

**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.

**REPLY IN SUPPORT OF
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

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I. INTRODUCTION

The facts of this case are stark and undisputed. The State purposefully redrew the boundaries of CD 1 and 12 in a manner that (a) added tens of thousands of African-American citizens to the districts; (b) increased the African-American population by 5-7% over previous plans; and (c) made the districts less compact.

The central legal issue is simple: Did the Voting Rights Act (“VRA”) justify a deliberate decision to draw CDs 1 and 12 as majority-BVAP districts by moving African Americans into the districts and White voters out of the districts, even though African Americans could and did easily elect their candidates of choice without constituting a majority of these districts’ voting age populations? The answer is clearly no. Plaintiffs respectfully ask the Court to grant summary judgment on their behalf.

A. Defendants Cannot Justify the Use of Race to Draw CD 1

1. Defendants Concede the Material Facts Establishing that CD 1 Was Drawn Predominantly Based on Race

Defendants concede that CD 1 was drawn as a majority-BVAP district out of an alleged need to comply with the VRA, but argue that race was not the *predominant* factor because it was not the *only* factor behind CD 1. Plaintiffs have addressed this claim at length, Dkt. #78, at 13-16, and a simple comparison further shows why it is unavailing. This case closely resembles *Bush v. Vera*, 517 U.S. 952 (1996), in which the U.S. Supreme Court rejected the same “mixed motive” argument. The Court was persuaded by proof the state there: (1) neglected traditional districting criteria such as compactness;

(2) was committed to creating majority-minority districts, and (3) manipulated district lines based on racial data. *Id.* at 962. The same things are true here.

First, Defendants do not seek to justify the geographic shape of CD 1 by reference to traditional redistricting criteria, such as respecting political subdivisions and drawing reasonably compact districts; instead, they argue that there is no “judicially manageable standard” to assess compactness. *Opp.* at 26. There may be no mathematical bright line rule for compactness, but it is well-established that a bizarre, non-compact district supports the inference it was drawn on the basis of race. *Bush*, 517 U.S. at 959-60. Here, the numbers confirm what the eye can see: The State did not attempt to make CD 1 compact—it *reduced* CD 1’s compactness (by roughly 38%). *Dkt.* #69-1, Ex. 21, ¶¶ 6-8.

Second, as Plaintiffs detailed in their motion (*Dkt.* #70-1, at 5-9) and Defendants acknowledge in their opposition, the State was committed to creating CD 1 as a majority-minority district based on its (incorrect) reading of Supreme Court precedent:

In 2011, after the [U.S.] Supreme Court’s 2009 mandate in *Strickland v. Bartlett* [sic] that any district drawn to protect the State from liability under Section 2 of the VRA be drawn with a true majority-minority voting-age population (“VAP”), the General Assembly returned [CD 1] to its status as a majority-black district.

Opp. at 1-2.¹ Defendants make the same concession throughout their opposition.²

¹ Defendants mischaracterize *Bartlett*, 556 U.S. 1 (2009), which did not address a Section 2 defense to a racial gerrymander claim but, rather, rejected the plaintiffs’ claim that Section 2 could require creation of “cross-over” districts in which a minority did not constitute a majority of a district’s VAP. *See, e.g., id.* at 14.

² *See, e.g., Opp.* at 4 (the State drew the district to create an “African American voting-age majority to comply with the *Strickland* decision”); *id.* at 5 (same, because the State concluded “that a majority-minority district was needed to protect the State from liability under Section 2 of the VRA”); *id.* at 20 (“The General Assembly decided to follow the clear bright-line rule provided in *Strickland* and draw the First District with a 50%-plus TBVAP.”).

Finally, there is no dispute that the State used cartographic tools to make CD 1 majority-BVAP. Defendants concede “the population in Durham was added . . . to make the district majority-minority.”³ Opp. at 21. They do not dispute, moreover, that the tendrils emanating from CD 1 were drawn purposefully to sweep in pockets of African-American voters in counties other than Durham. *See* Dkt. #69-1, Ex. 21, ¶ 31 (describing how “[w]ithin each county, the boundary takes VTDs with lower black populations and puts them in CD 3 and leaves VTDs with higher black populations in CD 1”).

The result is that an African-American voter was far more likely to be included in CD 1 than a White voter. Rather than dispute the point, Defendants deride it as obvious. Opp. at 20-21 (“[I]n *any* majority-black district, a voter in a county is going to be more likely to be included in the district if he is African American rather than if he is white; otherwise, the district would not have a majority-minority population as required by law.”). Indeed, Defendants do not attempt to refute the analysis offered by Plaintiffs’ expert Dr. Ansolabehere and the state court plaintiffs’ expert Dr. David Peterson that race—and not politics—best explains why particular North Carolinians were or were not included in CD 1. *See* Dkt. #69-1, Ex. 21, ¶ 23, 26-33; Ex. 22, ¶¶ 48-53; Ex. 28, ¶¶ 2-18.

As in *Bush*, the evidence shows that while the State had more than one purpose in drawing CD 1, race was the *predominant* purpose. CD 1 is subject to strict scrutiny.

³ The fact that Durham County was included in CD 1 in a 1991 map that was never precleared and never used in an election (Opp. at 4), is irrelevant. A voting change in a covered jurisdiction that is not precleared is a legal nullity. *City of Monroe v. United States*, 522 U.S. 34, 38 (1997) (an “unprecleared charter amendment was a nullity as a matter of federal law”); *Smith v. Clark*, 189 F. Supp. 2d 529, 534 (S.D. Miss. 2002) (“If this newly asserted change in redistricting authority is not precleared, it renders the plan itself a legal nullity under the Voting Rights Act.”). In any event, this 1991 version of CD 1 was visually more compact than the 2011 version, with a solid core of whole counties—unlike the 2011 version. *See* Dkt. #30-5, at 19.

2. Defendants Cannot Meet Their Burden on Strict Scrutiny

Because the State drew CD 1 with race as the predominant factor, it must satisfy strict scrutiny. That is a burden the State simply cannot meet here.

a. Section 5 Not a Compelling Interest

Defendants argue that the State's use of race in drawing CD 1 is justified by Section 5 of the VRA. This is wrong for two primary reasons.

First, even if Section 5 remained effective after *Shelby County, Alabama v. Holder*, 570 U.S. ___, 133 S. Ct. 2612 (2013), Section 5 did not require these changes to CD 1. The State did not hold CD 1's BVAP steady to avoid retrogression—it added African Americans to make CD 1 BVAP-majority. *See Bush*, 517 U.S. at 983 (rejecting the argument that Section 5 can “justify not maintenance, but substantial augmentation, of the African-American population percentage” in the challenged district).

Second, the State *cannot* rely on Section 5 after *Shelby County*. Defendants agree that states cannot “use Section 5 to justify future majority-minority districts,” Opp. at 25, but argue (without legal support) that the compelling state interest inquiry ends upon a districting plan's enactment. They ignore well-established case law holding that changes in either factual circumstances or the legal landscape can render a law unconstitutional even if it once would have survived strict scrutiny. For example, in the wake of cases requiring that districts be composed of equal population, *see, e.g., Reynolds v. Sims*, 377 U.S. 533 (1964), the Supreme Court affirmed an order requiring reapportionment of the Indiana legislature, even though the plan had previously passed muster. *Whitcomb v.*

Chavis, 403 U.S. 124, 162-63 (1971) (a court may order redistricting where “intervening decisions of [the Supreme] Court” establish that a redistricting plan is no longer valid).

Because the VRA no longer requires North Carolina to draw district lines to satisfy preclearance requirements, Section 5 cannot constitute a compelling state interest for the State’s predominant use of race in drawing CD 1.

b. Section 2 Not a Compelling Interest

The State also cannot rely on Section 2 to justify CD 1. The Court need look no further than Defendants’ own briefing to see why that is so.

As to the first *Gingles* factor, Defendants cannot show that the African-American population in the northeastern part of the state is “sufficiently large and geographically compact to constitute a majority in a single-member district.”⁴ *Gingles*, 478 U.S. at 50. The State substantially increased the size of CD 1 because the district’s “massive under-population” (Opp. at 23) meant it could not otherwise make the district majority-BVAP. Creating a racial archipelago to put disparate minority communities in the same district is the very definition of improper gerrymandering. *See, e.g., League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 435 (2006) (Section 2 did not require Texas to draw sprawling district connecting Latinos in Austin and those near the Mexican border).⁵

⁴ Defendants’ characterization of former CD 1 as a “majority-minority coalition” district (Opp. at 3) misses the point. If African Americans could join with other minorities to elect Black candidates of choice without constituting a majority of the district’s VAP, this shows Section 2 did *not* require the State to redraw CD 1 with a majority BVAP. Moreover, Defendants provide no evidence showing that African Americans and other minorities vote cohesively for the same candidates. *See Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 426 (S.D.N.Y. 2004) (Hispanics and Blacks cannot be treated as “a monolithic minority group” absent evidence of “Hispanic-black cohesion”).

⁵ *See Bush*, 517 U.S. at 979 (“If, because of the dispersion of the minority population, a reasonably compact majority-minority district cannot be created, § 2 does not require [one].”); *Moon v. Meadows*, 952 F. Supp. 1141, 1149 (E.D. Va. 1997) (“[T]he district does not draw upon a geographically compact group of black voters” given its

Defendants’ inability to justify CD 1 under Section 2 is even clearer with respect to the third *Gingles* factor, which they flatly admit cannot be established. It is undisputed that African Americans have not formed a majority of the VAP in CD 1 since 1997, but that *nonetheless* “African American voters have been able to elect their candidates of choice in the First District since the district was established in 1992.” Opp. at 2, 8. This ends the inquiry. Because African Americans could consistently elect candidates of their choice without constituting a majority of the VAP in CD 1, the State had no basis for concluding that Section 2 required CD 1 to be majority-BVAP. See, e.g., *Moon*, 952 F. Supp. at 1149-50 (Virginia could not justify redistricting plan under Section 2 where “white bloc voting does not prevent blacks from electing their candidates of choice” as “black candidates . . . were elected despite the absence of a black majority district.”)⁶

By the same token, while there is *some* degree of racially polarized voting in North Carolina, Defendants cannot meet their burden by pointing to that generic fact. What matters for purposes of the VRA is not racially polarized voting in the *abstract*, but whether racially polarized voting exists in the district in question significantly enough that the minority in question usually cannot elect its candidate of choice. If there is racially polarized voting insufficient to prevent African Americans from electing their candidate of choice with the aid of cross-over voting from non-African Americans—as

“bizarre lines”); *African-Am. Voting Rights Legal Def. Fund, Inc. v. Mo.*, 994 F. Supp. 1105, 1123 (E.D. Mo. 1997) (same, where “the only feature linking . . . disparate territories” was “the numerosity of African–Americans”).

⁶To the degree Defendants contend that they had a substantial justification for drawing CD 1 as majority-BVAP because academics informed Rucho and Lewis that the State must still comply with *Gingles* (Opp. at 5-6), Defendants are mistaken. *Gingles* did not address congressional districts—it addressed *state legislative* districts. See *Gingles*, 478 U.S. at 35. Indeed, the thinness of Defendants’ Section 2 justification for CD 1 is illustrated by the fact that the General Assembly was able to make CD 1 majority-BVAP only by expanding CD 1 into Durham County—a county whose voting patterns were held in 1986 *not* to make out a prima facie Section 2 claim. *Id.* at 77.

indisputably is true here—than Section 2 does not require a State to draw a majority-minority district. That is one of *Bartlett*'s primary holdings. 556 U.S. at 16 (Section 2 does not require creation of “cross-over” districts because “[i]t is difficult to see how the majority-bloc-voting requirement could be met in a district where, by definition, white voters join in sufficient numbers with minority voters to elect the minority's preferred candidate”). Thus, a racially polarized voting analysis does not establish the third *Gingles* precondition unless it demonstrates that the percentage of non-African-American voters who vote against the African American-preferred candidate is sufficient to defeat him or her. *Cano v. Davis*, 211 F. Supp. 2d 1208, 1238 n.34 (C.D. Cal. 2002) (“[T]o the extent Dr. Kousser concludes that there is ‘racially polarized’ voting in the district, it is not the type of ‘legally significant’ polarization about which *Gingles* speaks.”); *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1010 (D.S.D. 2004) (“The third *Gingles* factor considers not the size of the bloc but considers the bloc's effect on minority voters”).

Finally, even if Defendants could identify a compelling interest—which they cannot—they cannot establish that CD 1 is narrowly tailored. Although Defendants state time and again that the State wished to take advantage of *Bartlett*'s bright-line “50%+1” rule, CD 1 has a BVAP of 52.65%, well over the *Bartlett* threshold. Even assuming Section 2 required CD 1 to be drawn with a majority-BVAP, Defendants offer no racially polarized voting analysis to so much as explain (let alone justify) this BVAP figure over any other. Indeed, under Defendants' argument (Opp. at 30), the narrow tailoring inquiry would end as soon as the “50%+1” threshold is met.

Because the State had no reasonable basis in evidence to conclude that Section 2 required CD 1 to be drawn as majority-BVAP, and Defendants have not demonstrated the district is narrowly tailored, Defendants cannot meet their burden on strict scrutiny.⁷

B. Defendants Cannot Justify the Use of Race to Draw CD 12

1. Defendants Concede the Material Facts Establishing that CD 12 Was Drawn Predominantly Based on Race

It is undisputed that the State greatly increased the African-American population of CD 12 or, as Defendants would have it, the State “added only 34,654 more African Americans of voting age.” Opp. at 33. Given that CD 12 was only over-populated by 2,847 persons, Dkt. #69-1, Ex. 7, at 14, the State, in effect, removed 37,501 Whites from CD 12 and replaced them with 34,654 African Americans. That is the context in which Defendants’ claim that race was not the predominant factor must be assessed.

Defendants claim that although Rucho and Lewis specifically instructed Dr. Hofeller to include African-American residents in Guilford County in CD 12, there is no evidence that Dr. Hofeller used racial data to address this concern. Opp. at 31. But Plaintiffs need not prove Dr. Hofeller used racial *data* to draw CD 12—merely that race was the predominant purpose behind the construction of CD 12. It is clear it was:

[T]here were . . . going to be a new bunch of districts surrounding [CD 12] that we were worried that there would be a challenge because the black community would have been fractured if the

⁷ Defendants assert that the State considered the totality of the circumstances in drawing CD 1 (Opp. at 29), but present no evidence supporting that claim or that, on the merits, consideration of the totality of the circumstances showed the need to draw CD 1 as majority-BVAP. “Airy generalities, conclusory assertions and hearsay statements [do] not suffice to stave off summary judgment . . . because none of these would be admissible evidence at an evidentiary hearing.” *United States v. Roane*, 378 F.3d 382, 400-01 (4th Cir. 2004).

district were left in the same place. So, my instruction . . . was to try to take care of that problem, Guilford

Dkt. #69-1, Ex. 27 (Hofeller Dep. 71:2-21); *see also id.*, Ex. 7, at 14-15 (the State drew CD 12 based on Congressman Watt’s “desire that African-American voters in Guilford and Forsyth” be included in CD 12); *id.*, Ex. 12 (July 25, 2011 Senate Testimony (Sen. Rucho 63:4-8) (“Because Guilford is a county covered by Section 5 of the Voting Rights Act, we were careful to assure that the African-American population was not . . . made worse off by dividing the county.”). Dr. Hofeller did not need racial data on the screen to know that Guilford County had a large African-American population. Rucho and Lewis knew it did—which is why they instructed Dr. Hofeller to include the county in CD 12.

Finally, Defendants’ reliance on the *Cromartie* cases’ discussion of voting behavior and party registration is misplaced. Dr. Ansolabehere’s undisputed analysis of the correlation between party registration and electoral behavior concludes that at present “[r]egistration is highly correlated with actual election results in the State of North Carolina.” Dkt. #69-1, Ex. 21, ¶ 31. His analysis further shows that race better explains the contours of CD 12 and otherwise inexplicable results, such as the fact that the Democratic registration rate among African Americans was higher in VTDs moved out of CD 12 than it was in VTDs kept in or moved into the district, or that Black Republicans were included in CD 12 at far higher rates than White Republicans. Ex. 22, ¶¶ 45, 52.

But perhaps most significantly, in the *Cromartie* cases, the U.S. Supreme Court relied heavily on Dr. Peterson’s segment boundary analysis that “concluded that the State included the more heavily Democratic precinct much more often than the more heavily

black precinct.” *Hunt v. Cromartie*, 526 U.S. 541, 550 (1999). Here, by contrast, Dr. Peterson did the same analysis and reached the *opposite* conclusion: “[R]acial considerations better account for the boundary definition of the 12th NC Congressional Voting District than do party affiliation considerations.” Dkt. #69-1, Ex. 28, ¶ 18.

Defendants do not offer evidence in response, instead relying on antiquated data from *Cromartie* and other redistricting cases to argue that Whites vote Republican and African Americans vote Democratic. Opp. at 34. As the Supreme Court made clear in *Shelby County*, things change. 133 S. Ct. at 2625. The government cannot rely on outdated data to justify race-based legislation, as Defendants try to do here.

Finally, assuming the Court concludes that CD 12 was drawn with race as the predominant purpose, Defendants offer no compelling interest that would justify CD 12. If strict scrutiny applies, CD 12 plainly fails it.

II. CONCLUSION

“[W]hen the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, ‘think alike, share the same political interests, and will prefer the same candidates at the polls.’” *Miller v. Johnson*, 515 U.S. 900, 911-12 (1995) (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)). That is precisely what the State did here. For the reasons stated above, and in Plaintiffs’ opening memorandum and their opposition to Defendants’ cross-motion for summary judgment, the Court should grant summary judgment for Plaintiffs.

Respectfully submitted, this the 3rd day of July, 2014.

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Local Rule 83.1

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