EXHIBITS TO THE DEPOSITION OF J. MORGAN KOUSSER, PH.D.


By J. Morgan Kousser
# Table of Contents

<table>
<thead>
<tr>
<th>Section Title</th>
<th>Page Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Aims and Methods</td>
<td>3</td>
</tr>
<tr>
<td>II. Abstract of Findings</td>
<td>3</td>
</tr>
<tr>
<td>III. Credentials</td>
<td>6</td>
</tr>
<tr>
<td>IV. A Short History of Racial Discrimination in North Carolina Politics</td>
<td></td>
</tr>
<tr>
<td>A. The First Disfranchisement</td>
<td>8</td>
</tr>
<tr>
<td>B. Election Laws and White Supremacy in the Post-Civil War South</td>
<td>8</td>
</tr>
<tr>
<td>C. The Legacy of White Political Supremacy Hung on Longer in</td>
<td>13</td>
</tr>
<tr>
<td>North Carolina than in Other States of the “Rim South”</td>
<td></td>
</tr>
<tr>
<td>V. Democratizing North Carolina Election Law and Increasing Turnout, 1995-2009</td>
<td></td>
</tr>
<tr>
<td>A. What Provoked H.B. 589? The Effects of Changes in Election Laws</td>
<td>17</td>
</tr>
<tr>
<td>Before 2010</td>
<td></td>
</tr>
<tr>
<td>B. The Intent and Effect of Election Laws Must Be Judged by their Context</td>
<td></td>
</tr>
<tr>
<td>1. The First Early Voting Bill, 1993</td>
<td>23</td>
</tr>
<tr>
<td>2. No-Excuse Absentee Voting, 1995-97</td>
<td>24</td>
</tr>
<tr>
<td>4. An Instructive Incident</td>
<td></td>
</tr>
<tr>
<td>and Out-of-Precinct Voting, 2005</td>
<td>27</td>
</tr>
<tr>
<td>5. A Fair and Open Process:</td>
<td></td>
</tr>
<tr>
<td>Same-Day Registration, 2007</td>
<td></td>
</tr>
<tr>
<td>6. Bipartisan Consensus on</td>
<td></td>
</tr>
<tr>
<td>16-17-Year-Old-Preregistration, 2009</td>
<td></td>
</tr>
<tr>
<td>VI. Voter ID and the Restriction of Early Voting: The Preview, 2011</td>
<td></td>
</tr>
<tr>
<td>A. Constraints</td>
<td>34</td>
</tr>
<tr>
<td>B. In the Wings</td>
<td>34</td>
</tr>
<tr>
<td>C. Center Stage: Voter ID</td>
<td>35</td>
</tr>
<tr>
<td>VII. H.B. 589 Before and After <em>Shelby County</em></td>
<td></td>
</tr>
<tr>
<td>A. Process Reveals Intention</td>
<td>37</td>
</tr>
<tr>
<td>B. Facts</td>
<td></td>
</tr>
<tr>
<td>1. The Extent of Fraud</td>
<td>39</td>
</tr>
<tr>
<td>2. The Disproportionate Use of Same-Day Registration,</td>
<td></td>
</tr>
</tbody>
</table>
Out-of-Precinct Voting, and Early Voting, Particularly Sunday Voting, by African-Americans 40
3. The Disproportionate Lack of Identification Documents Among Minorities 40
C. Justifications for and Criticisms of H.B. 589 41
1. Fraud 42
2. Lack of Confidence 44
3. Expense 45
4. Efficiency and Uniformity 46

VIII. H.B. 589 and the “Senate Factors” 47
A. Modifications in the Senate Factors for this Case
B. The Evidence Arrayed under the Rubrics of Relevant Factors
1. History of Official Discrimination 48
2. Racially Polarized Voting 49
3. Enhancing Provisions 50
4. Candidate Slating Processes 51
5. The Current Effects of Past Discrimination 52
6. Racial Appeals 53
7. The Election of Minority Group Members 53
8. Unresponsiveness 54
9. Tenuous Policy 56

IX. The Intent of H.B. 589 56
A. Reasons, Scrutinized Reasons, and Motives
B. H.B. 589 and Ten “Intent Factors”
1. Models of Human Behavior 57
2. Historical Context 58
3. Text of Law or Lines of Districts 58
4. Basic Demographic Facts 63
5. Climate of Racial Politics 63
6. Background of Key Decisionmakers 63
7. Other Actions of Key Decisionmakers 64
8. Statements by Important Participants 65
9. State Policies and Institutional Rules 65
10. Impact 65
C. Alternative Explanations Tested
1. A Response to Fraud 66
2. Restoration of Confidence 66
3. Economy, Efficiency, and Uniformity 67
4. Partisanship and Racial Discrimination 67
I. Aims and Materials

I was asked by the plaintiffs in this case to gather and analyze evidence to determine whether three provisions of the 2013 North Carolina election law, known as H.B. 589, were adopted with a discriminatory intent and whether those provisions would deny minority voters "an equal opportunity to participate in the political processes and to elect candidates of their choice," in the phrase of the 1982 Senate Report on the Voting Rights Act. The three provisions are those eliminating a week of early voting, ending same-day registration during the "early voting" period, and prohibiting "out-of-precinct" voting.

The following report is based on transcripts of the legislative hearings and floor debates, bill histories and other legislative documents available on the state legislature's website and from printed sources, newspaper articles, reports from various public and private groups and agencies, public opinion polls, scholarly studies, and materials that I have used in previous published and unpublished work. These documents notably do not include depositions or internal records of the legislature, which have been of considerable use to me in analyzing similar events in other states. If any other documents become available subsequent to my completion of this report, I will examine them and either produce additional reports or supplement this one. I may also look at expert reports produced by witnesses from parties to the lawsuit. As is the scholarly custom, I have footnoted this document extensively so that the reader can assess the credibility of my arguments and evidence.

II. Abstract of Findings

After introducing my credentials, I begin with a short history of racial discrimination in North Carolina politics not merely to document the fact of that history, but also to point out parallels between earlier periods and today's discrimination. Politicians who were elected overwhelmingly by white votes faced threats from black voters in the past, and their restructuring and manipulation of election laws to put down those threats throws an important light on the actions of the sponsors of H.B. 589. From 1867 through at least the 1930s, the Democrats were the "white party" in North Carolina, and their partisan and racial interests coincided: they successfully disfranchised the core constituency of the "black party," then the Republicans. Although partisan and racial motives for the passage of election laws in North Carolina before 1965 were inextricably intertwined, historians have not hesitated to attribute racial motives to the framers of such laws. Disavowals of racial intent during the debates over H.B. 589 and the possible defense of the law as inspired by partisan, rather than racial, goals

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1S. Rep. 97-417, 28-29 contains the language and sets out the seven "Senate Factors" that I will address.

2The state of Texas has made such an argument in its brief in the current redistricting
should be interpreted in the context of the state’s specific history of framing election laws primarily to enforce racial discrimination.

“Free men of color,” like other freemen, could vote from the time when North Carolina entered the union until the state constitutional convention of 1835, when the word “white” was inserted into the suffrage article. After slavery ended, the period from the disfranchisement of southern blacks by the Reconstruction Act of 1867 through 1900 witnessed the highest participation by African-American voters in the state’s history, and they were as central to the 19th century Republican coalition as they are to the 21st century Democratic coalition. In 1894, North Carolina Republicans swept the legislature, in coalition with Populists and the Populist-Republican “Fusionists” won the governorship in 1896. One of their first acts on taking power was to replace the Democrats’ anti-democratic election laws with the most liberal election law in the South at the time. When Democrats violently wrested power from the Republicans in the “white supremacy campaign” of 1898, one of their first acts was to make drastic changes in the Fusion election law. These changes allowed Democratic election officials — not individual voters — to stuff enough ballot boxes to carry the 1900 disfranchisement amendment, instituting a poll tax and a literacy or property test that almost completely eliminated blacks from the state’s politics for two generations. The greatest and most blatant electoral fraud in the state’s history, facilitated by election laws that gave one party total control of the election machinery, was necessary to establish a new racially discriminatory political order.

I then bring the story up to 2011 in three steps. First, I show that North Carolina was tardy, compared to many other “Rim South” and even some Deep South states in beginning to emerge from the Jim Crow/Disfranchisement Era. After 1900, it was not usually necessary for the Democratic party or even individual Democratic politicians to profess their devotion to white supremacy and black suppression shrilly. Everyone understood that the political order in the state rested on keeping African-Americans largely powerless. A smaller percentage of African-Americans were registered to vote in North Carolina in 1948 than in Georgia. When a Democratic candidate for the U.S. Senate, Frank Graham, appeared to threaten that consensus in 1950, he was race-baited and soundly thrashed in the Democratic primary.

A second phase followed the passage of the Voting Rights Act in 1965. As more blacks registered to vote and as legislative districts were required to be equal in population, other electoral rules — racial gerrymandering and at-large elections — intentionally kept them from attaining power proportionate to their numbers in the electorate. By the mid-1980s and the 1990s, these rules began to be successfully attacked by Voting Rights Act lawsuits and, at the same time, the Republican party, a party now based almost entirely on white votes, became competitive in the state for the first time since 1900, reemerging on the strength, among other things, of Jesse Helms’s strongly racist campaign appeals.

As the Democratic base darkened and the Republican threat increased, Democrats reversed the state’s historical stance of black voter suppression to pass a series of expansionary laws from 1999 through 2009 which dramatically expanded turnout, especially black turnout. Through a series of measures – pre-election day voting (hereinafter called “early voting”), same-day registration during the early voting period, counting votes that happened to be cast in the wrong precinct on election day, and encouraging the participation of young people in voting – the state managed to climb from 48th to 11th in the percentage of voting-age citizens who actually voted. The process of passing those measures, which became very popular with the state’s newspapers and voters, was deliberate and allowed opponents plenty of time and space to object. There were no credible charges of more than minuscule fraud even levied against the expansive voting rules, and when in 2007 State Auditor Les Merritt found some anomalies in state registration rolls, he quickly retreated when State Elections Board Executive Director Gary Bartlett explained to him how to interpret state registration records correctly.

Nonetheless, when a Republican landslide swept them into control of the statehouse and both houses of the state legislature in 2010, for the first time since 1898, Republicans charged that either vote fraud was rife or that the electors were disfranchised because they imagined that it might be rife, and that therefore a photo identification law was needed. Although some Republicans want to repeal all of the expansive laws that had been passed since 1999, one of which many Republicans had supported, a bill to accomplish this was shelved after passing the House. The prospects that such a law would survive the preclearance process of the Department of Justice, even if it avoided a veto by Democratic Governor Bev Perdue, and the fear that its obviously retrogressive effect on African-Americans would further taint a photo ID law apparently kept it bottled up in committee.

An even larger Republican majority in the legislature, greatly assisted by a redistricting that further packed blacks into districts that they had shown they were capable of carrying with white crossover votes, plus the election of the first Republican governor in 18 years emboldened Republicans, who pushed a photo ID bill through the 2013 House. They left in committee a more comprehensive bill that repealed the previous expansive measures, neither holding hearings on it nor bringing a bill to the floor and to public discussion. But on June 25, 2013, the U.S. Supreme Court struck down Section 4 of the Voting Rights Act in Shelby County v. Holder, 133 S.Ct. 2612 (2013), relieving North Carolina of the necessity of preclearing changes in election laws with the Department of Justice or the District Court of the District of Columbia. At that point, Republicans framed a new, much larger bill, containing all of their anti-participation wish list items, which they sprang on the public and the legislature in late July and passed in two days without hearings and with absolutely minimal Republican participation in debate.

Republicans passed the new, more comprehensive H.B. 589 with the full knowledge, in well-documented public sources, that: 1) there had been virtually no provable voter fraud in the recent history of the state; 2) each of the four major measures – photo ID, cutting down early voting, particularly Sunday voting, and ending same-day registration during the early voting period, and refusing to count votes cast outside of the voter’s precinct – would disproportionately
burden African-American voters. Democrats, public policy groups, activists, and newspapers loudly repeated the same charges. Republicans made no compromises with their critics after June 25; indeed, they greatly strengthened the suppressive effect of the bill’s provisions. There was no scandal or crisis — an incident of ballot box irregularity or a Bush-Gore controversy, for example — that provoked such a radical response as H.B. 589. The only validated reason for its passage was the threat to the Republican Party that too many minority and college student voters posed. It must be concluded that the majority of the legislature and the governor pushed the bill precipitately through the legislature because of, and not just in spite of — and certainly not unaware of — its racially discriminatory effects.

After presenting the pre-history and history of H.B. 589, I extract from that analytical narrative information relevant to the “Senate Factors” necessary for proof of a violation of Section 2 of the Voting Rights Act and to ten “intent factors” drawn largely from federal court opinions in voting rights cases. I conclude that there is strong evidence both for many of the “Senate Factors” of a Section 2 effect test and for a discriminatory intent under Section 2 or the Reconstruction amendments.

III. Credentials

I am the William R. Kenan, Jr. Professor of History and Social Science at the California Institute of Technology. I received my A.B. summa cum laude from Princeton University in 1965 and my Ph.D. from Yale University in 1971. Except for sabbatical years, I have taught at Caltech since 1969. I have also been a visiting professor at Michigan, Harvard, Oxford, and Claremont Graduate University.

I have published three books and edited another, in addition to 44 scholarly articles, 80 book reviews, and 24 entries in reference works. My work has focused on minority voting rights, educational discrimination, race relations, political history, and quantitative methods. I was executive editor of the journal Historical Methods, which specializes in interdisciplinary and quantitative history, from 2001 to 2013. One of my most recent articles, “The Strange, Ironic Career of Section Five of the Voting Rights Act, 1965-2007,” published in the Texas Law Review, was the first comprehensive history of the crucial provision’s first 42 years.

My dissertation and first book, The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910 (Yale University Press, 1974), which was termed “the definitive monograph on the establishment of the one-party system in the postwar South” by the late David Donald of Harvard, concerned the connection between party politics and the disfranchisement of African-Americans and poor whites in the late 19th and early 20th century South. 3 A substantial part of one chapter of that book, a section titled “North Carolina:

3 More recently, it has been referred to as “still magisterial.” Richard H. Pildes, “Foreword: The Constitutionalization of Democratic Politics - The Supreme Court 2003 Term,” 118 Harvard
Disfranchising ‘Low-Born Scum and Quondam Slaves,’” analyzed the threat that the 1890s Populist-Republican fusion movement in North Carolina posed to white supremacist Democrats and the crucial role of changes in election laws in putting down that threat. An article in The Journal of Southern History specified the racial and class consequences of disfranchisement for the state’s public policy by showing how educational expenditures were dramatically shifted away from black and poor white children after their fathers lost the right to vote.4

I returned to the topic of racial discrimination in North Carolina politics in a law review article5 that was the basis for a chapter titled “A Century of Electoral Discrimination in North Carolina” in my later book, Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction (University of North Carolina Press, 1999), which was the co-winner of the Lillian Smith Award of the Southern Regional Council and the Ralph J. Bunche Award of the American Political Science Association. That article and chapter derived from an expert witness report that I had written as part of the case for the NAACP Legal Defense Fund in Shaw v. Hunt 517 U.S. 899 (1996), the second round of the decade-long litigation about the 1991-92 congressional redistricting in North Carolina.

I have previously testified or consulted in 25 federal voting rights or redistricting cases and seven state cases (in Alaska and California), as well as before Congress on revisions of the Voting Rights Act in 1981. In seven federal cases, such as the 2002 California state redistricting case, Cano v. Davis, 191 F.Supp. 2d 1135 (C.D. Cal. 2002), and in six cases brought under the 2002 California Voting Rights Act, the sources of my testimony have been primarily quantitative. Among the most significant of those cases were the two 2012 Texas redistricting cases, Perez v. Perry, 835 F.Supp. 2d 209 (W.D. Tex., San Antonio Div. 2012) and Texas v. U.S. (C.A. No. 1:11-cv-01303, D.D.C. 2012).

Other cases in which I have appeared as an expert, such as the case of City of Mobile v. Bolden, 542 F. Supp. 1050 (S.D.Ala. 1982), concerned whether at-large systems of voting were adopted or maintained with a racially discriminatory intent or whether they had discriminatory effects. Cases such as Garza v. Los Angeles County Board of Supervisors, 756 F. Supp. 1298 (C.D. Cal., 1990), aff’d, 918 F.2d 763 (9th Cir. 1990), cert. denied, 111 S. Ct. 681(1991), involved questions of “racial gerrymandering.” My testimony on the racial intent of those who redistricted the Los Angeles County Board served as the basis for the district and appeals court decisions on that issue in Garza, and their opinions on intent provided the framework for the Justice Department’s standard objection letter on the grounds of discriminatory intent under Section 5 of the Voting Rights Act during the 1990s. The Garza decision led directly to the election of Gloria

LR 28 (2004), 60, n. 139.


Molina, the first Latino to be elected to the Los Angeles County Board of Supervisors since 1875. My Garza report was expanded into a 141-page law review paper, “How to Determine Intent: Lessons from L.A.”

IV. A Short History of Racial Discrimination in North Carolina Politics

A. The First Disfranchisement

From the state’s first constitution in 1776 until its second in 1835, “free men of color” who met the state’s general property qualifications for voting had the right to vote in North Carolina, because there was no explicit racial restriction. Even though the black vote was small, a petition from New Bern claimed that during “the heat of party contests,” free blacks “are courted and caressed by both parties and treated apparently with respect and attention.” In Cumberland County in the early 1830s, a legislative election was allegedly determined by African-American votes. During the state’s 1835 constitutional convention, some delegates expressed the fear that there might eventually be black majorities of voters in some towns and counties unless the word “white” was explicitly inserted as a qualification. Despite the fact that several prominent leaders, including former Governor, Senator, and Secretary of the Navy John Branch, favored allowing black freemen who owned $250 worth of property (a substantial sum at the time) to continue to vote, in the hopes that they would ally themselves with whites, instead of slaves, the convention banned black suffrage entirely by the close vote of 64 to 61. James Bryan of Carteret County introduced the issue of fraud, claiming that the free African-American was “the tool of the ambitious and designing demagogue,” thereby increasing the “sources of corruption” in the electorate. Future state attorney general Hugh McQueen apparently expressed the sense of the majority of the (all-white) convention delegates, saying of the African-American that “he came here debased, he is yet debased, and there is no sort of polish which education or circumstance can give him, which ever will reconcile the whites to an extension of the right of suffrage” to blacks.

B. Election Laws and White Supremacy in the Post-Civil War South

It was not so easy to disfranchise African-Americans after the passage of the Fifteenth Amendment in 1870. Since explicitly racial disfranchisement was thenceforth illegal, more subtle election laws became the favorite weapons of white supremacists.

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8Quoted in Ford, Deliver Us From Evil, 430.
In an event with close recent parallels, less than two years after the ratification of the Fifteenth Amendment, the Democrats, who had attained a majority in the North Carolina legislature through extensive violence and intimidation against black and white Republicans, packed African-Americans into the “Black Second,” the only congressional district in the South during the era to have its own published biography.\textsuperscript{10} The compact southeastern Second District drawn by the Republicans in 1867 had contained a small white majority, a total population that was eight percent below that of the ideal in the state, and had only twenty percent more black citizens than could be expected if the state’s black population had been divided equally in the nine congressional districts.\textsuperscript{11} From the Democratic reapportionment of 1872 until disfranchisement in 1900, the district contained substantial black majorities, from ten to eighteen percent more total population than the average district in the state and, most important, it had approximately twice the number of blacks as an equal division would have dictated. Since the other districts were “stacked” to insure that there was no black majority, the apportionment effectively confined black control in a state that was approximately a third African-American to a maximum of one district in eight or nine (depending on the total population in the decade), and minimized black influence and Republican representation in all the other congressional districts. Republican Governor Tod Caldwell described its shape as “extraordinary, inconvenient and most grotesque.”\textsuperscript{12} Nineteenth century transportation and communication made the district much less accessible than any district in North Carolina today. Democrats also extensively gerrymandered state legislative and city districts to undermine black political power in the state during this period.\textsuperscript{13} The 2011 packing of African-Americans into the state’s legislative districts to minimize black and Democratic influence faithfully followed the state’s “traditional districting principles” of the late 19th century.\textsuperscript{14}

\textsuperscript{10}Eric Anderson, Race and Politics in North Carolina, 1872-1901: The Black Second (Baton Rouge, LA: Louisiana State Univ. Press, 1981). Other notorious discriminatory racial gerrymanders of congressional districts in the South after Reconstruction included the “shoestring district” in Mississippi, the Black Belt Fourth District in Alabama, and the “boa constrictor” Seventh District in South Carolina. On these districts, see Kossuer, “How to Determine Intent,” 598-606.


\textsuperscript{12}Quoted in Anderson, Black Second, 3.


\textsuperscript{14}Editorial, CO, July 9, 2013: “That’s what Republicans did in 2011 by packing minorities into a handful of districts - including Rep. Mel Watt’s 12th District - and making surrounding districts more white and friendly to GOP candidates. Republicans also split voting districts - and even split single counties into multiple voting districts - in order to give themselves an electoral advantage.” See also Anne Blythe, “NAACP, others appeal GOP-created districts - Voter-rights
Racial gerrymandering notwithstanding, post-Civil War Republicans kept the state competitive long after the so-called “end of Reconstruction” in 1877. In the five gubernatorial elections from 1880 through 1896, Democrats never won more than 53.8% of the vote, and Republican Daniel L. Russell took the governorship in 1896, following up an off-year legislative landslide for the Populist-Republican Fusion ticket. Turnout was very high, averaging over 80% of the total adult males in those five elections. In the 1896 gubernatorial election, approximately 87% of the adult male African-Americans and a similar percentage of whites are estimated to have turned out to vote – the highest level of any election in the post-Reconstruction South and a turnout that would be considered amazing today.15

The Populist-Republican Fusion movement that controlled the North Carolina legislature from 1894 until 1898 was the most successful biracial political movement in the post-Reconstruction South. Despite the fact that African-Americans comprised only 28 percent of the state’s adult males, they accounted for an estimated 43 percent of Gov. Russell’s votes in 1896. That only five of the state legislators were black may not seem very impressive until one realizes that this was half of the total number of black legislators in the eleven states of the ex-Confederate South combined in 1896 and 1898.

Responsive to their black and poor white core, the Fusionists in the legislature put through a remarkably (small-d) democratic program. To keep Republicans from electing local officials, Democrats had made all county offices appointive by the state legislature.16 The Fusion legislature restored local elections. Democrats had leased the state-owned railroad to J.P. Morgan’s Southern Railway for 99 years. Republican Governor Russell attacked the lease. Democrats had starved public services. Fusionists substantially increased appropriations for education from the elementary to the college level and increased taxes on businesses and railroads to pay for better schools and charitable institutions. In response, businessmen and denominational colleges strongly backed the Democrats’ “white supremacy” campaign of 1898.17

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15Shaping of Southern Politics, 183.
16Unhappy with the county election districts drawn by local citizens and governing bodies in four counties, apparently because they were insufficiently favorable to Republicans, the 2011 North Carolina legislature intervened in what was usually the local task of redistricting county commissions and redrew districts by state legislative act in Mecklenburg, Guilford, Buncombe, and Lenoir counties. See “Lawmakers leave town after new maps, overrides,” Rocky Mount Telegram, July 28, 2011. The Mecklenburg County-based CO declared editorially that the legislature’s last-minute move “violated every principle of good government” by rejecting a proposed map that a bipartisan citizens’ commission “had spent months crafting.” “Disrespecting voters, in name of politics - Legislature erases Mecklenburg residents’ say on redistricting,” CO, July 29, 2011.
17Shaping of Southern Politics, 184-87.
Most strikingly, the Fusionists replaced an 1889 Democratic law that increased barriers to voter registration with what was probably the fairest, most democratic election law in the post-Reconstruction South. Recognizing that election officials were the principal sources of election fraud, the Fusionist statute required each county clerk to appoint one election judge from each party and to allow all of the judges to be present during the counting of ballots. To prevent the clerk from appointing incompetents from parties other than his own, each local party chairman actually nominated his own party’s representative. To end disfranchisement by deliberate delays in large precincts, the clerk had to set up a voting place for every 350 voters. To debar registrars from illegally and capriciously disqualifying voters, the Fusionists strictly limited the registrars’ powers. To eliminate repeated partisan challenges against voters, the legislature put the burden of proof on the challenger, rather than the voter. Finally, to make voting easier for illiterates, the 1895 law allowed colored ballots and party emblems on the ballots.18

The election law did not save the Fusionists from an onslaught of racist oratory, violence, and openly-admitted ballot box fraud that was barely sufficient to carry a Democratic majority of the statewide vote, as recorded, in 1898. As the Raleigh News & Observer, edited by future Woodrow Wilson cabinet member Josephus Daniels, expressed the Democratic view of what it called the “White Supremacy Campaign”:

Shall low-born scum and quondam slaves
Give laws to those who own the soil?
No! By our gransires' bloody graves,
No! By our homesteads bought with toil.19

Realizing that they were not safe yet, Democrats planned to submit a constitutional amendment that would have the effect of disfranchising Republicans, particularly African-Americans, in 1900.20 But to insure passage of the amendment, they had first to repeal and replace the Fusionist election law. The 1899 law that passed the legislature with every Populist and Republican in vehement opposition and all but two Democratic members in favor stripped appointment of election officers from local officials and placed it in the hands of a state election board selected by the Democratic General Assembly.21 To negate the liberal registration provisions of the Fusionist law, the new Democratic law required every voter to re-register and gave registrars leeway to disfranchise anyone they wished to. Finally, at a time when election

19 Raleigh News and Observer (hereinafter N&O), Nov. 6, 1898.
20 Shaping of Southern Politics, 190.
ballots were printed by the parties and brought to the polls, instead of being provided at the polls by the state, the law provided that any ballot placed in the wrong box—there were six—whether by election officers or the voter himself, would be void.22

The constitutional amendment, which contained a poll tax and required registrants to pass a literacy test or to own a certain amount of property, with a very temporary grandfather clause inserted in order to attract votes from lower-class whites, passed the General Assembly with all but five Democratic members in favor, and every Republican and three of the six Populists opposed. Its partisan and racial purposes were broadcast. As the News and Observer put it in an editorial:

The victory won last November will be short-lived and almost barren unless it is garnered. To leave on the registration books every ignorant Negro in the State, who is merely a tool of selfish and designing men, would be to invite a repetition of the disgraceful rule of 1895-1899 whenever there is any considerable division among the white voters.23

The subsequent campaign was brutal. Future “progressive” governor Charles Brantley Aycock branded his opponents “public enemies” who deserved “the contempt of all mankind.” Democratic “Red Shirts” broke up opposition meetings, intimidated voters, and prevented such opposition orators as Populist U.S. Senator Marion Butler from speaking to public meetings. The leader of the “Wilmington Riot,” which had killed approximately twenty African-Americans in an 1898 post-election frenzy, Alfred Moore Waddell, told an election-eve crowd in 1900 to “go to the polls tomorrow and if you find the Negro out voting, tell him to leave the polls and if he refuses, kill him, shoot him down in his tracks.”24

Democratic control of the registration and counting of ballots carried the suffrage amendment by a 59-41% margin, but the fraud necessary to sustain that result was as obvious as it was impossible to stop. As a North Carolina Republican congressman put it at the time, African-Americans, “according to the election returns, actually voted to disfranchise themselves.” The overwhelming vote counted for the amendment in heavily-black counties produces a statistical estimate than no blacks at all opposed the poll tax and literacy test aimed primarily at them, while nearly three-fourths of all adult black males favored it.25 This was not fraud by individuals, but by election officials, always the most serious and prevalent variety of fraud. In the next gubernatorial election, turnout shrank by 50%, Republicans abandoned their African-American core and began to claim that they were the real “lily-white” party, and the state entered a political slumber from

22Part 49 of the 2013 election law repealed a 2005 law that allowed for the votes for offices above the precinct level to be counted on a ballot cast in the wrong precinct. The 2013 statute instead threw out all votes recorded on a ballot cast in the wrong precinct—for instance, votes for statewide or national officers. See Transcript of Senate Rules Committee Meeting, July 23, 2013, pp. 12-13.
24Shaping of Southern Politics, 193.
25Shaping of Southern Politics, 193-95.
which it did not fully recover until the passage of the Voting Rights Act in 1965.

C. The Legacy of White Political Supremacy Hung On Longer in North Carolina than in Other States of the "Rim South"

For a state in the "Rim" or "Border" South with a cherished progressive self-image, North Carolina suppressed black political activity thoroughly during the period of the "nadir" of race relations in the first half of the twentieth century and only slowly, grudgingly, and partially liberalized thereafter. Only 15 percent of the state's blacks -- less than the percentage in Georgia -- were registered to vote in 1948, and only 36 percent in 1962.26

For nearly fifty years after the revolution of 1900, North Carolina enjoyed conservative, but less tumultuous rule. Then, in 1948, North Carolinians elected insurgent moderate W. Kerr Scott as governor, and he, in turn, appointed the University of North Carolina's distinguished and widely-known Chancellor, Frank Porter Graham, to a vacant seat in the U.S. Senate in 1949. Graham's candidacy set up an election that brought once more into the open North Carolina's fervently racist political history. When support from virtually the entire establishment of the state's politics carried Graham dangerously close to an outright majority in the first primary, his chief opponent, Willis Smith, redoubled the openly racist appeals that he had initiated in the earlier part of the campaign.27 In nearly every speech, Smith charged that Graham’s election would foster school integration and an end to racial discrimination in employment, charges Graham vehemently denied. Smith’s campaign employed blacks to parade around white sections of Eastern North Carolina towns in cars festooned with Graham banners and reprinted endorsements of Graham from black newspapers.

Stressing the continuity of North Carolina politics, Smith backers distributed photographs of black legislators from the 1868 state legislature, suggesting that Graham’s election would automatically bring about the horror of having blacks in elective offices, superior in position to at least some whites. Another flyer featured more recent World War II photos of black soldiers dancing with white Englishwomen, doctored to superimpose the face of Graham's well-known wife on the head of one of the women. The week before election day, a circular blanketed the state:

26Colorblind Injustice, 245.
27On the contest, see generally Julian M. Pleasants and Augustus M. Burns III, Frank Porter Graham and the 1950 Senate Race in North Carolina (Chapel Hill, N.C.: University of North Carolina Press, 1990). One of the gems was a fake postcard from “W. Wite, Executive Secretary, National Society for the Advancement of Colored People,” an obvious distortion of Walter White of the NAACP, which encouraged a vote for Graham because he “has done much to advance the place of the Negro in North Carolina.” It was sent to large numbers of white voters in the state. Ibid., 176.
DO YOU WANT Negroes working beside you, your wife and daughters in your mills and factories? Negroes eating beside you in all public eating places? Negroes riding beside you, your wife and your daughters in buses, cabs and trains? Negroes sleeping in the same hotels and rooming houses? Negroes teaching and disciplining your children in school? ... Negroes going to white schools and white children going to Negro schools? Negroes to occupy the same hospital rooms with you and your wife and daughters? Negroes as your foremen and overseers in the mills? Negroes using your toilet facilities?

If you did, the circular concluded, "Vote for Frank Graham. But if you don’t, vote for and help elect WILLIS SMITH FOR SENATOR. He will uphold the traditions of the South." When Smith overtook Graham to win the primary by a comfortable margin, the favorite song at his campaign celebration was "Dixie."28

Because of low overall voter registration and its continued use of a literacy test, 40 of the state's counties were subjected to Section 5 preclearance under the Voting Rights Act in 1965. A year later, black registration in the state finally surpassed 50% for the first time since 1900. While Tennessee elected its first black of the century to the General Assembly in 1964 and abolished multimember districts in urban counties in 1965 on the grounds that they discriminated against blacks, North Carolina did not elect a black state legislator until 1968, and it refused at that time to abolish multimember districts for the state legislature, even though it was advised that the districts might be challenged in court on the grounds of racial discrimination. The state simultaneously passed a numbered post system with an anti-"single shot" provision over the protests of blacks and white Republicans, who charged that it would have a discriminatory impact. A federal court subsequently struck down that law as racially discriminatory.29 The same legislature that adopted the multimember district/numbered post system also refused to add black activist Durham County to the Second Congressional District, reportedly to prevent a rise in black influence in that district.30

1968 was not only the year when Henry Frye of Greensboro became the first African-American elected to the General Assembly, but also the year when Dr. Reginald Hawkins, a black Charlotte dentist, received 129,808 votes for the Democratic nomination for governor and when Eva Clayton became the first black since 1898 to run a serious campaign for Congress. When Clayton, who had never previously held public office, began her campaign, blacks made up approximately 40 percent of the population of the Second District, but only 11 percent of the voters. Although her poorly financed campaign lost 70-30 to eight-term incumbent L.H. Fountain, the most conservative Democrat in the state's congressional delegation, Clayton and her cadre of

28Pleasants and Burns, Graham, 216-21, 244, quote at 221.
black activists managed to raise black registration to 26 percent of the district's voters.\textsuperscript{31}

Four years later, in 1972, Howard Lee became Fountain's second and much more serious black challenger. The son of a Georgia sharecropper, Lee had come to Chapel Hill to attend graduate school in social work at the University of North Carolina in 1961 and stayed on in a job at Duke University. He had been narrowly elected to the largely ceremonial office of mayor of the majority-white town of Chapel Hill in 1969 and reelected in 1971, and as the first black mayor in the state during the twentieth century, had been named vice-chairman of the state Democratic party in 1970. Lee's intensive efforts to appeal to whites fell short, as he lost the primary by a 59-41 margin. According to Daniel C. Hoover of the \textit{News and Observer}, "Although [Lee] got some white votes, especially in his own traditionally liberal Chapel Hill area, the balloting generally was along racial lines." Being "a highly skilled campaigner with strong appeal not only to blacks but to liberal urbanites as well" was not enough to win an overwhelmingly rural Second District in which voting was widely understood to be markedly racially polarized. Lee's failure apparently discouraged other potential African-American candidates, as there was no serious black candidacy for Congress in the state for the rest of the decade.\textsuperscript{32}

In an attempt to avoid a black recapture of the Second Congressional District 81 years after George Henry White became the last southern black member of Congress for three generations, Rep. Fountain and his allies held up redistricting in the North Carolina legislature for six months in 1981. Ultimately, they drew a district that bore a striking resemblance to an upside-down version of the original 1812 Massachusetts district that led to the coining of the term "gerrymander." Before an NAACP-LDF lawsuit in the name of Ralph Gingles, charging that the district was drawn with a racial purpose and had a racially discriminatory effect, could be heard, the Ronald Reagan-era Department of Justice refused preclearance of the redistricting under Section 5 of the Voting Rights Act.\textsuperscript{33} Fountain retired rather than face a challenge from Mickey Michaux, now as then a prominent black state legislator. But Michaux lost a racially polarized runoff for the Democratic nomination for Congress when his white opponent, Tim Valentine, mailed appeals to whites warning that Michaux would "again be busing his supporters to the polling places," where they would cast a "bloc vote" for him. The reference to busing and the familiar racial code phrase "bloc vote" were more subtle than Willis Smith's 1950 entreaties, but they had the same effect. Michaux's defeat and that of another African-American candidate, state representative Kenneth Spaulding, in 1984, discouraged blacks from contesting the Second for the rest of the decade.\textsuperscript{34}

But by 1990, civil rights pioneer and Charlotte mayor Harvey Gantt cast off caution, launching a nationally-prominent and well-funded campaign against the symbol of the new southern Republicanism, Sen. Jesse Helms. Threatened with defeat, Helms echoed Willis Smith's anti-Fair Employment Practices Commission campaign against Frank Graham in the most

\textsuperscript{32}\textit{Colorblind Injustice}, 246-47.
\textsuperscript{33}\textit{Colorblind Injustice}, 247-53.
\textsuperscript{34}\textit{Colorblind Injustice}, 254-57.
infamous southern political television commercial of the century. A pair of white hands was shown crumbling a job application, while a voice-over announced

“You needed that job, and you were the best qualified. But they had to give it to a minority because of a racial quota. Is that really fair?”

Less well known in the fact that the Helms campaign and the state Republican party mailed 125,000 post cards into black neighborhoods charging that there was a plot to commit voter fraud and warning recipients of the penalties for such actions and providing misleading information about registration. The George H.W. Bush Justice Department sued, securing from the state GOP a promise to abjure such “ballot security” campaigns in the future.35

Before Sen. Helms defeated Gantt in another racially-charged election in 1996, Republicans in the state reflected the regional trend by winning control of the state’s House of Representatives, its congressional delegation, and nearly its State Senate in 1994. With popular moderate Democrat Jim Hunt serving as governor for the eight years after 1992 and Democrats almost retaking the State House in 1996, however, neither party could impose changes in election laws. There was a widespread understanding that as more and more whites left the Democratic party, racial and partisan identification increasingly overlapped, and the Democratic party necessarily became more responsive to its black members. For example, former GOP state chairman Jack Hawke told a reporter in 1996 that “as the Democratic party shrinks in size and numbers, percentage-wise it becomes more black-dominated . . . the Democratic party is becoming the party of minorities and the Republican party is becoming the party of the white folks.”36 The large swings in the numbers of members of each party elected on the basis of small changes in the share of votes in this most competitive southern state during the 1990s37 invited each party to make changes in election laws in an effort to gain even the smallest advantage, which might tip the divided state one way or the other.

V. Democratizing North Carolina Election Law and Increasing Turnout, 1995-2009


36Quoted in Christensen and Fleer, “Helms and Hunt,” 88-89.

37Christensen and Fleer, “Helms and Hunt,” 102.
A. What Provoked H.B. 589?
The Effects of Changes in Election Laws Before 2010

During the 1990s and in the 21st century up to the election of 2010, North Carolina attempted to escape its history of electoral lassitude and racial discrimination by adopting a series of changes in election laws that would increase voting participation and civic involvement. Foremost among them were the adoption of voting in the weeks before election day without the necessity of having an excuse (hereinafter referred to as “early voting”); registration that extended up to the close of the early-voting period, with the ability to cast an absentee ballot at the same time as registration that would be counted unless there was positive evidence that the voter was not eligible to vote (hereinafter called “same-day registration” or “SDR”); the counting of votes for some offices on a ballot, even if the voter had not cast her ballot in the correct precinct (hereinafter called “out-of-precinct voting”); and various changes to encourage high-school students to pre-register to vote and college students to be able to register at their college domiciles.

The best way to see the effects and infer the intent of these changes and the likely effects and intent of their reversal by H.B. 589 is to consider tables of turnout statistics. Table 1 shows the dramatic rise in turnout in presidential elections in North Carolina after the establishment of early voting, which went into effect in time for the 2000 election, and the second burst after the 2007 adoption of same-day registration. As often noted during the debates over H.B. 589 in 2013, North Carolina went from near the bottom of the states in its participation level in 1988 to close to the top twenty percent of the states in 2012. These were not national or regional trends, and since there were no economic or demographic trends in North Carolina during this period large enough to explain a 45% increase in turnout, that increase must be attributed to changes in the election laws.

Table 2, based on statistics from the North Carolina State Board of Elections, shows that the turnout increase was particularly marked among African-American voters. Although there are other influences that no doubt partially account for the increased black turnout, notably the nomination of the first major-party African-American nominee for president in American history, a great deal of the African-American turnout increase preceded 2008. There was a 47% rise in black turnout in North Carolina from 1996 to 2004 – a date at which Barack Obama was merely running for his first term in the U.S. Senate. By 2008, African-American North Carolinians were voting at higher rates than whites as a percentage of potential voters, not just of registrants. As in the

38 If a person voted a provisional ballot at the wrong precinct, then if out-of-precinct voting were allowed, the votes for those offices on both the ballot at the “wrong” precinct and on the voter’s correct precinct would be counted. Votes for the offices not shared on both precincts would not be counted. Disallowing out-of-precinct votes invalidates the votes for every office on the mistaken voter’s ballot.


40 Note that these percentages are based on actual vote counts by the state, not survey
nineteenth century, when the Populist-Republican Fusion of the 1890s in North Carolina revived hopes (for blacks) and fears (for white Democrats) of a renewal of Reconstruction—the first decade of the twenty-first century in the state seemed to renew the promise of a renewal of the Civil Rights Movement, an ominous prospect to the representatives of the tradition of Willis Smith and Jesse Helms.

As Table 3 makes dramatically clear, once they got used to early voting, white and especially black North Carolinians took advantage of the opportunity to avoid very long lines, possibly getting their pay docked or failing to pick up their children from day care or school on time. By 2008, over half of whites and nearly three-quarters of African-Americans who voted did so in person before "election day." Any compression of the time for early voting would have a disproportionate effect on black turnout, and since the statistics were available and widely discussed,41 legislators whose careers depended on knowing the facts of electoral life must have anticipated the effect of slicing the early voting period.

Not only were African-Americans more likely to vote early than whites in North Carolina, they were also more than twice as likely to take advantage of same-day registration when they voted early. In 2008, 6.9% of blacks who registered did so initially or changed their place of registration using SDR, compared to only 3.2% of whites. In 2012, the figures were 4.6% for blacks and 1.5% for whites. To put the figures another way, African-Americans made up only 21.7% of all registered voters in 2008 and 22.4% in 2012, but they comprised 35.8% of the same-day registrants and registration changers in 2008 and 40.7% in 2012.42 Any measure that eliminated same-day registration would have approximately twice as large an impact on African-Americans as on whites, and any legislator who voted for such a measure must have anticipated this consequence.


42Sources of data:
<ftp://www.app.sboe.state.nc.us/Requests/200811104_Changed_OneStop_registrations.xls>
<ftp://www.app.sboe.state.nc.us/Requests/200811104_New_OneStop_registrations.xls>
<ftp://www.app.sboe.state.nc.us/Requests/20121106_Changed_OneStop_registrations.xls>
<ftp://www.app.sboe.state.nc.us/Requests/20121106_New_OneStop_registrations.xls>
And they were much more likely than whites to cast ballots outside their legal precincts on election day. In 2004, the first election in which the legislature tried to guarantee that ballots would be counted, even if the voters went to or were directed to the wrong precinct, 36% of the out-of-precinct votes were cast by African-Americans, although they cast only 19% of overall votes in that election. In 2008, blacks cast 27% of the out-of-precinct votes; in 2010, 46%; in 2012, 32%.43

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43Sources of data:
2012: <ftp://www.app.sboe.state.nc.us/ENRS/provisionals_2012_11_06.txt>
Table 1: A 45% Rise in Turnout Accompanied the Democratization of Election Laws

<table>
<thead>
<tr>
<th>Election Year</th>
<th>% Turnout of Voting-Eligible Population</th>
<th>National Rank</th>
</tr>
</thead>
<tbody>
<tr>
<td>1988</td>
<td>44.5%</td>
<td>48</td>
</tr>
<tr>
<td>1992</td>
<td>51.4%</td>
<td>46</td>
</tr>
<tr>
<td>1996</td>
<td>46.3%</td>
<td>43</td>
</tr>
<tr>
<td>2000</td>
<td>50.7%*</td>
<td>37</td>
</tr>
<tr>
<td>2004</td>
<td>57.8%</td>
<td>38</td>
</tr>
<tr>
<td>2008</td>
<td>65.5%**</td>
<td>22</td>
</tr>
<tr>
<td>2012</td>
<td>64.6%</td>
<td>11</td>
</tr>
</tbody>
</table>

* Early Voting Introduced
** Same-day Registration Introduced

Source: Michael P. McDonald, United States Elections Project, https://docs.google.com/file/d/0B0bHdAFS4MgqWmdKdEdWTHRzJUE/edit?usp=sharing&pli=1

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44The 20.1% increase in turnout divided by the initial 44.5% turnout rate = 45.2%.
Table 2: The Black Vote Rising – Most of the Post-1996 Turnout Increase Represented Increased African-American Participation

<table>
<thead>
<tr>
<th>Election Year</th>
<th>% of Citizen-Age Population Voting</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>White</td>
</tr>
<tr>
<td>1996(^1)</td>
<td>48.3</td>
</tr>
<tr>
<td>2000(^2)</td>
<td>52.9</td>
</tr>
<tr>
<td>2002(^3)</td>
<td>45.1</td>
</tr>
<tr>
<td>2004(^3)</td>
<td>63.8</td>
</tr>
<tr>
<td>2006(^3)</td>
<td>35.9</td>
</tr>
<tr>
<td>2008(^3)</td>
<td>64.6</td>
</tr>
<tr>
<td>2010(^3)</td>
<td>42.0</td>
</tr>
<tr>
<td>2012(^3)</td>
<td>64.4</td>
</tr>
</tbody>
</table>

Sources:
1: North Carolina State Board of Elections, data provided through discovery in this case.
Table 3: African-Americans Took Disproportionate Advantage of Early Voting

<table>
<thead>
<tr>
<th>Election Year</th>
<th>% Voting Early of Those Who Voted</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>White</td>
</tr>
<tr>
<td>2004</td>
<td>19.5</td>
</tr>
<tr>
<td>2006</td>
<td>20.5</td>
</tr>
<tr>
<td>2008</td>
<td>51.1</td>
</tr>
<tr>
<td>2010</td>
<td>33.3</td>
</tr>
<tr>
<td>2012</td>
<td>51.8</td>
</tr>
</tbody>
</table>

Source: North Carolina State Board of Elections


2006-2012 Data: SEIMS Data from BOE Discovery Request compiled by Paul Gronke.
B. The Intent and Effect of Election Laws Must Be Judged by their Context

Defenders of the current state of suffrage restrictions tell an abstract, fact-free, time-and-space-independent story to justify their actions. They suspect that election fraud occurs, and if they produce little or no evidence of that contention, the mere suspicion is enough, they claim, to provide a rational basis for the laws.\textsuperscript{45} Conditions in all places at all times are essentially the same, and details about the provisions of laws are irrelevant — if a restriction was legal in Indiana or Georgia in 2005, then a somewhat similar law must be legal in Texas or North Carolina in 2014 or 2015.

But the story of the changes in the election laws before 2011 and of the proposals that failed, the sometimes unintended consequences of those laws, and the changes that those laws made in the political context that faced the North Carolina legislature in 2013 undercuts the ahistorical version of H.B. 589. As I have argued at length elsewhere about English and American election laws from before the founding of this country through the present, one can only judge the intent and effects of such laws by viewing them in their very specific historical and spatial contexts.\textsuperscript{46}

1. The First Early Voting Bill, 1993

On May 6, 1993, Senate Elections Committee Chair Linda Gunter of Wake County introduced S.B. 1066, which provided for the pre-registration of 16- and 17-year-olds. Reported favorably out of committee a week later, it passed the senate by 36-2, with no apparent controversy. In the House, it passed on June 17 by 71-27, but it was then withdrawn, referred to the House Judiciary Committee on June 29, and a substitute bill that expanded the original bill to include no-excuse absentee voting at "early voting" sites passed second and third readings in the House on July 23 by a vote of 78-11. At that point, the Senate refused rather loudly to concur in the House amendments, a conference committee was appointed, and even carrying the bill over to the "short session" of the legislature in 1994 did not produce agreement. Finally, the legislature dropped both the 16- and 17-year-old-preregistration and early voting features and simply authorized registration at driver's license, unemployment, and social services offices statewide, in order to conform state law to the National Voter Registration Act.\textsuperscript{47}

\textsuperscript{47}Here and at other points in the next few pages, I draw on the legislative histories of each bill available on the General Assembly's website, which can be accessed by searching for the bill numbers and years. To reduce the length of this report, I will simply refer the reader to that website for details. In this instance, I draw also on Foon Rhee, "LEGISLATORS SAY END OF SESSION IN SIGHT - "WE'VE GOT A HANDSHAKE," SENATE LEADER SAYS LAWMAKERS HOPE
This was not a partisan battle. Democrats were firmly in control of both houses of the legislature and, for the first time in eight years, of the governor’s office, and Republicans did not then oppose the early voting provision. Nor was it pushed because of an effort by Democrats to facilitate voting by their partisans, minority or white. It does not seem to have occurred to anyone at the time that African-Americans would be particularly likely to take advantage of early voting. According to the recollections of a state senator from that session, a voting rights lawyer who would have been sensitive to any mentions of racial considerations or consequences, there was no discussion of such matters in connection with S.B. 1066. Rather, there was a concern that having too many people vote at different times would complicate campaigning, because of the necessity of contacting voters earlier in the election cycle, and that it would therefore increase the expense of elections.  

2. No-Excuse Absentee Voting, 1995-97

Seven House members in 1995, led by the longtime African-American legislative leader Mickey Michaux, introduced a bill to allow no-excuse absentee votes to be cast by mail or, at the option of each county, at not only the county board of elections, but also at additional sites. The 39-page H.B. 27 does not seem to have been acted upon in the House, where Republicans enjoyed a majority for the first time in a century.

Two years later, a somewhat simpler 19-page bill, H.B. 1014, titled “Shorter Lines at Polls,” allowed “one-stop” voting (the ability to apply for, receive, and vote a ballot in a single trip) at the county board of election and perhaps additional sites. It attracted 75 sponsors, mostly Democrats, but also about a dozen Republicans. Chiefly sponsored by Martin Nesbitt, an Asheville Democrat, as well as Michaux and Democrat Martha Alexander of Charlotte, the bill was, according to Nesbitt, a response to voting lines of over an hour in 1996 in Buncombe County. 49 In Mecklenburg County, said Alexander, some voters had to wait two and a half hours in the rain to vote in November, 1996. 50 Other supporters noted the differential burden of long lines on working people and discounted the likelihood of fraud, stressing that voters would still have to go through the process of applying for an absentee ballot. As the Durham Herald-Sun put it:

...voting at the polls is not always convenient when both parents work. People also run out of time standing in long lines and leave without voting.

Any means of making voting easier, of course, always raises questions about the

TO FINISH SEVERAL ISSUES AND GO HOME,” CO, July 16, 1994.

49Personal communication from Leslie J. Winner, March 21, 2014.

49Dennis Patterson, “Legislators are full of ideas on reforming elections process,” Durham Herald-Sun, April 22, 1997.

potential for vote fraud. As Rep. [Jim] Black [the House Minority Leader] noted, absentee voting leaves a substantial paper trail. Moreover, the state Board of Elections would be the first to pounce on a potentially fraudulent method of voting that an estimated 35 percent of North Carolina's voters will use. The board has endorsed most of the provisions of the no-excuses bill, which would become effective with the 1998 elections.  

Nonetheless, the House Elections Committee tabled the bill, and the legislature never got a chance to vote on it. The chair of the committee, Rep. Connie Wilson, R-Mecklenburg, "cited concerns about fraudulent voting as one of the reasons she and others were concerned about the bill," according to the Charlotte Observer, which did not specify whether it was mail-in or on-site voting that bothered Wilson. The newspaper was skeptical of the fraud suggestion. "Some politicians," the Observer asserted editorially, "seem to have an instinctive negative reaction to making voting too easy, as if that somehow cheapens the democratic process or devalues the responsibilities of citizenship."  


When Democrats returned to control of the lower house of the legislature in 1999, Republican support for early voting collapsed in the House, though it partially persisted in the Senate. Democratic control, however, meant that a bill authorizing no-excitse absentee voting and authorizing satellite sites where early voting could take place could emerge from the committee and actually be considered on the floor.

S.B. 568 was introduced on March 29, 1999 and passed the Senate by 36-10, including four Republicans in the majority, on April 21, and the House, on July 13, by 60-53, with one Democrat joining all of the Republicans in opposition. The bill was entirely concerned with authorizing no-excuse absentee voting, including authorizing county boards of elections to establish additional sites for one-stop voting. On the way to passage, the Senate rejected an amendment from Republican Senator Robert Rucho to require voters to display some form of photo identification before voting. Since the form was not specified, it presumably could have included business or student or local government IDs, or identification documents used to obtain various welfare benefits or to buy prescription drugs. The Senate rejected the amendment, 35-15, on a party-line vote. In the House, Republican J. Russell Capps introduced a voter ID amendment, which failed, 54-57, with two Democrats crossing over to vote for the amendment. Republican Larry Justus also proposed a voter identification restriction, but this one was loose enough that a voter could qualify if she presented a social security card and any type of ID showing the name and picture of the voter. If a voter did not have that or any other identification card, she could cast a provisional ballot, and the county board of elections could count it if the board determined, under rules which the State Board of Elections was tasked with writing, that the voter was legally qualified.

53 All of this information comes from official documents on the legislature's website or from
according to a Winston-Salem newspaper, "has long opposed efforts to make voting more convenient," charged that the early voting bill would lead to "massive fraud." The newspaper was skeptical: "If anything, most observers feel that the absentee voting changes will help Republicans turn out a larger share of their suburban vote. Harried parents will have the choice, for example, to vote at any time in the three weeks leading up to Election Day."55

Initially less controversial was S.B. 767, which directed the State Board of Elections to study and report on the process of setting up satellite early voting sites for early voting. The bill first passed the House by 102-6. But it was amended by a conference committee to include a grant-in-aid program by the State Board of Elections to help counties set up more early voting sites, as well as authorization for the State Board to step in and set up more sites if county boards (which were split, 2-1 between the political parties) failed to agree on site selection. This had been a divisive issue since at least 1992, when the Mecklenburg County Board of Elections had moved seven voting machines from black to white precincts in the county, prompting a successful Democratic bill to require county boards of election to allocate voting machines based strictly on registration totals in each precinct.56 In Union County in 2000, there was a partisan controversy over how many satellite early voting sites to establish and where to put them — on the Republican western side of the county or on the Democratic eastern side.57 At least four counties had refused to authorize any satellite sites at all in 2000.58 Republicans in the 1999-2000 legislative session, smelling a threat by Democrats to allocate early voting sites disproportionately to Democratic areas, angrily filibustered for four hours on the short 2000 session's last day before the bill finally passed.59

Nonetheless, 2000 session-end wrap-ups by newspapers noted the "uncharacteristic harmony" of the "short and sweet" legislative session, which "avoided much partisan sniping,"60 an indication that early voting itself was not seen as terribly controversial. Drawing on the long experience of Texas with early voting, some observers expected early voting not to lead to increased turnout in North Carolina.61 In fact, about 400,000 people, 13% of those who voted, cast

printed state documents.
62Editorial, "Early Voting Promises Convenience, Little Else," Greensboro News & Record,
ballots early in 2000, and early voting was a "big success with the voters."62 There was no evidence that Democratic election boards had slighted Republican areas in establishing early polling sites, and Republican opposition diminished, as "by Election Day many Republicans were conceding that early suburban voting probably helped their party."63 By 2001, H.B. 977, to extend early voting to party primaries, sailed through the legislature by votes of 106-4 in the House and 47-0 in the Senate, and neither charges that there was any fraud in the 2000 election nor predictions of fraud in the future graced the debate.

4. An Instructive Incident and Out-of-Precinct Voting, 2005

The controversy that provoked the passage of a law that unequivocally protected the right to have votes counted, even though they were cast outside a voter's home precinct, is instructive in two regards: First, despite the fact that it was a very close and hotly contested election that turned on a few thousand votes of over three million cast, the contest over the election of the Superintendent of Public Instruction in 2004 did not produce any allegations of in-person voting fraud.64 With a major statewide office at stake and both parties boiling about it, one would expect any plausible example of fraud to be exposed. The fact that no such exposure occurred provides strong evidence that the state's elections were quite clean and that a desire to eliminate fraud cannot be a plausible motive for the passage of H.B. 589. Second, the connection of an election controversy to the passage of an electoral reform law fits the paradigm of incremental electoral change in America, for example the passage of the Help America Vote Act (HAVA) in 2002 after the Bush-Gore imbroglio of 2000. That paradigm contrasts starkly with the passage of H.B. 589 in 2013, a "reform" completely unconnected to any particular election incident.

In 2003, the legislature had almost unanimously (109-1 in the House and 46-0 in the Senate on second reading) passed H.B. 842 to bring the state's laws in compliance with the HAVA. Among the provisions of the national act was one that sought to guarantee the counting of ballots that for one reason or other were cast in the wrong precinct. If someone mistakenly showed up at the wrong precinct because she was confused or was trying to vote at a precinct in which she no longer resided, or because she was mistakenly directed to the wrong precinct by an election official or notice, then she would be given a provisional ballot and at least the non-precinct-specific parts of her ballot would be counted. According to the Democratic leaders of the 2003 legislature, the intention of H.B. 842 was to mandate the same procedures for state as for federal elections.65 Yet a


64 As the Rocky Mount Telegram, "Provisional votes should count," Feb. 8, 2005, explicitly noted: "No one has presented any evidence to suggest voter fraud."

65 House Speaker Jim Black, D-Matthews, said Saturday that the ruling misread legislators
five-man majority of the North Carolina Supreme Court tentatively threw out 11,310 provisional ballots that had been cast in the wrong precincts, many on bad advice from election officials. The decision in *James v. Bartlett*, 359 N.C. 260 (2005) endangered Democrat June Atkinson’s 8535-vote lead over Republican Bill Fletcher when the Supreme Court remanded the election contest to the Wake County Superior Court with instructions to settle the winner without counting the 11,310 ballots, which no one doubted were cast by legitimate voters. Democrats charged that a “judicial activist” Supreme Court was protecting its party’s “political cronies.”

Democrats responded very quickly, introducing S.B. 133, which had the short title “Reconfirming Provisional Voting,” within a week of the Supreme Court’s decision in *James v. Bartlett*. What was controversial about the bill was not counting votes cast in the wrong precinct, but applying the law to elections that had already taken place — not only the State Superintendent’s race, but county commission contests in Mecklenburg and Guilford counties. As intent, which was to have those ballots count.” Carrie Levine, “GOP: RETALLY COUNTY VOTES - DISCARDED BALLOTS COULD CHANGE RESULTS,” *CO*, Feb. 8, 2005. “[State E]lections board director Gary Bartlett said he was at the Legislature when lawmakers crafted these statutes and knows their intent was to allow out-of-precinct voters to cast ballots on Election Day.” William L. Holmes, “Out-of-precinct votes rejected. N.C. Supreme Court says provisional ballots cannot be counted, *Durham Herald-Sun*, Feb. 5, 2005.


69Carrie Levine, “GOP: RETALLY COUNTY VOTES - DISCARDED BALLOTS COULD CHANGE RESULTS,” *CO*, Feb. 8, 2005; “COURT DISCARDS VOTES - LAST WEEK’S RULING GIVES TRUDY WADE AND BILL FLETCHER A CHANCE TO WIN WITH FEWER VOTES. THE DECISION MAY BE CORRECT LEGALLY, BUT IT'S HARDLY FAIR,”
often noted during the debate and even in the text of the bill, since early voting was not organized by precinct and generally had fewer polling sites than election-day voting, a great many early votes were necessarily cast outside of their precincts, but the Supreme Court ignored the point, and Republicans in and out of the legislature did not cast doubt on the legitimacy of out-of-precinct early votes or use the supposed centrality of precinct voting in order to attack early voting.

One thing that neither activists nor bill sponsors ignored was the racial implications of refusing to count provisional ballots that were cast in the wrong precincts. The State Board of Elections released the names of the 11,310 people whose provisional ballots had been rejected by the Supreme Court because they were cast in the wrong precincts, and Democracy North Carolina checked their racial identities on the voter rolls. Thirty-six percent of the out-of-precinct ballots were cast by African-Americans, even though blacks cast only nineteen percent of all ballots in 2004. As the organization's Adam Sotak noted, "The out-of-precinct provision is especially helpful to people who can't take off several hours from work, who recently registered or moved within the county or who don't have easy access to transportation." Apparently drawing on Democracy North Carolina's analysis, Section 9 of the bill stated that:


Mark Johnson, "11,310 BALLOTS CAST OUT - COURT RULES VOTING OUTSIDE HOME PRECINCT IS ILLEGAL - RACES IN LIMBO," _CO_, Feb. 5, 2005; Jack Betts, "N.C. VOTERS NOW PUNISHED FOR OTHERS' ERRORS - EVEN THOUGH COURT SAYS FAULT LIES WITH BOARD OF ELECTIONS, VOTES TOSSED OUT," _CO_, Feb. 13, 2005. Section 8 of the bill noted that "Several hundred thousand registered North Carolina voters cast ballots outside their resident precincts during the one-stop absentee balloting ("early voting") period pursuant to G.S. 163-227.2 prior to the General Election in November 2004, during the two primaries in 2004, and then on the date of the General Election in November 2004. There is no statutory basis upon which to distinguish out-of-precinct voting that occurred on the date of the General Election in November 2004 from out-of-precinct voting that occurred during the First and Second Primaries in 2004 or that occurred during the period of one-stop absentee ("early") voting prior to the General Election of 2004."

See James v. Bartlett, at note 5 ("Absentee voting (N.C.G.S. §§ 163-227.2, -231, -248 (2003)) and election day voting at specially created "out-of-precinct" voting places (N.C.G.S. § 163-130.1 (2003)) are not at issue in the present case.")

David Ingram, "BILL THAT CLARIFIES VOTE COUNT GETS PUSH - COURTS TOSSING OUT PROVISIONAL BALLOTS IS CENTER OF DEBATE," _Winston-Salem Journal_, Feb. 18, 2005 broadcast the results of the report, which is available at <http://www.democracy-nc.org/reports/researchreports/OOPChart.pdf>.

The General Assembly takes note of the fact that of those registered voters who happened to vote provisional ballots outside their resident precincts on the day of the November 2004 General Election, a disproportionately high percentage were African-American.

After a Republican amendment to apply the out-of-precinct bill only to future elections lost in the Senate, the bill rapidly passed both houses on party-line votes. As extra insurance, the Democratic majority also passed another law reinstating a 19th-century law that had apparently been inadvertently omitted from a 1971 codification. The law provided a procedure to put into effect a state constitutional provision mandating that the legislature, and not the courts, would decide contested election cases for statewide offices. It was that law, not the out-of-precinct law, that Wake County Superior Court Judge Henry Hight eventually used to decide the Superintendent of Public Instruction race.

5. A Fair and Open Process: Same-Day Registration, 2007

The adoption of same-day registration during the early voting period by the Democratic-majority 2007 legislature provides two sharp contrasts with the adoption of H.B. 589 and exposes two very instructive facts: The first contrast is that essentially the same bill was considered for five months, discussed in committee and on the floor, amended, passed from house to house, conferenced, and finally passed. Nothing in the bill was dumped in at the last minute without time or process that allowed for explanation and public debate. The second contrast is that when the Republican State Auditor Les Merritt raised questions about previous registration rolls -- not about SDR itself -- and requested, 26 minutes before Senate debate was scheduled to begin, that the bill be postponed, the legislature agreed. In 2013, after the Supreme Court decision in Shelby County v. Holder, nothing was allowed to delay the steamroller of H.B. 589. The facts are, first, that when questioned by the legislature and refuted by State Elections Director Gary Bartlett, Auditor Merritt quickly backtracked from his sensational charges of dead people voting and lists of drivers' licenses and Social Security numbers not matching all of those on the voter registration lists. So evidence of fraud, which would have been useful to Republicans in the 2011 and 2013 debates, dissolved under examination and was discarded. The second fact is that what Republicans objected to during the debates over SDR was the lack of photo identification required for new registrants, not SDR per se. This implies that once H.B. 589 required photo ID of voters, there should have been no need to include a repeal of SDR in the bill.

76 Gary D. Robertson, “RULING APPEARS TO FAVOR WADE FOR COMMISSIONER - IT DOESN'T GUARANTEE HER WIN BUT ORDERS CERTAIN PROVISIONAL BALLOTS TO BE THROWN OUT,” Greensboro News & Record, Mar 18, 2005.
H.B. 91, "Registration and Voting at One-Stop Sites," was introduced with 57 House sponsors on Feb. 7, 2007. It finally passed the Senate, with 4 Republicans joining 30 Democrats in favor, on July 11. On the same day, it passed the House with 3 Republicans joining 66 Democrats in favor. All the opponents, 15 in the Senate and 47 in the House, were members of the GOP. Many amendments were considered and some adopted during the session. As finally passed, the law allowed initial registration or changes in registration (connected with an address change, for instance) during the early voting period. The identification required included a drivers’ license, a photo ID from any government agency, any of the documents specified for registration under HAVA, or other documents that the State Board of Elections might designate. Each registrant had to include either her drivers’ license number or the last four digits of her Social Security number on the registration form. Ballots cast by new registrants were to be identifiable and retrievable so that they could be excluded from the count if the county board of elections determined that the registrant was not qualified. Within two days of registration, the State Board of Elections had to verify the drivers’ license or Social Security number, update the statewide registration database and search for possible duplicate registrations, and send postal mail to the registrant to check the mailing address on each form. If the postal mail, which was not forwardable, was returned, the county board of elections sent out a second piece of mail to that address. If this was returned, most counties apparently invalidated the ballot. Anyone who registered fraudulently, under this or older methods, of course, was guilty of a felony, punishable by a jail term.

The debate and amendments offered were instructive. In the House in March, according to a newspaper report,

The measure faced stiff opposition from Republicans, who tried to amend the measure to require those registering and voting on the same day to show photo identification.

Same-day registration and voting would open the polls to fraud without additional safeguards, they argued.78

In the Senate in June, Republican Minority Leader Phil Berger stated that "If that bill did not include allowing someone to register and vote by showing a utility bill as identification or showing a bank statement as identification, I could support the bill."79 Democrats who supported the bill believed that the necessity to show various types of identification and the checks on registrants that the elections boards had to complete quickly before the same-day registrants’ ballots were counted were sufficient guarantees against fraud. Sen. Larry Shaw, D-Cumberland, the leading Senate proponent of the measure, expected the prime enrollees under SDR to be young people. "They need to be enfranchised and we need to empower these young men and women so that they can be

77As above, all of this information is derived from the bill history on the legislative website.
... active citizens. Other observers pointed to "minorities and poor voters" as those most likely to take advantage of SDR.

The House approved H.B. 91 on March 29. After consideration by a Senate committee, the Senate was set to vote on the bill at 3 p.m. on June 5. At 2:34 p.m. that day, State Auditor Les Merritt, who had already announced for reelection to the post in 2008, sent an email to the co-chairman of the Senate Committee on Election Laws and Government Reform, Dan Clodfelter, a Charlotte Democrat, asking Clodfelter to pull the bill from the Senate calendar. Merritt claimed that his department had begun a study of voter registration in January and had now turned up unspecified "sensitive information" about the voting registration rolls. In response, Clodfelter and Senate Majority Leader Tony Rand replied to Merritt. "We are sure you appreciate how unusual it is for us to receive a specific request that we not take action on a pending bill," they wrote, "and we therefore trust that you have substantial, credible, and specific evidence to back up the general inferences in your letter." Merritt's spokesman, Chris Mears, who had been the political director for the state Republican party, where he had been involved in voter registration issues, before he took the government job, acknowledged that Merritt's request represented an effort to delay the bill. "We know that this was a very unusual situation," Mears said, "but we thought it was necessary because of the information we discovered and also the timing. The bill was within hours of passing both houses of the General Assembly." Merritt's investigation paralleled one by the U.S. Department of Justice, which sent a letter to the State Board of Elections in April inquiring about inadequately pruned registration rolls, one of a series of inquiries across the country in 2007 that eventually exploded when several U.S. attorneys who refused to file charges of fraud were summarily fired.

When Clodfelter invited Merritt and State Elections Board Executive Director Gary Bartlett to testify before his committee, hundreds of people came to listen – a very large total for a mere committee meeting scheduled to hear technically complicated testimony from two bureaucrats. Merritt charged that the voter registration database contained 24,821 invalid driver's license numbers, 380 people who appear to have voted after their dates of death, and others who had voted before they were 18 years old. Bartlett responded in testimony and a 10-page letter that the Auditor did not understand the data that the Election Board compiled, did not realize that many of the 380 "dead" people cast absentee ballots in the two months before election day in which absentee ballots

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could be returned, but died before election day (meaning that the voter had been alive and legally entitled to vote when they sent in their ballots). Merritt had also apparently failed to understand that 17-year-olds who would turn 18 before a general election were authorized to vote in primaries to nominate candidates for that general election, even if they were still 17 at the time of the primary. After hearing Bartlett’s response, Merritt, in a reporter’s words, “backed away . . . from the early findings of a review of North Carolina’s voter rolls, telling lawmakers his office might find no irregularities at all. ‘We’ll eventually get to a correct, final report,’” Merritt said, “and that final report, it could very well say there isn’t anything here, that everything’s fine, we’re doing a super job.’”85 Convinced that there was nothing to the Auditor’s charges, the Committee sent the bill to the floor, and the next day, the Senate passed SDR by a party-line vote.86 But it had held the bill up for two weeks to give the Auditor a chance to present evidence of registration problems.

6. Bipartisan Consensus on 16-17-Year-Old-Preregistration, 2009

Although a bill to allow 16- and 17-year-olds to preregister had been introduced and passed by both houses of the legislature in 1993, as explained above, it died when it was amended to include early voting. The issue at long last reemerged 16 years later, when the legislature in a burst of bipartisanism passed H.B. 908, by votes of 107-6 in the House and 32-3 in the Senate. The bill not only allowed the pre-18-year-olds to preregister at county election offices, early voting sites, and public high schools but it also mandated that public high schools had to mount annual voter registration drives, even in non-election years. There were no reports of fraud in this classic civic consciousness program.

85David Ingram, “Voter roll probe raises hackles,” N&O, June 20, 2007. Similar considerations might well explain a more recent sensationalized story about voter matches of interstate registration files and death records. Despite screaming headlines and exaggerated claims by Republican politicians that massive fraud had been discovered, State Board of Elections Executive Director Kim Westbrook Strach cautioned that some of the apparent matches may have been the result of “data error,” such as a poll or precinct worker marking the wrong person’s name as having voted. None of the cases that had been sent to local law enforcement officials had been prosecuted. See Laura Leslie, “State elections officials seek tighter security,” WRAL, April 2, 2014, available at <http://www.wral.com/state-elections-officials-seek-tighter-security/13533579/>.
VI. Voter ID and the Restriction of Early Voting: The Preview, 2011

A. Constraints

With their tea party-led triumph at the polls in the 2010 election, Republicans sought in the succeeding legislative session to pass a voter identification bill and to repeal or constrain the major Democratic laws that had led to such a marked increase in turnout, particularly African-American turnout. But in the 2011 session, they faced two constraints, which frustrated their efforts. First, Democratic Governor Beverly Perdue held the veto power and might at least force Republicans to compromise. Having served in the legislature from 1987 through 2001 and as Lt. Gov. from 2002 to 2009, Perdue was quite familiar with voting rights issues and had supported the voting expansion laws. Second, and even more important, any changes in voting laws had to be precleared by the Obama Administration’s Department of Justice under Section 5 of the Voting Rights Act, and there was scant reason to believe that the Attorney General would allow a voter ID bill, much less a clearly retrogressive bill cutting down early voting or eliminating SDR, to go into effect.

B. In the Wings

In both the 2011 and 2013 legislatures, voter ID legislation held center stage, attracting most of the media attention, legislative debate, and, in 2013, hearings and protests. Restrictions on early voting and other measures divided the Republican party, particularly in 2011, and the 2011 bill, H.B. 658, never made it to the Senate floor. Introduced on April 5, H.B. 658 was referred to the Committee on Elections, reported favorably on May 11, and passed its second reading in the House by 61-53 on May 12. On May 18, one of the primary sponsors, Rep. Bert Jones, proposed an amendment allowing one-stop voting to take place from 10 to 4 or 11 to 5 on both Saturdays of the early voting period, instead of stopping it at 1 p.m., as in the original bill. The amendment passed, 107-10, with support from both parties. At this point, in other words, there was a bipartisan consensus that holding early voting sites open on Saturday afternoons facilitated voting by working people and that that was a good thing – a consensus that strikingly broke down when H.B. 589 was considered in 2013.

Later on May 18, 2011, H.B. 658 passed third reading by only 60-58, with 6 Republicans joining 52 Democrats in opposition and only Republicans in support. The bill, which reduced the number of days of early voting from 12.5 days to 7.5 days, including banning Sunday voting, and also ended SDR, was sent over to the Senate, but died in committee. A companion Senate bill, S.B. 657, with the short title “Voting Integrity,” cut down early voting by 7 days, including eliminating Sunday voting, and it ended SDR. It, too, failed to emerge from committee.

A more comprehensive bill, S.B. 47, reduced the early voting period by a week, banned Sunday voting, eliminated SDR and straight-ticket voting, restored partisan judicial elections, made it a crime to compensate workers in voter registration drives, and allowed unlimited corporate donations to political parties. It does not appear ever to have emerged from committee, but many of its provisions would later be added to H.B. 589, after the Supreme Court’s decision in Shelby County.

One possible reason for the close votes and even Republican defections on H.B. 658 was that the Executive Director of the State Elections Board, Gary Bartlett, made public a memo to the legislature on early voting on the same day that H.B. 658 passed its third reading. The memo explained that a restriction on early voting would actually cost more, because county elections officials would have to buy more equipment and open more early voting sites to satisfy the growing demand for early voting, and that such a restriction would decrease the flexibility that officials had to deploy personnel and resources. The memo also contained statistics on who had taken advantage of early voting in 2008 and 2010, which showed the disproportionate use of early voting by African-Americans. Public debate emphasized the partisan and racial implications of the bill. As a News and Observer story summarized it: “During the 2008 presidential election, early voters helped propel both President Barack Obama and Gov. Bev Perdue to narrow victories. Many of those were minority voters, who voted on Sunday after leaving church.”

C. Center Stage: Voter ID

The only election bill of 2011 to be considered on the floors of both houses was the photo ID bill, H.B. 351, titled “Restore Confidence in Government.” Introduced on March 15, it was referred to two committees, and the Appropriations Committee reported out a substitute on June 7. The bill passed second reading in the House on June 8 by 67-50 and third reading, the next day, by 66-48. It was acted upon more much quickly in the Senate, being slightly amended and then passing second and third reading, 31-19 on June 15. The House concurred with the Senate amendments on June 16 by a vote of 62-51. When Gov. Perdue vetoed the bill, the House took four votes on July 26 in an attempt to override it. The overrides got 66-68 votes, while the opponents’ 51-52 were enough to prevent the bill from obtaining the necessary three-fifths vote. All of the votes were almost pure partisan splits.

91 Jim Morrill and Michael Biesecker, “Voter ID requirement passes Senate - The House approves changes that would cut down time for voting and limit registration,” N&O, June 16, 2011.
93 Jim Morrill, “Voter ID bill passes House - Requires voters show photo,” N&O, June 10, 2012; “GOP legislators continue push for photo ID of voters,” Rocky Mount Telegram, June 15,
The discussion on H.B. 351 was instructive and filled with racial overtones. A State Board of Elections summary of prosecutions found only 2 in the state for in-person fraud from 2000 through 2010. There were 40 for absentee voter fraud, which was untouched by H.B. 351. Altogether, in 2008, there were 50 cases referred to District Attorney offices in 2008, of about 4.3 million votes cast. As will be discussed at greater length in the section on the 2013 bill, Republicans contended that the very absence of evidence of fraud proved how much the law was needed: Without a strict photo ID law, one could not discover fraud, so the present lack of convictions did not mean that fraud was not occurring. Seeking invisible conspiracies to organize voters or potential voters to engage in systematic fraud, proponents of voter ID apparently played upon the growth in the state's Latino population to suggest that "illegal immigrants" might be culpable. The News and Observer editorially denounced such ungrounded charges:

In making their case for voter ID, Republicans conjured visions of people (including illegal immigrants) sneaking into the polls to cast illegitimate ballots. In fact, the problem in North Carolina is virtually non-existent, and GOP leaders know it. . . .

The party now in control of the General Assembly was the one doing the pandering here. In trying to convince people there was a problem where there wasn't one, they were appealing to anti-immigrant sentiment, to suspicion in the minds of some that there is a conspiracy to rig elections with crooked voting.

Summarizing criticisms of the bill, the Charlotte Observer declared that opponents "said it would suppress voter turnout, particularly among students, African-Americans and elderly people, calling it a modern-day poll tax." Democracy North Carolina publicized a study that found that "one in eight senior citizen voters have no photo ID; one in nine African-American voters and one in 10 women voters have no photo ID."

Realizing that Gov. Perdue would likely veto their bill, Republicans in June had floated a compromise, allowing a provisional vote to be cast if voters presented their current voter registration cards, a utility bill, or a pay stub. Perdue's office felt an agreement was within reach, but enough Democrats, worried that the provisional ballots would not be counted, rejected the bill to scuttle the potential deal. One of the bill's sponsors, Rep. Tim Moore, called the measure that

2011.

96 Editorial, "The governor's veto of a voter ID bill makes sense, whether it is popular with the public or not," N&O, June 25, 2011.
passed as H.B. 351 “more of a purist bill.” In her veto message, Gov. Perdue asserted that the bill would “unfairly disenfranchise” voters. Suggesting that she would have been willing to accept a compromise, Perdue stated that “The legislature should pass a less extreme bill that allows for other forms of identification, such as those permitted under federal law.”

Instead of compromising, proponents of voter ID began a campaign to have the legislature pass local voter ID laws for three dozen localities, laws which the governor could not constitutionally veto. But state Attorney General Roy Cooper issued an opinion stating that such local voter ID laws would violate the state constitution’s provision that laws be uniformly applicable across the state.

VII. H.B. 589 Before and After Shelby County

A. Process Reveals Intention

At the beginning of the legislative process on H.B. 589, House Speaker Thom Tillis promised a “deliberative, responsible and interactive approach” to the bill, which, he claimed at a news conference, had not yet been written. Appearing with Tillis, House Elections Committee Chairman David Lewis invited opponents of voter ID to “help us . . . come to the table and seriously talk about an issue” that was important to its sponsors. Lewis, a member of the Republican National Committee, promised that opponents would have a chance to influence the final product. Asked whether the measure would be a “stand-alone voter ID bill” or an omnibus bill containing other


101Nathan Tabor, guest columnist, “Perdue’s selfish veto of a sensible voter ID bill,” Winston-Salem Journal, June 30, 2011. The HAVA documents to which the governor was apparently referring include any government-issued photo ID or a current utility bill, bank statement, government check, paycheck, or other government document showing their name and address. See <http://moritzlaw.osu.edu/electionlaw/ebook/part5/hava.html>.

102Craig Jarvis and Lynn Bonner, “Legislature saw drama, big shifts - GOP leader touts a ‘successful bipartisan effort,’ but Democrats differ,” N&O, July 31, 2011; Editorial, “Stop the shenanigans over the voter ID bill - Some Republicans seem to be drunk on power; sober up,” CO, Aug 1, 2011.

103Editorial, “Republicans should give up voter photo ID effort,” Elizabeth City Daily Advance, Dec. 24, 2011; Roy Cooper to Mark A. Davis, General Counsel to the Governor, Nov. 23, 2011, quoting Art. XIV, Sec. 3 of the North Carolina Constitution and various treatises.
provisions, Lewis said he planned to address only voter ID and absentee voting requirements.\textsuperscript{104}

Reporters attending the news conference characterized Tillis’s statement as a promise to “slow walk the bill through the House.”\textsuperscript{105} Opponents were skeptical, one declaring that “this is all window dressing - a kind of political theater of the absurd in which the outcome is foreordained and most of the elected officials in the drama are merely playing roles assigned to them.”\textsuperscript{106} But the House did hold two public hearings and five committee meetings between March 12 and April 23, 2013 on the original H.B. 589, a stand-alone voter ID bill, hearing experts and citizens and allowing votes on 10 amendments. Three of the amendments were non-controversial and passed overwhelmingly, with from 109 to 116 votes in favor and from 0 to 9 votes opposed. The other seven amendments failed by almost straight party-line votes. The bill passed the House on April 24, garnering 4 Democratic votes, but otherwise revealing polarized parties.

A much different process was followed for H.B. 451, an omnibus elections bill slicing the early voting period, eliminating Sunday voting, ending SDR and straight-ticket voting, loosening restrictions on absentee ballots to let anyone deliver other voters’ absentee ballot request forms, and fulfilling other dreams of the conservative Civitas Foundation think tank.\textsuperscript{107} Although sponsored by House Majority Leader Edgar Starnes, H.B. 451 was introduced on March 27, referred to committee on March 28, and received neither hearing, nor committee report, nor floor action, at least in its initial guise. A similar lack of progress impeded the unfortunately-numbered S.B. 666, which proposed to shrink early voting by a week and end Sunday voting and SDR.\textsuperscript{108}

H.B. 589 was passed over to the Senate on April 25. There it sat in committee for two months until the Supreme Court’s June 25 decision in \textit{Shelby County v. Holder} because, as the chair of the Senate Elections Committee, Tom Apodaca said, “the state Senate ... held up the bill pending the court ruling.”\textsuperscript{109} Operating with no publicity until July 23, the Senate sprang upon the legislature in

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\item \textsuperscript{104}Press Conference, March 5, 2013, WRAL (video); Gary D. Robertson, “NC House Republicans lay out voter ID bill process,” AP, March 5, 2013.
\item \textsuperscript{105}Rob Christensen and John Frank, “Confident GOP preps for voter ID bill - Democrats say it's more of the same; poll shows bill has support,” \textit{N&O}, March 6, 2013.
\item \textsuperscript{106}Rob Schofield, “Theatre of the absurd on voter ID laws,” \textit{Durham Herald-Sun}, March 18, 2013.
\item \textsuperscript{109}Wesley Young, “Impact of ruling to be felt in N.C.,” \textit{Winston-Salem Journal}, June 26, 2013. As one of the House sponsors of H.B. 589 said of the photo id section of the bill the day after the decision, “I guess the bottom line is we were very concerned about pre-clearance, so our range of
the session’s last week a much different bill, 57 pages long, instead of the original 14.\footnote{Although rumors abounded, the Charlotte Observer commented the day before H.B. 589 was unveiled that “It’s still unclear whether the legislature will move to enact restrictions on early voting and Sunday voting. Proposals have been floated but aren’t in the bill being considered Tuesday by the Senate.” Ely Portillo and Fred Clasen-Kelly, “Voter ID bill draws protesters - House, Senate versions differ on forms of acceptable identification,” \textit{CO}, July 23, 2013.} Within a period of 48 hours, the new bill was reported out of committee, passed by both houses, and ordered enrolled. An omnibus containing provisions from H.B. 451 from 2013, H.B. 658 from 2011, and six other bills, none of which had been the subjects of hearings or committee or floor debate, the new H.B. 589 was considered in a flurry that mocked the promises of “a very deliberative, responsible manner” that Tillis had made in March. The obvious and admitted reason for throwing off the pretense of deliberation was the Supreme Court’s \textit{Shelby County} decision, which meant that laws that had a discriminatory intent or a retrogressive effect no longer faced rejection by the Department of Justice or the District Court of the District of Columbia. The reticence that the overwhelmingly Republican legislature had to passing an omnibus election bill in 2011 and before June 25, 2013 and the fervor with which the majority waved the bloated H.B. 589 through the legislature after \textit{Shelby} by itself goes a long way toward establishing the bill’s discriminatory intent. As Congressman G.K. Butterfield remarked about the legislature on June 26, “undoubtedly, there will be more efforts to suppress minority voting strength.”\footnote{Margaret Banks, “Ruling removes review of Guilford election laws,” \textit{Greensboro News & Record}, June 26, 2013.}

\section*{B. Facts}

Beneath often emotional and ideological debate on the two versions of H.B. 589, which I will hereafter refer to as H.B. 589 (1) and H.B. 589 (2), lay certain facts, which are important to keep in mind in judging the intent of the framers of the bill and its supporters, as well as the likely effects of the bill. It will be useful to review the facts that were in the public sphere before examining the debate \textit{per se}.

\subsection*{1. The Extent of Fraud}

Conveniently for the discussion, the State Board of Elections in 2011 and again in 2013 made public summaries of its investigations of voter fraud and those it had referred to local district attorneys for potential action. From 2000 through 2012, there were 1032 cases sent on to district attorneys. Only 2 of them charged a voter with impersonating another, the only kind of fraud that a photo voter ID measure would expose. Seventy-two related to absentee voting. Thirty-two concerned voter registration, though there was no breakdown between registration that took place 25 or more days before the election and SDR registrations. Fifty-eight had to do with non-citizens


\footnote{“Swift impact of voting decision,” \textit{Durham Herald-Sun}, June 27, 2013.}
registering or voting. There were approximately 21 million votes cast during the period. Provable fraud was much less than round-off error.

2. The Disproportionate Use of Same-Day Registration, Out-of-Precinct Voting, and Early Voting, Particularly Sunday Voting, by African-Americans

Table 3 above sets out the basic figures on disproportionately early voting by blacks, but other studies show that “Souls to the Polls” campaigns by the NAACP, the General Baptist State Convention, AME Zion Church, Prince Hall Masons, Eastern Stars, and other groups especially energized black urban voters. In 2008, according to a Democracy North Carolina study, more people voted per hour on Sunday in the seven urban counties – Cumberland, Durham, Forsyth, Guilford, Mecklenburg, Pitt, and Wake – than on any other day during the early voting period. (On Sunday, early voting sites were open only in the afternoons; on weekdays, they were also open in the mornings.) In 2012, according to figures from the State Board of Elections, African-Americans were more likely to vote on Saturday than whites and much more likely to vote on Sunday. On Friday, Oct. 19, 2012 in the first week of early voting, 32% of the voters were black; on Saturday, Oct. 20, 36%; on Sunday, Oct. 21, 43%. The next week’s Friday-Sunday percentages for black voting were 26%, 305, and 36%. 61,498 people voted on Sunday in 2012.

Statistics on voting by race using SDR and out-of-precinct voting are given above, in Section V-A. In addition, State Board of Elections numbers show that blacks were much more likely than whites to favor in-person early voting to absentee voting by mail. Whereas African-Americans made up 29% of in-person early voters, they comprised only 9% of absentee voters by mail.

Even politicians who did not pay close attention to reports by public policy groups, listen to their opponents’ speeches, or read newspapers would probably have been aware of events like one that took place on the first day of early voting in Durham, where students at predominantly black North Carolina Central University held a rally addressed by the president of the state NAACP, William Barber, and then marched to an early voting site at the student union to vote.

3. The Disproportionate Lack of Identification Documents Among Minorities

Although the League of Women Voters plaintiffs are not challenging the photo ID sections of H.B. 589 in this court, facts about the probable disproportionate impact of that voting restriction are relevant to questions about the intent of the legislation. An April 2013 report by the State Board of

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Elections matched voter registration lists with lists of current holders of North Carolina driver’s licenses or state identity cards. It found non-matches for 318,643 of the 6.4 million voters at the time. The information, which was available to the legislature at the time it considered H.B. 589 (1), is most easily presented in tabular form. Table 4 shows that disproportionate numbers of African-American registrants, and even more disproportionate numbers of African-American actual 2012 voters, did not appear on the Department of Motor Vehicles lists. That is, the legislature was certainly aware that substantially more African-Americans would have to acquire some form of state-issued identification card if a photo ID law were passed.\textsuperscript{118}

<table>
<thead>
<tr>
<th>Group</th>
<th>All Registered Voters</th>
<th>% Without State Photo IDs</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Registered Voters</td>
</tr>
<tr>
<td>Whites</td>
<td>71</td>
<td>54</td>
</tr>
<tr>
<td>Blacks</td>
<td>23</td>
<td>34</td>
</tr>
</tbody>
</table>

Source: <http://www.democracy-nc.org/downloads/SBOEDataNoIDApril2013PR.pdf>

C. Justifications for and Criticisms of H.B. 589

The quality of the debate in the two days between the time when the Senate Elections Committee reported out H.B. 589 (2) and when both houses passed it, sent it to the governor, and triumphantly adjourned the legislative session, was not high. Brent Laurenz, executive director of the nonpartisan North Carolina Center for Voter Education testified before a brief Senate hearing, saying “Voting is among the most fundamental and sacred rights that we have as North Carolinians and as Americans. Any effort to limit the free exercise of that right should be examined cautiously, fairly and with full public involvement.” As he spoke, the Associated Press reported, “Republican lawmakers rolled their eyes, talked among themselves or checked their smart phones for messages.”\textsuperscript{119} In the House, the only Republican to speak was Elections Committee Chair David Lewis, who did not bother to answer charges that the measure would lead to long lines at the polls and disfranchise minorities and college students. Democrats, according to a news report, “used most of the 2-1/2 hours of debate to recall the fight for voting rights in the 1960s.” As the House majority

\textsuperscript{118} Part or all of the statistics in Table 4 were repeated, e.g., in the testimony of Sarah Preston, Policy Director of the North Carolina ACLU, House Hearing, March 12, 2013, at 13-14; Jennifer Frye of Democracy North Carolina, \textit{ibid.}, at 49-50; Keesha Gaskins of the Brennan Center, in March 13, 2013 House Hearing, at 9; Allison Riggs in \textit{ibid.}, at 32-33.

\textsuperscript{119} Michael Biesecker, AP, "NC bill would place new restrictions on voting," July 24, 2013.
voted in the law, Democrats stood, held hands, and bowed their heads.\textsuperscript{120}

1. Fraud

To charges that there was almost no in-person voting fraud, usually backed up by statistics from the State Board of Elections or the Brennan Center,\textsuperscript{121} the typical response was a variation on Secretary of Defense Donald Rumsfeld’s famous statement about the failure to find evidence of weapons of mass destruction in Iraq: “The absence of evidence is not evidence of absence.” Typical was that given during the Senate hearing on H.B. 589 by Sen. Bob Rucho: Fraudulent votes “never seem to get recorded or reported.”\textsuperscript{122} Or as Sen. Jerry Tillman phrased it, “If you don’t check it, you ain’t going to detect it . . . We don’t know how many there are.”\textsuperscript{123} As a reporter summarized the debate, “Despite the lack of evidence showing widespread voter fraud in the state, Republicans repeatedly insisted that cheating at the polls is rampant and that the perpetrators are not caught.”\textsuperscript{124}

The chief group charging that there was actual voter fraud in North Carolina was the Voter Integrity Project (VIP), a group “inspired by”\textsuperscript{125} the national organization “True the Vote,” which targeted black and Latino voters for challenges in Houston in 2010. Jay DeLancy, the founder of the VIP, told the New York Times that he split off from True the Vote “partly because the group raised concerns about focusing on immigrants,” which Mr. DeLancy did not mind doing.\textsuperscript{126} The evidence it cited was very circumstantial and mostly amounted to inadequate purging of registration rolls – counties in which the registration lists were nearly as large as the number of voting age citizens; 30,000 dead people who had not yet been removed from the rolls;\textsuperscript{127} 150 people in Wake County who

\textsuperscript{120}Lynn Bonner, David Perlmutter, and Anne Blythe, “Election changes move ahead - House and Senate approve the package, which could invite a Department of Justice lawsuit,” CO, July 26, 2013.

\textsuperscript{121}E.g., Sarah Preston, Policy Director of the ACLU of North Carolina, in House Hearing March 12, 2013, at 13-14; Diana D. Hatch, in ibid., at 19; Bill Rowe, in ibid., at 45; Sonya Gressel, in ibid, at 101-02; Keesha Gaskins, in March 13, 2013 House Hearing at 8;


\textsuperscript{123}Craig Jarvis, “Senate gives voter ID law initial OK - Final approval today would send measure to the N.C. House,” CO, July 25, 2013.

\textsuperscript{124}Michael Biesecker, “NC Senate approves GOP-backed election changes,” AP, July 25, 2013.

\textsuperscript{125}See http://voterintegrityproject.com/faqs/.


\textsuperscript{127}In the normal course of purging in a 19-month period in 2006-07, the State Board of Elections removed 725,999 names from the voter rolls, most because of death or inactivity, so 30,000
had voted, but who had claimed at some point in response to jury summonses not to be voters; 7000
Wake County voters from 2012 to whom letters were sent and returned as undeliverable; and 63
people in Buncombe County who registered and whose driver’s licenses and social security numbers
matched state records, but whom the post office did not find at the addresses they had given. VIP
Director Jay DeLancy’s testimony on the subject before the House was quickly disavowed by the
organization itself,218 meticulously debunked by critics,219 as well as undermined by his charge that
critics of the VIP were “all part of a vast left-wing conspiracy, if you will pardon the term, working to
pad the voter rolls with as many non-citizens as possible.”219

There were some charges during the debates that there was not time to validate SDR votes by
sending out mail and seeing if it was returned (the post office was not supposed to forward it).211 Not

remaining on the rolls at any one time was unsurprising. David Ingram, “Inquiries checking rolls of

Two days later, the VIP website posted a “Statement on possible errors,” which read, in
part “Late this afternoon, we learned that some of our findings, revealed at the April 10 public
Legislative hearing, may be inaccurate; so we plan to issue a full report after completing an audit.”
See http://voterintegrityproject.com/poss_errors/. The VIP did not indicate which of its findings were
inaccurate, and if it did conduct an audit, it apparently never posted or published a “full report.”

The VIP presented a list of 528 registered voters who were allegedly not citizens to the
Wake County Board of Elections in 2012. The Board quickly found evidence that at least 510 of
them were citizens and called the remaining 18 before a hearing. “Advocacy group appeals dismissal
http://projects.newsobserver.com/under_the_dome/advocacy_group_0ppeals_dismissal_of_voter_fra-
ud.

Bill Bryson in House Elections Committee Hearing, April 10, 2013, at 70-71; Jay
DeLancy, in House Hearing, March 12, 2013, at 34. There were over 700,000 voters registered in
Wake County in 2012.

E.g., Francis DeLuca, President of the John W. Pope Civitas Institute, in March 13, 2013
House Hearing, at 17. See also Meghann Evans, “Republicans take control of county elections
board,” Winston-Salem Journal, July 17, 2013; testimony of John Pizzo, research director of the
Voter Integrity Project, at House Elections Committee Public Hearing, April 10, 2013, at 22; and
testimony by numerous individuals, announcing individual names, provided by VIP on slips of paper,
of voters in Buncombe County who used SDR, but whose mailed confirmation letters were returned,
in April 10, 2013 public hearing. As Gerry Sovak remarked at the April 10, 2013 Public Hearing of
the House Elections Committee, at 141, “I have, of course, another one of these things here from the
Voter Integrity people, who have done a magnificent job in their research. And I don’t have to bore
you any more with more from Buncombe County. We have a guy, Keith Miles Avery (phonetic), and
he did the same thing that all the rest of them from that county did.” The State Board of Elections
investigated a county commission contest from Buncombe County, referred to in complaints about
SDR at this hearing, and found that almost all of the challenged ballots, which were from Warren
Wilson College students, were valid. Johnnie F. McLean, Deputy Director of the State Board of

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only did this ignore the other checks on such registration, which required HAVA identification and either a drivers’ license number or the last four digits of a Social Security number, but they also ignored the tagging of the SDR ballots, as explained above, so that they could be excluded for the count if found later to be invalid.\(^{132}\) Again, proponents of H.B. 589 (2) presented no evidence of actual fraud, just what Gov. Pat McCrory called the “potential for abuse.”\(^{133}\) Asked at a post-passage news conference how ending SDR, cutting a week off of early voting, and eliminating teenage pre-registration would prevent voter fraud, Gov. McCrory seemed not to know the details of either existing North Carolina law by suggesting that people could register online, which was not legal, he ignored the question about early voting, and he confessed he did not know about pre-registration. “I don’t know enough, I’m sorry, I haven’t seen that part of the bill,” McCrory replied.\(^{134}\)

It was very telling that no one in the 2013 debates referred to the 2007 Auditor’s study by Les Merritt or the investigation of the same year by the U.S. Department of Justice as providing any evidence of fraud. Nor did anyone counter the contention made, for example, by Lee Mortimer, a former member of the Legislative Study Commission for Election Law Review in 1996, that if there had been appreciable fraud, some candidate in a close election would have successfully challenged his defeat.\(^{135}\) It does not take Sherlock Holmes to appreciate the significance of non-barking dogs.\(^{136}\)

2. Lack of Confidence

Lacking credible evidence of fraud, proponents of voter ID retreated to the notion that people believed there was fraud, whether or not it was true, and that therefore, they needed voter ID to assuage their fears and restore confidence in the electoral process.\(^{137}\) Speaking of the voter identification bill about to be introduced in the North Carolina House, Speaker Thom Tillis told MSNBC on March 16, 2013 that

- There is some voter fraud, but that's not the primary reason for doing this. There's a lot of people who are just concerned with the potential risk of fraud. And in our state it could be significant. This is just a measure that we think makes three-

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\(^{132}\) The confirmation-by-mail rate of SDR and earlier registrations was approximately equal. Bob Hall, “Sounding a retreat on voting,” \textit{N&O}, July 1, 2011.


\(^{134}\) Michael Biesecker, “McCrory not familiar with all of bill he’s to sign,” \textit{AP}, July 28, 2013.

\(^{135}\) Mortimer testimony in April 10, 2013 Public Hearing before House Elections Committee, at 94-95.

\(^{136}\) Arthur Conan Doyle, “Silver Blaze.”

\(^{137}\) The most amusing response to this argument came from Dr. Walter Salinger, a psychologist, who told the House Elections Committee in its March 12, 2013 hearing that “I can assure you that individuals who find themselves unsettled enough by imaginary danger that they require a new law against it will not find relief from that new law. It is surely safe to say that therapy for that kind of affliction is not found in the North Carolina General Assembly.” At 152.
fourths, nearly three-fourths of the population, more comfortable and more confident when they go to the polls.\textsuperscript{138}

Likewise, David Lewis, chairman of the House Elections Committee, said of the purpose of H.B. 589 (2) that "It's all about continuing to improve the confidence in elections."\textsuperscript{139} Introducing H.B. 589 (1) on the House floor, Lewis remarked that he would not stand before you today and list name by name or example after example, but I can tell you that the perception is that there needs to be an improvement in the integrity of the election system.\textsuperscript{140} They offered even less evidence for the incidence of such fears than they did for the incidence of fraud.\textsuperscript{141} In any event, no one had any occasion to say during hearings on H.B. 589 (1) that slicing early voting or SDR or out-of-precinct voting or teenage pre-registration would somehow restore the electorate's confidence, and they never made such assertions. Democrats responded with an equal lack of specific information, Sen. Malcolm Graham, for example, asserting that H.B. 589 (2) was "not about providing confidence, honesty, integrity, and trust in government. Trust is being lost as we speak."\textsuperscript{142} The disagreement about what the public thought and the lack of evidence on both sides suggests that the whole issue was merely rhetorical and not a possible motive for acting.

3. Expense

Sen. Bill Cook declared that in his rural district, there was no need to open early voting sites for more than two weeks. "I don't think we need (the extra days)," he said. "The first week, you get lots of folks. The second week, nothing. It's almost a desert." Urban election administrators, such as George Gilbert of Guilford County, disagreed, saying, in the words of a newspaper reporter, that shrinking the early voting period would mean "extremely long voter lines" or millions of dollars to buy enough voting machines to keep voters moving on the remaining days.

He scoffed at the idea the state could save money by cutting back on voting days, saying he did that math for elections going back to 2000.

"On a cost basis, early voting is much more efficient," Gilbert said.\textsuperscript{143}

On a perhaps similar note, Senate President Pro Tem Phil Berger declared that early voting "put stress

\begin{footnotes}
\item[139] Gary D. Robertson, "NC Senate rolls out voter ID proposal," AP, July 18, 2013.
\item[140] House Floor Debate, April 24, 2013, 43, my underlining.
\item[141] The one study of the correlation between the public perception of fraud and turnout, by Steve Ansolobehere and Nate Persily, cited by Allison Rigg's in her testimony before the House Elections Committee, March 13, 2013, at 38, found no correlation at all.
\item[143] "Early voting could shrink," Greensboro News & Record, April 5, 2013. During the Senate debate on the bill, African-American Senator Dan Blue made the same point as Gilbert. Senate Debate, July 24, 2013, at 19-20.
\end{footnotes}
on election workers and campaign coffers." Gilbert responded that

Early voting enabled us to use fewer polling places and place more experienced and better-trained poll workers in the early voting sites. We were also able to place better technology in these sites and, as a result, execute elections much more accurately. To the extent that there was any discussion of expenses with respect to other provisions of the bill, Democrats pointed out that providing free identity cards and advertising about the new election provisions would cost the state a fair amount. The largest expense as a result of the bill, certainly larger than any possible cost savings from restricting early voting, was in moving the presidential primaries up to coincide with the South Carolina primary. Sen. Rucho blithely predicted that the extra spending on presidential campaigns coming into the state would offset the $12 million that he predicted it would cost the counties to run another election. Despite the importance of cutting spending in normal Republican rhetoric, noponent touted any provision of the bill as a cost-saving measure.

4. Efficiency and Uniformity

Introducing H.B. 589 (2) in the Senate Rules Committee, Sen. Bob Rucho touted "early voting changes, which help streamline and make the system work smoothly as it was intended ... It would provide for more uniformity across the state." On the Senate floor, however, Rucho was inconsistent about consistency. On the one hand, he declared that H.B. 589 "sets standards as to the voting hours, uh, across the one hundred counties. Everyone will be treated the same way. Lack of consistency has been a problem." On the other hand, Rucho criticized a compromise amendment by African-American Senator Floyd McKissick, Jr. to restore the full 17 days of early voting in presidential years, when turnout was especially high. Counties could provide more days or more sites if they desired, said Sen. Rucho, who praised the bill for providing county-level "flexibility." And Rucho was not alone. Other Republicans, such as Sen. Brent Jackson, touted the non-uniformity of the bill. As Jackson told his hometown newspaper, "While it does shorten the period for early voting, it gives counties flexibility to set their own early voting hours during this, provided that they are the same throughout the county." In fact, the bill allowed counties to petition for exemptions to

144 Early voting could shrink," Greensboro News & Record, April 5, 2013.
146 Senate Debate, July 24, 2013, at 8-9.
147 Senate Rules Committee Meeting, July 23, 2013, at 3-4.
150 Senate Debate, July 24, 2013, at 12. McKissack's amendment was defeated on a party-line vote. Id., at 21.
151 Chris Berendt, "Voter ID bill draws praise from Jackson, disdain from Bell," Sampson Independent, July 31, 2013.
decrease early voting more than the standard for the state, and by February, 2014, more than a third of the state’s counties had petitioned to provide fewer days or shorter hours.\textsuperscript{152} It is a curious argument if a relatively simple provision of the bill can be interpreted in opposite ways, even by its chief sponsor, and a loophole can guarantee the failure of an asserted goal.

Sen. Rucho also argued that SDR should be ended because it strained election boards. H.B. 589, he declared, “allows time for, um, to verify voters’ information, uh, by repealing same-day registration, and which will ensure accuracy. Uh, it’s been a challenge for the Board of Elections, uh, to be able to identify and validate everyone that has come there on the basis of one-day registration.”\textsuperscript{153} This was, of course, a problem that might have been attacked by relatively small increases in spending to hire more people to work at county election boards. Instead, the legislature cut appropriations for the boards of election.\textsuperscript{154}

\section*{VIII. H.B. 589 and the “Senate Factors”}

Having laid out the evidence extensively in narrative/analytical form, I now more briefly summarize it, organizing it under the rubrics of the nine “Senate Factors” of the 1982 Senate Report on the renewal of the Voting Rights Act. I then reorganize the evidence, summarizing it under the rubrics of ten “intent factors” drawn primarily from federal court opinions dealing with intent.

\section*{A. Modifications in the Senate Factors for this Case}

Senate Report 97-417 sets out seven “typical factors” and two “additional factors” that might be used to prove a violation of Section 2 of the Voting Rights Act. As the Report notes at p. 28, n. 113, “These factors are derived from the analytical framework used by the Supreme Court in \textit{White v. Regester}, 412 U.S. 755 (1973), as articulated in \textit{Zimmer v. McKeithen}, 485 F.2d 1297 (5th Cir. 1973)).” Because \textit{White v. Regester} concerned at-large elections in Dallas and San Antonio, these factors are not entirely congruent with the particulars of state-wide election laws. Moreover, political conditions have changed a great deal since 1973 — the Latino population has grown markedly in many states, more minorities have been elected to office, and the Republican party has replaced the Democratic party as the dominant one in the South. As a consequence, some of the “Senate Factors,” such as factor #4 on slating processes, may be ignored in this case, while others, such as factor #1, must be slightly reinterpreted.

\begin{flushright}
\textsuperscript{152} Doug Chapin, “Many North Carolina Counties Seek Further Cutbacks on Early Voting,” \textit{Electionline}, Feb. 27, 2014, available at \\
<http://blog.lib.umn.edu/cspg/electionacademy/2014/02/many_north_carolina_counties_s.php>.
\textsuperscript{153} Senate Debate, July 24, 2013, at 4-5.
\textsuperscript{154} Statement of Joanne Clayton, Wake County Board of Elections Trustee, in House Elections Committee Hearing, March 12, 2013, at 161
\end{flushright}
B. The Evidence Arrayed Under the Rubrics of Relevant Factors

What follows is largely a very abbreviated rearrangement of the evidence presented in sections IV-VI, augmented by evidence from outside the narrative where appropriate.

1. History of Official Discrimination

The first Senate factor is "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process."¹⁵⁵ Part IV of my report is largely devoted to this factor.

The 1835 constitutional convention’s closing of the loophole that allowed black freemen to vote by inserting the word “white” because of the threat that free men of color might influence or even dominate a local election represents the purest form of black disfranchisement (Section IV.A.) But efforts to diminish black voting power did not cease when the Fifteenth Amendment made disfranchisement explicitly on racial grounds unconstitutional. There was significant Ku Klux Klan violence against African-Americans and their white allies in North Carolina, captured memorably in the phrase of the famous North Carolina Republican and later lawyer for Homer Plessy, Albion W. Tourgee: “It is no crime for a white man to cut a colored man open in Alamance.”¹⁵⁶

But really lasting discrimination in the political process in the South in the late nineteenth and early twentieth centuries was accomplished by changes in election laws that brief frenzies of violence and fraud made possible. After Democrats took over the legislature, at least partly through Klan violence, in 1870, they redistricted both legislative and congressional seats to pack blacks into as few districts as possible in order to minimize the influence of blacks and the Republican party to which they overwhelmingly adhered. Although the state remained politically competitive until 1894 and African-Americans retained the ability to vote, their effective participation in the politics of the state was considerably diminished. Then, largely as a result of the worldwide depression of the 1890s, a Republican-Populist Fusion movement swept into control of the legislature in 1894 and the governorship in 1896. In an event paralleling the liberalization of election laws in the state from 1999 through 2007, the Fusion movement passed the most expansive election law in the post-Reconstruction South, and turnout of both blacks and whites reached the highest levels of any southern state after 1876, including recent elections. This experiment in competitive democratic elections was brought to an abrupt end by the violent 1898 “white supremacy campaign,” which enabled Democrats to pass a severely restrictive election law and gave Democratic election officials the unrestrained ability to fabricate election returns. They used this ability in the 1900 referendum

¹⁵⁵ S.R. 97-417, p. 28. The rest of the Senate factors appear on p. 29. I will quote them without further citation.

that fastened upon the state a poll tax and literacy test, enforced by Democratic election officials who moved electoral discrimination from the ballot box to the registration list.

It took African-Americans in the state a long time to recover politically. Even after the repeal of the poll tax in the state in 1920 and the Supreme Court's outlawing of the white primary in 1944, few blacks managed to register — only 15% in 1948 and 36% in 1962. When after the 1965 passage of the Voting Rights Act, black registration in North Carolina finally approached levels that might have allowed them to elect candidates of their choice, the state retained at-large elections for urban legislative and city council seats, a form of elections only gradually overturned by judicial action in such notable cases as Thornburg v. Gingles. Intentional discrimination in the drawing of congressional districts in 1971 and 1981 kept blacks from winning even a single seat, although they comprised over 20% of the state's population. Only pressure from Sections 2 and 5 of the Voting Rights Act in 1991-92 caused the state to adopt congressional districts where, for the first time since 1898, blacks in North Carolina enjoyed the opportunity to elect candidates of their first choice.

Also relevant for evaluating H.B. 589 is the history of anti-discrimination in North Carolina politics - the passage of election laws that encouraged African-Americans and the small, but growing Latino population to participate in politics. Early voting, same-day registration, the counting of votes cast outside of the voter's precincts, in addition to civic education and the pre-registration of 16- and 17-year-olds while they were still in high school, spurred turnout in the state from 48th among the states in 1988 to 11th in 2012,157 and most of this increase can be attributed to increased black participation. (See Section V above.) It is the repeal of these laws by H.B. 589 that directly threatens the participation of African-Americans in North Carolina politics that makes the analysis of the 1999-2007 laws central to the history of minority political participation in the state.

2. Racially Polarized Voting

Factor 2 is “the extent to which voting in the elections of the state or political subdivision is racially polarized.” The extent of racial bloc voting is relevant to the intent prong of Section 2.158 If Republicans crafted changes in election laws to do the maximum damage to Democrats, then they necessarily must have aimed them at that party's most loyal supporters. If a majority of African-Americans in 1900 had been Democrats, Democrats would have had no interest in disfranchising them. If a majority of African-Americans in 2013 had been Republicans, Republicans would have had no interest in restricting the opportunities to vote that blacks differentially exercised.

Voting in North Carolina is racially polarized, as I understand the state has conceded in the current redistricting litigation. The CNN exit poll for the 2012 Governor's race found 29% of whites

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158 For example, in Rogers v. Lodge, 458 U.S. 613, 623 (1982), the Court declared that “bloc voting along racial lines” and the failure to elect blacks “bear heavily on the issue of purposeful discrimination.”
and 85% of African-Americans voting for Democrat Walter Dalton, while 70% of whites and only 13% of blacks favored Republican Pat McCrory.\footnote{Also relevant to the provisions of H.B. 589, the vote was polarized by age, as well. 56% of voters aged 18-29 voted Democratic, compared to 34% of those over 65.} The polarization by race was much more pronounced than those by education or income. Thirty-nine percent of high school graduates voted Democratic, compared to 46% of college graduates and 45% with postgraduate degrees. Forty-nine percent of those with incomes under $50,000/year favored Dalton, but only 38% with incomes over $100,000. The presidential contest (Romney carried the state, 50-48) was even more polarized. Thirty-one percent of whites, but 96% of African-Americans voted for Barack Obama. There was almost no correlation between education and 2012 presidential vote choice, and that between income and the vote was tempered. Fifty-five percent of those with incomes of less than $50,000/year voted for Obama, while only 44% of those with incomes above $100,000 did so.

Outcomes from earlier polls are similar. In 2004, the CNN exit poll showed that 43% of whites and 87% of blacks voted for the successful Democratic gubernatorial candidate, Michael Easley, which was again, much more polarized than votes by income or education. Even though John Kerry ran considerably behind Easley among whites, garnering only 27% of their votes, he polled nearly as well, 85%, as Easley did among African-Americans.

In the state as a whole, there are sometimes enough crossover white voters to elect the choice of black voters, as in the gubernatorial elections from 1992 through 2006, and sometimes not enough white crossover voters, as in 2010. Nor do legislative or congressional seats necessarily have to contain majorities of minority voters to elect the minority candidates of choice, as shown by the repeated reelection of Mel Watt to Congress, after his first two elections, in a minority-minority congressional district. Racial polarization has never been defined legally as 100% of whites opposing and 100% of minorities favoring particular candidates, and indeed, Justice Brennan in \textit{Gingles} singled out “legally significant white bloc voting” as that subset of all bloc or racially polarized voting in which white voters “normally will defeat the combined strength of minority support plus white ‘crossover’ votes . . .”.\footnote{\textit{Gingles}, at 56.}


Factor 3 is “the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group.” These types of laws pertain largely to local elections or to an era in which winning the Democratic primary virtually guaranteed a candidate the election. The implicit lawsuit to which they pertain is one attempting to overturn an at-large election in a system containing other provisions that add to the difficulty of electing minority candidates of choice.

The best analogy in this case is simply the number of provisions being put into effect.
simultaneously, each of which by itself has a disproportionately large effect on African-American participation. Added together, they have a multiplier or interactive effect: the constriction of early voting, especially the ending of Sunday voting and the confining of Saturday voting to a half-day, the end of SDR and counting out-of-precinct votes, cutting off preregistration and civic outreach for 16-17-year olds, plus voter ID legislation with a very limited range of ID cards accepted. As was pointed out during the Senate debate, the end of straight-ticket voting also disproportionately affected African-Americans, 80% of whom voted straight tickets in 2012, compared to 45% of whites. It would take much longer for people to vote in predominantly black than in predominantly white precincts, compared to the times in 2012, which would make for longer lines and more people leaving without voting. ¹⁶¹ Putting all of these into effect at the same time will depress turnout for two reasons: First, political organizations will have to insure that every voter overcomes more than one new obstacle – that they register at least 25 days before the election AND that they vote on a weekday or Saturday morning in an 11-day, rather than in an 18-day period (ten days plus the normal election day), AND that they remember to bring a valid ID with them to the polls. Second, because minority voters will expect fewer of their group to vote, and that therefore, there will be a smaller chance for a minority-preferred candidate to win, they will have less incentive to vote, and those who contribute funds to campaigns will have less incentive to contribute to such candidates.

In 2008, the Obama campaign key ed its strategy in North Carolina to the newly expansive election laws, targeted potential black and college student voters, and invested more resources in the state than any Democratic presidential campaign since 1964. The combination of laws that encouraged more people to vote and a campaign that grasped that opportunity produced the greatest increase in turnout of any state in the country between 2004 and 2008. ¹⁶² H.B. 589 can be expected to produce the opposite effect – a law designed to make voting more difficult, coupled with decreased campaign efforts because the outcome seems predetermined, will lead to a decline in turnout, especially among minorities. The 1999-2009 laws enhance minority participation; the many provisions of H.B. 589, added together, enhance discrimination.

4. Candidate Slating Processes

This factor relates only to local elections and is not relevant to this case.

5. The Current Effects of Discrimination

¹⁶¹ See Senate Debate, July 24, 2013, Track 3, at 6. The estimate of straight-ticket voting by race was made by regressing the percentage of straight-ticket votes on the percent of black voters in each precinct.
The fifth factor is “the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process.” Congress assumed in its statement of this factor a fact long recognized by social scientists -- that in the post-World War II U.S., political participation is strongly correlated with education and income. As Raymond E. Wolfinger and Steven J. Rosenstone put it in *Who Votes* in 1980, “probably the best-known finding about turnout is that ‘citizens of higher social and economic status participate more in politics.’”

Poorer people are less likely to own cars or have internet connections. Less educated people may make more errors following complicated bureaucratic instructions. Any legal change that shortens voting periods, penalizes mistakes in going to the wrong polling place, or sets the registration deadline at a time before some people are paying much attention to an election will have a disproportionate effect on those who bear the effects of hundreds of years of discrimination.

But there are also two particular legacies of past discrimination that are relevant to the particular provisions under review are, first, the geographic mobility of African-Americans, compared to whites, which would affect a voter’s need to re-register because she moved within or between counties. The repeal of SDR would disproportionately affect a more geographically mobile group, and the contraction of the early voting period would disproportionately affect even those who moved within a county, because they would have less time to change their registration to reflect their new residences. A second trait is the extent to which members of a group held blue collar or low-skilled service jobs, because people holding these jobs might have more difficulty than professionals or those in high-skilled service jobs or homemakers to get off from work for long periods during the day. They would therefore be disproportionately damaged by a constricttion of early voting, particularly on weekends. Both conditions – geographic mobility and low-skilled jobs – can be seen as resulting from generations of past discrimination.

As in the country as a whole, African-Americans are more geographically mobile than non-Hispanic whites in North Carolina. The 2006-1010 American Community Survey (ACS) data indicates that an average of 17.1% of blacks moved within the state each year during that 5-year period, compared to 10.9% of whites. Although most of that movement took place within each county, blacks were still more likely than whites to move from county to county – 4.2% to 3.3% – per year.164


164 See <http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_5YR_DP01&prodType=table>.
Furthermore, in North Carolina, African-Americans are still disproportionately concentrated on the lower end of the employment spectrum, presumably enjoying less ability to take long periods of time off of work, in the case lines at the polls are long. The 2006-2010 ACS data show that non-Hispanic blacks hold only 16.2% of the management, professional, technical, or sales jobs in the state, while they fill 25.0% of the administrative support, construction, operative, laborer, and service worker jobs.  

So two specific legacies of slavery and Jim Crow connect directly with two specific provisions of H.B. 589, in both cases hindering minority group participation in politics as a direct result of that law. Lengthening lines at polling places, a certain result of eliminating a week of early voting, especially voting on the weekends, will disproportionately affect African-Americans because of their geographic mobility and less flexible employment conditions.

6. Racial Appeals

The sixth factor is “whether political campaigns have been characterized by overt or subtle racial appeals.”

The unsubtle racial appeals in the 1950 Willis Smith and 1990 Jesse Helms campaigns are sufficiently notorious as to have been the principal subject of several books and articles. There have been fewer such blatant uses of race by political candidates in the state since that time, but there have not needed to be. The racial demagoguery of the 1898 white supremacy campaign fastened the black collar around the Republican party’s neck in North Carolina for fifty years or more. Every effort that the party made – and there were many, particularly in the 1920 gubernatorial campaign of John J. Parker – to claim that it, not the Democrats, was “the party of the white man” failed. A sufficiently strong racial appeal, in the earlier case, imprinted itself on one party for a very long time. The continued racial polarization in voting in the state suggests that Helms’s racial appeal has had a similar effect in the more recent period.

7. The Election of Minority Group Members

The seventh factor is “the extent to which members of the minority group have been elected to public office in the jurisdiction.” With the Gingles case in 1986, it became much more difficult to retain at-large systems of electing candidates to local and legislative offices, and the resulting district elections sent many more African-Americans to city halls and state legislative chambers. The redistricting of the 1990s, as a direct result nationally of Gingles, greatly increased the number of districts where blacks could elect candidates of their choice. The growth of black officeholding, in other words, was the result of the enforcement of the Voting Rights Act.

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165See <http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_5YR_RAC_DP03&prodType=yovb>. 

53
In 2011, Republican redistricting plans for congress and the state legislature in North Carolina insured the election of a certain number of black candidates – no more, no less – by packing more African-Americans into districts where blacks could already elect black candidates with white crossover votes.¹⁶⁶ Slate magazine rated the two black-dominated North Carolina congressional as among the 20 “most gerrymandered” in the country.¹⁶⁷

Whether black officeholding in North Carolina will ever equal the percentage of black voters, which might be one interpretation of the aim of the seventh factor, is difficult to say because of the Supreme Court’s invalidation of Section 4 of the Voting Rights Act in Shelby County v. Holder. Whether the Republican party’s interest in redistricting will continue to be maximized by packing African-Americans into the smallest number of districts, or whether the North Carolina party, like the Texas party, will attempt to decrease the number of minorities elected by cracking the existing minority opportunity districts, also remains to be seen. If districts that currently elect black members are “cracked,” instead of packed in the future, then the number of candidates of choice of the black community elected will probably decline.

8. Unresponsiveness

The eighth factor, which the Senate Report calls “not an essential part of plaintiff’s case,” is particularly relevant in this one because it is unusually easy to measure. The Report defines the factor as “whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.” Three laws passed by the 2013 North Carolina legislature demonstrate unresponsiveness: slicing the length of time that people can receive unemployment benefits, refusing to expand Medicaid under the Affordable Care Act, even though the first five years were 100% paid for by the federal government, and repealing the Racial Justice Act.

The Great Recession drove up long-term unemployment generally, but particularly black long-term unemployment. Nationally, 1.9% of African-Americans were unemployed for 27 weeks or more in 2007, compared to just 0.7% of whites. By 2010, the totals were 7.7% and 3.7%, respectively. By 2012, black long-term unemployment had fallen to 6.5%, and white long-term unemployment had dropped to 2.8%. A larger proportion of blacks than of whites had been unemployed for a year or more — in 2012, fully 4.8% of blacks and 2.0% of whites. In March, 2013, not long before the legislature passed a bill limiting unemployment benefits to 12-20 weeks,¹⁶⁸ North

Carolina had the third highest long-term unemployment rate of any state. The general unemployment rate of African-Americans in North Carolina during the fourth quarter of 2012 was 17.3%—nearly three times as high as that of whites, which was 6.7%. Cutting the length of time for which someone actively seeking work (a requirement of the program) could receive benefits would obviously hurt blacks more than whites, and cutting benefit levels, as the law also did, would damage even those left on the rolls. A government that was responsive to the particular needs of African-Americans would not sever a lifeline that was disproportionately important to that group.

More African-Americans and Latinos than whites lack health insurance in North Carolina. In 2011-12, 21% of blacks, 44% of Latinos, but only 15% of whites in the state lacked health insurance. Whites in the state were very much more likely to obtain their health insurance from their employers—71% of whites did, but only 18% of blacks and 4% of Latinos. Blacks and Latinos were much more dependent on Medicaid than whites. Although some people received both Medicaid and employment-based insurance during a single year, so that coverage figures can exceed 100%, 36% of blacks, 16% of Latinos, and 38% of whites received at least some coverage from Medicaid in 2011-12. Because minorities were more likely to lack health insurance, particularly private insurance, any cuts in Medicaid or a refusal to expand it to cover people with incomes between 100% and 138% of poverty (the level at which subsidies under the Affordable Care Act begin) would disproportionately hurt members of minority groups. That is what the state did. North Carolina’s actions were estimated to eliminate 40,000 North Carolinians from health insurance coverage provided by Medicaid and cause from 455 to 1145 extra deaths in the state per year. Because minorities disproportionately lacked insurance, a disproportionate number of those deaths would likely be to minorities. Certainly, those who suffered additional pain, suffering, or death because of the legislature’s refusal to accept a federal grant to expand Medicaid in the state would believe the state unresponsive to their interests, and they would be disproportionately minority.

Finally, the 2013 legislature repealed the Racial Justice Act, passed in 2009, which provided that those convicted of murder, who were disproportionately minority in North Carolina, could escape

unemployment_n_3515448.html>.


the death penalty if they could prove that racial bias tainted their cases.\textsuperscript{174} Eight-one of the 153 convicts awaiting execution when the law was passed were black – 53\%, compared to the 22\% black proportion of the total population of the state.\textsuperscript{175} Only 61 were white. Blacks and other minorities who believed the justice system of the state infected with racism, as some reversals of death penalties under the Racial Justice Act had already shown, had reason to doubt the responsiveness of the legislature to their particularized needs.

9. Tenuous Policy

The ninth factor is “whether the policy underlying the state or political subdivision’s use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous,” and the sentence has a footnote which begins “If the procedure markedly departs from past practices or from practices elsewhere in the jurisdiction, that bears on the fairness of its impact.” While the factor was obviously framed primarily to apply to sub-jurisdictions of a state, it does have an application here, especially because H.B. 589 represents such a radical departure from the previous practices.

H.B. 589 reversed all of the policies that had been adopted since 1999, all of which except 16- and 17-year-old preregistration had been shown to have a disproportionately expansive effect on African-American voting participation, and it added a photo ID requirement, when it had been shown that blacks were considerably less likely to hold state-issued photo IDs than whites were. There is simply no evidentiary basis to doubt the conclusion that this abrupt departure from previous legal requirements will have a discriminatory impact on minority voters.

VIII. The Intent of H.B. 589

A. Reasons, Scrutinized Reasons, and Motives

Courts sometimes seem to accept almost any reasons for actions by a government proffered by an attorney in a lawsuit, even if it cannot be shown that the government actors articulated those reasons before or at the time that they acted.\textsuperscript{176} In other cases, courts require governments not only


\textsuperscript{176} See, e.g., \textit{Maine v. Taylor}, 477 U.S. 131 (1986), where the majority of the Supreme Court accepted the state’s defense of a ban on imports of fish on the grounds that non-native species or parasites might otherwise invade, prompting Justice Stevens’s skeptical rejoinder: “There is something fishy about this case.” \textit{id.}, at 152.
to come up with reasons for their actions, but to have considered sufficient evidence, in the court’s view, to have arrived at the decision to pass the various provisions of the law. In a third class of cases, those that turn on the government’s intent, courts have felt compelled to weigh the evidence for and against competing explanations of that intent. Intent is often a complicated inquiry, one turning on facts and not simply on assertions of motives, and therefore, like historians’ inquiries in general, the inquiry must be initially skeptical of all explanations and desirous of testing each potential explanation against other plausible ones. I have examined these issues at much greater length in chapter 7, “Intent and Effect in Law and History,” in Colorblind Injustice.

B. H.B. 589 and Ten “Intent Factors”

Drawing largely on federal court opinions, particularly the U.S. Supreme Court’s opinion in Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977), I set out ten “intent factors” in Colorblind Injustice, 347-58, discussing their rationales at greater length than courts have often done. I have very briefly indicated their rationales at the beginning of the discussion of each factor. For a more extensive discussion, the reader is referred to Colorblind Injustice. As in the “Senate Factors” section above, I compress the evidence presented in earlier sections of my report and array it under each of the ten rubrics.

1. Models of Human Behavior

Every explanation rests implicitly or explicitly on some model of human behavior. The models that each observer or analyst has in her mind influences what explanations seem plausible, whether she uses the model self-consciously or not. If we think that politicians who frame election laws are typically public-spirited citizens who only want the best for all people, then we will be more likely to accept the inevitable rhetoric of reform. If we believe all politicians are only narrowly self-interested in every endeavor, we will look for self-interested motives.

What should the history of election laws in North Carolina suggest about the proper model of human behavior to adopt in analyzing H.B. 589? Since this history has been reviewed above, it is easy to be brief. North Carolina’s election laws until very recently have been biased against African-Americans, with the exception of the Fusion election law of 1895, and laws and redistricting schemes have repeatedly been used to disadvantage both blacks and minority parties. Major changes in those

177 See, e.g., University of Alabama v. Garrett, 531 U.S. 356 (2001), in which a majority of the U.S. Supreme Court held that Congress had not found a sufficient pattern of discrimination against disabled persons by state governmental entities to justify applying the Americans With Disabilities Act to such entities. Id., at 370-71.

178 See, e.g., Washington v. Davis, 426 U.S. 229 (1976), in which a majority of the U.S. Supreme Court weighed the evidence for and against the proposition that a written test for police officers in the District of Columbia was instituted for a discriminatory purpose, finding that the District’s minority outreach and pattern of hiring, and the connection of the test to communication skills outweighed the disparate impact of the test. Id., at 246.
laws have usually taken place at times of major challenge to a ruling party, and they have represented attempts to entrench that party – always the party least dependent upon African-American votes.

We should approach such a major change in the rules of elections as H.B. 589 with this history in mind.

2. Historical Context

The sequence of historical events, which often reveals a great deal about the general attitudes and interests of decisionmakers, is particularly telling in this instance in three respects: First, although Democrats had managed to control the governorship and at least one house of the legislature from 1992 through 2010, the party had not won a presidential election in North Carolina since 1976. Obama’s breakthrough in 2008, fueled by huge turnouts of African-Americans and college students, posed the threat that Democrats would extend the power of a younger, growing coalition into a dominant position in state politics. Second, Republicans reversed that surge in the nationwide tea party landslide of 2010 and partially solidified its control through heavily partisan and racial gerrymandering of legislative and congressional lines in 2011. But demographic trends were against the GOP, and Obama nearly carried the state in 2012. Third, and most important, was the Supreme Court’s decision in Shelby County, which freed the state from preclearance. Many of the segments of H.B. 589 that were added to the bare-bones photo ID bill that had passed the House would surely have been deemed retrogressive by the Department of Justice, because it could be easily shown, by the evidence presented above, that African-Americans were more likely to vote early, more likely to register using SDR, and more likely to vote out of their precincts. The timing of the addition of the sections of the bill under attack in this case should be decisive in determining its intent.

3. Text of Law or Lines of Districts

The text of the law – for example late or anomalous additions or deletions or amendments not accepted – may be indicators of its intent. First, consider some of the amendments that were NOT adopted as the process proceeded. Ms. Pricey Harrison moved to include high school photo IDs and then, when objections to those from private high schools were raised, removed them. The amendment still failed. Harrison also wanted to add private college IDs as, she noted, were valid in several other states. That failed, too. Elmer Floyd moved to allow someone without a photo ID to agree to have a photo taken of her at the polls, along with her signature. That proposal was also defeated. Rick Glazier proposed an amendment allowing someone who did not bring a photo ID to the polls to vote if a polling place official knew them. The defeat of this amendment weakened the case for those who contend that the law was about stopping fraud. Glazier also proposed an amendment similar to the one that the Department of Justice forced on South Carolina, allowing someone who had a “reasonable impediment” to obtaining a photo ID to vote without him. Photo ID

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179 House Elections Committee Meeting, April 17, 2013, 48-110.
180 House Appropriations Committee Hearing, April 23, 2013, 31-34.
purists prevented this amendment from passing. All of these amendments would have made it easier to vote without increasing the possibility of fraud.

It is also instructive to compare the voter ID section of H.B. 589 with the laws of three states with well-known voter ID laws, as well as with H.B. 658 from 2011 and H.B. 589 (1). Table 5 does so. It shows that H.B. 589 (2) is vastly more restrictive than the Georgia and Indiana laws, which were declared constitutional, and considerably more restrictive than the Texas voter ID law, which did not survive a Section 5 challenge in the District Court of the District of Columbia and is now under a Section 2 challenge in Texas. It was more restrictive than the 2011 photo ID bill, as well. Georgia allowed county, municipal, state public and private college, gun license, pilot’s license, and government assistance cards to be used as IDs. H.B. 589 (2) allowed none of these. Indiana also allowed college student IDs, as well as expired state drivers’ licenses. Both Georgia and Indiana scheduled 21 days of early voting, instead of H.B. 589 (2)’s 10. Texas allowed gun licenses and U.S. citizenship certificates as IDs. The 2011 bill that Gov. Perdue vetoes allowed federal, state government, county, municipal, and public college IDs and those issued by a county Board of Election, and it did not change the number of days of early voting.

The changes between H.B. 589 (1) and H.B. 589 (2) were also dramatic. When introducing the House version in the Elections Committee, one of the chief sponsors, Harry Warren, touted the VIVA (Voter Information Verification Act) Board in grandiose terms:

VIVA provides for increased participation of eligible voters through an aggressive, bipartisan program of voter education and voter registration initiatives at the grassroots level across the state over a two-year period. VIVA aggressively addresses allegations of voter suppression and dispels predictions of disenfranchisement.

After Shelby County, the sponsors dropped the VIVA Board and the information campaign, along with the use of public college, local government IDs, and IDs used for government assistance programs, which they had added when the House Elections Committee agreed to an amendment by longtime African-American legislator Mickey Michaux. The sponsors added a section to allow people who resided anywhere in the county, not just in a voter’s precinct, to challenge her right to vote, and they authorized political parties to appoint bands of wandering observers to supplement the normal two observers at each polling place, in case there were fewer than two partisan observers at a polling site at any time. The prospect of large-scale challenging at minority precincts, which True the

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182 Activists paid very close attention to the exact provisions of each bill, and the politicians who passed them must be assumed to have, too. For example, in the April 10 public hearing before the House Elections Committee at 15, Maria Gaither, a representative of the Voter Integrity Project, declared that H.B. 589 (1) “has been watered down from the bill passed in the previous session. Now is . . . not the time to go wobbly.”
183 House Elections Committee Meeting, April 10, at 36-37.
184 See House Elections Committee Meeting, April 17, 2013, at 44.
Vote had threatened to do nationally in 2012, filled civil rights forces with trepidation.

Most important for this case, H.B. 589(2) reduced early voting from 17 to 10 days, eliminated voting on one of the two Sundays preceding the election, which was particularly important to African-Americans, and ended Saturday voting at 1 p.m., not 5 p.m. It also ended SDR during the early voting period and disallowed counting ballots for any offices at all that were cast out of precinct on election day.

The simplest way to gauge the impact of Shelby County on the bill is to compare the last two columns of Table 5. A bill that was already more restrictive than those in other states became much more restrictive, and those provisions disproportionately affected minorities. Clearly, the majority party in the legislature chose the more restrictive option in every case, and they did so with full knowledge of their discriminatory impact.

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186 Rob Schofield, “Voter suppression proposal a fitting conclusion to the 2013 legislature,” Elkin Tribune, July 31, 2013. The News and Observer predicted that the provision “it will give muscle to those who want to make trouble at polling places by challenging the rights of others.” Editorial, “Unhappy ending - Republican legislators produced a session to forget . . . if only we could.” N&O, July 27, 2013.
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Sources:
Indiana: <http://www.in.gov/sos/elections/2401.htm>
Texas: <http://www.sos.state.tx.us/elections/pamphlets/largepamp.shtml>
North Carolina 2011: H.B. 351, as ratified
*left status quo untouched
4. Basic Demographic Facts

A fast-growing minority population or populations whose depressed educational and economic levels reflect the vestiges of past and present racial and ethnic discrimination are facts that politicians can be expected to observe and that, therefore, should be assumed to affect their design of electoral rules and structures. Although the black population percentage in the state was virtually constant from 2000 to 2010, the Latino population more than doubled, and the white percentage dropped by almost four percent. A party almost wholly dependent on white voters, especially where younger white voters had preferred Obama in 2008 and 2012, faced a daunting long-range prospect.

5. Climate of Racial Politics

The climate of racial politics must be assumed to condition the expectations of officials who frame or maintain electoral structures. To the traditional antagonism between whites and African-Americans in the state, intensified by the election of the nation’s first African-American president, the marked growth of a Latino population in the state, for the first time, added another element to the racial stew, and there is evidence that it partly motivated H.B. 589. According to an editorial in the Raleigh News & Observer, “In making their case for voter ID, Republicans conjured visions of people (including illegal immigrants) sneaking into the polls to cast illegitimate ballots.”

6. Background of Key Decisionmakers

In some election law changes, as in the adoption of a majority-vote requirement in Georgia in 1964, one or a small group of legislators were clearly the prime movers, and their histories and biographies become key to understanding the motives of the legislature in passing the law. The prime mover of the Georgia majority-vote law in 1964, Denmark Groover, whose political career had been almost brought to an end by what he called a black “bloc vote” in 1958, was the leader of the extreme segregationist/county unit forces in the legislature. His leadership and background cast strong light on the intentions of the legislature that passed the majority-vote law. There is as yet insufficient evidence to connect H.B. 589 strongly to a particular legislator or small group of legislators. Instead, it seems on current evidence that a 2010 landslide and the continuation of that geographical shift in 2012 brought a cadre of new legislators to join veterans who had opposed extensive early voting, same-day registration, and out-of-precinct voting since they were adopted. Although internal documents that may emerge later in discovery may spotlight some particular

187 See http://censusviewer.com/state/NC.
188 In 2012, according to the CNN exit poll, voters aged 18-24 in North Carolina favored Obama by 67-31; those from 25-29, by 66-33; those in their thirties, by 58-41. In contrast, only 35% of voters over 65 preferred the African-American Democrat.
189 Editorial, “The governor’s veto of a voter ID bill makes sense, whether it is popular with the public or not,” NDQ, June 25, 2011, discussing Gov. Perdue’s veto.
190 See Colorblind Injustice, chapter 4, “The Bloc Vote in Georgia.”
legislators, currently it appears that these extensive changes should be attributed to the whole Republican leadership that came to power in 2010 and 2012.

7. Other Actions of Key Decisionmakers

Like their backgrounds, other actions of key decisionmakers may be indirect indicators of their general attitudes toward different minority groups. According to John Hood, a conservative writer at the John Locke Foundation, the 2013 legislative session in North Carolina was “phenomenal.” As the News and Observer summarized its accomplishments, not so enthusiastically:

The Republican supermajority, backed by Gov. Pat McCrory, dramatically reshaped the North Carolina landscape, upending decades of settled law, cutting once-sacred institutions and redefining the state’s political vision. The moves represent a test of how a moderate, evenly divided state reacts to a deep-red governing class. . . .

Once the new laws take effect, the new North Carolina will require photo identification at the polls, levy a flat income tax that reduces rates for many, make it harder to get an abortion, offer less generous unemployment benefits, require cursive education in schools, give low-income families vouchers for private schools, require fewer government regulations on businesses, resume executions for capital crimes and allow concealed handguns in bars and restaurants. . . .

It’s a similar story on the Racial Justice Act, which allowed convicted killers to be spared the death penalty if they could prove racial bias in their cases. Republican lawmakers weakened it last year but repealed it completely this session with McCrory’s approval. 191

Repealing a law called the “Racial Justice Act” might serve as the symbol of the legislative session. But others had wider effects.

An omnibus deregulation bill weakened restrictions on siting landfills. Democrats and some Republicans opposed the bill in the House, saying sponsors kept a provision on landfills in the dark and they weren’t able to properly vet it in committee. . . . But it does restrict consideration of the impact of multiple landfills on minority or low-income communities to only what’s required under federal law. . . . Landfills’ impact on low-income and minority towns was an important consideration in 2007, when the legislature approved tougher landfill regulations. 192

And as Rep. Garland Pierce, chairman of the Legislative Black Caucus, remarked, the legislature repealed the Earned Income Tax Credit, a benefit to lower-income working families with children,

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and decided to reject the 100% federally funded expansion of Medicaid in Obamacare.  

8. Statements by Important Participants

It is rare nowadays to find “smoking gun” statements about voting rights cases littering the legislative hallways, and one is forced to rely more on objective evidence. Careful to avoid statements that might undermine their case in the inevitable Section 2 and constitutional challenge to H.B. 589, backers of the legislation said as little as possible, especially about H.B. 589 (2). Dismissing their critics’ continual charges that the bills were aimed at bolstering the Republican party by suppressing the votes of minorities, college students, and seniors, proponents of H.B. 589 contented themselves with chanting their concern for minorities and their nonpartisanship.

9. State Policies and Institutional Rules

Departures from settled or widespread state policies or well-established institutional norms may be indicators of a discriminatory intent. Although there were no telltale abrogations of rules when the wholesale ripping up of the state election code that H.B. 589 represented took place, there were abrogations of norms. In 2007, when the Republican State Auditor requested a sudden halt to the planned debate on the SDR bill, Democrats jammed on the brakes, invited him to a public session, and considered the evidence he presented. By contrast, Republicans in 2013 sprung H.B. 589 (2) on the Democrats and the state just before legislative adjournment. There were no hearings or, in the House, even one committee meeting to let the Democrats debate, offer compromises, and vote on amendments. In Larios v. Cox, 300 F.Supp. 2d 1320 (2004), a federal district court examining the intent of the 2001 Georgia legislature in passing a redistricting plan for itself began by discussing the plan’s partisan origin and the majority Democrats’ defeat of all Republican amendments. A similar analysis of the 2:1 ratios of Republicans to Democrats on legislative committees in North Carolina in 2013, the generation of the bills wholly by the Republicans, the rejection of most Democratic amendments to H.B. 589 (1) and the reneging after Shelby County on the few compromises the Republicans had made should lead to a judgment similar to that in Larios. Every Democratic amendment to either bill considered on the House or Senate floors was rejected by a party-line vote.

10. Impact

Effect is very often taken as an indicator of intent because the framers of electoral laws may be assumed to be aware of and to calculate the consequences of their actions carefully and to be quite good at making such calculations. The likely impact of the voter identification provision of H.B. 589 and of the additional provisions at issue here is very clear, very discriminatory, and very

194 Larry G. Pittman in House Floor Debate, April 24, 2013, at 148: “It deeply distresses me that some of the opponents of this bill have brought the issue of race into this discussion.”

65
easily anticipated because of all of the publicity given to the statistics while the law was being considered. African-Americans, a matching study by the State Board of Elections showed, were much more likely than whites not to have a driver’s license or state identity card, and they were much more likely to vote early, to use SDR, and to vote outside their precincts. Republicans showed no reluctance to adopt these suppressive provisions; they did not accept them "in spite of" their racially discriminatory effects, in the words of Feeney.\textsuperscript{195} Rather, they did so triumphantly, gleefully, because of the discriminatory effects.

C. Alternative Explanations Tested

1. A Response to Fraud

If H.B. 589 were really a response to fraud, one would expect a large incident – a contested or disputed election, the discovery of a conspiracy to alter election returns, the report of obviously spurious returns, as in the 1900 suffrage amendment referendum in North Carolina – would precede and focus the election law debate. But there was no scandal, small or large, that precipitated the passage of H.B. 589 and, indeed, no credible evidence of in-person voting fraud or illegal registrations. What little fraud there was concerned mail-in absentee balleting,\textsuperscript{196} and the legislature rejected proposals to require a copy of a photo ID to be included with mail-in ballots or that they be notarized.\textsuperscript{197} There was no evidence presented that the strictly-regulated SDR allowed fraudulent ballots and not even any conceivable rationale for a connection of fraud and the first week of early voting or for counting out-of-precinct votes.

2. Restoration of Confidence

It was odd that since “restore confidence” appears in the title of H.B. 589 (2), as it had in H.B. 589 (1), there was never any testimony in the hearings or attempt to demonstrate in the debates that there was any lack of confidence in elections among the populace, or that any of the provisions of the bill would increase confidence.\textsuperscript{198} Nor were there any polling results on the issue of whether there was any crisis of confidence among the voters, even though there were plenty of polling results

\textsuperscript{196} State Board of Elections, “Documented Cases of Voter Fraud in North Carolina” showed that 47 cases of absentee voter fraud and 2 cases of in-person voter fraud were prosecuted in the state from 2000 to 2012.
\textsuperscript{197} Amendment offered by Darren G. Jackson, House Floor Debates, April 23, 2013, 62-75.
\textsuperscript{198} Speaking during House debate on H.B. 589 (1), at 152-53, of the perception of fraud, Democratic Leader Larry Hall asked “What does this bill do to address that perception? What did the hearings do to address that perception?”
discussed in the legislature and the media on generic photo ID bills, early voting, and same-day registration. Nor was there any recent event that would have destroyed the confidence of voters in North Carolina government in general or the election process in particular. In fact, as Democratic Senate Leader Martin Nesbitt, Jr. pointed out during the Senate debate, it was the earlier, expansive laws that responded to problems with the electoral system:

We haven't had hanging chads, we haven't had problems, and we have been proactive in trying to solve the problems we have had—long lines at the polls. Uh, back in the early '90s, we were having three and four hour lines at our polls, and we were proactive about that, and we created early voting. It was bipartisan when we created it, it was a good thing, it solved the problem, and voters were better off for it.  

Calling H.B. 589 an attempt to restore confidence was an empty rhetorical gesture, like calling a self-interested change a "reform," to which politicians in America have been addicted since at least the late nineteenth century. It is entirely implausible as a motive.

3. Economy, Efficiency, and Uniformity

Given the place of such words in business-oriented rhetoric and ideology, one would have expected to see such claims play a larger role in the debates than they did. But in fact, they barely made an appearance, and there was never any effort to provide any evidence that the bill would have any such effects or to explain why it would.

4. Partisanship and Racial Discrimination

Civil rights leaders and Democrats continually drummed into the debate in public and in the legislative halls that the bill was intended to have partisan and racially discriminatory effects. Jamie Phillips of the NAACP was exemplary:

I want to point out as every single person before me has, that these changes to voting laws are impacting specific groups of people. The fewer young people and minorities who vote, the better it seems in your minds. We get it. No one is being fooled. . . . Of registered North Carolina voters who lack ID, nearly 25 percent are seniors over the age of sixty-five even though they make up only 13 percent of the state's population. Seniors are also hard hit by provisions making it more difficult to add satellite voting sites to

\[199\] Senate Debate, July 24, 2013, at Track 3, 36-37.

\[200\] Stephen Ansolabehere and Nathaniel Persily, "Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements," \textit{Harvard Law Review}, 121 (2008), 1737-74 find that perceptions of fraud have no relationship to a survey participants' likelihood of turning out to vote.

67
accommodate seniors and voters with disabilities. The youth; in a sad move to restrict youth participation in our democracy, this bill specifically bans college student ID’s from being used for voting, eliminates pre-registration for sixteen and seventeen years olds and eliminates the requirement for high school voter registration drives. We should be encouraging the civic participation of young people, not blocking it. And finally, the most blatant and harmful impact of these changes are in voters of color. 31 percent of registered North Carolinian voters who don’t have photo ID are African-American despite comprising just 22 percent of the state’s population. This bill also bans out [of] precinct provisional ballots, striking the votes of people who move, making it much easier to challenge voters’ eligibility and create an intimidating presence at the polls. 201

Or as Sen. Josh Stein put it, referring to statistics that had been frequently cited in the Senate debate on H.B. 589 (2):

It will disproportionally affect minorities. Minorities take advantage of early vote, and in particular the first week of early vote, more than the general population. They take advantage of same-day registration, like college students do, more than the general population. They disproportionally don’t have driver’s licenses. And the biggest instance where they do things disproportionately, as Senator [Angela R.] Bryant talked about yesterday, was straight party voting. You wrap all these election changes into one, in fact it was in today’s Washington Post, the Department of Justice is readying their complaint to file against North Carolina when this gets enacted because of its impact on the participation of minorities in North Carolina and the electoral process. Why are you making it harder for seniors, young people, and minorities to vote? Might it be because these folks disproportionally vote Democratic? 202

The obvious strategy of H.B. 589 (2) was to put into effect provisions that would have disproportionate suppressive effects on constituencies that tended to vote Democratic. Since the core constituency of the North Carolina Democratic party at this time, the one that is most overwhelmingly Democratic in its vote and the one whose participation has risen the most as a result of the expansive changes in election laws since 1999 is African-Americans, they were of necessity the principal targets of any election law that would assist Republicans by decreasing Democratic turnout. When blacks were Republicans in North Carolina, the target of suppressive laws was black Republicans; now that they are Democrats, the target is black Democrats. The constant is race.

Since African-Americans’ disproportionate use of the targeted expansive provisions that were cut back was well known, and since none of the other possible hypotheses about the motives for the passage of the law in general or those provisions in particular can be logically or factually sustained, it is safe to conclude that the law was passed with a discriminatory intent. As the earlier

discussion of the factors underlying a judgment of a violation of Section 2 makes clear, it will very likely have a discriminatory effect, as well.
Signed at Pasadena California

J. Morgan Kousser

April 10, 2014
STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

MARGARET DICKSON, et al.,

Plaintiffs,

v.

ROBERT RUCHO, et al.,

Defendants.

NORTH CAROLINA STATE CONFERENCE
OF BRANCHES OF THE NAACP, et al.,

Plaintiffs,

v.

THE STATE OF NORTH CAROLINA, et al.,

Defendants.

11 CVS 16896

11 CVS 16940

(Consolidated)

JUDGMENT and MEMORANDUM OF DECISION
OUTLINE OF THE JUDGMENT OF THE TRIAL COURT

I. INTRODUCTION

II. PROCEDURAL HISTORY

III. SUMMARY JUDGMENT STANDARD

IV. ARE THE CHALLENGED DISTRICTS A RACIAL GERRYMANDER THAT VIOLATES THE EQUAL PROTECTION GUARANTEES OF THE UNITED STATES OR NORTH CAROLINA CONSTITUTIONS?

A. Burden of Proof
B. Level of Scrutiny
C. Analysis of the Voting Rights Act Districts created in the Enacted Plans under the Strict Scrutiny Standard of Review
   1. Compelling Governmental Interests
      a. Avoiding Voting Rights Act §2 Liability
      b. Ensuring Voting Rights Act §5 Pre clearance
   2. Narrow Tailoring
      a. Did the General Assembly fail to narrowly tailor the Enacted Plans by creating more Voting Rights Act districts than reasonably necessary to comply with the Act?
      b. Did the General Assembly fail to narrowly tailor the Enacted Plans by “packing” the Voting Rights Act districts?
      c. Did the General Assembly fail to narrowly tailor the Enacted Plans by placing the Voting Rights Act districts in geographic locations where there is insufficient evidence of a reasonable threat of § 2 liability?
      d. Did the General Assembly fail to narrowly tailor the Enacted Plans by crafting irregularly shaped and non-compact Voting Rights Act districts or by otherwise disregarding traditional redistricting principles such as communities of interest and precinct boundaries?
   3. NC-NAACP Plaintiffs’ Equal Protection claim of diminution of political influence.
D. Did racial motives predominate in the creation of the Non-Voting Rights Act districts?

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

VI. DO THE ENACTED PLANS VIOLATE THE EQUAL PROTECTION GUARANTEES OF THE UNITED STATES OR NORTH CAROLINA CONSTITUTIONS BY DISREGARDING
TRADITIONAL REDISTRICTING PRINCIPLES BY FAILING TO BE SUFFICIENTLY COMPACT OR BY EXCESSIVELY SPLITTING PRECINCTS?
A. Lack of Compactness and Irregular Shapes
B. Absence of a Judicially Manageable Standard for Measuring Compliance, or Lack Thereof, with Traditional Redistricting Principles
C. Excessive Split Precincts

VII. CONCLUSIONS

APPENDICES

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

APPENDIX B: FINDINGS OF FACT RELEVANT TO THE ISSUE OF WHETHER RACE WAS THE PREDOMINANT MOTIVE FOR THE SHAPES AND LOCATIONS OF DISTRICTLINES FOR CONGRESSIONAL DISTRICT 4 OR 12, SENATE DISTRICTS 31 OR 32 OR HOUSE DISTRICTS 51 OR 54.  

Page 76

Page 160
I. INTRODUCTION

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

Political losses and partisan disadvantage are not the proper subject for judicial review, and those whose power or influence is stripped away by shifting political winds cannot seek a remedy from courts of law, but they must find relief from courts of public opinion in future elections. Our North Carolina Supreme Court has observed that "we do not believe the political process is enhanced if the power of the courts is consistently invoked to second-guess the General Assembly's redistricting decisions." Pender County v. Bartlett, 361 N.C. 491, 506 (2007) [hereinafter Pender County] aff'd sub nom. Bartlett v. Strickland, 556 U.S. 1 (2009). Rather, the role of the court in the redistricting process is to ensure that North Carolinians' constitutional rights — not their political rights or preferences — are secure. In so doing, this trial court must apply prevailing law, consider arguments, and examine facts dispassionately and in a manner that is consistent with each judge's oath of office — namely "without favoritism to anyone or to the State."

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

It is the ultimate holding of this trial court that the redistricting plans enacted by the General Assembly in 2011 must be upheld and that the Enacted Plans do not impair the constitutional rights of the citizens of North Carolina as those rights are defined by law. This decision was reached unanimously by the trial court. In other words, each of the three judges on the trial court --appointed by the North Carolina Chief Justice from different geographic regions and each with differing ideological and political outlooks -- independently and collectively arrived at the conclusions that are set out below. The decision of the unanimous trial court follows.

II. PROCEDURAL HISTORY

On July 27 and 28, 2011, following the 2010 Decennial Census, the North Carolina General Assembly enacted new redistricting plans for the North Carolina House of Representatives,1 North Carolina Senate,2 and United States House of Representatives3 pursuant to Article II, §§ 3 and 5 of the North Carolina Constitution and Title 2, § 2a and 2c of the United States Code. On September, 2, 2011, the North Carolina Attorney

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1 Session Law 2011-404 (July 28, 2011) also known as “Lewis-Dollar-Dockham 4 [hereinafter “Enacted House Plan”].
2 Session Law 2011-402 (July 27, 2011) also known as “Ruco Senate 3 [hereinafter “Enacted Senate Plan”].”
3 Session law 2011-403 (July 28, 2011) also known as “Ruco-Lewis Congress 3 [hereinafter “Enacted Congressional Plan”]. Collectively, the 2011 plans are referred to as the “Enacted Plans.”
General sought administrative preclearance from the United States Attorney General as required by § 5 of the Voting Rights Act ("VRA"). 42 U.S.C. § 1973c (2013). The redistricting plans were pre-cleared administratively by the United States Attorney General on November 1, 2011.

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

Meanwhile, Plaintiffs filed separate suits on November 3 and 4, 2011, challenging the constitutionality of the redistricting plans and seeking a preliminary injunction to prevent Defendants⁴ from conducting elections using the Enacted Plans. In accordance with N. C. Gen. Stat. § 1-267.1, the Chief Justice appointed a three-judge panel to hear both actions [hereinafter the "trial court"].

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

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

⁵ The Court, in its February 6, 2012 order, allowed Defendants' Motions to Dismiss as to claims for relief 6, 7, 8, 12 and 13 of the NC State Conference of the Branches of the NAACP et al. v. The State of North Carolina et al. complaint and claims for relief 1, 2, 3, 4, 5, 6, 7, 8, 17 and 18 of the Dickson et al. v. Rucho et al. complaint.
On April 20, 2012, the trial court entered an order compelling the production of certain documents. The trial court’s order was appealed as a matter of right to the North Carolina Supreme Court ("N.C. Supreme Court"). On January 25, 2013, the N.C. Supreme Court issued its ruling on that interlocutory matter.

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

On May 13, 2013, the trial court, pursuant to Rule 42(b)(1) of the North Carolina Rules of Civil Procedure, ordered that two issues be separated from the remaining pending issues and that a bench trial be held on those two issues.6 A bench trial was held on June 5 and 6, 2013, before the three judges of the trial court, who received evidence through witnesses and designations of the record.

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

III. SUMMARY JUDGMENT STANDARD

Summary judgment must be granted when the “pleadings, depositions, answers to interrogatories, and the admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.” N.C. R. Civ. P. 56(c). The rule is “designed to eliminate the necessity of a formal trial where only questions of law are involved and a fatal weakness

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6 The two issues separated for trial in the May 13, 2013 order were: “(A) Assuming application of a strict scrutiny standard and, in considering whether the Enacted Plans were narrowly tailored, was each challenged Voting Rights Act ("VRA") district drawn in a place where a remedy or potential remedy for racially polarized voting was reasonable for purposes of preclearance or protection of the State from vote dilution claims under the Constitution or under § 2 of the VRA?” and “(B) For six specific districts (Senate Districts 31 and 32, House Districts 51 and 54 and Congressional Districts 4 and 12 – none of which is identified as a VRA district), what was the predominant factor in the drawing of those districts?”
in the claim of a party is exposed.” *Dalton v. Camp*, 353 N.C. 647, 650 (2001). “When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the non-moving party. Moreover the party moving for summary judgment bears the burden of establishing the lack of any triable issue.” *Id.* at 651 (citation omitted).

Pending before the trial court is the Defendants’ Motion for Summary Judgment seeking judgment in Defendants’ favor on each of Plaintiffs’ claims. Also pending is the Plaintiffs’ Motion for Partial Summary Judgment seeking judgment in Plaintiffs’ favor on many of their claims against the Defendants. The trial court, in considering these cross-motions for summary judgment, has concluded that certain discrete issues present genuine issues of material fact and thus, as to those issues, summary judgment would be inappropriate. In the trial court’s May 13, 2013 order (*supra* at fn. 6), those discrete issues were identified and separated from the remaining issues in the case and, in accordance with that order, a bench trial, limited to evidence on those issues, has occurred. The trial court’s findings of fact and conclusions of law with respect to those discrete issues are set out and incorporated into this Judgment.

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

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

8 Traditionally, in granting or denying summary judgment, trial courts’ written orders are general and non-specific, and trial courts often refrain from elaborating upon their reasoning. In this matter, perhaps ignoring the advice of Will Rogers to “never miss a good chance to shut up,” the trial court has opted to
IV. ARE THE CHALLENGED DISTRICTS A RACIAL GERRYMANDER THAT VIOLATES THE EQUAL PROTECTION GUARANTEES OF THE UNITED STATES OR NORTH CAROLINA CONSTITUTIONS? (Dickson amended complaint, Claims 19-24; NAACP amended complaint Claims 1-3 & 9-11)

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

A. Burden of Proof

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

The Plaintiffs bear the burden of proof of establishing that the Enacted Plans violate equal protection guarantees. This remains true even in the context of the strict
scrutiny analysis discussed below. Under strict scrutiny, the burden of proof as to whether race was the overriding consideration behind a redistricting plan “rests squarely with the Plaintiffs.” Johnson v. Miller, 864 F. Supp. 1354, 1378-79 (S.D. Ga. 1994) aff’d 515 U.S. 900 (1995). If the Plaintiffs meet that burden, the state then has the burden of “producing evidence that the plan’s use of race is narrowly tailored to further a compelling state interest, and the plaintiffs bear the ultimate burden of persuading the court either that the proffered justification is not compelling or that the plan is not narrowly tailored to further it.” Shaw v. Hunt, 861 F. Supp. 408, 436 (E.D. N.C. 1994).

The state’s burden of production is a heavy burden because “the purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race by assuring that the [government] is pursuing a goal important enough to warrant use of a highly suspect tool.” Richmond v. J.A. Croson, 488 U.S. 469, 493 (1989). Racial classifications are “presumptively invalid and can be upheld only upon an extraordinary justification” by the state. Shaw v. Reno, 509 U.S. 630, 643-44 (1993) [hereinafter Shaw I] (quoting Pers. Adm’r of Mass. v. Feeney, 442 U.S. 256, 272 (1979)).

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

the University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference. . . . it is for the courts, not the university administrators, to ensure that “the means chosen to accomplish the government’s asserted purpose must be specifically and narrowly framed to accomplish that purpose.”
Id. at No. 11-345, slip op. at 10, (citing Grutter v. Bollinger, 539 U.S. 306, 333, 337 (2003)). The Court summarized the respective burdens as follows: "[a] plaintiff, of course, bears the burden of placing the validity of a university’s adoption of an affirmative action plan in issue. But strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice." Id. at 11.

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

There are, however, two important distinctions that must be noted between the Fisher holding, which relates to strict scrutiny of university enrollment policies, and judicial review of claims of racial gerrymandering. The first has already been noted: redistricting, unlike university enrollment, is an inherently political process delegated to the legislative branch of government. Second, unlike academic admission policies, where a university can create affirmative action plans on the basis of relatively easily measured current and historic enrollment data, in redistricting, a legislature must, to a certain extent, tailor its redistricting plans according to its best predictions of how a future court or the U.S. Department of Justice will, at a future date after enactment, view those plans if challenged in litigation or when submitted for preclearance. A legislature
must, in legislative redistricting, peer into the future somewhat because it must take into
account the compelling governmental interests of avoiding future liability under § 2 of
the VRA and ensuring future preclearance of the redistricting plans under § 5 of the
action must, at a minimum, remedy the anticipated violation or achieve compliance to be
narrowly tailored." (emphasis added)). Consequently, any judicial standard of review
that requires the reviewing court to strike a racial classification that is not "necessary," in
absolute terms, to avoid some yet unknown liability or yet unknown objection to
preclearance would be an impossibly stringent standard for both the legislature to meet or
the court to apply. Recognizing this, the Supreme Court has instructed, with respect to
redistricting plans designed to avoid future § 2 liability or to ensure § 5 preclearance,
"that the 'narrow tailoring' requirement of strict scrutiny allows the States a limited
degree of leeway in furthering such interests. If the State has a 'strong basis in evidence'
for concluding that creation of a majority-minority district is reasonably necessary to
comply with § 2, and the districting that is based on race 'substantially addresses the § 2
omitted) (rejecting as "impossibly stringent" the lower court's view of the narrow
tailoring requirement that "a district must have the least possible amount of irregularity in
shape, making allowances for traditional districting criteria") (citing Wygant v. Jackson
Bd. of Ed., 476 U.S. 267, 291 (1986) ("state actors should not be 'trapped between the
competing hazards of liability' by the imposition of unattainable requirements under the
rubric of strict scrutiny.").
B. Level of Scrutiny

Generally, all racial classifications imposed by a government must be analyzed by a reviewing court under strict scrutiny, even if the laws are "remedial" or "benign" in nature. Johnson v. California, 543 U.S. 499, 505 (2005); Shaw I, 509 U.S. at 656; Wygant, 476 U.S. 267. However, strict scrutiny does not apply to redistricting plans merely because the drafters prepared plans with a "consciousness of race." Nor does it apply to all cases of intentional creation of majority-minority districts, or where race was a motivation for the drawing of such districts. Vera, 517 U.S. at 958. Indeed, because of the VRA, race is "obviously a valid consideration in redistricting, but a voting district that is so beholden to racial concerns that it is inexplicable on other grounds becomes, ipso facto, a racial classification." Johnson v. Miller, 864 F. Supp. at 1369.

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

Unless the legislature acknowledges that race was the predominant factor motivating redistricting decisions, the determination by the trial court of the legislature's motive and, hence, the appropriate level of scrutiny, is an inherently factual inquiry.
requiring "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977). In the absence of direct evidence of racial motivation, circumstantial evidence, such as dramatically irregular shapes of districts, may serve as a "proxy for direct evidence of a legislature’s intentions." Johnson v. Miller, 864 F. Supp. at 1370 (citing Shaw I, 509 U.S. at 647). Indeed, a dramatically irregular shaped district has been called the "smoking gun," revealing the racial intent needed for an Equal Protection claim. Id.

In this litigation, however, the trial court concludes that it is able to by-pass this factual inquiry for some, but not all, of the challenged districts. The Plaintiffs collectively challenge as racial gerrymanders 9 Senate, 18 House and 3 U.S. Congressional districts created by the General Assembly in the Enacted Plans. Of those 30 challenged districts, it is undisputed that the General Assembly intended to create 26 of the challenged districts to be "Voting Rights Act districts" [hereinafter "VRA districts"] and that it set about to draw each of these VRA districts so as to include at least 50% Total Black Voting Age Population [hereinafter "TBVAP"].

Def's. Mem. Supp. Summ. J. 3. Moreover, the General Assembly acknowledges that it intended to create as many VRA districts as needed to achieve a "roughly proportionate" number of Senate, House and Congressional districts as compared to the Black population in North Carolina. Id. To draw districts based upon these criteria necessarily requires the drafters of districts to classify residents by race so as to include a sufficient number of

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

10 Of the challenged districts listed in fn. 9, supra, all but Senate District 32, House District 54 and Congressional Districts 4 and 12 were created by the General Assembly as VRA Districts.
black voters inside such districts, and consequently exclude white voters from the
districts, in an effort to achieve a desired racial composition of >50% TBVAP and the
desired “rough proportionality.” This is a racial classification.

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

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

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

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

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

In general, compliance with the Voting Rights Act can be a compelling governmental interest.\(^{11}\) A redistricting plan furthers a compelling governmental interest if the challenged districts are “reasonably established” to avoid liability under § 2 of the VRA or the challenged districts are “reasonably necessary” to obtain preclearance of the plan under § 5 of the VRA. *Shaw I*, 509 U.S. at 655; *Vera*, 517 U.S. at 977; *Cromartie v. Hunt*, 133 F. Supp. 2d at 423.

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

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

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

**Avoiding Voting Rights Act §2 Liability**

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

The General Assembly's "reasonable fears" must be based upon strong evidence in the legislative record that three factors, known as the Gingles factors, existed in North Carolina when the Enacted Plans were adopted: The Gingles factors, which are a mandatory precondition to any § 2 claim against the State, are (1) that a minority group exists within the area affected by the Enacted Plans, and that this group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) that the group is politically cohesive; and (3) that racial bloc voting usually will work to defeat the minority's preferred candidate. *Vera*, 517 U.S. at 978; *Johnson v. De Grandy*, 512 U.S. 997, 1006-09 (1994); *Growe v. Emison*, 507 U.S. 25, 40, 41 (1993); see also

"substantial evidence based upon the whole record" standard used by the North Carolina Supreme Court and federal courts to review agency decisions. See, e.g. *N.C. Dep't of Env't and Natural Res. v. Carroll*, 358 N.C. 649, 660 (2004). Defs.' Memo in Response to the Court's Inquiry of April 5, 2013, p. 3. This analogy is helpful—while the "strong basis in evidence" test certainly implies a more critical, and less deferential, standard of review than the "substantial evidence test," the substantial evidence test is a question of law for the reviewing court, as Defendants argue should be the case here. This suggestion has some support in persuasive authority. See, e.g. *Contractors Ass'n v. City of Philadelphia*, 91 F.3d 586, 596 (3d Cir. 1996) ("ultimately, whether a strong basis in evidence of past or present discrimination exists, thereby establishing a compelling state interest for the municipality to enact a race-conscious ordinance, is a question of law, subject to plenary review. The same is true of the issue of whether there is a strong basis in evidence for concluding that the scope of the ordinance is narrowly tailored to remedy the identified past or present discrimination") (citations omitted). In any event, whether applying the Plaintiffs' rationale or the Defendants', both reach the same conclusion, as does the trial court, that the issues before the trial court are predominantly issues of law appropriate for summary judgment.
Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986). In a §2 lawsuit, once the three Gingles factors are established, the trial court must consider the “totality of the circumstances” to determine whether a majority-minority district is appropriate to remedy vote dilution. Shaw II, 517 U.S. at 914. In judicial review of the Enacted Plans, the trial court must examine the record before the General Assembly to determine, as a matter of law, whether this strong basis in evidence exists.

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

- testimony from lay witnesses at numerous public hearings conducted throughout the state both before and after draft redistricting plans were proposed by the General Assembly;
- testimony and correspondence from representatives of interest groups and advocacy organizations, including the Southern Coalition for Social Justice (“SCSJ”), the Alliance for Fair Redistricting and Minority Voting Rights (“AFRAM”), the NC NAACP, Democracy NC, and the League of Women Voters;
- Legal opinions from faculty from the UNC School of Government;
- Scholarly writings regarding voting rights in North Carolina;

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

14 See fn. 12, supra.
• Law review articles submitted to the General Assembly’s Redistricting Committee by various individuals or entities;

• Election results for elections conducted through and including 2010;

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

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

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

• Prior redistricting plans; and

• Alternative redistricting plans proposed by SCSJ and AFRAM, Democratic leaders, and the Legislative Black Caucus (“LBC”).

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

The trial court concludes, as a matter of law, based upon a review of the entire record before the General Assembly at the time of the passage of the Enacted Plans, that the General Assembly had a strong basis in evidence to conclude that each of the Gingles preconditions was present in substantial portions of North Carolina and that, based upon

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15 The alternative plans received by the General Assembly prior to the enactment of the Enacted Plans were as follows: Congressional Fair and Legal, Senate Fair and Legal and House Fair and Legal, all entered into the Legislative Record during floor debate on July 25, 2011 (also referred to as “Fair and Legal” or “F&L”), the Possible Senate Districts and the Possible House Districts, also entered into the Legislative Record during the floor debate on July 25, 2011 (also referred to as “PSD” and “PHD” plans or, alternatively “Legislative Black Caucus Plans” or “LBC” plans), and Senate, House and Congressional Possible Maps prepared by the AFRAM and the SCSJ, presented at public hearings held on May 9 and June 23, 2011 (also referred to as “SCSJ” maps).
the totality of circumstances, VRA districts were required to remedy against vote
dilution. Therefore, the trial court concludes, the General Assembly had a compelling
governmental interest of avoiding § 2 liability and was justified in crafting redistricting
plans reasonably necessary to avoid such liability.

b. **Ensuring Voting Rights Act § 5 Preclearance**

Ensuring preclearance of redistricting plans under § 5 of the VRA can also be a
compelling governmental interest. *Vera*, 517 U.S. at 982. Forty counties in North
Carolina are “covered jurisdictions” under § 5 of the VRA. Section 5 suspends all
changes to a covered jurisdiction’s elections procedures, including changes to district
lines by redistricting legislation, until those changes are submitted to and approved by the
United States Attorney General or a three-judge panel of the United States District Court

A newly-enacted redistricting plan may not be used until the jurisdiction has
demonstrated that the plan does not have a discriminatory purpose or effect, and the
newly-enacted plan may not undo or defeat rights afforded by the most recent legally
enforceable redistricting plan in force or effect in the covered jurisdiction (the

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In its June 25, 2013 opinion in *Shelby Co. v. Holder*, 570 U.S. ___ (2013), the Supreme Court struck
down § 4 of the Voting Rights Act, holding that its formula could no longer be used as a basis for
subjecting jurisdictions to preclearance. This holding has no practical effect upon the outcome of this case
because the measure of the constitutionality of the Enacted Plans depends upon the compelling
governmental interests at the time of the enactment of the Enacted Plans. At the time of enactment in 2011,
preclearance by the USDOJ was required of all North Carolina legislative and congressional redistricting
plans. Moreover, *Shelby County*, in *dicta*, reaffirms that “§ 2 is permanent, applies nationwide, and is not
at issue in this case.” *Id.* at No. 12-96, slip op. at 3. Thus, regardless of any retroactive application of *Shelby County* to § 5, the legitimate governmental interest of avoiding § 2 liability remains.
A legislature’s efforts to ensure preclearance must be based upon its reasonable interpretation of the legal requirements of § 5 of the VRA, including the effect of a 2006 amendment that clarified that § 5 expressly prohibits “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of citizens of the United States on account of race or color . . . to elect their preferred candidate of choice.” Pub. L. No. 109-246, § 5, 120 Stat. 577, 580-81 (2006) (emphasis added). This amendment aligned the language of § 5 with the same language in § 2 of the VRA to the extent that both now refer to the ability of minority groups to “elect their preferred candidate of choice.” The Supreme Court has recently recognized that the effect of the 2006 amendment to § 5 is that “the bar that covered jurisdictions must clear has been raised.” Shelby County, supra note 13, at 16-17 (citing Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 336 (2000)).

The trial court concludes, as a matter of law, based upon the review of the entire record before the General Assembly at the time of the passage of the Enacted Plans, that the General Assembly had a strong basis in evidence to conclude that the Enacted Plans must be precleared, and that they must meet the heightened requirements of preclearance under the 2006 amendments to § 5 of the VRA. Therefore, the General Assembly had a compelling governmental interest in enacting redistricting plans designed to ensure preclearance under § 5 of the VRA.17

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

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

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

   1. The Enacted Plans contain significantly more VRA districts (i.e. districts intentionally created by the General Assembly as majority-minority districts to avoid § 2 liability or to ensure § 5 preclearance) than reasonably necessary to comply with the VRA (Pl.'s Mem. Supp. Partial Summ. J. 82);

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

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


   The trial court considers each of these contentions in turn.
a. Did the General Assembly fail to narrowly tailor the Enacted Plans by creating more Voting Rights Act districts than reasonably necessary to comply with the Act?

Purportedly to avoid VRA § 2 liability and to ensure VRA § 5 preclearance, the General Assembly created majority-minority districts throughout the State. The Plaintiffs draw the trial court's attention to the increased number of such districts compared to prior enacted plans. The Enacted House Plan contains 23 districts with a TBVAP in excess of 50% as compared to 10 such districts in the 2009 House Plan -- the last plan in effect before the Enacted House Plan. The Enacted Senate Plan contains 9 districts with a TBVAP in excess of 50% as compared to zero in its predecessor, the 2003 Senate Plan. This seemingly dramatic increase in the number of VRA districts, Plaintiffs contend, would suggest that "one would assume that race relations in North Carolina had to be among the worst in the country, if such extreme racial remedies were required."

Pl.’s Mem. Opp’n 44.

However, a closer look at the data is warranted. The following tables compares the Enacted Plans with the alternative plans proffered or supported by the Plaintiffs and, in addition to focusing on the number of districts in prior or competing plans with TBVAP > 50%, also considers the number of districts in each plan where TBVAP is greater than 40%.
Table 1: Comparison of Number of Senate Districts > 40% TBVAP among all plans

<table>
<thead>
<tr>
<th></th>
<th>Enacted Plan</th>
<th>2001 Plan</th>
<th>SCSJ Plan</th>
<th>F&amp;L Plan</th>
<th>LBC Plan</th>
</tr>
</thead>
<tbody>
<tr>
<td># of Districts &gt; 50% TBVAP</td>
<td>9</td>
<td>0</td>
<td>5</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td># of Districts &gt; 40% but ≤ 50% TBVAP</td>
<td>1</td>
<td>8</td>
<td>4</td>
<td>6</td>
<td>8</td>
</tr>
<tr>
<td>Total Districts &gt; 40% TBVAP</td>
<td>10</td>
<td>8</td>
<td>9</td>
<td>7</td>
<td>8</td>
</tr>
</tbody>
</table>

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

<table>
<thead>
<tr>
<th></th>
<th>Enacted Plan</th>
<th>2001 Plan</th>
<th>SCSJ Plan</th>
<th>F&amp;L Plan</th>
<th>LBC Plan</th>
</tr>
</thead>
<tbody>
<tr>
<td># of Districts &gt; 50% TBVAP</td>
<td>23</td>
<td>10</td>
<td>11</td>
<td>9</td>
<td>10</td>
</tr>
<tr>
<td># of Districts &gt; 40% but ≤ 50% TBVAP</td>
<td>2</td>
<td>10</td>
<td>10</td>
<td>11</td>
<td>13</td>
</tr>
<tr>
<td>Total Districts &gt; 40% TBVAP</td>
<td>25</td>
<td>20</td>
<td>21</td>
<td>20</td>
<td>23</td>
</tr>
</tbody>
</table>

These tables show that when comparing the aggregate number of districts with TBVAP > 40% in the Enacted Plan with all other plans, the difference between the plans is not as dramatic. This is significant when taken in the context of the parties' disagreement over what constitutes a lawful VRA district. (See further infra § IV(C)(2)(b), discussion regarding cross-over districts (i.e. districts with TBVAP >40%) and majority-minority districts (districts with TBVAP >50%)). All parties, this data suggests, agree that a significant number of VRA districts – however that term is defined – are required in North Carolina. For example, in the proposed SCSJ Senate Plan, the drafters would create 9 VRA Senate districts, compared to 10 in the Enacted Senate Plan. Likewise, in the proposed LBC plan, the drafters would create 23 VRA districts compared to 25 in the Enacted House Plan. In the trial court’s consideration of the strong basis of evidence
that existed in the legislative record at the time of the enactment of the Enacted Plans, it is compelling that all of the alternative plans propounded or endorsed by the Plaintiffs contain a large number of voting districts created to increase TBVAP so as to provide minority voters with the opportunity to elect their candidate of choice.

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

The General Assembly, in using “rough proportionality” as a benchmark for the number of VRA districts it created in the Enacted Plans, relies upon Supreme Court precedent that favorably endorses “rough proportionality” as a means by which a redistricting plan can provide minority voters with an equal opportunity to elect candidates of choice. League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 429-30 (2006) [hereinafter LULAC]; Shaw II, 517 U.S. at 916 n.8; De Grandy, 512 U.S. at 1000. In De Grandy, the Supreme Court said that “no violation of § 2 can be found …, where, in spite of continuing discrimination and racial bloc voting, minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters’ respective shares in the voting-age population.” 512 U.S. at 1013-1015. Where a State’s election districts reflect substantial proportionality between majority and minority
populations, the Supreme Court explained, such districts would "thwart the historical tendency to exclude [the minority population], not encourage or perpetuate it."\textsuperscript{18} \textit{Id.} at 1014. It is reasonable for the General Assembly to rely upon this unequivocal holding of the Supreme Court in drafting a plan to avoid § 2 liability. When the Supreme Court says "no violation of § 2 can be found" under certain circumstances, prudence dictates that the General Assembly should be given the leeway to seek to emulate those circumstances in its Enacted Plans.

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

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

Arrington Dep., 30-31. Moreover, Dr. Arrington, who is often requested by the Department of Justice to draw illustrative redistricting maps in the § 5 preclearance

\textsuperscript{18} The Supreme Court distinguishes "rough proportionality," as it is used here to "link[] the number of majority-minority voting districts to minority members' share of the relevant population" from the constitutionally-suspect concept of "proportional representation" which suggests a "right to have members of a protected class elected in numbers equal to their proportion in the population." \textit{De Grandy}, 512 U.S. at 1013-1015 ("The concept is distinct from the subject of the proportional representation clause of § 2, which provides that 'nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.' \textit{42 U.S.C. § 1973(b). This proviso speaks to the success of minority candidates, as distinct from the political or electoral power of minority voters. (citations omitted.) And the proviso also confirms what is otherwise clear from the text of the statute, namely, that the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." \textit{Id. at n.11}).
process, was not aware of a single instance “where a legislative plan has provided black
voters with roughly proportional number of districts for the entire state where that plan
has been found to discriminate against black voters.” Arrington Dep., 192.

As such, based upon the law and the undisputed facts, and allowing for the limited
degree of leeway that permits the General Assembly to exercise political discretion in its
reasonable efforts to address compelling governmental interests, the trial court finds that
the General Assembly had a strong basis in evidence for concluding that “rough
proportionality” was reasonably necessary to protect the State from anticipated liability
under § 2 of the VRA and ensuring preclearance under § 5 of the VRA. The trial court
further finds that, notwithstanding the racial classification inherent in “rough
proportionality,” the Enacted Plans substantially address the threat of anticipated § 2
liability and challenges to preclearance under § 5 of the VRA. The trial court therefore
concludes that the number of VRA districts created by the General Assembly in the
Enacted Plans is not inconsistent with the General Assembly’s obligation to narrowly
tailor the plans under strict scrutiny.

b. **Did the General Assembly fail to narrowly tailor the Enacted Plans by**

   **“packing” the Voting Rights Act Districts?**

   The trial court next considers whether the majority-minority districts created in
the Enacted Plans are “packed” with Black voters to a greater degree than would be
necessary under a narrow tailoring of the Plans to meet the compelling governmental
interests of avoiding § 2 liability and obtaining preclearance under § 5 of the VRA. This
issue is best understood by re-examining Tables 1 and 2 above, and noting that one of the
most significant differences between the Enacted Plans and all other plans is the greater frequency of districts in the Enacted Plans with TBVAP > 50%, whereas the predecessor plans, as well as all proposed plans, have significantly fewer districts with TBVAP >50%, but significantly greater numbers of districts with TBVAP between 40% and 50%.

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

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

Plaintiffs’ argument on this point is not in accord with the appellate court precedents that bind this trial court. Specifically, in Pender County, 361 N.C. 491, the N.C. Supreme Court considered the 2003 version of House District 18. House District 18 was drawn by the General Assembly in its 2003 redistricting plan with 39.36% Black voting age population. The district included portions of Pender County and an adjoining county. Keeping Pender County whole would have resulted in a Black voting age population of 35.33%. The legislators’ rationale was that splitting Pender County gave Black voters a greater opportunity to join with white voters to elect the minority group’s candidate of choice, while leaving Pender County whole would have violated § 2 of the Voting Rights Act. Pender County and others filed suit against the State (and other officials), alleging that the redistricting plan violated the Whole County Provision of the N.C. Constitution. The State answered that dividing Pender County was required by § 2. Bartlett v. Strickland, 556 U.S. 1, 7-8 (2009) [hereinafter Strickland].

The State’s position, in defending House District 18 as drawn, was that the language of both Gingles and § 2 did not necessarily require the creation of majority-minority districts, but allowed for other types of legislative districts, such as coalition, crossover, and influence districts. The State considered House District 18 to be an "effective minority district" that functioned as a “single-member crossover district” in

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

20 See further infra § V.
which the total Black voting age population of 39.36% could predictably draw votes from a white majority to elect the candidate of its choice, and argued that as such, the district, as drawn, was permitted by § 2 and Gingles. Pender County, supra at 502.

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

The N.C. Supreme Court agreed with the Pender County plaintiffs, and found their position to be "more logical and more readily applicable in practice." Id. at 503. The Court concluded that "when a district must be created pursuant to Section 2, it must be a majority-minority district." Id. Recognizing that the majority-minority requirement could be considered a "bright-line" rule, the Court reasoned as follows:

This bright line rule, requiring a minority group that otherwise meets the Gingles preconditions to constitute a numerical majority of citizens of voting age, can be applied fairly, equally, and consistently throughout the redistricting process. With a straightforward and easily administered standard, Section 2 legislative districts will be more uniform and less susceptible to ephemeral political voting patterns, transitory population shifts, and questionable predictions of future voting trends. A bright line rule for the first Gingles precondition "promotes ease

21 A "majority-minority" district was defined by the Court as "a district in which >50% of the population in the district are voting age citizens of a specific minority group." Id. at 501
of application without distorting the statute or the intent underlying it."

In addition, a bright line rule provides our General Assembly a safe harbor for the redistricting process. Redistricting should be a legislative responsibility for the General Assembly, not a legal process for the courts. Without a majority requirement, each legislative district is exposed to a potential legal challenge by a numerically modest minority group with claims that its voting power has been diluted and that a district therefore must be configured to give it control over the election of candidates. In such a case, courts would be asked to decide just how small a minority population can be and still claim that Section 2 mandates the drawing of a legislative district to prevent vote dilution.

_Id._ at 504-505 (citation omitted).

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

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

_Id._ at 510.

The United States Supreme Court affirmed the N.C. Supreme Court's _Pender County_ ruling. In its plurality opinion, the Supreme Court held that the General Assembly's contention that § 2 of the VRA required that House District 18 be drawn as a crossover district with a minority population of 39.26% must be rejected. _Strickland_, 556 U.S. at 14. Rather, districts created to avoid § 2 liability must be majority-minority districts that contain a numerical, working majority of the voting age population of a minority group. _Id._ at 13, 15. The Court went on to note that this majority-minority rule
found support not only in the language of § 2 of the VRA, but also in the need for workable standards and sound judicial and legislative administration:

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

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

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

*Id.* at 18 (citations omitted).

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

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

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

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

Id. at 43 (Souter, J., dissenting) (emphasis added) (citations omitted). The undisputed evidence establishes that the General Assembly, in crafting the Enacted Plans, interpreted the law of the land just as Justice Souter did — in its effort to avoid liability under § 2 of the VRA, the General Assembly eschewed crossover districts and, applying the bright line test endorsed by the N.C. Supreme Court in Pender County and the U.S. Supreme Court in Strickland, opted for the safe-harbor from § 2 liability by creating majority-minority districts with >50% TBVAP. In the context of narrow tailoring, the General Assembly's understanding of the law — as reflected in the Enacted Plans it created — cannot be considered unreasonable, and the trial court is required to give leeway to the General Assembly's "reasonable efforts to avoid § 2 liability." Vera, 517 U.S. at 977.

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

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

As the trial court concluded above in § IV(C)(1)(a), at the time of the enactment of the Enacted Plans, the General Assembly had strong evidence in the legislative record that each of the Gingles factors was present in substantial portions of North Carolina and that, based upon the totality of circumstances, majority-minority voting districts were required to remedy against vote dilution. Narrow tailoring requires that, to the extent that the General Assembly created VRA districts as part of its efforts to avoid § 2 liability, the VRA districts be located only in those geographic areas where a remedy against vote-dilution would be reasonably required. Plaintiffs challenge the geographic location of some VRA districts in the Enacted Plan, arguing that “for defendants to justify any

\textsuperscript{22} With respect to ensuring § 5 preclearance, Plaintiffs’ retained expert, Dr. Arrington, testified that when he consults on behalf of the USDOJ and draws illustrative plans in their preclearance process, “[the USDOJ] ask me to draw it specifically at more than 50%, and the reason for that is that that means there’s no question . . . so that eliminates one legal question about satisfying Gingles one, the first Gingles prong.” Arrington Dep. 191.
majority black district as being required by Section 2, they must satisfy the third prong of
Gingles by establishing that white voters in that district - not somewhere else or in the
state at large - vote ‘sufficiently as a bloc to enable [them]...usually to defeat the
minority’s preferred candidate.”' Gingles, 478 U.S. at 50-51; see also, Shaw II, 517 U.S.
at 917 (“if a § 2 violation is proved for a particular area,...[t]he vote-dilution injuries
suffered by these persons are not remedied by creating a safe majority-black district
somewhere else in the State.”); Pl.’s Mem. Supp. Partial Summ. J. 77. To consider this
issue, the trial court must consider whether the area affected by each VRA district
displays a sufficient degree of “racial polarization” to justify a narrowly tailored remedy
of a safe majority-black district at that location.

“Racial polarization” refers to the combined effect of the second and third Gingles
factors, that is, political cohesion by the minority and white bloc voting by the white
majority. Old Person v. Cooney, 230 F.3d 1113, 1123 (9th Cir. 2000) (citing Ruiz v. City
of Santa Maria, 160 F.3d 543, 551 (1998) (citing Gingles, 478 U.S. at 56)). Polarized
voting occurs when minority and white communities cast ballots along racial or language
minority lines, voting in blocs. Texas v. United States, 831 F. Supp. 2d 244 (D.D.C.
Plaintiffs, Dr. Ray Block, whose report Racially Polarized Voting in 2006, 2008 and
2010 in North Carolina State Legislative Contests was proffered to the General Assembly
at its public hearings prior to the enactment of the Enacted Plans, defines “racial
polarization” as:

The proportion of black voters who prefer a black
candidate is noticeably higher in an electoral contest as
compared to those of non blacks, and the proportion of
black candidates who win elections is noticeably higher in
majority minority districts than in non majority minority districts. . . . Racially polarized voting can be identified as occurring when there is a consistent relationship between the race of a voter and the way in which she/he votes.

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

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

Assuming application of a strict scrutiny standard and, in considering whether the Enacted Plans were narrowly tailored, was each challenged VRA district drawn in a place where a remedy or potential remedy for racially polarized voting was reasonable for purposes of preclearance or protection of the State from vote dilution claims under the Constitution or under § 2 of the VRA?

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

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

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

The Plaintiffs contend that VRA districts in the Enacted Plans, even if justified by the compelling governmental interests of avoiding § 2 liability or ensuring preclearance under § 5 of the VRA, are not narrowly tailored because they are drawn with a disregard of traditional redistricting principles resulting in lack of compactness, irregular shapes, and too many split counties and split precincts.
The Supreme Court has held that a “district drawn in order to satisfy § 2 must not subordinate traditional districting principles to race substantially more than is ‘reasonably necessary’ to avoid § 2 liability.” *Vera*, 517 U.S. at 979. On the other hand, the same Court said that narrow tailoring does not require a district have the “least possible amount of irregularity in shape, making allowances for traditional districting criteria” because that standard would be “impossibly stringent.” *Id.* at 977. “Districts not drawn for impermissible reasons or according to impermissible criteria may take any shape, even a bizarre one,” provided that the bizarre shapes are not “attributable to race-based districting unjustified by a compelling interest.” *Id.* at 999 (Kennedy, J. concurring). In sum, a VRA district that is based on a reasonably compact minority population, that also takes into account traditional redistricting principles, “may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs’ experts in endless ‘beauty contest.’” *Id.* at 977. The General Assembly, even under strict scrutiny, must be accorded a “limited degree of leeway” in tailoring its redistricting plan. *Id.*

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

We agree with the North Carolina court that the Supreme Court will probably not adopt a definition of “narrow tailoring” in the redistricting context that requires consideration of whether the challenged plan deviates from “traditional” notions of compactness, contiguity, and respect for political subdivisions to a greater degree than is necessary to accomplish the state’s compelling purpose. *Shaw v. Hunt*, supra, at 87. Such a standard would elevate to constitutional status that which was intended only as a barometer for determining whether a district adequately serves its constituents. Observance of those traditional principles is also difficult to judge at the exacting level required for a narrow tailoring determination, and such judging would force the judiciary to meddle with legislative
prerogatives to an undesirable degree. Nothing, however, precludes the Court from considering traditional districting principles as guideposts in a narrow tailoring analysis; while not required, they are potentially useful indicators of where the legislature could have done less violence to the electoral landscape.


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

The trial court is cognizant of its duty, under a narrow tailoring analysis, to examine the "fit" of a remedy against the "ends" to ensure that the Enacted Plans are the least restrictive means of advancing legitimate governmental interests. Boos v. Barry, 485 U.S. 312, 329 (1988); Wygant, 476 U.S. at 280 n.6. In so doing, the trial court is obligated to consider whether lawful alternatives and less restrictive means could have been used, regardless of whether the General Assembly considered those alternatives. Boos v. Barry, 485 U.S. at 329; Wygant, 476 U.S. at 280 n.6. But the obligation of the trial court to consider all lawful alternatives must be harmonized with the Plaintiffs' burden of persuasion; even with the heavy burden of production resting upon the General
Assembly, the Plaintiffs have some obligation to persuade the trial court that lawful alternatives in fact exist that could be compared in some meaningful way to the Enacted Plans and that, after such comparison, do "less violence to the electoral landscape."

_Johnson v. Miller_, 864 F. Supp. at 1387 n.40. The trial court cannot exhaust "every conceivable race-neutral alternative," _Fisher v. Univ. of Texas, supra_. at slip op. p. 10, to discern whether a hypothetical alternative plan exists that better conforms with traditional notions of redistricting, and the Plaintiffs have failed to persuade the trial court that one exists.

Plaintiffs' arguments are not persuasive because Plaintiffs have not produced alternative plans that are of value to the trial court for comparison in this narrow tailoring analysis.\(^{23}\) None of the alternative plans proposed or endorsed by the Plaintiffs contain VRA districts in rough proportion to the Black population in North Carolina. None of the alternative plans seek to comply with the General Assembly's reasonable interpretation of _Strickland_ by populating each VRA district with \(>50\%\) TBVAP. None of the alternative plans comply with the N.C. Supreme Court's mandate in _Stephenson v. Bartlett_ to "group[ ] the minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard."

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

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

532 U.S. at 258.
355 N.C. 354, 384 (2002) [hereinafter Stephenson I], (see § V, infra, regarding the Whole County Provisions). As such, the trial court is left to speculate that a redistricting plan exists – one that protects the State from § 2 liability, ensures § 5 preclearance, and accomplishes all of the legitimate legislative objectives of the General Assembly, including political gain, protection of incumbency, and population equalization – yet appears, on some subjective measure, to be more “compact” or less “irregular.”

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

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

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

Anyone who wants districts drawn differently than they were or is advocating a particular set of districts will undoubtedly argue, whether they have good reason to do so or not, that their districts define a community of interest. Because community of interest can mean almost anything one chooses, it is rarely operationalized in a fashion to make it useful in either drawing or evaluating districts.

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

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

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

In Claims for Relief 9 through 11 of the NAACP Plaintiffs’ Amended Complaint, the Plaintiffs allege that in voting districts adjoining to those created in the Enacted Plans as VRA Districts, Black voters suffer a diminution of political influence. The Plaintiffs contend that by creating VRA districts with >50% TBVAP, Black voters were siphoned from adjoining counties, thereby lessening the political influence of the Black voters in those adjoining counties. The NAACP Plaintiffs contend this is a denial of equal protection under the United States and North Carolina constitutions.
The trial court concludes that this claim is not supported by prevailing law. No N.C. Supreme Court or United States Supreme Court decision has ever found a legislative or congressional redistricting plan unconstitutional because it deprived a group of plaintiffs of political influence. Indeed, the United States Supreme Court has warned against the constitutional dangers underlying Plaintiffs’ influence theories. In *LULAC*, the Court rejected an argument that the § 2 “effects” test might be violated because of the failure to create a minority “influence” district. The Court held that “if Section 2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.” *LULAC*, 548 U.S. at 445-46 (citing *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring)). Recognizing a claim on behalf of Black voters for influence or crossover districts “would grant minority voters ‘a right to preserve their strength for the purposes of forging an advantageous political alliance,’” a right that is not available to any other voters. *Strickland*, 556 U.S. at 15 (citing *Hall v. Virginia*, 385 F.3d 421, 431 (4th Cir. 2004), *cert. denied*, 544 U.S. 961 (2005)). This argument also raises the question of whether such a claim would itself run afoul of the equal protection guarantees of the Fourteenth Amendment and of the North Carolina Constitution. Nothing in federal law “grants special protection to a minority group’s right to form political coalitions.” *Strickland*, 556 U.S. at 15. Nor does federal law grant minority groups any right to the maximum possible voting strength. *Id.* at 15-16.

Thus, as a matter of law, the trial court concludes that the Plaintiffs’ claims of denial of equal protection premised upon diminished influence of Black voters in districts adjoining VRA districts must be denied.
D. Did racial motives predominate in the creation of the Non-Voting Rights Act districts?

As discussed above by the trial court in § IV(B), strict scrutiny is only the appropriate level of scrutiny for legislatively enacted redistricting plans when Plaintiffs establish that "all other legislative districting principles were subordinated to race and that race was the predominant factor motivating the legislature's redistricting decision." *Vera*, 517 U.S. at 959. The districts must be unexplainable on grounds other than race, and it must be established that the legislature neglected all traditional redistricting criteria such as compactness, continuity, respect for political subdivisions and incumbency protection. *Id.* For the 26 VRA districts created in the three Enacted Plans, the trial court concluded, for the purposes of analysis, that strict scrutiny was appropriate because the General Assembly's predominant motive was to create each of those VRA districts with >50% TBVAP and to create a sufficient number of VRA districts to achieve "rough proportionality." However, four districts that were not created by the General Assembly as VRA districts were also challenged by the Plaintiffs as being the product of racial gerrymander – the 12th and 4th Congressional Districts, Senate District 32, and House District 54. As to each of these four districts, for strict scrutiny to apply the trial court must make inquiry into whether race was the General Assembly's predominant motive.

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

For six specific districts (Senate Districts 31 and 32, House Districts 51 and 54 and Congressional Districts 4 and 12 – none of which is identified as a VRA district), what was the predominant factor in the drawing of those districts? ²⁴

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

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

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

Based upon the foregoing, the trial court concludes that the appropriate standard of review for the trial court’s consideration of the four non-VRA districts is not strict scrutiny, but instead the “rational relationship” review. Wilkins v. West, 264 Va. 447, 467 (2001). Under the rational relationship test, the challenged governmental action must be upheld “if there is any reasonably conceivable state of facts that could provide a rational

²⁴ Although Senate District 31 and House District 51 were not challenged by the Plaintiffs as racial gerrymanders, they adjoin the non-VRA districts that were challenged by the Plaintiffs, and hence the trial court received evidence on the General Assembly’s motivation in creating these two districts as well.
basis for the action." See generally, e.g. Doe v. Lower Merion Sch. Dist., 665 F.3d 524, 544 (3d Cir. 2011). The trial court also concludes that the General Assembly has articulated a reasonably conceivable state of facts, other than a racial motivation, that provides a rational basis for creating the non-VRA districts as drawn in the Enacted Plans.

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

Thus, to summarize, in considering the over-arching issue of whether the challenged districts are a racial gerrymander that violate the equal protection clauses of the United States Constitution or the North Carolina Constitution, the trial court has reviewed each district created by the General Assembly. For those districts created as VRA districts, the trial court has applied strict scrutiny, and has found as a matter of law that a strong basis in evidence supported the enactment of redistricting plans designed to protect the State from § 2 liability and to ensure preclearance under § 5. Further, the trial court has found, based upon a strong basis in evidence in the record, and according the

25 See fn. 23, supra.
General Assembly a limited degree of leeway, that the Enacted Plans are narrowly tailored to meet these compelling governmental interests. To the extent that the most exacting level of review, strict scrutiny, is not warranted by the facts of this case, the trial court concludes that under a lesser standard of review, such as a rational relationship test, the creation of the VRA districts as drawn was supported by a number of rational bases. For those districts in the Enacted Plans that are not VRA districts, the trial court finds, based upon the evidence before it, that race was not the predominant motive in the creation of those districts and thus, under a rational relationship standard of review, the trial court finds that the General Assembly had a rational basis for creating the non-VRA districts as drawn. Therefore, the trial court concludes that the Plaintiffs’ equal protection claims associated with racial gerrymandering must fail.

V. DO THE ENACTED SENATE AND HOUSE PLANS VIOLATE THE WHOLE COUNTY PROVISIONS OF THE NORTH CAROLINA CONSTITUTION? (Dickson amended complaint, Claims 11-16; NAACP amended complaint Claims 4-5)

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

The undisputed evidence of record establishes that the General Assembly, in its Enacted Senate and House Plans, endeavored to "group the minimum number of counties necessary to comply with the one person, one vote standard into clusters of counties."

Pl.’s Mem. Supp. Partial Summ. J. 82. The Plaintiffs, on the other hand, endorsed and proposed alternative House and Senate plans that yielded a fewer number of split counties, and consequently more counties kept whole, than the Enacted Plans. However, the Plaintiffs’ plans did not adhere strictly to the rubric of creating clusters with minimum numbers of counties. Plaintiffs urge that the number of counties split ought to be the standard by which compliance with the WCP is measured.

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

[3.] In counties having a census population sufficient to support the formation of one non-VRA legislative district falling at or within plus or minus five percent deviation from the ideal population consistent with "one-person, one-vote" requirements, the WCP requires that the physical boundaries of any such non-VRA legislative district not cross or traverse the exterior geographic line of any such county.
[5.] In counties having a non-VRA population pool which cannot support at least one legislative district at or within plus or minus five percent of the ideal population for a legislative district or, alternatively, counties having a non-VRA population pool which, if divided into districts, would not comply with the at or within plus or minus five percent "one-person, one-vote" standard, the requirements of the WCP are met by combining or grouping the minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard. Within such contiguous multi-county groupings, compact districts shall be formed, consistent with the at or within plus or minus five percent standard, whose boundary lines do not cross or traverse the "exterior" line of the multi-county grouping, provided, however, that the resulting interior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard.

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

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


The crux of the Plaintiffs' argument is whether the WCP and the *Stephenson I* and *II* decisions require the division of the fewest counties possible or do they require that counties be grouped into the smallest groupings possible. Plaintiffs urge that compliance with the WCP is measured by the former, namely the number of counties kept whole, and not by the grouping of minimum number of whole, contiguous counties necessary to comply with the one person, one vote standard.
The following table illustrates the county groupings contained within the Enacted Plan compared with all other alternative plans suggested by the Plaintiffs. 26

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

<table>
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<tr>
<th></th>
<th>2001</th>
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<th>2003</th>
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<th>2005</th>
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<tr>
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<td>14</td>
<td>7</td>
<td>2</td>
<td>3</td>
<td>23</td>
</tr>
</tbody>
</table>

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

At issue is the mandate of the N.C. Supreme Court in Stephenson I, as set out above in rule 5: “...the requirements of the WCP are met by combining or grouping the minimum number of whole, contiguous counties necessary to comply with the at or

26 Direct comparison between the Enacted Plans and each of the alternative plans proposed or endorsed by the Plaintiffs cannot be made because the alternative plans diverge from the Enacted Plans in not creating as many VRA districts as were created by the General Assembly in the Enacted House and Senate Plans. See supra at § IV(C)(2)(a). The trial court has concluded that the creation of these VRA districts by the General Assembly is consistent with narrow tailoring requirements. The Plaintiffs have proffered no alternative plan that adopts the General Assembly's VRA districts yet shows that greater compliance with the WCP could have been achieved.
within plus or minus five percent 'one-person, one-vote' standard." *Stephenson II*, 357 N.C. at 306. The undisputed evidences establishes that in seeking to comply with this mandate, the drafters of the Enacted House and Senate plans did the following, in sequence: (1) drew the VRA districts; (2) from the remaining counties after the first step, identified all counties whose population would support one or more districts wholly within the county lines; (3) from the remaining counties after the second step, identified all possible contiguous two-county combinations whose combined populations would support one or more districts wholly within the borders of the two-county groups; (4) from the remaining counties after the third step, identified all possible contiguous three-county combinations whose combined populations would support one or more districts wholly within the borders of the three-county groups; (5) and so on until all counties were included. By combining counties into groups by starting first with two-county groups, and combining all possible two-county groups, and then next considering three-county groups, and so on, the Enacted Plan drafters met the requirements of the WCP, as articulated in *Stephenson I* and *II*, "by combining or grouping the minimum number of whole, contiguous counties necessary to comply with the plus or minus five percent 'one-person, one-vote' standard." 355 N.C. at 383-84; 357 N.C. at 306.

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

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

8. The General Assembly’s May 2002 Fewer Divided Counties Senate and Sutton 5 House Plans fail to comply with the requirement that in forming districts, only the smallest number of counties necessary to comply with the one-person, one-vote requirement should be combined in forming multi-county groupings.

9. The General Assembly’s failure to create the maximum number of two-county groupings in the May 2002 House Plan violates Stephenson I.

Stephenson II, 357 N.C. at 308. In affirming the trial court, the N.C. Supreme Court, in Stephenson II, repeated the directive it gave in Stephenson I that “we direct that any new
redistricting plans . . . shall depart from strict compliance with the legal requirements set forth herein only to the extent necessary to comply with federal law." *Stephenson II*, 357 N.C. at 309 (citing *Stephenson I*, 355 N.C. at 384)

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

Likewise, as seen in Table 3 above, each of the alternative Senate plans proposed or endorsed by the Plaintiffs does not comport with the strict requirements of *Stephenson I*. The LBS and SCSJ alternative Senate plans fail to create the maximum number of two-county groups when compared to the Enacted Senate Plan.

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

55
[T]o make maximum use of county boundaries in constructing voting districts, and thereby minimizing the need to split counties, one should focus on dividing the state into many county groups each having small numbers of representatives rather than each having small numbers of counties. In particular, choosing county groups first by finding all possible single county groups, then all possible two-county groups, and so forth, is unlikely to lead to the most complete use of county boundaries, and the smallest number of divided counties.

Fifth Aff. of Pls.' Statistical Expert, David W. Peterson, PhD, ¶ 3.

Later, in deposition testimony, Dr. Peterson conceded that:

Q. In the third paragraph, the first sentence [of a letter marked Deposition Exhibit 295], it says, "Second, it seems to me that to implement the 'Whole County Principle' of the North Carolina Constitution, one has to proceed in a manner different from that attributed to Stephenson II." What did you mean by that?

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

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

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

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

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

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

A. Yes.

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

VI. **DO THE ENACTED PLANS VIOLATE THE EQUAL PROTECTION GUARANTEES OF THE UNITED STATES OR NORTH CAROLINA CONSTITUTIONS BY DISREGARDING TRADITIONAL REDISTRICTING PRINCIPLES BY FAILING TO BE SUFFICIENTLY COMPACT OR BY EXCESSIVELY SPLITTING PRECINCTS?** *(Dickson amended complaint, Claims 9-10; NAACP amended complaint Claims 9-11)*

A. **Lack of Compactness and Irregular Shapes**

The adherence to "traditional redistricting principles," such as compactness, regularity of shape, continuity, protecting communities of interest and political subdivisions, geographic barriers and protection of incumbents, is relevant in judicial
scrutiny of redistricting plans on several levels. First, as noted above, the lack of adherence to traditional redistricting principles and a high degree of irregularity may provide circumstantial evidence that racial considerations have predominated in the redistricting process. Second, "compactness," a traditional redistricting principle, takes on special significance when considering whether a compelling governmental interest exists because, under the Gingles factors discussed above, if an enacted VRA district is not significantly compact, one might conclude the absence of the first Gingles requirement that a "minority group exists within the area affected by the Enacted Plans, and that this group is sufficiently large and geographically compact to constitute a majority in a single-member district." Id. 478 U.S. at 50-51. Third, traditional redistricting principles may be relevant when comparing alternative plans under a narrow tailoring analysis to determine whether an enacted plan is the least restrictive alternative to accomplish legitimate governmental objectives. Fourth, the Stephenson I and II Courts each held in Rule 7 of their WCP hierarchy that "communities of interest should be considered in the formation of compact and contiguous electoral districts." 355 N.C. at 383-84; 357 N.C. at 306. Fifth, lack of adherence to traditional redistricting principles, if applied disproportionately, could be viewed as a violation of Equal Protection requirements of the state and federal constitutions.

In the trial court's consideration above of the level of scrutiny, the compelling governmental interests, and narrow tailoring, some discussion can be found regarding the analysis of traditional redistricting principles relevant to each of those topics. In this section, the trial court considers in greater detail the overall concepts of "compactness,"

27 See, supra at § IV(B).
28 See, supra at § IV(C)(1)(a).
29 See, supra at § IV(C)(2)(d).
"irregularity" and splitting of precincts and then considers the Plaintiffs' contentions that the Enacted Plans, by not adhering to traditional redistricting principles, fail to conform with the Stephenson I and II mandates or violate equal protection requirements.

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

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

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

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

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

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

We observe that the State Constitution's limitations upon redistricting and apportionment uphold what the United States Supreme Court has termed "traditional districting principles." These principles include such factors as compactness, contiguity, and respect for political subdivisions. The United States Supreme Court has "emphasized that these criteria are important not because they are constitutionally required -- they are not -- but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines."

Id. at 371 (emphasis omitted).

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

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

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

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

Stephenson II, 357 N.C. at 315 (Parker, J., dissenting) (citations omitted) (Justice Parker urged, in her dissent, that the challenged legislative plans complied with the WCP and were therefore lawful).
B. Absence of a Judicially Manageable Standard for Measuring Compliance, or Lack Thereof, with Traditional Redistricting Principles

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

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

Plaintiffs’ expert, Dr. Arrington, testified that when he consults with the United States Department of Justice on redistricting matters, he uses what he calls an "inter-ocular test” to determine if a district is compact, presumably meaning that if the district is

62
so irregular that it "hits him between the eyes" it must not survive strict scrutiny.

Arrington Dep. 202. Such a subjective test of compactness or irregularity is particularly unsuitable for judicial review of redistricting plans in North Carolina because, among other reasons, were this trial court to declare that a certain district was unlawful for lack of compactness or regularity, the law obligates the trial court to further "find with specificity all facts supporting that declaration, [ ] state separately and with specificity the court's conclusions of law on that declaration, and [the trial court] shall, with specific reference to those findings of fact and conclusions of law, identify every defect found by the court." N.C. Gen. Stat. § 120-2.3. A trial court's finding of fact or conclusion of law that a district "appears to be excessively irregular" would, in this court's view, be insufficient to comply with the requirement of N.C. Gen. Stat. §120-2.3.

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

Example 1:
Example 2:

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

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

The subjective task of determining whether a district is not compact enough or too irregular is made more complicated by the wide variety of court precedent on this topic. Consider, for example the following two districts:
Example 3:

The district on the left is House District 52 as proposed a decade ago. In looking at this district, one might concluded, according to the "inter-ocular" test, that it appears "tidy" and compact. However, this district was rejected by the Stephenson II trial court, whose decision was affirmed by the N.C. Supreme Court, as having a "substantial failure in compactness." *See, Stephenson II*, 357 N.C. 301, 309-313 (because it "is shaped like a 'C' rather than being compact, and leaves out the county seat.").

The district on the right is North Carolina's 12th Congressional District, a district perhaps most frequently associated with the lay person's understanding of "gerrymandering." However, when the 12th Congressional District faced a legal challenge in the Supreme Court in *Cromartie II*, 532 U.S. 234, even though the Court had previously labeled it as a "bizarre configuration" with a "'snakelike' shape and continues to track Interstate-85," *Cromartie I*, 526 U.S. at 544, n.3, the district's irregular shape and lack of compactness did not, as a matter of law, render the district

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30 As a rough measure of District 12's universal notoriety as a non-compact district, the Wikipedia article on the term "gerrymandering" has an image of the 2007 version of the 12th Congressional District as its very first image under "examples of gerrymandered districts." *Gerrymandering*, Wikipedia.com, http://en.wikipedia.org/wiki/Gerrymandering (last modified June 30, 2013).
unconstitutional or unlawful. This same district has persisted as a template for all iterations of the 12th Congressional District that have followed in two subsequent decennial redistricting efforts and persists even in the Enacted Congressional Plans under consideration today.

To be sure, there are several districts in the Enacted Plan that are “ugly” and that would appear to most to be bizarrely shaped, irregular and non-compact. For example, House District 7 in the Enacted Plan is one that could be described as such. And, indeed, while the alternative House District 7 proposed in the House Fair & Legal plan is not itself a model of compactness or regularity, it nonetheless could be perhaps described as “prettier.”

Example 4:

![House District 7 (Enacted) vs. House District 7 (Fair & Legal)]

But, in the absence of a judicially consistent, articulate or manageable standard for viewing a district and declaring it sufficiently regular, compact or “pretty,” the trial court cannot find that any district, simply on this ground alone, can be declared to be in violation of law or unconstitutional.
The Plaintiffs also urge that mathematical or quantitative measures of compactness or regularity can aid the trial court in determining whether districts in the Enacted Plan should be rejected for lack of adherence to traditional redistricting principles. But these quantitative measures are not, the trial court finds, particularly helpful in this task because even when a numerical value is assigned to “compactness,” the trial court is still left with the subjective task of deciding whether, for example, the Roeck Test\textsuperscript{31} compactness score of 0.45 for Enacted Plan House District 31 (see above at Example 1) versus a compactness score of 0.46 for the alternative Fair & Legal House District 31 renders the former unconstitutional, and the latter lawful. Or, similarly, whether a non-compactness score of 0.35 renders Enacted Plan District 107 unconstitutional, and the Fair & Legal alternative District 107, with a Roeck score of 0.40, lawful (See above at Example 2). This is in accord with Plaintiffs’ own expert, Dr. Arrington, who says:

Courts and reformers often cite compactness as a valuable technical criterion in redistricting, but scholars do not think it should be a priority. One problem is that there are many different and partially conflicting ways to measure the compactness of a district or a district plan. And there can be no mathematical standard of compactness that can be applied across varying geography in the way that equal population can have a mathematical standard. The most one can say is that with the use of a particular statistic, one redistricting plan for a particular jurisdiction has more or less compact districts than another plan for that same jurisdiction. But there is no standard that can tell us whether the districts in a plan are compact enough.

\textsuperscript{31} The “Roeck Test” is one of several tests employed by experts considering the compactness of voting districts. It measures a district’s “dispersion” by circumscribing the district with the smallest circle within which the district will fit, and comparing the area of the circle to the area of the district. A “perfectly compact” district would itself be a circle with a Roeck Score of 1, whereas a completely noncompact district would have a Roeck score of 0. (Fairfax Dep. 24). Whether any given score resulting from the Roeck test, or the other quantitative tests employed, is itself an indication of lack of compactness is “a judgment call.” (Fairfax Dep. 76-77).
Arrington Dep. 142-43.

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

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

<table>
<thead>
<tr>
<th>House District</th>
<th>Enacted Plan (House)</th>
<th>SCSJ</th>
<th>F&amp;L</th>
<th>LBC</th>
</tr>
</thead>
<tbody>
<tr>
<td>29</td>
<td>0.47</td>
<td>0.38</td>
<td></td>
<td></td>
</tr>
<tr>
<td>31</td>
<td>0.45</td>
<td>0.49</td>
<td>0.46</td>
<td></td>
</tr>
<tr>
<td>33</td>
<td>0.47</td>
<td>0.51</td>
<td></td>
<td></td>
</tr>
<tr>
<td>38</td>
<td>0.31</td>
<td>0.45</td>
<td></td>
<td>0.32</td>
</tr>
<tr>
<td>42</td>
<td>0.44</td>
<td>0.33</td>
<td></td>
<td>0.44</td>
</tr>
<tr>
<td>43</td>
<td>0.44</td>
<td>0.41</td>
<td>0.41</td>
<td></td>
</tr>
<tr>
<td>57</td>
<td>0.39</td>
<td>0.52</td>
<td>0.51</td>
<td>0.51</td>
</tr>
<tr>
<td>58</td>
<td>0.40</td>
<td>0.61</td>
<td>0.61</td>
<td>0.65</td>
</tr>
<tr>
<td>60</td>
<td>0.32</td>
<td>0.33</td>
<td>0.33</td>
<td></td>
</tr>
<tr>
<td>99</td>
<td>0.48</td>
<td>0.58</td>
<td></td>
<td></td>
</tr>
<tr>
<td>101</td>
<td>0.47</td>
<td>0.40</td>
<td></td>
<td>0.49</td>
</tr>
<tr>
<td>102</td>
<td>0.32</td>
<td>0.47</td>
<td>0.47</td>
<td></td>
</tr>
<tr>
<td>106</td>
<td>0.49</td>
<td>0.49</td>
<td>0.40</td>
<td></td>
</tr>
<tr>
<td>107</td>
<td>0.35</td>
<td></td>
<td>0.40</td>
<td>0.52</td>
</tr>
</tbody>
</table>

The shaded blocks in Table 4 represent the lowest Roeck, or the "least compact" district, among all plans. This comparison illustrates that even with a mathematical analysis of compactness, the results provide no better judicially manageable standard-by-

32 Districts contained wholly within a county are selected for this comparison because, as the trial court has concluded above, none of the alternative plans proposed or endorsed by the Plaintiffs complies with the hierarchy of rules established by the Stephenson I and II courts for compliance with the WCP, and none of the alternative plans are drawn to provide VRA districts in "rough proportionality to the Black population in North Carolina" or populate each VRA district with >50% TBVAP as is done in the Enacted Plans. Because of these differences, each of which could have a dramatic effect on the shape of any given district, comparison among the plans is akin to comparing "apples to oranges." By limiting the comparison to only those districts contained wholly within a county, the comparison becomes, perhaps, more instructive.
which the trial court can measure constitutionally permissible, or constitutionally
defective, adherence to traditional redistricting principles. While the above-tabulated
results of 4 of the 14 districts in the Enacted House Plan show the lowest compactness
scores for those same districts across all alternative plans, each of the alternative plans, in
turn, have their own set of districts that score lower than all others. In sum, in the
“beauty contest” between the Enacted Plans and the “rival compact districts designed by
plaintiffs’ experts,” this data suggests, at best, a tie. *Vera*, 517 U.S. at 977.

C. *Excessive Split Precincts*

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

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For the purposes of this discussion, the term “VTD” (Voter Tabulation District), as defined by the U.S.
Census Bureau and the term “precinct” are used interchangeably.
strict scrutiny standard because of the fundamental nature of one's right to vote and the impermissibility of raced-based classifications.

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

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

Arrington Dep. 105-106. When towns and municipalities annex property, precincts are split, and some voters then vote in municipal elections, while others in the same precincts vote in county elections. Ultimately, the establishment of precincts by the 100 different county boards of elections is an exercise of their discretion and based upon factors such as the amount of funding made available by their county’s board of commissioners and the availability of suitable polling places. N.C. Gen. Stat. § 163-33(4); Poucher Dep. 43.

Given the potential for disparate characteristics of precincts throughout the State, it is not surprising that there is no appellate authority affording any special constitutional status to precinct lines that would limit the General Assembly’s exercise of its lawful discretion in the redistricting process.

Second, like other instances of traditional redistricting principles, there is no judicially manageable standard for determining when a redistricting plan splits an “excessive” number of precincts. Each alternative plan proposed or endorsed by the Plaintiffs contains split precincts, as did the 2003 Senate Plan and the 2009 House Plan. To be sure, the Enacted Plans split more precincts, and affect more citizens, than the predecessor or alternative plans. But again, the trial court concludes that the subjective nature of what constitutes an “excessive” number of split precincts invites arbitrary and inconsistent outcomes of the trial court that must be avoided, particularly when examining challenges to legislatively enacted redistricting plans, where the trial court is instructed to respect the inherently political nature of the redistricting process.
Third, accepting the Plaintiffs’ contention that the splitting of precincts impairs the fundamental right of a split precinct’s voters disproportionately to other voters, and that the splitting of precincts was done for a predominantly racial motive, the equal protection analysis that would then follow is identical to that set out above with respect to racial gerrymandering. (See, supra, § IV.) As the trial court concluded above, the Enacted Plans were drafted to achieve compelling governmental interests of avoiding § 2 liability and to ensure preclearance under § 5 of the VRA, and the plans were narrowly tailored to accomplish those goals. Where precincts must to be divided to achieve those goals, the General Assembly must be given the leeway to do so.

Of historic significance to the interplay between precinct lines and compliance with § 2 and § 5 of the VRA was the attempt, in 1995, of the General Assembly to enact legislation that would prohibit legislative and congressional districts from crossing precinct lines. N.C. Gen. Stat. §§ 120-2.2 and § 163-261.22 (“whole precinct statute”). When submitted for pre-clearance, the U.S. Department of Justice (“USDOJ”) objected to preclearance of the whole precinct statute because it concluded the State had failed to prove the statute was free from discriminatory purpose and that the State had failed to prove that the statute would not have a discriminatory “effect” or “lead to a retrogression in the position of . . . minorities with respect to their effective exercise of the electoral franchise.” Arrington Dep. Ex. 238, at 3 (Letter of USDOJ to Charles M. Hensey, Special Deputy Attorney General (2/13/96)) (quoting Beer v. United States, 425 U.S. 130, 131 (1976)). The State’s responsibility to create “majority-black districts” formed the basis of the USDOJ’s objection to the whole precinct statute. The USDOJ noted that “under existing law, county election officials may use their discretion with regard to the
population size and racial composition of precincts,” and noted that prior to the whole
precinct requirement, “the size and composition of the precincts were of little relevance
because the legislature could draw district lines through precinct lines for any number of
reasons (e.g. to protect interests, to voluntarily satisfy the VRA, etc.).” Id. at 2. The
USDOJ was concerned that, under the whole precinct statute, precincts would take on
“new importance” because they would then “be used as the building blocks for each
district.” Id. The USDOJ observed that “if precincts do not fairly reflect minority voting
strength, it is virtually impossible for districts to do so.” Id. Based upon this analysis,
the USDOJ blocked the enforcement of the whole precinct statute because it
“unnecessarily restrict[ed]” the redistricting process and made “it more difficult to
maintain existing majority-black districts and to create new ones.” Id. at 3. Just as the
USDOJ did, the trial court concludes the tool of splitting of precincts to achieve a
narrowly tailored redistricting plan designed to avoid § 2 liability and ensure § 5
preclearance must be left available to the General Assembly, and an arbitrary constraint
would be ill-advised.

Finally, in connection with the equal protection analysis of the claims
challenging excessive split precincts, because the Plaintiffs have not proffered any
alternative plans that show that the General Assembly could have achieved its legitimate
political and policy objectives in alternate ways with fewer split precincts, the Plaintiffs
have failed to persuade the trial court that the Enacted Plans are not narrowly tailored.34

Thus, in considering all of the factors regarding traditional redistricting principles,
including the claim of excessive split precincts, the trial court cannot conclude, as a

34 See supra IV(C)(2)(d) and cases cited therein regarding the Plaintiffs’ burden when asserting a lack of
narrow tailoring under an Equal Protection analysis
matter of law, that (1) the failure to comport with "traditional redistricting principles," standing alone, renders the Enacted Plans unlawful under the North Carolina or United States constitutions, (2) that, even if such a cause of action exists, that the Enacted Plans deviate from traditional redistricting principles by any meaningful justiciable measure or (3) that a violation of any cognizable equal protection rights of any North Carolina citizens, or groups thereof, will result.

VII. CONCLUSIONS

Upon review of the entire record, consideration of all arguments of counsel, and being bound by the prevailing authority of the North Carolina Supreme Court and the United States Supreme Court, the trial court finds that the Plaintiffs' Motion for Partial Summary Judgment must be DENIED and, with respect to the claims asserted by the Plaintiffs challenging the 2011 Enacted Plans, the Defendants are entitled to JUDGMENT IN THEIR FAVOR on each claim.

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

/s/ Paul C. Ridgeway
Paul C. Ridgeway, Superior Court Judge

/s/ Joseph N. Crosswhite
Joseph N. Crosswhite, Superior Court Judge

/s/ Alma L. Hinton
Alma L. Hinton, Superior Court Judge

74
Certificate of Service

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

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This the ___ day of July, 2013.

75
APPENDIX A TO THE
JUDGMENT AND MEMORANDUM OF DECISION

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

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

Appendix A - 76
I. General Findings of Fact


2. During the legislative process, the two redistricting chairs, Senator Robert Rucho and Representative David Lewis, sought advice from many parties on a variety of issues, including whether North Carolina remained bound by *Gingles*. On May 27, 2011, faculty of North Carolina’s School of Government advised the redistricting chairs that North Carolina remained “obligated” to comply with *Gingles*. (Churchill Dep. Ex. 57, pp. 1, 2) (“[I]t appears to be commonly accepted that the legislature remains obligated to maintain districts with effective African American voting majorities in the same areas decided in *Gingles*, if possible.”)
3. In 2010, eighteen African American candidates were elected to the State House and seven African American candidates were elected to the State Senate. (First Frey Aff. Exs. 10, 11; Churchill Aff. Ex. 6, 7) Two African American candidates were elected to Congress in 2010. (Churchill Dep. Ex. 81; Churchill Aff. Ex. 1; Second Frey Aff. Ex. 62) All African American incumbents elected to the General Assembly in 2010 or the Congress in 2010 were elected in districts that were either majority-African American or majority-minority coalition districts. (minority-white districts including Hispanics in the category of “white” and one minority non-Hispanic white district) (Second Frey Aff. Exs. 34, 39, 60)\(^3\)

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

\(^3\)The census categories of “white,” “black,” “Hispanic,” “total black,” and “non-Hispanic white” are included for each district with the “stat packs” attached to all of the various plans in the Map Notebook. The “white” category is without regard to ethnicity and includes people who are Hispanic or Latino. The category “Non-Hispanic white” excludes that portion of the population. (Second Frey Aff. Ex. 34, Notes)
1992 through 2010, no black candidate for Congress was elected in a majority-white district. (Churchill Dep. Ex. 81)

5. From 2004 through 2010, no African American candidate was elected to state office in North Carolina in a statewide partisan election. In 2000, an African American candidate, Ralph Campbell, was elected State Auditor in a partisan election. In 2004, Campbell was defeated by a white Republican, Les Merritt, in a partisan election for state auditor. Churchill Dep. Ex. 94, 2004 Partisan Elections; see also Gingles, 590 F. Supp. at 364-65 (lack of success by black candidates in statewide elections is relevant evidence of legally significant racially polarized voting).


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

Appendix A - 79
Cromartie ruled that the First District was reasonably necessary to protect the State from liability under the VRA. *Cromartie*, 133 F. Supp. 2d at 423. That part of the district court's opinion in *Cromartie* was not appealed and remains binding on the State of North Carolina. *(Churchill Dep. Ex. 57; see also Opinion Letter from UNC School of Government Faculty stating that findings in *Gingles* remain binding on North Carolina)*

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

9. Evidence was presented by counsel for the NC NAACP plaintiffs, Anita Earls, and her colleague, Jessica Holmes, on 9 May 2011, and 23 June 2011. On 9 May 2011, both Ms. Earls and Ms. Holmes stated that they were appearing on behalf of the Alliance for Fair Redistricting and Minority Voting Rights ("AFRAM"). *(First Rucho Aff. Ex. 6, pp. 7, 8) Ms. Holmes explained that AFRAM was a "network of organizations" that included the Southern Coalition of Social Justice ("SCSJ"), and at
least three of the organizational plaintiffs: Democracy NC, the NC NAACP, and the League of Women Voters. (First Rucho Aff. Ex. 6, p. 6) Ms. Holmes stated that a proposed congressional map would be presented by the SCSJ following her statement. (First Rucho Aff. Ex. 6, p. 8) During her presentation on May 9, 2011, Ms. Earls stated that she was speaking on behalf of the SCSJ. (First Rucho Aff. Ex. 6, p. 9)

10. In addition to her testimony, on May 9, 2011, Ms. Earls provided the joint committee with other documents. One of these was her written statement. (Rucho Aff. Ex. 7) Another was a racial polarization study by AFRAM’s expert, Dr. Ray Block. (Rucho Aff. Ex. 8) In his study, Dr. Block analyzed the presence of racial polarization in all of the black candidate versus white candidate elections for the General Assembly and Congress (a total of 54 elections) for the 2006, 2008, and 2010 general elections. (Rucho Aff. Ex. 6, p. 12; Rucho Aff. Ex. 7, p. 2; Rucho Aff. Ex. 8, p. 1) Ms. Earls also submitted a law review article prepared by her. See Earls et al., Voting Rights in North Carolina 1982-2006, 17 S. CAL. REV. L. & SOC. JUST. 577 (2008) (attached to Rucho Aff. as Ex. 9) Finally, Ms. Earls presented a proposed congressional map that is listed in the map notebook provided to the Court as “SCSJ Congress Plan.”

36 The following relevant counties were included in the districts studied by Dr. Block: (a) First Congressional District: Beaufort, Bertie, Chowan, Craven, Edgecombe, Gates, Granville, Greene, Halifax, Hertford, Jones, Lenoir, Martin, Northampton, Pasquotank, Perquimans, Pitt, Vance, Warren, Washington, Wayne, Wilson; (b) Twelfth Congressional District: Guilford and Mecklenburg; (c) 2003 SD 4: Bertie, Chowan, Gates, Halifax, Hertford, Northampton, Perquimans; 2003 SD 5: Greene, Lenoir, Pitt; 2003 SD 14: Wake; 2003 SD 20: Durham; 2003 SD 21: Cumberland; 2003 SD 28: Guilford; 2003 SD 38 and 40: Mecklenburg; (d) 2009 HD 5: Bertie, Gates, Hertford, Perquimans; 2009 HD 12: Craven, Lenoir; 2009 HD 21: Sampson, Wayne; 2009 HD 24: Edgecombe, Wilson; 2009 HD 25: Nash; 2009 HD 29 and 31: Durham; 2009 HD 33: Wake; 2009 HD 48: Hoke, Robeson, Scotland; 2009 HD 58 and 60: Guilford; and 2009 HD 101 and 107: Mecklenburg. (See First Rucho Aff. Ex. 8, pp. 5-7; Map Notebook provided to the Court (“Map Notebook”); Congress Zero Deviation, 2003 Senate Plan and 2009 House Plan). According to Dr. Block, from 2006-2010, there were no contested general elections between black and white candidates in SD 3, HD 7, 8, 27, 42, 43, 99 and 102. (First Rucho Aff. Ex. 8, pp. 5-7) However, it appears that a contested election between a black and white candidate occurred in 2010 in HD 99. (Churchill Aff. Ex. 3, p. 1)
11. Through her testimony and the documents she submitted, Ms. Earls gave her opinion that “we still have very high levels of racially polarized voting in the State.” Referencing Dr. Block’s report, Ms. Earls testified that racially polarized voting is present when 88 to 93 percent of black voters vote for “the black candidate” and “less than 50” percent of the white voters vote for the black candidate. *Id.* Ms. Earls confirmed her testimony in her written statement which provides:

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

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

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

1. Is there a relationship between the number of Blacks who vote in a particular district and the amount of votes that an African American candidate receives?

2. Is there evidence of racial polarization in the preferences of voters who participate in electoral contests involving African American candidates running against non-Black candidates?
3. Is the number of elections won by Black candidates higher in majority-minority districts than in other districts?

13. Dr. Block’s analysis answers all three of these questions in the affirmative.

(Rucho Aff. Ex. 8, pp. 1-3) Dr. Block concluded his report with the following summary:

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

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

14. Dr. Block’s report is highly informative in demonstrating racially polarized voting in many areas of the State. To a limited extent, it leaves a few questions in some areas. First, Dr. Block assessed 54 elections in the State of North Carolina in 2006, 2008, and 2010 to determine the degree to which African American candidates for political office failed to win the support of “non-blacks” in the event they were the preferred candidate among black voters. In Dr. Block’s analysis, the non-black vote for the black candidate includes whites and minorities other than blacks who voted for the black candidate. Thus, any assessment of the “non-black” vote for the black candidates in an election held in a majority-black or a majority-minority district does not represent

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

Appendix A - 83
the exact percentage of white voters who voted for the candidate of choice of black voters. (Rucho Aff. Ex. 8, p. 1 n. 1; Second Frey Aff. Exs. 34, 39, 60)

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

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

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

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

19. Dr. Brunell was asked to assess the extent to which racially polarized voting was present in recent elections in 51 counties in North Carolina. (First Rucho Aff. Ex. 10, p. 3) These counties included the 40 North Carolina counties covered by Section 5 of the VRA and Columbus, Duplin, Durham, Forsyth, Jones, Mecklenburg, Richmond,
Sampson, Tyrell, Wake, and Warren counties. *Id.* Elections analyzed by Dr. Brunell included the 2008 Democratic Presidential primary, the 2008 Presidential General Election, the 2004 General Election for State Auditor (the only statewide partisan election for a North Carolina office between black and white candidates), local elections in Durham County, local elections in Wake County, the 2010 General Election for Senate District 5, the 2006 General Election for House District 60, local elections in Mecklenburg County, local elections in Robeson County, and the 2010 Democratic primary for Senate District 3. (First Rucho Aff. Ex. 10, pp. 5-25)

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

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

22. The law review article submitted by Ms. Earls also provided evidence of racially polarized voting as alleged or established in voting rights lawsuits filed in many of the counties in which 2011 VRA districts were enacted. (Rucho Aff Ex. 9, App. B)

These cases included: *Ellis v. Vance County, Fayetteville; Cumberland County Black*

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

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

24. On 13 April 2011, Lois Watkins, a member of the Rocky Mount City Council, asked the legislature to draw majority-minority districts and stated that there was a desire in the City of Rocky Mount to elect and keep representatives of choice. (NC11-S-28F-3(a), pp. 13-15)39 Another member of the Rocky Mount City Council,

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39 Citations beginning “NC11-S-28F” refer to a portion of the preclearance submission to USDOJ of the enacted Senate Plan dealing with public input. Pages cited herein were attached to Defendants’ Response to “Plaintiffs’ Undisputed Material Facts” as “Attachment B.” Moreover, an electronic copy of the State’s
Reuben Blackwell, testified that there was inequality in housing, elections, transportation, and economic development. (NC11-S-28F-3(a), pp. 20-23) AFRAM representative Jessica Holmes testified that many historical factors, including racial appeals in campaigns, had conspired to exclude African American voters from the political process. (NC11-S-28F-3(a), pp. 24-27) Ms. Holmes further stated that social science would confirm that racially polarized voting continues to occur in many areas of North Carolina and that any redistricting plan should not have the purpose or effect of making African American voters worse off. (NC11-S-28F-3(a), p. 26) Finally, Andre Knight, another member of the Rocky Mount City Council and President of the local branch of the NAACP, testified about the historical exclusion of African Americans from the electoral process in Rocky Mount, that race and economic class continued to be divisive issues in regard to school systems, and that racially polarized voting still exists and is demonstrated by the negative attitude toward the African American majority on the Rocky Mount City Council. (NC11-S-28F-3(a), pp. 28-30)

25. On 20 April 2011, Bob Hall, Executive Director of plaintiff Democracy NC and a proffered expert for plaintiffs, testified that race must be taken into consideration in the redistricting process, that discrimination still exists in North Carolina, and that racially polarized voting continues in some parts of the State. (NC11-S-28F-3(b), pp. 29-31) Toye Shelton, an AFRAM representative, testified that African Americans and other protected groups must be afforded an equal opportunity to participate in the political process. (NC11-S-28F-3(b), pp. 33-37) Terry Garrison, a Vance County Commissioner, urged the legislature to be cognizant of race as they drew

complete Section 5 submission was provided to the Court with Defendants’ Motion for Summary Judgment.

Appendix A - 87
districts. (NC11-S-28F-3(b), pp. 41-44) Lavonia Allison, Chair of the Durham Committee on the Affairs of Black People, testified that racial minorities have faced discrimination in voting, that race must be taken into account when drawing redistricting plans to serve the goal of political participation, and that the VRA requires the General Assembly to draw districts in which minorities are afforded the opportunity to elect a candidate of choice. (NC11-S-28F-3(b), pp. 71-74) Ms. Allison also drew attention to the fact that African Americans represent 22% of the total population of North Carolina and that fair representation would reflect that with proportional numbers of representatives in the General Assembly. *Id.*

26. On 28 April 2011, Bill Davis, Chair of the Guilford County Democratic Party, testified that redistricting plans should not undermine minority voting strength. (NC11-S-28F-3(d), pp. 17-20) James Burroughs, Executive Director of Democracy at Home, advised that the legislature was “obligated by law” to create districts that provide an opportunity for minorities to elect candidates of choice. He asked that current minority districts be maintained and that other districts be created to fairly reflect minority voting strength. (NC11-S-28F-3(d), pp. 26-28)

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

Appendix A - 88
the League of Women Voters, urged that any new plan fairly reflect minority voting strength. (NC11-S-28F-3(f), pp. 28-31)

2. On 7 May 2011, Mary Perkins-Williams, a resident of Pitt County, testified that the VRA was in place to give minorities a chance to participate in the political process. She stated that Pitt County African Americans had faced disenfranchisement and that it remained hard for African Americans to be elected in her county. (NC11-S-28F-3(j), pp. 23-26) Taro Knight, a member of the Tarboro Town Council, expressed his opinion that wards for the Town Council drawn with 55% to 65% African American population properly strengthened the ability of minorities to be elected. (NC11-S-28F-3(j), pp. 40-42)

29. On 7 May 2011, Keith Rivers, President of the Pasquotank County NAACP, stated that race must be considered, that current majority-minority districts should be preserved, and that additional majority-minority districts should be drawn where possible. (NC11-S-28F-3(k), pp. 9-11) Kathy Whitaker Knight, a resident of Halifax County, stated that race must be considered to enfranchise all voters. (NC11-S-28F-3(k), pp. 35-37) Nehemiah Smith, editor of the Weekly Defender, a publication in Rocky Mount, North Carolina, testified that minorities have faced many obstacles to being involved in the electoral process throughout history. (NC11-S-28F-3(k), pp. 39-41) David Harvey, President of the Halifax County NAACP, stated that communities in eastern North Carolina are linked by high poverty rates, disparities in employment, education, housing, health care, recreation and youth development, and that these communities have benefited from majority-minority districts. (NC11-S-28F-3(k), pp. 47-48)
30. On 23 June 2011, Florence Bell, a resident of Halifax County, testified that northeastern North Carolina continued to lag behind in the “Gingles factors” including “high poverty rates, health disparities, high unemployment, community exclusion, lack of recreational and youth development and that these are contributing factor to juvenile delinquency, issues of racial injustice, inequality of education and economic development.” (NC11-S-28F-3(m), pp. 97-100)

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

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

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


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

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

36. 2011 First Congressional District

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


(Map Notebook, Rucho-Lewis Congress 3)

a. Which group of plaintiffs have challenged this district?

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

b. Counties included in Gingles districts:


(See General Findings of Fact, No. 1)

c. Counties included in Cromartie First Congressional District:


(See General Findings of Fact, No. 6)

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


Appendix A - 92
2003 SD 3: Edgecombe, Martin, Pitt
2003 SD 4: Bertie, Chowan, Gates, Halifax, Northampton, Hertford, Perquimans
2009 HD 5: Bertie, Gates, Hertford, Perquimons
2009 HD 7: Halifax, Nash
2009 HD 8: Martin, Pitt
2009 HD 12: Craven, Lenoir
2009 HD 24: Edgecombe, Wilson
2009 HD: 21; Wayne

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

e. Section 5 Counties:


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

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

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

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

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

Counties: Beaufort, Bertie, Chowan, Craven, Durham, Edgecombe, Franklin, Gates, Granville, Greene, Halifax, Hertford, Lenoir, Martin,

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

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


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

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

PSD SD 3: Edgecombe, Nash, Pitt

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

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


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

SCSJ HD 7: Edgecombe, Halifax, Nash

SCSJ HD 8: Bertie, Martin, Pitt

SCSJ HD 24: Edgecombe, Halifax, Wilson


SCSJ HD 12: Craven, Greene, Lenoir

Appendix A - 94
SCSJ HD 21: Wayne
F&L HD 5: Bertie, Gates, Hertford, Martin
F&L HD 7: Edgecombe, Nash
F&L HD 8: Pitt
F&L HD 24: Edgecombe, Wilson
F&L HD 27: Halifax, Northampton
F&L HD 12: Craven, Greene, Lenoir
F&L HD 21: Wayne
PHD HD 5: Bertie, Gates, Hertford, Martin
PHD HD 7: Halifax, Nash
PHD HD 8: Greene, Pitt
PHD HD 24: Edgecombe, Wilson
PHD HD 27: Northampton, Warren
PHD HD 12: Craven, Lenoir
PHD HD 21: Wayne

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

37. **2011 Senate District 4**

TBVAP 52.75 (First Frey Aff. Ex. 10)

Counties: Halifax, Vance, and Warren, and portions of Nash and Wilson

(Map Notebook, Rucho Senate 2)

a. Which group of plaintiffs have challenged this district?

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

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

(See General Findings of Fact, No. 1)

c. Counties included in Cromartie First Congressional District:

  Halifax, Nash, Vance, Warren

(See General Findings of Fact, No. 6)

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

  2003 Senate District 4: Halifax
  2009 House District 7: Halifax, Nash
  2009 House District 24: Nash, Wilson

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

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

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

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

  2003 SD 4: Halifax
  2003 HD 24: Wilson, Nash
  2009 HD 25: Nash

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

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

  Halifax, Nash, Vance, Warren, Wilson

(First Rucho Aff. Ex. 10, pp. 1-14)
h. Counties included in majority-black or majority-minority districts in plans

proposed by SCSJ or Democratic Leaders:

SCSJ Congress CD 1: Halifax, Nash, Vance, Warren, Wilson
Congressional Fair & Legal 1: Halifax, Nash, Vance, Warren, Wilson
SCSJ SD 3: Wilson
F&L SD 3: Wilson
SCSJ SD 4: Halifax, Vance, Warren
F&L SD 4: Halifax, Vance, Warren
PSD SD4: Halifax, Warren
PSD SD 3: Nash
SCSJ HD 27: Halifax, Vance, Warren
SCSJ HD 7: Halifax, Nash
SCSJ HD 24: Halifax, Wilson
F&L HD 27: Halifax
F&L HD 7: Nash
F&L HD 24: Wilson
PHD HD 27: Nash, Warren
PHD HD 7: Halifax, Nash
PHD HD 24: Wilson

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

38. 2011 Senate District 5

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

(Map Notebook, Rucho Senate 2)

a. Which group of plaintiffs have challenged this district?

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

b. Counties included in Gingles districts: None

c. Counties included in Cromartie First Congressional District:

Greene, Lenoir, Pitt, Wayne

(See General Findings of Fact, No. 6)
d. Counties that were part of a 2001/2003/2009 majority-black or majority-minority district:

   2001 First Congressional District: Greene, Lenoir, Pitt, Wayne
   2003 SD 3: Pitt
   2003 HD 8: Pitt
   2003 HD 12: Greene, Lenoir
   2003 HD 21: Wayne

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

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

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

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

   2010 CD 1: Greene, Lenoir, Pitt, Wayne
   2008 & 2010 SD 5: Greene, Pitt, Wayne
   2008 & 2010 HD 12: Lenoir
   2008 & 2010 HD 21: Wayne

   (First Rucho Aff. Ex. 8, pp. 1-7)

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

   Greene, Lenoir, Pitt, Wayne

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

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

   SCSJ CD 1: Greene, Lenoir, Pitt, Wayne
   F&L CD 1: Greene, Lenoir, Pitt, Wayne
   SCSJ SD 3: Pitt
   PSD SD 3: Pitt
   SCSJ HD 12: Greene, Lenoir
   SCSJ HD 21: Wayne
   F&L HD 8: Pitt
39. **2011 Senate District 14**

TBVAP: 51.28% (First Frey Aff. Ex. 10)
County: Wake (Map Notebook, Rucho Senate 2)

a. Which group of plaintiffs have challenged this district?

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

b. County included in *Gingles* districts: Wake

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

c. County included in *Cromartie* First CD: None

d. County that was part of 2001/2003/2009 majority-black or majority-minority district

2003 Senate District 14: Wake
2009 House District 33: Wake

*(Map Notebook, 2003 Senate Plan; 2009 House Plan; First Frey Aff. Exs. 10, 11; Second Frey Aff. Exs. 34, 39; First Frey Aff. Exs. 10, 11)*

e. Section 5 county: No

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

2008-2010 SD 14: Wake
2008 HD 33: Wake

*(First Rucho Aff. Ex. 8, pp. 1-7)*

Appendix A - 99
g. County analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting:

Wake

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

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

- SCSJ SD 14: Wake
- F&L SD 14: Wake
- PSD SD 14: Wake
- SCSJ HD 33: Wake
- F&L HD 33: Wake
- PHD HD 33: Wake

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

i. County included in majority-black Superior Court district in recently enacted Superior Court Plan: Wake

(See:
http://www.wakegov.com/gis/services/Documents/SuperiorCourt_24x24.pdf;

40. 2011 Senate District 20

TBVAP: 51.04% (First Frey Aff. Ex. 10)
County: Durham, Granville (Map Notebook, Rucho Senate 2)

a. Which group of plaintiffs have challenged this district?

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

b. Counties included in a Gingles District:

In Thornburg v. Gingles, 478 U.S. 38, 77 (1986), because of the sustained success of black candidates, the United States Supreme Court reversed the district court's finding that racially polarized voting was present in the

Appendix A - 100
1982 version of District 23 located in Durham County. In Pender County v. Bartlett, 361 N.C. 491, 494, 649 S.E.2d 364, 367 (2007), aff'd sub. nom Bartlett v. Strickland, 561 U.S. 1 (2009), the North Carolina Supreme Court relied upon an affidavit filed by Representative Martha Alexander to make the statement that “[p]ast elections in North Carolina demonstrate that a legislative voting district with a total African-American population of at least 41.54 percent, or an African-American voting age population of at least 38.37 percent, creates an opportunity to elect African American candidates.” What was not mentioned is that the district cited from Representative Alexander’s affidavit was the 1992 version of the same multi-member, Durham County, District 23 that had been reviewed in Gingles. (Record on Appeal at 45-63 (Aff. of Martha Alexander, ¶ 7, Att. A), Pender County (No. 103A06) (available at http://www.ncappellatecourts.org/show-file.php?document_id=65479)

As explained by the Supreme Court in Thornburg and the district court’s opinion in Gingles, the dynamics of racially polarized voting is completely different in a multi-member district as compared to a single-member district. For example, in a multi-member district, a black candidate may be elected when he or she is the last choice of white voters, but where the number of candidates running is identical to the number of positions to be elected. Gingles, 590 F. Supp. at 368 n.1, 369. Further, “bullet” or “single-shot” voting (a practice that would allow black voters to cast one vote for their candidate of choice as opposed to voting for three candidates in a three-member, multi-member district) may result in the election of a black candidate even when voting in the district is racially polarized. Thornburg, 478 U.S. at 38 n. 5, 57. Thus, the finding in Thornburg that legally significant polarized voting was absent in a multi-member district does not preclude a strong basis in evidence of racially polarized voting in Durham County as related to single-member districts.

c. Counties included in Cromartie First Congressional District: Granville

(See General Findings of Fact, No. 6)

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

2001 CD 1: Granville
2003 SD 20: Durham
2003 HD 29: Durham
2003 HD 31: Durham

(Map Notebook, Congress Zero Deviation, 2003 Senate, 2009 House; First Frey Aff. Exs. 10, 11, 12; Second Frey Aff. Exs. 34, 39, 60)
e. Section 5 Counties: Granville
   (Churchill Dep. Ex. 46, p. 6)

f. Counties included in Dr. Block's analysis of district elections from 2006-2010:
   2008 2010 SD 20: Durham
   2008 HD 29: Durham
   2010 HD 31: Durham
   (First Rucho Aff. Ex. 8, pp. 1-7)

g. Counties analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting:
   Durham, Granville
   (First Rucho Aff. Ex. 10, pp. 1-16)

h. Counties included in majority-black or majority-minority district in plans proposed by SCSJ and Democratic leaders:
   SCSJ Congress CD 1: Granville
   Congressional F&L CD 1: Granville
   SCSJ SD 20: Durham
   F&L SD 20: Durham
   PSD SD 20: Durham
   SCSJ HD 29, 31: Durham
   F&L HD 29, 31: Durham
   PHD HD 29, 31: Durham
   (Map Notebook, SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House; First Frey Aff. Exs. 10, 11, 12; Second Frey Aff. Exs. 36-38, 41-43, 66, 67)

41. **2011 Senate District 21**

   TBVAP: 51.43% (First Frey Aff. Ex. 10)
   Counties: Cumberland and Hoke (Map Notebook, Rucho Senate 2)

   a. Which group of plaintiffs have challenged this district?
Both sets of plaintiffs alleged that the district is a racial gerrymander. *(Dickson Pls. Am. Compl. ¶¶ 497-500, 510-14; NAACP Pls. Am. Compl. ¶¶ 422-34, 472-79)*

b. Counties included in *Gingles* districts:

   None

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

   None

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

   2003 SD 21: Cumberland  
   2009 HD 42: Cumberland  
   1009 HD 43: Cumberland

   *(Map Notebook, 2003 Senate, 2003 House; First Frey Aff. Exs. 10, 11; Second Frey Aff. Exs. 34, 39)*

e. Section 5 Counties:

   Cumberland and Hoke

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

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

   2010 SD 21: Cumberland

   *(First Rucho Aff. ex. 8, pp. 1-7)*

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

   Cumberland, Hoke

   *(First Rucho Aff. Ex. 10, pp. 1-14)*
h. Counties included in majority-black or majority-minority district in plans proposed by SCSJ and Democratic leaders:

SCSJ SD 21: Cumberland
F&L SD 21: Cumberland
PSD SD 21: Cumberland
SCSJ HD 42, 43: Cumberland
F&L HD 42, 43: Cumberland
PHD HD 42, 43: Cumberland

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

42. 2011 Senate District 28

TBVAP 56.49% (First Frey Aff. Ex. 10)
County: Guilford (Map Notebook, Rucho Senate 2)

a. Which group of plaintiffs have challenged this district?

Both sets of plaintiffs alleged that the district is a racial gerrymander.

b. Counties included in Gingles districts: None

c. Counties included in Cromartie First Congressional District: None

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

2001 CD 12: Guilford
2009 SD 28: Guilford
2009 HD 58: Guilford
2009 HD 60: Guilford

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

e. Section 5 County: Guilford

(Churchill Dep. Ex. 46, p. 6)
f. Counties included in Dr. Block's analysis of district elections from 2006-2010:

2008 and 2010 CD 12: Guilford
2006 and 2010 CD 13: Guilford
2010 SD 28: Guilford
2010 HD 58: Guilford
2006 and 2010 HD 60: Guilford

(First Rucho Aff. Ex. 8, pp. 1-7)

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

Guilford

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

h. Counties included in majority-black or majority-minority district in plans proposed by SCSJ and Democratic leaders:

SCSJ CD 12: Guilford
F&L CD 12: Guilford
SCSJ SD 28: Guilford
F&L SD 28: Guilford
PSD SD 28: Guilford
SCSJ HD 58, 60: Guilford
F&L HD 58, 60: Guilford
PHD HD 58, 60: Guilford

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

43. 2011 Senate Districts 38 and 40

TBVAP: 38 (52.51%) (First Frey Aff. Ex. 10)
40 (51.84%) (First Frey Aff. Ex. 10)
County: Mecklenburg (Map Notebook, Rucho Senate 2)

a. Which group of plaintiffs have challenged this district?
Both sets of plaintiffs alleged that these districts are racial gerrymanders.  

b. County included in Gingles districts: Mecklenburg

(See General Findings of Fact, No. 1)

c. County included in Cromartie First Congressional District: None

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

2001 CD 12: Mecklenburg  
2003 SD 38: Mecklenburg  
2003 SD 40: Mecklenburg  
2003 HD 99, 100, 101, 102; 107, Mecklenburg

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

e. Section 5 County: No

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

2008, 2010 CD 12: Mecklenburg  
2006, 2008, 2010 SD 40: Mecklenburg  
2008 SD 38: Mecklenburg  
2008, 2010 HD 107: Mecklenburg  
2010 HD 101: Mecklenburg

(First Rucho Aff. Ex. 8, pp. 1-7)

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

Mecklenburg

(First Rucho Aff. Ex. 10, pp. 1-15, 22)

h. County included in majority-black or majority-minority district in plans proposed by SCSJ and Democratic leaders

Appendix A - 106
44. 2011 House District 5

TBVAP 54.17% (First Frey Aff. Ex. 11)
Counties: Bertie, Gates, Hertford, Pasquotank (Map Notebook, Lewis-Dollar-Dockham 4)

a. Which group of plaintiffs have challenged this district?

The NAACP plaintiffs have alleged that 2011 District 5 is a racial gerrymander. NAACP Pl. Am. Compl. ¶¶ 410-21, 464-71; The Dickson Plaintiffs have not challenged this district. Dickson Pl. Am. Compl. ¶¶ 493-96, 505-509.

b. Counties included in Gingles districts: Bertie, Hertford, Gates

(See General Findings of Fact, No. 1)

c. Counties included in Cromartie First Congressional District: First District: Bertie, Hertford, Gates

(See General Findings of Fact, No. 6)
d. Counties that were part of a 2001/2003/2009 majority-black or majority-minority district:

2001 CD 1: Bertie, Gates, Hertford, Pasquotank
2003 SD 4: Bertie, Gates, Hertford
2009 HD 5: Bertie, Gates, Hertford

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

e. Section 5 Counties: Bertie, Hertford, Gates, Pasquotank

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

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

2010 CD 1: Bertie, Gates, Hertford, Pasquotank
2010 SD 4: Bertie, Gates, Hertford
2006 HD 5: Bertie, Gates, Hertford

(First Rucho Aff. Ex. 8, pp. 1-7)

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

Bertie, Gates, Hertford, Pasquotank

(First Rucho Aff. Ex. 10, pp. 1-15)

h. Counties included in majority-black or majority-minority district in plans proposed by SCSJ and Democratic leaders:

SCSJ CD 1: Bertie, Gates, Hertford, Pasquotank
F&L CD 1: Bertie, Gates, Hertford, Pasquotank
SCSJ SD 4: Bertie, Gates, Hertford
F&L SD 3: Bertie
F&L SD 4: Gates, Hertford
PSD SD 4: Bertie, Gates, Hertford
SCSJ HD 5: Bertie, Hertford, Gates, Pasquotank
F&L HD 5: Bertie, Gates, Hertford
PHD HD 5: Bertie, Gates, Hertford

Appendix A - 108
45. **2011 House District 7**

TBVAP: 50.67% (First Frey Aff. Ex. 11)
Counties: Franklin, Nash (Map Notebook, Lewis-Dollar-Dockham 4)

a. Which group of plaintiffs have challenged this district?

The *Dickson* plaintiffs have alleged that 2011 HD 7 is a racial
gerrymander. *Dickson* Pls. Am. Compl. ¶¶ 493-96, 505-509; The *NAACP*
Plaintiffs have not challenged this district. *NAACP* Pls. Am. Compl. ¶¶
410-21, 464-71.

b. Counties included in *Gingles* districts: Nash

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

c. Counties included in *Cromartie* First Congressional District: None

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

- 2001 CD 1: Nash
- 2009 HD 7: Nash

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

e. Section 5 County: Franklin, Nash

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

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

- 2010 CD 1: Nash

*(First Rucho Aff. Ex. 8, pp. 1-7)*

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

Appendix A - 109
Franklin and Nash

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

h. Counties included in majority-black or majority-minority district in plans proposed by SCSJ and Democratic leaders:

SCSJ CD 1: Franklin, Nash
F&L CD 1: Franklin, Nash
PSD SD 3: Nash
SCSJ HD 7: Nash
F&L HD 7: Nash
PHD HD 7: Nash

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

46. 2011 House District 12

TBVAP: 50.60% (First Frey Aff. Ex. 11)
Counties: Craven, Greene, Lenoir (Map Notebook, Lewis-Dollar-Dockham, 4)

a. Which group of plaintiffs have challenged this district?

The Dickson plaintiffs have alleged that this district is a racial gerrymander. *Dickson* Pls. Am. Compl. ¶¶ 493-96, 505-509; The NAACP Plaintiffs have not challenged this district. *NAACP* Pls. Am. Compl. ¶¶ 410-21, 464-71.

b. Counties included in Gingles districts: None

c. Counties included in Cromartie First Congressional District: Craven, Greene, Lenoir

(See General Findings of Fact, No. 6)

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

2001 CD 1: Craven, Greene, Lenoir
2009 HD 12: Craven, Lenoir
(Map Notebook, Congress Zero Deviation and 2009 House Plan; First Frey Aff.
Exs. 11, 12; Second Frey Aff. Exs. 39, 60)

e. Section 5 Counties: Craven, Greene, Lenoir
   (Churchill Dep. Ex. 46, p. 6)

f. Counties included in Dr. Block’s analysis of district elections from 2006-2010:
   2010 CD 1: Craven, Greene, Lenoir
   2006-2010 HD 12: Craven, Lenoir
   (First Rucho Aff. Ex. 8, pp. 1-7)

g. Counties analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting:
   Craven, Greene, Lenoir
   (First Rucho Aff. Ex. 10, pp. 1-14)

h. Counties included in majority-black or majority-minority district in plans proposed by SCSJ and Democratic leaders
   SCSJ CD 1: Craven, Greene, Lenoir
   F&L CD 1: Craven, Greene, Lenoir
   SCSJ HD 12: Craven, Greene, Lenoir
   F&L HD 12: Craven, Greene, Lenoir
   PHD HD 12: Craven, Lenoir
   (Map Notebook, SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House; Second Frey Aff. Exs. 41-43; 66, 67)

47. **2011 House District 21**

   TBVAP: 51.90% (First Frey Aff. Ex. 11)
   Counties: Duplin, Sampson, Wayne (Map Notebook, Lewis-Dollar-Dockham 4)

a. Which group of plaintiffs have challenged this district?
Both sets of plaintiffs alleged that the district is a racial gerrymander.  

b. Counties included in *Gingles* districts: None

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

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

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

   2001 CD 1: Wayne  
   2009 HD 21: Sampson, Wayne

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

e. Section 5 County: Wayne  
   *(Churchill Dep. Ex. 46, p. 6)*

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

   2010 CD 1: Wayne  
   2010 HD 21: Sampson, Wayne

   *(First Rucho Aff. Ex. 8, pp. 1-7)*

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

   Duplin, Sampson, Wayne

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

h. Counties included in majority-black or majority-minority district in plans proposed by SCSJ and Democratic leaders:

   SCSJ CD 1: Wayne  
   F&L CD 1: Wayne  
   SCSJ HD 21: Duplin, Sampson, Wayne

Appendix A - 112
F&L HD 21: Sampson, Wayne
PHD HD 21: Sampson, Wayne

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

48. 2011 House District 24

TBVAP: 57.33% (First Frey Aff. Ex. 11)
Counties: Pitt, Wilson (Map Notebook, Lewis-Dollar-Dockham 4)

a. Which group of plaintiffs have challenged this district?

Both groups of plaintiffs have alleged that this district is a racial gerrymander. (Dickson Pls. Am. Compl. ¶¶ 493-95, 505-509; NAACP Pls. Am. Compl. ¶¶ 410-21, 464-71)

b. Counties included in Gingles districts: Wilson

(See General Findings of Fact, No. 1)

c. Counties included in Cromartie First Congressional District: Pitt, Wilson

(See General Findings of Fact, No. 6)

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

2001 CD 1: Pitt, Wilson
SD 3: Pitt
2009 HD 8: Pitt
2009 HD 24: Wilson

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

e. Section 5 County: Pitt, Wilson

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

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

2008 SD 5: Pitt

Appendix A - 113
2010 SD 5: Pitt, Wilson

(First Rucho Aff. Ex. 6, pp. 1-7)

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

Pitt, Wilson

(First Rucho Aff. Ex. 10, pp. 1-15)

h. Counties included in majority-black or majority-minority district in plans proposed by SCSJ and Democratic leaders:

SCSJ CD 1: Pitt, Wilson
F&L CD 1: Pitt, Wilson
SCSJ SD 3: Pitt, Wilson
F&L SD 3: Wilson
PSD SD 3: Pitt
SCSJ HD 8: Pitt
SCSJ HD 24: Wilson
F&L HD 8: Pitt
F&L HD 24: Wilson
PHD HD 8: Pitt
PHD HD 24: Wilson

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

49. 2011 House Districts 29 and 31 (Durham County)

TBVAP: HD 29 (51.34%) (First Frey Aff. Ex. 11)
HD 31 (51.81%) (First Frey Aff. Ex. 11)
County: Durham

(Map Notebook, Lewis-Dollar-Dockham 4)

a. Which group of plaintiffs have challenged these districts?

Both groups of plaintiffs challenged this district. (Dickson Pls. Am. Compl. ¶ 493-96, 505-509; NAACP Pls. Am. Compl. ¶ 410-21, 464-71)
b. County included in *Gingles* districts: None, but see but see Finding of Fact 41.b, *supra*.

c. County included in *Cromartie* First Congressional District: None

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

2003 SD 20: Durham  
2009 HD 29: Durham  
2009 HD 31: Durham

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

e. Section 5 County: No

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

2008 SD 20: Durham  
2009 HD 29: Durham  
2010 SD 20: Durham  
2010 HD 31: Durham

(First Rucho Aff. Ex. 8, pp. 1-7)

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

Durham

(First Rucho Aff. Ex. 10, pp. 1-16)

h. Counties included in majority-black or majority-minority district in plans proposed by SCSJ and Democratic leaders

SCSJ SD 20: Durham  
F&L SD 20: Durham  
RSP SD 20: Durham  
SCSJ HD 29: Durham  
SCSJ HD 31: Durham
50. **2011 House District 32**

TBVAP: 50.45% (First Frey Aff. Ex. 11)
Counties: Granville, Vance, Warren
(Map Notebook, Lewis-Dollar-Dockham 4)

a. Which group of plaintiffs have challenged this district?

The *NAACP* plaintiffs allege that this district was a racial gerrymander. (*NAACP* Pls. Am. Comp. ¶¶ 410-12, 464-71) The *Dickson* plaintiffs did not challenge this district. (*Dickson* Pls. Am. Compl. ¶¶ 493-96, 510-14)

b. Counties included in Gingles districts: None
c. Counties included in Cromartie First Congressional District: Granville, Vance, Warren

*(See General Findings of Fact, No. 6)*
d. Counties that were part of a 2001/2003/2009 majority-black or majority-minority district:

2001 CD 1: Granville, Vance, Warren  
2003 HD 27: Vance, Warren

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

e. Section 5 County: Granville, Vance

*(Churchill Dep. Ex. 46, p. 6)*
f. Counties included in Dr. Block’s analysis of district elections from 2006-2010:

Appendix A - 116
2010 CD 1: Granville, Vance, Warren  
(First Rucho Aff. Ex. 8, pp. 1-7)  
g. Counties analyzed by Dr. Brunell and confirmed as continuing to experience statistically significant racially polarized voting:  
Granville, Vance, Warren  
(First Rucho Aff. Ex. 8, pp. 1-7)  
h. Counties included in majority-black or majority-minority district in plans proposed by SCSJ and Democratic leaders:  
SCSJ CD 1: Granville, Vance, Warren  
F&L CD 1: Granville, Vance, Warren  
SCSJ SD 4: Vance, Warren  
F&L SD 4: Vance, Warren  
PSD SD 4: Warren  
SCSJ HD 27: Vance, Warren  
PHD HD 27: Warren  
(Map Notebook, SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House; First Frey Aff. Exs. 10, 11, 12; Second Frey Aff. Exs. 36-38, 41-43, 66, 67)  
51. 2011 House Districts 33 and 38  
TBVAP: HD 33 (51.42%) (First Frey Aff. Ex. 11)  
HD 38 (51.37%) (First Frey Aff. Ex. 11)  
Counties: Wake  
(Map Notebook, Lewis-Dollar-Dockham 4)  
a. Which group of plaintiffs have challenged these districts?  
The *Dickson* plaintiffs have challenged HD 33 but not HD 38. (*Dickson* Pls. Am. Compl. ¶¶ 493-96, 505-509) The *NAACP* plaintiffs have challenged HD 38 but not HD 33. (*NAACP* Pls. Am. Compl. ¶¶ 410-21, 464-71)  
b. County included in Gingles districts: Wake  
(See General Findings of Fact, No. 1)  

Appendix A - 117
c. County included in *Cromartie* First Congressional District: None

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

   2003 SD 14: Wake
   2003 HD 33: Wake

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

e. Section 5 County: No

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

   2008 SD 14: Wake
   2008 HD 33: Wake
   2010 SD 14: Wake
   2010 HD 33: Wake

   (First Rucho Aff. Ex. 8, pp. 1-7)

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

   Wake

   (First Rucho Aff. Ex. 10, pp. 1-14, 16-18)

h. Counties included in majority-black or majority-minority district in plans proposed by SCSJ and Democratic leaders:

   SCSJ SD 14: Wake
   F&L SD 14: Wake
   PSD SD 14: Wake
   SCSJ HD 33: Wake
   F&L HD 33: Wake
   PHD HD 33: Wake

   (Map Notebook, SCSJ Congress, Senate, House; Congressional F&L, F&L Senate, F&L House; Possible Senate and House; Second Frey Aff. Exs. 36-38, 41-43, 66-67)
i. County included in majority-black superior court district in recently
enacted Superior Court plan: Wake

(See:  
http://www.wakegov.com/gis/services/Documents/SuperiorCourt_24x24.pdf;  

52. 2011 House District 42

TBVAP: 52.56% (First Frey Aff. Ex. 11)  
Counties: Cumberland  
(Map Notebook, Lewis-Dollar-Dockham 4

a. Which group of plaintiffs have challenged this district?

Both groups of plaintiffs challenged HD 4. (Dickson Pls. Am. Compl. ¶¶ 493-96, 505-509; NAACP Pls. Am. Compl. ¶¶ 410-21, 464-71) Neither group of plaintiffs challenged 2011 HD 43, a majority-black House district in Cumberland County that adjoins HD 42. (Id.)

b. Counties included in Gingles districts: None

c. Counties included in Cromartie First Congressional District: None

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

2003 SD 21: Cumberland  
2009 HD 42: Cumberland  
2009 HD 43: Cumberland

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

e. Section 5 County: Cumberland

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

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

2010 SD 21: Cumberland  
2010 SD 21: Cumberland

Appendix A - 119
(First Rucho Aff. Ex. 8, pp. 1-7)

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

Cumberland

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

h. County included in majority-black or majority-minority district in plans proposed by SCSJ and Democratic leaders:

SCSJ HD 42: Cumberland
SCSJ HD 43 Cumberland
F&L HD 42 Cumberland
F&L HD 43 Cumberland
PHD HD 42 Cumberland
PHD HD 43 Cumberland

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

53. 2011 House District 48

TBVAP: 51.27% (First Frey Aff. Ex. 11)
Counties: Hoke, Richmond, Robeson, Scotland

(Map Notebook, Lewis-Dollar-Dockham 4)

a. Which group of plaintiffs have challenged this district?

Both groups of plaintiffs have challenged this district. (Dickson Pls. Am. Compl. ¶¶ 493-96, 505-509; NAACP Pls. Am. Compl. ¶¶ 410-21, 464-71)

b. Counties included in Gingles districts: None

c. Counties included in Cromartie First Congressional District: None

d. Counties that were part of a 2001/2003/2009 majority-black or majority-minority district:
2009 HD 48: Hoke, Robeson, Scotland

(Map Notebook, 2009 House Map; First Frey Aff. Ex. 11; Second Frey Aff. Ex. 39)

e. Section 5 County: Hoke, Robeson, Scotland

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

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

2010 HD 48: Hoke, Robeson, Scotland

(First Rucho Aff. Ex. 8, pp. 1-7)

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

Hoke, Richmond, Robeson, Scotland

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

h. County included in majority-black or majority-minority district in plans proposed by SCSJ and Democratic leaders:

SCSJ HD 48: Hoke, Robeson, Scotland
F&L HD 48: Hoke, Robeson, Scotland
PHD HD 48: Hoke, Richmond, Robeson, Scotland

(Map Notebook, SCSJ House; F&L House; Possible House; First Frey Aff. Ex. 11; Second Frey Aff. Exs. 41-43)

54. 2011 House District 57

TBVAP: 50.69% (First Frey Aff. Ex. 11)
Counties: Guilford
(Map Notebook, Lewis-Dollar-Dockham 4)

a. Which group of plaintiffs have challenged this district?

Both groups of plaintiffs challenged this district. (Dickson Pls. Am. Compl. ¶¶ 493-96, 505-509; NAACP Pls. Am. Compl. ¶¶ 410-21, 464-71)
Neither group of plaintiffs challenged two other majority-black districts

Appendix A - 121
located in Guilford County, 2011 HD 58 (TBVAP: 51.41%) and 2011 HD 60 (TBVAP: 54.36%). (Id.)

b. County included in Gingles districts: None

c. County included in Cromartie First Congressional District: None

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

   2001 CD 12: Guilford
   2003 SD 28: Guilford
   2009 HD 58: Guilford
   2009 HD 60: Guilford

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

e. Section 5 County: Guilford

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

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

   2010 HD 60: Guilford
   2008 CD 12: Guilford
   2010 CD 12: Guilford
   2010 SD 28: Guilford
   2010 HD 58: Guilford
   2010 HD 60: Guilford

   (First Rucho Aff. Ex. 8, pp. 1-8)

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

   Guilford

   (First Rucho Aff. Ex. 10, pp. 1-14, 19, 20)

h. County included in majority-black or majority-minority district in plans proposed by SCSJ and Democratic leaders:

Appendix A - 122
55. **House Districts 99, 102, 106, 107**

TBVAP: HD 99 (54.65%) (First Frey Aff. Ex. 11)
HD 102 (53.53%) (First Frey Aff. Ex. 11)
HD 106 (51.12%) (First Frey Aff. Ex. 11)
HD 107 (52.52%) (First Frey Aff. Ex. 11)

Counties: Mecklenburg

(Map Notebook, Lewis-Dollar-Dockham 4)

a. Which group of plaintiffs have challenged this district?


b. Counties included in *Gingles* districts: Mecklenburg

(See General Findings of Fact, No. 1)

c. Counties included in *Cromartie* First Congressional District: None

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

2001 CD 12: Mecklenburg
2003 SD 38: Mecklenburg
2003 SD 40: Mecklenburg

Appendix A - 123
2009 HD 99: Mecklenburg
2009 HD 100: Mecklenburg
2009 HD 101: Mecklenburg
2009 HD 102: Mecklenburg
2009 HD 106: Mecklenburg
2009 HD 107: Mecklenburg

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

e. Section 5 County: None

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

2006 SD 40: Mecklenburg
2008 CD 12: Mecklenburg
2008 SD 38: Mecklenburg
2008 SD 40: Mecklenburg
2008 CD 12: Mecklenburg
2010 HD 107: Mecklenburg
2010 SD 40: Mecklenburg
2010 HD 101: Mecklenburg
2010 HD 107: Mecklenburg

(First Rucho Aff. Ex. 8, pp. 1-8)

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

Mecklenburg
(First Rucho Aff. Ex. 10, pp. 1-14, 22)

h. County included in majority-black or majority-minority district in plans proposed by SCSJ and Democratic leaders:

SCSJ CD 12: Mecklenburg
F&L CD 12: Mecklenburg
SCSJ SD 38: Mecklenburg
SCSJ SD 40: Mecklenburg
F&L SD 38: Mecklenburg
F&L SD 40: Mecklenburg
PSD SD 38: Mecklenburg
PSD SD 40: Mecklenburg

Appendix A - 124

polarized voting in the following challenged districts: Senate Districts 4 and 5; House Districts 5, 7, 24, 32, 33, 38, 42, 57, 102, and 106.

57. The parties in Strickland stipulated that the area encompassed by 2003 House District 18 continued to experience racially polarized voting. Strickland, 556 U.S. at 39 n. 3. Thus, there was no evidence presented to the Court showing either the presence or absence of racially polarized voting in the area encompassed by 2003 House District 18. In dicta, the Court expressed skepticism about whether racially polarized voting could exist in a majority-white crossover district where a black candidate had enjoyed sustained success. Id. at 16, 24. However, this observation is no different from the Supreme Court's statement that racially polarized voting could not be present in a majority-white multi-member crossover district in which black candidates have been elected in six consecutive elections. Thornburg v. Gingles, 478 U.S. 30, 77 (1986). Strickland expressly did not address majority-minority coalition districts. Strickland, 556 U.S. at 13.

58. The fact that incumbent black candidates or strong black candidates have won elections in majority-minority coalition districts with TBVAP between 40% and 49.99% does not prove the absence of racially polarized voting. In Gingles, almost all of the challenged districts that were found to be unlawful were majority-white. (Def. Desg. P.21, n. 1) Further, in Cromartie, the 1997 version of the First Congressional District was found to be a valid § 2 remedy despite the fact that the district's black voting age population was under 50%. (Def. Desg. pp. 6, 7).
2003 Senate District 14: Wake County

59. The 2003 version of Senate District 14 was located in Wake County. There is no evidence in the legislative record disputing the conclusion of Dr. Block and Dr. Brunell that racially polarized voting is present in Wake County. (First Rucho Aff. Ex. 8, pp. 1-7; Ex. 10, pp. 3-14, 16-18; Def. Desg. p. 27, f. and g.) In all versions of District 14 in the previous or alternative plans, which plaintiffs describe as legal, the non-Hispanic white population for Senate District 14 is below 50%: 2003 Senate 14 (41.07%); 2011 SCSJ Senate 14 (34.84%); Senate F&L 14 (44.36%); and LBC Senate 14 (44.53%). The evidence shows that the 2003 version of Senate District 14 was not “less than majority-minority.” (Pl. Mem. ¶ 65; Second Frey Aff. ¶¶ 12-13, Exs. 34, 36-38) Nor was 2011 Senate District 14 a majority-white crossover district.

60. In North Carolina, whites make up 53.37% of the registered Democrats while African Americans constitute 41.38% of the registered Democrats. (Second Frey Aff. ¶¶ 16-17, Exs. 44, 46-48) If racially polarized voting no longer existed in Wake County, then the percentage of white and black registered Democrats should approximate the statewide average. Instead, in the 2003 version of Senate District 14, African Americans constituted a super majority (68.26%) of all registered Democrats. (Second Frey Aff. ¶ 16, Ex. 44) In the 2011 SCSJ Senate 14, African Americans constitute 72.31% of the registered Democrats; in the 2011 F&L Senate 14 Plan, African Americans constitute 68.11% of registered Democrats; and in the LBC Senate 14, African Americans constitute 68.02% of the registered Democrats. (Second Frey Aff. ¶¶ 16-17, Exs. 44, 46-48) In comparison, the statewide percentage of Democrats who are African
The strategy of cracking majority-TBVAP districts to create coalition and influence districts, so long as blacks constitute super-majorities among registered Democrats, and recommended by Justices Souter and Ginsburg in LULAC, was rejected by the Court in Bartlett.

61. In the 2011 SCSJ Senate 14 Plan, African Americans constituted 52.62% of registered party voters, not the 21.63% state average. (Second Frey Aff. ¶ 17, Ex. 46) In the 2003 version of Senate District 14, whites constituted a minority of the district’s registered voters (46.41%). Similarly, white voters are a minority of the registered voters in the F&L version of District 14 (48.52%) and the LBC version (48.96%) (Second Frey Aff. ¶ 17, Exs. 47, 48)

62. Under the 2009 House Plan, House District 33, located in Wake County, had a TBVAP of 51.74%. (Second Frey Aff. ¶ 16, Ex. 44) All 2011 alternative plans recommended that House District 33 be created with a majority-TBVAP district: SCSJ House 33 (56.45%); F&L House 33 (52.42%) LBC House 33 (50.66%) (Second Frey Aff. ¶ 24, Ex. 11) Plaintiffs have offered no evidence explaining why a majority-TBVAP House district is necessary in Wake County but a majority-TBVAP Senate district is not.

63. In 2004, African American candidate Vernon Malone defeated his Republican opponent 45,727 to 25,595 (+20,132); in 2006, Malone defeated his Republican opponent 26,404 to 13,644 (+12,760); and in 2008, Malone defeated his Republican opponent 67,823 to 29,835 (+37,988). In 2010, African American candidate Dan Blue defeated his Republican opponent 40,746 to 21,067 (+19,679). In each of these four elections, the actual margin of victory for the African American Democrat was less

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40 Second Frey Affidavit, Exs. 34-43 (voting age percentages for VRA districts by race for all Senate and House Plans) and Exs. 44-53 (registration totals for VRA districts for all Senate and House plans).
than the population deviation for the district under the 2010 Census (+41,804). (Churchill Aff. ¶ 1-7, Ex. 2)

64. In the 2004 election cycle, African American candidate Vernon Malone raised $137,042 and spent $165,598.84. His Republican opponent raised and spent $4,875.00. In the 2006 cycle, Sen. Malone raised $281,835 and spent $276,380. His Republican opponent raised $1,061 and spent $1,031.85. In the 2008 cycle, Sen. Malone raised $108,084 and spent $74,721. His Republican opponent raised and spent $1,692.54. Finally, in the 2010 cycle, African American candidate Dan Blue raised $187,613 and spent $176,464. His Republican opponent raised $646.61 and spent $547.66. (Churchill Aff. ¶ 1-3, Ex. 2)

65. At the time of the 2011 Session of the North Carolina General Assembly, Sen. Blue had served one term as a state Senator and 14 terms as a state Representative. (Churchill Aff. ¶ 8, Ex. 4.) The Court can take judicial notice that Sen. Blue served as Speaker of the House from 1991 to 1995. (See http://projects.newsobserver.com/under_the_dome/profiles/dan_blue)

2003 Senate Districts 20: Durham County

66. The 2011 version of District 20 includes all of Granville County, a covered jurisdiction under § 5 of the VRA, and a portion of Durham County. The 2003 Senate District 20 was located in Durham County. There is no evidence in the legislative record disputing Dr. Block’s and Dr. Brunell’s conclusions that racially polarized voting exists in Durham and Granville Counties. (First Rucho Aff. Ex. 8, pp. 1-7; Ex. 10, pp. 3-14, 16-18; Def. Desg. p. 30, f. and g.) For the first time in history, the 2011 version of
District 20 provides African American voters in Granville County with an equal opportunity to elect their preferred candidate of choice.

67. In all versions of District 20 in the previous or alternative plans, which plaintiffs describe as legal, the non-Hispanic white population is below 50%: 2003 Senate (39.86%); 2011 SCSJ (40.21%); 2011 F&L Senate (43.32%); 2011 LBC (37.29%). The evidence shows that the 2003 version of Senate District 20 was not "less than majority-minority." (Pl. Mem. ¶ 65; Second Frey Aff. ¶¶ 12-13, Exs. 34, 36-38) Moreover, this district was not a majority-white crossover district.

68. In the 2003 version of Senate District 20, 63.70% of registered Democrats were African American. African Americans constituted 61.37% of registered Democrats in the 2011 SCSJ version of District 20, 57.97% in the F&L version, and 63.27% in the LBC version. (Second Frey Aff. ¶¶ 16-17, Exs. 44, 46-48) In comparison, the statewide percentage of Democrats who are African Americans is only 41.38%.

69. Whites were a minority of the registered voters in the 2003 version of Senate District 20 (45.18%). In all three 2011 alternative versions of Senate District 20, whites are a minority of the total registered voters: SCSJ (46.34%); F&L (49.77%); LBC (43.24%). (Second Frey Aff. ¶ p. 17, Ex. 45-48)

70. The SCSJ Plan recommended that House District 31, located in Durham County, be established with a TBVAP of 51.69%. (First Frey Aff. ¶ 24, Ex. 11) Plaintiffs have offered no evidence explaining why a majority-TBVAP House district is necessary in Durham County, but a majority-TBVAP Senate district in Durham and Granville is not.

Appendix A - 130
71. The 2003 version of District 20 was located exclusively in Durham County. There were no prior election results for a majority-TBVAP or a 40% plus TBVAP district located in a portion of Durham and all of Granville County.

72. There were contested general elections for Senate District 20 in 2004, 2008, and 2010. In each of these contests, the margin of victory for the African American Democrat was in excess of the size of the population deviation for the district under the 2010 Census (-9,086). In the 2004 election cycle, African American candidate Jeanne Lucas raised $29,006.50 and spent $31,861.89. Her Republican opponent did not file campaign disclosure reports because any funds raised by the Republican were below the amount that triggers a reporting obligation. There was no contested election in this district during the 2006 election cycle. In the 2008 election cycle, African American candidate Floyd B. McKissick, Jr. raised $36,619 and spent $21,165. He was opposed by Republican and Libertarian candidates neither of whom raised enough money to be required to file campaign disclosure reports. In the 2010 election cycle, Sen. McKissick raised $28,827 and spent $35,440. His Republican opponent did not file campaign disclosure reports. (Churchill Aff. ¶ 1-7, Ex. 2.)

2003 Senate Districts 21: Cumberland County

73. The 2003 version of District 21 was located in Cumberland County. The 2011 version of District 21 includes Hoke County as well. Both counties are covered by § 5 of the VRA. There is no evidence in the legislative record disputing Dr. Block’s and Dr. Brunell’s conclusions that racially polarized voting exists in Cumberland County, and Dr. Brunell’s conclusion that racially polarized voting exists in Hoke County. (First Rucho Aff. Ex. 8, pp. 1-7; Ex. 10, pp. 3-14; Def. Desg. p. 32 f. and g.) For the first time
in history, the 2011 version of Senate District 21 provides African American voters in Hoke County with an equal opportunity to elect their preferred candidates of choice. There were no past election results for a majority-TBVAP district that included Hoke County.

74. In all versions of Senate District 21 in the previous or alternative plans, which plaintiffs describe as legal, the non-Hispanic white population is below 50%: 2003 Senate 21 (41.63%); SCSJ Senate 21 (40.43%); F&L Senate 21 (41.62%); LBC Senate 21 (42.09%). The evidence shows that the 2003 version of Senate District 20 was not "less than majority-minority." (Pl. Mem. ¶ 65; Second Frey Aff. ¶¶ 12-13, Exs. 34, 36-38). Nor was 2003 Senate District 20 a majority-white crossover district.

75. In the 2003 version of Senate District 21, African Americans constituted 73.14% of the registered Democrats. All alternative plans created super-majorities of registered Democrats who are African American: SCSJ Senate 21 (73.41%); F&L Senate 21 (73.09%); LBC Senate 21 (72.29%). (Second Frey Aff. ¶¶ 16-17, Exs. 44, 46-48) In comparison, the statewide percentage of Democrats who are African Americans is 41.38%.

76. Whites were a minority of the registered voters in the 2003 version of Senate District 21 (37.40%). Whites are also a minority of the registered voters in all three of the 2011 alternatives: SCSJ Senate 21 (37.17%); F&L Senate 21 (37.52%); and LBC Senate 21 (38.41%). (Second Frey Aff. ¶¶ 12-13, Exs. 34, 36-38)

77. African Americans are a majority of the registered voters in 2003 Senate 21 (51.15%); 2011 SCSJ District 21 (51.52%); F&L Senate 21 (51.13%); and LBC Senate 21 (50.31%). (Second Frey Aff. ¶¶ 16-17, Exs. 44, 46-48)
78. The 2003 version of House District 43, also located in Cumberland County, had a TBVAP of 54.69%. All 2011 alternative House Plans recommended that this district be recreated with a TBVAP in excess of 50%: SCSJ House 43 (54.70%) F&L House 43 (54.70%); LBC House 43 (51.51%). (First Frey Aff. ¶ 24, Ex. 11) Plaintiffs have offered no evidence explaining why a majority-TBVAP House district is necessary in Cumberland County, but a majority-TBVAP Senate District is not.

79. There are no past election results for a 40% plus TBVAP-district or a majority-TBVAP district that includes Hoke and Cumberland counties.

80. In the 2004 General Election, African American Democratic candidate Larry Shaw defeated his Republican opponent 27,866 to 16,434 (+11,432) with a Libertarian candidate receiving 1,225 votes. In 2006, Sen. Shaw defeated his Republican opponent 13,412 to 8,344 (+5,068). There was no contested general election in this district in 2008. In 2010, Democratic African American candidate Eric Mansfield defeated his Republican opponent 21,004 to 10,062 (+10,942). The deviation for this district under the 2010 Census was (-26,593). Thus, in each of these contested Senate races from 2004 to 2010, the margin of victory for the African American Democrat was less than the population deviation for this district. (Churchill Aff. ¶ 1-7, Ex. 2)

81. In the 2004 election cycle, the African American Democratic candidate, Larry Shaw, raised $19,800 and spent $15,437. His Republican opponent raised $1,311 and spent $422. The Libertarian candidate did not file campaign reports. In 2006, Shaw raised $39,258 and spent $42,123. His Republican opponent raised and spent $26,151 and spent $26,075. In 2010, African American candidate Eric Mansfield raised $178,878.
and spent $176,548. His Republican opponent raised $40,559 and spent $49,777.  
(Churchill Aff. ¶ 1-7, Ex. 2)

2003 Senate District 28: Guilford County

82. Guilford County is a covered county under § 5 of the VRA. The 2003 Senate District 28 was located in Guilford County. There was no evidence in the legislative record disputing the conclusions by Dr. Block and Dr. Brunell that racially polarized voting is present in Guilford County. (First Rucho Aff. Ex. 8, pp. 1-7; Ex. 10, pp. 3-14, 21, 22; Def. Desg. p. 34, f. and g.)

83. In all versions of Senate District 28 in the previous or alternative plans, which plaintiffs describe as legal, the non-Hispanic white voting age population is less than 50%: 2003 Senate 28 (42.32%); SCSJ Senate 28 (36.94%); F&L Senate 28 (40.65%); LBC Senate 28 (41.91%). The evidence shows that the 2003 version of Senate District 28 was not “less than majority-minority.” (Pl. Mem. ¶ 65; Second Frey Aff. ¶ 12-13, Exs. 34, 36-38) Nor was this district a majority-white crossover district.

84. AFRAM recommended that Senate District 28 be established with a majority-TBVAP district (51.77%). (First Frey Aff. ¶ 24, Ex. 10) This version of Senate 28 was the only version presented by any of the plaintiffs or any other party during the public hearing process.

85. In the 2003 version of Senate District 28, African Americans constituted 73.55% of all registered Democrats. Super-majorities of African Americans in Democratic registration are also found in the SCSJ Senate 28 (75.49%); the F&L Senate 28 (73.62%), and the LBC Senate 28 (73.22%). (Second Frey Aff. ¶¶ 16-17, Exs. 44, 46-
48) In comparison, the statewide percentage of Democrats who are African Americans is 41.38%.

86. In the 2003 version of Senate 28, African Americans were a majority of the registered voters (50.16%). This is also true for the SCSJ Senate 18 (54.11%), the F&L Senate 28 (50.25%), and the LBC Senate 28 (50.26%). (Second Frey Aff. ¶ 16-17, Exs. 44, 46-48)

87. All versions of the 2011 alternative House plans recommended that two majority-TBVAP districts be created in Guilford County: SCSJ House 58 (53.47%) and House 60 (54.41%); F&L House 58 (53.47%) and House 60 (54.47%); LBC House 58 (54.00%) and House 60 (50.43%). (First Frey Aff. ¶ 24, Ex. 11) Plaintiffs do not explain why a majority-TBVAP Senate District is unacceptable but two majority-TBVAP House Districts are acceptable.

88. There were no contested general elections for this district from 2004 through 2008. In the 2010 General Election, African American candidate Gladys Robinson defeated her Republican opponent 21,496 to 17,383 (+4,113). An unaffiliated candidate also received 6,054 votes in the 2010 General Election. The total number of votes received in 2010 by Sen. Robinson's Republican and unaffiliated opponents (23,427) exceeded the total votes received by Sen. Robinson. Under the 2010 Census, this district was underpopulated by (-13,673). Thus, the margin of victory for Sen. Robinson, when compared only to her Republican opponent, was less than the total deviation for this district. (Churchill Aff. ¶ 1-7, Ex. 2)
89. In the 2010 cycle, Sen. Robinson raised $69,748 and spent $60,889. Her Republican opponent raised $59,487 and spent $57,679. Her unaffiliated opponent raised $26,417 and spent $24,408. (Churchill Aff. ¶ 1-7, Ex. 2)

2003 Senate District 38: Mecklenburg County

90. The 2003 Senate District 38 is located in Mecklenburg County. There was no evidence in the legislative record disputing the conclusions by Dr. Block and Dr. Brunell that racially polarized voting is present in Mecklenburg County. (First Rucho Aff. Ex. 8, pp. 1-7; Ex. 10, pp. 3-14, 21; Def. Desg. p. 36, f. and g.) In all versions of Senate District 38 in the previous or alternative plans; which plaintiffs describe as legal, the non-Hispanic white population is less than 50%: 2003 Senate 38 (36.64%); SCSJ Senate 38 (30.22%); F&L Senate 38 (34.55%); LBC Senate 38 (34.55%). The evidence shows that the 2003 version of Senate District 38 was not “less than majority-minority.” (Pl. Mem. ¶ 65; Second Frey Aff. ¶¶ 12-13, Exs. 34, 36-38). Nor was this district a majority-white crossover district.

91. The AFRAM version of Senate 38 recommended that this district be created with a majority-TBVAP (51.68%). AFRAM also recommended a second majority-TBVAP Senate district for Mecklenburg County: District 40 (52.06%). (First Frey Aff. ¶ 24, Ex. 11) Plaintiffs have not explained why the two SCSJ-AFRAM majority-TBVAP districts are legal while enacted Senate District 38 is illegal.

92. In the 2003 version of Senate District 38, African Americans constituted a super-majority of registered Democrats (63.25%). The same is true for SCSJ Senate 38 (76.63%), the F&L Senate 38 (73.89%) and the LBC Senate 38 (73.89%). (Second Frey
In comparison, the statewide percentage of Democrats who are African Americans is 41.38%.

93. African Americans are a majority of the registered voters in the 2003 Senate 38 (50.33%), the SCSJ Senate 38 (56.22%), the F&L Senate (51.44%), and the LBC Senate 38 (51.44%). (Second Frey Aff. ¶ 16-17, Exs. 44, 46-48)

94. All alternative 2011 House plans recommended that majority-TBVAP House districts be created in Mecklenburg County: SCSJ House 101 (57.28%) and House 107 (56.43%); F&L House 101 (52.41%); LBC House 101 (50.25%). (First Frey Aff. ¶ 24, Ex. 11)

95. There were no contested general elections in this district in 2004 or 2006. In 2008, the Democratic African American candidate Charles Dannelly defeated his Republican opponent 67,755 to 22,056 (+45,699). A Libertarian candidate also received 2,588 votes. In 2010, Sen. Dannelly defeated his Republican opponent 33,692 to 15,369 (+18,323). The population deviation for this district under the 2010 Census was +47,572 (+24.9%). The amount of population deviation for this district exceeded the margin of victory for the African American Democrat in both 2008 and 2010. (Churchill Aff. ¶ 1-7, Ex. 2)


97. At the beginning of the 2011 session, Sen. Dannelly had served nine terms in the State Senate. (Churchill Aff. ¶ 8, Ex. 4)
2003 Senate District 40: Mecklenburg County

98. The 2003 Senate District 40 was located in Mecklenburg County. There was no evidence in the legislative record disputing the conclusions by Dr. Block and Dr. Brunell that racially polarized voting is present in Mecklenburg County. (First Rucho Aff. Ex. 8, pp. 1-7; Ex. 10, pp. 3-14, 21; Def. Desg. p. 36, f. and g.) In all previous or alternative versions of Senate District 40, which plaintiffs describe as legal, the non-Hispanic white population is less than 50#: 2003 Senate 40 (48.87%); SCSJ Senate 40 (26.09%); F&L Senate 40 (36.45%); and LBC Senate 40 (36.45%). The evidence shows that the 2003 version of Senate District 40 was not “less than majority-minority.” (Pl. Mem. ¶ 65; Second FREY Aff. ¶¶ 12-13, Exs. 34, 36-38) Nor was this district a majority-white crossover district.

99. AFRAM recommended that Senate District 40 be created with a TBVAP of 52.06%, as compared to enacted 2011 Senate District 40, which establishes this district with a slightly lower TBVAP (51.84%). Thus, AFRAM recommended that this district be established with a TBVAP in excess of that found in the enacted 2011 District 40. (First Frey Aff. ¶ 24, Ex. 10) Plaintiffs have produced no evidence explaining why the enacted 2011 Senate District 40 is “packed” or how the General Assembly allegedly “maximized” the TBVAP for their district, given that SCSJ District 40 contains a higher TBVAP than the enacted versions.

100. In all previous or alternative versions of Senate District 40 in the alternative plans, African Americans constitute a super-majority of registered Democrats: 2003 Senate 40 (63.32%); SCSJ Senate 40 (75.11%); F&L Senate 40 (70.62%); and LBC
Senate 40 (70.62%). (Second Frey Aff. p. 6, Exs. 44, 46-48) In comparison, the worldwide percentage of Democrats who are African Americans is 41.38%.

101. In the 2003 version of Senate District 40, African Americans represented only 37.08% of the registered voters. However, in all 2011 alternative versions of Senate District 40, African Americans represent a majority of registered voters: (SCSJ Senate 40 – 57.85%), or a near majority of registered voters (F&L District 40 – 49.10%; LBC District 40 – 49.10%). (Second Frey Aff. ¶ 16-17, Exs. 44, 46-48)

102. In each of the 2011 alternatives, whites represent a minority of registered voters: SCSJ District 40 (32.23%); F&L Senate 40: (40.58%); LBC District 40: (40.58%). (Second Frey Aff. ¶ 16-17, Exs. 44, 46-48)

103. All alternative 2011 House plans recommended that majority-TBVAP House districts be created in Mecklenburg County: SCSJ House 101 (57.28%) and House 107 (56.43%); F&L House 101 (52.41%); LBC House 101 (50.25%). (First Frey Aff. ¶ 24, Ex. 11)

104. In 2004, African American Democratic candidate Malcolm Graham defeated his Republican opponent 42,096 to 30,633 (+11,463). In 2006, Sen. Graham defeated his Republican opponent 21,247 to 13,314 (+7,933). In 2008, Sen. Graham defeated his Republican opponent 66,307 to 32,711 (+33,596). In 2010, Sen. Graham defeated his Republican opponent 32,168 to 23,145 (+9,023). The population deviation for this district under the 2010 Census is 54,523 (+28.6%). Thus, Sen. Graham’s margin of victory for the 2004, 2006, 2008 and 2010 general elections was less than the total deviation for this district. (Churchill Aff. ¶¶ 1-7, Ex. 2)

106. At the time of the 2011 session, Sen. Graham had been elected to four terms in the state Senate. (Churchill Aff. ¶ 8, Ex. 4)

2009 House District 12: Craven and Lenoir Counties

107. The 2009 House District 12 was located in Craven and Lenoir Counties. There is no evidence in the legislative record disputing the conclusions by Dr. Block and Dr. Brunell that racially polarized voting is present in these counties. (First Rucho Aff. Ex. 8, pp. 1-7; Ex. 10, pp. 3-14; Def. Desg. p. 42, f. and g.) In the previous and alternative versions of House District 12, which plaintiffs describe as legal, the non-Hispanic white population is less than 50%: 2009 House 12 (46.23%); SCSJ House 12 (47.12%); F&L House 12 (46.14%); and LBC House 12 (45.58). The evidence shows that the 2009 version of House District 12 was not “less than majority-minority.” (Pl. Mem. ¶ 65; Second Frey Aff. ¶¶ 14-15, Exs. 39, 41) Nor was the 2009 version a majority-white crossover district.
108. In the 2009 version of House District 12, African Americans constituted a super-majority of registered Democrats (68.36%). The same is true for SCSJ House District 12 (66.82%), F&L House District 12 (65.26%), and LBC House District 12 (66.59%). (Second Frey Aff. ¶¶ 18-19, Exs. 49, 51-53) In comparison, the statewide percentage of Democrats who are African American is 41.38%.

109. Whites are a slight majority of the registered voters in 2009 House District 12 (51.01%), enacted 2011 House District 12 (51.47%), SCSJ House District 12 (51.37%), F&L House District 12 (51.64%), and LBC House District 12 (52.14%). The percentage of “registered whites” includes Hispanics. (Second Frey Aff. ¶¶ 18-19, Exs. 49, 51-53)

110. The 2009 version of House District 12 contained portions of Craven and Lenoir Counties. It was similar in construction to 2003 House District 18, which was found to violate the Stephenson criteria. Because the 2003 version of House District 18 did not have a TBVAP in excess of 50%, it could not be justified under § 2 of the VRA and therefore could not support any departure from the WCP. Strickland, 556 U.S. at 17-20. By raising the TBVAP of 2011 District 12 to 50.60%, the General Assembly precluded any lawsuits challenging the 2011 version as being in violation of the Stephenson or Strickland criteria. In contrast, all three alternative 2011 versions of House District 12 are subject to the same legal challenge that led to the ruling that the 2003 version of House District 18 violated Stephenson because their TBVAP is under 50%. (First Frey Aff. ¶ 24, Ex. 11)

111. The 2009 version of House District 12 included portions of Carteret and Lenoir Counties. The enacted 2011 version of House District 12 includes portions of
Craven, Lenoir, and Greene Counties. All three counties are covered by § 5 of the VRA.
The enacted 2011 version of District 12 gives African American voters in Greene County their first equal opportunity to vote for a preferred candidate of choice. There are no past elections results for a VRA House district that includes Greene County.

112. In 2004, African American Democrat William Wainwright defeated his Republican opponent 13,573 to 7,473 (+6,100). In 2006, Rep. Wainwright defeated his Republican opponent 7,941 to 4,040 (+3,901). In 2008, Rep. Wainwright defeated his Republican opponent 17,659 to 7,882 (+9,777). In 2010, Rep. Wainwright defeated his Republican opponent 9,390 to 6,206 (+3,184). The population deviation in this district under the 2010 Census was (-15,862). Thus, in all general elections for 2004, 2006, 2008 and 2010, Rep. Wainwright’s margin of victory was less than the population deviation for this district. (Churchill Aff. ¶ 1-7, Ex. 3)


114. At the beginning of the 2011 session, Rep. Wainwright had served eleven terms in the state House. (Churchill Aff. ¶ 8, Ex. 5)

2009 House District 21: Sampson and Wayne Counties
115. The 2009 House District 21 was located in Sampson and Wayne Counties. There is no evidence in the legislative record disputing Dr. Block’s and Dr. Brunell’s conclusions that racially polarized voting exists in these counties. (First Rucho Aff. Ex. 8, pp. 1-7; Ex. 10, pp. 3-14; Def. Desg. p. 44, f. and g.) In the previous and alternative versions of House District 21, the non-Hispanic white population is less than 50%: 2009 House 21 (40.31%); SCSJ House 21 (40.62%); F&L House 21 (42.31%); and LBC House 21 (40.25%). The evidence shows that the 2009 version of House District 12 was not “less than majority-minority.” (Pl. Mem. ¶ 65; Second Frey Aff. ¶¶ 14-15, Exs. 39, 41-43) Nor was this district a majority-white crossover district.

116. In the 2009 version of House District 21, African Americans constituted a super-majority of registered Democrats (70.55%). The same is true for SCSJ House District 21 (69.08%), F&L House District 21 (70.58%), and LBC House District 21 (69.81%). (Second Frey Aff. ¶¶ 18-19, Exs. 49, 51-53) In comparison, the statewide percentage of Democrats who are African Americans is 41.38%.

117. In the 2009 version of House District 21, African Americans were a majority of the registered voters (50.39%). The same is true for the F&L version of House District 21 (50.91%). African Americans are nearly a majority of registered voters in SCSJ House District 21 (49.44%) as well as LBC House District 21 (49.45%). (Second Frey Aff. ¶¶ 18-19, Exs. 49, 51-53)

118. In all versions of House District 21, including the previous and alternatives plans, which plaintiffs describe as legal, whites constitute a minority of the registered voters: 2009 House 21 (43.97%); SCSJ House 21 (45.18%); F&L House 21 (44.03%) and LBC 21 (45.13%). (Second Frey Aff. ¶ 14, Exs. 39, 41-43)
119. The 2003 version of District 21 included portions of Wayne and Sampson Counties. It was comparable to the 2003 version of House District 18, which was found to violate the *Stephenson* criteria because it did not have a TBVAP in excess of 50%. Thus, the 2009 version of House District 21 could not be justified under § 2 of the VRA and could not support a departure from the WCP. By raising the TBVAP for District 21 to 51.90%, the General Assembly precluded any potential challenges to the 2011 version as being in violation of the *Stephenson* or *Strickland* criteria. In contrast, all three 2011 alternative versions of House District 21 are subject to the same legal challenges that led to the ruling that the 2003 version of House District 18 violated *Stephenson* because their TBVAP is under 50%. (First Frey Aff. ¶ 24, Ex. 11)

120. The 2009 version of House District 21 included portions of Wayne and Sampson Counties. The enacted 2011 version of District 21 includes portions of Wayne, Sampson and Bladen Counties. All three counties are covered under § 5 of the VRA. The enacted 2011 version of House District 21 gives African American voters in Bladen County their first equal opportunity to vote for a preferred candidate of choice. There are no past election results for a 50% or a 40% plus TBVAP House District that includes Bladen County.

121. From 2004 through 2008, there were no contested general elections in House District 21. In 2010, African American Democrat Larry Bell defeated his Republican opponent 11,678 to 6,126 (+5,552). The population deviation for this district under the 2010 Census was (-9,837). Rep. Bell's margin of victory in the 2010 election was less than the population deviation for this district. (Churchill Aff. ¶ 1-7, Ex. 3)
122. In this 2010 election cycle, Rep. Bell raised $23,671 and spent $27,906. His Republican opponent raised and spent $1,732. (Churchill Aff. ¶ 1-7, Ex. 3)

123. At the beginning of the 2011 session, Rep. Bell had been elected to six terms in the State House. (Churchill Aff. ¶ 8, Ex. 5)

2009 House District 29: Durham County

124. The 2009 District 29 was located in Durham County. There is no evidence in the legislative record disputing the conclusions of Dr. Block and Dr. Brunell that racially polarized voting is present in Durham County. (First Rucho Aff. Ex. 8, pp. 1-7; Ex. 10, pp. 3-16; Def. Desg. p. 48, f. and g.) In all versions of House District 29 in the previous and alternative plans, which plaintiffs describe as legal, the non-Hispanic white population is less than 50%: 2009 House 29 (46.05%); SCSJ House 21 (45.55%); F&L House 21 (41.70%); and LBC House 21 (37.83%). The evidence shows the 2003 version of House District 12 was not “less than majority-minority.” (Pl. Mem. ¶ 65; Second Frey Aff. ¶¶ 14-15, Exs. 39, 41-43) Nor was this district a majority-white crossover district.

125. In the 2009 version of House District 29, African Americans constituted 68.20% of all registered Democrats. In the AFRAM House District 29, African Americans constituted 55.76% of the registered Democrats. In the F&L House District 29, African Americans constituted 60.06% of the registered Democrats. In the LBC House District 29, African Americans constituted 61.97% of the registered Democrats. (Second Frey Aff. ¶¶ 18-19, Exs. 49, 51-55) In comparison, the statewide percentage of Democrats who are African Americans is 41.38%.
126. White voters are a minority among registered voters in F&L House 29 (47.90%) and LBC House 29 (44.20%). African Americans are a plurality of registered voters under the LBC District 29 (45.93%). (Second Frey Aff. ¶ 19, Exs. 52-53)

127. The SCSJ House Plan recommended the creation of a majority-TBVAP district located in Durham County: District 31 (51.69%). (First Frey Aff. ¶ 24, Ex. 11)


129. In the 2008 general election, Rep. Hall raised $29,595 and spent $22,931. The Libertarian candidate did not file any campaign disclosure reports. (Churchill Aff. ¶¶ 1-7, Ex. 3)

130. At the beginning of the 2011 session, Rep. Hall had been elected to three terms in the state House. (Churchill Aff. ¶ 8, Ex. 5)

2009 House District 31: Durham County

131. The 2009 House District 31 was located in Durham County. There is no evidence in the legislative record disputing the conclusions of Dr. Block and Dr. Brunell that racially polarized voting is present in Durham County. (First Rucho Aff. Ex. 8, pp. 1-7; Ex. 10, pp. 3-16; Def. Desg. p. 48, f. and g.) In all versions of House District 31 in the previous and alternative plans, which plaintiffs describe as legal, the non-Hispanic white population is less than a majority: 2009 House 31 (35.47%); SCSJ House 31 (30.13%); F&L House 31 (35.73%); and LBC House 31 (34.97%). The evidence shows the 2003 version of House District 31 was not “less than majority-minority.” (Pl. Mem.

Appendix A - 146
¶65; Second Frey Aff. ¶¶ 14-15, Exs. 39, 41-43). Nor was this district a majority-white crossover district.

132. AFRAM recommended that the 2011 version of House District 31 be created with a majority of TBVAP (51.69%), only slightly lower than the TBVAP included in the enacted 2011 House District 31 (51.81%). (First Frey Aff. ¶ 24, Ex. 11)

133. In all previous and alternative versions of House District 31, African Americans constituted a super-majority of registered Democrats: 2009 House 31 (69.65%); SCSJ House 31 (74.28%); F&L House 31 (70.49%); and LBC House 31 (70.26%). (Second Frey Aff. ¶¶ 18-19, Exs. 49, 51-53) In comparison, the statewide percentage of Democrats who are African Americans is 41.38%.

134. In all previous and alternative versions of House District 31, African Americans constituted a majority of the registered voters: 2009 House 31 (52.13%); SCSJ House 31 (58.13%); F&L House 31 (52.86%); and LBC House (52.70%). (Second Frey Aff. ¶¶ 18-19, Exs. 49, 51-53)

135. Plaintiffs have offered no evidence explaining why a majority-TBVAP District 31 was needed in Durham (SCSJ Plan) or why a majority-black registered voter district was needed in Durham (District 31 in the 2009 Plan, SCSJ Plan, F&L Plan and LBC Plan) while a second majority-TBVAP district (District 29) was unnecessary and evidence of alleged racial gerrymandering. Nor have plaintiffs produced any evidence showing why the SCSJ majority-TBVAP District 31 is legal, or why the other two proposals (F&L 31 and PHD 31) with majority black registration totals are legal, but the enacted 2011 version of House District 31 is illegal.
136. The Democratic African American candidate from this district faced opposition in the general election only in 2004 and 2010. In 2004, the African American candidate, H.M. ("Mickey") Michaux defeated a Libertarian candidate 23,313 to 3,802 (+19,511). In 2010, Rep. Michaux defeated a Republican candidate 18,801 to 6,102 (+12,699). The population deviation for this district under the 2010 Census was +11,812, or only 887 persons fewer than Rep. Michaux’s margin of victory in 2010. (Churchill Aff. ¶¶ 1-7, Ex. 3)

137. In the 2004 election cycle, Rep. Michaux raised $5,500 and spent $5,940. His Libertarian opponent did not file campaign finance reports. In 2010, Rep. Michaux raised $34,600 and spent $10,564. His Republican opponent raised $1,828 and spent $1,798. (Churchill Aff. ¶¶ 1-7, Ex. 3)

138. At the beginning of the 2011 session, Rep. Michaux had served 16.5 terms in the state House. (Churchill ¶ 8, Ex. 5)

2009 House District 48: Hoke, Robeson and Scotland Counties

139. The 2009 House District 48 was located in Hoke, Robeson, and Scotland Counties. There is no evidence in the legislative record disputing the conclusions of Dr. Block and Dr. Brunell that racially polarized voting is present in these counties. (First Rucho Aff. Ex. 8, pp. 1-7; Ex. 10, pp. 1-14; Def. Desg. p. 56, f. and g.) In all versions of House District 48 included in the alternative plans, which plaintiffs describe as legal, the non-Hispanic white population is less than 50%: 2009 House 48 (29.63%), SCSJ (29.90%), F&L House 48 (33.68%), and LBC House 48 (34.12%). The evidence shows the 2009 version of House District 48 was not “less than majority-minority.” (Pl. Mem. ¶
65; Second Frey Aff. p. 5, Exs. 39, 41-43) Nor was this district a majority-white
crossover district.

140. In all previous and alternative versions of District 48, African Americans
constitute a super-majority of registered Democrats: 2009 House 48 (59.81%); SCSJ
House 48 (58.82%); F&L House 48 (57.31%); LBC House 48 (58.72%). (Second Frey
Aff. ¶¶ 18-19, Exs. 49, 51-53) In comparison, the statewide percentage of Democrats
who are African Americans is 41.38%.

141. In the 2009 version of House District 48, 50.80% of all registered voters
were African American. In the 2011 alternative plans, African Americans constitute a
significant plurality of all registered voters: SCSJ House 48 (49.23%); F&L House 48
(47.14%); and LBC House 48 (48.39%). (Second Frey Aff. ¶¶ 18-19, Exs. 49, 51-53)

142. In all previous and alternative versions of House District 48, whites
constitute a minority of the registered voters: 2009 House 48 (31.80%); SCSJ House 48
(33.93%); F&L House 48 (36.56%); and LBC House 48 (38.78%). (Second Frey Aff. ¶¶
18-19, Exs. 49, 51-53)

143. The construction of 2003 House District 48, which includes portions of
Hoke, Robeson, Scotland, and Richmond Counties, is similar to 2003 House District 18,
which was found to violate the Stephenson criteria. Because the 2009 version did not
have a TBVAP in excess of 50%, it could not be justified under § 2 of the VRA and
therefore could not support departure from the WCP. By raising the TBVAP of House
District 48 to 51.27%, the General Assembly precluded any potential challenges to the
2011 version as being in violation of the Stephenson or Strickland criteria. All of the
alternative 2011 versions of District 48 are subject to the same legal challenge that led to
the ruling that the 2003 House District 18 violated Stephenson, because their TBVAP is below 50%. (First Frey Aff. ¶ 24, Ex. 11)

144. The 2009 version of District 48 was located only in Hoke, Robinson, and Scotland Counties. Both the enacted 2011 version of District 48 and the LBC version include these three counties and a portion of Richmond County. There is no evidence in the legislative record disputing Dr. Brunell’s conclusion that racially polarized voting is present in Richmond County. (First Rucho Aff. Ex. 10, pp. 3-7) For the first time, African American voters in Richmond County have an equal opportunity to elect a representative of their choice. There are no past election results involving a 50% plus or a 40% TBVAP House District that included Richmond County.

145. There were no contested general elections in this district in 2004, 2006, and 2008. In 2010, African American Democrat Garland Pierce defeated his Republican opponent 9,698 to 3,267 (+6,431). The population deviation for this district was (-13,018), which exceeds Rep. Pierce’s margin of victory for the 2010 general election. (Churchill Aff. ¶¶ 1-7, Ex. 3)

146. In the 2010 general election, Rep. Pierce raised $46,557 and spent $44,607. His Republican opponent raised $2,982 and spent $2,978. (Churchill Aff. ¶¶ 1-7, Ex. 3)

147. At the beginning of the 2011 session, Rep. Pierce had served four terms in the state House. (Churchill ¶ 8, Ex. 5)

2009 House District 99: Mecklenburg County

148. The 2009 House District 99 was located in Mecklenburg County. There is no evidence in the legislative record disputing the conclusions by Dr. Block and Dr.
Brunell that racially polarized voting is present in Mecklenburg County. (First Rucho Aff. Ex. 8, pp. 1-7; Ex. 10, pp. 3-14, 21; Def. Desg. pp. 60, 61, f. and g.) In all previous and alternative versions of House District 99, including the alternative plans which plaintiffs describe as legal, the non-Hispanic white VAP is less than 50%; 2009 House 99 (39.41%); SCSJ House 99 (37.60%); F&L House 99 (35.68%); and LBC House 99 (30.89%). The evidence shows the 2003 version of House District 99 was not “less than majority-minority.” (Pl. Mem. ¶ 65; Second Frey Aff. ¶¶ 14-15, Exs. 39, 41-43) Nor was this district a majority-white crossover district.

149. In all previous and alternative versions of House District 99, African Americans constitute a super-majority of registered Democrats: 2009 House 99 (67.85%); SCSJ House 99 (68.17%); F&L House 99 (70.38%); and LBC House 99 (75.37%). (Second Frey Aff. ¶¶ 18-19, Exs. 49, 51-53) In comparison, the statewide percentage of Democrats who are African Americans is 41.38%.

150. In LBC House District 99, African Americans are a majority of registered voters (56.73%). In the other versions of House District 99, African Americans are a plurality of the registered voters: 2009 House 99 (45.20%); SCSJ House 99 (46.27%); and F&L House 99 (48.79%). (Second Frey Aff. ¶¶ 18-19, Exs. 49, 51-53)

151. In all previous and alternative versions of House District 99, whites are a minority of the registered voters: 2009 House 99 (43.27%); SCSJ House 99 (41.06%); F&L House 99 (38.52%); and LBC House 99 (32.47%). (Second Frey Aff. ¶¶ 18-19, Exs. 49, 51-53)

152. The AFRAM Plan recommended two majority-TBVAP Senate Districts for Mecklenburg County and two majority-TBVAP House Districts. (First Frey Aff. ¶

Appendix A - 151
24, Ex. 10) Both the F&L House Plan and the LBC House Plan recommended one majority-TBVAP House district for Mecklenburg County. (First Frey Aff. ¶ 24, Ex. 11) Plaintiffs have offered no evidence explaining why these alternative majority-TBVAP House districts are appropriate for Mecklenburg County, while those drawn by the General Assembly are alleged racial gerrymanders. 

153. All four of the House Plans plaintiffs have alleged to be legal have six House districts in Mecklenburg County that are majority-minority and in which the non-Hispanic white population is less than 50%:

a. 2009 House Plan: House District 99 (39.41%); House District 100 (36.63%); House District 101 (31.58%); House District 102 (39.88%); House District 106 (48.54%); and House District 107 (37.30%). (Second Frey Aff. ¶ 14, Ex. 39) Only three African Americans were elected from these six districts in 2010: Moore (District 99); Earle (District 101); and Alexander (District 107). (Churchill Aff. ¶ 1-7, Ex. 3)

b. SCSJ House Plan: House District 99 (37.60%); House District 100 (31.59%); House District 101 (31.88%); House District 102 (37.00%); House District 106 (44.65%); and House District 107 (28.69%). (Second Frey Aff. ¶ 15, Ex. 41)

c. F&L House Plan: House District 96 (47.88%); 99 (35.68%); House District 100 (49.04%); House District 101 (34.67%); House District 102 (41.15%); and House District 107 (45.29%). (Second Frey Aff. ¶ 15, Ex. 42)

d. LBC House Plan: House District 25 (42.44%); House District 99 (30.89%); House District 100 (37.98%); House District 101 (32.58%);
District 102 (37.29%); and House District 107 (40.30%). (Second Frey Aff. ¶ 15, Ex. 43) Plaintiffs have failed to explain why six majority-minority districts for Mecklenburg County are legal, but five majority-TBVAP counties are illegal.

154. In 2008, the African American Democrat Nick Mackey defeated his Republican opponent 28,106 to 14,925 (+13,181). In 2010, African American candidate Rodney Moore defeated his Republican opponent 15,591 to 6,059 (+9,532). The deviation for this district under the 2010 Census was +32,850, which far exceeds the margin of victory for African American candidates in 2008 and 2010. (Churchill Aff. ¶ 1-7, Ex. 3)


2009 House District 107: Mecklenburg County

156. The 2009 House District 107 was located in Mecklenburg County. There is no evidence in the legislative record disputing the conclusions by Dr. Block and Dr. Brunell that racially polarized voting is present in Mecklenburg County. (First Rucho Aff. Ex. 8, pp. 1-7; Ex. 10, pp. 3-14, 21; Def. Desg. pp. 60, 61, f. and g.) In all versions of House District 107, which plaintiffs describe as legal, the non-Hispanic white VAP is less than 50%: 2009 House 107 (37.30%); SCSJ House 107 (28.62%); F&L House 107 (45.29%); and LBC House 107 (40.30%). The evidence shows the 2003 version of House District 107 was not “less than majority-minority.” (Pl. Mem. ¶ 65; Second Frey Aff. p. 5, Exs. 39, 41-43) Nor was this district a majority-white crossover district.
157. The SCSJ Plan recommended that House District 107 be created with a TBVAP of 56.43%, as compared to the enacted 2011 House District 107, which has a TBVAP of 52.52%. (First Frey Aff. ¶ 24, Ex. 11) Thus, the SCSJ Plan recommended a higher TBVAP for this district than the enacted version.

158. In all previous and alternative versions of House District 107, African Americans constitute a super-majority of registered Democrats: 2009 House 107 (72.18%); SCSJ House 107 (78.78%); F&L House 107 (72.24%); and LBC House 107 (73.41%). (Second Frey Aff. ¶¶ 18-19, Exs. 49, 51-53) In comparison, the statewide percentage of Democrats who are African Americans is 41.38%.

159. African Americans constitute a majority of the registered voters in the SCSJ House 107 (60.38%) and the LBC House 107 (50.19%). African Americans are a plurality of registered voters in the 2009 House 107 (48.72%). (Second Frey Aff. ¶¶ 18-19, Exs. 49, 51-53)

160. Whites are a minority of the registered voters in all previous and alternative versions of House 107: 2009 House 107 (42.20%); SCSJ House 107 (31.13%); F&L House 107 (47.00%); and LBC 107 (42.99%). (Second Frey Aff. ¶¶ 18-19, Exs. 49, 51-53)

161. Majority-TBVAP house districts for Mecklenburg County are found in all five plans. The two highest TBVAP districts are found in the AFRAM House Plan: SCSJ House District 101 (57.28%), and SCSJ House District 107 (56.43%). (First Frey Aff. ¶ 24, Ex. 11) Both of these proposed “legal” SCSJ House Districts have a higher percentage of TBVAP than any of the enacted 2011 House Districts located in Mecklenburg County.

Appendix A - 154
162. There were no contested general elections for this district in 2004 or 2006. In 2008, African American Democratic candidate Kelly Alexander defeated his Republican opponent 27,502 to 9,043 (+18,459). In 2010, Rep. Alexander defeated his Republican opponent 13,132 to 6,392 (+6,740). The population deviation for this district under the 2010 Census is (+13,998), which exceeds Rep. Alexander’s margin of victory for the 2010 General Election. (Churchill Aff. ¶ 1-7, Ex. 3)


164. At the beginning of the 2011 session, Rep. Alexander had served 2.5 terms in the state House. (Churchill Aff. ¶ 8, Ex. 5)

2001 First Congressional District

165. The 2001 First Congressional District includes the following counties: Bertie, Beauford, Chowan, Craven, Edgecombe, Hertford, Gates, Granville, Greene, Halifax, Jones, Lenoir, Martin, Northampton, Pasquotank, Perquimins, Pitt, Vance, Warren, Washington, Wayne, and Wilson. There is no evidence in the legislative record disputing the conclusions of Dr. Block and Dr. Brunell that racially polarized voting continues to be present in these counties. (First Rucho Aff. Ex. 8, pp. 1-7; Ex. 10, pp. 3-14; Def. Desg. p. 20, f. and g.) In all versions of the First Congressional District in the previous or alternative plans, which plaintiffs describe as legal, the non-Hispanic white population is less than 50%: 2001 First Congressional (45.59%); SCSJ First Congressional (46.47%); F&L First Congressional (46.46%). The evidence shows that
the 2001 version of the First Congressional District was not “less than majority-minority.” (Pl. Mem. ¶ 65; Second Frey Aff. ¶ 26, Exs. 60, 62-63, 66-67) Nor was this district a majority-white crossover district.

166. In the previous and alternative versions of the First Congressional District, African Americans represent a super-majority of registered Democrats: 2001 First Congressional (66.55%); SCSJ First Congressional (65.73%); F&L First Congressional (65.66%). (Second Frey Aff. ¶ 27, Exs. 64, 66-67) In comparison, the statewide percentage of Democrats who are African Americans is 41.38%.

167. In the 2001 First Congressional District, African Americans were a majority of all registered voters (50.55%). African Americans constituted a very strong plurality of all registered voters in the SCSJ First Congressional (49.32%) and in the F&L First Congressional (49.12%). (Second Frey Aff. ¶ 27, Exs. 64, 66-67)

168. In the previous and alternative versions of the First Congressional District, white voters constituted a minority of all registered voters: 2001 First Congressional (46.03%); SCSJ First Congressional (47.40%); F&L First Congressional (47.71%). (Second Frey Aff. ¶ 27, Exs. 64, 66-67)

169. In the 2004 General Election, African American Democrat G. K. Butterfield defeated his Republican opponent 137,667 to 77,508 (+60,159). Congressman Butterfield had no opposition in the 2006 General Election. In 2008, Congressman Butterfield defeated his Republican opponent 192,765 to 81,506 (+111,259). In 2010, Congressman Butterfield defeated his Republican opponent 103,294 to 70,867 (+32,427). The population deviation for this district under the 2010
Census (-97,563) exceeds Congressman Butterfield’s margin of victory for 2004 and 2010. (Churchill Aff. ¶ 1-7, Ex. 1)


171. Congressman Butterfield was first elected on July 20, 2004, and has served through the present. See http://butterfield.house.gov/biography/.

2001 Twelfth Congressional District

172. The 2001 Twelfth Congressional District includes Guilford and Mecklenburg Counties. There is no evidence in the legislative record disputing the conclusions of Dr. Block and Dr. Brunell that racially polarized voting is present in these counties. (First Rucho Aff. Ex. 8, pp. 1-7; Ex. 10, pp. 3-14) In all versions of the Twelfth Congressional District, which plaintiffs describe as legal, the non-Hispanic white VAP was less than 50%: 2001 Twelfth Congressional (42.40%); SCSJ Twelfth Congressional (42.38%) and F&L Twelfth Congressional (41.48%). The evidence shows the 2001 version of the Twelfth Congressional District was not “less than majority-minority.” (Pl. Mem. ¶ 65; Second Frey Aff. ¶ 26, Exs. 60, 62-63) Nor was this district a majority-white crossover district.

173. In the previous and alternative versions of the Twelfth Congressional District, African Americans constitute a super-majority of registered Democrats: 2001
Twelfth Congressional (71.44%); SCSJ Twelfth Congressional (71.53%); and F&L Twelfth Congressional (69.14%). (Second Frey Aff. ¶ 27, Exs. 64, 66-67) In comparison, the statewide percentage of Democrats who are African Americans is 41.38%.

174. African Americans constitute a plurality of registered voters in the previous and alternative versions of the Twelfth Congressional District: 2001 Twelfth Congressional (48.56%); SCSJ Twelfth Congressional 48.70%; and F&L Twelfth Congressional (46.54%). (Second Frey Aff. ¶ 27, Exs. 64, 66-67)

175. Whites are a minority of all registered voters in the previous and alternative versions of the Twelfth Congressional District: 2001 Twelfth Congressional (45.26%); SCSJ Twelfth Congressional (45.17%); and F&L Twelfth Congressional (46.09%). (Second Frey Aff. ¶ 27, Exs. 64, 66-67)

176. The African American incumbent, Mel Watt, was challenged by a Republican opponent in 2004, 2006, 2008, and 2012. In all of these elections, Congressman Watt’s margin of victory exceeded the deviation for this district under the 2010 Census (+2,847). (First Frey Aff. ¶ 24; Ex. 12)

178. Congressman Watt was first elected in 1992 and has served continuously in this office through the present. See http://watt.house.gov/index.php?option=com_content&view=article&id=2578&Itemid=75.
APPENDIX B TO THE

JUDGMENT AND MEMORANDUM OF DECISION

FINDINGS OF FACT RELEVANT TO THE ISSUE OF WHETHER RACE WAS THE PREDOMINANT MOTIVE FOR THE SHAPES AND LOCATIONS OF DISTRICT LINES FOR 2011 CONGRESSIONAL DISTRICTS 12 AND 4, SENATE DISTRICTS 31 AND 32, OR HOUSE DISTRICTS 51 AND 54.

See § IV(D) of Judgment and Memorandum of Decision
2011 12th Congressional District

179. Dr. Thomas Hofeller was engaged by the General Assembly for the purpose of drawing redistricting plans. (Rough Draft Trial Transcript, June 5, 2011, p. 5) ("TT Vol. II") He was not engaged to prepare expert testimony regarding the presence or absence of racially polarized voting. (Id. at p. 8)

180. Dr. Hofeller testified as a witness in the case of Shaw v. Hunt, 517 U.S. 899 (1996) ("Shaw II"), a case that challenged the 1992 North Carolina Twelfth Congressional District as a racial gerrymander. (TT, Vol. II, p. 4) Dr. Hofeller is familiar with the decision in Easley v. Cromartie, 532 U.S. 234 (2000) ("Cromartie"), a decision in which the 1997 version of the Twelfth Congressional District was upheld on the grounds that politics explained the shape and location of the districts lines as opposed to race. (TT Vol. II, p. 11)

181. The 2001 version of the Twelfth Congressional Districts was based upon the same principles that motivated the 1997 version, and is located in the same general area as the 1997 version. (Id. at pp. 12-14; Defs. Trial Ex. 8)

182. Dr. Hofeller took instructions for drawing maps primarily from Senator Robert Rucho, Chair of the Senate Redistricting Committee, and Representative David Lewis, Chair of the House Redistricting Committee. (Id. at p. 14)

183. Senator Rucho and Representative Lewis instructed Dr. Hofeller to follow the legal standard stated in Cromartie II, in the drawing of the 2011 Twelfth Congressional District. (Id. at p. 15)

184. Senator Rucho and Representative Lewis instructed Dr. Hofeller to increase the number of Democratic voters included in the 2011 Twelfth Congressional
District as compared to the number of Democratic voters included in the 2001 version. By increasing the number of Democratic voters in the 2011 version of the Twelfth Congressional District, the two Chairmen intended to achieve two goals: (1) creating the 2011 Twelfth District as an even stronger Democratic district as compared to the 2001 version; and (2) by doing so, making districts that adjoin the Twelfth Congressional District more competitive for Republicans in their 2011 versions as compared to these districts as they were created in the 2001 Congressional Plan. (*Id.* at pp. 15-17)

185. The 2011 Twelfth Congressional District is located in the same six counties as the 2001 version. (TT Vol. II, p. 13;Defs. Trial Ex. 8)

186. The 1997, 2001, and 2011 versions of the Twelfth Congressional districts are based upon urban population centers located in Mecklenburg, Guilford, and Forsyth Counties. These urban areas are connected by more narrow corridors located in Cabarrus, Rowan, and Davidson Counties. (*Id.*; Rough Draft Transcript, June 4, 2013, pp. 210-211) ("TT Vol. I")

187. The principal differences between the 2001 version of the Twelfth Congressional District and the 2011 version is that the 2011 version adds more strong Democratic voters located in Mecklenburg and Guilford Counties and removes Republican voters who had formerly been assigned to the 2001 Twelfth Congressional District from the corridor counties of Cabarrus, Rowan, Davidson and other locations. (TT Vol. II, pp. 15-17; TT Vol. I, pp. 208-209).

188. Dr. Hofeller constructed the 2011 Twelfth Congressional District based upon whole Vote Tabulation Districts ("VTDs") in which President Obama received the highest voter totals during the 2008 Presidential Election (TT Vol. II, pp. 15-17). The
only information on the computer screen used by Dr. Hofeller in selecting VTDs for inclusion in the Twelfth District was the percentage by which President Obama won or lost a particular VTD. (Id. at pp. 18-19) There was no racial data on the screen used by Dr. Hofeller to construct this district. (Id. at p. 24)

189. The 2011 Twelfth Congressional District includes 179 VTDs. (Second Frey Aff. Ex. 28). Only six VTDs were divided by Dr. Hofeller in forming the 2011 Twelfth Congressional District (TT Vol. II, pp. 20-24; Def. Trial Ex. 14). All of these divisions were done to equalize population among the Twelfth Congressional District and other districts or for political reasons, such as dividing a VTD in Guilford County so that incumbent Congressman Howard Coble could be assigned to the 2011 Sixth Congressional District as opposed to being placed in the 2011 Twelfth Congressional District. None of the VTDs were divided based upon racial criteria. (Id.)

190. Dr. Hofeller's division of VTDs in his construction of the Twelfth Congressional District did not have any impact on the political performance of the 2011 Twelfth Congressional District or its racial composition. (TT Vol. II, pp. 29-30)

191. By increasing the number of Democratic voters in the 2011 Twelfth Congressional District located in Mecklenburg and Guilford Counties, the 2011 Congressional Plan created other districts that were more competitive for Republican candidates as compared to the 2001 versions of these districts, including the 6th Congressional District, the 8th Congressional District, the 9th Congressional District, and the 13th Congressional District. (Id. at pp.16-17) (Map Notebook, Rucho Lewis Congress 3 and Congress Zero Deviation)
2011 Fourth Congressional District

192. Dr. Hofeller was instructed by the redistricting chairs, Senator Rucho and Representative Lewis, to construct the 2011 Fourth Congressional District based upon the same principles stated in Cromartie II and used to create the 1997, 2001, and 2011 versions of the Twelfth Congressional District. (TT Vol. II, p. 32)

193. Like the 2011 Twelfth Congressional District, Dr. Hofeller was instructed to create the 2011 Fourth Congressional District as a very strong Democratic district so that 2011 Congressional districts that adjoin the 2011 Fourth Congressional District would be more competitive for Republicans as compared to the 2001 versions of these districts. (Id.)

194. The 2011 Fourth Congressional District is similar in construction to the 2001 Thirteenth Congressional District and the version of the Thirteenth Congressional District found in the 2011 Fair and Legal Congressional Plans. If the distance between the two most distant points of each of these three versions of the Thirteenth District are compared, the 2001 Thirteenth District has a span of 111 miles, the Fair & Legal Districts has a span of 97 miles, and the enacted 2011 Thirteenth Congressional District has a span of 88 miles. (Id. at p. 33;Defs. Trial Exs. 7, 9, 10) While the 2011 Fourth Congressional District is partially located in a different region than the 2001 Thirteenth or the Fair and Legal Thirteenth, all three districts contain significant portions of Wake County. All three districts also use rural corridors to connect urban centers of population. (Map Notebook, Rucho-Lewis Congress 3, District 4; Congress Zero Deviation, District 13; Congressional Fair & Legal, District 13)
195. Like the 2011 Twelfth Congressional District, Dr. Hofeller constructed the
2011 Fourth Congressional District based upon whole VTDs in which President Obama
received the highest vote totals during the 2008 Presidential Election. The only
information on the computer screen used by Dr. Hofeller in selecting VTDs for inclusion
in the Fourth Congressional District was the percentage by which President Obama won
or lost in a particular VTD. There was no racial data on the screen used by Dr. Hofeller
to construct this district. (TT Vol. II, pp. 34-35)

196. The 2011 Fourth Congressional District includes 160 VTDs.
(http://www.ncleg.net/representation/Content/Plans/PlanPage_DB_2011.asp?Plan=Rucho
-Lewis_Congress_3&Body=Congress). Only 14 VTDs were divided by Dr. Hofeller in
forming the 2011 Fourth Congressional District. All of the divisions were done to
equalize population among the Fourth Congressional District and the adjoining
Congressional districts, to make the district contiguous, or for political reasons. None of
the VTDs were divided based upon racial data. (TT Vol. II, pp. 34-37; Def. Trial Ex. 14)

197. Dr. Hofeller’s division of VTDs in his construction of the Fourth District
did not have any impact on the political performance of the 2011 Fourth Congressional
District or its racial composition. (TT Vol. II, p. 37)

198. By drawing the 2011 Fourth Congressional District as a very strong
Democratic district, the 2011 Congressional Plan created other districts that were more
competitive for Republican candidates as compared to the 2001 versions of these
districts, including the Second, Seventh, Eighth, and Thirteenth Congressional Districts.
(TT Vol. II, at p. 32)

Appendix B -165
2011 Senate Districts 31 and 32

199. Forsyth County is a county in which the State was held liable for a § 2 violation in *Thornburg v. Gingles*, 478 U.S. 30 (1986) (Def. Pr. Fds. No. 1)

200. A majority-minority coalition district is a district in which black voters are a plurality and are then combined with other minority voters, such as Hispanics, to form a majority coalition of two or more minority groups. *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009). The United States Supreme Court has declined to address whether a majority-minority coalition district may be legally ordered as a remedy for a § 2 violation. *Id.* One circuit court has held that such districts are not proper remedies under § 2. *Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996). At least two circuit courts have endorsed majority-minority coalition districts as an appropriate § 2 remedy where there is insufficient black population to draw a majority-TBVAP district and the other minority group is politically cohesive with black voters. *Bridgeport Coalition for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 283 (2nd Cir. 1994); *Campos v. City of Baytown, Texas*, 840 F.2d 1240, 1244 (5th Cir. 1988).

201. Forsyth County is not covered by § 5. Regardless, when reviewing a redistricting plan for predominance, § 5 requires that any inquiry by the reviewing authority, either the United States Attorney General or the United States District Court for the District of Columbia, must encompass the statewide plan as a whole. *Georgia v. Ashcroft*, 539 U.S. 461, 479 (2003).

202. Under the 2003 Senate Plan, there was enough population in Forsyth County to draw two Senate districts wholly within that county, 2003 Senate District 31 and 2003 Senate District 32: (Map Notebook, 2003 Senate Plan)
203. Under the 2000 Census, there was not enough black population in Forsyth County to draw a majority-TBVAP district. Instead, 2003 Senate District 21 was drawn as a majority-minority coalition district. The TBVAP for the District under the 2010 Census was 42.52%. (First Frey Aff. Ex. 10) The total white VAP was 45.75%. (Second Frey Aff. Ex. 34) The total Hispanic VAP was 13.72%. (Id.) The total non-Hispanic white population was 42.11%. (Id.)

204. As was true under the 2000 Census, under the 2010 Census there is insufficient TBVAP in Forsyth County to draw a majority-TBVAP Senate district in Forsyth County. However, because of concerns regarding the State's potential liability under § 2 and § 5, Dr. Hofeller was instructed by the redistricting chairs to base the 2011 Senate District 32 on the 2003 versions of Senate District 32. (TT Vol. II, p. 46)

205. Under the criteria established in Stephenson v. Bartlett, 355 N.C. 354, 562 S.E.2d 377 (2002) ("Stephenson I"), the population deviation for the Senate District must be plus or minus 5% from the ideal number. The ideal population for a Senate District under the 2010 Census is 190,710. (First Frey Aff. Ex. 10). Under the 2010 Census, the General Assembly could not re-enact the 2003 version of Senate District 32 because it was under populated by more than 5% (-15,440 people or -8.10%). (First Frey Aff. Ex. 10)

206. Under the 2010 Census, Forsyth County no longer had enough population to draw two Senate districts within the county, as had been done under the 2003 Senate Plan. Instead, Forsyth was grouped with Yadkin County to form a population pool sufficient to draw two Senate districts within that county group. (Map Notebook, Rucho Senate 2)
207. The first version of Senate District 32 that was released by the General Assembly had a TBVAP of 39.32%. (http://www.ncleg.net/representation/Content/Plans/PlanPage_DB_2011.asp?Plan=Rucho_Senate_VRA_Districts&Body=Senate). Subsequently, the SCSJ plan was released. Its version of District 32 was located in a three-county and three-district group (Forsyth, Davie, Davidson). (Map Notebook, SCSJ Senate) The SCSJ District 32 had a TBVAP of 41.95%. (First Frey Aff., Ex. 10) The SCSJ District 32 was a majority-minority coalition district with a non-Hispanic white population of 43.18%. (First Frey Aff. Ex. 37)

208. The redistricting chairs were concerned that any failure to match the TBVAP % found in the SCSJ District 32 could potentially subject the state to liability under § 2 or § 5 of the VRA. Therefore, Dr. Hofeller was instructed by the Redistricting Chairs to re-draw the State’s version of Senate District 32 so that it would at least equal the SCSJ version in terms of TBVAP. (TT Vol. II, pp. 46-48)

209. The average district population for three Senate districts located in the SCSJ county group allowed for the creation of districts with deviations below the ideal number. In contrast, the average district population for two districts located in the state’s two-county group required the creation of districts with deviations above the ideal number. (Id.)

210. The SCSJ Senate District 32 was created with the total population of 181,685 or 4.73% below the ideal number for a Senate district (190,710). The State could not enact the SCSJ version of Senate District 32 in the two-county combination of Forsyth and Yadkin because to do so would have pushed the total population in Senate District 31 to a level that was above the plus 5% restriction established in Stephenson.

Appendix B -168
Thus, for the State to enact a Senate District 32 that would match the TBVAP in the SCSJ version, it would have to create a district with more total population than the SCSJ version and would need to do so by expanding the boundaries of the enacted Senate District 32. (Id.)

211. After Dr. Hofeller revised the State’s version of Senate District 32 to match the TBVAP found in the SCSJ version, the enacted 2011 version of Senate District 32 had a TBVAP of 42.53%, which was almost identical to the TBVAP found in the 2003 version. (First Frey Aff. Ex. 10). The population deviation for the enacted 2011 Senate District 32 was -0.79%. The population deviation for the enacted 2011 Senate District 31, the second district drawn within the Forsyth-Yadkin combination, was 4.81%. (Map Notebook, Rucho Senate 2, Actual Population Table with Deviation Listed, Senate District 31). As already explained, if the General Assembly had adopted the SCSJ version of Senate District 32 (and its deviation of -4.73%), the population that would have been forced into the enacted Senate District 31 would have caused that district to substantially exceed in population the plus 5% restriction established in Stephenson. (TT Vol. II, p. 47)

212. A review of the 2003 Senate Plan, the 2011 Senate Plan, the SCSJ Senate Plan, and the Possible Senate Plan offered by the Legislative Black Caucus, shows that the geographic locations of Senate District 32 largely overlap in all versions of the district. (Map Notebook, Rucho Senate 2, 2003 Senate, SCSJ Senate, Fair and Legal Senate, Possible Senate). Further, the percentage of TBVAP found in each version of this district runs from 38.28% (Fair and Legal and Possible Senate) to 42.53% (2011 Senate). The differences between all variations of this district are factually insignificant.

Appendix B -169
2011 House Districts 51 and 54

213. The 2011 House Districts 51 and 54 are in a three-county, three-district group consisting of Chatham, Lee, and Harnett Counties. (TT Vol. II, p. 51; Def. Trial Ex. 20)

214. The 2011 House District 54 consists of all of Chatham County and a portion of Lee County mainly located in the City of Sanford. House District 51 consists of the remaining portions of Lee County and a portion of Harnett County. Chatham is the only whole county in this group. There are two traversals of county lines to form the three districts (all of Chatham traversing into a portion of Lee to form House District 54 and the remaining portion of Lee traversing into a part of Harnett to form House District 51). (TT Vol. II, 2013, pp. 51-52)

215. Under the Martin House Fair and Legal Plan, Chatham, Lee, and Harnett form a three-county group with enough population for three districts (F&L House District 56, F&L House District 52, and F&L House District 65). (Id.; Defs. Trial Ex. 19)

216. Under the Fair and Legal configuration for this three-county group, Chatham is wholly within House District 56 which traverses into a portion of Harnett County. Lee County is wholly within House District 53 which also traverses into Harnett. Thus, while the Fair and Legal configuration has more whole counties (two) as compared to the 2011 House Plan (one), both plans form three districts by two traversals of a county line.

217. Dr. Hofeller was instructed to draw the 2011 House District 54 as a strong Democratic district. In part, this was because the former Democratic Speaker of the House had a potential residence in Chatham County. Dr. Hofeller therefore based this

Appendix B -170
district on all of Chatham County and the location of the highest concentration of Democratic voters in Lee County. (TT Vol. II, 2013, p. 54)

218. There are only five VTDs in Lee County. The City of Sanford is located in at least four of these five VTDs. The City of Sanford is the largest population center in Lee County and it is impossible to divide Lee County into different House Districts without dividing VTDs. (Id. at p. 56; Defs. Trial Ex. 4, Pl. Trial Notebook, Ex. 7)

219. Dr. Hofeller was instructed by Republicans who live in this county group regarding the location of Democratic voters in the City of Sanford. Dr. Hofeller drew House District 54 into Sanford based upon these instructions. He largely followed roads or streets in dividing the City of Sanford and placing into District 54 those areas of the City in which Democratic voters reside, as instructed by local Republicans. (TT Vol. II, pp. 57-58)

220. Dr. Hofeller did not reference any racial data when he constructed House District 54. (Id. at p. 58)

221. The TBVAP for the 2011 House District 54 is 17.98%. (Map Notebook, Lewis-Dollar-Dockham 4, Table Showing Voting Age Population by Race).
Supreme Court of the United States

Lacy H. THORNBURG, et al., Appellants

v.

Ralph GINGLES et al.


Action was brought challenging use of multimember districts in North Carolina legislative apportionment. The United States District Court for the Eastern District of North Carolina, 590 F.Supp. 345, found the plan to violate the Voting Rights Act and state officials appealed. The Supreme Court, Justice Brennan, J., held that: (1) plaintiffs claiming impermissible vote dilution must demonstrate that voting devices resulted in unequal access to electoral process; (2) use of multimember districts does not impede the ability of minority voters to elect representatives of their choice unless a bloc voting majority will usually be able to defeat candidates supported by a politically cohesive, geographically insular minority; (3) District Court applied proper standard in determining whether there was racial polarization and voting; (4) legal concept of racially polarized voting incorporates neither causation nor intent; (5) some electoral success by minority group does not foreclose successful section 2 claim; (6) finding of impermissible dilution was supported by the evidence; but (7) claim of dilution with respect to one multimember district was defeated by evidence that last six elections resulted in proportional representation for black residents.

Affirmed in part and reversed in part.

Justice White filed a concurring opinion.

Justice O'Connor filed an opinion concurring in the judgment in which Chief Justice Burger, Justice Powell, and Justice Rehnquist joined.

Justice Stevens filed an opinion concurring in part and dissenting in part in which Justice Marshall and Justice Blackmun joined.

[1] Election Law

➡ Discriminatory practices proscribed in general

Election Law

➡ Dilution of voting power in general

Subsection 2(a) of the Voting Rights Act prohibits all state and political subdivisions from imposing any voting qualifications or prerequisites to voting or any standards, practices, or procedures which result in the denial or abridgment of the right to vote of any citizen who is a member of a protected class of racial and language minorities. Voting Rights Act of 1965, § 2(a), as amended, 42 U.S.C.A. § 1973(a).

17 Cases that cite this headnote

[2] Election Law

➡ Discriminatory practices proscribed in general


2 Cases that cite this headnote

[3] Election Law

➡ Judicial Review or Intervention.

Electoral devices such as at-large elections may not be considered per se violative of section 2 of the Voting Rights Act; parties challenging electoral devices must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

6 Cases that cite this headnote

[4] Election Law

➡ Dilution of voting power in general

9 Cases that cite this headnote

[5] Election Law
⇒ Judicial Review or Intervention

5 Cases that cite this headnote

[6] Election Law
⇒ Dilution of voting power in general
Essence of a claim under section 2 of the Voting Rights Act is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

41 Cases that cite this headnote

[7] States
⇒ Political subdivisions; multi-member or floterial districts
Factors bearing on challenges under section 2 of the Voting Rights Act to multimember legislative districts are the extent to which minority group members have been elected to public office in the jurisdiction and the extent to which voting in the state or political subdivision is racially polarized; other factors such as the lingering effects of past discrimination, use of appeals to racial bias in election campaigns, and use of electoral devices which enhance the dilutive effects of multimember districts when substantial white bloc voting exists are supportive of, but not essential to, a minority voter's claim of dilution. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

126 Cases that cite this headnote

[8] Election Law
⇒ Racially polarized or bloc voting
Bloc voting majority must be able to usually defeat candidates supported by politically cohesive, geographically insular minority group in order for there to be a showing of vote dilution through the use of multimember districts. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

398 Cases that cite this headnote

[9] Election Law
⇒ Compactness and cohesiveness of minority group
If minority group claiming dilution of its vote in violation of section 2 of the Voting Rights Act through use of multimember district is not sufficiently large and geographically compact to constitute a majority in a single-member district, the multimember form of the district cannot be responsible for minority voters' inability to elect their candidates. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

193 Cases that cite this headnote

[10] Election Law
⇒ Compactness and cohesiveness of minority group
If minority group claiming dilution of its voting strength in violation of section 2 of the Voting Rights Act through use of multimember district is not able to show that it is politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

28 Cases that cite this headnote

Racially polarized or bloc voting

If minority voting group claiming dilution of its voting strength in violation of section 2 of the Voting Rights Act through use of multimember districts is not able to demonstrate that the white majority votes sufficiently as a bloc to enable it to usually defeat the minority's preferred candidate, it has not shown that the multimember district impedes the minority group's ability to elect its chosen representatives. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

338 Cases that cite this headnote

[14] Election Law

Racially polarized or bloc voting

In a district where elections are shown to usually be polarized along racial lines, fact that racially polarized voting is not present in one or few individual elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting so that use of multimember district can be shown to impermissibly dilute minority voting strength in violation of section 2. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

4 Cases that cite this headnote

[15] States

Judicial review and control

Finding of political cohesiveness of black voters and existence of a white voting bloc, supporting claim that use of multimember districts impermissibly diluted black voting strength in violation of section 2, was supported by evidence of black support for black candidates in excess of 70% in both primary and general elections, that an average of 81.7% of white voters would not vote for any black candidate in the primary elections, and that two-thirds of the white voters would not vote for a black candidate even after he won the Democratic primary. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

8 Cases that cite this headnote

[16] States

Judicial review and control

District court's approach which tested election data from three years in each multimember district and revealed that blacks strongly supported black candidates while, to the usual detriment of black candidates, whites rarely did support black candidates satisfactorily addressed each facet of the proper legal standard for determining claim of vote dilution under section 2. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

2 Cases that cite this headnote
3 Cases that cite this headnote

[17] Election Law

\( \Rightarrow \) Dilution of voting power in general

For purposes of section 2, the legal concept of "racially polarized voting" incorporates neither causation nor intent but, rather, simply means that the race of voters correlates with the selection of certain candidates; it refers to the situation where different races or minority language groups vote in blocs for different candidates. (Per Justice Brennan, with three Justices concurring and one Justice concurring in part and concurring in the judgment.) Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

3 Cases that cite this headnote

[20] Election Law

\( \Rightarrow \) Racially polarized or bloc voting

Concept of racially polarized voting as it refers to dilution of minority group voting strength through use of multimember districts in violation of section 2 does not refer only to white bloc voting which is caused by white voters' racial hostility toward the black candidate. (Per Justice Brennan, with three Justices concurring and one Justice concurring in part and concurring in the judgment.) Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

32 Cases that cite this headnote

[18] Election Law

\( \Rightarrow \) Vote Dilution

It is the difference between the choices made by blacks and whites, and not the reason for that difference, which results in blacks having less opportunity than whites to elect their preferred representatives when there is dilution of black vote in violation of section 2 through use of multimember districts. (Per Justice Brennan, with three Justices concurring and one Justice concurring in part and concurring in the judgment.) Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

26 Cases that cite this headnote

[19] Election Law

\( \Rightarrow \) Vote Dilution

Fact that race of voter and race of candidate is often correlated is not directly pertinent to inquiry as to whether there has been impermissible dilution of minority vote through use of multimember districts in violation of section 2; it is the status of the candidate as the chosen representative of a particular racial group, not the race of the candidate, that is important. (Per Justice Brennan, with three Justices concurring and one Justice concurring in part and concurring in the judgment.) Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

[21] Election Law

\( \Rightarrow \) Evidence

Minority voters claiming vote dilution in violation of section 2 through use of electoral devices such as multimember districts need not prove causation or intent in order to prove a prima facie case of racial bloc voting and defendants may not rebut a prima facie case with evidence of causation or intent. (Per Justice Brennan, with three Justices concurring and one Justice concurring in part and concurring in the judgment.) Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

21 Cases that cite this headnote

[22] Election Law

\( \Rightarrow \) Dilution of voting power in general

Proof that some minority candidates have been elected does not foreclose a claim under section 2 for impermissible dilution of minority voting strength. (Per Justice Brennan, with three Justices concurring and one Justice concurring in part and concurring in the judgment.) Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.
1 Cases that cite this headnote

[23] States

Judicial review and control


1 Cases that cite this headnote

[24] States

Political subdivisions; multi-member or floterial districts

Persistent proportional representation in particular multimember district over the last six elections showed that multimember district did not impermissibly dilute black voting strength in violation of section 2, in the absence of any explanation for success of black candidates in three of the six elections. (Per Justice Brennan with one Justice concurring and four Justices concurring in part and concurring in the judgment.) Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

6 Cases that cite this headnote


Elections, voting, and political rights


11 Cases that cite this headnote

[26] States

Judicial review and control

Finding of impermissible dilution of black voting strength through use of multimember legislative districts was supported by evidence of racially polarized voting, legacy of official discrimination in voting matters, education, housing, employment, and health services, and persistence of campaign appeals to racial prejudice. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

1 Cases that cite this headnote

**2755 *30 Syllabus**

In 1982, the North Carolina General Assembly enacted a legislative redistricting plan for the State's Senate and House of Representatives. Appellees, black citizens of North Carolina who are registered to vote, brought suit in Federal District Court, challenging one single-member district and six multimember districts on the ground, inter alia, that the redistricting plan impaired black citizens' ability to elect representatives of their choice in violation of § 2 of the Voting Rights Act of 1965. After appellees brought suit, but before trial, § 2 was amended, largely in response to *Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47, to make clear that a violation of § 2 could be proved by showing discriminatory effect alone, rather than having to show a discriminatory purpose, and to establish as the relevant legal standard the "results test." Section 2(a), as amended, prohibits a State or political subdivision from imposing any voting qualifications or prerequisites to voting, or any standards, practices, or procedures that result in the denial or abridgment of the right of any citizen to vote on account of race or color. Section 2(b), as amended, provides that § 2(a) is violated where the "totality of circumstances" reveals that "the political processes leading to nomination or election ... are not equally open to participation by members of a [protected class] ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," and that the extent to which members of a protected class have been elected to office is one circumstance that may be considered. The District Court applied the "totality of circumstances" test set forth in § 2(b) and held that the redistricting plan violated § 2(a) because it resulted in the dilution of black citizens' votes in all of the **2756 disputed districts.** Appellants, the Attorney General of North Carolina
and others, took a direct appeal to this Court with respect to five of the multimember districts.

Held: The judgment is affirmed in part and reversed in part.

590 F.Supp. 345, affirmed in part and reversed in part.

Justice BRENNAN delivered the opinion of the Court with respect to Parts I, II, III-A, III-B, IV-A, and V, concluding that:

1. Minority voters who contend that the multimember form of districting violates § 2 must prove that the use of a multimember electoral structure operates to minimize or cancel out their ability to elect their preferred candidates. While many or all of the factors listed in the Senate Report may be relevant to a claim of vote dilution through submergence in multimember districts, unless there is a conjunction of the following circumstances, the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice. Stated succinctly, a bloc voting majority must usually be able to defeat candidates supported by a politically cohesive, geographically insular minority group. The relevance of the existence of racial bloc voting to a vote dilution claim is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidate. Thus, the question whether a given district experiences legally significant racial bloc voting requires discrete inquiries into minority and white voting practices. A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, and consequently establishes minority bloc voting within the meaning of § 2. And, in general, a white bloc vote that normally will defeat the combined strength of minority support plus white "crossover" votes rises to the level of legally significant white bloc voting. Because loss of political power through vote dilution is distinct from the mere inability to win a particular election, a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences significant polarization than are the results of a single election. In a district where elections are shown usually to be polarized, the fact that racially polarized voting is not present in one election or a few elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting. Furthermore, the success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election. Here, the District Court's approach, which tested data derived from three election years in each district in question, and which revealed that blacks strongly supported black candidates, while, to the black candidates' usual detriment, whites rarely did, satisfactorily addresses each facet of the proper standard for legally significant racial bloc voting. Pp. 2762–2772.

2. The language of § 2 and its legislative history plainly demonstrate that proof that some minority candidates have been elected does not foreclose a § 2 claim. Thus, the District Court did not err, as a matter of law, in refusing to treat the fact that some black candidates have succeeded as dispositive of appellees' § 2 claims. Where multimember districting generally works to dilute the minority vote, it cannot be depended on the ground that it sporadically and serendipitously benefits minority voters. Pp. 2779–2780.

3. The clearly-erroneous test of Federal Rule of Civil Procedure 52(a) is the appropriate standard for appellate review of ultimate findings of vote dilution. As both amended § 2 and its legislative history make clear, in evaluating a statutory claim of vote dilution through districting, the trial court is to consider the "totality of the circumstances" and to determine, based upon a practical evaluation of the past and present realities, whether the political process is equally open to minority voters. In this case, the District Court carefully considered the totality of the circumstances and found that in each district racially polarized voting; the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice acted in concert with the multimember districting scheme to impair the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice. Pp. 2780–2782.

Justice BRENNAN, joined by Justice MARSHALL, Justice BLACKMUN, and Justice STEVENS, concluded in Part III-C that for purposes of § 2, the legal concept of racially polarized voting, as it relates to claims of vote dilution—that is, when it is used to prove that the minority group is politically cohesive and that white voters will usually be able to defeat the minority's preferred candidates—refers only to the existence of a correlation between the race of voters and the selection of certain candidates. Plaintiffs need not prove causation or intent in order to prove a prima facie case of
racial bloc voting, and defendants may not rebut that case with evidence of causation or intent. Pp. 2772–2779.

Justice BRENNAN, joined by Justice WHITE, concluded in Part IV–B, that the District Court erred, as a matter of law, in ignoring the significance of the sustained success black voters have experienced in House District 23. The persistent proportional representation for black residents in that district in the last six elections is inconsistent with appellants' allegation that black voters' ability in that district to elect representatives of their choice is not equal to that enjoyed by the white majority. Pp. 2780–2781.

Justice O'CONNOR, joined by THE CHIEF JUSTICE, Justice POWELL, and Justice REHNQUIST, concluded that:

1. Insofar as statistical evidence of divergent racial voting patterns is admitted solely to establish that the minority group is politically cohesive and to assess its prospects for electoral success, such a showing cannot be rebutted by evidence that the divergent voting patterns may be explained by causes other than race. However, evidence of the reasons for divergent voting patterns can in some circumstances be relevant to the overall vote dilution inquiry, and there is no rule against consideration of all evidence concerning voting preferences other than statistical evidence of racial voting patterns. Pp. 2766–2767.

2. Consistent and sustained success by candidates preferred by minority voters is presumptively inconsistent with the existence of a § 2 violation. The District Court erred in assessing the extent of black electoral success in House District 39 and Senate District 22, as well as in House District 23. Except in House District 23, despite these errors the District Court's ultimate conclusion of vote dilution is not clearly erroneous. But in House District 23 appellants failed to establish a violation of § 2. Pp. 2766–2769.

BRENNAN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A, III–B, IV–A, and V, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, J., joined, an opinion with respect to Part III–C, in which MARSHALL, BLACKMUN, and STEVENS, J., joined, and an opinion with respect to Part IV–B, in which WHITE, J., joined. WHITE, J., filed a concurring opinion, post, p. O'CONNOR, J., filed an opinion concurring in the judgment, in which BURGER, C.J., and POWELL and REHNQUIST, J., joined, post, p. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL and BLACKMUN, J.J., joined, post, p. ——.

Attorneys and Law Firms

Lacy H. Thornburg, Attorney General of North Carolina, pro se, argued the cause for appellants. With him on the briefs were Jerris Leonard, Kathleen Heenan McGuin, James Wallace, Jr., Deputy Attorney General for Legal Affairs, and Tiare B. Smiley and Norma S. Harrell, Assistant Attorneys General.

Solicitor General Fried argued the cause for the United States as amicus curiae urging reversal. With him on the brief were Assistant Attorney General Reynolds and Deputy Assistant Attorney General Cooper.

Julius LeVonne Chambers argued the cause for appellants. With him on the briefs for appellants Gingles et al. were Eric Schnapper, C. Lani Guinier, and Leslie J. Winner. C. Allen Foster, Kenneth J. Guminber, Robert N. *343 Hunter, Jr., and Arthur J. Donaldson filed briefs for appellants Eaglin et al.*

* Daniel J. Popeo and George C. Smith filed a brief for the Washington Legal Foundation as amicus curiae urging reversal.

Briefs of amici curiae urging affirmance were filed for the American Civil Liberties Union Foundation, Inc., et al. by Cynthia Hill, Maureen T. Thornton, Lauglin McDonald, and Neil Bradley; for Common Cause by William T. Lake; for the Lawyer's Committee for Civil Rights Under Law et al. by James Robertson, Harold R. Tyler, Jr., Norman Redlich, William L. Robinson, Frank R. Parker, Samuel Rabinove, and Richard T. Foliti; for James G. Martin, Governor of North Carolina, by Victor S. Friedman; for Legal Services of North Carolina by David H. Harris, Jr., Susan M. Perry, Richard Taylor, and Julian Pierce; for the Republican National Committee by Roger Allan Moore and Michael A. Hess; and for Senator Dennis DeConcini et al. by Walter J. Rockier.

Opinion

**2758** Justice BRENNAN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A, III–B, IV–A, and V, and an opinion with respect to Part III–C, in which Justice MARSHALL, Justice BLACKMUN, and Justice STEVENS join, and an opinion with respect to Part IV–B, in which Justice WHITE joins.
This case requires that we construe for the first time § 2 of the Voting Rights Act of 1965, as amended June 29, 1982. 42 U.S.C. § 1973. The specific question to be decided is whether the three-judge District Court, convened in the Eastern District of North Carolina pursuant to 28 U.S.C. § 2284(a) and 42 U.S.C. § 1973c, correctly held that the use in a legislative redistricting plan of multimember districts in five North Carolina legislative districts violated § 2 by impairing the opportunity of black voters "to participate in the political process and to elect representatives of their choice." § 2(b), 96 Stat. 134.

I

BACKGROUND

In April 1982, the North Carolina General Assembly enacted a legislative redistricting plan for the State's Senate and House of Representatives. Appellees, black citizens of North Carolina who are registered to vote, challenged seven districts, one single-member 1 and six multimember 2 districts, alleging that the redistricting scheme impaired black citizens' ability to elect representatives of their choice in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution and of § 2 of the Voting Rights Act. 3

After appellees brought suit, but before trial, Congress amended § 2. The amendment was largely a response to this Court's plurality opinion in Mobile v. Bolden, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), which had declared that, in order to establish a violation either of § 2 or of the Fourteenth or Fifteenth Amendments, minority voters must prove that a contested electoral mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose. Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the "results test," applied by this Court in White v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), and by other federal courts before Bolden, supra. S.Rep. No. 97-417, 97th Cong.2nd Sess. 28 (1982), U.S.Code Cong. & Admin.News 1982, pp. 177, 205 (hereinafter S.Rep.).

*36 Section 2, as amended, 96 Stat. 134, reads as follows:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the *2759 guarantees set forth in section 4(f)(2), as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." Codified at 42 U.S.C. § 1973.

The Senate Judiciary Committee majority Report accompanying the bill that amended § 2, elaborates on the circumstances that might be probative of a § 2 violation, noting the following "typical factors":

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state of political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
"5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

"6. whether political campaigns have been characterized by overt or subtle racial appeals;

"7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

"Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

"whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

"whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." S.Rep., at 28–29, U.S.Code Cong. & Admin.News 1982, pp. 206–207.

The District Court applied the "totality of the circumstances" test set forth in § 2(b) to appellees' statutory claim, and, relying principally on the factors outlined in the Senate *38 Report, held that the redistricting scheme violated § 2 because it resulted in the dilution of black citizens' votes in all seven disputed districts. In light of this conclusion, the court did not reach appellees' constitutional claims. Gingles v. Edmisten, 590 F.Supp. 345 (EDNC 1984).

Preliminarily, the court found that black citizens constituted a distinct population and registered-voter minority in each challenged **2760 district. The court noted that at the time the multimember districts were created, there were concentrations of black citizens within the boundaries of each that were sufficiently large and contiguous to constitute effective voting majorities in single-member districts lying wholly within the boundaries of the multimember districts. With respect to the challenged single-member district, Senate District No. 2, the court also found that there existed a concentration of black citizens within its boundaries and within those of adjoining Senate District No. 6 that was sufficient in numbers and in contiguity to constitute an effective voting majority in a single-member district. The District Court then proceeded to find that the following circumstances combined with the multimember districting scheme to result in the dilution of black citizens' votes.

First, the court found that North Carolina had officially discriminated against its black citizens with respect to their exercise of the voting franchise from approximately 1900 to 1970 by employing at different times a poll tax, a literacy test, a prohibition against ballot (single-shot) voting *39 and designated seat plans 6 for multimember districts. The court observed that even after the removal of direct barriers to black voter registration, such as the poll tax and literacy test, black voter registration remained relatively depressed; in 1982 only 52.7% of age-qualified blacks statewide were registered to vote, whereas 66.7% of whites were registered. The District Court found these statewide depressed levels of black voter registration to be present in all of the disputed districts and to be traceable, at least in part, to the historical pattern of statewide official discrimination.

Second, the court found that historic discrimination in education, housing, employment, and health services had resulted in a lower socioeconomic status for North Carolina blacks as a group than for whites. The court concluded that this lower status both gives rise to special group interests and hinders blacks' ability to participate effectively in the political process and to elect representatives of their choice.

Third, the court considered other voting procedures that may operate to lessen the opportunity of black voters to elect candidates of their choice. It noted that North Carolina has a majority vote requirement for primary elections and, while acknowledging that no black candidate for election to the State General Assembly had failed to win solely because of this requirement, the court concluded that it nonetheless presents a continuing practical impediment to the opportunity of black voting minorities to elect candidates of their choice. The court also remarked on the fact that North Carolina does not have a subdistrict residency requirement for members of the General Assembly elected from multimember *40 districts, a requirement which the court found could offset to some extent the disadvantages minority voters often experience in multimember districts.

Fourth, the court found that white candidates in North Carolina have encouraged **2761 voting along color lines by appealing to racial prejudice. It noted that the record is replete with specific examples of racial appeals, ranging in style from overt and blatant to subtle and furtive, and in date from the 1890's to the 1984 campaign for a seat in the United
States Senate. The court determined that the use of racial appeals in political campaigns in North Carolina persists to the present day and that its current effect is to lessen to some degree the opportunity of black citizens to participate effectively in the political processes and to elect candidates of their choice.

Fifth, the court examined the extent to which blacks have been elected to office in North Carolina, both statewide and in the challenged districts. It found, among other things, that prior to World War II, only one black had been elected to public office in this century. While recognizing that "it has now become possible for black citizens to be elected to office at all levels of state government in North Carolina," 590 F.Supp., at 367, the court found that, in comparison to white candidates running for the same office, black candidates are at a disadvantage in terms of relative probability of success. It also found that the overall rate of black electoral success has been minimal in relation to the percentage of blacks in the total state population. For example, the court noted, from 1971 to 1982 there were at any given time only two-to-four blacks in the 120-member House of Representatives—that is, only 1.6% to 3.3% of House members were black. From 1975 to 1983 there were at any one time only one or two blacks in the 50-member State Senate—that is, only 2% to 4% of State Senators were black. By contrast, at the time of the District Court's opinion, blacks constituted about 22.4% of the total state population.

*41 With respect to the success in this century of black candidates in the contested districts, see also Appendix B to opinion, post, p. —, the court found that only one black had been elected to House District 36—after this lawsuit began. Similarly, only one black had served in the Senate from District 22, from 1975–1980. Before the 1982 election, a black was elected only twice to the House from District 39 (part of Forsyth County); in the 1982 contest two blacks were elected. Since 1973 a black citizen had been elected each 2-year term to the House from District 23 (Durham County), but no black had been elected to the Senate from Durham County. In House District 21 (Wake County), a black had been elected twice to the House, and another black served two terms in the State Senate. No black had ever been elected to the House or Senate from the area covered by House District No. 8, and no black person had ever been elected to the Senate from the area covered by Senate District No. 2.

The court did acknowledge the improved success of black candidates in the 1982 elections, in which 11 blacks were elected to the State House of Representatives, including 5 blacks from the multimember districts at issue here. However, the court pointed out that the 1982 election was conducted after the commencement of this litigation. The court found the circumstances of the 1982 election sufficiently aberrational and the success by black candidates too minimal and too recent in relation to the long history of complete denial of elective opportunities to support the conclusion that black voters' opportunities to elect representatives of their choice were not impaired.

Finally, the court considered the extent to which voting in the challenged districts was racially polarized. Based on statistical evidence presented by expert witnesses, supplemented to some degree by the testimony of lay witnesses, the court found that all of the challenged districts exhibit severe and persistent racially polarized voting.

*42 Based on these findings, the court declared the contested portions of the 1982 redistricting plan violative of § 2 and enjoined appellants from conducting elections pursuant to those portions of the plan. Appellants, the Attorney General of North Carolina and others, took a direct appeal to this Court, pursuant to 28 U.S.C. § 1253, with respect to five of the multimember districts—House Districts 21, 23, 36, and 39, and Senate District 22. Appellants argue, first, that the District Court utilized a legally incorrect standard in determining whether the contested districts exhibit racial bloc voting to an extent that is cognizable under § 2. Second, they contend that the court used an incorrect definition of racially polarized voting and thus erroneously relied on statistical evidence that was not probative of polarized voting. Third, they maintain that the court assigned the wrong weight to evidence of some black candidates' electoral success. Finally, they argue that the trial court erred in concluding that these multimember districts result in black citizens having less opportunity than their white counterparts to participate in the political process and to elect representatives of their choice. We noted probable jurisdiction, 471 U.S. 1064, 105 S.Ct. 2137, 85 L.Ed.2d 495 (1985), and now affirm with respect to all of the districts except House District 23. With regard to District 23, the judgment of the District Court is reversed.

II

SECTION 2 AND VOTE DILUTION THROUGH USE OF MULTIMEMBER DISTRICTS

An understanding both of § 2 and of the way in which multimember districts can operate to impair blacks' ability to elect representatives of their choice is prerequisite to an evaluation of appellants' contentions. First, then, we review amended § 2 and its legislative history in some detail. Second, we explain the theoretical basis for appellees' claim of vote dilution.

*43 A

SECTION 2 AND ITS LEGISLATIVE HISTORY

[1] Subsection 2(a) prohibits all States and political subdivisions from imposing any voting qualifications or prerequisites to voting, or any standards, practices, or procedures which result in the denial or abridgment of the right to vote of any citizen who is a member of a protected class of racial and language minorities. Subsection 2(b) establishes that § 2 has been violated where the “totality of the circumstances” reveal that “the political processes leading to nomination or election ... are not equally open to participation by members of a [protected class] ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” While explaining that “[the extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered” in evaluating an alleged violation, § 2(b) cautions that “nothing in [§ 2] establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.”

The Senate Report which accompanied the 1982 amendments elaborates on the nature of § 2 violations and on the proof required to establish these violations. 7 First and foremost, the Report dispositivey rejects the position of the plurality in Mobile v. Bolden, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), which required proof that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters. 8 See, e.g., S.Rep., at 2, 15–16, 27. The intent test was repudiated for three principal reasons—it is “unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities,” it places an “inordinately difficult” burden of proof on plaintiffs, and it “asks the wrong question.” Id., at 36, U.S.Code Cong. & Admin.News 1982, p. 214. The “right” question, as the Report emphasizes repeatedly, is whether “as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.” Id., at 28, U.S.Code Cong. & Admin.News 1982, p. 206. See also id., at 2, 27, 29, n. 118, 36.

[2] In order to answer this question, a court must assess the impact of the contested structure or practice on minority electoral opportunities “on the basis of objective factors.” Id., at 27, U.S.Code Cong. & Admin.News 1982, p. 205. The Senate Report specifies factors which typically may be relevant to a § 2 claim: the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slateing processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction. Id., at 28–29; see also supra, at ——. The Report notes also that evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous may have probative value. Id., at 29. The Report stresses, however, that this list of typical factors is neither comprehensive nor exclusive. While the enumerated factors will often be pertinent to certain types of § 2 violations, particularly to vote dilution claims, other factors may also be relevant and may be considered. Id., at 29–30. Furthermore, the Senate Committee observed that “there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.” Id., at 29, U.S.Code Cong. & Admin.News 1982, p. 207. Rather, the Committee determined that “the question whether the political processes are ‘equally open’ depends upon a searching practical evaluation of the ‘past and present reality,’” id., at 30, U.S.Code Cong. & Admin.News 1982, p. 208 (footnote omitted), and on a “functional” view

*46 [3] [4] [5] Although the Senate Report espouses a flexible, fact-intensive test for § 2 violations, it limits the circumstances under which § 2 violations may be proved in three ways. First, electoral devices, such as at-large elections, may not be considered *per se* violative of § 2. Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process. *Id.*, at 16. Second, the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation. *Ibid.* Third, the results test does not assume the existence of racial bloc voting; plaintiffs must prove it. *Id.*, at 33.

B

VOTE DILUTION THROUGH THE USE OF MULTIMEMBER DISTRICTS

Appellees contend that the legislative decision to employ multimember, rather than single-member, districts in the contested jurisdictions dilutes their votes by submerging them in a white majority, thus impairing their ability to elect representatives of their choice. *12*

*47 [6] The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives. This Court has long recognized that multimember districts and at-large voting schemes may "operate to minimize or cancel out the voting strength of racial [minorities] in the voting population." *13* *48 Burns **2765** v. *Richardson*, 384 U.S. 73, 88, 86 S.Ct. 1286, 1294, 16 L.Ed.2d 376 (1966) (quoting Fortson v. Dorsey, 379 U.S. 433, 439, 85 S.Ct. 498, 501, 13 L.Ed.2d 401 (1965)). See also *Rogers v. Lodge*, 458 U.S. 613, 617, 102 S.Ct. 3272, 3275, 73 L.Ed.2d 1012 (1982); *White v. Regester*, 412 U.S., at 765, 93 S.Ct., at 2339; *Whitcomb v. Chavis*, 403 U.S. 124, 143, 91 S.Ct. 1858, 1869, 29 L.Ed.2d 363 (1971). The theoretical basis for this type of impairment is that where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters. *14* See, *e.g.*, Grofman, Alternatives, in Representation and Redistricting Issues 113–114. Multimember districts and at-large election schemes, however, are not *per se* violative of minority voters' rights. S.Rep., at 16. Cf. *Rogers v. Lodge, supra*, 458 U.S., at 617, 102 S.Ct., at 3275; *Regester, supra*, 412 U.S., at 765, 93 S.Ct., at 2339; *Whitcomb, supra*, 403 U.S., at 142, 91 S.Ct., at 1868. Minority voters who contend that the multimember form of districting violates § 2, must prove that the use of a multimember electoral structure operates to minimize or cancel out their ability to elect their preferred candidates. See, *e.g.*, S.Rep., at 16.

*7 [8] [9] [10] [11] While many or all of the factors listed in the Senate Report may be relevant to a claim of vote dilution through submergence in multimember districts, unless there is a conjunction of the following circumstances, the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice. *15* Stated succinctly, *49 a **2766** bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group. Bonapfel 355; Blacksher & Menefee 34; Butler 903; Carpeneti 696–699; Davidson, Minority Vote Dilution: An Overview (hereinafter Davidson), in Minority Vote Dilution 4; Grofman, Alternatives 117. Cf. *Bolden*, 446 U.S., at 105, n. 3, 100 S.Ct., at 1520, n. 3 (MARSHALL, J., dissenting) ("It is obvious *50 that the greater the degree to which the electoral minority is homogeneous and insular and the greater the degree that bloc voting occurs along majority-minority lines, the greater will be the extent to which the minority's voting power is diluted by multimember districting"). These circumstances are necessary preconditions for multimember districts to operate to impair minority voters' ability to elect representatives of their choice for the following reasons. First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. *16* If it is not, as would be the case in a substantially integrated district, the *multi-member form* of the district cannot be responsible for minority voters' inability to elect its candidates. *17* Cf. *51 Rogers*, 458 U.S., at 616, 102 S.Ct., at 3275. See also, Blacksher & Menefee 51–56, 58; Bonapfel 355; Carpeneti 696; Davidson 4; Jewell 130. Second, the minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. Blacksher & Menefee 51–55, 58–60, and n. 344; Carpeneti 696–697; Davidson 4. Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable...
it—in the absence of special circumstances, such as the minority candidate running unopposed, see, infra, at ——, and n. 26—usually **2767** to defeat the minority's preferred candidate. See, e.g., Blacksher & Menefee 51, 53, 56–57, 60. C.f. Rogers, supra, at 616–617, 102 S.Ct., at 3274–3275; Whitcomb, 403 U.S., at 158–159, 91 S.Ct., at 1877; McMillan v. Escambia County, Fla., 748 F.2d 1037, 1043 (CA5 1984). In establishing this last circumstance, the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives.

Finally, we observe that the usual predictability of the majority's success distinguishes structural dilution from the mere loss of an occasional election. Cf. Davis v. Bandemer, 478 U.S. 109, 131–133, 139–140, 106 S.Ct. 2797, ——, 92 L.Ed.2d 85 (1986) (opinion of WHITE, J.); Bolden, supra, 446 U.S., at 111, n. 7, 100 S.Ct., at 1523, n. 7 (MARSHALL, J., dissenting); Whitcomb, supra, 403 U.S., at 153, 91 S.Ct., at 1874. See also Blacksher & Menefee 57, n. 333; Note, Geometry and Geography: Racial Gerrymandering and the Voting Rights Act, 94 Yale L.J. 189, 200, n. 66 (1984) (hereinafter Note, Geometry and Geography).

**52 III**

**RACIALLY POLARIZED VOTING**

Having stated the general legal principles relevant to claims that § 2 has been violated through the use of multimember districts, we turn to the arguments of appellants and of the United States as amicus curiae addressing racially polarized voting. 18 First, we describe the District Court's treatment of racially polarized voting. Next, we consider appellants' claim that the District Court used an incorrect legal standard to determine whether racial bloc voting in the contested districts was sufficiently severe to be cognizable as an element of a § 2 claim. Finally, we consider appellants' contention that the trial court employed an incorrect definition of racially polarized voting and thus erroneously relied on statistical evidence that was not probative of racial bloc voting.

A

**THE DISTRICT COURT'S TREATMENT OF RACIALLY POLARIZED VOTING**

The investigation conducted by the District Court into the question of racial bloc voting credited some testimony of lay witnesses, but relied principally on statistical evidence presented by appellees' expert witnesses, in particular that offered by Dr. Bernard Grofman. Dr. Grofman collected and evaluated data from 53 General Assembly primary and general elections involving black candidacies. These elections were held over a period of three different election years in the six originally challenged multimember districts. 19 Dr. Grofman subjected the data to two complementary methods of analysis—extreme case analysis and bivariate ecological *53 regression analysis* —in order to determine whether blacks and whites in these districts differed in their voting behavior. These analytic techniques yielded data concerning the voting patterns of the two races, including estimates of the percentages of members of each race who voted for black candidates.

The court's initial consideration of these data took the form of a three-part inquiry: did the data reveal any correlation between **2768** the race of the voter and the selection of certain candidates; was the revealed correlation statistically significant; and was the difference in black and white voting patterns "substantively significant"? The District Court found that blacks and whites generally preferred different candidates and, on that basis, found voting in the districts to be racially correlated. 21 The court accepted Dr. Grofman's expert opinion that the correlation between the race of the voter and the voter's choice of certain candidates was statistically significant. 22 Finally, adopting Dr. Grofman's terminology, see *54 Tr. 195*, the court found that in all but 2 of the 53 elections 23 the degree of racial bloc voting was "so marked as to be substantively significant, in the sense that the results of the individual election would have been different depending upon whether it had been held among only the white voters or only the black voters." 590 F.Supp., at 368.

The court also reported its findings, both in tabulated numerical form and in written form, that a high percentage of black voters regularly supported black candidates and that most white voters were extremely reluctant to vote for black candidates. The court then considered the relevance to the existence of legally significant white bloc voting of the fact that black candidates have won some elections. It determined that in most instances, special circumstances, such as incumbency and lack of opposition, rather than a diminution in usually severe white bloc voting, accounted for these candidates' success. The court also suggested that
black voters' reliance on bullet voting was a significant factor in their successful efforts to elect candidates of their choice. Based on all of the evidence before it, the trial court concluded that each of the districts experienced racially polarized voting "in a persistent and severe degree." Id., at 367.

B

THE DEGREE OF BLOC VOTING THAT IS LEGALLY SIGNIFICANT UNDER § 2

1

Appellants' Arguments

North Carolina and the United States argue that the test used by the District Court to determine whether voting patterns in the disputed districts are racially polarized to an extent cognizable under § 2 will lead to results that are inconsistent with congressional intent. North Carolina maintains *55 that the court considered legally significant racially polarized voting to occur whenever "less than 50% of the white voters cast a ballot for the black candidate." Brief for Appellants 36. Appellants also argue that racially polarized voting is legally significant only when it always results in the defeat of black candidates. Id., at 39–40.

The United States, on the other hand, isolates a single line in the court's opinion and identifies it as the court's complete test. According to the United States, the District Court adopted a standard under which legally significant racial bloc voting is deemed to exist whenever "the results of the individual election would have been different depending upon whether it had been held among only the white voters or only the black voters in the election." **2769 Brief for United States as Amicus Curiae 29 (quoting 590 F.Supp., at 368). We read the District Court opinion differently.

[12] The purpose of inquiring into the existence of racially polarized voting is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates. See supra, at ——. Thus, the question whether a given district experiences legally significant racially polarized voting requires discrete inquiries into minority and white voting practices. A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, Blacksher & Menefee 59–60, and n. 344, and, consequently, establishes minority bloc voting within the context of § 2. And, in general, a white bloc vote that normally will defeat the combined strength of minority support plus white "crossover" votes rises to the level of legally significant white bloc voting. Id., at 60. The amount of white bloc voting that can generally "minimize or cancel," S.Rep., at 28, U.S.Code Cong. & Admin.News 1982, p. 205; Regester, 412 U.S., at 765, 93 S.Ct., at 2339, black voters' ability to elect representatives of their choice, however, will vary from district to district according to a number of factors, including the nature of the allegedly dilutive electoral mechanism; the presence or absence of other potentially dilutive electoral devices, such as majority vote requirements, designated posts, and prohibitions against bullet voting; the percentage of registered voters in the district who are members of the minority group; the size of the district; and, in multimember districts, the number of seats open and the number of candidates in the field. 24 See, e.g., Butler 874–876; Davidson 5; Jones,

[13] [14] Because loss of political power through vote dilution is distinct from the mere inability to win a particular election, Whitcomb, 403 U.S., at 153, 91 S.Ct., at 1874, a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election. 25 Blacksher & Menefee 61; Note, Geometry and Geography **2770 200, n. 66 ("Racial polarization should be seen as an attribute not of a single election, but rather of a polity viewed over time. The concern is necessarily temporal and the analysis historical because the evil to be avoided is the subordination of minority groups in American politics, not the defeat of individuals in particular electoral contests"). Also for this reason, in a district where elections are shown usually to be polarized, the fact that racially polarized voting is not present in one or a few individual elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting. Furthermore, the success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting, may explain minority electoral success in a polarized contest. 26

As must be apparent, the degree of racial bloc voting that is cognizable as an element of a § 2 vote dilution claim will *58 vary according to a variety of factual circumstances. Consequently, there is no simple doctrinal test for the existence of legally significant racial bloc voting. However, the foregoing general principles should provide courts with substantial guidance in determining whether evidence that black and white voters generally prefer different candidates rises to the level of legal significance under § 2.

**2771 In sharp contrast to its findings of strong black support for black candidates, the District Court found that a substantial majority of white voters would rarely, if ever, vote for a black candidate. In the primary elections, white support for black candidates ranged between 8% and 50%, and in the general elections it ranged between 28% and 49%. See ibid. The court also determined that, on average, 81.7% of white voters did not vote for any black candidate in the primary elections. In the general elections, white voters almost always ranked black candidates either last or next to last in the multicandidate field, except in heavily Democratic areas where white voters consistently ranked black candidates last among the Democrats, if not last or next to last among all candidates. The court further observed that approximately two-thirds of white voters did not vote for black candidates in general elections, even after the candidate had won the Democratic primary and the choice was to vote for a Republican or for no one. 28

*60 While the District Court did not state expressly that the percentage of whites who refused to vote for black candidates in the contested districts would, in the usual course of events, result in the defeat of the minority's candidates, that
conclusion is apparent both from the court's factual findings and from the rest of its analysis. First, with the exception of House District 23, see infra, at ——, the trial court's findings clearly show that black voters have enjoyed only minimal and sporadic success in electing representatives of their choice. See Appendix B to opinion, post, p. ——. Second, where black candidates won elections, the court closely examined the circumstances of those elections before concluding that the success of these blacks did not negate other evidence, derived from all of the elections studied in each district, that legally significant racially polarized voting exists in each district. For example, the court took account of the benefits incumbency and running essentially unopposed conferred on some of the successful black candidates, as well as of the "very different order of preference blacks and whites assigned black candidates," in reaching its conclusion that legally significant racial polarization exists in each district.

[16] We conclude that the District Court's approach, which tested data derived from three election years in each district, and which revealed that blacks strongly supported black candidates, while, to the black candidates' usual detriment, whites rarely did, satisfactorily addresses each facet of the proper legal standard.

EVIDENCE OF RACIALLY POLARIZED VOTING

Appellants' Argument

North Carolina and the United States also contest the evidence upon which the District Court relied in finding that voting patterns in the challenged districts were racially polarized. They argue that the term "racially polarized voting" must, as a matter of law, refer to voting patterns for which the principal cause is race. They contend that the District Court utilized a legally incorrect definition of racially polarized voting by relying on bivariate statistical analyses which merely demonstrated a correlation between the race of the voter and the level of voter support for certain candidates, but which did not prove that race was the primary determinant of voters' choices. According to appellants and the United States, only multiple regression analysis, which can take account of other variables which might also explain voters' choices, such as "party affiliation, age, religion, income, [ ] incumbency, education, campaign expenditures," Brief for *62 Appellants 42, "media use measured by cost, ... name, identification, or distance that a candidate lived from a particular precinct," Brief for United States as Amicus Curiae 30, n. 57, can prove that race was the primary determinant of voter behavior.

[17] Whether appellants and the United States believe that it is the voter's race or the candidate's race that must be the primary determinant of the voter's choice is unclear; indeed, their catalogs of relevant variables suggest both. Age, religion, income, and education seem most relevant to the voter; incumbency, campaign expenditures, name identification, and media use are pertinent to the candidate; and party affiliation could refer both to the voter and the candidate. In either case, we disagree: For purposes of § 2, the legal concept of racially polarized voting incorporates neither causation nor intent. It means simply that the race of voters correlates with the selection of a certain candidate or candidates; that is, it refers to the situation where different races (or minority language groups) vote in blocs for different candidates. Grofman, Migalski, & Noviello 203. As we demonstrate infra, appellants' theory of racially polarized voting would thwart the goals Congress sought to achieve when it amended § 2 and would prevent courts from performing the "functional" analysis of the political process, S.Rep., at 30, n. 119, U.S.Code Cong. & Admin.News 1982, p. 208, and the "searching practical evaluation of the 'past *63 and present reality,' " id., at 30, U.S.Code Cong. & Admin.News 1982, p. 208 (footnote omitted), mandated by the Senate Report.

Causation Irrelevant to Section 2 Inquiry

The first reason we reject appellants' argument that racially polarized voting refers to voting patterns that are in some way caused by race, rather than to voting patterns that are merely correlated with the race of the voter, is that the reasons black and white voters vote differently have no relevance to the central inquiry of § 2. By contrast, the correlation between race of voter and the selection of certain candidates is crucial to that inquiry.
[18] Both § 2 itself and the Senate Report make clear that the critical question in a § 2 claim is whether the use of a contested electoral practice or structure results in members of a protected group having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. See, e.g., S.Rep., at 2, 27, 28, 29, n. 118, 36. As we explained, supra, at ———, multimember districts may impair the ability of blacks to elect representatives of their choice where blacks vote sufficiently as a bloc to be able to elect their preferred candidates in a black majority, single-member district and where a white majority votes sufficiently as a bloc usually to defeat the candidates chosen by blacks. It is the difference between the choices made by blacks and whites—not the reasons for that difference—that results in blacks having less opportunity than whites to elect their preferred representatives. Consequently, we conclude that under the “results test” of § 2, only the correlation between race of voter and selection of certain candidates, not the causes of the correlation, matters.

The irrelevance to a § 2 inquiry of the reasons why black and white voters vote differently supports, by itself, our rejection of appellants’ theory of racially polarized voting. However, their theory contains other equally serious flaws *64 that merit further attention. As we demonstrate below, the addition of irrelevant variables distorts the equation and yields results that are indisputably incorrect under § 2 and the Senate Report.

Race of Voter as Primary Determinant of Voter Behavior

Appellants and the United States contend that the legal concept of “racially polarized voting” refers not to voting patterns that are merely correlated with the voter’s race, but to voting patterns that are determined primarily by the voter’s race, rather than by the voter’s other socioeconomic characteristics.

The first problem with this argument is that it ignores the fact that members of geographically insular racial and ethnic groups frequently share socioeconomic characteristics, such as income level, employment status, amount of education, housing and other living conditions, religion, language, and so forth. See, e.g., Butler 902 (Minority group “members’ shared concerns, including political ones, are ... a function of group status, and as such are largely involuntary... As a group blacks are concerned, for example, with police brutality, substandard housing, unemployment, etc., because these problems fall disproportionately upon the group”); S. Verba & N. Nie, Participation in America 151-152 (1972) (“Socioeconomic status ... is closely related to race. Blacks in American society are likely to be in lower-status jobs than whites, to have less education, and to have lower incomes”). Where such characteristics are shared, race or ethnic group not only denotes color or place of origin, it also functions as a shorthand notation for common social and economic characteristics. Appellants’ definition of racially polarized voting is even more pernicious where shared characteristics are causally related to race or ethnicity. The opportunity to achieve high employment status and income, for example, is often influenced by the presence or absence of racial or ethnic discrimination. A definition of racially polarized voting which *65 holds that black bloc voting does not exist when black voters’ choice of certain candidates is most strongly influenced by the fact that the voters have low incomes **2774 and menial jobs—when the reason most of those voters have menial jobs and low incomes is attributable to past or present racial discrimination—runs counter to the Senate Report’s instruction to conduct a searching and practical evaluation of past and present reality, S.Rep., at 30, and interferes with the purpose of the Voting Rights Act to eliminate the negative effects of past discrimination on the electoral opportunities of minorities. Id. at 5, 40.

Furthermore, under appellants’ theory of racially polarized voting, even uncontrovertible evidence that candidates strongly preferred by black voters are always defeated by a bloc voting white majority would be dismissed for failure to prove racial polarization whenever the black and white populations could be described in terms of other socioeconomic characteristics.

To illustrate, assume a racially mixed, urban multimember district in which blacks and whites possess the same socioeconomic characteristics that the record in this case attributes to blacks and whites in Halifax County, a part of Senate District 2. The annual mean income for blacks in this district is $10,465, and 47.8% of the black community lives in poverty. More than half—51.5%—of black adults over the age of 25 have only an eighth-grade education or less. Just over half of black citizens reside in their own homes; 48.9% live in rental units. And, almost a third of all black households are without a car. In contrast, only 12.6% of the whites in the district live below the poverty line. Whites enjoy a mean income of $19,042. White residents are better educated than
blacks—only 25.6% of whites over the age of 25 have only an eighth-grade education or less. Furthermore, only 26.2% of whites live in rental units, and only 10.2% live in households with no vehicle available. 1 App., Ex. 44. As is the case in Senate District 2, blacks in this hypothetical urban district have never been able to elect a representative of their choice.

According to appellants' theory of racially polarized voting, proof that black and white voters in this hypothetical district regularly choose different candidates and that the blacks' preferred candidates regularly lose could be rejected as not probative of racial bloc voting. The basis for the rejection would be that blacks chose a certain candidate, not principally because of their race, but principally because this candidate best represented the interests of residents who, because of their low incomes, are particularly interested in government-subsidized health and welfare services; who are generally poorly educated, and thus share an interest in job training programs; who are, to a greater extent than the white community, concerned with rent control issues; and who favor major public transportation expenditures. Similarly, whites would be found to have voted for a different candidate, not principally because of their race, but primarily because that candidate best represented the interests of residents who, due to their education and income levels, and to their property and vehicle ownership, favor gentrification, low residential property taxes, and extensive expenditures for street and highway improvements.

Congress could not have intended that courts employ this definition of racial bloc voting. First, this definition leads to results that are inconsistent with the effects test adopted by Congress when it amended § 2 and with the Senate Report's admonition that courts take a "functional" view of the political process. S.Rep. 30, n. 119, U.S.Code Cong. & Admin.News 1982, p. 208, and conduct a searching and practical evaluation of reality. Id., at 30. A test for racially polarized voting that denies the fact that race and socioeconomic characteristics are often closely correlated permits neither a practical evaluation of reality nor a functional analysis of vote dilution. And, contrary to Congress' intent in adopting the "results test," appellants' proposed definition could result in the inability of minority voters to establish a critical *67 element of a vote dilution claim, even though both races engage in "monolithic" bloc voting, id., at 33, U.S.Code Cong. & Admin.News **275 1982, p. 211, and generations of black voters have been unable to elect a representative of their choice.

Second, appellants' interpretation of "racially polarized voting" creates an irreconcilable tension between their proposed treatment of socioeconomic characteristics in the bloc voting context and the Senate Report's statement that "the extent to which members of the minority group ... bear the effects of discrimination in such areas as education, employment and health" may be relevant to a § 2 claim. Id., at 29, U.S.Code Cong. & Admin. News 1982, p. 206. We can find no support in either logic or the legislative history for the anomalous conclusion to which appellants' position leads—that Congress intended, on the one hand, that proof that a minority group is predominately poor, uneducated, and unhealthy should be considered a factor tending to prove a § 2 violation; but that Congress intended, on the other hand, that proof that the same socioeconomic characteristics greatly influence black voters' choice of candidates should destroy these voters' ability to establish one of the most important elements of a vote dilution claim.

Race of Candidate as Primary
Determinant of Voter Behavior

North Carolina's and the United States' suggestion that racially polarized voting means that voters select or reject candidates principally on the basis of the candidate's race is also misplaced.

[19] First, both the language of § 2 and a functional understanding of the phenomenon of vote dilution mandate the conclusion that the race of the candidate per se is irrelevant to racial bloc voting analysis. Section 2(b) states that a violation is established if it can be shown that members of a protected minority group "have less opportunity than other members of the electorate to ... elect representatives of their choice." *68 Emphasis added.) Because both minority and majority voters often select members of their own race as their preferred representatives, it will frequently be the case that a black candidate is the choice of blacks, while a white candidate is the choice of whites. Cf. Letter to the Editor from Chandler Davidson, 17 New Perspectives 38 (Fall 1985). Indeed, the facts of this case illustrate that tendency—blacks preferred black candidates, whites preferred white candidates. Thus, as a matter of convenience, we and the District Court may refer to the preferred representative of black voters as the "black candidate" and to the preferred representative of
white voters as the "white candidate." Nonetheless, the fact that race of voter and race of candidate is often correlated is not directly pertinent to a § 2 inquiry. Under § 2, it is the status of the candidate as the chosen representative of a particular racial group, not the race of the candidate, that is important.

An understanding of how vote dilution through submergence in a white majority works leads to the same conclusion. The essence of a submergence claim is that minority group members prefer certain candidates whom they could elect were it not for the interaction of the challenged electoral law or structure with a white majority that votes as a significant bloc for different candidates. Thus, as we explained in Part III, supra, the existence of racial bloc voting is relevant to a vote dilution claim in two ways. Bloc voting by blacks tends to prove that the black community is politically cohesive, that is, it shows that blacks prefer certain candidates whom they could elect in a single-member, black majority district. Bloc voting by a white majority tends to prove that blacks will generally be unable to elect representatives of their choice. Clearly, only the race of the voter, not the race of the candidate, is relevant to vote dilution analysis. See, e.g., Blackshear & Menese, 59-60; Grofman, Should Representatives be Typical?, in Representation and Redistricting Issues 98; Note, Geometry and Geography 207.

Second, appellants' suggestion that racially polarized voting refers to voting patterns where whites vote for white candidates because they prefer members of their own race or are hostile to blacks, as opposed to voting patterns where whites vote for white candidates because the white candidates spent more on their campaigns, utilized more media coverage, and thus enjoyed greater name recognition than the black candidates, fails for another, independent reason. This argument, like the argument that the race of the voter must be the primary determinant of the voter's ballot, is inconsistent with the purposes of § 2 and would render meaningless the Senate Report factor that addresses the impact of low socioeconomic status on a minority group's level of political participation.

Congress intended that the Voting Rights Act eradicate inequalities in political opportunities that exist due to the vestigial effects of past purposeful discrimination. S.Rep., at 5, 40; H.R.Rep. No. 97-227, p. 31 (1981). Both this Court and other federal courts have recognized that political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes. See, e.g., White v. Regester, 412 U.S., at 769-769, 93 S.Ct., at 2340-2341; Kirksey v. Board of Supervisors of Hinds County, Miss., 554 F.2d 139, 145-146 (CA5) (en banc), cert. denied, 434 U.S. 968, 98 S.Ct. 512, 54 L.Ed.2d 454 (1977). See also S. Verba & N. Nie, Participation in America 152 (1972). The Senate Report acknowledges this tendency and instructs that "the extent to which members of the minority group ... bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process," S.Rep., at 29, U.S.Code Cong. & Admin.News 1982, p. 206 (footnote omitted), is a factor which may be probative of unequal opportunity to participate in the political process and to elect representatives. Courts and commentators have recognized further that candidates generally must spend more money in order to win *70 election in a multimember district than in a single-member district. See, e.g., Graves v. Barnes, 343 F.Supp. 704, 720-721 (WD Tex.1972), aff'd in part and rev'd in part sub nom. White v. Regester, supra. Berry & Dye 88; Davidson & Fraga, Nonpartisan Slating Groups in an At-Large Setting, in Minority Vote Dilution 122-123; Derfner 554, n. 126; Jewell 131; Karnig, Black Representation on City Councils, 12 Urb. Aff. Q. 223, 230 (1976). If, because of inferior education and poor employment opportunities, blacks earn less than whites, they will not be able to provide the candidates of their choice with the same level of financial support that whites can provide theirs. Thus, electoral losses by candidates preferred by the black community may well be attributable in part to the fact that their white opponents outspent them. But, the fact is that, in this instance, the economic effects of prior discrimination have combined with the multimember electoral structure to afford blacks less opportunity than whites to participate in the political process and to elect representatives of their choice. It would be both anomalous and inconsistent with congressional intent to hold that, on the one hand, the effects of past discrimination which hinder blacks' ability to participate in the political process tend to prove a § 2 violation, while holding on the other hand that, where these same effects of past discrimination deter whites from voting for blacks, blacks cannot make out a crucial element of a vote dilution claim. Accord, Escambia County, 748 F.2d, at 1043 ("[T]he failure of the blacks to solicit white votes may be caused by the effects of past discrimination"). (quoting United States v. Dallas County Comm'n, 739 F.2d 1529, 1536 (CA11 1984); United States v. Marengo County Comm'n, 731 F.2d, at 1567.)
Racial Animosity as Primary Determinant of Voter Behavior

[20] Finally, we reject the suggestion that racially polarized voting refers only to \*\*\*2777 white bloc voting which is caused by \*71 white voters' racial hostility toward black candidates. \*33 To accept this theory would frustrate the goals Congress sought to achieve by repudiating the intent test of Mobile v. Bolden, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), and would prevent minority voters who have clearly been denied an opportunity to elect representatives of their choice from establishing a critical element of a vote dilution claim.

In amending § 2, Congress rejected the requirement announced by this Court in Bolden, supra, that § 2 plaintiffs must prove the discriminatory intent of state or local governments in adopting or maintaining the challenged electoral mechanism. \*34 Appellants' suggestion that the discriminatory intent of individual white voters must be proved in order to make out a § 2 claim must fail for the very reasons Congress rejected the intent test with respect to governmental bodies. See Engstrom, The Reincarnation of the Intent Standard: Federal Judges and At-Large Election Cases, 28 How. L.J. 495 (1985).

The Senate Report states that one reason the Senate Committee abandoned the intent test was that "the Committee ... heard persuasive testimony that the intent test is unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities." S.Rep., at 36, U.S.Code Cong. & Admin.News 1982, p. 214. The Committee found the testimony of Dr. Arthur S. \*72 Flemming, Chairman of the United States Commission on Civil Rights, particularly persuasive. He testified:

"[Under an intent test] [I]t is inevitable that minorities will have to explore the motivations of individual council members, mayors, and other citizens. The question would be whether their decisions were motivated by invidious racial considerations. Such inquiries can only be divisive, threatening to destroy any existing racial progress in a community. It is the intent test, not the results test, that would make it necessary to brand individuals as racist in order to obtain judicial relief." Ibid. (footnote omitted).

The grave threat to racial progress and harmony which Congress perceived from requiring proof that racism caused the adoption or maintenance of a challenged electoral mechanism is present to a much greater degree in the proposed requirement that plaintiffs demonstrate that racial animosity determined white voting patterns. Under the old intent test, plaintiffs might succeed by proving only that a limited number of elected officials were racist; under the new intent test plaintiffs would be required to prove that most of the white community is racist in order to obtain judicial relief. It is difficult to imagine a more racially divisive requirement.

A second reason Congress rejected the old intent test was that in most cases it placed an "inordinately difficult burden" on § 2 plaintiffs. Ibid. The new intent test would be equally, if not more, burdensome. In order to prove that a specific factor—racial hostility—determined white voters' ballots, it would be necessary to demonstrate that other potentially relevant \*\*\*2778 causal factors, such as socioeconomic characteristics and candidate expenditures, do not correlate better than racial animosity with white voting behavior. As one commentator has explained:

\*73 "Many of the[se] independent variables ... would be all but impossible for a social scientist to operationalize as interval-level independent variables for use in a multiple regression equation, whether on a step-wise basis or not. To conduct such an extensive statistical analysis as this implies, moreover, can become prohibitively expensive.

"Compared to this sort of effort, proving discriminatory intent in the adoption of an at-large election system is both simple and inexpensive." McCrary, Discriminatory Intent: The Continuing Relevance of "Purpose" Evidence in Vote-Dilution Lawsuits, 28 How. L.J. 463, 492 (1985) (footnote omitted).

The final and most dispositive reason the Senate Report repudiated the old intent test was that it "asks the wrong question." S.Rep., at 36, U.S.Code Cong. & Admin.News 1982, p. 214. Amended § 2 asks instead "whether minorities have equal access to the process of electing their representatives." Ibid.

Focusing on the discriminatory intent of the voters, rather than the behavior of the voters, also asks the wrong question. All that matters under § 2 and under a functional theory
of vote dilution is voter behavior, not its explanations. Moreover, as we have explained in detail, supra, requiring proof that racial considerations actually caused voter behavior will result—contrary to congressional intent—in situations where a black minority that functionally has been totally excluded from the political process will be unable to establish a § 2 violation. The Senate Report's remark concerning the old intent test thus is pertinent to the new test: The requirement that a "court ... make a separate ... finding of intent, after accepting the proof of the factors involved in the White [v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314] analysis ... [would] seriously cloud[d] the prospects of eradicating the remaining instances of racial discrimination in American elections." Id., at 37, U.S.Code Cong. & Admin.News 1982, p. 215. We therefore decline to adopt such a requirement.

*74 6

Summary

[21] In sum, we would hold that the legal concept of racially polarized voting, as it relates to claims of vote dilution, refers only to the existence of a correlation between the race of voters and the selection of certain candidates. Plaintiffs need not prove causation or intent in order to prove a prima facie case of racial bloc voting and defendants may not rebut that case with evidence of causation or intent.

IV

THE LEGAL SIGNIFICANCE OF SOME BLACK CANDIDATES' SUCCESS

A

[22] North Carolina and the United States maintain that the District Court failed to accord the proper weight to the success of some black candidates in the challenged districts. Black residents of these districts, they point out, achieved improved representation in the 1982 General Assembly election. They also note that blacks in House District 23 have enjoyed proportional representation consistently since 1973 and that blacks in the other districts have occasionally enjoyed nearly proportional representation. This electoral success demonstrates conclusively, appellants and the United States argue, that blacks in those districts do not have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). Essentially, appellants and the United States contend that if a racial minority gains proportional or nearly proportional representation in a single election, that fact alone precludes, as a matter of law, finding a § 2 violation.

Section 2(b) provides that "[t]he extent to which members of a protected class have been elected to office ... is one circumstance which may be considered." 42 U.S.C. § 1973(b). The Senate Committee Report also identifies the extent to which minority candidates have succeeded as a pertinent factor. S.Rep., at 29. However, the Senate Report expressly states that "the election of a few minority candidates does not 'necessarily foreclose the possibility of dilution of the black vote,' " noting that if it did, "the possibility exists that the majority citizens might evade § 2 by manipulating the election of a 'safe' minority candidate." Id., at 29, n. 115, U.S.Code Cong. & Admin.News 1982, p. 207, quoting Zimmer v. McKeithen, 485 F.2d 1297, 1307 (CA5 1973) (en banc), aff'd sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976) (per curiam ). The Senate Committee decided, instead, to "require an independent consideration of the record." S.Rep., at 29, n. 115, U.S.Code Cong. & Admin.News 1982, p. 207. The Senate Report also emphasizes that the question whether "the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality.' " Id., at 30, U.S.Code Cong. & Admin.News 1982, p. 208 (footnote omitted). Thus, the language of § 2 and its legislative history plainly demonstrate that proof that some minority candidates have been elected does not foreclose a § 2 claim.

[23] Moreover, in conducting its "independent consideration of the record" and its "searching practical evaluation of the 'past and present reality,' " the District Court could appropriately take account of the circumstances surrounding recent black electoral success in deciding its significance to appellees' claim. In particular, as the Senate Report makes clear, id., at 29, n. 115, the court could properly notice the fact that black electoral success increased markedly in the 1982 election—an election that occurred after the instant lawsuit had been filed—and could properly consider to what extent "the pendency of this very litigation [might have] worked a one-time advantage for black candidates in
the form of unusual organized political support by white leaders concerned to forestall single-member districting.” 37
590 F.Supp., at 367, n. 27.

Nothing in the statute or its legislative history prohibited the court from viewing with some caution black candidates’ success in the 1982 election, and from deciding on the basis of all the relevant circumstances to accord greater weight to blacks’ relative lack of success over the course of several recent elections. Consequently, we hold that the District Court did not err, as **2780 a matter of law, in refusing to treat the fact that some black candidates have succeeded as dispositive of appellees’ § 2 claim. Where multimember districting generally works to dilute the minority vote, it cannot be defended on the ground that it sporadically and serendipitously benefits minority voters.

*77 B

[24] The District Court did err, however, in ignoring the significance of the sustained success black voters have experienced in House District 23. In that district, the last six elections have resulted in proportional representation for black residents. This persistent proportional representation is inconsistent with appellees’ allegation that the ability of black voters in District 23 to elect representatives of their choice is not equal to that enjoyed by the white majority.

In some situations, it may be possible for § 2 plaintiffs to demonstrate that such sustained success does not accurately reflect the minority group’s ability to elect its preferred representatives, 38 but appellees have not done so here. Appellees presented evidence relating to black electoral success in the last three elections; they failed utterly, though, to offer any explanation for the success of black candidates in the previous three elections. Consequently, we believe that the District Court erred, as a matter of law, in ignoring the sustained success black voters have enjoyed in House District 23, and would reverse with respect to that District.

V

ULTIMATE DETERMINATION OF VOTE DILUTION

Finally, appellants and the United States dispute the District Court’s ultimate conclusion that the multimember districting scheme at issue in this case deprived black voters of an equal opportunity to participate in the political process and to elect representatives of their choice.

A

As an initial matter, both North Carolina and the United States contend that the District Court’s ultimate conclusion that the challenged multimember districts operate to dilute *78 black citizens’ votes is a mixed question of law and fact subject to de novo review on appeal. In support of their proposed standard of review, they rely primarily on Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), a case in which we reconfirmed that, as a matter of constitutional law, there must be independent appellate review of evidence of “actual malice” in defamation cases. Appellants and the United States argue that because a finding of vote dilution under amended § 2 requires the application of a rule of law to a particular set of facts it constitutes a legal, rather than factual, determination. Reply Brief for Appellants 7; Brief for United States as Amicus Curiae 18–19. Neither appellants nor the United States cite our several precedents in which we have treated the ultimate finding of vote dilution as a question of fact subject to the clearly-erroneous standard of Rule 52(a). See, e.g., Rogers v. Lodge, 458 U.S., at 622–627, 102 S.Ct., at 3278–3281; City of Rome v. United States, 446 U.S. 156, 183, 100 S.Ct. 1548, 1564, 64 L.Ed.2d 119 (1980); White v. Regester, 412 U.S., at 765–770, 93 S.Ct., at 2339–2341. Cf. Anderson v. Bessemer City, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

In Regester, supra, we noted that the District Court had based its conclusion that minority voters in two multimember districts in Texas had less opportunity to participate in the political process than majority voters on the totality of the circumstances and stated that

**2781 “we are not inclined to overturn these findings, representing as they do a blend of history and an intensely local appraisal of the design and impact of the ... multimember district in the light of past and present reality, political and otherwise.” Id., 412 U.S., at 769–770, 93 S.Ct., at 2341.

Quoting this passage from Regester with approval, we expressly held in Rogers v. Lodge, supra, that the question
whether an at-large election system was maintained for discriminatory purposes and subsidiary issues, which include whether that system had the effect of diluting the minority vote, were questions of fact, reviewable under Rule 52(a)'s clearly-erroneous standard. 458 U.S., at 622–623, 102 S.Ct., at 3278–3279. Similarly, in City of Rome v. United States, we declared that the question whether certain electoral structures had a "discriminatory effect," in the sense of diluting the minority vote, was a question of fact subject to clearly-erroneous review. 446 U.S., at 183, 100 S.Ct., at 1565.

[25] We reaffirm our view that the clearly-erroneous test of Rule 52(a) is the appropriate standard for appellate review of a finding of vote dilution. As both amended § 2 and its legislative history make clear, in evaluating a statutory claim of vote dilution through districting, the trial court is to consider the "totality of the circumstances" and to determine, based "upon a searching practical evaluation of the 'past and present reality,' " S.Rep., at 30, U.S.Code Cong. & Admin.News 1982, p. 208 (footnote omitted), whether the political process is equally open to minority voters. "This determination is peculiarly dependent upon the facts of each case," Rogers, supra, 458 U.S., at 621, 102 S.Ct., at 3277, quoting Nevett v. Sides, 571 F.2d 209, 224 (CA5 1978), and requires "an intensely local appraisal of the design and impact" of the contested electoral mechanisms. 458 U.S., at 622, 102 S.Ct., at 3278. The fact that amended § 2 and its legislative history provide legal standards which a court must apply to the facts in order to determine whether § 2 has been violated does not alter the standard of review. As we explained in Bose, Rule 52(a) "does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." 466 U.S., at 501, 104 S.Ct., at 1960, citing Pullman-Standard v. Swint, 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982); Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 855, n. 15, 102 S.Ct. 2182, 2189, n. 15, 72 L.Ed.2d 606 (1982). Thus, the application of the clearly-erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law.

*80 B

[26] The District Court in this case carefully considered the totality of the circumstances and found that in each district racially polarized voting; the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice acted in concert with the multimember districting scheme to impair the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice. It found that the success a few black candidates have enjoyed in these districts is too recent, too limited, and, with regard to the 1982 elections, perhaps too aberrational, to disprove its conclusion. Excepting House District 23, with respect to which the District Court committed legal error, see supra, at ——, we affirm the District Court's judgment. We cannot say that the District Court, composed of local judges who are well acquainted with the political realities of the State, clearly erred in concluding that use of a multimember electoral structure has caused black voters in the districts other than House District 23 to have less opportunity than white voters to elect representatives of their choice.

The judgment of the District Court is

Affirmed in part and reversed in part.

APPENDIX A TO OPINION OF BRENNAN, J.

Percentages of Votes Cast by Black and White Voters for Black Candidates in the Five Contested Districts

Senate District 22

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**House District 23**

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106 S.Ct. 2752, 92 L.Ed.2d 25, 54 USLW 4877, 4 Fed.R.Serv.3d 1082

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House District 36

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House District 39

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<td>Ross</td>
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<td>Sumter (Repub.)</td>
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1980 House

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<tr>
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1980 Senate
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|     | 12 | 61 | n/a | n/a |

1982 House
Hauser
Kennedy, A.

|     | 25 | 80 | 42  | 87  |

|     | 36 | 87 | 46  | 94  |


**APPENDIX B TO OPINION OF BRENNAN, J.**

Black Candidates Elected From 7 Originally Contested Districts

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See Brief for Appellees, table printed between pages 8 and 9; App. 93-94.

*82 **2783 Justice WHITE, concurring.
I join Parts I, II, III-A, III-B, IV-A, and V of the Court's opinion and agree with Justice BRENNAN's opinion as to Part IV-B. I disagree with Part III-C of Justice BRENNAN's opinion.

*83 Justice BRENNAN states in Part III-C that the crucial factor in identifying polarized voting is the race of the voter and that the race of the candidate is irrelevant. Under this test, there is polarized voting if the majority of white voters vote for different candidates than the majority of the blacks, regardless of the race of the candidates. I do not agree. Suppose an eight-member multimember district that is 60% white and 40% black, the blacks being geographically located so that two safe black single-member districts could be drawn. Suppose further that there are six white and two black Democrats running against six white and two black Republicans. Under Justice BRENNAN's test, there would be polarized voting and a likely § 2 violation if all the Republicans, including the two blacks, are elected, and 80% of the blacks in the predominantly black areas vote Democratic. I take it that there would also be a violation in a single-member district that is 60% black, but enough of the blacks vote with the whites to elect a black candidate who is not the choice of the majority of black voters. This is
interest-group politics rather than a rule hedging against racial discrimination. I doubt that this is what Congress had in mind in amending § 2 as it did, and it seems quite at odds with the discussion in *Whitcomb v. Chavis*, 403 U.S. 124, 149–160, 91 S.Ct. 1858, 1872–1878, 29 L.Ed.2d 363 (1971). Furthermore, on the facts of this case, there is no need to draw the voter/candidate distinction. The District Court did not and reached the correct result except, in my view, with respect to District 23.

Justice O'CONNOR, with whom THE CHIEF JUSTICE, Justice POWELL, and Justice REHNQUIST join, concurring in the judgment.

In this case, we are called upon to construe § 2 of the Voting Rights Act of 1965, as amended June 29, 1982. Amended § 2 is intended to codify the "results" test employed in *Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), and *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), and to reject the "intent" test propounded in the plurality opinion in *84 Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). S.Rep. No. 97–417, pp. 27–28 (1982) (hereinafter S.Rep.). Whereas *Bolden* required members of a racial minority who **2784 alleged impairment of their voting strength to prove that the challenged electoral system was created or maintained with a discriminatory purpose and led to discriminatory results, under the results test, "plaintiffs may choose to establish discriminatory results without proving any kind of discriminatory purpose." S.Rep., at 28, U.S.Code Cong. & Admin.News 1982, p. 206. At the same time, however, § 2 unequivocally disclaims the creation of a right to proportional representation. This disclaimer was essential to the compromise that resulted in passage of the amendment. See id., at 193–194 (additional views of Sen. Dole).

In construing this compromise legislation, we must make every effort to be faithful to the balance Congress struck. This is not an easy task. We know that Congress intended to allow vote dilution claims to be brought under § 2, but we also know that Congress did not intend to create a right to proportional representation for minority voters. There is an inherent tension between what Congress wished to do and what it wished to avoid, because any theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some reference to the proportion between the minority group and the electorate at large. In addition, several important aspects of the "results" test had received little attention in this Court's cases or in the decisions of the Courts of Appeals employing that test on which Congress also relied. See *id.*, at 32. Specifically, the legal meaning to be given to the concepts of "racial bloc voting" and "minority voting strength" had been left largely unaddressed by the courts when § 2 was amended.

The Court attempts to resolve all these difficulties today. First, the Court supplies definitions of racial bloc voting and minority voting strength that will apparently be applicable in all cases and that will dictate the structure of vote dilution litigation. Second, the Court adopts a test, based on the *85 level of minority electoral success, for determining when an electoral scheme has sufficiently diminished minority voting strength to constitute vote dilution. Third, although the Court does not acknowledge it expressly, the combination of the Court's definition of minority voting strength and its test for vote dilution results in the creation of a right to a form of proportional representation in favor of all geographically and politically cohesive minority groups that are large enough to constitute majorities if concentrated within one or more single-member districts. In so doing, the Court has disregarded the balance struck by Congress in amending § 2 and has failed to apply the results test as described by this Court in *Whitcomb* and *White*.

I

In order to explain my disagreement with the Court's interpretation of § 2, it is useful to illustrate the impact that alternative districting plans or types of districts typically have on the likelihood that a minority group will be able to elect candidates it prefers, and then to set out the critical elements of a vote dilution claim as they emerge in the Court's opinion.

Consider a town of 1,000 voters that is governed by a council of four representatives, in which 30% of the voters are black, and in which the black voters are concentrated in one section of the city and tend to vote as a bloc. It would be possible to draw four single-member districts, in one of which blacks would constitute an overwhelming majority. The black voters in this district would be assured of electing a representative of their choice, while any remaining black voters in the other districts would be submerged in large white majorities. This option would give the minority group roughly proportional representation.

Alternatively, it would usually be possible to draw four single-member districts in *two* of which black voters constituted much narrower majorities of about 60%. The
black *86 voters in these districts would often be able to elect the representative of their choice in each of these two districts, **2785 but if even 20% of the black voters supported the candidate favored by the white minority in those districts the candidates preferred by the majority of black voters might lose. This option would, depending on the circumstances of a particular election, sometimes give the minority group more than proportional representation, but would increase the risk that the group would not achieve even roughly proportional representation.

It would also usually be possible to draw four single-member districts in each of which black voters constituted a minority. In the extreme case, black voters would constitute 30% of the voters in each district. Unless approximately 30% of the white voters in this extreme case backed the minority candidate, black voters in such a district would be unable to elect the candidate of their choice in an election between only two candidates even if they unanimously supported him. This option would make it difficult for black voters to elect candidates of their choice even with significant white support, and all but impossible without such support.

Finally, it would be possible to elect all four representatives in a single at-large election in which each voter could vote for four candidates. Under this scheme, white voters could elect all the representatives even if black voters turned out in large numbers and voted for one and only one candidate.

To illustrate, if only four white candidates ran, and each received approximately equal support from white voters, each would receive about 700 votes, whereas black voters could cast no more than 300 votes for any one candidate. If, on the other hand, eight white candidates ran, and white votes were distributed less evenly, so that the five least favored white candidates received fewer than 300 votes while three others received 400 or more, it would be feasible for blacks to elect one representative with 300 votes even without substantial white support. If even 25% of the white voters *87 backed a particular minority candidate, and black voters voted only for that candidate, the candidate would receive a total of 475 votes, which would ensure victory unless white voters also concentrated their votes on four of the eight remaining candidates, so that each received the support of almost 70% of white voters. As these variations show, the at-large or multimember district has an inherent tendency to submerge the votes of the minority. The minority group's prospects for electoral success under such a district heavily depend on a variety of factors such as voter turnout, how many candidates run, how evenly white support is spread, how much white support is given to a candidate or candidates preferred by the minority group, and the extent to which minority voters engage in "bullet voting" (which occurs when voters refrain from casting all their votes to avoid the risk that by voting for their lower ranked choices they may give those candidates enough votes to defeat their higher ranked choices, see ante, at 2760, n.5).

There is no difference in principle between the varying effects of the alternatives outlined above and the varying effects of alternative single-district plans and multimember districts. The type of districting selected and the way in which district lines are drawn can have a powerful effect on the likelihood that members of a geographically and politically cohesive minority group will be able to elect candidates of their choice.

Although § 2 does not speak in terms of "vote dilution," I agree with the Court that proof of vote dilution can establish a violation of § 2 as amended. The phrase "vote dilution," in the legal sense, simply refers to the impermissible discriminatory effect that a multimember or other districting plan has when it operates "to cancel out or minimize the voting strength of racial groups." White, 412 U.S., at 765, 93 S.Ct., at 2339. See also Fortson v. Dorsey, 379 U.S. 433, 439, 85 S.Ct. 498, 501, 13 L.Ed.2d 401 (1965). This definition, however, conceals some very formidable difficulties. Is the "voting strength" of a racial group to be assessed solely *88 with reference to its **2786 prospects for electoral success, or should courts look at other avenues of political influence open to the racial group? Insofar as minority voting strength is assessed with reference to electoral success, how should undiluted minority voting strength be measured? How much of an impairment of minority voting strength is necessary to prove a violation of § 2? What constitutes racial bloc voting and how is it proved? What weight is to be given to evidence of actual electoral success by minority candidates in the face of evidence of racial bloc voting?

The Court resolves the first question summarily: minority voting strength is to be assessed solely in terms of the minority group's ability to elect candidates it prefers. Ante, at ——— ———. Under this approach, the essence of a vote dilution claim is that the State has created single-member or multimember districts that unacceptably impair the minority group's ability to elect the candidates its members prefer.

In order to evaluate a claim that a particular multimember district or single-member district has diluted the minority group's voting strength to a degree that violates § 2, however,
it is also necessary to construct a measure of "undiluted" minority voting strength. "[T]he phrase [vote dilution] itself suggests a norm with respect to which the fact of dilution may be ascertained." *Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002, 1012, 105 S.Ct. 416, 422, 83 L.Ed.2d 343 (1984) (REHNQUIST, J., dissenting from summary affirmance). Put simply, in order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it "should" be for minority voters to elect their preferred candidates under an acceptable system.

Several possible measures of "undiluted" minority voting strength suggest themselves. First, a court could simply use proportionality as its guide: if the minority group constituted 30% of the voters in a given area, the court would regard the minority group as having the potential to elect 30% *89* of the representatives in that area. Second, a court could posit some alternative districting plan as a "normal" or "fair" electoral scheme and attempt to calculate how many candidates preferred by the minority group would probably be elected under that scheme. There are, as we have seen, a variety of ways in which even single-member districts could be drawn, and each will present the minority group with its own array of electoral risks and benefits; the court might, therefore, consider a range of acceptable plans in attempting to estimate "undiluted" minority voting strength by this method. Third, the court could attempt to arrive at a plan that would maximize feasible minority electoral success, and use this degree of predicted success as its measure of "undiluted" minority voting strength. If a court were to employ this third alternative, it would often face hard choices about what would truly "maximize" minority electoral success. An example is the scenario described above, in which a minority group could be concentrated in one completely safe district or divided among two districts in each of which its members would constitute a somewhat precarious majority.

The Court today has adopted a variant of the third approach, to wit, undiluted minority voting strength means the maximum feasible minority voting strength. In explaining the elements of a vote dilution claim, the Court first states that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Ante*, at 2766. If not, apparently the minority group has no cognizable claim that its ability to elect the representatives of its choice has been impaired. *1* Second, "the minority group must **2787** be able *90* to show that it is politically cohesive," that is, that a significant proportion of the minority group supports the same candidates. *Ante*, at ---. Third, the Court requires the minority group to "demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances ...—usually to defeat the minority's preferred candidate." *Ibid.* If these three requirements are met, "the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives." *Ibid.* That is to say, the minority group has proved vote dilution in violation of § 2.

The Court's definition of the elements of a vote dilution claim is simple and invariable: a court should calculate minority voting strength by assuming that the minority group is concentrated in a single-member district in which it constitutes a voting majority. Where the minority group is not large enough, geographically concentrated enough, or politically cohesive enough for this to be possible, the minority group's claim fails. Where the minority group meets these requirements, the representatives that it could elect in the hypothetical district or districts in which it constitutes a *91* majority will serve as the measure of its undiluted voting strength. Whatever plan the State actually adopts must be assessed in terms of the effect it has on this undiluted voting strength. If this is indeed the single, universal standard for evaluating undiluted minority voting strength for vote dilution purposes, the standard is applicable whether what is challenged is a multimember district or a particular single-member districting scheme.

The Court's statement of the elements of a vote dilution claim also supplies an answer to another question posed above: *how much* of an impairment of undiluted minority voting strength is necessary to prove vote dilution. The Court requires the minority group that satisfies the threshold requirements of size and cohesiveness to prove that it will *usually* be unable to elect as many representatives of its choice under the challenged districting scheme as its undiluted voting strength would permit. This requirement, then, constitutes the true test of vote dilution. Again, no reason appears why this test would not be applicable to a vote dilution claim challenging single-member as well as multimember districts.

This measure of vote dilution, taken in conjunction with the Court's standard for measuring undiluted minority voting strength, creates what amounts to a right to *usual, roughly* proportional representation on the part of sizable, compact, cohesive minority groups. If, under a particular multimember or single-member district plan, qualified minority groups
usually cannot elect the representatives they would be likely to elect under the most favorable single-member districting plan, then § 2 is violated. Unless minority success under the challenged electoral system regularly approximates this rough version of proportional representation, that system dilutes minority voting strength and violates § 2.

**2788** To appreciate the implications of this approach, it is useful to return to the illustration of a town with four council representatives given above. Under the Court's approach, if the **92** black voters who constitute **30%** of the town's voting population do not usually succeed in electing one representative of their choice, then regardless of whether the town employs at-large elections or is divided into four single-member districts, its electoral system violates § 2. Moreover, if the town had a black voting population of **40%**, on the Court's reasoning the black minority, so long as it was geographically and politically cohesive, would be entitled usually to elect two of the four representatives, since it would normally be possible to create two districts in which black voters constituted safe majorities of approximately **80%**.

To be sure, the Court also requires that plaintiffs prove that racial bloc voting by the white majority interacts with the challenged districting plan so as usually to defeat the minority’s preferred candidate. In fact, however, this requirement adds little that is not already contained in the Court’s requirements that the minority group be politically cohesive and that its preferred candidates usually lose. As the Court acknowledges, under its approach, “in general, a white bloc vote that normally will defeat the combined strength of minority support plus white ‘crossover’ votes rises to the level of legally significant bloc voting.” *Ante*, at 2770. But this is to define legally significant bloc voting by the racial majority in terms of the extent of the racial minority’s electoral success. If the minority can prove that it could constitute a majority in a single-member district, that it supported certain candidates, and that those candidates have not usually been elected, then a finding that there is “legally significant white bloc voting” will necessarily follow. Otherwise, by definition, those candidates would usually have won rather than lost.

As shaped by the Court today, then, the basic contours of a vote dilution claim require no reference to most of the “Zimmer factors” that were developed by the Fifth Circuit to implement White’s results test and which were highlighted in the Senate Report. S.Rep., at 28–29; see *93* Zimmer v. Mc Keithen, 485 F.2d 1297 (CA5 1973) (en banc), aff’d sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976) (per curiam). If a minority group is politically and geographically cohesive and large enough to constitute a voting majority in one or more single-member districts, then unless white voters usually support the minority’s preferred candidates in sufficient numbers to enable the minority group to elect as many of those candidates as it could elect in such hypothetical districts, it will routinely follow that a vote dilution claim can be made out, and the multimember district will be invalidated. There is simply no need for plaintiffs to establish “the history of voting-related discrimination in the State or political subdivision,” *ante*, at —, or “the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group,” *ante*, at — or “the exclusion of members of the minority group from candidate slating processes,” *ante*, at — or “the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health,” *ibid.*, or “the use of overt or subtle racial appeals in political campaigns,” *ibid.*, or that “elected officials are unresponsive to the particularized needs of the members of the minority group.” *Ibid.* Of course, these other factors may be supportive of such a claim, because they may strengthen a court’s confidence that minority voters will be unable to overcome the relative disadvantage at which they are placed by a particular districting plan, or suggest a more general lack of opportunity to participate in the political process. But the fact remains that electoral success has now emerged, under the Court’s standard, as the linchpin of vote dilution claims, and **2789** that the elements of a vote dilution claim create an entitlement to roughly proportional representation within the framework of single-member districts.

*94 II*

In my view, the Court’s test for measuring minority voting strength and its test for vote dilution, operating in tandem, come closer to an absolute requirement of proportional representation than Congress intended when it codified the results test in § 2. It is not necessary or appropriate to decide in this case whether § 2 requires a uniform measure of undiluted minority voting strength in every case, nor have appellants challenged the standard employed by the District Court for assessing undiluted minority voting strength.
In this case, the District Court seems to have taken an approach quite similar to the Court's in making its preliminary assessment of undiluted minority voting strength:

“At the time of the creation of these multi-member districts, there were concentrations of black citizens within the boundaries of each that were sufficient in numbers and contiguity to constitute effective voting majorities in single-member districts lying wholly within the boundaries of the multi-member districts, which single-member districts would satisfy all constitutional requirements of population and geographical configuration.” Gingles v. Edmisten, 590 F.Supp. 345, 358–359 (EDNC1984).

The Court goes well beyond simply sustaining the District Court's decision to employ this measure of undiluted minority voting strength as a reasonable one that is consistent with § 2. In my view, we should refrain from deciding in this case whether a court must invariably posit as its measure of “undiluted” minority voting strength single-member districts in which minority group members constitute a majority. There is substantial doubt that Congress intended “undiluted minority voting strength” to mean “maximum feasible minority voting strength.” Even if that is the appropriate definition in some circumstances, there is no indication that Congress intended to mandate a single, universally applicable *95 standard for measuring undiluted minority voting strength, regardless of local conditions and regardless of the extent of past discrimination against minority voters in a particular State or political subdivision. Since appellants have not raised the issue, I would assume that what the District Court did here was permissible under § 2, and leave open the broader question whether § 2 requires this approach.

What appellants do contest is the propriety of the District Court's standard for vote dilution. Appellants claim that the District Court held that “[a]though blacks had achieved considerable success in winning state legislative seats in the challenged districts, their failure to consistently attain the number of seats that numbers alone would presumptively give them (i.e., in proportion to their presence in the population),” standing alone, constituted a violation of § 2. Brief for Appellants 20 (emphasis in original). This holding, appellants argue, clearly contravenes § 2's proviso that “nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.” 42 U.S.C. § 1973.

I believe appellants' characterization of the District Court's holding is incorrect. In my view, the District Court concluded that there was a severe diminution in the prospects for black electoral success in each of the challenged districts, as compared to single-member districts in which blacks could constitute a majority, and that this severe diminution was in large part attributable to the interaction of the multimember form of the district with persistent racial bloc voting on the part of the white majorities in those districts. See 590 F.Supp., at 372. The District Court attached **2790 great weight to this circumstance as one part of its ultimate finding that “the creation of each of the multi-member districts challenged in this action results in the black registered voters of that district being submerged as a voting minority in the district and thereby having less opportunity than do other members of the electorate to participate in the political process and to elect representatives of their choice.” Id., at 374. But the District Court's extensive opinion clearly relies as well on a variety of the other Zimmer factors, as the Court's thorough summary of the District Court's findings indicates. See ante, at __________.

If the District Court had held that the challenged multi-member districts violated § 2 solely because blacks had not consistently attained seats in proportion to their presence in the population, its holding would clearly have been inconsistent with § 2's disclaimer of a right to proportional representation. Surely Congress did not intend to say, on the one hand, that members of a protected class have no right to proportional representation, and on the other, that any consistent failure to achieve proportional representation, without more, violates § 2. A requirement that minority representation usually be proportional to the minority group's proportion in the population is not quite the same as a right to strict proportional representation, but it comes so close to such a right as to be inconsistent with § 2's disclaimer and with the results test that is codified in § 2. In the words of Senator Dole, the architect of the compromise that resulted in passage of the amendments to § 2:

“The language of the subsection explicitly rejects, as did White and its progeny, the notion that members of a protected class have a right to be elected in numbers equal to their proportion of the population. The extent to which members of a protected class have been elected under the challenged practice or structure is just one factor, among the totality of circumstances to be considered, __ and is not dispositive.” S.Rep., at 194, U.S.Code Cong. & Admin.News 1982, p. 364 (additional views of Sen. Dole).
On the same reasoning, I would reject the Court's test for vote dilution. The Court measures undiluted minority voting strength by reference to the possibility of creating single-member districts in which the minority group would constitute a majority, rather than by looking to raw proportionality alone. The Court's standard for vote dilution, when combined with its test for undiluted minority voting strength, makes actionable every deviation from usual, rough proportionality in representation for any cohesive minority group as to which this degree of proportionality is feasible within the framework of single-member districts. Requiring that every minority group that could possibly constitute a majority in a single-member district be assigned to such a district would approach a requirement of proportional representation as nearly as is possible within the framework of single-member districts. Since the Court's analysis entitles every such minority group usually to elect as many representatives under a multimember district as it could elect under the most favorable single-member district scheme, it follows that the Court is requiring a form of proportional representation. This approach is inconsistent with the results test and with § 2's disclaimer of a right to proportional representation.

In enacting § 2, Congress codified the "results" test this Court had employed, as an interpretation of the Fourteenth Amendment, in White and Whitcomb. The factors developed by the Fifth Circuit and relied on by the Senate Report simply fill in the contours of the "results" test as described in those decisions, and do not purport **2791 to redefine or alter the ultimate showing of discriminatory effect required by Whitcomb and White. In my view, therefore, it is to Whitcomb and White that we should look in the first instance in determining how great an impairment of minority voting strength is required to establish vote dilution in violation of § 2.

*98 The "results" test as reflected in Whitcomb and White requires an inquiry into the extent of the minority group's opportunities to participate in the political processes. See White, 412 U.S., at 766, 93 S.Ct., at 2339–40. While electoral success is a central part of the vote dilution inquiry, White held that to prove vote dilution, "it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential," id., at 765–766, 93 S.Ct., at 2339–40, and Whitcomb flatly rejected the proposition that "any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area sufficiently compact to constitute a single member district." 403 U.S., at 156, 91 S.Ct., at 1875. To the contrary, the results test as described in White requires plaintiffs to establish "that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." 412 U.S., at 766, 93 S.Ct., at 2339–40. By showing both a "history of disproportionate results" and "strong indicia of lack of political power and the denial of fair representation," the plaintiffs in White met this standard, which, as emphasized just today, requires "a substantially greater showing of adverse effects than a mere lack of proportional representation to support a finding of unconstitutional vote dilution." Davis v. Bandemer, 478 U.S. 109, 169–170, 106 S.Ct. 2797, ——, ——, 92 L.Ed.2d 85 (1986) (plurality opinion).

When Congress amended § 2 it intended to adopt this "results" test, while abandoning the additional showing of discriminatory intent required by Bolden. The vote dilution analysis adopted by the Court today clearly bears little resemblance to the "results" test that emerged in Whitcomb and White. The Court's test for vote dilution, combined with its standard for evaluating "voting potential," White, supra, 412 U.S., at 766, 93 S.Ct., at 2339–2340, means that any racial minority with distinctive interests must usually "be represented in legislative halls if *99 it is numerous enough to command at least one seat and represents a minority living in an area sufficiently compact to constitute" a voting majority in "a single member district." Whitcomb, 403 U.S., at 156, 91 S.Ct., at 1875. Nothing in Whitcomb, White, or the language and legislative history of § 2 supports the Court's creation of this right to usual, roughly proportional representation on the part of every geographically compact, politically cohesive minority group that is large enough to form a majority in one or more single-member districts.

I would adhere to the approach outlined in Whitcomb and White and followed, with some elaboration, in Zimmer and other cases in the Courts of Appeals prior to Bolden. Under that approach, a court should consider all relevant factors bearing on whether the minority group has "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973 (emphasis added). The court should not focus solely on the minority group's ability to elect representatives of its choice. Whatever measure of undiluted
minority voting strength the court employs in connection with evaluating the presence or absence of minority electoral success, it should also bear in mind that "the power to influence the political process is not limited to winning elections." Davis v. Bandemer, supra, 478 U.S., at 132, 106 S.Ct., at 1691. Of course, the relative lack of minority electoral success under a challenged plan, when compared **2792 with the success that would be predicted under the measure of undiluted minority voting strength the court is employing, can constitute powerful evidence of vote dilution. Moreover, the minority group may in fact lack access to or influence upon representatives it did not support as candidates. Cf. Davis v. Bandemer, supra, at 169-170, 106 S.Ct., at 1689 (POWELL, J., concurring in part and dissenting in part). Nonetheless, a reviewing court should be required to find more than simply that the minority group does not usually attain an undiluted measure of electoral success. The court must find that even substantial minority success will be highly infrequent *100 under the challenged plan before it may conclude, on this basis alone, that the plan operates "to cancel out or minimize the voting strength of [the] racial group[.]" White, supra, 412 U.S., at 765, 93 S.Ct., at 2339.

III

Only three Justices of the Court join Part III-C of Justice BRENNAN's opinion, which addresses the validity of the statistical evidence on which the District Court relied in finding racially polarized voting in each of the challenged districts. Insofar as statistical evidence of divergent racial voting patterns is admitted solely to establish that the minority group is politically cohesive and to assess its prospects for electoral success, I agree that defendants cannot rebut this showing by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race, such as an underlying divergence in the interests of minority and white voters. I do not agree, however, that such evidence can never affect the overall vote dilution inquiry. Evidence that a candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than those which made that candidate the preferred choice of the minority group would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority candidates. Such evidence would suggest that another candidate, equally preferred by the minority group, might be able to attract greater white support in future elections.

I believe Congress also intended that explanations of the reasons why white voters rejected minority candidates would be probative of the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account. In a community that is polarized along racial lines, racial hostility may bar these and other indirect avenues of political influence to a much greater extent than in a community where racial animosity is absent although the interests of racial groups diverge. Indeed, the *101 Senate Report clearly stated that one factor that could have probative value in § 2 cases was "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group." S.Rep., at 29, U.S.Code Cong. & Admin.News 1982, p. 207. The overall vote dilution inquiry neither requires nor permits an arbitrary rule against consideration of all evidence concerning voting preferences other than statistical evidence of racial voting patterns. Such a rule would give no effect whatever to the Senate Report's repeated emphasis on "intensive racial politics," on "racial political considerations," and on whether "racial politics ... dominate the electoral process" as one aspect of the "racial bloc voting" that Congress deemed relevant to showing a § 2 violation. Id., at 33-34. Similarly, I agree with Justice WHITE that Justice BRENNAN's conclusion that the race of the candidate is always irrelevant in identifying racially polarized voting conflicts with Whitcomb and is not necessary to the disposition of this case. Ante, at 2783 (concurring).

In this case, as the Court grudgingly acknowledges, the District Court clearly erred in aggregating data from all of the challenged districts, and then relying on the fact that on average, 81.7% of white voters did not vote for any black candidate **2793 in the primary elections selected for study. Ante, at 2771, n. 28. Although Senate District 22 encompasses House District 36, with that exception the districts at issue in this case are distributed throughout the State of North Carolina. White calls for "an intensely local appraisal of the design and impact of the ... multimember district," 412 U.S., at 769-770, 93 S.Ct., at 2341, and racial voting statistics from one district are ordinarily irrelevant in assessing the totality of the circumstances in another district. In view of the specific evidence from each district that the District Court also considered, however, I cannot say that its conclusion that there was severe racial bloc voting was clearly erroneous with regard to any of the challenged districts. Except in House District 23, where racial bloc voting did not prevent sustained and virtuallyproportional *102 minority electoral success, I would accordingly leave undisturbed the
District Court’s decision to give great weight to racial bloc voting in each of the challenged districts.

IV

Having made usual, roughly proportional success the sole focus of its vote dilution analysis, the Court goes on to hold that proof that an occasional minority candidate has been elected does not foreclose a § 2 claim. But Justice BRENNAN, joined by Justice WHITE, concludes that “persistent proportional representation” will foreclose a § 2 claim unless the plaintiffs prove that this “sustained success does not accurately reflect the minority group’s ability to elect its preferred representatives.” Ante, at 2780. I agree with Justice BRENNAN that consistent and sustained success by candidates preferred by minority voters is presumptively inconsistent with the existence of a § 2 violation. Moreover, I agree that this case presents no occasion for determining what would constitute proof that such success did not accurately reflect the minority group’s actual voting strength in a challenged district or districts.

In my view, the District Court erred in assessing the extent of black electoral success in House District 39 and Senate District 22, as well as in House District 23, where the Court acknowledges error. As the evidence summarized by the Court in table form shows, ante, at —, Appendix B, the degree of black electoral success differed widely in the seven originally contested districts. In House District 8 and Senate District 2, neither of which is contested in this Court, no black candidate had ever been elected to the offices in question. In House District 21 and House District 36, the only instances of black electoral success came in the two most recent elections, one of which took place during the pendency of this litigation. By contrast, in House District 39 and Senate District 22, black successes, although intermittent, dated back to 1974, and a black candidate had been elected in each of the last five elections. Finally, in House District 23 a black candidate had been elected in each of the last six elections.

The District Court, drawing no distinctions among these districts for purposes of its findings, concluded that “[t]he overall results achieved to date at all levels of elective office are minimal in relation to the percentage of blacks in the total population.” 590 F.Supp., at 367. The District Court clearly erred to the extent that it considered electoral success in the aggregate, rather than in each of the challenged districts, since, as the Court states, “[t]he inquiry into the existence of vote dilution ... is district-specific.” Ante, at 2771, n. 28. The Court asserts that the District Court was free to regard the results of the 1982 elections with suspicion and to decide “on the basis of all the relevant circumstances to accord greater weight to blacks’ relative lack of success over the course of several recent elections,” ante, at 2790, but the Court does not explain how this technique would apply in Senate District 22, where a black candidate was elected in three consecutive elections from 1974 to 1978, but no black candidate was elected in 1982, or in House District 39, where black candidates were elected in 1974 and 1976 as well as in 1982. Contrary to what the District Court thought, see 590 F.Supp., at 367, these pre-1982 successes, which were proportional or nearly proportional to black population in these three multimember districts, certainly lend some support for a finding that black voters in these districts enjoy an equal opportunity to participate in the political process and to elect representatives of their choice.

Despite this error, I agree with the Court’s conclusion that, except in House District 23, minority electoral success was not sufficiently frequent to compel a finding of equal opportunity to participate and elect. The District Court found that “in each of the challenged districts racial polarization in voting presently exists to a substantial or severe degree, and ... in each district it presently operates to *104 minimize the voting strength of black voters.” Id., at 372. I cannot say that this finding was clearly erroneous with respect to House District 39 or Senate District 22, particularly when taken together with the District Court’s findings concerning the other Zimmer factors, and hence that court’s ultimate conclusion of vote dilution in these districts is adequately supported.

This finding, however, is clearly erroneous with respect to House District 23. Blacks constitute 36.3% of the population in that district and 28.6% of the registered voters. In each of the six elections since 1970 one of the three representatives from this district has been a black. There is no finding, or any reason even to suspect, that the successful black candidates in District 23 did not in fact represent the interests of black voters, and the District Court did not find that black success in previous elections was aberrant.

Zimmer’s caveat against necessarily foreclosing a vote dilution claim on the basis of isolated black successes, 485 F.2d, at 1307; see S.Rep., at 29, n. 115, cannot be pressed this far. Indeed, the 23 Court of Appeals decisions on which the

Compromise is essential to much if not most major federal legislation, and confidence that the federal courts will enforce such compromises is indispensable to their creation. I believe that the Court today strikes a different balance than Congress intended to when it codified the results test and disclaimed any right to proportional representation under § 2. For that reason, I join the Court's judgment but not its opinion.

*106* Justice STEVENS, with whom Justice MARSHALL and Justice BLACKMUN join, concurring in part and dissenting in part.

In my opinion, the findings of the District Court, which the Court fairly summarizes, *ante*, at ——; ———, and n. 23; ———, "and nn. 28 and 29, adequately support the District Court's judgment concerning House District 23 as well as the balance of that judgment.

I, of course, agree that the election of one black candidate in each election since 1972 provides significant support for the State's position. The notion that this evidence creates some sort of a conclusive, legal presumption, *ante*, at ———, is not, however, supported by the language of the statute or by its legislative history. 1 I therefore cannot agree with the Court's view that the District Court committed error by failing to apply a rule of law that emerges today without statutory support. The evidence of candidate success in District 23 is merely one part of an extremely large record which the District Court carefully considered before making its ultimate findings of fact, all of which should be upheld under a normal application of the "clearly erroneous" standard that the Court traditionally applies. 2

The Court identifies the reason why the success of one black candidate in the elections in 1978, 1980, and 1982 is not *107* inconsistent with the District Court's ultimate finding concerning House District 23. 3 The fact that one black candidate was also elected in the 1972, 1974, and 1976 elections, *ante*, at ———, Appendix B, is not sufficient, in my opinion, to overcome the additional findings that apply to House District 23, as well as to other districts in the State for each of those years. The Court accurately summarizes those findings:

V

When members of a racial minority challenge a multimember district on the grounds that it dilutes their voting strength, I agree with the Court that they must show that they possess such strength and that the multimember district impairs it. A court must therefore appraise the minority group's undiluted voting strength in order to assess the effects of the multimember district. I would reserve the question of the proper method or methods for making this assessment. But once such an assessment is made, in my view the evaluation of an alleged impairment of voting strength requires consideration of the minority group's access to the political processes generally, not solely consideration of the chances that its preferred candidates will actually be elected. Proof that white voters withhold their support from minority-preferred **2795** candidates to an extent that consistently ensures their defeat is entitled to significant weight in plaintiffs' favor. However, if plaintiffs direct their proof solely towards the minority group's prospects for electoral success, they must show that substantial minority success will be highly infrequent under the challenged plan in order to establish that the plan operates to "cancel out or minimize"
"The District Court in this case carefully considered the totality of the circumstances and found that in each district racially polarized voting; the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice acted in concert with the multimember districting scheme to impair the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice. It found that the success a few black candidates have enjoyed in these districts is too recent, too limited, and, with regard to the 1982 elections, perhaps too aberrational, to disprove its conclusion." Ante, at 2782.

To paraphrase the Court's conclusion about the other districts, ibid., I cannot say that the District Court, composed of local judges who are well acquainted with the political realities of the State, clearly erred in concluding that use of a multimember electoral structure has caused black voters in House District 23 to have less opportunity than white voters to elect representatives of their choice. 4 Accordingly, I concur in *108 the Court's opinion except Part IV--B and except insofar as it explains why it reverses the judgment respecting House District 23.

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Footnotes
* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Appellees challenged Senate District No. 2, which consisted of the whole of Northampton, Hertford, Gates, Bertie, and Chowan Counties, and parts of Washington, Martin, Halifax, and Edgecombe Counties.

2 Appellees challenged the following multimember districts: Senate No. 22 (Mecklenburg and Cabarrus Counties—four members), House No. 36 (Mecklenburg County—eight members), House No. 39 (part of Forsyth County—five members), House No. 23 (Durham County—three members), House No. 21 (Wake County—six members), and House No. 8 (Wilson, Nash, and Edgecombe Counties—four members).

3 Appellants initiated this action in September 1981, challenging the North Carolina General Assembly's July 1981 redistricting. The history of this action is recounted in greater detail in the District Court's opinion in this case, Gingles v. Edmisten, 590 F.Supp. 345, 350--358 (EDNC 1984). It suffices here to note that the General Assembly revised the 1981 plan in April 1982 and that the plan at issue in this case is the 1982 plan.


5 Bullet (single-shot) voting has been described as follows:

"Consider [a] town of 600 whites and 400 blacks with an at-large election to choose four council members. Each voter is able to cast four votes. Suppose there are eight white candidates, with the votes of the whites split among them approximately equally, and one black candidate, with all the blacks voting for him and no one else. The result is that each white candidate receives about 300 votes and the black candidate receives 400 votes. The black has probably won a seat. This technique is called single-shot voting. Single-shot voting enables a minority group to win some at-large seats if it concentrates its vote behind a limited number of candidates and if the vote of the majority is divided among a number of candidates. " City of Rome v. United States, 446 U.S. 156, 184, n. 19, 100 S.Ct. 1548, 1565, n. 19, 64 L.Ed.2d 119 (1980), quoting United States Commission on Civil Rights, The Voting Rights Act: Ten Years After, pp. 206--207 (1975).

6 Designated (or numbered) seat schemes require a candidate for election in multimember districts to run for specific seats, and can, under certain circumstances, frustrate bullet voting. See, e.g., City of Rome, supra, at 185, n. 21, 100 S.Ct., at 1566, n. 21.

7 The United States urges this Court to give little weight to the Senate Report, arguing that it represents a compromise among conflicting "factions," and thus is somehow less authoritative than most Committee Reports. Brief for United States as Amicus Curiae 8, n. 12, 24, n. 49. We are not persuaded that the historical legislature of amended § 2 contains anything to lead us to conclude that this Senate Report should be accorded little weight. We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill. See, e.g., Garcia v. United States, 449 U.S. 70, 76, and n. 3, 105 S.Ct. 479, 483, and n. 3, 83 L.Ed.2d 472 (1984); Zuber v. Allen, 396 U.S. 168, 186, 90 S.Ct. 314, 324, 24 L.Ed.2d 345 (1969).

106 S.Ct. 2752, 92 L.Ed.2d 25, 54 USLW 4877, 4 Fed.R.Serv.3d 1082

8 The Senate Report states that amended § 2 was designed to restore the “results test”—the legal standard that governed voting discrimination cases prior to our decision in *Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). S.Rep., at 15–16. The Report notes that in pre-*Bolden* cases such as *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), and *Zimmer v. McKeithen*, 485 F.2d 1297 (CA5 1973), plaintiffs could prevail by showing that, under the totality of the circumstances, a challenged election law or procedure had the effect of denying a protected minority an equal chance to participate in the electoral process. Under the “results test,” plaintiffs are not required to demonstrate that the challenged electoral law or structure was designed or maintained for a discriminatory purpose. S.Rep., at 16, U.S.Code Cong. & Admin.News 1982, p. 193.

9 The Senate Committee found that “voting practices and procedures that have discriminatory results perpetuate the effects of past purposeful discrimination.” Id., at 40, U.S.Code Cong. & Admin.News 1982, p. 218 (footnote omitted). As the Senate Report notes, the purpose of the Voting Rights Act was “not only to correct an active history of discrimination, the denying to Negroes of the right to register and vote, but also to deal with the accumulation of discrimination.” Id., 5, U.S.Code Cong. & Admin.News 1982, p. 182 (quoting 111 Cong.Rec. 8295 (1965) (remarks of Sen. Javits)).

10 Section 2 prohibits all forms of voting discrimination, not just vote dilution. S.Rep., at 30.

11 Dilution of racial minority group voting strength may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority. Engstrom & Wildgen, Pruning Thorns from the Thicket: An Empirical Test of the Existence of Racial Gerrymandering, 2 Legis.Stud.Q. 465, 465–466 (1977) (hereinafter Engstrom & Wildgen). See also Derfer, Racial Discrimination and the Right to Vote, 25 Vand.L.Rev. 523, 553 (1973) (hereinafter Derfer); F. Parker, Racial Gerrymandering and Legislative Reapportionment (hereinafter Parker), in Minority Vote Dilution 86–100 (Davidson ed., 1984) (hereinafter Minority Vote Dilution).

12 The claim we address in this opinion is one in which the plaintiffs alleged and attempted to prove that their ability to elect the representatives of their choice was impaired by the selection of a multimember electoral structure. We have no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to influence elections.

We note also that we have no occasion to consider whether the standards we apply to respondents’ claim that multimember districts operate to dilute the vote of geographically cohesive minority groups, that are large enough to constitute majorities in single-member districts and that are contained within the boundaries of the challenged multimember districts, are fully pertinent to other sorts of vote dilution claims, such as a claim alleging that the splitting of a large and geographically cohesive minority between two or more multimember or single-member districts resulted in the dilution of the minority vote.


14 Not only does “[v]oting along racial lines” deprive minority voters of their preferred representative in these circumstances, it also “allows those elected to ignore [minority] interests without fear of political consequences,” *Rogers v. Lodge*, 458 U.S., at 623, 102 S.Ct., at 3279, leaving the minority effectively unrepresented. See, e.g., Grofman, Should Representatives be Typical of Their Constituents?, in Representation and Redistricting Issues 97; Parker 108.

15 Under a “functional” view of the political process mandated by § 2, S.Rep., at 30, n. 120, U.S.Code Cong. & Admin.News 1982, p. 208, the most important Senate Report factors bearing on § 2 challenges to multimember districts are the “extent to which minority group members have been elected to public office in the jurisdiction” and the “extent to which voting in the elections of the state or political subdivision is racially polarized.” Id., 28–29, U.S.Code Cong. & Admin.News 1982, p. 206. If present, the other factors, such as the lingering effects of past discrimination, the use of appeals to racial bias in election campaigns, and the use of electoral
devices which enhance the dilutive effects of multimember districts when substantial white bloc voting exists—for example antibullet voting laws and majority vote requirements, are supportive of, but not essential to, a minority voter's claim.

In recognizing that some Senate Report factors are more important to multimember district vote dilution claims than others, the Court effectuates the intent of Congress. It is obvious that unless minority group members experience substantial difficulty electing representatives of their choice, they cannot prove that a challenged electoral mechanism impedes their ability "to elect." §2(b). And, where the contested electoral structure is a multimember district, commentators and courts agree that in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters. See, e.g., McMillan v. Escambia County, Fla., 748 F.2d 1037, 1043 (CA5 1984); United States v. Marengo County Comm'rs, 731 F.2d 1546, 1556 (CA11), appeal dismissed and cert. denied, 469 U.S. 976, 105 S.Ct. 375, 83 L.Ed.2d 311 (1984); Nevett v. Sikes, 571 F.2d 209, 223 (CA5 1978), cert. denied, 446 U.S. 951, 100 S.Ct. 2916, 64 L.Ed.2d 807 (1980); Johnson v. Halifax County, 594 F.Supp. 161, 170 (EDNC 1984); Blacksher & Menefee; Engstrom & Wildgen 469; Parker 107. Consequently, if difficulty in electing and white bloc voting are not proved, minority voters have not established that the multimember structure interferes with their ability to elect their preferred candidates. Minority voters may be able to prove that they still suffer social and economic effects of past discrimination, that appeals to racial bias are employed in election campaigns, and that a majority vote is required to win a seat, but they have not demonstrated a substantial inability to elect caused by the use of a multimember district. By recognizing the primacy of the history and extent of minority electoral success and of racial bloc voting, the Court simply requires that §2 plaintiffs prove their claim before they may be awarded relief.

In this case appellees allege that within any contested multimember district there exists a minority group that is sufficiently large and compact to constitute a single-member district. In a different kind of case, for example a gerrymander case, plaintiffs might allege that the minority group that is sufficiently large and compact to constitute a single-member district has been split between two or more multimember or single-member districts, with the effect of diluting the potential strength of the minority vote.

The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice. The single-member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected. Thus, if the minority group is spread evenly throughout a multimember district, or if, although geographically compact, the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single-member district, these minority voters cannot maintain that they would have been able to elect representatives of their choice in the absence of the multimember electoral structure. As two commentators have explained:

"To demonstrate [that minority voters are injured by at-large elections], the minority voters must be sufficiently concentrated and politically cohesive that a putative districting plan would result in districts in which members of a racial minority would constitute a majority of the voters, whose clear electoral choices are in fact defeated by at-large voting. If minority voters' residences are substantially integrated throughout the jurisdiction, the at-large district cannot be blamed for the defeat of minority-supported candidates.... [This standard] thus would only protect racial minority votes from diminution proximately caused by the districting plan; it would not assure racial minorities proportional representation." Blacksher & Menefee 55–56 (footnotes omitted; emphasis added).

The terms "racially polarized voting" and "racial bloc voting" are used interchangeably throughout this opinion.

The 1982 reapportionment plan left essentially undisturbed the 1971 plan for five of the original six contested multimember districts. House District 39 alone was slightly modified. Brief for Appellees 8.


The court used the term "racial polarization" to describe this correlation. It adopted Dr. Grofman's definition—"racial polarization" exists where there is "a consistent relationship between [the] race of the voter and the way in which the voter votes," Tr. 160, or to put it differently, where "black voters and white voters vote differently." Id., at 203. We, too, adopt this definition of "racial bloc" or "racially polarized" voting. See, infra, at ——.

The court found that the data reflected positive relationships and that the correlations did not happen by chance. 590 F.Supp., at 368, and n. 30. See also D. Barnes & J. Conley, Statistical Evidence in Litigation 32–34 (1986); Fisher, Multiple Regression in Legal Proceedings, 80 Colum.L.Rev. 702, 716–720 (1980); Grofman, Migalski, & Noviello 206.
The two exceptions were the 1982 State House elections in Districts 21 and 23. 590 F.Supp., at 368, n. 31.

This list of factors is illustrative, not comprehensive.

The number of elections that must be studied in order to determine whether voting is polarized will vary according to pertinent circumstances. One important circumstance is the number of elections in which the minority group has sponsored candidates. Where a minority group has never been able to sponsor a candidate, courts must rely on other factors that tend to prove unequal access to the electoral process. Similarly, where a minority group has begun to sponsor candidates just recently, the fact that statistics from only one or a few elections are available for examination does not foreclose a vote dilution claim.

This list of special circumstances is illustrative, not exclusive.

The trial court did not actually employ the term "legally significant." At times it seems to have used "substantive significance" as Dr. Grofman did, to describe polarization severe enough to result in the selection of different candidates in racially separate electorates. At other times, however, the court used the term "substantively significant" to refer to its ultimate determination that racially polarized voting in these districts is sufficiently severe to be relevant to a § 2 claim.

In stating that 81.7% of white voters did not vote for any black candidates in the primary election and that two-thirds of white voters did not vote for black candidates in general elections, the District Court aggregated data from all six challenged multimember districts, apparently for ease of reporting. The inquiry into the existence of vote dilution caused by submergence in a multimember district is district specific. When considering several separate vote dilution claims in a single case, courts must not rely on data aggregated from all the challenged districts in concluding that racially polarized voting exists in each district. In the instant case, however, it is clear from the trial court's tabulated findings and from the exhibits that were before it, 1 App., Exs. 2-10, that the court relied on data that were specific to each individual district in concluding that each district experienced legally significant racially polarized voting.

For example, the court found that incumbency aided a successful black candidate in the 1978 primary in Senate District 22. The court also noted that in House District 23, a black candidate who gained election in 1978, 1980, and 1982, ran uncontested in the 1978 general election and in both the primary and general elections in 1980. In 1982 there was no Republican opposition, a fact the trial court interpreted to mean that the general election was for all practical purposes unopposed. Moreover, in the 1982 primary, there were only two white candidates for three seats, so that one black candidate had to succeed. Even under this condition, the court remarked, 63% of white voters still refused to vote for the black incumbent—who was the choice of 90% of the blacks. In House District 21, where a black won election to the six-member delegation in 1980 and 1982, the court found that in the relevant primaries approximately 60% to 70% of white voters did not vote for the black candidate, whereas approximately 80% of blacks did. The court additionally observed that although winning the Democratic primary in this district is historically tantamount to election, 55% of whites declined to vote for the Democratic black candidate in the general election.

The court noted that in the 1982 primary held in House District 36, out of a field of eight, the successful black candidate was ranked first by black voters, but seventh by whites. Similarly, the court found that the two blacks who won seats in the five-member delegation from House District 39 were ranked first and second by black voters, but seventh and eighth by white voters.

Appellants argue that plaintiffs must establish that race was the primary determinant of voter behavior as part of their prima facie showing of polarized voting; the United States suggests that plaintiffs make out a prima facie case merely by showing a correlation between race and the selection of certain candidates, but that defendants should be able to rebut by showing that factors other than race were the principal causes of voters' choices. We reject both arguments.

The Fifth Circuit cases on which North Carolina and the United States rely for their position are equally ambiguous. See Lee County Branch of NAACP v. Optelka, 748 F.2d 1473, 1482 (1984); Jones v. Lubbock, 730 F.2d 233, 234 (1984) (Higginbotham, J., concurring).

It is true, as we have recognized previously, that racial hostility may often fuel racial bloc voting. United Jewish Organizations v. Carey, 430 U.S. 144, 166, 97 S.Ct. 996, 1010, 51 L.Ed.2d 229 (1977); Rogers v. Lodge, 458 U.S., at 623, 102 S.Ct., at 3278. But, as we explain in this decision, the actual motivation of the voter has no relevance to a vote dilution claim. This is not to suggest that racial bloc voting is race neutral; because voter behavior correlates with race, obviously it is not. It should be remembered, though, as one commentator has observed, that "[t]he absence of racial animus is but one element of race neutrality." Note, Geometry and Geography 208.


The relevant results of the 1982 General Assembly election are as follows. House District 21, in which blacks make up 21.8% of the population, elected one black to the six-person House delegation. House District 23, in which blacks constitute 36.3% of the population, elected one black to the three-person House delegation. In House District 36, where blacks constitute 26.5% of the population, one black was elected to the eight-member delegation. In House District 39, where 25.1% of the population is black,
two blacks were elected to the five-member delegation. In Senate District 22, where blacks constitute 24.3% of the population, no black was elected to the Senate in 1982.

The United States points out that, under a substantially identical predecessor to the challenged plan, see n. 15, supra, House District 21 elected a black to its six-member delegation in 1980, House District 39 elected a black to its five-member delegation in 1974 and 1976, and Senate District 22 had a black Senator between 1975 and 1980.

See also Zimmer v. McKeithen, 485 F.2d, at 1307 ("[W]e cannot endorse the view that the success of black candidates at the polls necessarily forecloses the possibility of dilution of the black vote. Such success might, on occasion, be attributable to the work of politicians, who, apprehending that the support of a black candidate would be politically expedient, campaign to insure his election. Or such success might be attributable to political support motivated by different considerations—namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds. In either situation, a candidate could be elected despite the relative political backwardness of black residents in the electoral district").

We have no occasion in this case to decide what types of special circumstances could satisfactorily demonstrate that sustained success does not accurately reflect the minority's ability to elect its preferred representatives.

I express no view as to whether the ability of a minority group to constitute a majority in a single-member district should constitute a threshold requirement for a claim that the use of multimember districts impairs the ability of minority voters to participate in the political processes and to elect representatives of their choice. Because the plaintiffs in this case would meet that requirement, if indeed it exists, I need not decide whether it is imposed by § 2. I note, however, the artificiality of the Court's distinction between claims that a minority group's "ability to elect the representatives of [its] choice" has been impaired and claims that "its ability to influence elections" has been impaired. Ante, at 2765–2765, n. 12. It is true that a minority group that could constitute a majority in a single-member district ordinarily has the potential ability to elect representatives without white support, and that a minority that could not constitute a majority ordinarily does not. But the Court recognizes that when the candidates preferred by a minority group are elected in a multimember district, the minority group has elected those candidates, even if white support was indispensable to these victories. On the same reasoning, if a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice.

At times, the District Court seems to have looked to simple proportionality rather than to hypothetical single-member districts in which black voters would constitute a majority. See, e.g., 590 F.Supp., at 367. Nowhere in its opinion, however, did the District Court state that § 2 requires that minority groups consistently attain the level of electoral success that would correspond with their proportion of the total or voting population.

See ante, at 2779 ("Section 2(b) provides that '[t]he extent to which members of a protected class have been elected to office ... is one circumstance which may be considered." 42 U.S.C. § 1973(b)"). However, the Senate Report expressly states that "the election of a few minority candidates does not "necessarily foreclose the possibility of dilution of the black vote," " noting that if it did, "the possibility exists that the majority citizens might evade [§ 2] by manipulating the election of a "safe" minority candidate." ... The Senate Committee decided, instead, to "require an independent consideration of the record" "") (internal citations omitted).

See ante, at 46 ("[T]he application of the clearly-erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law").

Even under the Court's analysis, the decision simply to reverse—without a remand—is mystifying. It is also extremely unfair. First, the Court does not give appellees an opportunity to address the new legal standard that the Court finds decisive. Second, the Court does not even bother to explain the contours of that standard, and why it was not satisfied in this case. Cf. ante, at 2780, n. 38 ("We have no occasion in this case to decide what types of special circumstances could satisfactorily demonstrate that sustained success does not accurately reflect the minority's ability to elect its preferred representatives"). Finally, though couched as a conclusion about a "matter of law," ante, at 2782, the Court's abrupt entry of judgment for appellees on District 23 reflects an unwillingness to give the District Court the respect it is due, particularly when, as in this case, the District Court has a demonstrated knowledge and expertise of the entire context that Congress directed it to consider.