No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MARGARET DICKSON, et al.,

Petitioners

v.

ROBERT RUCHO, et al.,

Respondents

On Petition for Writ of Certiorari to the
Supreme Court of North Carolina

BRIEF IN OPPOSITION

Alexander McC. Peters
N.C. DEPARTMENT OF JUSTICE
P.O. Box 629
Raleigh, NC 27602
919.716.6900
Apeters@ncdoj.gov
Counsel for Respondents

Thomas A. Farr
Counsel of Record
Phillip J. Strach
Michael McKnight
OGLETREE DEAKINS
4602 Six Forks Road, Suite 1100
Raleigh, NC 27609
919.787.9700
Thomas.farr@ogletreedeakins.com
Phillip.strach@ogletreedeakins.com
Michael.mcknight@ogletreedeakins.com
Counsel for Respondents

QUESTION PRESENTED

Are the findings of fact made by the trial court and affirmed twice by the North Carolina Supreme Court, which show a strong basis in evidence for North Carolina's narrowly tailored majority-black districts, clearly erroneous?

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INTRODUCTION

Petitioners' petition for certiorari should be denied. Regarding petitioners' first proposed question, the facts as found by the trial court, and as admitted by petitioners, show that the North Carolina General Assembly did not consider itself obligated to enact a proportional number of majority-black districts and in fact did not enact a proportional number of such districts. In any case, this Court has repeatedly explained that proportionality is a factor that should be considered by a state legislature when enacting redistricting plans. Moreover, even assuming North Carolina had mandated a proportional number of majority-black districts, as this Court has also explained, statewide criteria such as the consideration of proportionality does not prove that race predominated in the creation of any single district.

Regarding petitioners' second proposed question, the facts as found by the trial court, and twice affirmed by the North Carolina Supreme Court, are inconsistent with petitioners' argument that the challenged districts are "bizarrely shaped" as compared to prior or alternative districts. The facts as found by the trial court and affirmed twice by the North Carolina Supreme Court also show that North Carolina had a strong basis in evidence to establish majority-black districts reasonably needed to protect the state from liability under the Voting Rights Act ("VRA"). Petitioners have never challenged the trial court's detailed and district-

specific findings of fact and have waived any right to do so. In any case, these findings are supported by competent evidence and are not clearly erroneous. Further, petitioners have never challenged the detailed findings of fact made by the trial court to support its legal conclusion that race was not the predominant motive for the location of Senate District 32 and that politics, not race, was the predominant motive for the 2011 version of the Twelfth Congressional District ("CD 12").

STATEMENT OF THE CASE

A. Proceedings Below

The extensive proceedings below, including reconsideration by the North Carolina Supreme Court of its decision following this Court's decision in *Alabama Legislative Black Caucus v. Alabama*, 135 S.Ct. 1257 (2015), are explained by the North Carolina Supreme Court in its second decision in this case. *See Dickson v. Rucho*, 766 S.E.2d 238 (N.C. 2014) ("*Dickson I*"); *Dickson v. Rucho*, 781 S.E.2d 404 (N.C. 2015) ("*Dickson II*"). (Pet. App. 5a-6a)

B. Background to the 2011 Redistricting Process

In 2011, forty North Carolina counties were covered by Section 5 of the VRA. *Shaw v. Reno*, 509 U.S. 630, 634 (1993). North Carolina was therefore required to seek preclearance of any new redistricting plans. *Georgia v. Ashcroft*, 539 U.S. 461, 472 (2003). To make this determination, the United States Department of Justice ("USDOJ"), or the District Court for the District of

Columbia, would have compared any newly-enacted 2011 plans against the most recent lawful plan (known as the "benchmark plan") used in prior elections. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 478 (1997) ("*Bossier I*").

The Congressional plan used in the 2010 General Elections was enacted in 2001. This plan was used in all congressional elections from 2002 through 2010. Under the 2010 Census, District 1 had a 48.43% Total Black Voting Age Population ("TBVAP") while District 12 had a 43.77% TBVAP.[1] Hispanics constituted 4.51% of the voting age population ("VAP") in District 1 and 10.11% of the VAP in District 12. (Pet. App. 261a – 267a; Resp. App. 67a) Both districts were "coalition" districts.[2]

In contrast, the legislative plans used in the 2010 General Elections were not enacted until November 25, 2003. *Stephenson v. Bartlett*, 358 N.C. 219, 222, 595 S.E.2d 112, 115 (2004) ("*Stephenson III*"). Legislative plans enacted in 2001 were declared unlawful under provisions of the North Carolina Constitution that legislative districts respect county boundaries (known as the "Whole County

[1] Under the reports published by North Carolina for congressional and legislative districts, the term "Total Black Voting Age Population" includes individuals who represented their race to the Census Bureau as "single race black" or "any part black." Regulations issued by the USDOJ require that the most current population data be used to measure benchmark plans and proposed redistricting plans. 28 C.F.R. 51.54(b)(2). Consistent with their past practice, for redistricting occurring after 2010, the General Assembly and the USDOJ evaluated plans using the 2010 Census, not the 2000 Census. Federal Register, Vol. 76, No. 27, Part III, p. 7472 (February 9, 2011).

[2] *See infra* n. 3.

Provisions" or "WCP"). *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) ("*Stephenson I*"); N.C. CONST. art. II, §§ 3(3) and 5(3). In 2003, a second set of legislative plans enacted in 2002 was found to be in violation of the WCP. Interim plans created by a superior court were used for legislative races in the 2002 General Election. *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) ("*Stephenson II*"). The only district from the 2003 plans that was ever subject to constitutional review (House District 18) was found to be in violation of the WCP. *Pender Cnty. v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (2007) ("*Pender County*"), *aff'd*, *Bartlett v. Strickland*, 556 U.S. 1 (2009).

On June 26, 2003, this Court issued its decision in *Ashcroft*. The Court articulated two strategies for states to obtain preclearance. Under one option, states could create "a certain number of 'safe districts' in which it is highly likely that minority voters will be able to elect their candidates of choice." *Ashcroft*, 539 U.S. at 480. The Court also endorsed an alternative strategy under which states could enact a combination of districts, including majority-minority districts, coalition districts, and influence districts, in the place of a plan based strictly on safe majority-minority districts. *Id*. at 480-83.[3]

[3] This Court has provided definitions "to describe various features of election districts in relation to the requirements of the Voting Rights Act." *Strickland*, 556 U.S. at 13. Majority-minority districts are districts in which a specific minority group constitutes a numerical majority of the VAP. Coalition districts are districts in which two minority groups combine to constitute a majority of VAP. Crossover

Following the Court's decision in *Ashcroft*, North Carolina followed the second option for preclearance explained in *Ashcroft*. Thus, North Carolina adopted legislative plans that included a combination of majority-black, coalition, crossover, and influence districts. By the time of the 2010 Census, the 2003 Senate Plan included eight districts that were coalition districts. (Pet. App. 172a) The TBVAP in a ninth district (Senate District 40) was only 35.43% but the district was a coalition district because the African American and Hispanic populations combined to form a majority of the VAP. (Resp. App. 49a-50a) The 2003 Senate Plan also included six "influence" districts with a TBVAP between 30.18% and 37.27%. (Resp. App. 63a)

North Carolina followed a similar preclearance strategy in its 2003 House plan. That plan included 10 districts that were majority-black and 10 districts with TBVAP between 40% and 50% which were also coalition districts. (Pet. App. 173a) The 2003 plan also contained four other districts in which African Americans were less than 40% TBVAP but in which a combination of African Americans and Hispanics constituted a VAP majority. (Resp. App. 54a-56a) The 2003 House plan also included 10 other crossover and influence districts with TBVAP between 30.15% and 36.90%. (Resp. App. 65a-66a) One of these

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districts are majority-white districts in which a sufficient number of whites crossover to support and elect the minority group's candidate of choice. Influence districts are districts in which a minority group allegedly has influence in determining election outcomes but cannot control the outcome. *Id.* at 13-14.

districts (House District 39) operated as a crossover district in the 2006 and 2008 General Elections because an African American Democrat was elected in each of these elections. *Id.*

The legal landscape at the time of *Ashcroft* changed after the 2003 legislative plans were enacted. In *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006) ("*LULAC*"), this Court rejected the argument that Section 2 requires influence districts because "the opportunity 'to elect representatives of their choice' . . . requires more than the ability to influence the outcome between some candidates, none of whom is [the minority group's] candidate of choice." 548 U.S. at 445-46; *see also Strickland*, 556 U.S. at 13.

Another significant legal development occurred when Congress reauthorized and amended Section 5. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, P.L. 109-246, 120 Stat. 577 (2006). One of the purposes of these amendments was to reverse any portion of *Ashcroft* which gave states the option of selecting coalition or influence districts over districts that allow the minority group to elect their preferred candidates of choice. *See* S. REP. NO. 109-295, at 18-21 (2006) ("Preferred Candidate of Choice"); H.R. REP. NO. 109-478, at 65-72 (2006).

The final significant legal change occurred in *Strickland*. Under the 2003 House plan, North Carolina traversed the New Hanover-Pender County line twice

in order to create a majority-white crossover district (House District 18). The *Strickland* plaintiffs contended that, unless required by the VRA, the New Hanover-Pender County line could only be traversed once without violating the *Stephenson* drawing formula that minimizes the number of county line traversals within a county grouping, which would have, in this instance, left Pender County whole. North Carolina defended the division of Pender County on the ground that majority-white crossover districts served as a defense to vote dilution claims under Section 2 of the Voting Rights Act. *Pender County*, 361 N.C. at 493-98, 649 S.E.2d at 366-68. This Court agreed with the North Carolina Supreme Court and held that Section 2 did not authorize the creation of crossover districts and that any district enacted to protect the State from Section 2 liability would need to be established with an actual majority-minority population. *Strickland*, 556 U.S. at 12-20.[4]

With this background, and heading into the 2011 redistricting cycle, it was apparent that changes were required in the 2003 legislative plans and the 2001 congressional plan. The state constitutional standards governing one person, one vote require that legislative districts be drawn with a population deviation of no more than plus or minus 5% from the ideal population. *Stephenson I*, 355 N.C. at

[4] While the Court did not squarely address whether coalition districts could be required by Section 2, it stated that such districts had never been ordered as a remedy for a Section 2 violation by any of the circuit courts. *Id.* at 13, 19.

383, 562 S.E.2d at 397. Following the 2010 Census, almost all of the majority-black or coalition legislative districts were underpopulated or overpopulated under this standard. (Resp. App. 47a; Pet. App. 317a, 318a, 323a, 325a. 326a, 330a, 393a. 336a, 340a, 343a, 346a, 348a 35a) The First Congressional District ("CD 1") was substantially underpopulated, while CD 12 was slightly overpopulated. (Resp. App. 48a; Pet. App. 350a, 352a)[5]

The General Assembly in 2011 was also obligated to consider the results of recent elections. In 2010, eighteen African American candidates were elected to the State House of Representatives and seven African American candidates were elected to the State Senate. Two African American candidates were elected to Congress in 2010. All African American candidates elected to the General Assembly or Congress in 2010 were elected in majority-black or coalition districts. No African American candidate elected in 2010 was elected from a majority-white crossover or influence district. Two African American incumbent senators were defeated in the 2010 General Election running in majority-white districts. (Pet. App. 243a-245a)

From 2006 through 2010, no African American candidate was elected to more than two consecutive terms in a majority-white legislative district. (Pet. App. 244a) From 2004 through 2010, no African American candidate was elected to

[5] Of course, for congressional districts the applicable one person, one vote standard is governed by federal law. *Wesberry v. Sanders*, 376 U.S. 1 (1964).

state office in North Carolina in a partisan election. In 2000, an African American candidate, Ralph Campbell, was elected State Auditor in a partisan election. However, in 2004, Campbell was defeated by a white Republican in a partisan election. (Pet. App. 244a, 245a)

C. The 2011 Redistricting Process in North Carolina

The Joint Redistricting Committee conducted thirteen public hearings from April 13, 2011, through July 18, 2011. Proposed VRA legislative districts were published by the Committee Chairs and a hearing conducted on these districts on June 23, 2011.[6] A public hearing was held on a proposed congressional plan on July 7, 2011, and a hearing on proposed legislative plans was held on July 18, 2011. (Pet. App. 246a)

In 2011, North Carolina changed its preclearance strategy and elected to pursue the first option explained in *Ashcroft* (and seemingly endorsed by Congress when it amended Section 5 in 2006). Thus, the 2011 General Assembly enacted majority-black districts in the place of coalition and influence districts. The Redistricting Chairs published five different statements outlining the criteria they would follow in the construction of legislative and congressional districts. (Resp. App. 1a – 46a) On June 17, 2011, the Co-Chairs stated that legislative plans must comply with the state constitutional criteria explained in *Stephenson I* and *II*,

[6] Under the WCP requirements, VRA districts must be created first. *Dickson I*, 766 S.E. 2d at 258.

Pender County and *Strickland* to determine the appropriate "VRA districts." The Co-Chairs had also sought advice during the redistricting process on the number of Section 2 districts to create, citing *Johnson v. De Grandy*, 512 U.S. 997 (1994). The Co-Chairs stated that they would "consider, where possible" plans that included "a sufficient number of majority African American districts to provide North Carolina's African American citizens with a substantially proportional and equal opportunity to elect their preferred candidates of choice." The Chairs also stated that based upon statewide demographic figures, proportionality for African American citizens "would roughly equal" twenty-four majority African American House districts and ten majority African American Senate districts. (Resp. App. 1a – 11a)

The Co-Chairs made it clear that proportionality was not an inflexible criterion and that majority-black districts would only be created "where possible." The Senate Co-Chair proposed only nine majority-black districts (instead of the proportional number of ten) because he was "unable to identify a reasonably compact majority African American population to create a tenth majority African American District." (Resp. App. 1a – 6a) While the House plan published on June 23, 2011, had twenty-four majority-black house districts, based upon public opposition expressed during a public hearing, a majority-black district proposed for

southeastern North Carolina (House District 18) was eliminated in the final House Plan. (Resp. App. 1a – 9a, 34a – 39a)

The proposed congressional plan was released on July 1, 2011. The Co-Chairs noted that CD 1 had been established in 1992 as a majority-black district designed to protect the State from liability under Section 2, that this district was still needed to protect the State from Section 2 liability, and that the 2001 version was underpopulated by 97,500 people. The Co-Chairs also stated that based upon the *Strickland* decision, the TBVAP for CD 1 would be a percentage above 50%. The Co-Chairs also explained that CD 12 would be retained as a very strong Democratic district. (Resp. App. 22a – 32a)

Three groups submitted alternative maps during the 2011 redistricting process. Counsel for the North Carolina NAACP plaintiffs in this case ("NC NAACP"), appeared at public hearings on May 9, 2011, and June 23, 2011, on behalf of a group called the Alliance for Fair Redistricting and Minority Voting Rights ("AFRAM").[7] On behalf of the members of AFRAM, petitioners' counsel submitted a proposed congressional plan on May 9, 2011, and proposed legislative plans for the Senate and House on June 23, 2011. All three plans were designated by the General Assembly as the Southern Coalition for Social Justice ("SCSJ") Plans. (Pet. App. 246a-252a, 259a) Next, on Monday, July 25, 2011, the

[7] This coalition included petitioners NC NAACP and the North Carolina League of Women Voters. (Pet. App. 246a – 247a)

Democratic legislative leadership published a series of redistricting plans designated as the "Fair and Legal" Congressional, Senate, and House Plans. On that same date, the Legislative Black Caucus ("LBC") published its "Possible Senate Plan" and "Possible House Plan." (Pet. App. 259a, 260a)

Political considerations played a significant role in the 2011 enacted plans and all alternatives. The Co-Chairs acknowledged that creating majority-black districts would make adjoining districts more competitive for Republicans. The uncontested evidence shows that the enacted legislative plans were constructed so that Republicans would retain their majorities.[8] The uncontested evidence also shows that all of the alternative districts were constructed to elect Democratic majorities in the Senate and House. Petitioners have never disputed this evidence. (Resp. App. 17a, 26a, 31a – 32a, 45a – 46a, 68a – 103a)

The General Assembly enacted redistricting plans for the Senate and Congress on July 27, 2011. A House plan was enacted on July 28, 2011. (Pet. App. 259a – 260a) The 2011 Senate plan included nine majority-TBVAP districts and one majority-minority coalition district (located in Forsyth County). The 2011

[8] The Court can take judicial notice that under the enacted plans Republicans retained majorities in 2012 and 2014.

House plan included twenty-three majority-black districts. (Pet. App. 172a, 173a, 264a) [9]

All of the 2011 alternative legislative plans adopted the same preclearance formula followed by the 2003 Democratic-controlled General Assembly and seemingly overruled by Congress in 2006 when it amended Section 5. All of the alternative 2011 House plans proposed a combination of majority-black, coalition, and influence districts. (Pet. App. 173a) The SCSJ House plan proposed eleven majority-TBVAP districts, thirteen coalition districts, and at least three influence districts. (Resp. App. 57a – 58a, 65a – 66a)[10] The Democratic leadership's Fair and Legal House plan proposed nine majority-TBVAP districts, fifteen coalition districts, and at least four influence districts. (Resp. App. 59a – 60a, 65a – 66a) The LBC's Possible House Districts plan proposed ten majority-TBVAP districts, fourteen coalition districts, and at least four influence districts. (Resp. App. 61a – 62a, 65a – 66a)

The alternative 2011 Senate plans followed a similar pattern. The 2011 SCSJ Senate plan proposed five majority-black districts, four coalition districts, and at least two influence districts. (Pet. App. 172a; Resp. App. 51a, 63a – 64a)

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[9] All three plans were precleared by USDOJ on November 1, 2011. *Dickson I*, 766 S.E.2d at 243.

[10] While the amount of TBVAP needed to create an "influence" district is not certain, Respondents are referring to districts in the alternative plans that were not majority-minority coalition districts but included TBVAP of at least 30%.

Notwithstanding the decisions in *Pender County* and *Strickland*, the "Fair and Legal" Senate plan did not include any majority-black districts. Instead, this plan contained nine majority-minority coalition districts, and two to three influence districts. (Pet. App. 172a; Resp. App. 52a, 63a – 64a) The 2011 LBC's Possible Senate plan also ignored *Pender County* and *Strickland* and proposed no majority-black districts, nine coalition districts, and at least two to three influence districts. (Pet. App. 172a; Resp. App. 53a, 63a – 64a)

D. Trial Court Opinion

The trial court panel consisted of three Superior Court Judges appointed to hear the case by the Chief Justice of North Carolina.[11] They reviewed a voluminous record of maps, affidavits, depositions, statistics, testimony and other evidence. The unanimous decision of the panel was rendered by judges from "different geographic regions and with differing ideological and political outlooks." (Pet. App. 144a, 145a)

During the week of February 25, 2013, the trial court conducted hearings on cross-motions for summary judgment. Prior to ruling on these motions, on May 13, 2013, the trial court ordered that a trial be held on only two issues:

> (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

[11] By statute, the Chief Justice is required to appoint a three-judge panel to hear any state court redistricting lawsuits. N.C. Gen. Stat. § 1-267.1.

> 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 these districts.

(Pet. App. 148a)

The trial court found that petitioners had challenged a total of thirty districts (9 Senate, 18 House, and 3 Congressional) on the grounds of racial gerrymandering. (Pet. App. 157a) Twenty-six of these districts were created by North Carolina for the purpose of avoiding VRA claims. The trial court found that four other districts challenged by petitioners were not created by North Carolina for that purpose. (*Id*.)

The three-judge panel conducted the trial assuming the applicability of strict scrutiny to districts enacted to protect the state from liability under the VRA. The three-judge court never held a trial on whether race was the predominant motive for the location of the challenged VRA legislative districts or CD 1. Instead, the trial court summarily found that North Carolina's 2011 VRA districts were subject to strict scrutiny. The basis for this ruling was the statement by the Co-Chairs of the Joint Redistricting Committee that substantial proportionality was one of the factors they would consider in legislative redistricting (even though neither plan maximized the number of majority-black districts or established the proportional

number of majority-black districts). (Pet. App. 157a) The trial court gave no reasoning in support of its decision to subject CD 1 to strict scrutiny.[12] Applying the test articulated by this Court in *Shaw II*, 517 U.S. at 908-910, the three-judge panel then found that the General Assembly had a strong basis in the legislative record to support all of the challenged VRA districts and that each challenged district was narrowly tailored. (Pet. App. 160a-199a)

The trial court's findings of fact included general findings applicable to all of the challenged districts (Pet. App. 242a-260a) as well as detailed findings related to each challenged VRA district. (Pet. App. 261a-353a) The trial court also held that petitioners had failed to provide a judicially manageable definition of the term "compact, " and failed to prove that the enacted districts were bizarrely shaped or that the districts they supported were any more geographically compact or more pleasing in appearance than the enacted districts. The trial court

[12] The trial court acknowledged that "a persuasive argument can be made that compliance with the VRA [was] but one of several competing redistricting criteria balanced by the General Assembly and that a lesser standard of review might be appropriate." (Pet. App. 159a) (citing *Vera v. Bush*, 517 U.S. 952, 958 (1996); *Wilkins v. West*, 264 Va. 447, 571 S.E.2d 100 (2002)). Despite these arguments, the trial court elected to apply strict scrutiny to the challenged VRA districts because "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 . . . ." (Pet. App. 159a)

concluded that petitioners had failed to prove that the enacted districts violated any "compactness" requirement under federal or state law. (Pet. App. 217a-232a)

Based upon the evidence presented at trial, the three-judge panel also concluded that race was not the predominant motive for the location of district lines established by Senate District 32 and CD 12 (Pet. App. 200a-204a) and entered extensive findings of fact in support of this conclusion. (Pet. App. 355a-358a; 361a-365a)

E. Opinions by the North Carolina Supreme Court in *Dickson I* and *Dickson II*

On appeal in *Dickson I*, the North Carolina Supreme Court affirmed the decision by the trial court. The North Carolina Supreme Court affirmed the trial court's summary judgment that the enacted Senate and House Plans complied with the *Stephenson* county-grouping formula and that petitioners' alternative Senate and House plans did not. *Dickson I*, at 244-45. The *Dickson I* court held that the trial court erred by applying strict scrutiny to the challenged VRA districts because summary resolution of the racial predominance element in favor of the plaintiffs is almost never appropriate. *Id.* at 251-54. *See also Hunt v. Cromartie*, 526 U.S. 541, 553 n. 9 (1999) (summary judgment is rarely granted in a plaintiff's favor in cases where the issue is a defendant's racial motivation). However, the *Dickson I* court found this error to be harmless based upon its decision to affirm the trial court's findings that the challenged VRA districts survived strict scrutiny. *Id.* The

Dickson I court also affirmed the trial court's conclusion that race was not the predominant motive for the location of the district lines of Senate District 32, and CD 12. *Id.* at 269-70.

This Court subsequently ordered the North Carolina Supreme Court to reconsider its opinion in light of the decision in *Alabama*.[13] The North Carolina Supreme Court then applied the test explained in *Alabama* and reaffirmed the trial court's opinion. *Dickson II*.

REASONS FOR DENYING THE WRIT

A. The General Assembly never adopted a mandatory criterion that the State enact a proportionate number of majority-black legislative districts.

Petitioners correctly state that North Carolina's principal map drawer prepared a proportionality chart early in the redistricting process. Petitioners claim that this chart shows that the State "needed to draw ten majority-black state senate districts and twenty-five majority black state house districts" to provide African American voters with a number of majority-black districts that is proportional to the percentage of statewide black voting age population. (Pet. 6) But petitioners concede that in 2011 North Carolina only enacted nine majority-black Senate districts and only twenty-three majority-black House districts. (Pet. 5; Pet. App.

[13] It is not clear whether this Court's order remanding this case for reconsideration in light of *Alabama* impacts the *Dickson I* decision or it relates to districts such as CD 12 which were not created by North Carolina to defend the State against VRA liability.

172a, 178a) Because, by petitioners' own admission, North Carolina did not enact a proportional number of majority-black districts, petitioners are improperly asking this Court to grant certiorari to provide an advisory opinion. *Alabama State Fed. Of Labor, Local Union No. 103 v. McAdory*, 325 U.S. 450, 461 (1945) ("This Court is without power to give advisory opinions.") (collecting cases).

Regardless, the fact that North Carolina considered whether proportionality in the number of majority-black districts could be achieved cannot, on its own, prove racial predominance. As explained in *Alabama*, general statewide redistricting criteria do not prove that race predominated in the drawing of a specific district. *Alabama*, 135 S.Ct. at 1266. Further, proportionality is part of the totality of the circumstances test applicable to all claims for vote dilution under Section 2. *League of United Latin American Citizens v. Perry*, 548 U.S. at 399, 427 (2006); *Strickland*, 556 U.S. at 30 (Souter, J., dissenting). In order to prove a case for vote dilution, plaintiffs must show an alternative plan that creates one or more majority-black districts than the number found in the enacted plan. *De Grandy*, 526 U.S. at 997, 1008. Plaintiffs bringing claims for vote dilution cannot meet this standard of proof when the minority group has achieved proportionality under the challenged redistricting plan. *Id*. at 1015-16. Even assuming North Carolina had adopted an "inflexible" rule requiring exact proportionality in the number of legislative districts, a state cannot possibly be guilty of racially

gerrymandering any specific districts simply because it has considered or adopted a defense recognized by this Court.[14]

B. Petitioners have never challenged the findings by the North Carolina courts that the challenged districts comply with the State's constitutional criteria concerning the importance of county lines in the formation of legislative districts. In any case, North Carolina had a strong basis in evidence to enact these districts.

In appeals from trial courts to this Court, findings of fact cannot be reversed unless they are clearly erroneous. *Easley v. Cromartie*, 532 U.S. 234, 242 (2001). Moreover, "where an intermediate court reviews, and affirms, a trial court's findings of fact, this Court will not 'lightly overturn' the concurrent findings of the two lower courts.'" *Id*. at 243 (citing *Neil v. Biggers*, 409 U.S. at 188, 193 n. 3 (1972)). Here, the courts below made or affirmed detailed findings regarding the factors that impacted the shapes and location of the challenged districts. For example, petitioners do not challenge the factual findings or the legal conclusions

[14] While petitioners attack the State for creating majority-black districts in numbers that approach but are less than proportional, petitioners ignore that under the 2003 plans and the 2011 alternative plans, minorities would receive substantially more than a proportional number of VRA districts based upon the number of majority-black, coalition, crossover and influence districts in those plans. The difference between the 2011 enacted plans as compared to the 2003 plans and the 2011 alternative plans is that the 2011 enacted plans comply with state law and *Strickland* while the 2003 plans and the 2011 plans comply with neither. Requiring the State to adopt an extra proportional number of majority-black, coalition, crossover and influence districts that do not comply with state law or *Strickland* and are designed to maximize the political influence of minorities "causes its own dangers, and they are not to be courted." *De Grandy*, 512 U.S. at 1015.

of the courts below that all of the challenged districts comply with the State's constitutional criteria regarding the importance of county lines in the formation of legislative districts. *Dickson I*, 766 S.E.2d at 257-260; *Dickson II*, 781 S.E.2d at 438-440. These findings arguably establish that compliance with state constitutional criteria, not race, was the predominant motive for how the challenged districts were drawn. *Cromartie*, 532 U.S. at 241-42 (plaintiffs in cases alleging racial gerrymandering must show that districts are "unexplainable on grounds other than race"). Thus, unlike the criteria applied to the legislative districts at issue in *Alabama*, North Carolina's equal population standard and county combination rules influenced the identity and the race of persons assigned to each challenged district. *Dickson II*, 781 S.E.2d at 412-14, 420-21, 438-40.

Further, the courts below made detailed and specific factual findings for each of the challenged districts showing a strong basis in evidence for each challenged district and that each challenged district was narrowly tailored. (Pet. App. 18a, 21a-29a, 51a-60a, 242a-353a, 355a-358a) Petitioners have never challenged any of the trial court's findings of fact related to the challenged districts. *Dickson I*, 766 S.E.2d at 251; *Dickson II*, 781 S.E.2d at 430. Nor have

they explained how any of the factual findings by the courts below are clearly erroneous.[15] (Pet. App. 29a-30a)

Instead of explaining why the trial court's findings of fact are clearly erroneous, petitioners rely upon a chart they prepared summarizing reports prepared by a legislative staffer early in the 2011 redistricting process. The legislative reports listed election results in districts with black VAP of over 40% under the 2000 Census (and not the 2010 Census). These reports also include the 2000 Census information showing the percentage of "white" voting age population in each district. Petitioners fail to explain that the "white" percentage in these reports, and summarized in petitioners' chart, includes Hispanics. (Pet. App. 244a; Resp. App. 104a – 111a) In contrast, the General Assembly and the trial court relied upon 2010 Census data and the trial court made detailed factual findings

[15] While the 2003 House District 18 was the only district litigated in *Pender County*, the North Carolina Supreme Court stated that the General Assembly should redistrict "other legislative districts directly and indirectly affected by this opinion." *Pender County*, 649 S.E. 2d at 376. The 2003 House and Senate plans had other districts that were proposed as VRA districts with black VAP between 40 and 50 percent that divided counties in violation of the state criteria explained in *Pender County*. Thus, it is improper for petitioners to compare 2011 district to underpopulated or overpopulated 2003 districts with less than 50 percent black VAP that divide counties in violation of the state constitutional criteria. The same is true for the 2011 alternative plans. This explains part of the reasoning behind the decisions by the North Carolina courts that none of the 2011 alternative plans complied with the state constitutional criteria. *Dickson I*, 766 S.E.2d at 259-60; *Dickson II*, 781 S.E.2d at 439-41.

regarding the non-Hispanic white population in all of the challenged districts. (Pet. App. 261a-313a)

Without explaining in their Petition that the percentage "white" population reported by them is based upon 2000 Census data and includes Hispanics, petitioners direct the Court to four different districts to prove the alleged absence of racially polarized voting. Two of the districts cited by petitioners are the 2003 versions of House Districts 39 and 41 (Pet. 9).[16] Petitioners argue that racially polarized voting was absent in both of these districts by comparing the percentage of "white" (including Hispanics) voting age population under the 2000 Census versus the percentage of the total vote received by successful black candidates in general elections in these two districts in 2006 and 2008. Petitioners fail to acknowledge that they did not challenge the 2011 versions of these two districts. Nor do they contest the trial court's findings of fact that during the 2010 General Election, black candidates were not elected in these two districts or any other districts that were not majority-black or coalition districts. (Pet. App. 244a)

Petitioners also cite the 2003 versions of Senate Districts 14 and 40 as proof that North Carolina lacked a strong basis in evidence to enact these districts in 2011 with a majority-black voting age population.[17] Once again, they compare the

[16] Both of these districts were located wholly within Wake County.
[17] Senate District 14 was located wholly within Wake County. Senate District 40 was located wholly within Mecklenburg County.

2000 Census data for "white" voting age population in these districts (including Hispanics) against the percentage of votes received by black candidates in general elections from 2006 through 2010. Petitioners ignore that at the time of the 2010 Census, non-Hispanic whites were a minority of the voting age population in each district. Petitioners also ignore that at the time of the 2010 Census, African Americans were a majority of the registered voters in the 2003 version of Senate District 14. Petitioners ignore that in versions of both of these districts recommended by the NC NAACP during the 2011 redistricting process (and were part of the record before the General Assembly), their proposed SD 14 was a coalition district with a proposed TBVAP in excess of 48% while their proposed SD 40 was majority-black in TBVAP. African Americans were a majority of the registered voters in both of these NC NAACP proposed districts. (Pet. App. 246a, 247a, 259a, 317a, 329a)

Petitioners also ignore that for both the 2003 Senate District 14 and the 2003 Senate District 40, the actual margins of victory (as opposed to percentage of vote) for black candidates in general elections for 2004 through 2010 were less than the amount by which each district was overpopulated under the 2010 Census. (Pet. App. 317a, 318a, 330a) Petitioners also ignore that in every contested election in those districts from 2004 through 2010, except for one (2010 election in Senate District 40), the black candidates substantially out-raised their white opponents in

campaign funds. (Pet. App. 317a, 318a, 330a, 331a) These findings of fact vindicate the judicially manageable standard established in *Strickland*. The *Strickland* rule relieves the State from deciding many imponderables including having to guess at the lowest percentage of black population needed in the district to provide African Americans an equal opportunity to elect their candidate of choice, the identity of non-Hispanic white voters who would need to be retained in each of these overpopulated districts under the 2010 Census to ensure that the minority group could elect their candidate of choice, and the impact of incumbency. *Strickland*, 556 U.S. at 17-18. Petitioners ignore identical findings of fact by the trial court, which were affirmed on two occasions by the North Carolina Supreme Court, for other contested majority-black districts. (Pet. App. 314a-353a)

Petitioners also ignore other related findings by the trial court showing a strong basis in evidence for all of the challenged districts. For example, petitioners ignore that counsel for the NC NAACP provided a statement to the redistricting committee that one of their own experts had found "statistically significant levels of racially polarized voting" in 54 general elections between African American and white candidates, that "we still have very high levels of racially polarized voting in the State," and that this "data demonstrates the continued need for majority-minority districts." (Pet. App. 248a, 249a) Petitioners then ignore the findings of

fact showing the counties in each of the challenged 2011 districts in which the NC NAACP's expert or an expert hired by the State found statistically significant racially polarized voting. Petitioners also ignore findings by the trial court for each challenged district showing (1) the counties covered by Section 5; (2) counties in which significant racially polarized voting had been found in prior cases, including *Thornburg v. Gingles*, 478 U.S. 30 (1986) and *Cromartie v. Hunt*, 133 F.Supp. 407, 422 (E.D. N.C. 2000) *rev'd on other grounds sub. nom Easley v. Cromartie*, 532 U.S. 234 (2001); and (3) counties in which alternative legislative plans proposed by the NC NAACP, Democratic leaders, and the LBC also recommended the creation of majority-black or coalition districts. (Pet. App. 261a-363a)

Finally, petitioners ignore the trial court's detailed findings of fact that supported its conclusion that race was not the predominant motive for the location of the 2011 Senate District 32 or CD 12. (Pet. App. 355a-358a)

Ultimately, as noted by the North Carolina Supreme Court, petitioners' arguments related to VRA districts rest upon their view that this Court wrongly decided *Strickland*. *Dickson II*, 781 S.E.2d at 421-22. The trial court's detailed and specific findings of fact show that there is no basis for overturning the decision by the courts below upholding the challenged VRA districts unless this Court decides to overrule *Strickland*. Further, the findings of fact by the trial court

support its conclusion that race was not the predominant motive for Senate District 32 and CD 12. (Pet. App. 355a-358a; 361a-365a)

Petitioners wrongfully argue that certiorari should be granted because the Court has noted probable jurisdiction in the case of *Harris v. McCrory*, No. 15-1262. Respondents believe that the *Harris* three-judge court improperly applied the standards established by this Court in *Shaw v. Hunt*, 517 U.S. 899 (1996), *Cromartie II*, *Strickland*, and *Alabama* and that these errors do not support the issuance of certiorari here. Nor does the decision by the three-judge court in *Page v. Virginia State Bd. Of Elections*, No. 3:13CV678, 2015 U.S. Dist. LEXIS 73514 (June 5, 2015), *appeal dismissed sub. nom*, *Wittman v. Personhuballah*, No. 14-1502, 2016 U.S. LEXIS 3353 (U.S. May 23, 2016) establish a split that warrants certiorari in this case. *Page* involves the standards applicable to Virginia congressional districts under Section 5 as compared to the Section 2 issues that are the core of the dispute here. *Page* also does not involve state legislative districts that comply with a state constitutional formula for grouping counties as established in the *Stephenson* line of cases.

Moreover, petitioners advocate a position that would hold states redistricting in the VRA context to a standard already rejected by this Court. In prior cases, this Court has presumed that drawing districts to avoid liability under the VRA can be a compelling state interest that supports the use of race in drawing districts. *Vera*,

517 U.S. at 977. In *Alabama*, this Court no longer assumed but instead expressly held that a state has a compelling reason for using race to create districts when reasonably necessary to protect the state from liability under the VRA. *Alabama*, 135 S. Ct. at 1272-73. The Court ruled that the district court had erred in approving the only district evaluated on certiorari (Alabama's Senate District 26) because Alabama did not demonstrate a strong basis in evidence to support the creation of a super majority-black district with BVAP in excess of 70%. In fact, Alabama cited *no* evidence in the legislative record to support the need for super majority-black districts. *Id.* at 1272-74.

The *Alabama* Court qualified its ruling by stating that it was not "insist[ing] that a legislature guess precisely what percentage reduction a court or the Justice Department might eventually find to be retrogressive." *Id.* at 1273. This is because "[t]he law cannot insist that a state legislature, when redistricting, determine precisely what percent minority population (the VRA) demands." *Id.*[18] Federal law cannot "lay a trap for an unwary legislature, condemning its redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place a few too many minority voters in a districts or (2) retrogressive under § 5 should the legislature place a few too few." *Id.* at 1274 (citing *Vera*, 517 U.S. at 977).

[18] *Alabama* concerns the Court's interpretation of Section 5.

Based upon these concerns, the Court held that strict scrutiny "does not demand that a State's action actually is necessary to achieve a compelling state interest in order to be constitutionally valid." *Id.* Instead, a legislature "may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have 'good reasons' to believe such a use is required, even if a court does not find that the actions were necessary for statutory compliance." *Id.* In *Alabama*, nothing in the legislative record explained why Alabama's Senate District 26 needed to be maintained with a BVAP in excess of 70% as opposed to a lower majority BVAP percentage. Therefore, the Court could not accept the district court's conclusion that District 26 served a compelling governmental interest or was narrowly tailored. *Id.* at 1273-74.

Here, in ignoring the substantial amount of evidence in the legislative record of racially polarized voting, petitioners would hold the State to the same level of proof that would be required of a plaintiff asserting a Section 2 vote dilution claim. But Petitioners' proposed standard for what a state must develop in a legislative record is irreconcilable with this Court's holding that "good reasons" alone are needed. *Alabama, supra.* The "good reasons" standard ensures that states do not engage in wholly unwarranted defensive compliance with Section 2 and that lower courts do not trap states between the competing hazards of liability of racial gerrymandering and vote dilution claims.

The facts found by the trial court and affirmed twice by the North Carolina Supreme Court demonstrate the wisdom of this Court's holding in *Alabama* and the error in petitioners' case. Petitioners never submitted a redistricting plan which complied with North Carolina's state constitutional criteria at all, much less one that complied with state constitutional criteria but used race "less" than they claimed it should be used. Thus, there is no basis in this case for comparing the plans enacted by the State in 2011 with any alternative maps that would allegedly be superior. There is certainly no basis for second guessing the State's BVAP percentages in districts that also otherwise complied with North Carolina's state constitutional conditions for redistricting.

Finally, petitioners want to trap North Carolina between competing hazards of liability is demonstrated by the BVAP percentages of the districts in the plans they did submit (which did not comply with the state constitution). Petitioners submitted plans which chose the former theory of preclearance strategy approved in *Ashcroft*, rather than the preclearance strategy actually adopted by North Carolina and supported by the 2006 amendments to Section 5 and *Strickland*. There is no basis for holding North Carolina liable for racial gerrymandering where the only plan-based evidence against it does not comply with its state constitution or this Court's decision in *Strickland*.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for certiorari.

Respectfully submitted this 4th day of August, 2016.

Thomas A. Farr
Counsel of Record
Phillip J. Strach
Michael McKnight
OGLETREE DEAKINS
4602 Six Forks Road, Suite 1100
Raleigh, NC 27609
919.787.9700
Thomas.farr@ogletreedeakins.com
Phillip.strach@ogletreedeakins.com
Michael.mcknight@ogletreedeakins.com

Alexander McC. Peters
N.C. DEPARTMENT OF JUSTICE
P.O. Box 629
Raleigh, NC 27602
919.716.6900
apeters@ncdoj.gov
Counsel for Respondents