Nos. 13-895 and 13-1138

IN THE

Supreme Court of the United States

ALABAMA DEMOCRATIC CONFERENCE, ET AL.
Appellants,

v.

ALABAMA, ET AL.,
Appellees.

ALABAMA LEGISLATIVE BLACK CAUCUS, ET AL.
Appellants,

v.

ALABAMA, ET AL.,
Appellees.

On Appeal From The United States District Court For The Middle District of Alabama

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BRIEF OF NORTH CAROLINA LITIGANTS AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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BRIEF OF NORTH CAROLINA LITIGANTS AS *AMICI CURIAE* SUPPORTING APPELLANTS

This brief is submitted on behalf of certain individual and organizational plaintiffs who have filed suit challenging the constitutionality of North Carolina's 2011 legislative and congressional redistricting plans as *amici curiae* in support of appellants.[1]

INTEREST OF *AMICI CURIAE*

Amici are residents of North Carolina and nonprofit organizations that focus on protecting voting rights and promoting voter participation in North Carolina. *Amici* are all plaintiffs in litigation currently pending in North Carolina that alleges that various districts in the state's 2011 legislative and congressional redistricting plans were drawn pursuant to racial targets that unconstitutionally classified citizens for voting purposes based on their race. The cases, which also raise state constitutional claims, were consolidated and currently are pending in the North Carolina Supreme Court. *Dickson v. Rucho,* and *NAACP v. State of North Carolina,* No. 201PA12-2.

Amici include white and black voters who live in the racially gerrymandered election districts challenged in the North Carolina litigation. One of those voters is Robinson O. Everett, Jr., who was a

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[1] The parties have consented to the filing of amicus curiae briefs in support of either party and have so informed the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici curiae* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

plaintiff in *Shaw v. Reno*, 509 U.S. 630 (1993). Organizational *amici* include the North Carolina State Conference of Branches of the NAACP, the North Carolina A. Philip Randolph Institute, Democracy North Carolina, the League of Women Voters of North Carolina -- all organizations that participated in the redistricting process in 2011.

Over the past few decades, *amici* have worked together to reach across racial lines in North Carolina and forge alliances that are based not on the color of voters' skin but on the voters' common interests in the important issues of the day. They have a strong interest in ensuring that this progress is not frustrated by a profound misapplication of existing equal protection doctrine and a mistaken understanding of this Court's rulings interpreting the Voting Rights Act. The lower court in the instant case wrongly endorsed the Alabama Legislature's belief that compliance with the Voting Rights Act required it to draw a racially proportionate number of majority-black districts with a specific percentage of black voting age population and thereby failed to properly follow the lessons of *Shaw v. Reno* and its progeny. The North Carolina 2011 redistricting process was similarly flawed, and *amici* can illuminate the impact of this error as applied to other jurisdictions.

SUMMARY OF THE ARGUMENT

Amici urge reversal of the court below because the Alabama Legislature's use of racial targets in drawing new redistricting plans following the 2011 census was an explicit racial classification that was not justified by a compelling governmental interest and was not narrowly tailored. This Court

reiterated in *Bartlett v. Strickland* the well-established principle that the "'moral imperative of racial neutrality is the driving force of the Equal Protection Clause,' and racial classifications are permitted only 'as a last resort.'" 556 U.S. 1, 21 (2009) (quoting *Richmond v. J. A. Croson Co.,* 488 U.S. 469, 518-19 (1989)). The Court further cautioned that "[o]ur holding also should not be interpreted to entrench majority-minority districts by statutory command, for that, too, could pose constitutional concerns." *Bartlett,* 556 U.S. at 23-24 (citing *Miller v. Johnson,* 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1992)).

The North Carolina legislature, like the Alabama legislature, misapplied these principles in the 2011 redistricting by imposing a racial proportionality target for the number of majority-black districts and requiring every district to meet a specific black population percentage target. As in Alabama, the North Carolina General Assembly believed that these fixed racial targets were required by the Voting Rights Act.

As a result of these racial targets, the North Carolina legislature enacted nine state senate districts as majority-black districts where previously none of the state's senate districts were majority-black.[2] They enacted twenty-three majority-black

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[2] Although there were no majority-black state senate districts, in June of 2011 there were seven African-Americans serving in the North Carolina State Senate. Joint Statement by Senator Bob Rucho, Chair of the Senate Redistricting Committee, and Representative David Lewis, Chair of the House Redistricting Committee 3 (June 17, 2011), http://www.ncleg.net/GIS/Download/ReferenceDocs/2011/Joint%20Statement%20by%20Senator%20Bob%20Rucho%20and%2

state house districts where previously only ten of those districts were majority-black.[3] Finally, they enacted two majority-black congressional districts where previously there were none, increasing the percentage of black voting age population in North Carolina's 12th Congressional District from 42.31% to 50.66%.[4] The General Assembly abandoned traditional redistricting criteria such as geographic compactness and respect for subdivision boundaries in the quest to reach the desired fixed racial targets.

Ignoring decades of progress in increasing opportunities for black voters to participate in the political process, in 2011 the General Assembly

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0Representative%20David%20Lewis_6.17.11.pdf. In Senate Districts 3 and 32, the candidates of choice of black voters were white candidates and were elected in 2008 and 2010. *Dickson v. Rucho*, No. 201PA12-2, Rule 9(d) Documentary Exhibits 7072 (Sept. 4, 2013).

[3] Although there were only ten majority-black state house districts, in June of 2011 there were eighteen African-American members serving in the North Carolina House of Representatives. Joint Statement, *supra* note 2, at 3. In House Districts 8 and 27, both of which were majority-black in voting age population, the candidate of choice of black voters was a white candidate who was elected in 2006, 2008, and 2010. *Dickson v. Rucho,* No. 201PA12-2, Rule 9(d) Documentary Exhibits 7071 (Sept. 4, 2013).

[4] In June of 2011 there were two African-Americans serving in Congress from North Carolina's 1st and 12th Congressional Districts. Statement by Senator Bob Rucho and Representative David Lewis Regarding the Proposed 2011 Congressional Plan 3 (July 1, 2011), http://www.ncleg.net/GIS/Download/ReferenceDocs/2011/Joint%20Statement%20by%20Senator%20Bob%20Rucho%20and%20Representative%20David%20Lewis_7.1.11.pdf.

created more majority-black districts than ever before, thereby entrenching racial stereotypes and tearing apart effective cross-racial coalitions that had evolved over time. *Cf. Alabama Legislative Black Caucus v. State of Alabama,* 989 F. Supp. 2d 1227, 2013 U.S. Dist. LEXIS 178735 at *327 (M.D. Ala. 2013) (Thompson, J. dissenting) ("The purpose of [the VRA] is to help minority groups achieve equality, not to lock them into legislative ghettos."). The General Assembly's use of racial targets in redistricting was justified only by the mistaken belief that they were required by federal law. In addition to North Carolina and Alabama, there is only one other redistricting case, currently pending in Virginia, in which it is alleged that the Legislature admittedly and explicitly used racial targets in drawing districts.

Thus, what is needed here is not a revision of voting rights jurisprudence; nor will reversal of the trial court result in significant upheaval of redistricting maps throughout jurisdictions formerly covered by Section 5 of the Voting Rights Act. Rather, the misinterpretation of the Voting Rights Act's requirements resulting in the unfair imposition of racial targets in redistricting in a few states is an unconstitutional use of race that must be corrected.

ARGUMENT

I. THE VOTING RIGHTS ACT AND EQUAL PROTECTION GUARANTEES WERE WORKING IN NORTH CAROLINA TO AMELIORATE THE EFFECTS OF PAST DISCRIMINATION IN VOTING

In the twenty-eight years since this Court's decision in *Thornburg v. Gingles,* 478 U.S. 30 (1986), and the twenty-one years since the Court's decision in *Shaw v. Reno*, 509 U.S. 630 (1993), voters in North Carolina have made significant progress towards achieving the goals of inclusion and fair representation embodied in the Voting Rights Act. The increasing willingness of white voters to support black candidates at the ballot box has meant that when black voters go to the polls, they have a reasonable chance of electing their candidates of choice even when those candidates are black and even if black voters are not a majority of the electorate. Indeed, in 2011 the record developed by the General Assembly showed that fifty-six times between 2006 and 2011, African-American candidates won election to the state house and senate from districts that were not majority-black, and twenty-two times those candidates were running in majority-white districts. Most of these elections involved candidates of different races, where the victorious black candidate defeated a white challenger, and in some notable cases, that white challenger was the incumbent.

When the North Carolina legislature was drawing Congressional districts following the 1990 Census, there had not been an African-American elected to Congress from North Carolina since 1896,

when George H. White was re-elected for his second and last term. When drawing Congressional Districts in 2011, three different African-Americans had been elected to represent North Carolina's rural coastal plain, and Representative Mel Watt had won seven of ten elections in urban districts that were majority white, including a strongly contested election in 1998 in which his opponent raised over a million dollars and the district was only 32% black in voting age population.[5]

However, the redistricting plans enacted by the General Assembly in 2011 unreasonably take no account of any of the important political progress that has been made in North Carolina. Instead of continuing the gradual transition to a system without racial roadblocks, they set a clear course in exactly the other direction, re-entrenching racial divisions in the political process.

The North Carolina Legislature explicitly imposed two racial targets: 1) The percentage of majority-black districts in each plan must equal the statewide black population percentage (a racial proportionality requirement that was so fixed it might reasonably be called a quota) and 2) Each majority-black district must be over 50% black in voting age population (a minimum black population percentage requirement). Employing these racial targets led the legislature to create nine state senate districts as majority-black districts where previously none of the state's senate districts were majority-black; and twenty-three majority-black state house

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[5] *Dickson v. Rucho*, No. 201PA12-2, Transcript of Proceedings 177-78 (June 4, 2013).

districts where previously only ten of those districts were majority-black. In the congressional plan, the General Assembly enacted two majority-black congressional districts where previously there were none. The districts challenged in *amici*'s litigation as being racially gerrymandered were drawn, with only one exception, with a higher black voting age population percentage than the previous decade. As in Alabama, compliance with the Voting Rights Act was the North Carolina Legislature's only justification for employing these racial targets.

A. The Impact Of Compliance With The Voting Rights Act And Equal Protection Doctrine In North Carolina Before 2011.

North Carolina has an extensive history of official discrimination against African-Americans in voting, as documented by this Court's cases from *Gingles* to *Shaw*. *See, e.g., Gingles v. Edmisten*, 590 F. Supp. 345, 359-61 (E.D.N.C. 1984), *aff'd in part and rev'd in part by Thornburg v. Gingles,* 478 U.S. 30 (1986). In 1982, African-American voters were registered statewide at percentages that lagged behind white voters by fourteen percentage points, and as much as twenty-three percentage points in some counties. 590 F. Supp. at 360. In 1981, the General Assembly enacted a legislative redistricting plan that had no majority-black single-member districts.[6] Following the *Gingles* litigation, the General Assembly enacted

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[6] Research Division, N.C. General Assembly, *Legislator's Guide to North Carolina Legislative and Congressional Redistricting* 20 (March 2011), *available at* http://www.ncleg.net/GIS/Download/Maps_Reports/2011RedistrictingGuide.pdf.

a plan creating ten majority-black single-member districts and one majority-black two-member district for the state house; and three majority-black senate districts.[7] Between 1990 and 2010, the number of majority-black districts for each body decreased by three, while the number of African-American legislators in the General Assembly steadily increased from 18 to 25 in that same period.[8] The following charts show the number of House and Senate Districts where the total black voting age population was greater than 50% from 1992 to the present:[9]

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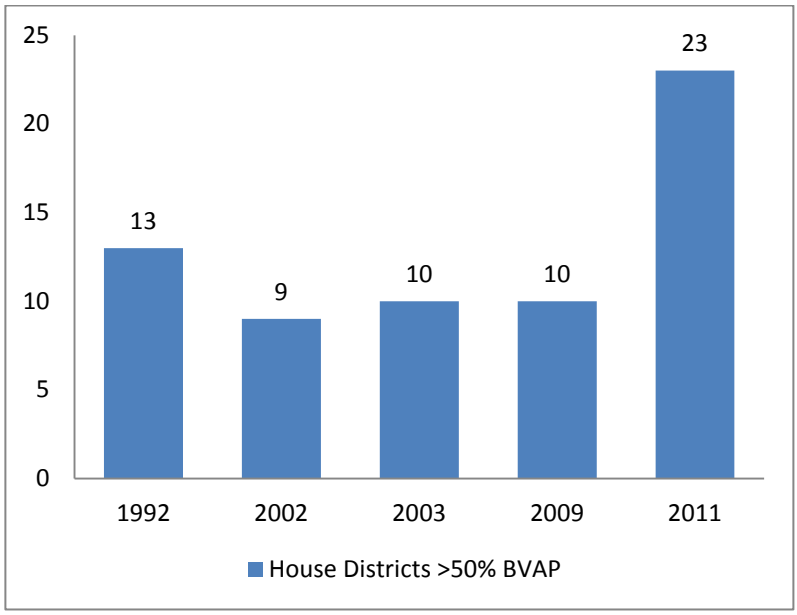
[7] *Id.* at 28.

[8] *See* Joint Statement, *supra* note 2, at 3; Keech and Sistrom, North Carolina, in Davidson and Grofman, eds., QUIET REVOLUTION IN THE SOUTH, THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990, 166 (1994); *Dickson v. Rucho*, No. 201PA12-2, Transcript of Proceedings 32-35 (June 4, 2013).

[9] Compiled from plan statistics contained in "Redistricting Archives" and "2011 Redistricting Process," *available at* http://www.ncleg.net/representation/redistricting.aspx.


25
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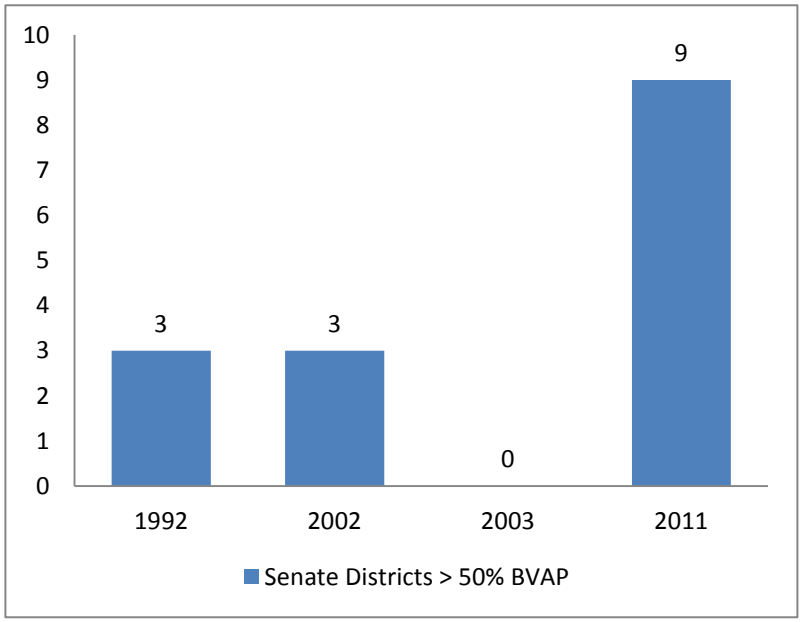
1992
2002
2003
2009
2011
House Districts >50% BVAP


10
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0
9
1992
2002
2003
2011
Senate Districts > 50% BVAP

The decline in the number of majority-black districts was accompanied by increases in the number of African-American legislators and voter registration by black voters. By the time the legislature was redrawing districts in 2011, levels of black voter registration had increased over what they were in 1982.[10]

The progress made in North Carolina is further demonstrated by the fact that between 2006 and 2011, black candidates won fifty-six election contests for state legislative seats in districts that were not majority-black, and twenty-two times in majority-white districts.[11] This pattern of sustained success for black voters over repeated election cycles is precisely what this Court previously found to be inconsistent with an allegation that the ability of black voters "is not equal to that enjoyed by the white majority." *Gingles*, 478 U.S. at 77.

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[10] In November 2010, 88.22% of the white voting age population was registered to vote while 89.75% of black voting age population in the state was registered to vote. *See* North Carolina State Board of Elections, N.C. Voter Statistics Results, (Dec. 25, 2010), *available at* http://www.ncsbe.gov/webapps/voter_stats/results.aspx?date=12-25-2010 *and* U.S. Census Bureau, Race, Hispanic or Latino, Age, and Housing Occupancy: 2010 Census Redistricting Data (Public Law 94-171) Summary File, *available at* http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_PL_QTPL&prodType=table. *See also, Dickson v. Rucho*, No. 201PA12-2, Transcript of Proceedings 384 (June 5, 2013) (expert testimony concerning African-American participation rates in North Carolina).

[11] *Dickson v. Rucho*, No. 201PA12-2, Plaintiff-Appellants'Brief, Appx. 6 (Oct. 11, 2013).

For the Congressional districts, the same pattern of progress was apparent. Congressional Districts 1 and 12 previously were less than 50% black in voting age population and both districts had elected candidates of choice of black voters in the primary and general elections since 1992.[12] In fact, the enacted plans increased the percentage of black voting age population in North Carolina's 12th Congressional District from 42.31% to 50.66%, which is higher than the 32.56% black voting age population district that was used for the 1998 election cycle,[13] and the 43.36% black voting age population district that was used in the 2000 election cycle.[14]

In the most recent election cycles in all state legislative and congressional districts, the candidate of choice of black voters prevailed in 28 of 31 districts with 40%+ black voting age population, for a win rate of 90%.[15] This win rate is no different

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[12] *Dickson v. Rucho,* No. 201PA12-2, Rule 9(d) Documentary Exhibits 7617, 7627 (Sept. 4, 2013).

[13] Redistricting Archives, 1998 Congressional Plan A, *available at* http://www.ncleg.net/GIS/Download/District_Plans/DB_1991/Congress/1998_Congressional_Plan_A/Reports/StatewideByDistrict/rptVap.pdf.

[14] Redistricting Archives, 97 House Plan A, *available at* http://www.ncleg.net/GIS/Download/District_Plans/DB_1991/Congress/97_House-Senate_Plan_A/Reports/StatewideByDistrict/rptVap.pdf.

[15] *Dickson v. Rucho,* No. 201PA12-2, Rule 9(d) Documentary Exhibits 962 (Sept. 4, 2013).

than the win rate for black and white candidates of choice of African-American voters in districts that are 50%+ in black voting age population.[16] Since 1986, Section 2 of the Voting Rights Act opened the doors of the state legislature to candidates of choice of African-American voters in an evolving process. *See also* Keech & Sistrom, *supra* note 8, at 155 (noting impact of VRA in increasing black participation and making possible the election of black candidates to public office).

African-American candidates winning in districts ranging from 21% to 41% black in voting age population illustrate that candidates of choice of black voters have built successful multi-racial campaigns. Examples include Dan Blue's ascent to the position of Speaker of the House in 1991, Ralph Campbell's statewide election as State Auditor in 2004, Malcolm Graham's defeat of the well-regarded white-incumbent Fountain Odom in 2006, and Dr. Eric Mansfield's election to the Senate from Fayetteville in 2010. They garnered strong support from black and white voters alike, and achieved winning margins in contested elections as high as 70 to 80% of the vote. Black and white voters have seen their common interests united behind the values they share, and they have seen their elected leaders, honorable and capable men and women of color, ably represent black and white voters together.

Indeed, the record in North Carolina illustrates very well Justice Souter's insight that:

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[16] *Id.* at 1302-03.

> If the lesson of *Gingles* is that society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity, that should not obscure the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice. Those candidates may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics.

Johnson v. De Grandy, 512 U.S. 997, 1020 (1994). While racially polarized voting has not disappeared from North Carolina elections since *De Grandy*, it has lessened to the degree that candidates of choice of black voters can be successful in some areas of the state without majority-black districts. It is that pattern of success that the North Carolina General Assembly needed to take into account, but disregarded when drawing its 2011 redistricting plans.

B. The Use Of Explicit Racial Targets In 2011 Was A Departure From North Carolina's Recent Progress.

The use of racial targets in the 2011 round of redistricting in North Carolina was a dramatic

departure from earlier applications of federal voting rights law in redistricting. They started the process of drawing new plans by establishing a fixed racial target: given that blacks are 21.2% of the state's voting age population, to achieve racial proportionality, approximately 10 of the state's 50 senate districts should be majority-black districts and approximately 24 of the state's 120 house districts should be majority-black districts.[17] The racial proportionality goal was implemented without any reference to the extent to which candidates of choice of black voters were elected to state house and state senate districts in various parts of the state, and without any reference to the extent of racially polarized voting throughout the state.[18] Instead, the goal of substantial proportionality was adopted in order to "expedite the preclearance of each plan pursuant to Section 5 of the Voting Rights Act," and to "further the State's obligation to comply with Section 2 of the Voting Rights Act." Joint Statement, *supra* note 2, at 3.

In addition, the legislators believed that any "Voting Rights Act District" drawn to comply with Section 5 of the Voting Rights Act must also comply with *Bartlett v. Strickland,* 556 U.S. 1 (2009), a case interpreting Section 2 of the Voting Rights Act, by being over 50% black in voting age population. They interpreted *Bartlett* to "require that districts drawn to insulate the State from liability under the Voting

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[17] *Dickson v. Rucho,* No. 201PA12-2, Rule 9(d) Documentary Exhibits 7376 (Sept. 4, 2013).

[18] *Dickson v. Rucho,* No. 201PA12-2, Record on Appeal 1041-43 (Sept. 4, 2013).

Rights Act must be drawn with a black voting age population in excess of 50% plus one." Statement by Senator Bob Rucho and Representative David Lewis Regarding Proposed State Legislative Redistricting Plans, 4 (July 12, 2011).[19]

The chairmen of the redistricting committees, Senator Rucho and Representative Lewis, testified that they provided two instructions to their chief architect, the consultant hired to draw districts: 1) draw a majority-black district wherever possible so that black voters are at least a majority of the voting age population in the district and 2) draw sufficient majority-black districts to provide North Carolina's black voters with a substantially proportional opportunity to elect their candidates of choice.[20] These two instructions were identified as the criteria that any plan submitted to the General Assembly must meet. In a public statement issued June 22, 2011, Rucho and Lewis unambiguously stated that they would entertain other redistricting maps "provided the total districts proposed provide black voters with a substantially proportional statewide opportunity to elect candidates of their choice. Moreover, any such districts must comply with *Bartlett v. Strickland,* and be drawn at a level that constitutes a true majority of black voting age population." Statement by Sen. Bob Rucho and Rep.

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[19] *Available at* http://www.ncleg.net/GIS/Download/ReferenceDocs/2011/Joint%20Statement%20by%20Senator%20Bob%20Rucho%20and%20Representative%20David%20Lewis_7-12-11.pdf.

[20] *Dickson v. Rucho,* No. 201PA12-2, Record on Appeal 1038-43 (Sept. 4, 2013).

David Lewis Regarding Proposed VRA Districts, 7 (June 22, 2011).[21] Later, Rucho and Lewis explained their rejection of alternative plans that were submitted to them by a citizen group on the grounds that those plans did not meet their racial targets.[22]

In fact, with only one exception in the House plan, all of the districts challenged by *amici* collectively as racially gerrymandered by packing were drawn at or above the black population percentage they had before being redrawn, using 2010 census data. This is in stark contrast to the General Assembly's redistricting plans enacted following the 2000 Census, when, as the Appellants point out, nearly all of North Carolina's House and Senate districts had lower black population percentages than the prior districts and the 2003 plans were precleared by the Department of Justice. *See* Brief of Appellants, No. 13-1138, at 29 (Aug. 13, 2014).

The following charts compare the percentage black voting age population in 1) individual districts challenged by *amici* as racially gerrymandered districts; and 2) the "benchmark" or prior districts.[23]

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[21] *Available at* http://www.ncleg.net/GIS/Download/ReferenceDocs/2011/Joint%20Statement%20by%20Senator%20Bob%20Rucho%20and%20Representative%20David%20Lewis_6.22.11.pdf.

[22] Statement, *supra* note 19, at 4-5.

[23] *Dickson v. Rucho,* No. 201PA12-2 Rule 9(d) Documentary Exhibits 1205 & 1207 (Sept. 4, 2013).

House District	Benchmark BVAP	Enacted Plan BVAP	Difference
5	48.87%	54.17%	5.29%
7	60.77%	50.67%	-10.10%
12	46.45%	50.60%	4.15%
21	46.25%	51.90%	5.65%
24	50.23%	57.33%	7.11%
29	39.99%	51.34%	11.35%
31	47.23%	51.81%	4.58%
32	35.88%	50.45%	14.57%
33	51.74%	51.42%	-0.32%
38	27.96%	51.37%	23.41%
42	47.94%	52.56%	4.62%
48	45.56%	51.27%	5.71%
57	29.93%	50.69%	20.76%
99	41.26%	54.65%	13.38%
102	42.74%	53.53%	10.79%
106	28.16%	51.12%	22.96%
107	47.14%	52.52%	5.38%

Senate District	Benchmark BVAP	Enacted District BVAP	Difference
4	49.70%	53.33%	3.63%
5	30.99%	51.97%	20.98%
14	42.62%	51.28%	8.66%
20	44.64%	51.04%	6.40%
21	44.93%	51.53%	6.60%
28	47.20%	56.49%	9.30%
38	46.97%	52.51%	5.53%
40	35.43%	51.84%	16.40%

The racial proportionality and black population percentage targets employed by the Legislature led them to enact majority-black voting age population districts nearly everywhere possible. In making their redistricting plans public, Rucho and Lewis explained:

> [W]e see no principled legal reason not to draw all VRA districts at the 50% or above level when it is possible to do so. Now that it is apparent that these majority black districts can be drawn, any decision to draw a few selected districts at less than a majority level could be used as evidence of purposeful discrimination or in support of claims against the State filed under Section 2. Thus, in order to best protect the State from costly and unnecessary litigation, we have a legal obligation to draw these districts at true majority levels.

July 12, 2011 Statement at 5. Citing *Johnson v. Degrandy,* 512 U.S. 997 (1994), Rucho and Lewis' statement goes on to assert that providing proportional representation using the racial proportionality target will give the state "an important defense" to any lawsuit that might be filed under Section 2 of the Voting Rights Act. *Id.*

The degree to which adherence to the racial proportionality target led the Legislature to ignore current conditions is best illustrated by the fact that the enacted plans create new majority-black districts in Durham County where, as early as 1986, this Court held that no Section 2 violation occurred because white voters were voting for, and helping to

elect, candidates of choice of black voters. *See Gingles*, 478 U.S. at 77.

Similar to Durham County, the 2011 plan included two majority-black senate districts in Mecklenburg County where previously African-Americans were being elected to the Senate in majority-white districts. The Senate plan added a new majority-black senate district in eleven counties for the first time.[24] In Wake County, where there had never been a majority-black senate district and no majority-black house district since 2002, Linda Coleman, an African-American, won election in 2006 and 2008 in a house district that was 26.70% black in voting age population.[25] Similar patterns are true for the State House districts.[26] Throughout the state, the use of racial proportionality and black population percentage targets led to highly irregular district lines that split counties and precincts, and divided voters from one another on the basis of their race, block by block.

II. ONLY A FEW STATES USED EXPLICIT RACIAL TARGETS WITHOUT REGARD TO CURRENT CONDITIONS IN REDISTRICTING FOLLOWING THE 2010 CENSUS

Reversing the court below in this case will not result in substantial changes to election districts

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[24] *Id.* at 1205.

[25] *Dickson v. Rucho,* No. 201PA12-2, Plaintiff-Appellants' Brief, Appx. 6 (Oct. 11, 2013).

[26] *Id.*

around the country because there are only a few cases currently in litigation where it is alleged that racial targets were used in redistricting. In addition to litigation in North Carolina brought by *amici*,[27] there is a case pending in Virginia alleging that the Virginia General Assembly made the same error regarding the requirements of Section 5 of the Voting Rights Act. *See Page v. Virginia State Bd. of Elections,* No. 3:13-cv-678 (E.D. Va. filed Oct. 2, 2013).[28] In that case, legislators testified that they started with a 55% target in drawing Virginia's Congressional District 3, and ultimately increased the black VAP in that district from 53.9% in the existing plan to 57.2% in the enacted plan.[29] As in North Carolina and Alabama, they believed the 55% black voting age population target was required by the Voting Rights Act, without examining recent election data.[30]

There is also litigation pending in Florida raising federal constitutional claims concerning that state's congressional redistricting plan. *See Warinner v. Detzner,* No. 14-164 (N.D. Fla. filed Mar. 27, 2014).

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[27] An entirely different set of plaintiffs have brought similar racial gerrymander claims against North Carolina's 1st and 12th congressional districts in federal court. *See Harris v. McCrory*, No. 1:13-cv-949 (M.D.N.C. filed Oct. 24, 2013).

[28] To date there has been no final ruling from the trial court in this case.

[29] *Page v. Virginia State Bd. of Elections*, No. 3:13-cv-678, Plaintiffs' Post-Trial Brief 5-9 (E.D. Va June 6, 2014), ECF No. 105.

[30] *Id.*

In *Warinner,* the Plaintiffs' amended complaint alleges that Florida's Congressional District 5 is racially gerrymandered because the black voting age population of the district was increased from 49.9% to 50.1% without a proper functional analysis of minority voting rights.[31] However, the *Warinner* case will be impacted by the fact that Congressional District 5 is in the process of being redrawn to remedy state constitutional violations found to exist on other grounds. *See Romo v. Detzner*, Nos. 2012-CA-00412 & 2012-CA-00490 (Fla. 2d Jud. Cir. Ct. July 10, 2014).

In the post-2010 round of redistricting, there were several other cases raising claims of racial gerrymandering in state legislative or congressional redistricting that have been resolved. None of these cases included admissions by legislators that they interpreted the Voting Rights Act to require explicit racial targets, that is, a specific number of majority-black districts at a certain percentage black voting age population level, without examining current conditions. *See, e.g., Backus v. South Carolina,* 857 F. Supp. 2d 553, 564 (D.S.C.) (three-judge court) *aff'd*, *Backus v. South Carolina*, 133 S. Ct. 156 (2012) (testimony by one legislator that map drawers "relied on predetermined demographic percentages" but court finds that was not a general motivation of the legislature and that race was just one consideration among many); *Radogno v. Ill. State Bd. of Elections,* 836 F. Supp. 2d 759 (N.D. Ill. 2011) (three-judge court), *aff'd*, 133 S. Ct. 103 (2012) (no

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[31] *Warinner v. Detzner,* No. 13-1860, First Amended Complaint, 5-6, Jan. 16, 2014, ECF No. 22.

racial gerrymander claim against district that was 25% black in voting age population); *Comm. For a Fair and Balanced Map v. Ill. State Bd. of Elections,* 835 F. Supp. 2d 563 (N.D. Ill. 2011) (three-judge court) (partisan, not racial considerations, dominated map, no use of race-based targets for districts); *Fletcher v. Lamone,* 831 F. Supp. 2d 887 (D. Md. 2011) (three-judge court) *aff'd*, 133 S. Ct. 29 (2012) (no evidence that race predominated, no allegations of packing or use of racial targets); *Jeffers v. Beebe,* 895 F. Supp. 2d 920 (E.D. Ark. 2012) (no evidence of racial animus, no allegations of racial targets).

Of these cases, only *Backus v. South Carolina* involved a jurisdiction that was covered by Section 5 of the Voting Rights Act in 2011, and in South Carolina, compliance with Section 5 was not interpreted by the legislature to require the same percentage black voting age population or the same number of majority-black districts as before. For example, State Senate District 7 provided black voters with the ability to elect their candidate of choice, an African-American Senator named Ralph Anderson.[32] Mr. Anderson defeated two non-African-American candidates in the 2008 general

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[32] *See* Senate Preclearance Submission - S. 815, South Carolina Senate Judiciary Committee, *available at* http://redistricting.scsenate.gov/PreclearanceSubmissionsS815.html; and Exhibit – 14, Report by Richard Engstrom, Ph.D., South Carolina Senate Judiciary Committee, *available at:* http://redistricting.scsenate.gov/Exhibits/Exhibit%2014%20%20REPORT%20BY%20RICHARD%20ENGSTROM,%20PHD/Exhibit%2014%20%20Report%20by%20Richard%20Engstrom%20PhD.pdf.

election, winning with 70.1% of the vote.[33] The benchmark district had a 46.1% BVAP, and the 2011 enacted plan had a 43.3% BVAP. The candidate of choice of black voters was winning white votes in the district, and that district did not need to be packed with additional black voters to satisfy Section 5 of the Voting Rights Act.[34]

Indeed, across the whole South Carolina redistricting plan, in three out of the four districts that elected the candidate of choice of black voters despite being under 50% BVAP in the benchmark plan, South Carolina did not increase the black population percentage of the district to 50% BVAP. The fourth district involved only a 1.1% increase in the BVAP. Moreover, the state actually lowered the BVAP percentage in seven out of the twelve districts that elected the candidates of choice of black voters. The South Carolina Legislature did not employ racial targets in its redistricting process.

Thus, the Alabama Legislature's mis-interpretation of the Voting Rights Act to require specific racial targets was not a widespread or common interpretation, but it did occur in North Carolina and Virginia. This Court's correction of that error in this case ultimately will assist those states to redraw their districts in a way that does

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[33] *Id.*

[34] The Department of Justice precleared the South Carolina State Senate Plan on November 14, 2011. Status of Statewide Redistricting Plans, United States Department of Justice, http://www.justice.gov/crt/about/vot/sec_5/statewides.php (last accessed December 18, 2012).

not involve the excessive and mechanical use of race-based targets.

III. WHILE REDISTRICTING IS PRIMARILY THE RESPONSIBILITY OF LEGISLATURES, THE COURT MUST ACT WHEN DISTRICTS ARE BASED ON EXPLICIT RACIAL CLASSIFICATIONS

Asking this Court to enforce the constitutional equal protection guarantees that guard against unjustified race-based decision-making by a legislature is not "punishing" the state that is striving in good faith to comply with the Voting Rights Act, as the lower court in this case believed. *Alabama Legislative Black Caucus v. State of Alabama,* 989 F. Supp. 2d 1227, 2013 U.S. Dist. LEXIS 178735 at *230 (M.D. Ala. 2013). Rather, it is correcting a misunderstanding of governing legal standards that led to the imposition of racial targets in redistricting that were never intended by Congress. The crucial error made by the North Carolina General Assembly, and by the Alabama Legislature, was to conclude that the Voting Rights Act creates a requirement for majority-black districts without regard to recent progress in ameliorating the impact of racially polarized voting.

Instead, the task the North Carolina General Assembly faced when drawing new legislative and congressional districts was to assess where white bloc voting exists at levels high enough usually to defeat the candidate of choice of black voters. *Bartlett,* 556 U.S. at 24. In other words, majority-black districts are only necessary, as a temporary and remedial measure, after a searching inquiry revealing that black voters are consistently shut out

of the political process and a majority-black district is the only way black voters will have a fair opportunity to elect their candidates of choice. Whether under the Section 5 non-retrogression standard, or the Section 2 vote dilution standard, a deep and searching local inquiry of current practical realities has always been required. *See, e.g, Shelby Cnty. v. Holder,* 133 S. Ct. 2612, 2629 (2013) (VRA must be tied to current conditions); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 437 (2006) (vote dilution inquiry requires an "intensely local appraisal"); *Miller v. Johnson,* 515 U.S. 900, 922 (1995) (majority-black districts drawn to satisfy Section 5 of the VRA require strong basis in evidence of the harm being remedied); *Johnson v. DeGrandy,* 512 U.S. at 1000; *Gingles,* 478 U.S. at 45 ("the question whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality,' and on a 'functional' view of the political process."). Where race-based targets are employed without regard to current conditions, the courts must intervene to guarantee the constitutional right of voters to equal protection of the laws.

CONCLUSION

For the reasons articulated above, and in order to continue the important progress that the Voting Rights Act was intended to foster, *amici* respectfully request that the Court reverse the judgment below.

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