson

(First Rucho Aff. Ex. 10, pp. 1-14)

h. Counties included in majority-black or majority-minority districts in plans proposed by SCSJ or Democratic Leaders:

SCSJ Congress CD 1: Halifax, Nash, Vance, Warren, Wilson Congressional Fair & Legal 1: Halifax, Nash, Vance, Warren, Wilson
SCSJ SD 3: Wilson
F&L SD 3: Wilson
SCSJ SD 4: Halifax, Vance, Warren
F&L SD 4: Halifax, Vance, Warren
PSD SD4: Halifax, Warren
PSD SD 3: Nash
SCSJ HD 27: Halifax, Vance, Warren
SCSJ HD 7: Halifax, Nash
SCSJ HD 24: Halifax, Wilson
F&L HD 27: Halifax
F&L HD 7: Nash
F&L HD 24: Wilson
PHD HD 27: Nash, Warren
PHD HD 7: Halifax, Nash
PHD HD 24: Wilson
(Map Notebook; SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House; First Frey Aff Exs.

10-12; Second Frey Aff. Exs. 36-38; 41, 43, 66, 67)

38. 2011 Senate District 5

TBVAP 51.97% (First Frey Aff Ex.10)
Counties: Greene, Lenoir, Pitt, Wayne

(Map Notebook, Rucho Senate 2)

a. Which group of plaintiffs have challenged this district?

Both sets of plaintiffs alleged that the district is a racial gerrymander. *Dickson* Pls. Am. Compl. ¶¶ 497-500, 510-14; *NAACP* Pls. Am. Compl. ¶¶ 422-34, 472-79.

b. Counties included in *Gingles* districts: None

c. Counties included in *Cromartie* First Congressional District:

Greene, Lenoir, Pitt, Wayne

(*See* General Findings of Fact, No. 6)

d. Counties that were part of a 2001/2003/2009 majority-black or majority-minority district:

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

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

(Map Notebook, Congress Zero Deviation, 2003 Senate Plan, and 2009 House Plan; First Frey Aff. Exs. 10, 11, 12; Second Frey Aff. Exs. 34, 39, 60)

e. Section 5 Counties: Greene, Lenoir, Pitt, Wayne

(Churchill Dep. Ex. 46, p. 6)

f. Counties included in Dr. Block's analysis of district elections from 2006-2010

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

(First Rucho Aff. Ex. 8, pp. 1-7)

g. Counties analyzed by Dr. Brunell and confirmed as continuing to have statistically significant racially polarized voting:

Greene, Lenoir, Pitt, Wayne

(First Rucho Aff. Ex. 10, pp. 1-14)

h. Counties included in majority-black or majority-minority districts in plans proposed by SCSJ or Democratic leaders:

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

(Map Notebook, SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House; First Frey Aff. Exs. 10, 11, 12; Second Frey Aff. Exs. 36-38, 41-43, 66, 67)

39. 2011 Senate District 14

TBVAP: 51.28% (First Frey Aff. Ex. 10)
County: Wake (Map Notebook, Rucho Senate 2)

a. Which group of plaintiffs have challenged this district?

Both sets of plaintiffs alleged that the district is a racial gerrymander. (*Dickson* Pls. Am. Compl. ¶¶ 497-500, 510-14; *NAACP* Pls. Am. Compl. ¶¶ 422-34, 472-79)

b. County included in *Gingles* districts: Wake

(*See* General Findings of Fact, No. 1)

c. County included in *Cromartie* First CD: None

d. County that was part of 2001/2003/2009 majority-black or majority-minority district

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

(Map Notebook, 2003 Senate Plan; 2009 House Plan; First Frey Aff. Exs. 10, 11; Second Frey Aff. Exs. 34, 39; First Frey Aff. Exs. 10, 11)

e. Section 5 county: No

f. County included in Dr. Block's analysis of district elections from 2006-2010:

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

(First Rucho Aff. Ex. 8, pp. 1-7)

g. County analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting:

Wake

(First Rucho Aff. Ex. 10, pp. 10-14)

h. Counties included in majority-black or majority-minority districts in plans proposed by SCSJ or Democratic leaders:

SCSJ SD 14: Wake
F&L SD 14: Wake
PSD SD 14: Wake
SCSJ HD 33: Wake
F&L HD 33: Wake
PHD HD 33: Wake

(Map Notebook, SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House; First Frey Aff. Exs. 10, 11; Second Frey Aff. Exs. 36-38; 41-43)

i. County included in majority-black Superior Court district in recently enacted Superior Court Plan: Wake

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

40. 2011 Senate District 20

TBVAP: 51.04% (First Frey Aff. Ex. 10)
County: Durham, Granville (Map Notebook, Rucho Senate 2)

a. Which group of plaintiffs have challenged this district?

Both sets of plaintiffs alleged that the district is a racial gerrymander. (*Dickson* Pls. Am. Compl. ¶¶ 497-500, 510-14; *NAACP* Pls. Am. Compl. ¶¶ 422-34, 472-79)

b. Counties included in a *Gingles* District:

In *Thornburg v. Gingles*, 478 U.S. 38, 77 (1986), because of the sustained success of black candidates, the United States Supreme Court reversed the district court's finding that racially polarized voting was present in the 1982 version of District 23 located in Durham County. In *Pender County v. Bartlett*, 361 N.C. 491, 494, 649 S.E.2d 364, 367 (2007), *aff'd sub. Nom Bartlett v. Strickland*, 561 U.S. 1 (2009), the North Carolina Supreme Court relied upon an affidavit filed by Representative Martha Alexander to make the statement that "[p]ast elections in North Carolina demonstrate that a legislative voting district with a total African-American

population of at least 41.54 percent, or an African-American voting age population of at least 38.37 percent, creates an opportunity to elect African American candidates." What was not mentioned is that the district cited from Representative Alexander's affidavit was the 1992 version of the same multi-member, Durham County, District 23 that had been reviewed in *Gingles*. (Record on Appeal at 45-63 (Aff. of Martha Alexander, ¶ 7, Att. A), *Pender County* (No. 103A06) (available at http://www.ncappellatecourts.org/show-file.php?document_id=65479)

As explained by the Supreme Court in *Thornburg* and the district court's opinion in *Gingles*, the dynamics of racially polarized voting is completely different in a multi-member district as compared to a single-member district. For example, in a multi-member district, a black candidate may be elected when he or she is the last choice of white voters, but where the number of candidates running is identical to the number of positions to be elected. *Gingles*, 590 F. Supp. at 368 n.1, 369. Further, "bullet" or "single-shot" voting (a practice that would allow black voters to cast one vote for their candidate of choice as opposed to voting for three candidates in a three-member, multi-member district) may result in

the election of a black candidate even when voting in the district is racially polarized. *Thornburg*, 478 U.S. at 38 n. 5, 57. Thus, the finding in *Thornburg* that legally significant polarized voting was absent in a multi-member district does not preclude a strong basis in evidence of racially polarized voting in Durham County as related to single-member districts.

c. Counties included in *Cromartie* First Congressional District: Granville

(*See* General Findings of Fact, No. 6)

d. Counties that were part of a 2001/2003/2009 majority-black or majority-minority district

2001 CD 1: Granville
2003 SD 20: Durham
2003 HD 29: Durham
2003 HD 31: Durham

(Map Notebook, Congress Zero Deviation, 2003 Senate, 2009 House; First Frey Aff. Exs. 10, 11, 12; Second Fry Aff. Exs. 34, 39, 60)

e. Section 5 Counties: Granville

(Churchill Dep. Ex. 46, p. 6)

f. Counties included in Dr. Block's analysis of district elections from 2006-2010:

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

(First Rucho Aff. Ex. 8, pp. 1-7)

g. Counties analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting:

Durham, Granville

(First Rucho Aff. Ex. 10, pp. 1-16)

h. Counties included in majority-black or majority-minority district in plans proposed by SCSJ and Democratic leaders:

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

(Map Notebook, SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House; First Frey Aff. Exs.

10, 11, 12; Second Frey Aff. Exs. 36-38, 41-43, 66, 67)

41. 2011 Senate District 21

TBVAP: 51.43% (First Frey Aff. Ex. 10)
Counties: Cumberland and Hoke (Map Notebook, Rucho Senate 2)

a. Which group of plaintiffs have challenged this district?

Both sets of plaintiffs alleged that the district is a racial gerrymander. (*Dickson* Pls. Am. Compl. ¶¶ 497-500, 510-14; *NAACP* Pls. Am. Compl. ¶¶ 422-34, 472-79)

b. Counties included in *Gingles* districts:

None

c. Counties included in *Cromartie* First Congressional District:

None

d. Counties that were part of a 2001/2003/2009 majority-black or majority-minority district:

2003 SD 21: Cumberland
2009 HD 42: Cumberland
1009 HD 43: Cumberland

(Map Notebook, 2003 Senate, 2003 House; First Frey Aff. Exs. 10, 11; Second Frey Aff. Exs. 34, 39)

e. Section 5 Counties:

Cumberland and Hoke

(Churchill Dep. Ex. 46, p. 6)

f. Counties included in Dr. Block's analysis of district elections from 2006-2010:

2010 SD 21: Cumberland

(First Rucho Aff. ex. 8, pp. 1-7)

g. Counties analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting:

Cumberland, Hoke

(First Rucho Aff. Ex. 10, pp. 1-14)

h. Counties included in majority-black or majority-minority district in plans proposed by SCSJ and Democratic leaders:

SCSJ SD 21: Cumberland
F&L SD 21: Cumberland
PSD SD 21: Cumberland
SCSJ HD 42, 43: Cumberland
F&L HD 42, 43: Cumberland
PHD HD 42, 43: Cumberland

(Map Notebook, SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House; Second Frey Aff. Exs. 36-38, 41-43)

42. 2011 Senate District 28

TBVAP 56.49% (First Frey Aff. Ex. 10)
County: Guilford (Map Notebook, Rucho Senate 2)

a. Which group of plaintiffs have challenged this district?

Both sets of plaintiffs alleged that the district is a racial gerrymander.
(*Dickson* Pls. Am. Compl. ¶¶ 497-500, 510-14; *NAACP* Pls. Am. Compl. ¶¶ 422-34, 472-79)

b. Counties included in *Gingles* districts: None

c. Counties included in *Cromartie* First Congressional District: None

d. Counties that were part of a 2001/2003/2009 majority-black or majorityminority district:

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

(Map Notebook, Congress Zero Deviation, 2003 Senate, 2009 House; First Frey Aff. Exs. 10, 11, 12; Second Frey Aff. Exs. 34, 39, 60)

e. Section 5 County: Guilford

(Churchill Dep. Ex. 46, p. 6)

f. Counties included in Dr. Block's analysis of district elections from 2006-2010:

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

(First Rucho Aff. Ex. 8, pp. 1-7)

g. Counties analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting:

Guilford

(First Rucho Aff. Ex. 10, pp. 1-14)

h. Counties included in majority-black or majority-minority district in plans proposed by SCSJ and Democratic leaders:

SCSJ CD 12: Guilford
F&L CD 12: Guilford
SCSJ SD 28: Guilford
F&L SD 28: Guilford

PSD SD 28: Guilford
SCSJ HD 58, 60: Guilford
F&L HD 58, 60: Guilford
PHD HD 58, 60: Guilford

(Map Notebook, SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House; Possible Senate and Possible House; First Frey Aff. Exs. 10, 11, 12; Second Frey Aff. Exs. 36-38, 41-43, 66, 67)

43. 2011 Senate Districts 38 and 40

TBVAP: 38 (52.51%) (First Frey Aff. Ex. 10)
40 (51.84%) (First Frey Aff. Ex. 10)
County: Mecklenburg (Map Notebook, Rucho Senate 2)

a. Which group of plaintiffs have challenged this district?

Both sets of plaintiffs alleged that these districts are racial gerrymanders.
(*Dickson* Pls. Am. Compl. ¶¶ 497-500, 510-514; *NAACP* Pls. Am. Compl. ¶¶ 422-34, 472-79)

b. County included in *Gingles* districts: Mecklenburg

(*See* General Findings of Fact, No. 1)

c. County included in *Cromartie* First Congressional District: None

d. County that was part of a 2001/2003/2009 majority-black or majority-minority district:

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

(Map Notebook, Congress Zero Deviation, 2003 Senate, 2009 House; First Frey Aff. Exs. 10, 11, 12; Second Frey Aff. Exs. 34, 39, 60)

e. Section 5 County: No

f. County included in Dr. Block's analysis of district elections from 2006-2010:

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

(First Rucho Aff. Ex. 8, pp. 1-7)

g. County analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting:

Mecklenburg

(First Rucho Aff. Ex. 10, pp. 1-15, 22)

h. County included in majority-black or majority-minority district in plans proposed by SCSJ and Democratic leaders

SCSJ CD 12: Mecklenburg
F&L CD 12: Mecklenburg
SCSJ SD 38.40: Mecklenburg
F&L SD 38.40: Mecklenburg
PSD SD 38.40: Mecklenburg
SCSJ HD 99: Mecklenburg
SCSJ HD 100: Mecklenburg
SCSJ HD 101: Mecklenburg
SCSJ HD 102: Mecklenburg
SCSJ HD 107: Mecklenburg
F&L HD 99: Mecklenburg
F&L HD 101: Mecklenburg
F&L HD 102: Mecklenburg
F&L HD 107: Mecklenburg
PHD HD 25: Mecklenburg
PHD HD 99: Mecklenburg
PHD HD 100: Mecklenburg
PHD HD 101 Mecklenburg
PHD HD 102: Mecklenburg
PHD HD 107: Mecklenburg

(Map Notebook, SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House; First Frey Aff. Exs. 10, 11, 12; Second Frey Aff. Exs. 36-38, 41-43, 66, 67)

44. 2011 House District 5

TBVAP 54.17% (First Frey Aff. Ex. 11)
Counties: Bertie, Gates, Hertford, Pasquatank (Map Notebook, Lewis-Dollar-Dockham 4)

a. Which group of plaintiffs have challenged this district?

The *NAACP* plaintiffs have alleged that 2011 District 5 is a racial gerrymander. *NAACP* Pl. Am. Compl. ¶¶ 410-21, 464-71; The *Dickson* Plaintiffs have not challenged this district. *Dickson* Pl. Am. Compl. ¶¶ 493-96, 505-509.

b. Counties included in *Gingles* districts: Bertie, Hertford, Gates

(*See* General Findings of Fact, No. 1)

c. Counties included in *Cromartie* First Congressional District: First District: Bertie, Hertford, Gates

(*See* General Findings of Fact, No. 6)

d. Counties that were part of a 2001/2003/2009 majority-black or majority-minority district:

2001 CD 1: Bertie, Gates, Hertford, Pasquatank
2003 SD 4: Bertie, Gates, Hertford

2009 HD 5: Bertie, Gates, Hertford

(Map Notebook Congress Zero Deviation, 2003 Senate, 2003 House; First Frey Aff. Exs. 10, 11, 12; Second Frey Aff. Exs. 34, 39, 60)

e. Section 5 Counties: Bertie, Hertford, Gates, Pasquatank

(Churchill Dep. Ex. 46, p. 6)

f. Counties included in Dr. Block's analysis of district elections from 2006-2010

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

(First Rucho Aff. Ex. 8, pp. 1-7)

g. Counties analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting:

Bertie, Gates, Hertford, Pasquatank

(First Rucho Aff. Ex. 10, pp. 1-15)

h. Counties included in majority-black or majority-minority district in plans proposed by SCSJ and Democratic leaders:

SCSJ CD 1: Bertie, Gates, Hertford, Pasquatank
F&L CD 1: Bertie, Gates, Hertford, Pasquatank
SCSJ SD 4: Bertie, Gates, Hertford
F&L SD 3: Bertie
F&L SD 4: Gates, Hertford
PSD SD 4: Bertie, Gates, Hertford
SCSJ HD 5: Bertie, Hertford, Gates, Pasquatank
F&L HD 5: Bertie, Gates, Hertford
PHD HD 5: Bertie, Gates, Hertford

(Map Notebook, SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House; First Frey Aff. Exs. 10, 11, 12; Second Frey Aff. Exs. 36-38, 41-42, 66, 67)

45. 2011 House District 7

TBVAP: 50.67% (First Frey Aff. Ex. 11)
Counties: Franklin, Nash (Map Notebook, Lewis-Dollar-Dockham 4)

a. Which group of plaintiffs have challenged this district?

The *Dickson* plaintiffs have alleged that 2011 HD 7 is a racial gerrymander. *Dickson* Pls. Am. Compl. ¶¶ 493-96, 505-509; The *NAACP* Plaintiffs have not challenged this district. *NAACP* Pls. Am. Compl. ¶¶ 410-21, 464-71.

b. Counties included in *Gingles* districts: Nash

(*See* General Findings of Fact, No. 1)

c. Counties included in *Cromartie* First Congressional District: None

d. Counties that were part of a 2001/2003/2009 majority-black or majority-minority district:

2001 CD 1: Nash
2009 HD 7: Nash

(Map Notebook, Congress Zero Deviation and 2009 House Plan; First Frey Aff. Exs. 11, 12; Second Frey Aff. Exs. 39, 60)

e. Section 5 County: Franklin, Nash

(Churchill Dep. Ex. 46, p. 6)

f. Counties included in Dr. Block's analysis of district elections from 2006-2010:

2010 CD 1: Nash

(First Rucho Aff. Ex. 8, pp. 1-7)

g. Counties analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting:

Franklin and Nash

(First Rucho Aff. Ex. 10, pp. 1-14)

h. Counties included in majority-black or majority-minority district in plans proposed by SCSJ and Democratic leaders

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

(Map Notebook, SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House; First Frey Aff. Exs. 11, 12; Second Frey Aff. Exs. 38, 41-43, 66, 67

46. 2011 House District 12

TBVAP: 50.60% (First Frey Aff. Ex. 11)
Counties: Craven, Greene, Lenoir (Map Notebook, Lewis-Dollar-Dockham, 4)

a. Which group of plaintiffs have challenged this district?

The *Dickson* plaintiffs have alleged that this district is a racial gerrymander. *Dickson* Pls. Am. Compl. ¶¶ 493-96, 505-509; The *NAACP* Plaintiffs have

not challenged this district. *NAACP* Pls. Am. Compl. ¶¶ 410-21, 464-71.

b. Counties included in *Gingles* districts: None

c. Counties included in *Cromartie* First Congressional District: Craven, Greene, Lenoir

(*See* General Findings of Fact, No. 6)

d. Counties that were part of a 2001/2003/2009 majority-black or majority-minority district:

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

(Map Notebook, Congress Zero Deviation and 2009 House Plan; First Frey Aff. Exs. 11, 12; Second Frey Aff. Exs. 39, 60)

e. Section 5 Counties: Craven, Greene, Lenoir

(Churchill Dep. Ex. 46, p. 6)

f. Counties included in Dr. Block's analysis of district elections from 2006-2010:

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

(First Rucho Aff. Ex. 8, pp. 1-7)

g. Counties analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting:

Craven, Greene, Lenoir
(First Rucho Aff. Ex. 10, pp. 1-14)

h. Counties included in majority-black or majority-minority district in plans proposed by SCSJ and Democratic leaders

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

(Map Notebook, SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House; Second Frey Aff. Exs. 41-43; 66, 67)

47. 2011 House District 21

TBVAP: 51.90% (First Frey Aff. Ex. 11)
Counties: Duplin, Sampson, Wayne
(Map Notebook, Lewis-Dollar-Dockham 4)

a. Which group of plaintiffs have challenged this district?

Both sets of plaintiffs alleged that the district is a racial gerrymander.

Dickson Pls. Am. Compl. ¶¶ 493-96, 505-509; *NAACP* Pls. Am. Compl. ¶¶ 410-21, 464-71.

b. Counties included in *Gingles* districts: None

c. Counties included in *Cromartie* First Congressional District: Wayne

(*See* General Findings of Fact, No. 6)

d. Counties that were part of a 2001/2003/2009 majority-black or majority-minority district:

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

(Map Notebook, Congress Zero Deviation; 2009 House Map; First Frey Aff. Exs. 11, 12; Second Frey Aff. Exs. 39, 60)

e. Section 5 County: Wayne

(Churchill Dep. Ex. 46, p. 6)

f. Counties included in Dr. Block's analysis of district elections from 2006-2010

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

(First Rucho Aff. Ex. 8, pp. 1-7)

g. Counties analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting:

Duplin, Sampson, Wayne

(First Rucho Aff. Ex. 10, pp. 1-14)

h. Counties included in majority-black or majority-minority district in plans proposed by SCSJ and Democratic leaders

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

(Map Notebook, SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House; First Frey Aff. Exs. 41-43, 66, 67)

48. 2011 House District 24

TBVAP: 57.33% (First Frey Aff. Ex. 11)
Counties: Pitt, Wilson (Map Notebook, Lewis-Dollar-Dockham 4)

a. Which group of plaintiffs have challenged this district?

Both groups of plaintiffs have alleged that this district is a racial gerrymander. (*Dickson* Pls. Am. Compl. ¶¶ 493-95, 505-509; *NAACP* Pls. Am. Compl. ¶¶ 410-21, 464-71)

b. Counties included in *Gingles* districts: Wilson

(*See* General Findings of Fact, No. 1)

c. Counties included in *Cromartie* First Congressional District: Pitt, Wilson

(*See* General Findings of Fact, No. 6)

d. Counties that were part of a 2001/2003/2009 majority-black or majority-minority district:

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

(Notebook, Congress Zero Deviation, 2003 Senate Plan, 2009 House Plan; First Frey Aff. Exs. 11, 12; Second Frey Aff. Exs. 34, 39, 60)

e. Section 5 County: Pitt, Wilson

(Churchill Dep. Ex. 46, p. 6)

f. Counties included in Dr. Block's analysis of district elections from 2006-2010:

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

(First Rucho Aff. Ex. 6, pp. 1-7)

g. Counties analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting:

Pitt, Wilson

(First Rucho Aff. Ex. 10, pp. 1-15)

h. Counties included in majority-black or majority-minority district in plans proposed by SCSJ and Democratic leaders:

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

(Map Notebook, SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible

Senate and House; Possible Senate and House; First Frey Aff. Exs. 10, 11, 12; Second Frey Aff. Exs. 36-38, 41-43, 66, 67)

49. 2011 House Districts 29 and 31 (Durham County)

TBVAP: HD 29 (51.34%) (First Frey Aff. Ex. 11)
HD 31 (51.81%) (First Frey Aff. Ex. 11)
County: Durham

(Map Notebook, Lewis-Dollar-Dockham 4)

a. Which group of plaintiffs have challenged these districts?

Both groups of plaintiffs challenged this district. (*Dickson* Pls. Am. Compl. ¶¶ 493-96, 505-509; *NAACP* Pls. Am. Compl. ¶¶ 410-21, 464-71)

b. County included in *Gingles* districts: None, but see but see Finding of Fact 41.b, *supra*.

c. County included in *Cromartie* First Congressional District: None

d. Counties that were part of a 2001/2003/2009 majority-black or majority-minority district:

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

(Map Notebook, 2003 Senate Plan and 2009 House Plan; First Frey Aff. Exs. 10,11; Second Frey Aff. Exs. 34, 39)

e. Section 5 County: No

f. Counties included in Dr. Block's analysis of district elections from 2006-2010:

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

(First Rucho Aff. Ex. 8, pp. 1-7)

g. Counties analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting:

Durham

(First Rucho Aff. Ex. 10, pp. 1-16)

h. Counties included in majority-black or majority-minority district in plans proposed by SCSJ and Democratic leaders

SCSJ SD 20: Durham
F&L SD 20: Durham
RSP SD 20: Durham

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

(Map Notebook, SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House; First Frey Aff. Exs. 10, 11; Second Frey Aff. Exs. 36-38, 41-43)

50. 2011 House District 32

TBVAP: 50.45% (First Frey Aff. Ex. 11)
Counties: Granville, Vance, Warren
(Map Notebook, Lewis-Dollar-Dockham 4)

a. Which group of plaintiffs have challenged this district?

The *NAACP* plaintiffs allege that this district was a racial gerrymander. (*NAACP* Pls. Am. Comp. ¶¶ 410-12, 464-71) The *Dickson* plaintiffs did not challenge this district. (*Dickson* Pls. Am. Compl. ¶¶ 493-96, 510-14)

b. Counties included in *Gingles* districts: None

c. Counties included in *Cromartie* First Congressional District: Granville, Vance, Warren

(*See* General Findings of Fact, No. 6)

d. Counties that were part of a 2001/2003/2009 majority-black or majority-minority district:

2001 CD 1: Granville, Vance, Warren
2003 HD 27: Vance, Warren

(Map Notebook, Congress Zero Deviation, 2009 House Plan; First Frey Aff. Exs 11, 12; Second Frey Aff. Exs. 39, 60)

e. Section 5 County: Granville, Vance

(Churchill Dep. Ex. 46, p. 6)

f. Counties included in Dr. Block's analysis of district elections from 2006-2010:

2010 CD 1: Granville, Vance, Warren

(First Rucho Aff. Ex. 8, pp. 1-7)

g. Counties analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting:

Granville, Vance, Warren

(First Rucho Aff. Ex. 8, pp. 1-7)

h. Counties included in majority-black or majority-minority district in plans proposed by SCSJ and Democratic leaders:

SCSJ CD 1: Granville, Vance, Warren
F&L CD 1: Granville, Vance, Warren
SCSJ SD 4: Vance, Warren
F&L SD 4: Vance, Warren
PSD SD 4: Warren
SCSJ HD 27: Vance, Warren
PHD HD 27: Warren

(Map Notebook, SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House; First Frey Aff. Exs. 10, 11, 12; Second Frey Aff. Exs. 36-38, 41-43, 66, 67)

51. 2011 House Districts 33 and 38

TBVAP: HD 33 (51.42%) (First Frey Aff. Ex. 11)
HD 38 (51.37%) (First Frey Aff. Ex. 11)
Counties: Wake

(Map Notebook, Lewis-Dollar-Dockham 4)

a. Which group of plaintiffs have challenged these districts?

The *Dickson* plaintiffs have challenged HD 33 but not HD 38. (*Dickson* Pls.

Am. Compl. ¶¶ 493-96, 505-509) The *NAACP* plaintiffs have challenged HD 38 but not HD 33. (*NAACP* Pls. Am. Compl. ¶¶ 410-21, 464-71)

b. County included in *Gingles* districts: Wake

(*See* General Findings of Fact, No. 1)

c. County included in *Cromartie* First Congressional District: None

d. County that was part of a 2001/2003/2009 majority-black or majority-minority district:

2003 SD 14: Wake
2003 HD 33: Wake

(Map Notebook, 2003 Senate Plan and 2009 House Plan; First Frey Aff. Exs. 10, 11; Second Frey Exs. 34, 39)

e. Section 5 County: No

f. Counties included in Dr. Block's analysis of district elections from 2006-2010:

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

(First Rucho Aff. Ex. 8, pp. 1-7)

g. County analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting:

Wake

(First Rucho Aff. Ex. 10, pp. 1-14, 16-18)

h. Counties included in majority-black or majority-minority district in plans proposed by SCSJ and Democratic leaders:

SCSJ SD 14: Wake
F&L SD 14: Wake
PSD SD 14: Wake
SCSJ HD 33: Wake
F&L HD 33: Wake
PHD HD 33: Wake

(Map Notebook, SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House; Second Frey Aff. Exs. 36-38, 41-43, 66-67)

i. County included in majority-black superior court district in recently enacted Superior Court plan: Wake

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

52. 2011 House District 42

TBVAP: 52.56% (First Frey Aff. Ex. 11)
Counties: Cumberland
(Map Notebook, Lewis-Dollar-Dockham 4

a. Which group of plaintiffs have challenged this district?

Both groups of plaintiffs challenged HD 4. (*Dickson* Pls. Am. Compl. ¶¶ 493-96, 505-509; *NAACP* Pls. Am. Compl. ¶¶ 410-21, 464-71) Neither group of plaintiffs challenged 2011 HD 43, a majority-black House district in Cumberland County that adjoins HD 42. (*Id.*)

b. Counties included in *Gingles* districts: None

c. Counties included in *Cromartie* First Congressional District: None

d. Counties that were part of a 2001/2003/2009 majority-black or majority-minority district:

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

(Map Notebook, 2003 Senate Plan and 2009 House Plan; First Frey Aff. Exs. 10, 11; Second Frey Aff. Exs. 34, 39)

e. Section 5 County: Cumberland

(Churchill Dep. Ex. 46, p. 6)

f. Counties included in Dr. Block's analysis of district elections from 2006-2010:

2010 SD 21: Cumberland
2010 SD 21: Cumberland

(First Rucho Aff. Ex. 8, pp. 1-7)

g. County analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting:

Cumberland

(First Rucho Aff. Ex. 10, pp. 1-14)

h. County included in majority-black or majority-minority district in plans proposed by SCSJ and Democratic leaders:

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

(Map Notebook, SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House; Second Frey Aff. Exs. 36-38, 41-43)

53. 2011 House District 48

TBVAP: 51.27% (First Frey Aff. Ex. 11)
Counties: Hoke, Richmond, Robeson, Scotland
(Map Notebook, Lewis-Dollar-Dockham 4)

a. Which group of plaintiffs have challenged this district?

Both groups of plaintiffs have challenged this district. (*Dickson* Pls. Am. Compl. ¶¶ 493-96, 505-509; *NAACP* Pls. Am. Compl. ¶¶ 410-21, 464-71)

b. Counties included in *Gingles* districts: None

c. Counties included in *Cromartie* First Congressional District: None

d. Counties that were part of a 2001/2003/2009 majority-black or majority-minority district:

2009 HD 48: Hoke, Robeson, Scotland

(Map Notebook, 2009 House Map; First Frey Aff. Ex. 11; Second Frey Aff. Ex. 39)

e. Section 5 County: Hoke, Robeson, Scotland

(Churchill Dep. Ex. 46, p. 6)

f. Counties included in Dr. Block's analysis of district elections from 2006-2010:

2010 HD 48: Hoke, Robeson, Scotland

(First Rucho Aff. Ex. 8, pp. 1-7)

g. Counties analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting:

Hoke, Richmond, Robeson, Scotland

(First Rucho Aff. Ex. 10, pp. 1-14)

h. County included in majority-black or majority-minority district in plans proposed by SCSJ and Democratic leaders:

SCSJ HD 48: Hoke, Robeson, Scotland
F&L HD 48: Hoke, Robeson, Scotland
PHD HD 48: Hoke, Richmond, Robeson, Scotland

(Map Notebook, SCSJ House; F&L House; Possible House; First Frey Aff. Ex. 11; Second Frey Aff. Exs. 41-43)

54. 2011 House District 57

TBVAP: 50.69% (First Frey Aff. Ex. 11)
Counties: Guilford
(Map Notebook, Lewis-Dollar-Dockham 4)

a. Which group of plaintiffs have challenged this district?

Both groups of plaintiffs challenged this district. (*Dickson* Pls. Am. Compl. ¶¶ 493-96, 505-509; *NAACP* Pls. Am. Compl. ¶¶ 410-21, 464-71) Neither group of plaintiffs challenged two other majority-black districts located in Guilford County, 2011 HD 58 (TBVAP: 51.41%) and 2011 HD 60 (TBVAP: 54.36%). (*Id.*)

b. County included in *Gingles* districts: None

c. County included in *Cromartie* First Congressional District: None

d. County that was part of a 2001/2003/2009 majority-black or majority-minority district:

2001 CD 12: Guilford

2003 SD 28: Guilford
2009 HD 58: Guilford
2009 HD 60: Guilford

(Map Notebook, Congress Zero Deviation, 2003 Senate; 2009 House; Frist Frey Aff. Exs. 10-12; Second Frey Aff. Exs. 34, 39, 60)

e. Section 5 County: Guilford

(Churchill Dep. Ex. 46, p. 6)

f. County included in Dr. Block's analysis of district elections from 2006-2010:

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

(First Rucho Aff. Ex. 8, pp. 1-8)

g. County analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting:

Guilford

(First Rucho Aff. Ex. 10, pp. 1-14, 19, 20)

h. County included in majority-black or majority-minority district in plans proposed by SCSJ and Democratic leaders:

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

(Map Notebook, SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House; Possible Senate and House; First Frey Aff. Ex. 11, 12, 13; Second Frey Aff. Exs. 36-38, 41-43, 66, 67)

55. House Districts 99, 102, 106, 107

TBVAP: HD 99 (54.65%) (First Frey Aff. Ex. 11)
HD 102 (53.53%) (First Frey Aff. Ex. 11)
HD 106 (51.12%) (First Frey Aff. Ex. 11)
HD 107 (52.52%) (First Frey Aff. Ex. 11)

Counties: Mecklenburg

(Map Notebook, Lewis-Dollar-Dockham 4)

a. Which group of plaintiffs have challenged this district?

The *NAACP* Plaintiffs challenged HD 99, 102, 106, and 107. (*NAACP* Pls. Am. Compl. ¶¶ 410-21, 464-71) The *Dickson* Plaintiffs challenged only HD 99 and 107. (*Dickson* Pls. Am. Compl. ¶¶ 493-96, 505-509) Neither group of plaintiffs challenged HD 101 (TBVAP: 51.31%).

b. Counties included in *Gingles* districts: Mecklenburg

(*See* General Findings of Fact, No. 1)

c. Counties included in *Cromartie* First Congressional District: None

d. Counties that were part of a 2001/2003/2009 majority-black or majority-minority district:

2001 CD 12: Mecklenburg
2003 SD 38: Mecklenburg
2003 SD 40: Mecklenburg
2009 HD 99: Mecklenburg
2009 HD 100: Mecklenburg
2009 HD 101: Mecklenburg
2009 HD 102: Mecklenburg

2009 HD 106: Mecklenburg
2009 HD 107: Mecklenburg

(Map Notebook, Congress Zero Deviation, 2003 Senate Plan, 2009 House Plan; First Frey Aff. Exs. 10, 11, 12; Second Frey Aff. Exs. 34, 39, 60)

e. Section 5 County: None

f. Counties included in Dr. Block's analysis of district elections from 2006-2010:

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

(First Rucho Aff. Ex. 8, pp. 1-8)

g. County analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting:

Mecklenburg
(First Rucho Aff. Ex. 10, pp. 1-14, 22)

h. County included in majority-black or majority-minority district in plans proposed by SCSJ and Democratic leaders:

SCSJ CD 12: Mecklenburg
F&L CD 12: Mecklenburg
SCSJ SD 38: Mecklenburg
SCSJ SD 40: Mecklenburg
F&L SD 38: Mecklenburg
F&L SD 40: Mecklenburg
PSD SD 38: Mecklenburg
PSD SD 40: Mecklenburg
SCSJ HD 99: Mecklenburg
SCSJ HD 100: Mecklenburg
SCSJ HD 101: Mecklenburg
SCSJ HD 102: Mecklenburg
SCSJ HD 107: Mecklenburg
F&L HD 99: Mecklenburg
F&L HD 101: Mecklenburg
F&L HD 102: Mecklenburg
F&L HD 107: Mecklenburg
PHD HD 25: Mecklenburg
PHD HD 99: Mecklenburg
PHD HD 100: Mecklenburg
PHD HD 101: Mecklenburg
PHD HD 102: Mecklenburg
PHD HD 107: Mecklenburg

(Map Notebook, SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House; First Frey Aff. Exs. 10, 11, 12; Second Frey Aff. Exs. 36-38, 41-43, 66, 67)

III. Election Results in 2003 Senate Districts, 2009 House Districts, and 2001 Congressional Districts that Were Majority-Minority Coalition Districts.

56. Plaintiffs' post-enactment evidence regarding the alleged absence of racially polarized voting consists of election results in 2001/2003/2009 districts with a TBVAP under 50%, and plaintiffs' post-enactment expert's opinions regarding these districts. (Plaintiffs' Memorandum in Support of Joint Motion for Summary Judgment ("Pl. Mem.") (5 October 2012), ¶¶ 68-82; Churchill Dep. Ex. 81, Congressional Races with Minority Candidates, 1992-2010; Churchill Dep. Ex. 82, Senate Legislative Races with Minority Candidates, 2006-2010; Churchill Dep. Ex. 83, House legislative Races with Minority Candidates, 2006-2010; Pl. Trial Notebook, Ex. 13, First Aff. of Allan Lichtman (28 January 2012). These 2001/2003/2009 under 50% TBVAP districts included Senate Districts 14, 20, 21, 28, 38, and 40; House Districts 12, 21, 29, 31, 48, 99 and 107; and Congressional Districts 1 and 2. (Pl. Mem. ¶¶ 68-82). Plaintiffs did not offer, post-enactment, election results as evidence showing the absence of racially polarized voting in the following challenged districts: Senate Districts 4 and 5; House Districts 5, 7, 24, 32, 33, 38, 42, 57, 102, and 106.

57. The parties in *Strickland* stipulated that the area encompassed by 2003 House District 18 continued to experience racially polarized voting. *Strickland*, 556 U.S. at 39 n. 3. Thus, there was no evidence presented to the Court showing either the presence or absence of racially polarized voting in

the area encompassed by 2003 House District 18. In dicta, the Court expressed skepticism about whether racially polarized voting could exist in a majority-white crossover district where a black candidate had enjoyed sustained success. *Id*. at 16, 24. However, this observation is no different from the Supreme Court's statement that racially polarized voting could not be present in a majority-white multi-member crossover district in which black candidates have been elected in six consecutive elections. *Thornburg v. Gingles*, 478 U.S. 30, 77 (1986). *Strickland* expressly did not address majority-minority coalition districts. *Strickland*, 556 U.S. at 13.

58. The fact that incumbent black candidates or strong black candidates have won elections in majority-minority coalition districts with TBVAP between 40% and 49.99% does not prove the absence of racially polarized voting. In *Gingles*, almost all of the challenged districts that were found to be unlawful were majority-white. (Def. Desg. P.21, n. 1) Further, in *Cromartie*, the 1997 version of the First Congressional District was found to be a valid § 2 remedy despite the fact that the district's black voting age population was under 50%. (Def. Desg. pp. 6, 7).

2003 Senate District 14: Wake County

59. The 2003 version of Senate District 14 was located in Wake County. There is no evidence in the legislative record disputing the conclusion of Dr. Block and Dr. Brunell that racially polarized voting is present in Wake County. (First Rucho Aff. Ex. 8,

pp. 1-7; Ex. 10, pp. 3-14, 16-18; Def. Desg. p. 27, f. and g.) In all versions of District 14 in the previous or alternative plans, which plaintiffs describe as legal, the non-Hispanic white population for Senate District 14 is below 50%: 2003 Senate 14 (41.07%); 2011 SCSJ Senate 14 (34.84%); Senate F&L 14 (44.36%); and LBC Senate 14 (44.53%). The evidence shows that the 2003 version of Senate District 14 was not "less than majority-minority." (Pl. Mem. ¶ 65; Second Frey Aff. ¶¶ 12-13, Exs. 34, 36-38) Nor was 2011 Senate District 14 a majority-white crossover district.

60. In North Carolina, whites make up 53.37% of the registered Democrats while African Americans constitute 41.38% of the registered Democrats. (Second Frey Aff. ¶¶ 16-17, Exs. 44, 46-48) If racially polarized voting no longer existed in Wake County, then the percentage of white and black registered Democrats should approximate the statewide average. Instead, in the 2003 version of Senate District 14, African Americans constituted a super majority (68.26%) of all registered Democrats. (Second Frey Aff. ¶ 16, Ex. 44) In the 2011 SCSJ Senate 14, African Americans constitute 72.31% of the registered Democrats; in the 2011 F&L Senate 14 Plan, African Americans constitute 68.11% of registered Democrats; and in the LBC Senate 14, African Americans constitute 68.02% of the registered Democrats. (Second Frey Aff. ¶¶ 16-17, Exs. 44, 46-48) In comparison, the statewide percentage of Democrats who are African Americans is only 41.38%.[40] The strategy of cracking majority-

[40] Second Frey Affidavit, Exs. 34-43 (voting age percentages for VRA districts by race for all Senate and House Plans) and Exs.

TBVAP districts to create coalition and influence districts, so long as blacks constitute super-majorities among registered Democrats, and recommended by Justices Souter and Ginsburg in *LULAC*, was rejected by the Court in *Bartlett*.

61. In the 2011 SCSJ Senate 14 Plan, African Americans constituted 52.62% of registered party voters, not the 21.63% state average. (Second Frey Aff. ¶ 17, Ex. 46) In the 2003 version of Senate District 14, whites constituted a minority of the district's registered voters (46.41%). Similarly, white voters are a minority of the registered voters in the F&L version of District 14 (48.52%) and the LBC version (48.96%) (Second Frey Aff. ¶ 17, Exs. 47, 48)

62. Under the 2009 House Plan, House District 33, located in Wake County, had a TBVAP of 51.74%. (Second Frey Aff. ¶ 16, Ex. 44) All 2011 alternative plans recommended that House District 33 be created with a majority-TBVAP district: SCSJ House 33 (56.45%); F&L House 33 (52.42%) LBC House 33 (50.66%) (Second Frey Aff. ¶ 24, Ex. 11) Plaintiffs have offered no evidence explaining why a majority-TBVAP House district is necessary in Wake County but a majority-TBVAP Senate district is not.

63. In 2004, African American candidate Vernon Malone defeated his Republican opponent 45,727 to 25,595 (+20,132); in 2006, Malone defeated his Republican opponent 26,404 to 13,644 (+12,760); and in 2008, Malone defeated his Republican opponent 67,823 to 29,835 (+37,988). In 2010,

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44-53 (registration totals for VRA districts for all Senate and House plans).

African American candidate Dan Blue defeated his Republican opponent 40,746 to 21,067 (+19,679). In each of these four elections, the actual margin of victory for the African American Democrat was less than the population deviation for the district under the 2010 Census (+41,804). (Churchill Aff. ¶¶ 1-7, Ex. 2)

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

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

2003 Senate Districts 20: Durham County

66. The 2011 version of District 20 includes all of Granville County, a covered jurisdiction under

§ 5 of the VRA, and a portion of Durham County. The 2003 Senate District 20 was located in Durham County. There is no evidence in the legislative record disputing Dr. Block's and Dr. Brunell's conclusions that racially polarized voting exists in Durham and Granville Counties. (First Rucho Aff. Ex. 8, pp. 1-7; Ex. 10, pp. 3-14, 16-18; Def. Desg. p. 30, f. and g.) For the first time in history, the 2011 version of District 20 provides African American voters in Granville County with an equal opportunity to elect their preferred candidate of choice.

67. In all versions of District 20 in the previous or alternative plans, which plaintiffs describe as legal, the non-Hispanic white population is below 50%: 2003 Senate (39.86%); 2011 SCSJ (40.21%); 2011 F&L Senate (43.32%); 2011 LBC (37.29%). The evidence shows that the 2003 version of Senate District 20 was not "less than majority-minority." (Pl. Mem. ¶ 65; Second Frey Aff. ¶¶ 12-13, Exs. 34, 36-38) Moreover, this district was not a majority-white crossover district.

68. In the 2003 version of Senate District 20, 63.70% of registered Democrats were African American. African Americans constituted 61.37% of registered Democrats in the 2011 SCSJ version of District 20, 57.97% in the F&L version, and 63.27% in the LBC version. (Second Frey Aff. ¶¶ 16-17, Exs. 44, 46-48) In comparison, the statewide percentage of Democrats who are African Americans is only 41.38%.

69. Whites were a minority of the registered voters in the 2003 version of Senate

District 20 (45.18%). In all three 2011 alternative versions of Senate District 20, whites are a minority of the total registered voters: SCSJ (46.34%); F&L (49.77%); LBC (43.24%). (Second Frey Aff. ¶ p. 17, Ex. 45-48)

70. The SCSJ Plan recommended that House District 31, located in Durham County, be established with a TBVAP of 51.69%. (First Frey Aff. ¶ 24, Ex. 11) Plaintiffs have offered no evidence explaining why a majority-TBVAP House district is necessary in Durham County, but a majority-TBVAP Senate district in Durham and Granville is not.

71. The 2003 version of District 20 was located exclusively in Durham County. There were no prior election results for a majority-TBVAP or a 40% plus TBVAP district located in a portion of Durham and all of Granville County.

72. There were contested general elections for Senate District 20 in 2004, 2008, and 2010. In each of these contests, the margin of victory for the African American Democrat was in excess of the size of the population deviation for the district under the 2010 Census (-9,086). In the 2004 election cycle, African American candidate Jeanne Lucas raised $29,006.50 and spent $31,861.89. Her Republican opponent did not file campaign disclosure reports because any funds raised by the Republican were below the amount that triggers a reporting obligation. There was no contested election in this district during the 2006 election cycle. In the 2008 election cycle, African American candidate Floyd B. McKissick, Jr. raised $36,619 and spent $21,165. He

was opposed by Republican and Libertarian candidates neither of whom raised enough money to be required to file campaign disclosure reports. In the 2010 election cycle, Sen. McKissick raised $28,827 and spent $35,440. His Republican opponent did not file campaign disclosure reports. (Churchill Aff. ¶¶ 1-7, Ex. 2.)

2003 Senate Districts 21: Cumberland County

73. The 2003 version of District 21 was located in Cumberland County. The 2011 version of District 21 includes Hoke County as well. Both counties are covered by § 5 of the VRA. There is no evidence in the legislative record disputing Dr. Block's and Dr. Brunell's conclusions that racially polarized voting exists in Cumberland County, and Dr. Brunell's conclusion that racially polarized voting exists in Hoke County. (First Rucho Aff. Ex. 8, pp. 1-7; Ex. 10, pp. 3-14; Def. Desg. p. 32 f. and g.) For the first time in history, the 2011 version of Senate District 21 provides African American voters in Hoke County with an equal opportunity to elect their preferred candidates of choice. There were no past election results for a majority-TBVAP district that included Hoke County.

74 In all versions of Senate District 21 in the previous or alternative plans, which plaintiffs describe as legal, the non-Hispanic white population is below 50%: 2003 Senate 21 (41.63%); SCSJ Senate 21 (40.43%); F&L Senate 21 (41.62%); LBC Senate 21 (42.09%). The evidence shows that the 2003 version of Senate District 20 was not "less than majority-minority." (Pl. Mem. ¶ 65; Second Frey Aff.

¶¶ 12-13, Exs. 34, 36-38). Nor was 2003 Senate District 20 a majority-white crossover district.

75. In the 2003 version of Senate District 21, African Americans constituted 73.14% of the registered Democrats. All alternative plans created super-majorities of registered Democrats who are African American: SCSJ Senate 21 (73.41%); F&L Senate 21 (73.09%); LBC Senate 21 (72.29%). (Second Frey Aff. ¶¶ 16-17, Exs. 44, 46-48) In comparison, the statewide percentage of Democrats who are African Americans is 41.38%.

76. Whites were a minority of the registered voters in the 2003 version of Senate District 21 (37.40%). Whites are also a minority of the registered voters in all three of the 2011 alternatives: SCSJ Senate 21 (37.17%); F&L Senate 21 (37.52%); and LBC Senate 21 (38.41%). (Second Frey Aff. ¶¶ 12-13, Exs. 34, 36-38)

77. African Americans are a majority of the registered voters in 2003 Senate 21 (51.15%); 2011 SCSJ District 21 (51.52%); F&L Senate 21 (51.13%); and LBC Senate 21 (50.31%). (Second Frey Aff. ¶¶ 16-17, Exs. 44, 46-48)

78. The 2003 version of House District 43, also located in Cumberland County, had a TBVAP of 54.69%. All 2011 alternative House Plans recommended that this district be recreated with a TBVAP in excess of 50%: SCSJ House 43 (54.70%) F&L House 43 (54.70%); LBC House 43 (51.51%). (First Frey Aff. ¶ 24, Ex. 11) Plaintiffs have offered no evidence explaining why a majority-TBVAP

House district is necessary in Cumberland County, but a majority-TBVAP Senate District is not.

79. There are no past election results for a 40% plus TBVAP-district or a majority-TBVAP district that includes Hoke and Cumberland counties.

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

81. In the 2004 election cycle, the African American Democratic candidate, Larry Shaw, raised $19,800 and spent $15,437. His Republican opponent raised $1,311 and spent $422. The Libertarian candidate did not file campaign reports. In 2006, Shaw raised $39,258 and spent $42,123. His Republican opponent raised and spent $26,151 and spent $26,075. In 2010, African American candidate Eric Mansfield raised $178,878 and spent $176,548.

His Republican opponent raised $40,559 and spent $49,777. (Churchill Aff. ¶¶ 1-7, Ex. 2)

2003 Senate District 28: Guilford County

82. Guilford County is a covered county under § 5 of the VRA. The 2003 Senate District 28 was located in Guilford County. There was no evidence in the legislative record disputing the conclusions by Dr. Block and Dr. Brunell that racially polarized voting is present in Guilford County. (First Rucho Aff. Ex. 8, pp. 1-7; Ex. 10, p. 3-14, 21, 22; Def. Desg. p. 34, f. and g.)

83. In all versions of Senate District 28 in the previous or alternative plans, which plaintiffs describe as legal, the non-Hispanic white voting age population is less than 50%: 2003 Senate 28 (42.32%); SCSJ Senate 28 (36.94%); F&L Senate 28 (40.65%); LBC Senate 28 (41.91%). The evidence shows that the 2003 version of Senate District 28 was not "less than majority-minority." (Pl. Mem. ¶ 65; Second Frey Aff. ¶¶ 12-13, Exs. 34, 36-38) Nor was this district a majority-white crossover district.

84. AFRAM recommended that Senate District 28 be established with a majority-TBVAP district (51.77%). (First Frey Aff. ¶ 24, Ex. 10) This version of Senate 28 was the only version presented by any of the plaintiffs or any other party during the public hearing process.

85. In the 2003 version of Senate District 28, African Americans constituted 73.55% of all registered Democrats. Super-majorities of African

Americans in Democratic registration are also found in the SCSJ Senate 28 (75.49%); the F&L Senate 28 (73.62%), and the LBC Senate 28 (73.22%). (Second Frey Aff. ¶¶ 16-17, Exs. 44, 46-48) In comparison, the statewide percentage of Democrats who are African Americans is 41.38%.

86. In the 2003 version of Senate 28, African Americans were a majority of the registered voters (50.16%). This is also true for the SCSJ Senate 18 (54.11%), the F&L Senate 28 (50.25%), and the LBC Senate 28 (50.26%). (Second Frey Aff. ¶¶ 16-17, Exs. 44, 46-48)

87. All versions of the 2011 alternative House plans recommended that two majority-TBVAP districts be created in Guilford County: SCSJ House 58 (53.47%) and House 60 (54.41%); F&L House 58 (53.47%) and House 60 (54.47%); LBC House 58 (54.00%) and House 60 (50.43%). (First Frey Aff. ¶ 24, Ex. 11) Plaintiffs do not explain why a majority-TBVAP Senate District is unacceptable but two majority-TBVAP House Districts are acceptable.

88. There were no contested general elections for this district from 2004 through 2008. In the 2010 General Election, African American candidate Gladys Robinson defeated her Republican opponent 21,496 to 17,383 (+4,113). An unaffiliated candidate also received 6,054 votes in the 2010 General Election. The total number of votes received in 2010 by Sen. Robinson's Republican and unaffiliated opponents (23,427) exceeded the total votes received by Sen. Robinson. Under the 2010

Census, this district was underpopulated by (-13,673). Thus, the margin of victory for Sen. Robinson, when compared only to her Republican opponent, was less than the total deviation for this district. (Churchill Aff. ¶¶ 1-7, Ex. 2)

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

2003 Senate District 38: Mecklenburg County

90. The 2003 Senate District 38 is located in Mecklenburg County. There was no evidence in the legislative record disputing the conclusions by Dr. Block and Dr. Brunell that racially polarized voting is present in Mecklenburg County. (First Rucho Aff. Ex. 8, pp. 1-7; Ex. 10, pp. 3-14, 21; Def. Desg. p. 36, f. and g.) In all versions of Senate District 38 in the previous or alternative plans, which plaintiffs describe as legal, the non-Hispanic white population is less than 50%: 2003 Senate 38 (36.64%); SCSJ Senate 38 (30.22%); F&L Senate 38 (34.55%); LBC Senate 38 (34.55%). The evidence shows that the 2003 version of Senate District 38 was not "less than majority-minority." (Pl. Mem. ¶ 65; Second Frey Aff. ¶¶ 12-13, Exs. 34, 36-38) Nor was this district a majority-white crossover district.

91. The AFRAM version of Senate 38 recommended that this district be created with a majority-TBVAP (51.68%). AFRAM also recommended a second majority-TBVAP Senate

district for Mecklenburg County: District 40 (52.06%). (First Frey Aff. ¶ 24, Ex. 11) Plaintiffs have not explained why the two SCSJ-AFRAM majority-TBVAP districts are legal while enacted Senate District 38 is illegal.

92. In the 2003 version of Senate District 38, African Americans constituted a super-majority of registered Democrats (63.25%). The same is true for SCSJ Senate 38 (76.63%), the F&L Senate 38 (73.89%) and the LBC Senate 38 (73.89%). (Second Frey Aff. ¶¶ 16-17, Exs. 44, 46-48) In comparison, the statewide percentage of Democrats who are African Americans is 41.38%.

93. African Americans are a majority of the registered voters in the 2003 Senate 38 (50.33%), the SCSJ Senate 38 (56.22%), the F&L Senate (51.44%), and the LBC Senate 38 (51.44%). (Second Frey Aff. ¶¶ 16-17, Exs. 44, 46-48)

94. All alternative 2011 House plans recommended that majority-TBVAP House districts be created in Mecklenburg County: SCSJ House 101 (57.28%) and House 107 (56.43%); F&L House 101 (52.41%); LBC House 101 (50.25%). (First Frey Aff. ¶ 24, Ex. 11)

95. There were no contested general elections in this district in 2004 or 2006. In 2008, the Democratic African American candidate Charles Dannelly defeated his Republican opponent 67,755 to 22,056 (+45,699). A Libertarian candidate also received 2,588 votes. In 2010, Sen. Dannelly defeated his Republican opponent 33,692 to 15,369

(+18,323). The population deviation for this district under the 2010 Census was +47,572 (+24.9%). The amount of population deviation for this district exceeded the margin of victory for the African American Democrat in both 2008 and 2010. (Churchill Aff. ¶¶ 1-7, Ex. 2)

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

97. At the beginning of the 2011 session, Sen. Dannelly had served nine terms in the State Senate. (Churchill Aff. ¶ 8, Ex. 4)

2003 Senate District 40: Mecklenburg County

98. The 2003 Senate District 40 was located in Mecklenburg County. There was no evidence in the legislative record disputing the conclusions by Dr. Block and Dr. Brunell that racially polarized voting is present in Mecklenburg County. (First Rucho Aff. Ex. 8, pp. 1-7; Ex. 10, pp. 3-14, 21; Def. Desg. p. 36, f. and g.) In all previous or alternative versions of Senate District 40, which plaintiffs describe as legal, the non-Hispanic white population is less than 50%: 2003 Senate 40 (48.87%); SCSJ Senate 40 (26.09%); F&L Senate 40 (36.45%); and LBC Senate 40 (36.45%). The evidence shows that the 2003 version of Senate District 40 was not "less than majority-minority." (Pl. Mem. ¶ 65; Second

Frey Aff. ¶¶ 12-13, Exs. 34, 36-38) Nor was this district a majority-white crossover district.

99. AFRAM recommended that Senate District 40 be created with a TBVAP of 52.06%, as compared to enacted 2011 Senate District 40, which establishes this district with a slightly lower TBVAP (51.84%). Thus, AFRAM recommended that this district be established with a TBVAP in excess of that found in the enacted 2011 District 40. (First Frey Aff. ¶ 24, Ex. 10) Plaintiffs have produced no evidence explaining why the enacted 2011 Senate District 40 is "packed" or how the General Assembly allegedly "maximized" the TBVAP for their district, given that SCSJ District 40 contains a higher TBVAP than the enacted versions.

100. In all previous or alternative versions of Senate District 40 in the alternative plans, African Americans constitute a super-majority of registered Democrats: 2003 Senate 40 (63.32%); SCSJ Senate 40 (75.11%); F&L Senate 40 (70.62%); and LBC Senate 40 (70.62%). (Second Frey Aff. p. 6, Exs. 44, 46-48) In comparison, the statewide percentage of Democrats who are African Americans is 41.38%.

101. In the 2003 version of Senate District 40, African Americans represented only 37.08% of the registered voters. However, in all 2011 alternative versions of Senate District 40, African Americans represent a majority of registered voters: (SCSJ Senate 40 – 57.85%), or a near majority of registered voters (F&L District 40 – 49.10%; LBC District 40 – 49.10%). (Second Frey Aff. ¶¶ 16-17, Exs. 44, 46-48)

102. In each of the 2011 alternatives, whites represent a minority of registered voters: SCSJ District 40 (32.23%); F&L Senate 40: (40.58%); LBC District 40: (40.58%). (Second Frey Aff. ¶¶ 16-17, Exs. 44, 46-48)

103. All alternative 2011 House plans recommended that majority-TBVAP House districts be created in Mecklenburg County: SCSJ House 101 (57.28%) and House 107 (56.43%); F&L House 101 (52.41%); LBC House 101 (50.25%). (First Frey Aff. ¶ 24, Ex. 11)

104. In 2004, African American Democratic candidate Malcolm Graham defeated his Republican opponent 42,096 to 30,633 (+11,463). In 2006, Sen. Graham defeated his Republican opponent 21,247 to 13,314 (+7,933). In 2008, Sen. Graham defeated his Republican opponent 66,307 to 32,711 (+33,596). In 2010, Sen. Graham defeated his Republican opponent 32,168 to 23,145 (+9,023). The population deviation for this district under the 2010 Census is 54,523 (+28.6%). Thus, Sen. Graham's margin of victory for the 2004, 2006, 2008 and 2010 general elections was less than the total deviation for this district. (Churchill Aff. ¶¶ 1-7, Ex. 2)

105. In the 2004 cycle, Sen. Graham raised $145,170 and spent $123,330. His Republican opponent raised $15,382 and spent $15,382. In 2006, Sen. Graham raised $52,825 and spent $35,536. His Republican opponent did not file campaign disclosure reports. In 2008, Sen. Graham raised $40,075 and spent $46,841. His Republican opponent raised nothing. In 2010, Sen. Graham raised $55,750

and spent $38,583. His Republican opponent outraised Sen. Graham ($70,744), and spent more funds ($69,199). Of the four elections won by Sen. Graham, his Republican opponent in the 2010 general election received the highest percentage of the vote (41.84%) as compared to all Republican challengers from 2004 to 2010. (Churchill Aff. ¶¶ 1-7, Ex. 2)

106. At the time of the 2011 session, Sen. Graham had been elected to four terms in the state Senate. (Churchill Aff. ¶ 8, Ex. 4)

2009 House District 12: Craven and Lenoir Counties

107. The 2009 House District 12 was located in Craven and Lenoir Counties. There is no evidence in the legislative record disputing the conclusions by Dr. Block and Dr. Brunell that racially polarized voting is present in these counties. (First Rucho Aff. Ex. 8, pp. 1-7; Ex. 10, pp. 3-14; Def. Desg. p. 42, f. and g.) In the previous and alternative versions of House District 12, which plaintiffs describe as legal, the non-Hispanic white population is less than 50%: 2009 House 12 (46.23%); SCSJ House 12 (47.12%); F&L House 12 (46.14%); and LBC House 12 (45.58). The evidence shows that the 2009 version of House District 12 was not "less than majority-minority." (Pl. Mem. ¶ 65; Second Frey Aff. ¶¶ 14-15, Exs. 39, 41) Nor was the 2009 version a majority-white crossover district.

108. In the 2009 version of House District 12, African Americans constituted a super-majority

of registered Democrats (68.36%). The same is true for SCSJ House District 12 (66.82%), F&L House District 12 (65.26%), and LBC House District 12 (66.59%). (Second Frey Aff. ¶¶ 18-19, Exs. 49, 51-53) In comparison, the statewide percentage of Democrats who are African American is 41.38%.

109. Whites are a slight majority of the registered voters in 2009 House District 12 (51.01%), enacted 2011 House District 12 (51.47%), SCSJ House District 12 (51.37%), F&L House District 12 (51.64%), and LBC House District 12 (52.14%). The percentage of "registered whites" includes Hispanics. (Second Frey Aff. ¶¶ 18-19, Exs. 49, 51-53)

110. The 2009 version of House District 12 contained portions of Craven and Lenoir Counties. It was similar in construction to 2003 House District 18, which was found to violate the *Stephenson* criteria. Because the 2003 version of House District 18 did not have a TBVAP in excess of 50%, it could not be justified under § 2 of the VRA and therefore could not support any departure from the WCP. *Strickland*, 556 U.S. at 17-20. By raising the TBVAP of 2011 District 12 to 50.60%, the General Assembly precluded any lawsuits challenging the 2011 version as being in violation of the *Stephenson* or *Strickland* criteria. In contrast, all three alternative 2011 versions of House District 12 are subject to the same legal challenge that led to the ruling that the 2003 version of House District 18 violated *Stephenson* because their TBVAP is under 50%. (First Frey Aff. ¶ 24, Ex. 11)

111. The 2009 version of House District 12 included portions of Carteret and Lenoir Counties. The enacted 2011 version of House District 12 includes portions of Craven, Lenoir, and Greene Counties. All three counties are covered by § 5 of the VRA. The enacted 2011 version of District 12 gives African American voters in Greene County their first equal opportunity to vote for a preferred candidate of choice. There are no past elections results for a VRA House district that includes Greene County.

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

113. In 2004, Rep. Wainwright raised $76,225 and spent $70,171. His Republican opponent raised $5,859 and spent $10,629. In 2006, Rep. Wainwright raised $134,917 and spent $119,798. His Republican opponent raised $19,460 and spent $19,144. In 2008, Rep. Wainwright raised $155,271 and spent $97,125. His Republican opponent raised $4,884 and spent $4,755. In 2010, Rep. Wainwright raised $223,051 and spent $153,528. His Republican

opponent raised $11,252 and spent $8,525. (Churchill Aff. ¶¶ 1-7, Ex. 3)

114. At the beginning of the 2011 session, Rep. Wainwright had served eleven terms in the state House. (Churchill Aff. ¶ 8, Ex. 5)

2009 House District 21: Sampson and Wayne Counties

115. The 2009 House District 21 was located in Sampson and Wayne Counties. There is no evidence in the legislative record disputing Dr. Block's and Dr. Brunell's conclusions that racially polarized voting exists in these counties. (First Rucho Aff. Ex. 8, pp. 1-7; Ex. 10, pp. 3-14; Def. Desg. p. 44, f. and g.) In the previous and alternative versions of House District 21, the non-Hispanic white population is less than 50%: 2009 House 21 (40.31%); SCSJ House 21 (40.62%); F&L House 21 (42.31%); and LBC House 21 (40.25%). The evidence shows that the 2009 version of House District 12 was not "less than majority-minority." (Pl. Mem. ¶ 65; Second Frey Aff. ¶¶ 14-15, Exs. 39, 41-43) Nor was this district a majority-white crossover district.

116. In the 2009 version of House District 21, African Americans constituted a super-majority of registered Democrats (70.55%). The same is true for SCSJ House District 21 (69.08%), F&L House District 21 (70.58%), and LBC House District 21 (69.81%). (Second Frey Aff. ¶¶ 18-19, Exs. 49, 51-53) In comparison, the statewide percentage of Democrats who are African Americans is 41.38%.

117. In the 2009 version of House District 21, African Americans were a majority of the registered voters (50.39%). The same is true for the F&L version of House District 21 (50.91%). African Americans are nearly a majority of registered voters in SCSJ House District 21 (49.44%) as well as LBC House District 21 (49.45%). (Second Frey Aff. ¶¶ 18-19, Exs. 49, 51-53)

118. In all versions of House District 21, including the previous and alternatives plans, which plaintiffs describe as legal, whites constitute a minority of the registered voters: 2009 House 21 (43.97%): SCSJ House 21 (45.18%); F&L House 21 (44.03%) and LBC 21 (45.13%). (Second Frey Aff. ¶ 14, Exs. 39, 41-43)

119. The 2003 version of District 21 included portions of Wayne and Sampson Counties. It was comparable to the 2003 version of House District 18, which was found to violate the *Stephenson* criteria because it did not have a TBVAP in excess of 50%. Thus, the 2009 version of House District 21 could not be justified under § 2 of the VRA and could not support a departure from the WCP. By raising the TBVAP for District 21 to 51.90%, the General Assembly precluded any potential challenges to the 2011 version as being in violation of the *Stephenson* or *Strickland* criteria. In contrast, all three 2011 alternative versions of House District 21 are subject to the same legal challenges that led to the ruling that the 2003 version of House District 18 violated *Stephenson* because their TBVAP is under 50%. (First Frey Aff. ¶ 24, Ex. 11)

120. The 2009 version of House District 21 included portions of Wayne and Sampson Counties. The enacted 2011 version of District 21 includes portions of Wayne, Sampson and Bladen Counties. All three counties are covered under § 5 of the VRA. The enacted 2011 version of House District 21 gives African American voters in Bladen County their first equal opportunity to vote for a preferred candidate of choice. There are no past election results for a 50% or a 40% plus TBVAP House District that includes Bladen County.

121. From 2004 through 2008, there were no contested general elections in House District 21. In 2010, African American Democrat Larry Bell defeated his Republican opponent 11,678 to 6,126 (+5,552). The population deviation for this district under the 2010 Census was (-9,83). Rep. Bell's margin of victory in the 2010 election was less than the population deviation for this district. (Churchill Aff. ¶¶ 1-7, Ex. 3)

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

123. At the beginning of the 2011 session, Rep. Bell had been elected to six terms in the State House. (Churchill Aff. ¶ 8, Ex. 5)

2009 House District 29: Durham County

124. The 2009 District 29 was located in Durham County. There is no evidence in the

legislative record disputing the conclusions of Dr. Block and Dr. Brunell that racially polarized voting is present in Durham County. (First Rucho Aff. Ex. 8, pp. 1-7; Ex. 10, pp. 3-16; Def. Desg. p. 48, f. and g.) In all versions of House District 29 in the previous and alternative plans, which plaintiffs describe as legal, the non-Hispanic white population is less than 50%: 2009 House 29 (46.05%); SCSJ House 21 (45.55%); F&L House 21 (41.70%); and LBC House 21 (37.83%). The evidence shows the 2003 version of House District 12 was not "less than majority-minority." (Pl. Mem. ¶ 65; Second Frey Aff. ¶¶ 14-15, Exs. 39, 41-43) Nor was this district a majority-white crossover district.

125. In the 2009 version of House District 29, African Americans constituted 68.20% of all registered Democrats. In the AFRAM House District 29, African Americans constituted 55.76% of the registered Democrats. In the F&L House District 29, African Americans constituted 60.06% of the registered Democrats. In the LBC House District 29, African Americans constituted 61.97% of the registered Democrats. (Second Frey Aff. ¶¶ 18-19, Exs. 49, 51-55) In comparison, the statewide percentage of Democrats who are African Americans is 41.38%.

126. White voters are a minority among registered voters in F&L House 29 (47.90%) and LBC House 29 (44.20%). African Americans are a plurality of registered voters under the LBC District 29 (45.93%). (Second Frey Aff. ¶ 19, Exs. 52-53)

127. The SCSJ House Plan recommended the creation of a majority-TBVAP district located in Durham County: District 31 (51.69%). (First Frey Aff. ¶ 24, Ex. 11)

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

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

130. At the beginning of the 2011 session, Rep. Hall had been elected to three terms in the state House. (Churchill Aff. ¶ 8, Ex. 5)

2009 House District 31: Durham County

131. The 2009 House District 31 was located in Durham County. There is no evidence in the legislative record disputing the conclusions of Dr. Block and Dr. Brunell that racially polarized voting is present in Durham County. (First Rucho Aff. Ex. 8, pp. 1-7; Ex. 10, pp. 3-16; Def. Desg. p. 48, f. and g.) In all versions of House District 31 in the previous and alternative plans, which plaintiffs describe as legal, the non-Hispanic white population is less than a majority: 2009 House 31 (35.47%); SCSJ House 31 (30.13%); F&L House 31 (35.73%); and LBC House 31 (34.97%). The evidence shows the 2003 version of

House District 31 was not "less than majority-minority." (Pl. Mem. ¶65; Second Frey Aff. ¶¶ 14-15, Exs. 39, 41-43). Nor was this district a majority-white crossover district.

132. AFRAM recommended that the 2011 version of House District 31 be created with a majority of TBVAP (51.69%), only slightly lower than the TBVAP included in the enacted 2011 House District 31 (51.81%). (First Frey Aff. ¶ 24, Ex. 11)

133. In all previous and alternative versions of House District 31, African Americans constituted a super-majority of registered Democrats: 2009 House 31 (69.65%); SCSJ House 31 (74.28%); F&L House 31 (70.49%); and LBC House 31 (70.26%). (Second Frey Aff. ¶¶ 18-19, Exs. 49, 51-53) In comparison, the statewide percentage of Democrats who are African Americans is 41.38%.

134. In all previous and alternative versions of House District 31, African Americans constituted a majority of the registered voters: 2009 House 31 (52.13%); SCSJ House 31 (58.13%); F&L House 31 (52.86%); and LBC House (52.70%). (Second Frey Aff. ¶¶ 18-19, Exs. 49, 51-53)

135. Plaintiffs have offered no evidence explaining why a majority-TBVAP District 31 was needed in Durham (SCSJ Plan) or why a majority-black registered voter district was needed in Durham (District 31 in the 2009 Plan, SCSJ Plan, F&L Plan and LBC Plan) while a second majority-TBVAP district (District 29) was unnecessary and evidence of alleged racial gerrymandering. Nor have

plaintiffs produced any evidence showing why the SCSJ majority-TBVAP District 31 is legal, or why the other two proposals (F&L 31 and PHD 31) with majority black registration totals are legal, but the enacted 2011 version of House District 31 is illegal.

136. The Democratic African American candidate from this district faced opposition in the general election only in 2004 and 2010. In 2004, the African American candidate, H.M. ("Mickey") Michaux defeated a Libertarian candidate 23,313 to 3,802 (+19,511). In 2010, Rep. Michaux defeated a Republican candidate 18,801 to 6,102 (+12,699). The population deviation for this district under the 2010 Census was +11,812, or only 887 persons fewer than Rep. Michaux's margin of victory in 2010. (Churchill Aff. ¶¶ 1-7, Ex. 3)

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

138. At the beginning of the 2011 session, Rep. Michaux had served 16.5 terms in the state House. (Churchill ¶ 8, Ex. 5)

2009 House District 48: Hoke, Robeson and Scotland Counties

139. The 2009 House District 48 was located in Hoke, Robeson, and Scotland Counties. There is no evidence in the legislative record disputing the

conclusions of Dr. Block and Dr. Brunell that racially polarized voting is present in these counties. (First Rucho Aff. Ex. 8, pp. 1-7; Ex. 10, pp. 1-14; Def. Desg. p. 56, f. and g.) In all versions of House District 48 included in the alternative plans, which plaintiffs describe as legal, the non-Hispanic white population is less than 50%: 2009 House 48 (29.63%), SCSJ (29.90%), F&L House 48 (33.68%), and LBC House 48 (34.12%). The evidence shows the 2009 version of House District 48 was not "less than majority-minority." (Pl. Mem. ¶ 65; Second Frey Aff. p. 5, Exs. 39, 41-43) Nor was this district a majority-white crossover district.

140. In all previous and alternative versions of District 48, African Americans constitute a super-majority of registered Democrats: 2009 House 48 (59.81%); SCSJ House 48 (58.82%); F&L House 48 (57.31%): LBC House 48 (58.72%). (Second Frey Aff. ¶¶ 18-19, Exs. 49, 51-53) In comparison, the statewide percentage of Democrats who are African Americans is 41.38%.

141. In the 2009 version of House District 48, 50.80% of all registered voters were African American. In the 2011 alternative plans, African Americans constitute a significant plurality of all registered voters: SCSJ House 48 (49.23%); F&L House 48 (47.14%); and LBC House 48 (48.39%). (Second Frey Aff. ¶¶ 18-19, Exs. 49, 51-53)

142. In all previous and alternative versions of House District 48, whites constitute a minority of the registered voters: 2009 House 48 (31.80%); SCSJ

House 48 (33.93%); F&L House 48 (36.56%); and LBC House 48 (38.78%). (Second Frey Aff. ¶¶ 18-19, Exs. 49, 51-53)

143. The construction of 2003 House District 48, which includes portions of Hoke, Robeson, Scotland, and Richmond Counties, is similar to 2003 House District 18, which was found to violate the *Stephenson* criteria. Because the 2009 version did not have a TBVAP in excess of 50%, it could not be justified under § 2 of the VRA and therefore could not support departure from the WCP. By raising the TBVAP of House District 48 to 51.27%, the General Assembly precluded any potential challenges to the 2011 version as being in violation of the *Stephenson* or *Strickland* criteria. All of the alternative 2011 versions of District 48 are subject to the same legal challenge that led to the ruling that the 2003 House District 18 violated *Stephenson*, because their TBVAP is below 50%. (First Frey Aff. ¶ 24, Ex. 11)

144. The 2009 version of District 48 was located only in Hoke, Robinson, and Scotland Counties. Both the enacted 2011 version of District 48 and the LBC version include these three counties and a portion of Richmond County. There is no evidence in the legislative record disputing Dr. Brunell's conclusion that racially polarized voting is present in Richmond County. (First Rucho Aff. Ex. 10, pp. 3-7) For the first time, African American voters in Richmond County have an equal opportunity to elect a representative of their choice. There are no past election results involving a 50% plus or a 40% TBVAP House District that included Richmond County.

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

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

147. At the beginning of the 2011 session, Rep. Pierce had served four terms in the state House. (Churchill ¶ 8, Ex. 5)

2009 House District 99: Mecklenburg County

148. The 2009 House District 99 was located in Mecklenburg County. There is no evidence in the legislative record disputing the conclusions by Dr. Block and Dr. Brunell that racially polarized voting is present in Mecklenburg County. (First Rucho Aff. Ex. 8, pp. 1-7; Ex. 10, pp. 3-14, 21; Def. Desg. pp. 60, 61, f. and g.) In all previous and alternative versions of House District 99, including the alternative plans which plaintiffs describe as legal, the non-Hispanic white VAP is less than 50%: 2009 House 99 (39.41%); SCSJ House 99 (37.60%); F&L House 99 (35.68%); and LBC House 99 (30.89%). The evidence shows the 2003 version of House District 99 was not "less than majority-minority." (Pl. Mem. ¶ 65;

Second Frey Aff. ¶¶ 14-15, Exs. 39, 41-43) Nor was this district a majority-white crossover district.

149. In all previous and alternative versions of House District 99, African Americans constitute a super-majority of registered Democrats: 2009 House 99 (67.85%); SCSJ House 99 (68.17%); F&L House 99 (70.38%); and LBC House 99 (75.37%). (Second Frey Aff. ¶¶ 18-19, Exs. 49, 51-53) In comparison, the statewide percentage of Democrats who are African Americans is 41.38%.

150. In LBC House District 99, African Americans are a majority of registered voters (56.73%). In the other versions of House District 99, African Americans are a plurality of the registered voters: 2009 House 99 (45.20%); SCSJ House 99 (46.27%); and F&L House 99 (48.79%). (Second Frey Aff. ¶¶ 18-19, Exs. 49, 51-53)

151. In all previous and alternative versions of House District 99, whites are a minority of the registered voters: 2009 House 99 (43.27%); SCSJ House 99 (41.06%); F&L House 99 (38.52%); and LBC House 99 (32.47%). (Second Frey Aff. ¶¶ 18-19, Exs. 49, 51-53)

152. The AFRAM Plan recommended two majority-TBVAP Senate Districts for Mecklenburg County and two majority-TBVAP House Districts. (First Frey Aff. ¶ 24, Ex. 10) Both the F&L House Plan and the LBC House Plan recommended one majority-TBVAP House district for Mecklenburg County. (First Frey Aff. ¶ 24, Ex. 11) Plaintiffs have offered no evidence explaining why these alternative

majority-TBVAP House districts are appropriate for Mecklenburg County, while those drawn by the General Assembly are alleged racial gerrymanders.

153. All four of the House Plans plaintiffs have alleged to be legal have six House districts in Mecklenburg County that are majority-minority and in which the non-Hispanic white population is less than 50%:

a. 2009 House Plan: House District 99 (39.41%); House District 100 (36.63%); House District 101 (31.58%); House District 102 (39.88%); House District 106 (48.54%); and House District 107 (37.30%). (Second Frey Aff. ¶ 14, Ex. 39) Only three African Americans were elected from these six districts in 2010: Moore (District 99); Earle (District 101); and Alexander (District 107). (Churchill Aff. ¶ 1-7, Ex. 3)

b. SCSJ House Plan: House District 99 (37.60%); House District 100 (31.59%); House District 101 (31.88%); House District 102 (37.00%); House District 106 (44.65%); and House District 107 (28.69%). (Second Frey Aff. ¶ 15, Ex. 41)

c. F&L House Plan: House District 96 (47.88%); 99 (35.68%); House District 100 (49.04%); House District 101 (34.67%); House District 102 (41.15%); and House District 107 (45.29%). (Second Frey Aff. ¶ 15, Ex. 42)

d. LBC House Plan: House District 25 (42.44%); House District 99 (30.89%); House District 100 (37.98%); House District 101 (32.58%); House District 102 (37.29%); and House District 107 (40.30%). (Second Frey Aff. ¶ 15, Ex. 43) Plaintiffs have failed to explain why six majority-minority districts for Mecklenburg County are legal, but five majority-TBVAP counties are illegal.

154. In 2008, the African American Democrat Nick Mackey defeated his Republican opponent 28,106 to 14,925 (+13,181). In 2010, African American candidate Rodney Moore defeated his Republican opponent 15,591 to 6,059 (+9,532). The deviation for this district under the 2010 Census was +32,850, which far exceeds the margin of victory for African American candidates in 2008 and 2010. (Churchill Aff. ¶¶ 1-7, Ex. 3)

155. In 2008, Rep. Mackey raised and spent $19,469. His Republican opponent raised $10,281.99 and spent $9,974. In 2010, Rep. Moore raised $9,155 and spent $3,213. His Republican opponent raised and spent $207. (Churchill ¶ 8, Ex. 5)

2009 House District 107: Mecklenburg County

156. The 2009 House District 107 was located in Mecklenburg County. There is no evidence in the legislative record disputing the conclusions by Dr. Block and Dr. Brunell that racially polarized voting is present in Mecklenburg County. (First Rucho Aff. Ex. 8, pp. 1-7; Ex. 10, pp. 3-14, 21; Def. Desg. pp. 60, 61, f. and g.) In all versions of House

District 107, which plaintiffs describe as legal, the non-Hispanic white VAP is less than 50%: 2009 House 107 (37.30%); SCSJ House 107 (28.62%); F&L House 107 (45.29%); and LBC House 107 (40.30%). The evidence shows the 2003 version of House District 107 was not "less than majority-minority." (Pl. Mem. ¶ 65; Second Frey Aff. p. 5, Exs. 39, 41-43) Nor was this district a majority-white crossover district.

157. The SCSJ Plan recommended that House District 107 be created with a TBVAP of 56.43%, as compared to the enacted 2011 House District 107, which has a TBVAP of 52.52%. (First Frey Aff. ¶ 24, Ex. 11) Thus, the SCSJ Plan recommended a higher TBVAP for this district than the enacted version.

158. In all previous and alternative versions of House District 107, African Americans constitute a super-majority of registered Democrats: 2009 House 107 (72.18%); SCSJ House 107 (78.78%); F&L House 107 (72.24%); and LBC House 107 (73.41%). (Second Frey Aff. ¶¶ 18-19, Exs. 49, 51-53) In comparison, the statewide percentage of Democrats who are African Americans is 41.38%.

159. African Americans constitute a majority of the registered voters in the SCSJ House 107 (60.38%) and the LBC House 107 (50.19%). African Americans are a plurality of registered voters in the 2009 House 107 (48.72%). (Second Frey Aff. ¶¶ 18-19, Exs. 49, 51-53)

160. Whites are a minority of the registered voters in all previous and alternative versions of House 107: 2009 House 107 (42.20%); SCSJ House 107 (31.13%); F&L House 107 (47.00%); and LBC 107 (42.99%). (Second Frey Aff. ¶¶ 18-19, Exs. 49, 51-53)

161. Majority-TBVAP house districts for Mecklenburg County are found in all five plans. The two highest TBVAP districts are found in the AFRAM House Plan: SCSJ House District 101 (57.28%), and SCSJ House District 107 (56.43%). (First Frey Aff. ¶ 24, Ex. 11) Both of these proposed "legal" SCSJ House Districts have a higher percentage of TBVAP than any of the enacted 2011 House Districts located in Mecklenburg County.

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

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

164. At the beginning of the 2011 session, Rep. Alexander had served 2.5 terms in the state House. (Churchill Aff. ¶ 8, Ex. 5)

2001 First Congressional District

165. The 2001 First Congressional District includes the following counties: Bertie, Beauford, Chowan, Craven, Edgecombe, Hertford, Gates, Granville, Greene, Halifax, Jones, Lenoir, Martin, Northampton, Pasquatank, Perquimins, Pitt, Vance, Warren, Washington, Wayne, and Wilson. There is no evidence in the legislative record disputing the conclusions of Dr. Block and Dr. Brunell that racially polarized voting continues to be present in these counties. (First Rucho Aff. Ex. 8, pp. 1-7; Ex. 10, pp. 3-14; Def. Desg. p. 20, f. and g.) In all versions of the First Congressional District in the previous or alternative plans, which plaintiffs describe as legal, the non-Hispanic white population is less than 50%: 2001 First Congressional (45.59%); SCSJ First Congressional (46.47%); F&L First Congressional (46.46%). The evidence shows that the 2001 version of the First Congressional District was not "less than majority-minority." (Pl. Mem. ¶ 65; Second Frey Aff. ¶ 26, Exs. 60, 62-63, 66-67) Nor was this district a majority-white crossover district.

166. In the previous and alternative versions of the First Congressional District, African Americans represent a super-majority of registered Democrats: 2001 First Congressional (66.55%); SCSJ First Congressional (65.73%); F&L First Congressional (65.66%). (Second Frey Aff. ¶ 27, Exs.

64, 66-67) In comparison, the statewide percentage of Democrats who are African Americans is 41.38%.

167. In the 2001 First Congressional District, African Americans were amajority of all registered voters (50.55%). African Americans constituted a very strong plurality of all registered voters in the SCSJ First Congressional (49.32%) and in the F&L First Congressional (49.12%). (Second Frey Aff. ¶ 27, Exs. 64, 66-67)

168. In the previous and alternative versions of the First Congressional District, white voters constituted a minority of all registered voters: 2001 First Congressional (46.03%); SCSJ First Congressional (47.40%); F&L First Congressional (47.71%). (Second Frey Aff. ¶ 27, Exs. 64, 66-67)

169. In the 2004 General Election, African American Democrat G. K. Butterfield defeated his Republican opponent 137,667 to 77,508 (+60,159). Congressman Butterfield had no opposition in the 2006 General Election. In 2008, Congressman Butterfield defeated his Republican opponent 192,765 to 81,506 (+111,259). In 2010, Congressman Butterfield defeated his Republican opponent 103,294 to 70,867 (+32,427). The population deviation for this district under the 2010 Census (-97,563) exceeds Congressman Butterfield's margin of victory for 2004 and 2010. (Churchill Aff. ¶¶ 1-7, Ex. 1)

170. In the 2004 cycle, Congressman Butterfield raised $429,441 and spent $404,055. His Republican opponent raised $41,955 and spent

$46,030. In 2008, Congressman Butterfield raised $792,331 and spent $703,696. His Republican opponent did not report any contributions or expenditures. In 2010, Congressman Butterfield raised $828,116 and spent $794,383. His Republican opponent raised $134,393 and spent $134,386. (Churchill Aff. ¶¶ 1-7, Ex. 1)

171. Congressman Butterfield was first elected on July 20, 2004, and has served through the present. *See* http://butterfield.house.gov/biography/.

2001 Twelfth Congressional District

172. The 2001 Twelfth Congressional District includes Guilford and Mecklenburg Counties. There is no evidence in the legislative record disputing the conclusions of Dr. Block and Dr. Brunell that racially polarized voting is present in these counties. (First Rucho Aff. Ex. 8, pp. 1-7; Ex. 10, pp. 3-14) In all versions of the Twelfth Congressional District, which plaintiffs describe as legal, the non-Hispanic white VAP was less than 50%: 2001 Twelfth Congressional (42.40%); SCSJ Twelfth Congressional (42.38%) and F&L Twelfth Congressional (41.48%). The evidence shows the 2001 version of the Twelfth Congressional District was not "less than majority-minority." (Pl. Mem. ¶ 65; Second Frey Aff. ¶ 26, Exs. 60, 62-63) Nor was this district a majority-white crossover district.

173. In the previous and alternative versions of the Twelfth Congressional District, African Americans constitute a super-majority of registered Democrats: 2001 Twelfth Congressional (71.44%);

SCSJ Twelfth Congressional (71.53%); and F&L Twelfth Congressional (69.14%). (Second Frey Aff. ¶ 27, Exs. 64, 66-67) In comparison, the statewide percentage of Democrats who are African Americans is 41.38%.

174. African Americans constitute a plurality of registered voters in the previous and alternative versions of the Twelfth Congressional District: 2001 Twelfth Congressional (48.56%); SCSJ Twelfth Congressional 48.70%); and F&L Twelfth Congressional (46.54%). (Second Frey Aff. ¶ 27, Exs. 64, 66-67)

175. Whites are a minority of all registered voters in the previous and alternative versions of the Twelfth Congressional District: 2001 Twelfth Congressional (45.26%); SCSJ Twelfth Congressional (45.17%); and F&L Twelfth Congressional (46.09%). (Second Frey Aff. ¶ 27, Exs. 64, 66-67)

176. The African American incumbent, Mel Watt, was challenged by a Republican opponent in 2004, 2006, 2008, and 2012. In all of these elections, Congressman Watt's margin of victory exceeded the deviation for this district under the 2010 Census (+2,847). (First Frey Aff. ¶ 24, Ex. 12)

177. In 2004, Congressman Watt raised $579,199 and spent $519,885. His Republican opponent raised $108,189 and spent $104,668. In 2006, Congressman Watt raised $503,515 and spent $535,747. His Republican opponent raised $444,044 and spent $446,782. In 2008, Congressman Watt raised $680,473 and spent $646,079. His Republican

opponent raised $25,306 and spent $25,584. In 2010, Congressman Watt raised $604,718 and spent $591,203. His Republican opponent raised $13,041 and spent $12,995. (Churchill Aff. ¶¶ 1-7, Ex. 1)

178. Congressman Watt was first elected in 1992 and has served continuously in this office through the present. *See* http://watt.house.gov/index.php?option=com_content&view=article&id=2578&Itemid=75.

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

MARGARET DICKSON, *et al.*,	)
	)
Plaintiffs,	)
	)
v.	)
	)
ROBERT RUCHO, *et al.*,	)
	)
Defendants.	)

11 CVS 16896

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

11 CVS 16940

(Consolidated)

APPENDIX B TO THE

JUDGMENT AND MEMORANDUM OF DECISION

FINDINGS OF FACT RELEVANT TO THE ISSUE OF WHETHER RACE WAS THE PREDOMINANT MOTIVE FOR THE SHAPES AND LOCATIONS OF DISTRICT LINES FOR 2011 CONGRESSIONAL DISTRICTS 12 AND 4, SENATE DISTRICTS 31 AND 32, OR HOUSE DISTRICTS 51 AND 54.

See § IV(D) of Judgment and Memorandum of Decision

2011 12th Congressional District

179. Dr. Thomas Hofeller was engaged by the General Assembly for the purpose of drawing redistricting plans. (Rough Draft Trial Transcript, June 5, 2011, p. 5) ("TT Vol. II") He was not engaged to prepare expert testimony regarding the presence or absence of racially polarized voting. (*Id*. at p. 8)

180. Dr. Hofeller testified as a witness in the case of *Shaw v. Hunt*, 517 U.S. 899 (1996) ("*Shaw II*"), a case that challenged the 1992 North Carolina Twelfth Congressional District as a racial gerrymander. (TT, Vol. II, p. 4) Dr. Hofeller is familiar with the decision in *Easley v. Cromartie*, 532 U.S. 234 (2000) ("*Cromartie*"), a decision in which the 1997 version of the Twelfth Congressional District was upheld on the grounds that politics explained the shape and location of the districts lines as opposed to race. (TT Vol. II, p. 11)

181. The 2001 version of the Twelfth Congressional Districts was based upon the same principles that motivated the 1997 version, and is located in the same general area as the 1997 version. (*Id*. at pp. 12-14; Defs. Trial Ex. 8)

182. Dr. Hofeller took instructions for drawing maps primarily from Senator Robert Rucho, Chair of the Senate Redistricting Committee, and Representative David Lewis, Chair of the House Redistricting Committee. (*Id*. at p. 14)

183. Senator Rucho and Representative Lewis instructed Dr. Hofeller to follow the legal standard stated in *Cromartie II*, in the drawing of the 2011 Twelfth Congressional District. (*Id*. at p. 15)

184. Senator Rucho and Representative Lewis instructed Dr. Hofeller to increase the number of Democratic voters included in the 2011 Twelfth District as compared to the number of Democratic voters included in the 2001 version. By increasing the number of Democratic voters in the 2011 version of the Twelfth Congressional District, the two Chairmen intended to achieve two goals: (1) creating the 2011 Twelfth District as an even stronger Democratic district as compared to the 2001 version; and (2) by doing so, making districts that adjoin the Twelfth Congressional District more competitive for Republicans in their 2011 versions as compared to these districts as they were created in the 2001 Congressional Plan. (*Id*. at pp. 15-17)

185. The 2011 Twelfth Congressional District is located in the same six counties as the 2001 version. (TT Vol. II, p. 13; Defs. Trial Ex. 8)

186. The 1997, 2001, and 2011 versions of the Twelfth Congressional districts are based upon urban population centers located in Mecklenburg, Guilford, and Forsyth Counties. These urban areas are connected by more narrow corridors located in Cabarrus, Rowan, and Davidson Counties. (*Id.*; Rough Draft Transcript, June 4, 2013, pp. 210-211) ("TT Vol. I")

187. The principal differences between the 2001 version of the Twelfth Congressional District and the 2011 version is that the 2011 version adds more strong Democratic voters located in Mecklenburg and Guilford Counties and removes Republican voters who had formerly been assigned to the 2001 Twelfth Congressional District from the corridor counties of Cabarrus, Rowan, Davidson and other locations. (TT Vol. II, pp. 15-17; TT Vol. I, pp. 208-209).

188. Dr. Hofeller constructed the 2011 Twelfth Congressional District based upon whole Vote Tabulation Districts ("VTDs") in which President Obama received the highest voter totals during the 2008 Presidential Election (TT Vol. II, pp. 15-17). The only information on the computer screen used by Dr. Hofeller in selecting VTDs for inclusion in the Twelfth District was the percentage by which President Obama won or lost a particular VTD. (*Id.* at pp. 18-19) There was no racial data on the screen

used by Dr. Hofeller to construct this district. (*Id*. at p. 24)

189. The 2011 Twelfth Congressional District includes 179 VTDs. (Second Frey Aff. Ex. 28). Only six VTDs were divided by Dr. Hofeller in forming the 2011 Twelfth Congressional District (TT Vol. II, pp. 20-24; Def. Trial Ex. 14). All of these divisions were done to equalize population among the Twelfth Congressional District and other districts or for political reasons, such as dividing a VTD in Guilford County so that incumbent Congressman Howard Coble could be assigned to the 2011 Sixth Congressional District as opposed to being placed in the 2011 Twelfth Congressional District. None of the VTDs were divided based upon racial criteria. (*Id.*)

190. Dr. Hofeller's division of VTDs in his construction of the Twelfth Congressional District did not have any impact on the political performance of the 2011 Twelfth Congressional District or its racial composition. (TT Vol. II, pp. 29-30)

191. By increasing the number of Democratic voters in the 2011 Twelfth Congressional District located in Mecklenburg and Guilford Counties, the 2011 Congressional Plan created other districts that were more competitive for Republican candidates as compared to the 2001 versions of these districts, including the 6th Congressional District, the 8th Congressional District, the 9th Congressional District, and the 13th Congressional District. (*Id*. at pp.16-17) (Map Notebook, Rucho Lewis Congress 3 and Congress Zero Deviation)

2011 Fourth Congressional District

192. Dr. Hofeller was instructed by the redistricting chairs, Senator Rucho and Representative Lewis, to construct the 2011 Fourth Congressional District based upon the same principles stated in *Cromartie II* and used to create the 1997, 2001, and 2011 versions of the Twelfth Congressional District. (TT Vol. II, p. 32)

193. Like the 2011 Twelfth Congressional District, Dr. Hofeller was instructed to create the 2011 Fourth Congressional District as a very strong Democratic district so that 2011 Congressional districts that adjoin the 2011 Fourth Congressional District would be more competitive for Republicans as compared to the 2001 versions of these districts. (*Id*.)

194. The 2011 Fourth Congressional District is similar in construction to the 2001 Thirteenth Congressional District and the version of the Thirteenth Congressional District found in the 2011 Fair and Legal Congressional Plans. If the distance between the two most distant points of each of these three versions of the Thirteenth District are compared, the 2001 Thirteenth District has a span of 111 miles, the Fair & Legal Districts has a span of 97 miles, and the enacted 2011 Thirteenth Congressional District has a span of 88 miles. (*Id*. at p. 33; Defs. Trial Exs. 7, 9, 10) While the 2011 Fourth Congressional District is partially located in a different region than the 2001 Thirteenth or the Fair and Legal Thirteenth, all three districts contain significant portions of Wake County. All three

districts also use rural corridors to connect urban centers of population. (Map Notebook, Rucho-Lewis Congress 3, District 4; Congress Zero Deviation, District 13; Congressional Fair & Legal, District 13)

195. Like the 2011 Twelfth Congressional District, Dr. Hofeller constructed the 2011 Fourth Congressional District based upon whole VTDs in which President Obama received the highest vote totals during the 2008 Presidential Election. The only information on the computer screen used by Dr. Hofeller in selecting VTDs for inclusion in the Fourth Congressional District was the percentage by which President Obama won or lost in a particular VTD. There was no racial data on the screen used by Dr. Hofeller to construct this district. (TT Vol. II, pp. 34-35)

196. The 2011 Fourth Congressional District includes 160 VTDs. (http://www.ncleg.net/representation/Content/Plans/PlanPage_DB_2011.asp?Plan=Rucho-Lewis_Congress_3&Body=Congress). Only 14 VTDs were divided by Dr. Hofeller in forming the 2011 Fourth Congressional District. All of the divisions were done to equalize population among the Fourth Congressional District and the adjoining Congressional districts, to make the district contiguous, or for political reasons. None of the VTDs were divided based upon racial data. (TT Vol. II, pp. 34-37; Def. Trial Ex. 14)

197. Dr. Hofeller's division of VTDs in his construction of the Fourth District did not have any impact on the political performance of the 2011

Fourth Congressional District or its racial composition. (TT Vol. II, p. 37)

198. By drawing the 2011 Fourth Congressional District as a very strong Democratic district, the 2011 Congressional Plan created other districts that were more competitive for Republican candidates as compared to the 2001 versions of these districts, including the Second, Seventh, Eighth, and Thirteenth Congressional Districts. (TT Vol. II, at p. 32)

2011 Senate Districts 31 and 32

199. Forsyth County is a county in which the State was held liable for a § 2 violation in *Thornburg v. Gingles*, 478 U.S. 30 (1986) (Def. Pr. Fds. No. 1)

200. A majority-minority coalition district is a district in which black voters are a plurality and are then combined with other minority voters, such as Hispanics, to form a majority coalition of two or more minority groups. *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009). The United States Supreme Court has declined to address whether a majority-minority coalition district may be legally ordered as a remedy for a § 2 violation. *Id.* One circuit court has held that such districts are not proper remedies under § 2. *Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996). At least two circuit courts have endorsed majority-minority coalition districts as an appropriate § 2 remedy where there is insufficient black population to draw a majority-TBVAP district and the other minority group is politically cohesive with black voters. *Bridgeport Coalition for Fair Representation*

v. City of Bridgeport, 26 F.3d 271, 283 (2nd Cir. 1994); *Campos v. City of Baytown, Texas,* 840 F.2d 1240, 1244 (5th Cir. 1988).

201. Forsyth County is not covered by § 5. Regardless, when reviewing a redistricting plan for predominance, § 5 requires that any inquiry by the reviewing authority, either the United States Attorney General or the United States District Court for the District of Columbia, must encompass the statewide plan as a whole. *Georgia v. Ashcroft*, 539 U.S. 461, 479 (2003).

202. Under the 2003 Senate Plan, there was enough population in Forsyth County to draw two Senate districts wholly within that county, 2003 Senate District 31 and 2003 Senate District 32. (Map Notebook, 2003 Senate Plan)

203. Under the 2000 Census, there was not enough black population in Forsyth County to draw a majority-TBVAP district. Instead, 2003 Senate District 21 was drawn as a majority-minority coalition district. The TBVAP for the District under the 2010 Census was 42.52%. (First Frey Aff. Ex. 10) The total white VAP was 45.75%. (Second Frey Aff. Ex. 34) The total Hispanic VAP was 13.72%. (*Id.*) The total non-Hispanic white population was 42.11%. (*Id.*)

204. As was true under the 2000 Census, under the 2010 Census there is insufficient TBVAP in Forsyth County to draw a majority-TBVAP Senate district in Forsyth County. However, because of concerns regarding the State's potential liability

under § 2 and § 5, Dr. Hofeller was instructed by the redistricting chairs to base the 2011 Senate District 32 on the 2003 versions of Senate District 32. (TT Vol. II, p. 46)

205. Under the criteria established in *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) ("*Stephenson I*"), the population deviation for the Senate District must be plus or minus 5% from the ideal number. The ideal population for a Senate District under the 2010 Census is 190,710. (First Frey Aff. Ex. 10). Under the 2010 Census, the General Assembly could not re-enact the 2003 version of Senate District 32 because it was under populated by more than 5% (-15,440 people or -8.10%). (First Frey Aff. Ex. 10)

206. Under the 2010 Census, Forsyth County no longer had enough population to draw two Senate districts within the county, as had been done under the 2003 Senate Plan. Instead, Forsyth was grouped with Yadkin County to form a population pool sufficient to draw two Senate districts within that county group. (Map Notebook, Rucho Senate 2)

207. The first version of Senate District 32 that was released by the General Assembly had a TBVAP of 39.32%. (http://www.ncleg.net/representation/Content/Plans/PlanPage_DB_2011.asp?Plan=Rucho_Senate_VRA_Districts&Body=Senate). Subsequently, the SCSJ plan was released. Its version of District 32 was located in a three-county and three-district group (Forsyth, Davie, Davidson). (Map Notebook, SCSJ Senate) The SCSJ District 32 had a TBVAP of 41.95%. (First Frey Aff., Ex. 10) The

SCSJ District 32 was a majority-minority coalition district with a non-Hispanic white population of 43.18%. (First Frey Aff. Ex. 37)

208. The redistricting chairs were concerned that any failure to match the TBVAP % found in the SCSJ District 32 could potentially subject the state to liability under § 2 or § 5 of the VRA. Therefore, Dr. Hofeller was instructed by the Redistricting Chairs to re-draw the State's version of Senate District 32 so that it would at least equal the SCSJ version in terms of TBVAP. (TT Vol. II, pp. 46-48)

209. The average district population for three Senate districts located in the SCSJ county group allowed for the creation of districts with deviations below the ideal number. In contrast, the average district population for two districts located in the state's two-county group required the creation of districts with deviations above the ideal number. (*Id*.)

210. The SCSJ Senate District 32 was created with the total population of 181,685 or 4.73% below the ideal number for a Senate district (190,710). The State could not enact the SCSJ version of Senate District 32 in the two-county combination of Forsyth and Yadkin because to do so would have pushed the total population in Senate District 31 to a level that was above the plus 5% restriction established in *Stephenson*. Thus, for the State to enact a Senate District 32 that would match the TBVAP in the SCSJ version, it would have to create a district with more total population than the SCSJ version and would need to do so by expanding

the boundaries of the enacted Senate District 32. (*Id.)*

211. After Dr. Hofeller revised the State's version of Senate District 32 to match the TBVAP found in the SCSJ version, the enacted 2011 version of Senate District 32 had a TBVAP of 42.53%, which was almost identical to the TBVAP found in the 2003 version. (First Frey Aff. Ex. 10). The population deviation for the enacted 2011 Senate District 32 was -0.79%. The population deviation for the enacted 2011 Senate District 31, the second district drawn within the Forsyth-Yadkin combination, was 4.81%. (Map Notebook, Rucho Senate 2, Actual Population Table with Deviation Listed, Senate District 31). As already explained, if the General Assembly had adopted the SCSJ version of Senate District 32 (and its deviation of -4.73%), the population that would have been forced into the enacted Senate District 31 would have caused that district to substantially exceed in population the plus 5% restriction established in *Stephenson*. (TT Vol. II, p. 47)

212. A review of the 2003 Senate Plan, the 2011 Senate Plan, the SCSJ Senate Plan, and the Possible Senate Plan offered by the Legislative Black Caucus, shows that the geographic locations of Senate District 32 largely overlap in all versions of the district. (Map Notebook, Rucho Senate 2, 2003 Senate, SCSJ Senate, Fair and Legal Senate, Possible Senate). Further, the percentage of TBVAP found in each version of this district runs from 38.28% (Fair and Legal and Possible Senate) to 42.53% (2011 Senate). The differences between all variations of this district are factually insignificant.

2011 House Districts 51 and 54

213. The 2011 House Districts 51 and 54 are in a three-county, three-district group consisting of Chatham, Lee, and Harnett Counties. (TT Vol. II, p. 51; Def. Trial Ex. 20)

214. The 2011 House District 54 consists of all of Chatham County and a portion of Lee County mainly located in the City of Sanford. House District 51 consists of the remaining portions of Lee County and a portion of Harnett County. Chatham is the only whole county in this group. There are two traversals of county lines to form the three districts (all of Chatham traversing into a portion of Lee to form House District 54 and the remaining portion of Lee traversing into a part of Harnett to form House District 51). (TT Vol. II, 2013, pp. 51-52)

215. Under the Martin House Fair and Legal Plan, Chatham, Lee, and Harnett form a three-county group with enough population for three districts (F&L House District 56, F&L House District 52, and F&L House District 65). (*Id.*; Defs. Trial Ex. 19)

216. Under the Fair and Legal configuration for this three-county group, Chatham is wholly within House District 56 which traverses into a portion of Harnett County. Lee County is wholly within House District 53 which also traverses into Harnett. Thus, while the Fair and Legal configuration has more whole counties (two) as compared to the 2011 House Plan (one), both plans

form three districts by two traversals of a county line.

217. Dr. Hofeller was instructed to draw the 2011 House District 54 as a strong Democratic district. In part, this was because the former Democratic Speaker of the House had a potential residence in Chatham County. Dr. Hofeller therefore based this district on all of Chatham County and the location of the highest concentration of Democratic voters in Lee County. (TT Vol. II, 2013, p. 54)

218. There are only five VTDs in Lee County. The City of Sanford is located in at least four of these five VTDs. The City of Sanford is the largest population center in Lee County and it is impossible to divide Lee County into different House Districts without dividing VTDs. (*Id*. at p. 56; Defs. Trial Ex. 4, Pl. Trial Notebook, Ex. 7)

219. Dr. Hofeller was instructed by Republicans who live in this county group regarding the location of Democratic voters in the City of Sanford. Dr. Hofeller drew House District 54 into Sanford based upon these instructions. He largely followed roads or streets in dividing the City of Sanford and placing into District 54 those areas of the City in which Democratic voters reside, as instructed by local Republicans. (TT Vol. II, pp. 57-58)

220. Dr. Hofeller did not reference any racial data when he constructed House District 54. (*Id*. at p. 58)

221. The TBVAP for the 2011 House District 54 is 17.98%. (Map Notebook, Lewis-Dollar-Dockham 4, Table Showing Voting Age Population by Race).

Section 5 of the Voting Rights Act of 1965

52 U.S.C. §10304

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the first sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the second sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the third sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or

abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of

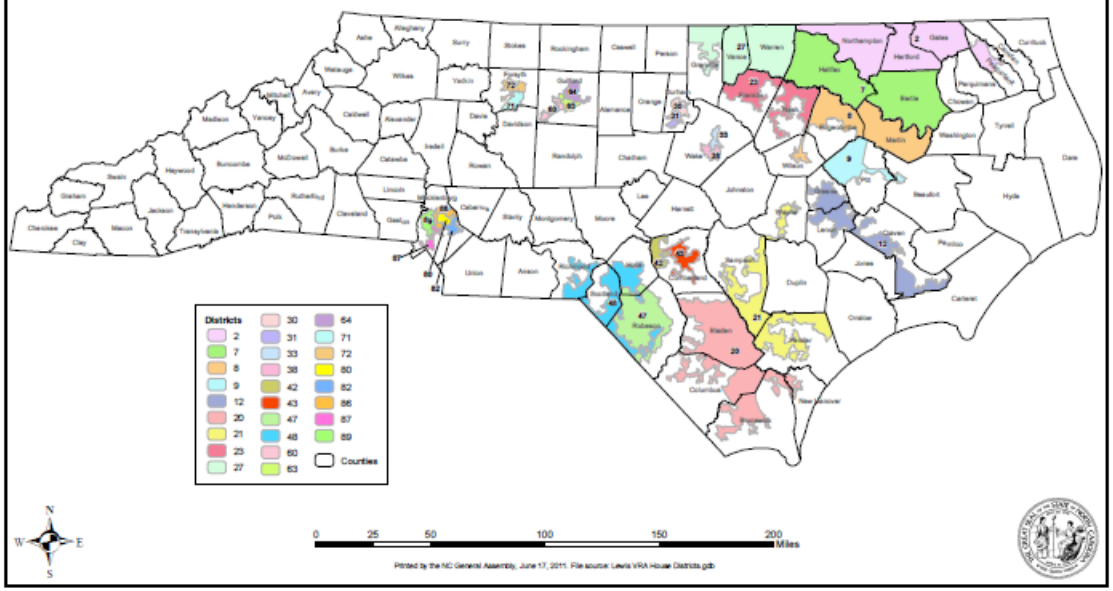
title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 10303 (f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

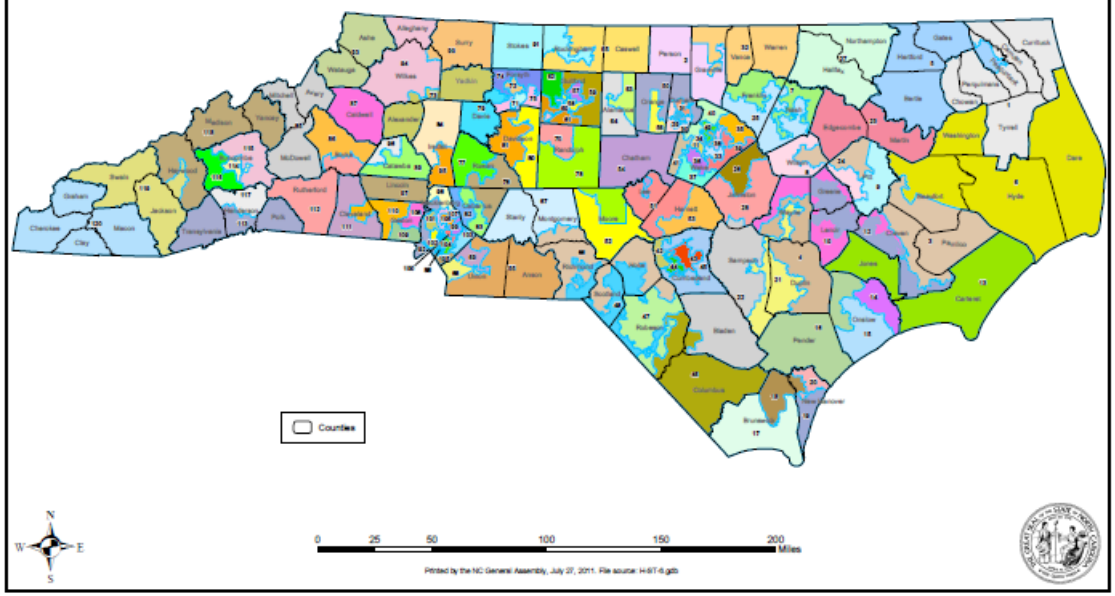
(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

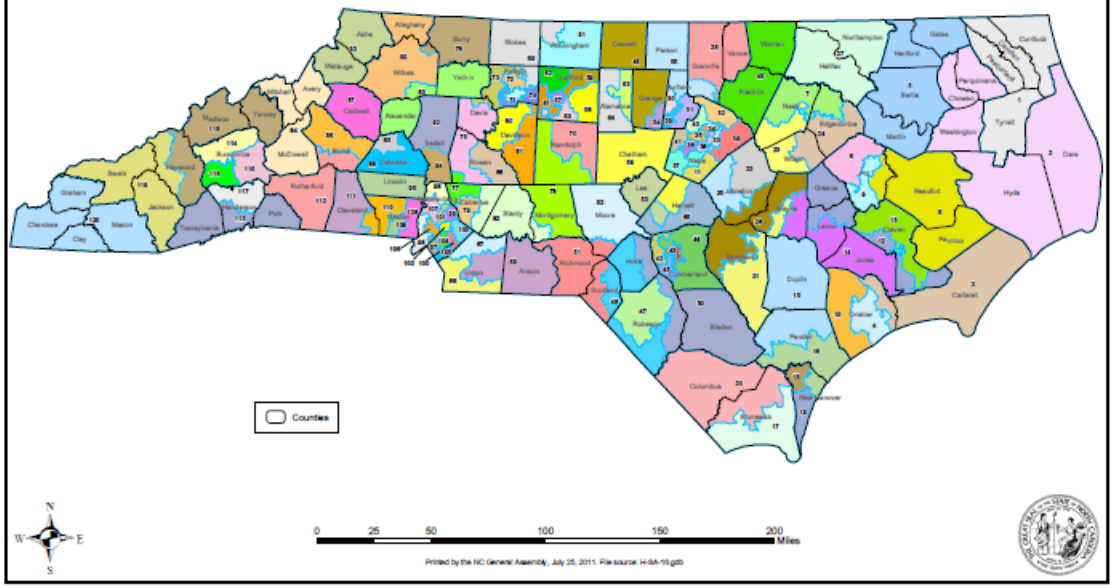
LEWIS VRA HOUSE DISTRICTS



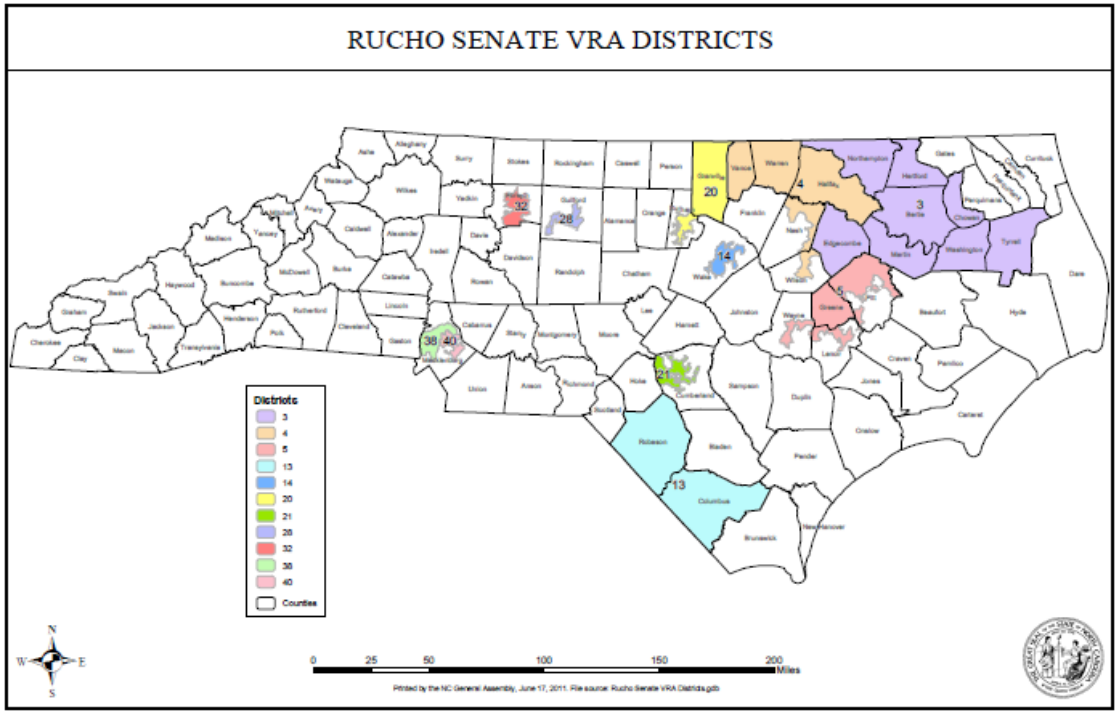
LEWIS-DOLLAR-DOCKHAM 4



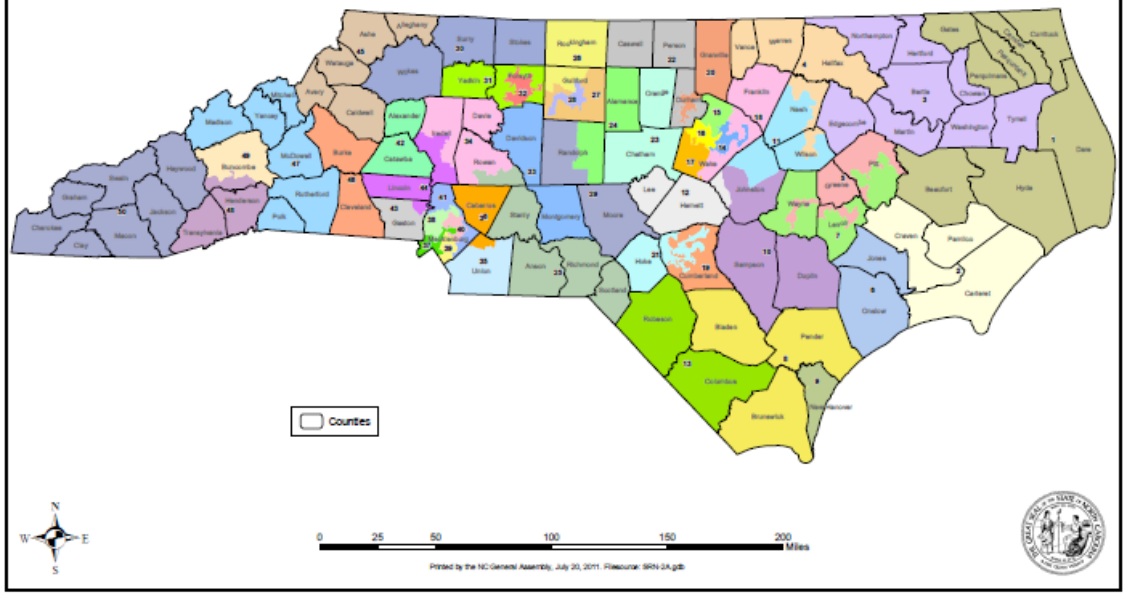
MARTIN HOUSE FAIR & LEGAL

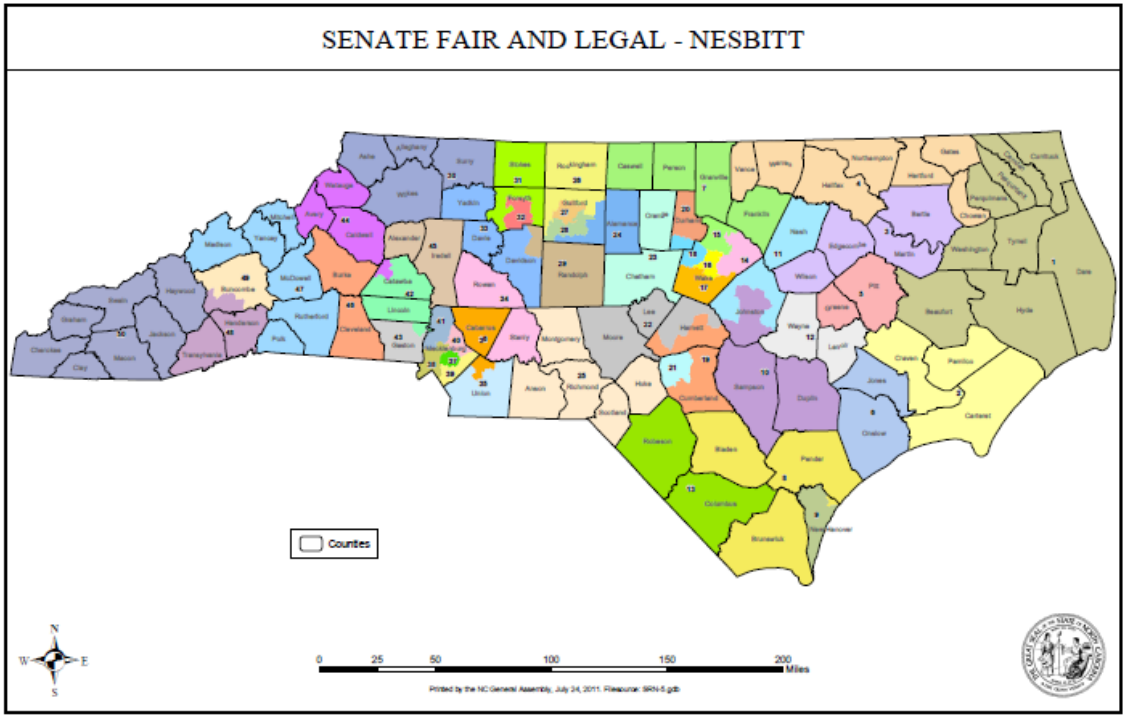


RUCHO SENATE VRA DISTRICTS



RUCHO SENATE 2




SENATE FAIR AND LEGAL - NESBITT
Counties
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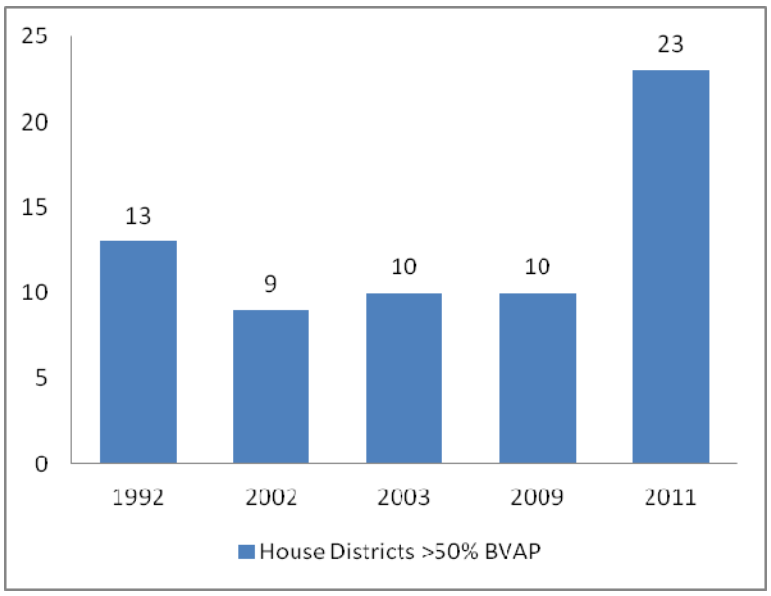
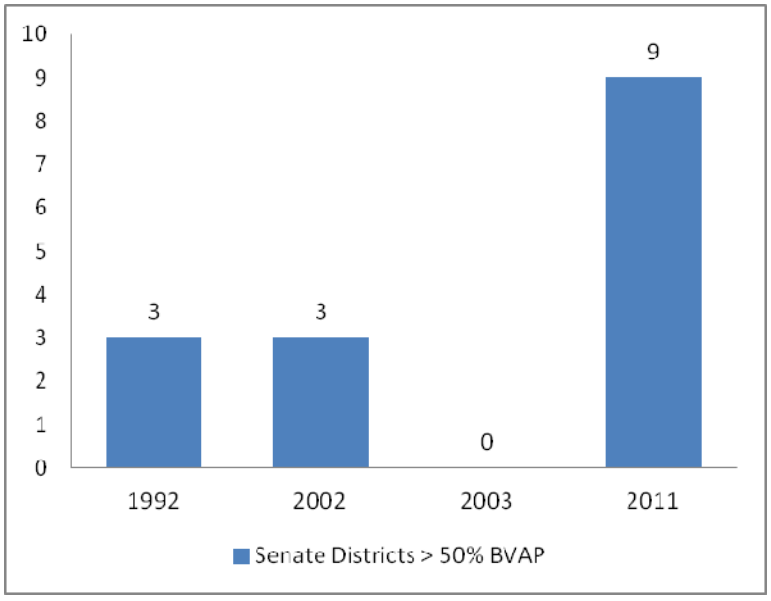
Printed by the NC General Assembly, July 24, 2011. Filesource: SRN-5.gdb

The number of House and Senate Districts where the total black voting age population was greater than 50% from 1992 to the present:





Compiled from plan statistics contained in "Redistricting Archives" and "2011 Redistricting Process," *available at* http://www.ncleg.net/representation/redistricting.aspx.

Comparison of the percentage black voting age population in each of the individual districts challenged by Plaintiffs as racially gerrymandered districts; and the "benchmark" or prior districts.

House Districts

House District	Benchmark BVAP	Enacted Plan BVAP	Difference
5	48.87%	54.17%	5.29%
7	60.77%	50.67%	-10.10%
12	46.45%	50.60%	4.15%
21	46.25%	51.90%	5.65%
24	50.23%	57.33%	7.11%
29	39.99%	51.34%	11.35%
31	47.23%	51.81%	4.58%
32	35.88%	50.45%	14.57%
33	51.74%	51.42%	-0.32%
38	27.96%	51.37%	23.41%
42	47.94%	52.56%	4.62%
48	45.56%	51.27%	5.71%
57	29.93%	50.69%	20.76%
99	41.26%	54.65%	13.38%
102	42.74%	53.53%	10.79%
106	28.16%	51.12%	22.96%
107	47.14%	52.52%	5.38%

Senate Districts

Senate District	Benchmark BVAP	Enacted District BVAP	Difference
4	49.70%	53.33%	3.63%
5	30.99%	51.97%	20.98%
14	42.62%	51.28%	8.66%
20	44.64%	51.04%	6.40%
21	44.93%	51.53%	6.60%
28	47.20%	56.49%	9.30%
38	46.97%	52.51%	5.53%
40	35.43%	51.84%	16.40%

Source: *Dickson v. Rucho,* No. 201PA12-2, Rule 9(d) Documentary Exhibits 1205 & 1207 (Sept. 4, 2013).

Recent Elections of African-American Officials from Majority White Districts

Year	District	Representative	Race	Racially Contested Election?	District WVAP%	Record Citation
2006	HD 18	Thomas Wright	Black	Y (prim)	57.73%	Churchill Depo. Ex. 83, p. 6
2008	HD 18	Sandra Hughes	Black	Y	57.73%	Churchill Depo. Ex. 83, p. 26
2006	HD 39	Linda Coleman	Black	Y	67.68%	Churchill Depo. Ex. 83, p. 66
2008	HD 39	Linda Coleman	Black	Y	67.68%	Churchill Depo. Ex. 83, p. 68
2006	HD 41	Ty Harrell	Black	Y	82.85%	Churchill Depo. Ex. 83, p. 79
2008	HD 41	Ty Harrell	Black	Y	82.85%	Churchill Depo. Ex. 83, p. 81
2006	HD 72	Earline Parmon	Black	N	51.33%	Churchill Depo. Ex. 83, p. 20

2008	HD 72	Earline Parmon	Black	N	51.33%	Churchill Depo. Ex. 83, p. 40
2010	HD 72	Earline Parmon	Black	Y	51.33%	Churchill Depo. Ex. 83, p. 59
2008	HD 99	Nick Mackey	Black	Y (prim)	62.20%	Churchill Depo. Ex. 83, p. 70
2010	HD 99	Rodney Moore	Black	Y	62.20%	Churchill Depo. Ex. 83, p. 74
2008	SD 14	Vernon Malone	Black	Y	51.84%	Churchill Depo. Ex. 82, p. 13
2010	SD 14	Dan Blue	Black	Y	51.84%	Churchill Depo. Ex. 82, p. 21
2006	SD 24	Tony Foriest	Black	Y (prim)	75.17%	Churchill Depo. Ex. 82, p. 36
2008	SD 24	Tony Foriest	Black	Y	75.17%	Churchill Depo. Ex. 82, p. 39
2006	SD 40	Malcolm Graham	Black	Y	59.89%	Churchill Depo. Ex. 82, p. 28
2008	SD 40	Malcolm Graham	Black	Y	59.89%	Churchill Depo. Ex. 82, p. 31

2010	SD 40	Malcolm Graham	Black	Y	59.89%	Churchill Depo. Ex. 82, p. 34
2008	SD 5	Don Davis	Black	Y	65.13%	Churchill Depo. Ex. 82, p. 29
2006	SD 28	Katie Dorsett	Black	N	50.74%	Churchill Depo. Ex. 82, p. 8
2008	SD 28	Katie Dorsett	Black	N	50.74%	Churchill Depo. Ex. 82, p. 16
2010	SD 28	Gladys Robinson	Black	Y	50.74%	Churchill Depo. Ex. 82, p. 24
1998	CD 1	Eva Clayton	Black	Y	52.42%	Churchill Depo. Ex. 81, p. 10
2000	CD 1	Eva Clayton	Black	Y	52.42%	Churchill Depo. Ex. 81, p. 12
1998	CD 12	Mel Watt	Black	Y	65.85%	Churchill Depo. Ex. 81, p. 11
2000	CD 12	Mel Watt	Black	Y	55.05%	Churchill Depo. Ex. 81, p. 14
2002	CD 12	Mel Watt	Black	Y	50.57%	Churchill Depo. Ex. 81, p. 16

2004	CD 12	Mel Watt	Black	Y (prim)	50.57%	Churchill Depo. Ex. 81, p. 19
2006	CD 12	Mel Watt	Black	N	50.57%	Churchill Depo. Ex. 81, p. 22
2008	CD 12	Mel Watt	Black	Y	50.57%	Churchill Depo. Ex. 81, p. 25
2010	CD 12	Mel Watt	Black	Y	50.57%	Churchill Depo. Ex. 81, p. 29

Recent Elections of African-American Officials from Non-Majority Black Districts

Year	District	Representative	Race	Racially Contested Election?	District BVAP%	Winner % of Vote	Record Citation
2008	HD 5	Annie Mobley	Black	N	48.76%	-	Churchill Depo. Ex. 83, p. 22
2010	HD 5	Annie Mobley	Black	Y	48.76%	58.99%	Churchill Depo. Ex. 83, p. 43
2006	HD 12	William Wainwright	Black	Y	47.09%	66.28%	Churchill Depo. Ex. 83, p. 5
2008	HD 12	William Wainwright	Black	Y	47.09%	69.14%	Churchill Depo. Ex. 83, p. 25

2010	HD 12	William Wainwright	Black	Y	47.09%	60.21%	Churchill Depo. Ex. 83, p. 47
2006	HD 18	Thomas Wright	Black	Y (prim)	39.09%	67.84%	Churchill Depo. Ex. 83, p. 6
2008	HD 18	Sandra Hughes	Black	Y	39.09%	67.18%	Churchill Depo. Ex. 83, p. 26
2006	HD 21	Larry Bell	Black	N	47.94%	-	Churchill Depo. Ex. 83, p. 7
2008	HD 21	Larry Bell	Black	N	47.94%	-	Churchill Depo. Ex. 83, p. 27
2006	HD 29	Larry Hall	Black	Y (prim)	44.12%	55.47%	Churchill Depo. Ex. 83, p. 10

2008	HD 29	Larry Hall	Black	Y	44.12%	90.73%	Churchill Depo. Ex. 83, p. 29
2010	HD 29	Larry Hall	Black	N	44.12%	-	Churchill Depo. Ex. 83, p. 49
2006	HD 31	Mickey Michaux	Black	N	44.20%	-	Churchill Depo. Ex. 83, p. 11
2008	HD 31	Mickey Michaux	Black	N	44.20%	-	Churchill Depo. Ex. 83, p. 30
2010	HD 31	Mickey Michaux	Black	Y	44.20%	75.50%	Churchill Depo. Ex. 83, p. 50
2006	HD 33	Bernard Allen	Black	N	49.19%	-	Churchill Depo. Ex. 83, p. 12

2008	HD 33	Dan Blue	Black	Y	49.19%	81.85%	Churchill Depo. Ex. 83, p. 31
2010	HD 33	Rosa Gill	Black	Y	49.19%	77.79%	Churchill Depo. Ex. 83, p. 51
2006	HD 39	Linda Coleman	Black	Y	26.70%	58.73%	Churchill Depo. Ex. 83, p. 66
2008	HD 39	Linda Coleman	Black	Y	26.70%	64.24%	Churchill Depo. Ex. 83, p. 68
2006	HD 41	Ty Harrell	Black	Y	8.30%	51.64%	Churchill Depo. Ex. 83, p. 79
2008	HD 41	Ty Harrell	Black	Y	8.30%	53.77%	Churchill Depo. Ex. 83, p. 81

2006	HD 42	Marvin Lucas	Black	N	43.94%	-	Churchill Depo. Ex. 83, p. 13
2008	HD 42	Marvin Lucas	Black	N	43.94%	-	Churchill Depo. Ex. 83, p. 32
2010	HD 42	Marvin Lucas	Black	N	43.94%	-	Churchill Depo. Ex. 83, p. 53
2006	HD 43	Mary McAllister	Black	N	47.75%	-	Churchill Depo. Ex. 83, p. 15
2008	HD 43	Elmer Floyd	Black	N	47.75%	93.31%	Churchill Depo. Ex. 83, p. 33
2006	HD 48	Garland Pierce	Black	N	45.24%	-	Churchill Depo. Ex. 83, p. 16

2008	HD 48	Garland Pierce	Black	N	45.24%	-	Churchill Depo. Ex. 83, p. 36
2010	HD 48	Garland Pierce	Black	Y	45.24%	74.80%	Churchill Depo. Ex. 83, p. 55
2006	HD 72	Earline Parmon	Black	N	42.93%	-	Churchill Depo. Ex. 83, p. 20
2008	HD 72	Earline Parmon	Black	N	42.93%	-	Churchill Depo. Ex. 83, p. 40
2010	HD 72	Earline Parmon	Black	Y	42.93%	69.48%	Churchill Depo. Ex. 83, p. 59
2008	HD 99	Nick Mackey	Black	Y (prim)	27.74%	65.32%	Churchill Depo. Ex. 83, p. 70

2010	HD 99	Rodney Moore	Black	Y	27.74%	72.01%	Churchill Depo. Ex. 83, p. 74
2006	SD 4	Robert Holloman	Black	Y	49.14%	69.67%	Churchill Depo. Ex. 82, p. 4
2008	SD 4	Edward Jones	Black	N	49.14%	-	Churchill Depo. Ex. 82, p. 11
2008	SD 5	Don Davis	Black	Y	30.14%	52.90%	Churchill Depo. Ex. 82, p. 29
2008	SD 14	Vernon Malone	Black	Y	41.01%	69.45%	Churchill Depo. Ex. 82, p. 13
2010	SD 14	Dan Blue	Black	Y	41.01%	65.92%	Churchill Depo. Ex. 82, p. 21

2006	SD 20	Jeanne Lucas	Black	N	44.58%	-	Churchill Depo. Ex. 82, p. 6
2008	SD 20	Floyd McKissick	Black	Y	44.58%	73.58%	Churchill Depo. Ex. 82, p. 14
2010	SD 20	Floyd McKissick	Black	Y	44.58%	73.11%	Churchill Depo. Ex. 82, p. 22
2008	SD 21	Larry Shaw	Black	N	41.00%	-	Churchill Depo. Ex. 82, p. 15
2010	SD 21	Eric Mansfield	Black	Y	41.00%	67.61%	Churchill Depo. Ex. 82, p. 23
2006	SD 24	Tony Foriest	Black	Y (prim)	20.79%	70.06%	Churchill Depo. Ex. 82, p. 36

2008	SD 24	Tony Foriest	Black	Y	20.79%	52.51%	Churchill Depo. Ex. 82, p. 39
2006	SD 28	Katie Dorsett	Black	N	44.18%	-	Churchill Depo. Ex. 82, p. 8
2008	SD 28	Katie Dorsett	Black	N	44.18%	-	Churchill Depo. Ex. 82, p. 16
2010	SD 28	Gladys Robinson	Black	Y	44.18%	47.38% [black (I) candidate received 13.47%]	Churchill Depo. Ex. 82, p. 24
2006	SD 38	Charlie Dannelly	Black	N	47.69%	-	Churchill Depo. Ex. 82, p. 9
2008	SD 38	Charlie Dannelly	Black	Y	47.69%	73.33%	Churchill Depo. Ex. 82, p. 17

2010	SD 38	Charlie Dannelly	Black	N	47.69%	-	Churchill Depo. Ex. 82, p. 26
2006	SD 40	Malcolm Graham	Black	Y	31.11%	61.48%	Churchill Depo. Ex. 82, p. 28
2008	SD 40	Malcolm Graham	Black	Y	31.11%	66.96%	Churchill Depo. Ex. 82, p. 31
2010	SD 40	Malcolm Graham	Black	Y	31.11%	58.16%	Churchill Depo. Ex. 82, p. 34
1998	CD 1	Eva Clayton	Black	Y	46.54%	62.24%	Churchill Depo. Ex. 81, p. 10
2000	CD 1	Eva Clayton	Black	Y	46.54%	66%	Churchill Depo. Ex. 81, p. 12

2002	CD 1	Frank Ballance	Black	Y	47.76%	63.73%	Churchill Depo. Ex. 81, p. 15
2004	CD 1	G.K. Butterfield	Black	Y	47.76%	63.97%	Churchill Depo. Ex. 81, p. 17
2006	CD 1	G.K. Butterfield	Black	N	47.76%	-	Churchill Depo. Ex. 81, p. 20
2008	CD 1	G.K. Butterfield	Black	Y	47.76%	70.28%	Churchill Depo. Ex. 81, p. 24
2010	CD 1	G.K. Butterfield	Black	Y	47.76%	59.31%	Churchill Depo. Ex. 81, p. 26
1998	CD 12	Mel Watt	Black	Y	32.56%	55.95%	Churchill Depo. Ex. 81, p. 11

2000	CD 12	Mel Watt	Black	Y	43.36%	65%	Churchill Depo. Ex. 81, p. 14
2002	CD 12	Mel Watt	Black	Y	42.31%	65.34%	Churchill Depo. Ex. 81, p. 16
2004	CD 12	Mel Watt	Black	Y (prim)	42.31%	66.82%	Churchill Depo. Ex. 81, p. 19
2006	CD 12	Mel Watt	Black	N	42.31%	-	Churchill Depo. Ex. 81, p. 22
2008	CD 12	Mel Watt	Black	Y	42.31%	71.55%	Churchill Depo. Ex. 81, p. 25
2010	CD 12	Mel Watt	Black	Y	42.31%	63.88%	Churchill Depo. Ex. 81, p. 29