IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

NO. 1:13-CV-00949

DAVID HARRIS; CHRISTINE BOWSER; and SAMUEL LOVE, **Plaintiffs,** **v.** **PATRICK MCCRORY, in his capacity as Governor of North Carolina; NORTH CAROLINA STATE BOARD OF ELECTIONS; and JOSHUA HOWARD, in his capacity as Chairman of the North Carolina State Board of Elections,** **Defendants.**	**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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I. INTRODUCTION

Defendants move for summary judgment on two grounds. Neither has any merit. Defendants first argue that the Court should dismiss this lawsuit without considering the merits of Plaintiffs' claims. This is a repackaged version of the claim that this lawsuit is an effort to take "a second bite at the apple," which the Court already rejected in denying Defendants' motion to stay (Dkt. #65). Plaintiffs were not parties to the state court litigation—they were not even aware that litigation *existed* prior to filing this lawsuit. They had no power to make decisions with respect to the conduct of the state court litigation.[1] The doctrines of collateral estoppel and res judicata simply do not operate to extinguish Plaintiffs' ability to protect their constitutional rights in these circumstances.

As to the merits, Plaintiffs have marshaled undisputed evidence that the State used race as the predominant factor in drawing CD 1 and 12, and Defendants cannot meet their resulting burden on strict scrutiny of demonstrating the use of race was narrowly tailored to serve a compelling interest. The Court should deny Defendants' motion for summary judgment and enter summary judgment on Plaintiffs' behalf.

A. Plaintiffs Have No Control Over or Connection to the State Court Litigation

Defendants argue that Plaintiffs are barred from pursuing their claims because they are members of the North Carolina Conference of Branches of the NAACP ("NC NAACP"). Defendants' recitation of the facts ignores undisputed testimony showing the lack of connection between Plaintiffs and the state court litigation.

[1] The North Carolina Supreme Court has not issued an opinion in *Dickson v. Rucho*, the state-court redistricting case. The North Carolina Supreme Court's next scheduled opinion day is in two months—August 20, 2014.

1. The NAACP Is Not a Party To This Lawsuit, Does Not Control It, and Its Leadership Does Not Know Who Plaintiffs Are

One of the parties to the currently pending state-court litigation is the NC NAACP. Defendants deposed Reverend William Joseph Barber II, President of the NC NAACP, regarding its involvement, if any, in this lawsuit. Rev. Barber testified unequivocally that the NC NAACP has nothing to do with the case pending before this Court:

> Our case is the case in the state court . . . . So, [*Harris v. McCrory* is] not our case. I don't know who [Plaintiffs] are. I don't know what they're doing. It's not our case, period.
>
> [. . .]
>
> [I]f you're trying to [answer] one fundamental question to your case; and that is, is the NAACP in any way involved in this case that is before the federal courts, while at the same time, we are pursuing a case in state court, and the answer to that question is, no.

See Declaration of John Devaney ("Devaney Decl."), Ex. 1 (Barber Dep. 24:2-10, 37:7-13), Barber Dep. 41:23-42:2 ("Do you want to know do we know [Plaintiffs]? No."). The NC NAACP was not aware of this lawsuit before it was filed, did not encourage Plaintiffs to file the lawsuit, and has not advised or consulted with Plaintiffs or otherwise participated in the lawsuit. *Id.* (Barber Dep. 44:25-45:23, 46:4-47:3). As Reverend Barber stated succinctly: "It's not our case." *Id.* (Barber Dep. 24:6).

2. Plaintiffs Were Not Parties to the State Court Lawsuit—They Were Unaware of the State Court Litigation Before Filing This Action

Both Plaintiffs, in their depositions, testified that they have nothing to do with the state court litigation. Plaintiffs do support the NAACP's broad-based mission and they

have made small monetary donations to branches of the NAACP. But they are not NC NAACP leaders and have any control over the NC NAACP's litigation strategy.

a. David Harris

David Harris resides in Durham. He has no connection with the state court case. Mr. Harris is not a plaintiff in the state lawsuit. Indeed, before this case was filed, Mr. Harris ***did not even know*** that a lawsuit had been filed in state court challenging the 2011 Congressional Plan—and was thus obviously unaware that the NC NAACP is a party to the state court litigation. *Id.*, Ex. 2 (Harris Dep. 52:14-19, 56:2-17, 70:7-71:8).

Mr. Harris does support the NAACP's basic mission. In 2009 or 2010, Mr. Harris completed an NAACP membership form and sent it to Baltimore, Maryland. *Id.* (Harris Dep. 47:12-48:2). He decided to join the NAACP because he thinks it does "good work" by "improving the quality of life for the people of America." *Id.* (51:11-16).

To the best of his knowledge, Mr. Harris is only a member of the *national* NAACP, to which he pays approximately $30 in annual dues sent to a Baltimore address. *Id.* (Harris Dep. 45:20-46:7). Mr. Harris does not believe he is a member of the NC NAACP, although he is unfamiliar with the NAACP's structure and so does not know for certain whether he could be deemed to be a member of the NC NAACP as well. *Id.* (Harris Dep. 45:20-46:15, 47:23-47:2, 47:16-48:7).

Mr. Harris has no leadership role in any chapter of the NAACP. He has never held an office with the NAACP. *Id.* (Harris Dep. 49:14-16). Mr. Harris has only ever

attended one NAACP meeting—in his capacity as representative of another group—and the topic of redistricting was not discussed. *Id.* (Harris Dep. 49:17-50:18, 56:18-57:13).

b. Christine Bowser

Ms. Bowser resides in Charlotte. Like Mr. Harris, before this lawsuit was filed, Ms. Bowser was ***not aware*** that the NC NAACP, League of Women Voters, or Democracy North Carolina are plaintiffs in the state court redistricting litigation. *Id.*, Ex. 3 (Bowser Dep. 54:13-55:6). Ms. Bowser has never discussed redistricting matters with any of the plaintiffs in the state court litigation. *Id.* (Bowser Dep. 58:25-59:20). Like Mr. Harris, Ms. Bowser has absolutely no connection with the prosecution of the state court litigation. She was not a plaintiff. She had no control over the state court litigation, no input on that litigation, and no decisionmaking role or responsibility.

Ms. Bowser *has*, over the years, provided modest financial support for certain organizations, including the Mecklenburg County branch of the NAACP, the League of Women Voters, and Democracy North Carolina. She is not an active member of any of these organizations. Ms. Bowser does not hold any positions with these organizations and has no ability to exercise control over their diverse and wide-ranging activities.

Ms. Bowser supports the NAACP's general cause of promoting equal rights for people of color but has never been prompted to support the NAACP because of a specific project or effort. *Id.* (Bowser Dep. 48:24-49:7). Ms. Bowser never filled out a membership application for the NAACP. *Id.* (Bowser Dep. 49:14-21). She is not actively involved in the NAACP's activities. *Id.* (Bowser Dep. 46:18-25). She does not

attend NAACP meetings. *Id.* She is not familiar with the NAACP's structure, and is not familiar with and does not believe that she is a member of the NC NAACP. *Id.* (Bowser Dep. 47:13-23). She does not receive information from the NAACP about its current activities. *Id.* (Bowser Dep. 55:14-56:13). Ms. Bowser has made financial contributions to the Mecklenburg County branch of the NAACP on and off since the 1960s. *Id.* (Bowser Dep. 44:18-46:17). She does not recall whether she made a contribution between 2010 and the present. *Id.* (Bowser Dep. 47:24-48:22). She last made a contribution to the national NAACP in 2012 or 2013. *Id.* (Bowser Dep. 48:21-23).

The League of Women Voters is a nonpartisan organization that encourages informed and active participation in government. *See* http://www.lwvnc.org/index.html. Over the past ten years, Ms. Bowser has periodically made monetary contributions of no more than $50 per year to the League because she supports its nonpartisan efforts to "get out information about voting and things of that nature" and "inform[] people about their rights and voting materials." Devaney Decl., Ex. 3 (Bowser Dep. 50:3-14). Ms. Bowser considered these contributions to be donations, not membership fees, and does not believe she is a "member" of the League. *Id.* (Bowser Dep. 50:15-51:6).

Democracy North Carolina is a nonpartisan organization that uses research, organizing, and advocacy to increase voter participation and reduce the influence of money in politics. http://www.democracy-nc.org/about-us/. Ms. Bowser became involved in the organization when President Obama first ran for office. Devaney Decl.,

Ex. 3 (Bowser Dep. 51:13-19). Her involvement with the group has been limited to attending a few meetings over the years concerning voter registration efforts and voter ID laws. *Id.* (Bowser Dep. 52:1-53:2). Ms. Bowser has never had any involvement with Democracy North Carolina with respect to redistricting. *Id.* (Bowser Dep. 52:13-15).

In sum, Plaintiffs' sole involvement with three of the organizational plaintiffs in the state court case consists of modest financial donations to the groups. Neither Plaintiff was aware of the state court litigation before filing this lawsuit, and neither Plaintiff has any control over or involvement in that case.

II. ARGUMENT

A. Plaintiffs' Claims Are Not Barred by the State Court Litigation

Defendants ask the Court to dismiss Plaintiffs' constitutional claims without addressing their merits even though Plaintiffs indisputably had no control over the state court litigation and did not even know of its existence. The law does not require such a harsh and inequitable result, and United State Supreme Court precedent forbids it. As to the merits, in their cross-motion for summary judgment, Plaintiffs laid out undisputed evidence that race was the predominant factor in drawing CD 1 and CD 12, and the State cannot meet its burden on strict scrutiny of establishing that the 2011 Congressional Plan was narrowly tailored to achieve a compelling interest. None of the evidence offered by Defendants in support of their motion raises a genuine issue of material fact.

1. Res Judicata and Collateral Estoppel Do Not Bar Plaintiffs' Claims

Defendants contend that Plaintiffs' claims are barred by res judicata and collateral estoppel. These are affirmative defenses on which Defendants bear the burden of proof. *Clodfelter v. Republic of Sudan*, 720 F.3d 199, 208-09 (4th Cir. 2013).

"For the doctrine of res judicata to be applicable, there must be: (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and the later suit; and (3) an identity of parties or their privies in the two suits." *Martin v. Am. Bancorporation Ret. Plan*, 407 F.3d 643, 650 (4th Cir. 2005) (internal quotation marks omitted). Similarly, "[c]ollateral estoppel precludes relitigation of an issue decided previously in judicial . . . proceedings provided the party against whom the prior decision was asserted enjoyed a full and fair opportunity to litigate that issue in an earlier proceeding." *In re McNallen*, 62 F.3d 619, 624 (4th Cir. 1995).

The "fundamental" rule is that "a litigant is not bound by a judgment to which she was not a party." *Taylor v. Sturgell*, 553 U.S. 880, 898 (2008). Defendants do not contend that Plaintiffs were parties to the state court case, but rather argue that Plaintiffs are bound by the state court judgment because they are "members" of the NAACP and the NAACP "adequately represent[ed] the interests of the Plaintiffs" in the state court litigation. Mot. at 12. Under prior Fourth Circuit jurisprudence, this concept was known as "virtual representation." *Martin*, 407 F.3d at 651-62. However, virtual representation is no longer an accepted basis for applying res judicata and collateral estoppel. In *Taylor v. Sturgell*, the United States Supreme Court rejected the doctrine in no uncertain terms:

> [V]irtual representation would authorize preclusion based on identity of interests and some kind of relationship between parties and nonparties, shorn of the procedural protections prescribed in [case law] and Rule 23. These protections, grounded in due process, could be circumvented were we to approve a virtual representation doctrine that allowed courts to create de facto class actions at will.

553 U.S. at 901 (internal quotation marks and citation omitted). Defendants' assertion that Plaintiffs' claims are barred by the state-court litigation thus fails at the outset.[2]

Even if the doctrine of virtual representation had not already been rejected, it would not apply here. Virtual representation was always a very narrow exception to the rule that a person is not bound to judgments to which she was not a party. *Martin*, 407 F.3d at 651-62 (describing exception as "narrow" and the standard for finding virtual representation "stringent"); *see also Klugh v. United States*, 818 F.2d 294, 300 (4th Cir. 1987) (stating that application of res judicata to a non-party to litigation "must cautiously be applied in order to avoid infringing on principles of due process"). Courts would find "virtual representation" only if two conditions were met: (1) the party to the prior suit must be "accountable to the nonparties who filed a subsequent suit" and (2) the virtual representative for a nonparty must have had "at least the tacit approval of the court" to proceed on behalf of non-parties. *Martin*, 407 F.3d at 652.

Here, it is undisputed that Plaintiffs have no involvement in the state court case. They did not know the state court case had been filed. They did not authorize the NC

[2] While *Taylor* recognized a distinct "adequately represented" exception, that exception is limited to "properly conducted class actions," "suits brought by trustees, guardians, and other fiduciaries," and similar circumstances. *Id.* at 894-95. The state court case was not certified as a class action and the NC NAACP was not a "fiduciary."

NAACP (or any other state court plaintiff) to file the lawsuit, and had no power to control its course. Plaintiffs do not believe they are members of the NC NAACP. They did not join the Mecklenburg County branch of the NAACP (in Ms. Bowser's case) or the national NAACP (in Mr. Harris') because they wished the association to file a challenge to the 2011 Congressional Map. They contributed money to NAACP branches because they believed in the NAACP's broad-based goal to advance racial equality—not to advance Plaintiffs' interests in litigation of which they were not even aware.

In these circumstances, Plaintiffs were not "in privity" with the NC NAACP for res judicata and collateral estoppel purposes. The state court plaintiffs were in no sense "accountable" to Plaintiffs, and there is no evidence in the record that the NC NAACP had the tacit approval of the state court to represent Mr. Harris or Ms. Bowser. The state court litigation was not certified as a class action under Federal Rule of Civil Procedure 23, and as far as Plaintiffs are aware, the scope of the NC NAACP's representation under principles of associational standing was never considered by the state court.[3]

Myriad cases have found res judicata and collateral estoppel inapplicable in similar contexts.[4] The cases cited by Defendants are either inapposite or support

[3] To the extent that Defendants contend that Ms. Bowser's claims are barred because the League of Women Voters and Democracy North Carolina were plaintiffs in the state court litigation, the same analysis applies.

[4] *See, e.g. N.A.A.C.P. v. Fordice*, 105 F.3d 655 (5th Cir. 1996) (unpublished) (copy attached as Appx. 1) (absent evidence the plaintiffs authorized the NAACP to pursue earlier litigation, "it is not sufficient [for preclusion purposes] that [plaintiffs] are black citizens seeking equal voting rights and that the NAACP exists in part to secure equal voting rights for blacks"); *Coors Brewing Co. v. Mendez-Torres*, 562 F.3d 3, 20 (1st Cir. 2009), *abrogated on other grounds by Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010) (brewer was not bound by earlier judgment against trade association, absent evidence it "either controlled the litigation strategy of the association or duly approved the [association] to represent its interests" in litigation); *Perez-Guzman v. Gracia*, 346 F.3d 229, 236 (1st Cir. 2003) (party member not bound by judgment against party absent evidence that he controlled prior litigation or

Plaintiffs' position. For example, in *Meza v. Gen. Battery Corp.*, 908 F.2d 1262 (5th Cir. 1990), the court held the plaintiff was *not* bound to the result of litigation by a labor union because "no evidence was presented to show that [the employee] 'chose' the [union] to represent him"; the record showed the plaintiff was "completely unaware of the [union] action purportedly undertaken on his behalf," and "one cannot acquiesce to something of which one is unaware." *Meza,* 908 F.2d at 1271-72. The same is true here.

The other cases cited by Defendants generally involve associations formed for the purpose of representing a discrete number of individuals in litigation, such as property owners' associations and labor unions, and rely on concepts of virtual representation rejected by the Supreme Court in *Taylor*. For example, in *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1084 (9th Cir. 2003), the court considered a lawsuit that was brought by the same lead plaintiff (a property owners' association) that had filed multiple earlier-dismissed actions. *Id.* at 1069. The "principal purpose" of the association was to represent 2,000 dues-paying members who owned real property in an area regulated by the defendant agency in regulatory proceedings before that same agency. *Id.* at 1083. Most of the plaintiffs were the same as in the earlier-dismissed actions. In these circumstances—where the association was the driving force behind all litigation—the Court found that the association could not avoid the preclusive

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that the party "in the institution of this action, were engaged in tactical maneuvering designed unfairly to exploit technical nonparty status in order to obtain multiple bites of the litigatory apple"); *Hoffman v. Sec'y of State of Maine*, 574 F. Supp. 2d 179, 187-88 (D. Me. 2008) (persons nominating candidate were not in privity with candidate nor bound by adverse judgment against candidate); *Griffin v. Burns*, 570 F.2d 1065, 1072 (1st Cir. 1978) (candidate was not in privity with voters, as his efforts to advance voters' interest were not "enough to make him their actual personal representative whose action or non-action in the state proceeding would legally bind them").

effect of past judgments through the simple expedient of naming a handful of association members as "new" plaintiffs. *Id.* at 1084 (an association cannot avoid res judicata "by arranging for successive actions by different sets of individual member plaintiffs"). The other cases cited by Defendants are to the same effect.[5] These are not the facts here.

In sum, this is not a case where an association that has engaged in prior litigation uses an individual suit by one of its members as a guise for taking a second bite at the apple; none of the plaintiffs in the state court case is involved in this case. Rather, this is a case where Plaintiffs are seeking to vindicate their constitutional rights, and Defendants are attempting to prevent the merits of Plaintiffs' claims from being tested. Plaintiffs are not bound by the state court litigation under either res judicata or collateral estoppel.

B. Defendants Are Not Entitled to Summary Judgment on the Merits

Plaintiffs address the merits of their racial gerrymandering claims at length in their memorandum in support of their cross-motion for summary judgment (Dkt. #70-1). Plaintiffs incorporate that discussion by reference and will not repeat it here. Suffice to say here, Plaintiffs have marshaled significant, undisputed evidence that race was the predominant factor behind CD 1 and CD 12. On this record, summary judgment for Plaintiffs is appropriate. At the least, the Court should deny Defendants' motion.

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[5] *See Murdock v. Ute Indian Tribe of Uintah & Ouray Reservation*, 975 F.2d 683, 689 (10th Cir. 1992) (res judicata applied where organization brought second lawsuit in name of individual member but retained "effective control" over the second lawsuit); *Expert Elec., Inc. v. Levine*, 554 F.2d 1227, 1234 (2d Cir. 1977) (finding privity between electrical contracting firms and a membership corporation established specifically for the purpose of representing the firms' interests that were the subject matter of litigation because the "only interests [the association] had to protect through the administrative and judicial process were those of the participating contractors"); *Acree v. Air Line Pilots Ass'n*, 390 F.2d 199, 202 (5th Cir. 1968) (privity between labor union and individual members where failure to find privity where in effect there were "two class actions and the members of the classes are identical").

1. Plaintiffs' Claim That the State Has Packed African Americans Into CD 1 and CD 12 Is Plainly Cognizable

Defendants' argument that Plaintiffs do not assert a cognizable injury is specious, Mot. at 14-15, as it ignores controlling Supreme Court precedent. Plaintiffs contend that the State packed African Americans into CD 1 and CD 12 without any compelling interest. *See, e.g.*, Compl. ¶¶ 1-6; Devaney Decl., Ex. 3 (Bowser Dep. 26:16-24) (stating that CD 12 was drawn on the basis of race "[b]ecause the way it's shaped, it took in the black neighborhoods"); *id.*, Ex. 2 (Harris Dep. 95:23-96:15) (stating that the "districts were drawn to get pockets of African American[s]").

This is a quintessential Fourteenth Amendment racial gerrymandering claim. As the United States Supreme Court held in *Shaw v. Reno*:

> [A] plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.

509 U.S. 630, 649 (1993). That is precisely the claim Plaintiffs advance here.

2. Defendants Fail to Meet Their Burden of Establishing That No Reasonable Factfinder Could Conclude That Race Was the Predominant Factor in Drawing CD 1 and CD 12

As the moving party, Defendants bear the burden of showing there is no genuine issue of material fact and they are entitled to judgment as a matter of law. *In re French*, 499 F.3d 345, 351 (4th Cir. 2007). The Court draws all inferences in the light most

favorable to Plaintiffs and cannot grant Defendants' motion unless no reasonable trier of fact could find in Plaintiffs' favor. *Id.* Defendants do not meet this burden.

a. A Reasonable Factfinder Could Conclude That Race Was the Predominant Factor Behind CD 1

Defendants concede, as they must, that the State purposefully drew CD 1 to be a majority-minority district out of purported concern that it would otherwise be liable under Section 2 of the Voting Rights Act ("VRA"). Mot. at 17. The concession that CD 1 was drawn on the basis of race explains the otherwise unexplainable—the district's bizarre shape, which ignores political subdivisions and is not at all compact. See Dkt. #69-1, Ex. 22, Table 1; Dkt. #33-2, at ¶¶ 45, 47. Indeed, Defendants admit the State sacrificed other redistricting principles to create a majority-minority district. Dkt. # 69-1, Ex. 27 (Hofeller Dep. 41:15-42:12) (agreeing that most precinct splits in the 2011 Congressional Plan were the result of creating CD 1 as majority-BVAP). The fact that CD 1 cannot be understood by reference to traditional redistricting principles supports Plaintiffs' contention that race was the predominant factor behind CD 1.[6]

While Defendants concede that CD 1 was drawn purposefully to be majority-minority, they maintain that CD 1 was not drawn *predominantly* on the basis of race. This claim can be disposed of quickly. The State points to other interests, such as giving

[6] The State's argument that CD 1's lack of compactness is irrelevant to whether race was the predominant factor is puzzling. Mot. at 20. "[R]eapportionment is one area in which appearances do matter." *Id.* at 647. Courts can and do consider whether a map "is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification." *Shaw*, 509 U.S. at 642; *see also Miller v. Johnson*, 515 U.S. 900, 916 (1995) ("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.").

Republicans disproportionate electoral advantage and drawing districts of equal population. Mot. at 17-18. But 'predominant purpose' does not mean 'only purpose.' *Bush v. Vera*, 517 U.S. 952, 963 (1996) (race was predominant factor where a legislature conceded one of its objectives was to create majority-minority districts, notwithstanding that "[s]everal factors other than race were at work in the drawing of the districts"). Indeed, here, the record shows that racial considerations came first.

Defendants' contention that race was not the predominant purpose because districts of equal population were drawn is particularly odd. Defendants appear to believe they have carte blanche to segregate North Carolina citizens on the basis of race so long as citizens are segregated into equally apportioned districts. It is undoubtedly true that the State wanted to draw equally apportioned districts. This begs the question—which citizens did it choose to place in particular districts? The record confirms what the bizarre shape of CD 1 suggests—the State drew the district to pull in pockets of African-American citizens. Dkt. #69-1, Ex. 22, ¶¶ 27-33. Thus, crediting the State's contention that it wished to move portions of Durham County into CD 1 to address hypothetical future population shifts, it accomplished that goal by purposefully packing African Americans into CD 1. CD 1 now includes more than 78% of all African-American registered voters in Durham County, and a mere 39% of white voters. *Id.*, Ex. 21, ¶ 49. By the same token, the State cannot simply ignore its own prior admissions about its motives in drawing CD 1. *See id.*, Ex. 7, at 13 (stating that the "majority African-

American status of the District is corrected by extending CD 1 into Durham County"). If the mere fact that a state drew districts of equal population meant that race was not the predominant factor, then the U.S. Supreme Court would not have struck down redistricting plans in cases such as *Bush*, 517 U.S. 952 and *Miller*, 515 U.S. 900. The equal population rule simply does not explain why African Americans ended up on one side of the district line and Whites ended up on the other.

Defendants' other purported "non-racial" justifications for CD 1 are no more availing. Defendants claim that CD 1's contours were "heavily influenced" by incumbent Congressman Butterfield's "desires." Mot. at 19. Notably, Defendants do not set out those purported "desires"—because they are about race. *See* Dkt. #31-1, at 28-29 ("Congressman Butterfield advised us that he preferred the addition to his district of the minority population in Wake County, as opposed to the minority population in Durham County. We elected to accommodate Congressman Butterfield's preference.").

As to Defendants' contention that political considerations in part drove creation of CD 1, Plaintiffs have marshaled undisputed evidence that race—not politics—best explains CD 1. Plaintiffs' expert, Dr. Stephen Ansolabehere, has offered an unrebutted analysis that controls for partisanship when calculating the racial disparities in the populations moved in and out of CD 1. Dkt. #69-1, Ex. 22, ¶ 47. Dr. Ansolabehere concludes that whereas party affiliation has little effect on the likelihood of a person being included in CD 1, race has a very large effect in explaining whether a specific

population was included or excluded from CD 1. *Id.* ¶¶ 48-53.[7] To take one stark example, a Black Republican was more likely to be moved *into* CD 1, whereas a White Republican was more likely to be moved *out* of CD 1. *Id.*, Table 10.

Because the State wanted to draw CD 1 as majority-BVAP regardless of the traditional redistricting principles it sacrificed, its race-based objectives came first. The State obviously could have drawn districts of equal population without making CD 1 majority-minority. And given Defendants' claim that Section 2 of the VRA *compelled* the State to make CD 1 majority-minority, Defendants' desire to advance the Republican Party's partisan interests necessarily came second to their perceived need to comply with federal law. Defendants fail to show that no reasonable trier of fact could conclude that race was the predominant purpose in drawing CD 1.

b. Defendants Cannot Meet Strict Scrutiny and Justify CD 1

Defendants also make a half-hearted effort to claim entitlement to summary judgment even assuming race was the primary factor behind CD 1. But if that is the case, Defendants bear the burden of proving they can meet strict scrutiny by demonstrating that its districting legislation is narrowly tailored to achieve a compelling interest. *Miller*, 515 at, 920. And strict scrutiny requires the State to have a "'strong basis in evidence' for concluding that the creation of a majority-minority district is reasonably necessary to comply with § 2." *Bush*, 517 U.S. at 977.

[7] Defendants' assertion that Dr. Ansolabehere "conceded that the population removed from the 2001 version of the First District was more likely to support Republican candidates than the population added" to the 2011 version of the district is misleading at best. *See* Dkt. #68-5 (Ansolabehere Dep. 119:14-120:7) (stating that he did not have sufficient data to reach that conclusion).

Defendants scarcely try to make this showing here. The State could only make CD 1 majority-minority by lumping together urban Durham with the rural communities of the Coastal Plain. Race is the only unifying feature of the district, and it is well-established that Section 2 does not mandate creation of a district that "reaches out to grab small and apparently isolated minority communities which, based on the evidence presented, could not possibly form part of a compact majority-minority district." *Bush*, 517 U.S. at 979; *see also Shaw v. Hunt*, 517 U.S. 899, 916 (1996).

Likewise, Defendants do not meet their burden of establishing a degree of racially polarized voting in Northeastern North Carolina sufficient to allow the White majority to vote as a bloc to defeat African Americans' candidate of choice. African Americans have not constituted a majority of the voting age population of CD 1 in many years, yet have consistently been able to elect their candidate of choice. Defendants cannot meet their burden on strict scrutiny by baldly asserting that there is *some* racially polarized voting in the area encompassed by CD 1. *See, e.g., Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 438-39 (S.D.N.Y. 2004) (rejecting an "analysis [that] examines racially polarized voting without addressing the specifics of the third *Gingles* factor, which requires white majority bloc voting that usually defeats the [minority]-preferred candidate" and noting that "[e]ven if there were racially polarized voting, the report does not speak—one way or the other—to the effects of the polarized voting"), *aff'd*, 543 U.S. 997 (2004).

3. A Reasonable Factfinder Could Conclude That Race Was the Predominant Factor Behind CD 12, and Defendants Cannot Meet Strict Scrutiny and Justify CD 12

Defendants contend that the dramatic increase in the BVAP in CD 12—from 43.8% to 50.7%—was inadvertent. Defendants fail to meet their summary judgment burden with respect to CD 12 as well.

As set out in detail in Plaintiffs' motion: (1) CD 12—quite possibly the least compact district in the entire country—cannot be explained by traditional redistricting principles; (2) legislative leaders directed the mapdrawer to move African Americans residing in Guilford County into CD 12; and (3) expert analysis demonstrates that race—and not politics—provides the best explanation for the State's construction of CD 12. *See* Dkt. 70-1, at 19-27. Plaintiffs' evidence demonstrates, as a matter of law, that race was the predominant factor behind CD 12. It most certainly demonstrates that Defendants are not entitled to summary judgment.

Defendants claim that "Dr. Hofeller did not rely upon or consider the race of voters . . . in drawing" CD 12. Mot. at 23. That bald assertion cannot be squared with Dr. Hofeller's testimony that he was *expressly* instructed by legislative leaders to add African-American voters in Guilford County to CD 12, Dkt. 69-1, Ex. 27 (Hofeller Dep. 37:2-22, 71:2-21, 74:9-75:16), or statements by legislative leaders that "they drew the "proposed [CD 12] at a black voting age level that is above the percentage of black voting age population found in the current [CD 12]" to "ensure preclearance" under

Section 5 of the VRA. *Id.*, Ex. 10, at 2-5. Defendants' *post hoc* attempts to rewrite the record cannot erase these clear expressions that race was a driving factor behind CD 12.

Demographic analysis confirms the point. Dr. Ansolabehere did not merely consider the "effect" of the 2011 Congressional Plan (Mot. at 24)—he analyzed data providing circumstantial evidence of causation. He concluded that the increase in African-American population in CD 12 was not "due to an increase in Democrats who happened to be [African-American]" but rather the State moving African-Americans *in all party groups* into CD 12 at a disproportionate rate. Dkt. #21, ¶ 23.[8] The plaintiffs' expert in the state court litigation, Dr. David Peterson, conducted a similar analysis and reached the same conclusion. Comparing the racial and partisan political characteristics of the residents assigned to precincts just inside and just outside the boundary of CD 12, Dr. Peterson concluded that race, not partisan considerations, best explained the way the State chose to draw the lines of CD 12 in 2011. Dkt. #69-1, Ex. 28 ¶¶ 3, 18.

4. Plaintiffs Need Not Provide an Alternative Map At This Stage

Finally, relying on *Easley v. Cromartie*, 532 U.S. 234 (2001), Defendants argue that Plaintiffs are required to submit an alternative map at this stage. Defendants are

[8] The State's contention that the *Cromartie* cases "rejected" use of party registration statistics to examine the relationship between race and politics misreads those cases badly. In fact, the Court in *Cromartie I* held that evidence that the State excluded from CD 12 precincts that had a lower percentage of black population but were as Democratic (in terms of registered voters) as the precincts inside CD 12 "tends to support an inference that the State drew its district lines with an impermissible racial motive." *Hunt v. Cromartie*, 526 U.S. 541, 548-49 (1999). It found that the District Court erred in granting summary judgment to the plaintiffs based on the record evidence presented in that case. *Id.* at 550-54. And in *Cromartie II*, the Court was persuaded by the State's evidence of its political motivations—a report by Dr. Peterson that relied on years of election data to show that "the State included the more heavily Democratic precinct much more often than the more heavily black precinct," which refuted the plaintiffs' registration-based evidence. *Id.* at 549-50; *see also Easley v. Cromartie*, 532 U.S. 234, 243-46 (2001).

wrong. Plaintiffs need only demonstrate that racial considerations predominated during the State's reapportionment of CD 1 and 12 to shift the burden to Defendants to meet strict scrutiny. This showing does not need require submission of an alternative map. For example, in *Miller*, the United States Supreme Court affirmed the lower court's conclusion that plaintiffs had successfully demonstrated that the challenged district was a racial gerrymander based on (1) the shape of the district, (2) relevant racial demographics, and (3) evidence of motivation from pre-clearance documents—not on any alternative map. 515 U.S. at 917. *Cromartie* will be searched in vain for any suggestion that a plaintiff must submit an alternative map. The case instead holds simply that where race correlates with political affiliation, a plaintiff must submit evidence that race, and not politics, explains the challenged plan. *Cromartie*, 532 U.S. at 257-58. Plaintiffs have done just that through the analysis of Dr. Ansolabehere and Dr. Peterson discussed above.[9]

III. CONCLUSION

For the reasons stated above, the Court should deny Defendants' motion for summary judgment.

[9] Even if it were somehow necessary for Plaintiffs to submit an alternative map at this stage, Defendants have already cited and relied upon an alternative plan submitted by Stephen Gerontakis. *See* Defendants' Memo in Opposition to Preliminary Injunction at 20 (Dkt. # 29). Mr. Gerontakis's plan split 10 counties, only a single precinct, and had a Reock score of 0.365, compared to the General Assembly's enacted plan, which split 19 counties, 35 precincts, and had a Reock score of 0.294. With regard to CD 1, Mr. Gerontakis's map moved 21,000 people out of the district while adding 118,000 people to the district. The General Assembly's plan, on the other hand, moved 142,000 people out of the district and added 239,000 people to the district. Compared to Mr. Gerontakis's map, the enacted plan is clearly "unexplainable on grounds other than race" and cannot possibly be considered "narrowly tailored" to protect the state from liability under the Voting Rights Act.

Respectfully submitted, this the 23rd day of June, 2014.

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