No. 201PA12-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
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MARGARET DICKSON, *et al.*, *Plaintiffs,*	)	**From Wake County**
v.	)	11 CVS 16896
ROBERT RUCHO, *et al.*, *Defendants.*	)	11 CVS 16940 *(Consolidated)*
NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP, *et al.*, *Plaintiffs,*	)	
v.	)	
THE STATE OF NORTH CAROLINA, *et al.*, *Defendants.*	)	

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PLAINTIFF-APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGES

CASES

STATUTES

RULES

OTHER AUTHORITIES

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PLAINTIFF-APPELLANTS' REPLY BRIEF

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Pursuant to Rule 28(b) of the Rules of Appellate Procedure, Plaintiffs submit this Reply Brief in rebuttal of the principal arguments in Defendants-Appellees' Brief filed on 9 December 2013.

This case arises because the United States and North Carolina Constitutions contain guarantees of individual rights regarding the composition of election districts that constrain the General Assembly's discretion to use racial criteria, divide counties, or draw non-compact districts when enacting redistricting legislation. It is the duty of the judiciary to enforce these constitutional rights. Particularly when racial classifications are imposed by the government, as the trial court found occurred here, *see* R p 1278, the Court's duty is to apply strict scrutiny and conduct a "searching judicial inquiry into the justification for such race-based measures." *Johnson v. California*, 543 U.S. 499, 506 (2005).

However, the trial court misinterpreted that duty, believing it was required to defer to the General Assembly's interpretation of the law regarding redistricting and the General Assembly's assessment of the proper application of that law. (R p 1281). Because it is based on fundamental legal errors, the trial court's ruling in this case must be reversed.

This brief addresses four main issues. Plaintiffs first address the flaws in the Defendants' arguments that they had a compelling governmental interest under Section 2 and Section 5 of the Voting Rights Act to draw in 2011 more than three times the number of majority Black legislative districts than has ever existed in the history of the state. The second section responds to Defendants' illogical

contentions regarding the North Carolina Constitution's whole county provisions. The third section addresses Defendants' arguments regarding the North Carolina Constitution's compactness requirement, which is embedded in equal protection principles and articulated by this Court's *Stephenson* decisions. A fourth section responds to the argument Defendants made regarding the enormous number of split precincts in certain enacted districts.

I. THE CHALLENGED DISTRICTS ARE UNCONSTITUTIONAL RACIAL GERRYMANDERS

Defendants' interpretation of what the Voting Rights Act demands simply cannot be squared with any reasonable understanding of that law. Logically, the Defendants' arguments lead to the conclusions that:

- Racial proportionality in electoral districting is required, presumably nationwide;
- Racial remedies are justified anywhere it is possible to draw a majority-Black district;
- The consistent and proven ability of Black voters to elect their candidates of choice, whether those candidates are white, Black or of some other race, is irrelevant to the Section 2 analysis; and
- Section 5, despite being ruled unconstitutional by the Supreme Court, continues to justify and mandate extreme racial remedies in previously covered jurisdictions.

All of these propositions are inconsistent with the Fourteenth Amendment's demand that race play a minimal role in determining state policy, including

redistricting. Indeed, four distinguished North Carolina constitutional law professors and nationally-renowned voting rights professors have indicated to this Court that the Defendants' legal theories are fundamentally wrong.[1] *See* Brief of Amici Curiae Election Law Professors, 8-19, 11 Oct. 2013; Amicus Curiae Brief (of four law professors), 25-46, 11 Oct. 2013. The North Carolina Legislative Black Caucus similarly does not agree with this characterization of the law. *See* Brief of Amicus Curiae North Carolina Legislative Black Caucus, 2-41, 11 Oct. 2013. This Court must reject Defendants' untenable legal theories and conclude that the challenged districts are racial gerrymanders that violate state and federal equal protection guarantees because they are not justified by a compelling governmental interest and they are not narrowly tailored to serve any purported governmental interest.

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[1] The professors are Prof. William P. Marshall, Kenan Professor of Law, University of North Carolina School of Law; Prof. Walter Dellinger, Douglas B. Maggs Professor Emeritus of Law, Duke University School of Law; H. Jefferson Powell, Professor of Law, Duke University School of Law; Michael Curtis, Judge Donald L. Smith Professor in Constitutional and Public Law, Wake Forest University School of Law; Guy-Uriel Charles, Charles S. Rhyne Professor Of Law, Duke Law School; Gilda R. Daniels, Associate Professor Of Law, University Of Baltimore School Of Law; Lani Guinier, Bennett Boskey Professor of Law, Harvard Law School; Samuel Issacharoff, Reiss Professor Of Constitutional Law, New York University School Of Law; Justin Levitt, Associate Professor Of Law, Loyola Law School; Janai S. Nelson, Professor Of Law, St. John's University School Of Law; Spencer Overton, Professor Of Law, The George Washington University Law School; Richard H. Pildes, Sudler Family Professor of Constitutional Law, New York University School of Law; and Franita Tolson, Betty T. Ferguson Professor Of Voting Rights, Florida State University College Of Law.

A. Proportionality Goals and Vague, Generalized Fears of Section 2 Liability Are Not Compelling Interests

It is well-established law that Section 2 does not obligate States to create as many majority-Black districts as possible, or even a proportional number of majority-Black districts.[2] *Johnson v. DeGrandy*, 512 U.S. 997, 1016-17 (1994) ("Failure to maximize cannot be the measure of § 2"); *Abrams v. Johnson*, 521 U.S. 74, 88-90 (1997). Indeed, the Supreme Court has repeatedly cautioned against a focus on racial proportionality in any context because of the Equal Protection concerns implicated by such a goal. *Shaw v. Reno*, 509 U.S. at 657 ("Racial gerrymandering may balkanize this country into competing racial factions"); *Fisher v. Univ. of Tex*., 133 S. Ct. 2411, 2418 (2013) ("To be narrowly tailored, a race-conscious admissions program cannot use a quota system") (quoting *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003)). Despite such well-established guidance, Defendants claim that "the United States Supreme Court has essentially advised jurisdictions to consider proportionality as a possible defense to vote dilution claims." Defendants-Appellees' Brief [hereinafter "Defs. Br."] at 75. Just the opposite is true.

[2] Section 2 of the Voting Rights Act, the vote dilution statute itself, states 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. § 1973b.

Simply put, when the Supreme Court has been explicit in holding that proportionality is not a constitutional or statutory demand, it is not credible to read into that precedent an instruction that jurisdictions should seek proportionality to avoid litigation. *See, e.g.*, *Shaw v. Hunt*, 517 U.S. 899, 913 (1996) (court rejects any Section 2 or Section 5 justification for a policy requiring 22% of North Carolina's congressional districts to be majority Black because the population is 22% Black); *Mobile v. Bolden*, 446 U.S. 55, 76 (1980) ("[t]he Equal Protection Clause of the Fourteenth Amendment does not require proportional representation"); *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971); *Bartlett v. Strickland*, 556 U.S. 1, 43 (2009) ("Our holding also should not be interpreted to entrench majority-minority districts by statutory command, for that, too, could pose constitutional concerns.")

In evaluating Defendants' implausible attempts to defend their plans, it must be remembered that this Court in 2002 upheld and ordered the use of Senate and House plans that contained only 12 majority-Black districts, *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (*Stephenson I*), and that no previous General Assembly has ever determined that the VRA requires the drawing of more than 16 majority-Black districts. *See* Plaintiffs-Appellants' Brief [hereinafter "Pls. Br."] at 15. It should also not be forgotten that no court has ever required the North

Carolina Legislature to enact a legislative redistricting plan with anything like the 32 majority-Black districts in these plans. Indeed, for example, over 25 years ago the Supreme Court held that racially polarized voting in Durham County did not give rise to the need for a single-member majority-Black legislative district in that county, and yet now the Defendants argue that the law requires it. *Thornburg v. Gingles*, 478 U.S. 30, 77 (1986).

In recent times, Section 2 cases, especially against state legislatures, are almost never successful. During the 2000 round of redistricting, lawsuits were filed challenging statewide redistricting plans in 37 states. *See* All About Redistricting, Redistricting Litigation- 2000 Cycle, *available at* http://redistricting.lls.edu/who-courtfed00.php. There were only 3 of those 37 states in which Section 2 violations were found: involving one state legislative district in South Dakota, *Bone Shirt v. Hazeltine*, 461 F.3d 1011 (8th Cir. 2006); one in Massachusetts, *Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291 (D. Mass. 2004); and the failure to create one additional Latino Congressional district in Texas, *LULAC v. Perry*, 548 U.S. 399 (2006). That trend continued in this cycle as well—there has been redistricting litigation in 42 states, but to date, not one court has ruled that a state violated Section 2 of the Voting Rights Act. *See* All About Redistricting, Redistricting Litigation- 2010 Cycle, *available at*

http://redistricting.lls.edu/who-courtfed10.php. Indeed, since 1983, the State of North Carolina has not been subjected to any Section 2 lawsuit for statewide redistricting plans, but it has been subjected to numerous *successful* suits for unconstitutional racial gerrymandering. *Shaw v. Reno*, 509 U.S. 630 (1993); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Hunt v. Cromartie*, 524 U.S. 980 (1998). Defendants cite to no case decided in the last three decades where plaintiffs have succeeded in a Section 2 redistricting case that is remotely relevant to this case.

In light of decades of litigation and the plans drawn by previous sessions of the General Assembly and the courts in 2002, Defendants had no reason to believe that they had to draw 9 new majority-Black senate districts and 13 new majority-Black house districts to avoid Section 2 liability. What they should have seen coming in light of the districts they drew in pursuit of their proportionality goal is the racial gerrymander claims presented in these cases.

Defendants' heavy reliance on *Bush v. Vera*, 517 U.S. 952 (1996), for the proposition that avoiding Section 2 liability constitutes a compelling governmental interested is misplaced. (Defs. Br. at 66). It does not so hold. Indeed, no court has ever found that a desire to insulate a State from Section 2 litigation actually meets the high compelling governmental interest standard. The Court in *Vera*, while acknowledging that such fears, if reasonable, might counsel a court to defer to

legislative choices, actually found that Texas had no such "reasonable" fears in that case. The district court concluded, and the Supreme Court affirmed, that "[w]hat amounts to a ritualistic invocation of § 2 by the defendants simply proves too much: the possibility that some § 2 claim might have prevailed against the state if [the challenged plan] had not contained more minority districts than the base plan cannot justify" the non-compact districts challenged in the litigation. *Vera v. Bush*, 861 F. Supp. 1304, 1343 (S.D. Tx. 1994). North Carolina's fears of potential § 2 liability in 2011 were even more unreasonable than Texas' fears in 1992.

Indeed, a case out of the Fourth Circuit this redistricting cycle further highlights the implausibility of Defendants' fears of Section 2 liability. In *Fletcher v. Lamone*, plaintiffs sued Maryland for failing to draw a third majority-Black Congressional district, claiming violations of Section 2 of the Voting Rights Act. *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 897 (D. Md. 2011). The three-judge panel rejected those Section 2 claims on multiple grounds, noting the lack of compactness of the minority community in the third proposed African-American district, the lack of legally significant racially polarized voting given the extensive success of Black candidates, and the fact that the State was not required to draw a proportional or maximal number of African-American districts. *Id*. at 898-900.

B. Defendants and the Trial Court Misinterpret the First Prong of *Gingles*

The first prong of *Gingles* requires that a minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U.S. at 50-51. Neither the trial court nor Defendants have applied that requirement consistent with established law.

1. Legal Significance of the Difference Between Majority-Minority and Majority-Black Districts

Defendants' justification for their race-based districts relies on their counterintuitive contention that Section 2 compels the drawing of majority-Black districts where Black candidates win election in majority-minority (or "coalition") districts but do not win election in majority-white districts. This is incorrect as a matter of law.

Defendants and the trial court emphasized that most of the districts in which Black candidates had enjoyed substantial historic success—that success being well documented by legislative staff during the legislative process—were, at least in 2010, not majority white districts.[3] (Doc. Ex. 7726

[3] Some of these districts were majority white based on earlier census data, and likely were majority white at some points earlier in the decade when Black candidates were winning. (Doc. Ex. 7726 PS83\Depositions\Exhibits\Exhibits 44-94 (Churchill) Churchill Dep. Exs. 80-84, (Churchill Dep. Ex. 81-83)).

PS83\Depositions\Exhibits\Exhibits 44-94 (Churchill) Churchill Dep. Exs. 80-84, (Churchill Dep. Ex. 81-83)). However, what is significant is that they were not majority-Black districts, either—far from it. *Id.*

The basic holding of *Bartlett* by the United States Supreme Court is that where Black voters are electing their candidates of choice only with the votes of some other racial group, no Section 2 claim can be sustained. The Court stated:

> [B]ecause they form only 39 percent of the voting-age population in District 18, African-Americans standing alone have no better or worse opportunity to elect a candidate than does any other group of voters with the same relative voting strength. That is, **African-Americans in District 18 have the opportunity to join other voters—including other racial minorities**, or whites, or both—to reach a majority and elect their preferred candidate. They cannot, however, elect that candidate based on their own votes and without assistance from others. Recognizing a § 2 claim in this circumstance would grant minority voters a right to preserve their strength for the purposes of forging an advantageous political alliance. Nothing in § 2 grants special protection to a minority group's right to form political coalitions.

556 U.S. at 14-15 (emphasis added) (internal citations omitted). That is, because Black voters in a district that was not majority-Black were electing their candidate of choice by joining with white voters or other minority voters, no Section 2 liability could exist. Following *Bartlett*, other courts have reached the same conclusion. *See, e.g., Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 857 (E.D. Wis. 2012) (noting that data supporting a conclusion that

a district would act as a performing multi-racial coalition district "would have supported a finding of no Section 2 violation."). As a matter of law, there is no legal basis for concluding that North Carolina was required to take majority-minority districts and convert all of them to majority-Black districts.

2. Compactness – Compact Minority Population v. Geographically Compact

While Defendants are correct that the first prong of *Gingles* requires that a remedial district be based upon "compact populations of African Americans," they misstate the law when it comes to their obligations to comply with both the Fourteenth Amendment and Section 2. (Def. Br. at 77, n. 43). The Voting Rights Act requires that majority-Black districts must also be "geographically compact." *Thornburg v. Gingles*, 478 U.S. at 50-51. The United States Supreme Court has been unequivocal: Section 2 "does not require a State to create, on predominantly racial lines, a district that is not 'reasonably compact.'" *Vera*, 517 U.S. at 979. *See also Abrams*, 521 U.S. at 91; *Miller*, 515 U.S. 900 (1995); *DeGrandy*, 512 U.S. at 1008; *Reno*, 509 U.S. at 655-56 (1993).

Highly irregularly-shaped districts that span numerous counties, connecting urban and rural Black communities—in other words, districts seen all across the state's enacted plans—are not geographically compact, nor do they encompass

compact populations of African Americans. By any measure (whether the "intraocular" test or statistical measures of geographic compactness), the majority-African-American districts challenged in this litigation are not compact. Section 2 of the Voting Rights Act does not compel the creation of such districts, and they are in no sense narrowly tailored to serve a compelling Section 2 interest.

As *Bartlett* makes clear, the first prong of *Gingles* constitutes a significant limitation on the imposition of racial remedies under Section 2 of the Voting Rights Act, because it limits the situations in which such a remedy can be imposed. *Bartlett*, 556 U.S. at 18 (2009). The Defendants' approach to drawing minority districts would require the opposite interpretation of *Bartlett—i.e.*, that majority-minority districts should be drawn anywhere and everywhere possible. Defendants and the trial court have erred as a matter of law.

C. Defendants and the Trial Court Misunderstand the Third Prong of *Gingles*

The third prong of *Gingles* requires a showing that white voters "vote[] sufficiently as a block to enable [them] ... *usually to defeat* the minority's preferred candidate." *Gingles*, 478 U.S. at 50-51 (emphasis added). Legally-significant racially-polarized voting must be present in order for Defendants' Section 2 defense to be a compelling governmental interest. Defendants and the trial court

both made the critical legal error of assuming that if racially polarized voting exists, then a Section 2 violation is demonstrated, (*see, e.g.*, R p 1349) leading them to erroneously conclude that Section 2 remedies are required or appropriate all across the state of North Carolina.

1. Analyzing the Legal Significance of Racially Polarized Voting

In their arguments, Defendants continue to refuse to distinguish between racially polarized voting and legally-significant racially polarized voting, implying that there is no difference between the two terms.[4] Racially polarized voting simply means that voters of different races support different candidates. However, for Section 2 purposes, a finding of *legally significant racially polarized voting* requires more. It requires looking at election results to determine if racially polarized voting operates to prevent Black voters from electing their preferred candidates. In *Gingles,* the Supreme Court examined whether a bright-line standard could be used to determine when racially polarized voting becomes legally significant and decided that no such standard would work. Instead, courts

[4] Typical of this failure, for example, are the Defendants' selective quotations from the public hearing testimony of Counsel for the NAACP. In addition to pointing out that voting is racially polarized, at the same time Counsel also stated clearly that the VRA districts drawn by Defendants were NOT required by the VRA and packed Black voters far beyond what was necessary to provide an equal opportunity to participate in the political process, quoting and citing relevant Supreme Court precedent. (Doc. Ex. 609-12).

must evaluate the local circumstances. *See Thornburg v. Gingles*, 478 U.S. 30, 56-58 (1986). *See also Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 228 (2009) (Thomas, J. concurring in part, and dissenting in part) (observing that racially polarized voting is not evidence of unconstitutional discrimination and is not a problem unique to the south).

But what is absolutely clear from *Gingles* is that the mere presence of racially polarized voting does not constitute a Section 2 violation. If the question is not whether racially-polarized voting usually results in the defeat of minority-preferred candidates, then race-based remedies under the Voting Rights Act would have to be imposed everywhere the minority population is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50-51.

Since *Gingles*, courts in Section 2 cases have routinely engaged in the required careful examination to see if racially polarized voting acts to limit the opportunity that Black voters have to elect their candidates of choice. Courts have long recognized that "the existence of racially identifiable voting patterns itself is not sufficient to demonstrate the existence of white bloc voting." *Clarke v. City of Cincinnati*, 40 F.3d 807, 812 (6th Cir. 1994) (citing *Gingles*, 478 U.S. at 49). Dr. Brunell's inquiry as to whether there was statistically significant racially polarized

voting, without more, cannot provide a substantial basis in evidence to demonstrate potential Section 2 liability.

Indeed, numerous courts have recognized that the sustained success of Black candidates means, as a matter of law, that racially polarized voting does not operate to lessen opportunities for Black voters to participate in the political process and defeats any possible Section 2 liability. *See Clarke*, 40 F.3d at 812; *Overton v. City of Austin*, 871 F.2d 529, 538 (5th Cir. 1989); *Cottier v. City of Martin*, 604 F.3d 553, 558 (8th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 598 (2010); *Clay v. Board of Education*, 90 F.3d 1357, 1362 (8th Cir. 1996); *Valladolid v. National City*, 976 F.2d 1293 (9th Cir. 1992); *Askew v. City of Rome*, 127 F.3d 1355, 1385 (11th Cir. 1997). And in the Fourth Circuit, the Maryland three-judge panel in 2011 noted: "[t]o be sure, the evidence suggests that some instances of racial voting occur in Maryland. Even [the state's expert] concludes that Maryland experiences 'moderate' racial polarization. But proof of occasional racial block voting is insufficient to fulfill the third *Gingles* precondition, which requires the showing that the white majority must be able "usually" to defeat the minority's preferred candidate." *Fletcher*, 831 F. Supp. 2d at 900.

Moreover, Defendants still fail to engage with the evidence in the legislative record that not only were huge numbers of Black-preferred candidates winning in

non-majority Black districts, but they were doing so by margins so large that they necessarily were garnering enough white votes so as to fatally undermine any claims of legally-significant racially polarized voting. In a determination upheld by the United States Supreme Court, the District Court in *Johnson v. Miller* found that white support for Black-preferred candidates ranging from 22-38% meant that racial polarization was not so severe as to appropriately warrant a Section 2 remedy. 864 F. Supp. 1354, 1390-91 (S.D. Ga. 1994), *aff'd sub nom., Miller v. Johnson*, 515 U.S. 900 (1995). The undisputed margins of victory enjoyed by Black candidates in non-majority Black districts require that level of support from white voters. It is entirely consistent with this Court's holding in *Pender County v. Bartlett* that "[p]ast election results 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." 361 N.C. 491, 494, 649 S.E.2d 364, 367 (2007).

Contrary to Defendants' assertions, *see* Defs. Br. at 81-93, Dr. Lichtman was not testifying about legal standards; rather, he demonstrated how simple it was for the legislature to perform the very analysis that the law requires it to perform and which Defendants argue is "impossible," namely an analysis of the prior success of

Black voters' candidates of choice. That vital aspect of Dr. Lichtman's "post-enactment" analysis was one that did not even require an expert's eye: asking if Black voters are unable to elect their candidates of choice in districts that were under 50% TBVAP only requires reviewing the data that were undisputedly before the General Assembly. (Doc. Ex. 7726 PS83/Depositions/Exhibits/Exhibits 44-94 (Churchill)).

In all of the challenged districts, state legislative and congressional, 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%. (Doc. Ex. 962, ¶ 12). This win rate is no different than the win rate for African-American candidates and white candidates of choice of African-American voters in districts that are 50%+ in Black voting age populations. (Doc. Ex. 962, ¶ 12). Defendants did not dispute this fact—but that fact is fatal to the Defendants' claim that a Section 2 remedy was necessary. Where Black voters demonstrate an equal opportunity to, and indeed, the ability to, elect their candidates of choice in districts that are not majority Black, there can be no Section 2 liability.[5]

[5] Defendants' untenable legal theories do not become any more logical when applied to the facts, as the example of Senate District 40 makes abundantly clear. Defendants claim that "all" of the 2003 legislative districts that elected a Black candidate in 2010 "were majority-black or

Section 2 of the Voting Rights Act was designed to create and protect opportunities for political participation of minority voters in geographic regions of the country where Black voters have been shut out of the political process and where racially polarized voting behaviors play a role in shutting them out. The evidence here in North Carolina is that Black voters have achieved significant success in electing their candidates of choice, and cross-racial coalitions have become a hallmark of our state democracy. (Doc. Ex. 7068-69). Defendants turn the Voting Rights Act on its head when they claim that such progress requires segregating Black voters into assigned electoral districts.

2. Incumbency Does Not Undercut the Fact that Black Voters Elect their Candidates of Choice

Defendants and the trial court discount the many Black candidates elected to state legislative office as merely resulting from the incumbency advantages enjoyed by particular Black candidates (and the financial resources those Black candidates had), rather than as strong proof that there was no Section 2 justification for their plans because of the absence of proof of the third *Gingles* precondition.

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majority-minority." Defs. Br. at 43. In a footnote on the next page, Defendants acknowledge that "all" did not really mean **all**—that African-American Sen. Malcolm Graham has been repeatedly elected from Senate District 40, and that district has consistently been majority white. Defs. Br. at 43, n. 26. This is a critical admission, because, as Defendants explained, "[if] minorities can elect their preferred candidate in a district that is less than majority minority, than racially polarized voting must not exist as a matter of law." (R p 333).

(Def. Br. at 20-21, 44-45, 89) (R pp 1340-1422) (Trial court's findings for each district discuss incumbency and campaign finance reports of candidates.). While special circumstances, including incumbency advantage, "may" explain a single minority candidate's victory, "[e]very victory cannot be explained away as a fortuitous event." *Fletcher*, 831 F. Supp. 2d at 900 (citing *Rollins v. Fort Bend Indep. Sch. Dist.*, 89 F.3d 1205, 1213 (5th Cir. 1996)).

The Fourth Circuit has squarely addressed the extent to which incumbency should be factored into a Section 2 analysis. *See Lewis v. Alamance County*, 99 F.3d 600, 617 (4th Cir. 1996). In *Lewis*, the Black candidate of choice "won three straight general elections (and, apparently, 5 elections total, including primaries) after first being appointed to a vacant seat." *Id.* In an effort to overturn the trial court's decision against them, the plaintiffs argued that these victories did not count for Section 2 purposes because they were the product of the power of incumbency. The Fourth Circuit explained that to reverse the trial court would be to "transform what was at most a narrow or 'special' circumstance envisioned by the Court only in dicta into a categorical rule that all electoral successes of a minority-preferred incumbent are to be discounted." *Id.* The Court concluded, as have others, that such a transformation would be legally incorrect. *Cottier v. City of Martin*, 604 F.3d at 562 ("[i]ncumbency is the "least 'special'" of the special

circumstances, and incumbency "must play an unusually important role" before a court is required to disregard an electoral victory of a minority-preferred candidate."); *Clarke v. City of Cincinnati*, 40 F.3d at 813-14 ("like other 'special circumstances,' incumbency plays a significant role in the vast majority of American elections…a contrary rule would confuse the ordinary with the special, and thus make practically every American election a 'special circumstance') (internal citations omitted). Thus, the Defendants and the trial court err as a matter of law to the extent that they rely on incumbency to "explain away" African-American electoral success.

D. Section 5, Even Properly Interpreted, Can No Longer Serve as a Compelling Governmental Interest in the Strict Scrutiny Calculus

Defendants continue to insist that Section 5 justifies the majority-Black districts challenged in this case. They assert that "districts drawn to comply with the VRA, whether 2 or 5, must have a TBVAP of at least 50%," and they assert that no other plan "creates VRA districts that can receive preclearance form USDOJ … . " (Defs. Br. at 134, 138). This misses the point that the *Shelby County* decision changes this legal requirement. *Shelby County v. Holder,* 570 U.S. ___, 133 S. Ct. 2612 (2013). The Defendants had to comply with a "correct reading" of Section 5, *see Shaw v Hunt*, 517 U.S. at 911, when enacting the plans

but they cannot now claim that Section 5 is a compelling interest justifying the districts they drew or that the districts are narrowly tailored to comply with Section 5.

Plaintiffs' argument here is two-fold: as an initial matter, Section 5 has never required a jurisdiction to ***increase*** the number of majority-Black districts or ***increase*** the percentage of Black population in a district. *See* Pls. Br. at 57-58. Most importantly, even if Section 5 did provide a compelling governmental interest for the challenged districts at the time they were drawn, it can no longer provide such a justification. Plaintiffs are not arguing that Defendants were under a duty to predict that Section 5 would be found unconstitutional and avoid compliance with it, however many commentators at the time were, in fact, making that very prediction. Instead, Plaintiffs argue that in light of the *Shelby County* decision, Section 5 can no longer provide a compelling governmental interest in the Defendants continuing to conduct elections using districts drawn to comply with that unconstitutional statute.

E. The Trial Court Correctly Held That the VRA Districts are Racial Classifications

The trial court's analysis of undisputed evidence in the record began with the finding that "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 … ." (R p 1278). Defendants make only one argument that the trial court erred in concluding that 26 challenged districts constituted racial classifications subject to strict scrutiny. They argue that the trial court's finding that the districts were drawn to comply with the WCP, as a matter of law, established that the 26 districts did not constitute racial classifications triggering strict scrutiny.[6] (Defs. Br. at 77-78.) Their argument that clustering counties, and not race, was the predominant factor explaining the shapes and boundaries of the challenged districts, is demonstrably wrong. Race was the predominant factor in the VRA districts, even assuming that the Defendants were correct in drawing their plans to maximize clusters of counties rather than minimize the division of counties.

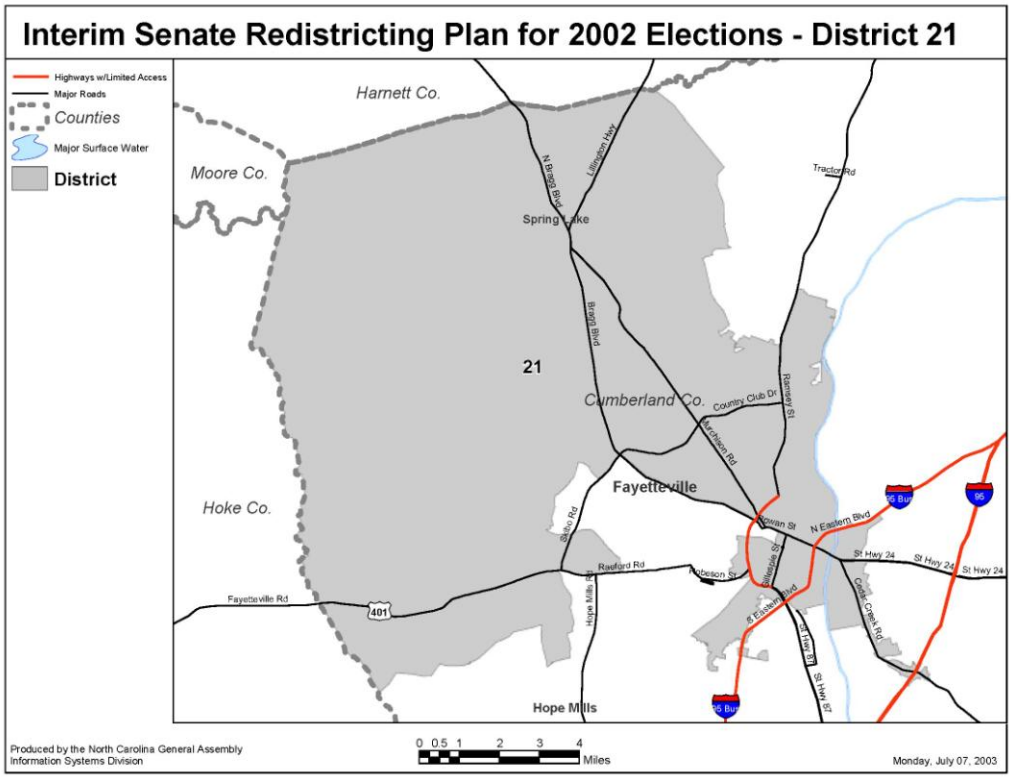
First, the *Stephenson* grouping criteria logically can have had no impact on VRA districts drawn entirely within a single county. Five of the 10 Senate VRA districts are contained with a single county: SD 14 in Wake, SD 28 in Guilford, SD 32 in Forsyth and SD 38 and 40 in Mecklenburg. Twelve of the 24 House VRA

[6] A similar argument was made in *Shaw v. Hunt*, 517 U.S. 899 (1996) and in *Miller v. Johnson*, 515 U.S. 919 (1995) namely that race did not predominate because districts were drawn to comply with the one-person, one vote requirement or to protect incumbents. The Supreme Court rejected it each time. *See Shaw,* 517 U.S. at 907-908, n.3; *Miller,* 515 U.S. at 919.

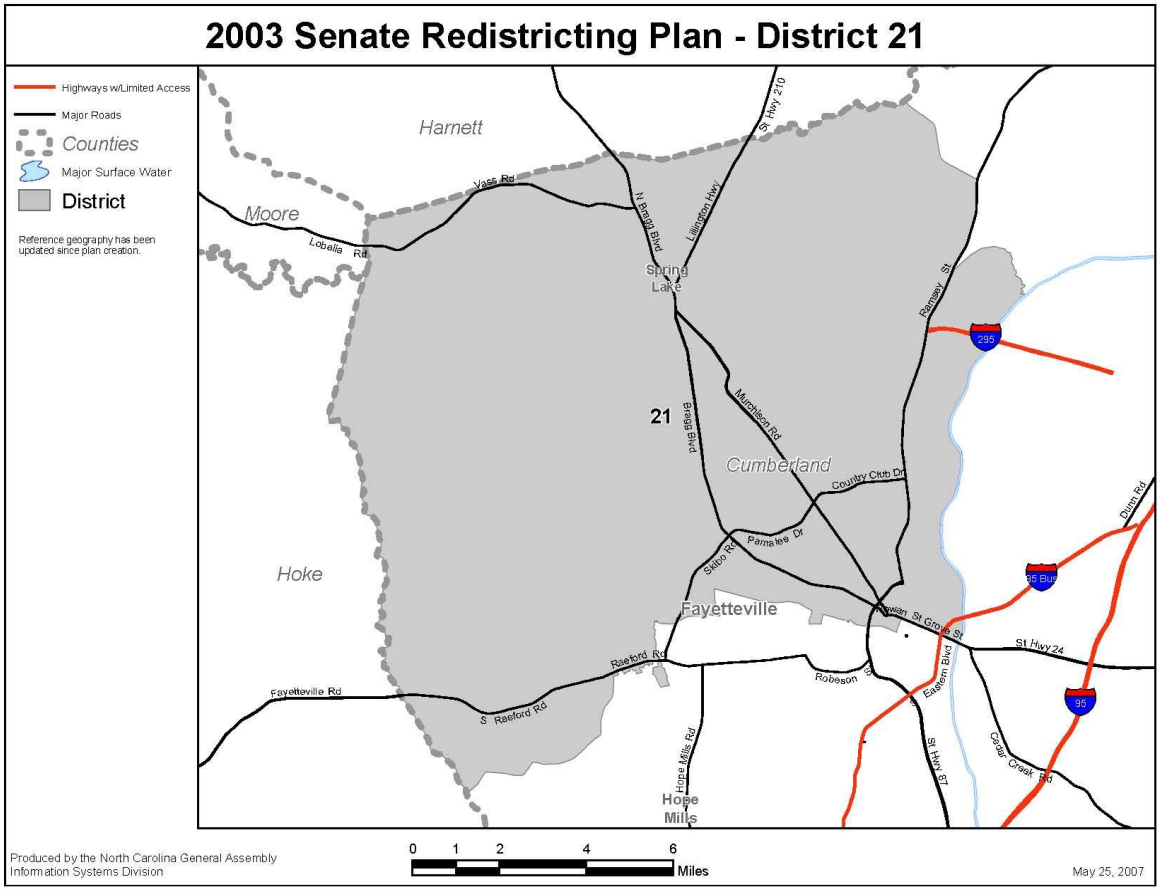
districts are contained in a single county: HD 29 and 31 in Durham, HD 33 and 38 in Wake, HD 42 and 43 in Cumberland, HD 57 and 60 in Guilford and HD 99, 102, 106 and 107 in Mecklenburg. Thus, compliance with the Whole County Provision cannot explain the irregular boundaries of those districts or, as a matter of law, preclude a finding that those districts are racial gerrymanders.

Second, for VRA districts located within two or more counties, Defendants' emphasis on maximizing the number of two county clusters may have had some impact on the counties in which the VRA districts were located, but race did not take a back seat to *Stephenson* in how those district lines were actually drawn. The dogged pursuit of districts with more than 50% TBVAP in numbers proportional to the State's Black population remained the goal that Defendants would not compromise. The victims of Defendants' efforts to shoehorn raced-based districts within specific sets of counties were the citizens of this State and traditional redistricting criteria.

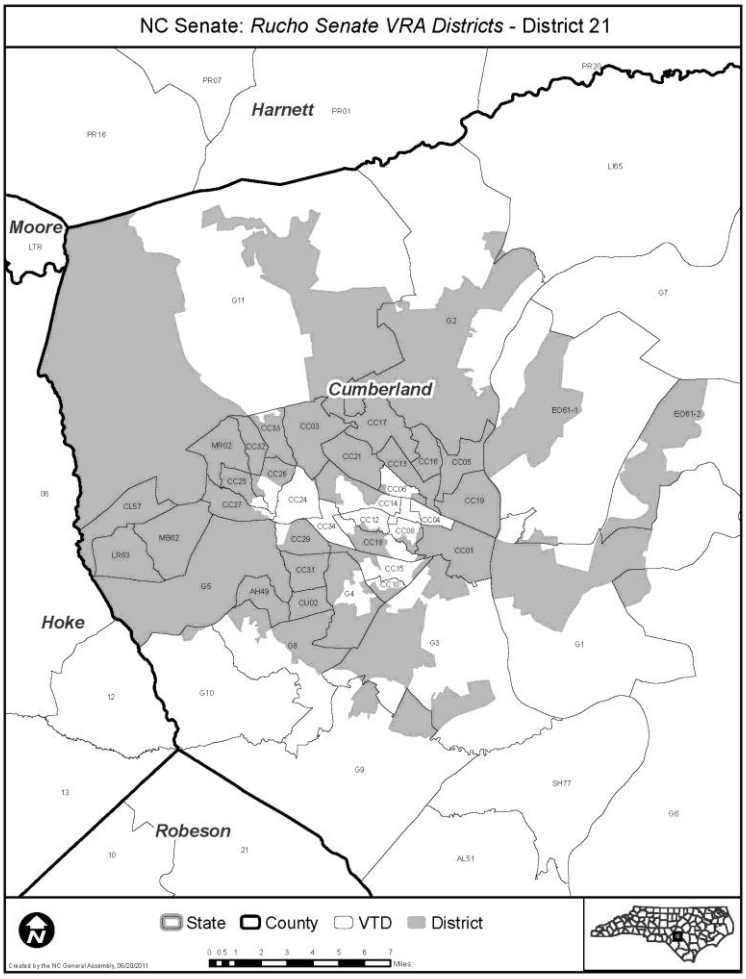
The extreme steps Defendants took to achieve their racial quotas in spite of *Stephenson* are illustrated by reviewing the evolution of SD 21. In the 2002 redistricting plan drawn by the *Stephenson* trial court and approved by this Court, SD 21 was located entirely in Cumberland County. It is depicted below:



In the 2003 plan drawn by the General Assembly, the shape and location of SD 21 was maintained. It is depicted below:

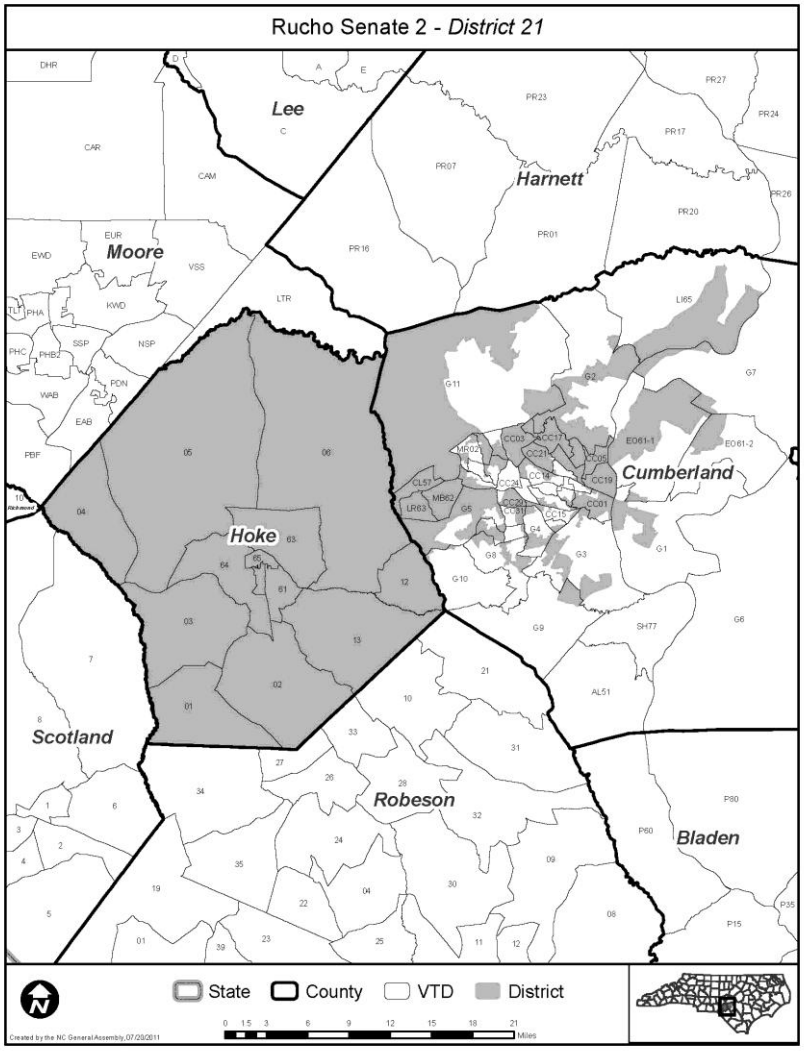


In the first version of SD 21 proposed in 2011, SD 21 was still located entirely in Cumberland County but its shape had become bizarre and 27 precincts were split in order to create a district with 50.08% BVAP. This version is depicted below:



As finally enacted, SD 21 was relocated to include all of Hoke County and part of Cumberland. Defendants' purpose in relocating SD 21 was to increase the

number of two county clusters to better comply, under their theory, with *Stephenson*. (Doc. Ex. 1986-87). This relocation, however, was not allowed to compromise Defendants' racial objectives. They in fact increased the BVAP from 50.03% in the first version to 51.53% in the enacted version, which required them to increase the number of split precincts from 27 to 33. SD 21 as enacted is depicted below:



The trial court's conclusion that race predominated in the drawing of these districts is consistent with the Supreme Court's holding in *Shaw v. Hunt*, 517 U.S. 899 (1996) and is well supported by all the evidence in the record. In *Shaw*, race was found to be predominant in the drawing of Congressional District 12 where "the General Assembly 'deliberately drew' District 12 so that it would have an effective voting majority of black citizens," *id.* at 905, and where the defendants "formally conceded that the state legislature deliberately created …[the district] in a way to assure black-voter majorities." *Id.* at 906. The Supreme Court concluded unequivocally that "[h]ere, as in *Miller*, 'we fail to see how the District Court could have reached any conclusion other than that race was the predominant factor in drawing the challenged district.'" *Id.* (citations omitted).

As the trial court found, "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." (R p 1277). Each VRA district also had to be at least 50% Black in voting age population. *Id.* Indeed, the General Assembly's map drawer calculated his proportionality table even before the census data had been released at the block level, and long before he or anyone else had made any examination whatsoever of whether there might be racially polarized

voting anywhere in the state severe enough to meet the three *Gingles* threshold factors. (Doc. Ex. 1943; T p 87). The trial court correctly concluded that "[t]his is a racial classification." (R p 1278).

Defendants argue that Plaintiffs have misstated the instructions provided to Mr. Hofeller. (Defs. Br. at 73 n.38). In fact, Senator Rucho and Representative Lewis directed Mr. Hofeller "to include in the House plan a sufficient number of majority African-American districts" to provide African-American citizens "with a substantial proportional and equal opportunity to elect their candidates." (Doc. Ex. 3087-89; 2362-63). Moreover, in a statement issued on 17 June 2011 announcing a public hearing on the Voting Rights Act districts, Senator Rucho and Representative Lewis recommended that any legislative redistricting plan for North Carolina include a sufficient number of majority African-American districts to provide substantial proportionality and stated 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." (Doc. Ex. 7726 PS83\Depositions\Exhibits\Exhibit 55 (Churchill)). The Defendants admit that the following districts were drawn "to provide African Americans with a roughly proportional opportunity to elect their preferred candidates of choice": House Districts 7, 12, 21, 24, 29, 31, 33, 38, 42, 43, 48, 57, 58, 60, 99, 102, and 107 (R p

257-311); and Senate Districts 4, 5, 14, 20, 21, 28, 32, 38 and 40. (R p 280-90). Finally, the irregular shapes of the challenged districts and the manner in which the district lines reach out to pick up pockets of African-American populations illustrate how the racial proportionality goal resulted in race predominating in the drawing of the districts. (Pls. Br., App. 8). There can be no doubt that racial proportionality was the driving force behind the creation of the districts challenged here.

II. DEFENDANTS HAVE FAILED TO SHOW THAT THEY STRICTLY COMPLIED WITH *STEPHENSON*

Defendants' position is that they were required to divide a significant number of counties in order to "create districts that can receive preclearance from USDOJ and withstand challenges under Section 2," and that "districts drawn to comply with the VRA, whether with section 2 or 5, must have a TBVAP of at least 50%." (Defs. Br. at 132, 134).

Under *Stephenson I*, a county may be divided only to the extent required by the Voting Rights Act. As the Supreme Court explained in *Stephenson II*:

> In *Stephenson I*, this Court harmonized the provisions of Article I, Section 2, 3 and 5, and the WCP of Article II, Sections 3(3) and 5(3) of the State Constitution 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 I*, 355 N.C. at 363-64, 562 S.E.2d

> at 384-85. Consistent with this premise and as the underlying redistricting standard set forth in *Stephenson I*, this Court stipulated: "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." *Id*. at 384, 562 S.E.2d at 397.

Stephenson v. Bartlett, 357 N.C. 301, 309, 582 S.E.2d 247, 251-52 (2003) (*Stephenson II*).

Moreover, *Pender County* places the burden upon the Defendants to prove that the Voting Rights Act required—not merely permitted—the division of a county. *Pender County*, 361 N.C. at 496, 649 S.E.2d at 367. Defendants cannot carry that burden. As Plaintiffs have explained, the Defendants' stated goal of proportionality is not required by the Voting Rights Act. (Pls. Br. at 40-59). Dividing counties to achieve proportionality does not constitute strict compliance with the WCP.

Nor does simple compliance with the Voting Rights Act itself justify the Defendants' excessive division of counties. As Plaintiffs have already explained, the Enacted 2011 House Plan contains seven (7) counties (Beaufort, Bladen, Duplin, Greene, Lee, Pasquotank, and Richmond Counties) that were kept whole in the 2002 House plan adopted by the Courts, as well as the 2003 and 2009 House plans adopted by the General Assembly, and did not contain a majority-minority

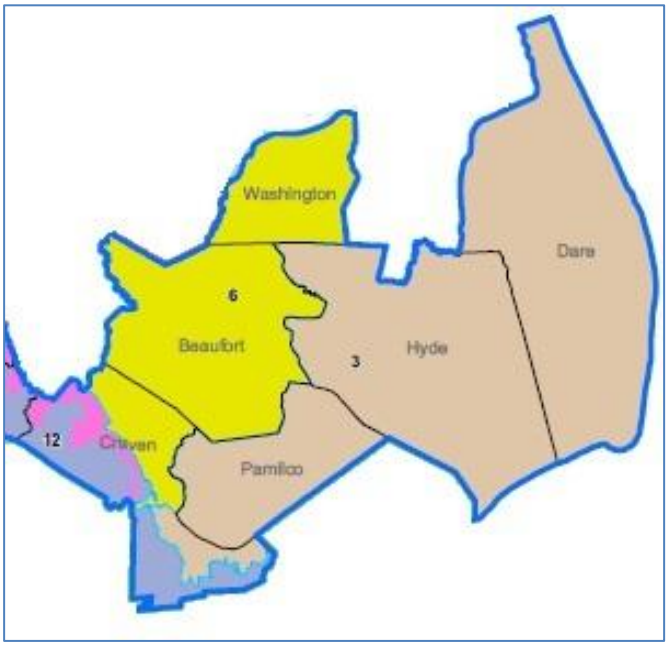
district.[7] (Pls. Br. at 124-37). Similarly, the Enacted 2011 Senate Plan contains two (2) counties (Lenoir and Wilson Counties) that were kept whole in the 2002 Senate plan adopted by the Courts and in the 2003 Senate plan adopted by the General Assembly, and did not contain a majority-minority district. (Pls. Br. at 138-42). The Courts in 2002 and the General Assembly in 2003 and 2009 determined that compliance with the Voting Rights Act did not require the division of any of those counties and that judgment proved correct. The United States Department of Justice precleared all six of those plans as consistent with the State's obligations under Section 5 of the VRA and no lawsuit was filed challenging any of those plans on Section 2 grounds. No change in the voting patterns of citizens that would justify dividing those counties to comply with the VRA has been offered by Defendants to meet their burden of strict compliance imposed on them by this Court in *Stephenson I* and *II* and the burden of proof imposed on them by this Court in *Pender County*.

Using Beaufort County as the example, Defendants do offer vague one-person, one-vote explanations for divided counties. (Defs. Br. at 131). An

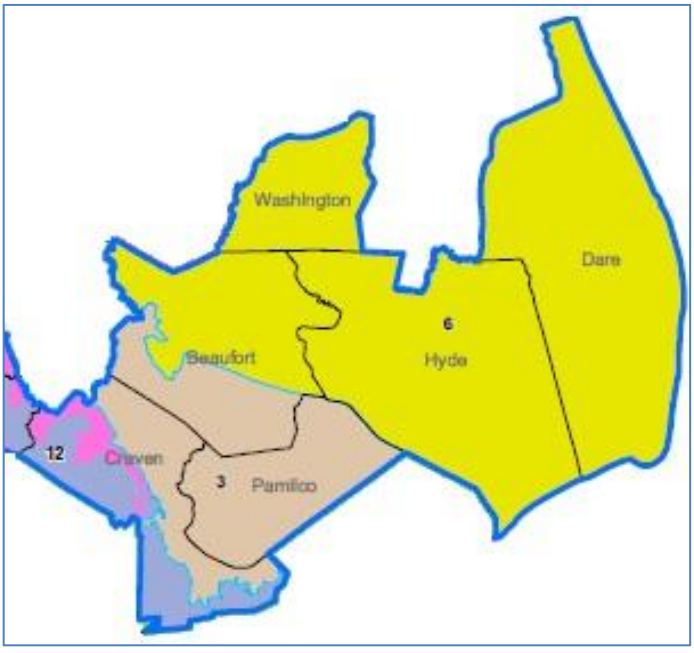
[7] Five of those 7 counties (i.e., Beaufort, Bladen, Lee, Pasquotank, and Richmond) had never been divided in any prior enacted House plan, nor had they ever contained a majority-minority district in any prior enacted House plan. Pls. Br. at 124-37.

examination of the uncontroverted evidence in the record demonstrates that politics, not the law, explains the division of Beaufort. In a prior draft of the House Plan (Lewis-Dollar-Dockham 2), Beaufort County was kept whole, as were Dare, Hyde, Washington, and Pamlico Counties. In the Enacted House Plan (Lewis-Dollar-Dockham 4), Defendants re-arranged the House Districts containing those counties (*i.e.*, House Districts 3 and 6), and Defendants then proceeded to split Beaufort County. A comparison of the draft map and the enacted map is set forth below.

Lewis-Dollar-Dockham 2



Enacted House Plan



Representative Lewis was asked at his deposition to explain the reason for dividing Beaufort. He answered that "politics' explained that division. (Pls. Br. at 125-26;

Doc. Ex. 2379). Thus, Defendants did exactly what *Stephenson* sought to prevent—they split counties for reasons of political expediency.

In summary, Defendants have relied upon a hyper-technical reading of the *Stephenson* criteria in order to flout the spirit and purpose of the *Stephenson* decisions. This Court should find that the Defendants have failed to strictly comply with the *Stephenson* criteria and prove that all departures from strict compliance were required by the VRA, properly interpreted.

III. DEFENDANTS' ARGUMENT THAT COMPACTNESS HAS NO CONSTITUTIONAL FOUNDATION IGNORES BASIC EQUAL PROTECTION PRINCIPLES

Defendants' position regarding compliance with compactness is similar to their position regarding compliance with the Whole County Provision of the Constitution. Once Defendants maximized the number of groups of counties in a redistricting plan they had fully met their obligations both to keep counties whole and to keep districts compact. *See* Defs. Br. at 141-42 ("traditional redistricting criteria such as compactness are upheld by adhering to the county grouping and traversal rules from *Stephenson*"). This argument is illogical. It allows the General Assembly to draw districts within a county grouping without any concern for either

compactness or county boundaries.[8] More importantly, it ignores basic equal protection principles protecting the fundamental right to vote.

Under basic equal protection principles, any legislative classification that adversely affects the right of citizens to vote on an equal basis is unconstitutional unless it is justified by a compelling governmental interest narrowly tailored to serve that interest. *Stephenson I* , 355 N.C. at 378, 562 S.E.2d at 393 ("It is well settled that "the right to vote on equal terms is a fundamental right."); *Blankenship v. Bartlett,* 363 N.C. 518, 522, 681 S.E.2d 759, 762-63 (2009) ("The right to vote on equal terms in representative elections…is a fundamental right."); *Libertarian Party v. State*, 365 N.C. 41, 53, 707 S.E.2d 199, 207 (2011) ("A burden on a fundamental right is permissible only when the State succeeds in demonstrating that the burden is narrowly tailored to further a compelling interest.") (Newby, J., dissenting).

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[8] In their brief Defendants do recognize the mandatory compactness language used by this Court in *Stephenson I* for non-VRA districts. *See Stephenson I*, 355 N.C. at 383, 562 S.E.2d at 397 ("Such non-VRA districts shall be compact"). They contend, however, that this language is not applicable in this case because all non-compact, non-VRA districts challenged by Plaintiffs here are contained within the same county grouping as non-compact, VRA districts. *See* Defs' Brief at 142. In other words, Defendants appear to argue that they had a compelling interest in drawing non-compact VRA districts and that this interest in turn constituted a compelling justification for drawing neighboring non-compact, non-VRA districts. No authority is cited for either of these remarkable propositions. Precedent is to the contrary. The Supreme Court has held that the VRA 'does not require a State to create, on predominately racial lines, a district that is not reasonably compact." *Bush v. Vera*, 517 U.S. at 979.

The plans drawn by Defendants created two classifications of voters: those assigned to compact districts and those assigned to non-compact districts. Voters in non-compact districts do not have the opportunity to exercise their vote on equal terms with voters in compact districts. Record evidence not refuted by Defendants establishes that voters assigned to non-compact districts are less likely to know who their representatives are than voters in compact districts and thus are disadvantaged in petitioning their representatives for redress of grievances, a right secured by Article I, sections 9 and 12 of the Constitution. (Doc. Ex. 3322-36). Additionally, citizens in non-compact districts are disadvantaged because their votes are more likely not to be counted than the votes of citizens in compact districts. Record evidence establishing that election administrators misassigned large numbers of voters in non-compact districts has not been refuted by Defendants. (Doc. Ex. 3284).

Defendants also argue that Plaintiffs' comparison of districts found non-compact in *Stephenson II* and Defendants' 2011 districts as a means of demonstrating that the 2011 districts are not compact is an "apples-to-oranges" comparison because the 2002 plans "predate the most recent *Stephenson* decision requiring VRA districts to be drawn at a level of TBVAP of 50%." (Defs. Br. at

142).[9] This is disingenuous at best. The boundaries of the State and its 100 counties and the requirement for 120 House districts, 50 Senate districts, and 13 Congressional districts have not changed since *Strickland*, and *Strickland* cannot be read to justify the drawing of non-compact VRA districts or neighboring non-compact, non-VRA districts.

Finally, Defendants argue that Plaintiffs have failed to enunciate a judicially-manageable standard for *compactness*. This is not so. Plaintiffs simply ask this Court to apply the same standards in 2014 that it used in 2003 in *Stephenson II* when it declared that districts had to be redrawn because they were not compact.

IV. THE SCOPE OF THE GENERAL ASSEMBLY'S DISCRETION DOES NOT INCLUDE DIVIDING PRECINCTS ON RACIAL GROUNDS

Defendants take the position that "there is nothing in the Constitution prohibiting the General Assembly from dividing every VTD in the State of North Carolina if it chooses to do so." (Defs. Br. at 151). This bold assertion of unlimited power ignores the undisputed facts before the Court and the legal consequences of those facts.

[9] This argument is unfounded because, as described above, *Bartlett v. Strickland* does not require 50% TBVAP districts absent a Section 2 violation.

Mr. Hofeller, the architect of the challenged districts, testified that dividing precincts was the tool that allowed him to draw majority Black districts in unprecedented numbers. (Doc. Ex. 2153-61). The residences of Black citizens within those precincts determined the path of the line Hofeller chose to draw to assign mostly Black voters to majority Black districts and mostly white voters to adjoining non-majority Black districts. Just as the assignment of voters to districts predominantly on the basis of race constitutes a racial classification, so too does dividing precincts on racial lines to create those race based districts constitutes a race based classification. Just as there was no constitutionally sufficient justification for drawing race-based districts, so too there was no constitutionally sufficient justification for dividing precincts on the basis of race to create those race-based districts.

V. CONCLUSION

For the foregoing reasons and those in Plaintiffs' opening brief, Plaintiffs respectfully renew their requests for relief as sought in their opening brief and specifically pray that the Court remand these cases with directions that new House, Senate and Congressional districts be enacted by the General Assembly, or, if necessary, ordered by the court, as provided by N.C.G.S. § 120-2.4, so that such new districts are in place and used in the 2014 elections for those offices.

This the 23rd day of December, 2013.

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