

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION
Civil Action No. 1:13-CV-00949

DAVID HARRIS; CHRISTINE)
BOWSER; and SAMUEL LOVE,)
))
Plaintiffs,)
))
v.)
))
PATRICK MCCRORY, in his capacity)
as Governor of North Carolina; NORTH)
CAROLINA STATE BOARD OF)
ELECTIONS; and JOSHUA HOWARD,)
in his capacity as Chairman of the North)
Carolina State Board of Elections,)
))
Defendants.)

**DEFENDANTS’ RESPONSE TO
PLAINTIFFS’ MEMORANDUM IN
SUPPORT OF ADMISSION OF
PLAINTIFFS’ EXHIBIT 13**

On or about October 15, 2015, during the trial of this matter, plaintiffs submitted a memorandum in support of their efforts to admit into evidence plaintiffs’ Exhibit 13, an email containing privileged and confidential attorney-client communications (“the privileged email communications”). The instant memorandum responds to that submission by plaintiffs.

Background

During the discovery period in the *Dickson v. Rucho* state court redistricting litigation (“*Dickson*”), plaintiffs attempted to use the privileged email communications, or a variant of them, twice in depositions. On both occasions, counsel for defendants objected to the use of the privileged email communications on attorney-client privilege grounds and plaintiffs’ counsel refrained from using them any further.

For example, during the first deposition of Dr. Tom Hofeller in *Dickson* on June 28, 2012, plaintiffs' counsel attempted to use deposition exhibit 460. Deposition exhibit 460 contains the same communications as the privileged email communications in Exhibit 13 plus additional communications among clients and counsel. A copy of an excerpt from the first Hofeller deposition in which exhibit 460 was introduced is attached as Exhibit A. Defense counsel immediately objected to the use of the exhibit, pointing out that it had been inadvertently produced and contained privileged communications. (Ex. A, p.169) Plaintiffs' counsel said "okay" and moved on to the next exhibit.

Dr. Hofeller's first deposition was recessed and later resumed on August 10, 2012. During that deposition, counsel for plaintiffs attempted to use deposition exhibit 564. Deposition exhibit 564 is the document plaintiffs attempted to introduce at the trial of this matter as Exhibit 13, and it contains many of the same privileged email communications as deposition exhibit 460. A copy of an excerpt from the second Hofeller deposition in which exhibit 564 was introduced is attached as Exhibit B. Again, defense counsel objected, noting that the document was produced by mistake. Plaintiffs' counsel acknowledged defense counsel's belief that the document was privileged as his immediate response was "I don't see how it's privileged." (Ex. B, p. 353) Nonetheless, plaintiffs' counsel again moved on from the exhibit and did not ask any questions about it.

On February 25-26, 2015, the state court held a summary judgment hearing in *Dickson*. Prior to that hearing, counsel for the State of North Carolina with the North Carolina Department of Justice compiled three compact discs containing essentially the

entire record of the case.¹ Alec Peters with the North Carolina Department of Justice described the contents of these discs during the hearing. A copy of the relevant transcript excerpt is attached as Exhibit C. Mr. Peters explained that the compilation was simply a collection of the entire record (the “library” of the case) and that it was for the convenience of the court and the parties. It was further explained that the discs contained all information and pleadings in the case whether submitted or created by defendants or the plaintiffs. The purpose of the compilation was to “make life easier for everybody involved” in the case. (Exhibit C, p. 7-8) The compilation was never submitted or treated as evidence.

Subsequently, in compiling the record on appeal in *Dickson*, plaintiffs carried forward the compilation on the disc into the record on appeal. Plaintiffs, not defendants, were responsible for compiling and docketing the record on appeal with the North Carolina Supreme Court. Similarly, plaintiffs, not defendants, filed the same material with this Court when they filed the *Dickson* record. (ECF 95)

To defendants’ knowledge, plaintiffs never used or attempted to use deposition exhibits 460 or 564 at any time in court proceedings during the *Dickson* trial court or appellate proceedings. To the extent that the privileged email communications were carried forward in the North Carolina state court record on appeal and then again in this case, the privileged communications were in the context of defense counsel’s repeated objection to their use as privileged and inadvertently produced.

¹ These discs contained dozens of affidavits, deposition transcripts, pleadings, and other materials numbering in the thousands of pages.

Argument

Under the Federal Rules of Evidence, privileged communications inadvertently disclosed in a state court proceeding do not waive the privilege if the disclosure would not be a waiver under the Federal Rules of Evidence if made in a federal proceeding. Fed. R. Evid. 502(c)(1) (2015). Inadvertently disclosed privileged communications do not waive the privilege in federal proceedings where the holder of the privilege “took reasonable steps to prevent disclosure” and to “rectify the error” including following Federal Rule of Civil Procedure 26(b)(5)(B). Fed. R. Evid. 502(b).

Under Fed. R. Civ. P. 26(b)(5)(B):

If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

Rule 26(b)(5)(B), Fed. R. Civ. P.²

Defendants plainly took reasonable steps to prevent disclosure of the privileged email communications and “rectify” any disclosure by repeatedly objecting to the use of the communications during the Hofeller depositions. This included putting plaintiffs’ counsel on notice of the privileged nature of the communications. Defense counsel’s

² The analogous state rule is nearly identical to the federal rule.

efforts were successful, at least during the *Dickson* litigation, as plaintiffs made no attempt to use or refer to the communications during any phase of the *Dickson* litigation.

However, before attempting to use the communications in the instant case, Rule 26(b)(5)(B), Fed. R. Civ. P. plainly required plaintiffs to present the communications to the court under seal and seek a ruling on the applicability of the privilege. Plaintiffs ignored this responsibility and instead blatantly sought an end-run around it by seeking its admission in this case. This court should not allow privileged communications to come into evidence in the face of this conduct by plaintiffs.

Conclusion

Defendants respectfully request that Exhibit 13 be excluded from the trial record in this case.

Respectfully submitted this 19th day of October, 2015.

NORTH CAROLINA DEPARTMENT OF
JUSTICE

By: /s/ Alexander McC. Peters
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Co-counsel for Defendants

CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day electronically filed the foregoing **DEFENDANTS' RESPONSE TO PLAINTIFFS' MEMORANDUM IN SUPPORT OF ADMISSION OF PLAINTIFFS' EXHIBIT 13** with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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This the 19th day of October, 2015.

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STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF WAKE 11 CVS 16896
11 CVS 16940

MARGARET DICKSON, et al.,)
)
Plaintiffs,)
vs.)
ROBERT RUCHO, in his)
official capacity only as)
the Chairman of the North)
Carolina Senate)
Redistricting Committee,)
et al.,)
)
Defendants.)

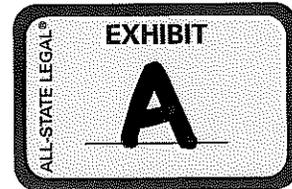
NORTH CAROLINA STATE)
CONFERENCE OF BRANCHES OF)
THE NAACP, et al.,)
)
Plaintiffs,)
vs.)
STATE OF NORTH CAROLINA,)
et al.,)
)
Defendants.)

DEPOSITION OF THOMAS HOFELLER, Ph.D.

9:31 A.M.

THURSDAY, JUNE 28, 2012

POYNER SPRUILL
301 FAYETTEVILLE STREET
SUITE 1900
RALEIGH, NC 27601



By: Denise Myers Byrd, CSR 8340, RPR

1 **Yes.**

2 Q. And when you said they are reasonably compact, were
3 you -- had you run any compactness measures?

4 A. **No.**

5 Q. And when you say reasonably compact, what were you
6 comparing it to?

7 A. **I don't think there was anything to which it could
8 be compared at that point.**

9 **Are you through with this?**

10 MR. FARR: That's fine.

11 MS. EARLS: Not entirely.

12 (WHEREUPON, Exhibit 459 was marked for
13 identification.)

14 BY MS. EARLS:

15 Q. Exhibit 459 is another e-mail from you. This is
16 later in the process, June 19th. And I don't have
17 the attachment, but do you recall sending this
18 e-mail?

19 A. **Well, I don't have to recall. It was sent by me.**

20 Q. When you say "I hope that the issues on the
21 minority districts in the House Plan get resolved,"
22 what were you referring to?

23 A. **I don't remember.**

24 (WHEREUPON, Exhibit 460 was marked for
25 identification.)

1 **BY MS. EARLS:**

2 Q. Exhibit 460 is an e-mail from -- it's an e-mail
3 string that starts -- I believe the first e-mail is
4 June 30, 2011, at 5:39 p.m., but you are copied on
5 this e-mail conveying -- I guess one of the
6 attachments is a statement by Rucho and Lewis in
7 support of the 2011 Congressional plan.

8 Do you remember receiving this e-mail?

9 **A. I have to look at it a little more here.**

10 Q. Sure.

11 **A. In the middle of the night.**

12 MR. FARR: Has this been marked
13 previously?

14 MS. EARLS: It may have been.

15 MR. FARR: I'm just going to state, again,
16 that this is something we think was improperly
17 produced because it's our position this is a
18 privileged communication to clients.

19 MS. EARLS: Okay.

20 (WHEREUPON, Exhibit 461 was marked for
21 identification.)

22 **BY MS. EARLS:**

23 Q. Exhibit 461 is another e-mail from Tom Farr to you,
24 and this is in response to an e-mail that you sent
25 to him on May 27th about releasing, and it's quite

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF WAKE 11 CVS 16896
11 CVS 16940

MARGARET DICKSON, et al.,)
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ROBERT RUCHO, in his)
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official capacity only as)
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Defendants.)

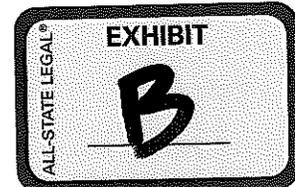
DEPOSITION OF THOMAS HOFELLER, Ph.D.
VOLUME II

9:31 A.M.

FRIDAY, AUGUST 10, 2012

POYNER SPRUILL
301 FAYETTEVILLE STREET
SUITE 1900
RALEIGH, NC 27601

By: Denise Myers Byrd, CSR 8340, RPR



1 American community?

2 A. I did. I think we covered this in the last --

3 Q. Did we?

4 A. Yes.

5 Q. Pardon me.

6 A. Well, no, you can cover it again. That's your
7 prerogative.

8 Q. If it's already been marked, I don't want to --

9 MS. EARLS: Just a second. No. Oh, yes,
10 it's a different typeface.

11 MR. SPEAS: All right. I don't need to
12 ask any more questions about it.

13 Let's mark this as 564.

14 (WHEREUPON, Exhibit 564 was marked for
15 identification.)

16 BY MR. SPEAS:

17 Q. Exhibit 564 is an e-mail exchange on June 30th.
18 You were copied.

19 Do you recognize Exhibit 564?

20 MR. FARR: Didn't we say this was produced
21 by mistake?

22 MR. SPEAS: I don't see how it's
23 privileged.

24 BY MR. SPEAS:

25 Q. And my question is simply this: Dr. Hofeller, did

1 you participate in drafting the joint statement
2 issued by Representative Lewis and Senator Rucho
3 with respect to the Congressional plans? I think
4 it was issued on July 1st.

5 **A. Not to my recollection, no.**

6 Q. Did you participate in drafting the June 17th
7 public statement issued by Representative Lewis and
8 Senator Rucho regarding the House and Senate VRA
9 districts?

10 **A. No.**

11 Q. I want to ask you a question about the data you had
12 in your machine and the data the General Assembly
13 had on its machine.

14 To your knowledge, was the data on your
15 Maptitude -- did the data you have or the data you
16 used identical to the data on the legislative
17 redistricting system?

18 **A. I can't really accurately answer that question.**
19 **There were -- there are multiple levels of data**
20 **both as to the databases that were built, what was**
21 **brought into the redistricting process for drawing**
22 **reasons, what was loaded on the Maptitude software.**

23 And if you remember, the State had a
24 different version of Maptitude than we did. And
25 then what you select out of the database on

1 STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
 COUNTY OF WAKE SUPERIOR COURT DIVISION

2 -----

3 MARGARET DICKSON, et al.,)
 Plaintiffs,) 11-CVS-16896

4 vs.)

5 ROBERT RUCHO, et al.,)
 Defendants.)

6 -----

7 NORTH CAROLINA STATE) OF
 CONFERENCE OF BRANCHES OF)
 THE NAACP, et al.,) PROCEEDINGS
 8 Plaintiffs,)

9 vs.) 11-CVS-16940
 (Consolidated)

10 THE STATE OF NORTH CAROLINA,)
 et al.,) Volume I of II
 11 Defendants.) Pages 1 - 176

12

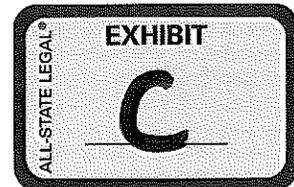
13 The above-captioned cases coming on for hearing
 14 Monday, February 25, 2013, Special Civil Session of the
 15 Superior Court of Wake County, Raleigh, North Carolina,
 before the Honorable Paul Ridgeway, the Honorable Alma
 Hinton and the Honorable Joseph Crosswhite, Judges
 presiding, the following proceedings were had:

16 A P P E A R A N C E S

17 For the Plaintiffs:

18 EDWIN M. SPEAS, JR., ESQ. ADAM STEIN, ESQ.
 JOHN W. O'HALE, ESQ. Tin Fulton Walker & Owen
 19 CAROLINE P. MACKIE, ESQ. 312 West Franklin Street
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 20 Post Office Box 1801
 Raleigh, NC 27602-1801

21 ANITA S. EARLS, ESQ.
 22 CLARE BARNETT, ESQ.
 ALLISON RIGGS, ESQ.
 23 Southern Coalition for Social Justice
 1415 West Highway 54, Suite 101
 24 Durham, NC 27707



Appearances Continued >>>>

25 -----
 Reported by: Ranae McDermott, RMR, CRR

Ranae McDermott, RMR, CRR
 Official Court Reporter

1 Appearances (Continued)

2 For the Defendants:

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Special Deputy Attorney General
4 SUSAN KELLY NICHOLS
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7 For the Defendants Rucho, Lewis, Dollar, Dockham, Berger
and Tillis:

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9 PHILLIP J. STRACH, ESQ.
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11 Raleigh, NC 27602

12 -----

13 I N D E X

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19 *****

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22
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24
25

Ranae McDermott, RMR, CRR
Official Court Reporter

1 (The Special Session of the Superior Court of Wake County
2 commenced on Monday, February 25, 2013, before the
3 Honorable Paul Ridgeway, the Honorable Alma Hinton and
4 the Honorable Joseph Crosswhite at 10:02 a.m.)

5 JUDGE RIDGEWAY: Good morning, ladies and
6 gentlemen. Welcome to these hearings before this
7 three-judge panel in the redistricting matters. These
8 are the consolidated cases of Margaret Dickson, et al.
9 versus Robert Rucho and the North Carolina State
10 Conference Branches of the NAACP versus State of North
11 Carolina. They've been consolidated for the purposes of
12 this hearing.

13 Before us today are the Plaintiffs'
14 motions for partial summary judgment, the Defendants'
15 motions for summary judgment. There is also a motion
16 to -- for judicial notice of certain facts. And we will
17 defer to you as to when that -- if that needs to be
18 argued and when --

19 MR. SPEAS: Your Honor, I am pleased to
20 report it's been resolved. We have today completed a
21 stipulation resolving all of the issues regarding the
22 notice of -- judicial notice motion. It was just signed
23 this morning. We will file it before the end of the day.
24 I have a copy here if -- if any of the members of the
25 court would like one.

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1 JUDGE RIDGEWAY: That's fine. If you have
2 a copy for us, we'll certainly accept it. And, of
3 course, you can refer to this in your arguments.

4 MR. SPEAS: If I may approach the bench.

5 JUDGE RIDGEWAY: Yes, please.

6 And that, I believe, is all of the motions
7 that I'm aware of for today's purposes.

8 So we'll just simply move -- we've not
9 discussed with you the order of the arguments. I'd be
10 inclined to suggest that the Plaintiffs lead off. Their
11 motion was the first filed back in October. The -- we
12 have reserved two days for these arguments. You're free
13 to use that time as you see fit. We want to make sure
14 that everybody has an opportunity to be fully heard on
15 their issues. So -- so you can divide it as you've seen
16 appropriate.

17 If you've discussed among yourselves
18 administratively how to proceed with the issues, we'll be
19 glad to accommodate you on that. Otherwise, we can just
20 simply move all the way through the Plaintiffs' issue and
21 then turn to the Defendants'.

22 MR. SPEAS: Your Honors, we have had some
23 discussions. It is our plan to address our motion for --
24 the Plaintiffs' motion for summary judgment, each part of
25 it; and then Mr. Peters and Mr. Farr will be heard; and

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1 then we'll go from there.

2 JUDGE RIDGEWAY: And that's fine.

3 We're -- we're happy to accommodate you on that.

4 All right. If there is nothing else
5 procedurally, then we'll simply -- we have received
6 your -- your memoranda, and we thank you very much for
7 your thorough briefing on this. So we do have those
8 before us. So thank you very much for that. If there is
9 nothing further, we'll just go ahead and proceed.

10 What I will ask you to do, Mr. Speas, is
11 just introduce counsel for the purposes of the record or
12 you can -- each of you can introduce yourselves, whatever
13 you prefer -- and then we'll turn to the Defense and
14 allow them to introduce themselves, and then we'll move
15 forward with the arguments.

16 MR. SPEAS: There is one other just
17 preliminary matter, Your Honor. We have prepared four
18 recordings of additional materials. Also, I believe
19 Mr. Peters has some. And if I may, I want to just hand
20 those up to the court. One, Your Honors, is -- is a -- a
21 copy -- a hard copy of our PowerPoint presentation that
22 we will -- we will be making today. Another is a
23 notebook with the principal redistricting decisions, all
24 of which are North Carolina decisions. Finally, Your
25 Honors, there -- we have made a notebook with the public

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1 statements made by Senator Rucho and Representative Lewis
2 describing the plans. Mr. Peters, I think, has some
3 additional materials.

4 MR. PETERS: Do you want to, for the
5 record, introduce folks over there?

6 MR. SPEAS: I will. Thank you,
7 Mr. Peters.

8 May it please the court. I'm Edwin Speas
9 with the firm of Poyner Spruill here in Raleigh
10 representing the Plaintiffs in *Dickson versus Rucho*. Two
11 of my colleagues from Poyner Spruill, John O'Hale and
12 Caroline Mackie, are also here today with me.

13 MS. EARLS: Your Honor, my name's Anita
14 Earls. I represent the NAACP, et al., Plaintiffs. And
15 with me is Allison Riggs and Clare Barnett. And then
16 Adam Stein also represents the NAACP.

17 JUDGE RIDGEWAY: Thank you.

18 MR. PETERS: Thank you. And may it please
19 the court. I'm Alexander Peters of the North Carolina
20 Attorney General's Office representing the Defendants.
21 And with me is Susan Nichols, also of our offices; and my
22 co-counsel Tom Farr and Phil Strach of the Wake County
23 Bar of the law firm of Ogletree Deakins, who represent
24 the Legislative Defendants in both of these matters.

25 And we do have something for the judges,

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1 too. We know there's been a lot of paper, so we were
2 trying to kind of pare it down for you. We've put
3 together what we've been referring to as the "library" on
4 this case. One of those discs has the pleadings, the
5 amended complaint to the answers. It has the motions for
6 summary judgment. It has all of the briefs on summary
7 judgment.

8 JUDGE RIDGEWAY: Both sides?

9 MR. PETERS: Both sides. It has the --
10 all of the affidavits and it has all of the depositions.
11 And I was astounded all of that could get on one disc,
12 but it did.

13 The second disc has all of the cases that
14 the Defendants have cited in their briefs, but we believe
15 it's the same as the Plaintiffs. If -- if there's any
16 one missing, it would probably be just one or two that I
17 can't think of. It's just the same body of cases we're
18 talking about.

19 And then the third disc is the
20 preclearance submission of the three plans to the United
21 States Department of Justice. You'll see when you look
22 at the stipulation that that is one of the things about
23 which we stipulated, that the court can take judicial
24 notice of the preclearance submissions.

25 If all has gone well, all of those

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1 documents on all three discs are searchable. We thought
2 that would probably make life easier for everybody
3 involved, so...

4 JUDGE RIDGEWAY: Just to clarify, for the
5 file, on the first disc you referred to, that contains
6 all the affidavits that had been submitted and
7 depositions that have been submitted in support of these
8 motions; is that right?

9 MR. PETERS: Yes, that's correct.

10 JUDGE RIDGEWAY: All right. So this will
11 be the entire record largely.

12 MR. PETERS: That -- that is pretty close.
13 And, again, if everything is on there correctly, there
14 were some exhibits to briefs for summary judgment that
15 were not themselves affidavits. Those should be attached
16 as exhibits to the brief in question.

17 But I believe there is a folder on there
18 for affidavits. And you can look under that folder and
19 see "Affidavit of Gary Bartlett," and it will have each
20 of his affidavits listed; and then there will be a folder
21 containing each exhibit to those affidavits.

22 And the deposition exhibits, of course, we
23 numbered them sequentially all the way through; but I
24 believe you'll find with each deposition the exhibits
25 that were attached to that deposition.

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1 JUDGE RIDGEWAY: All right. Very good.
2 Thank you.

3 All right. Mr. Speas.

4 MR. SPEAS: May it please the court.

5 We're here today on essentially cross-motions for summary
6 judgment. And I would like to take a few minutes in the
7 beginning to identify the issues that are here for
8 resolution and the order and burdens of proof with
9 respect to those issues. I would like to take a few
10 minutes to describe for the court the relationship among
11 those issues, because they are all related.

12 I will then broadly describe for the court
13 the facts upon which the Plaintiffs base their motion for
14 summary judgment. I will then describe for you the way
15 we propose to divide these arguments. And before -- but
16 before doing that -- or after doing that, I want to take
17 just a few minutes to describe for the court who drew the
18 plans, under whose direction the plans were drawn, and
19 how the plans were drawn.

20 Let me, Your Honors, talk about the
21 issues. There are four central issues in this case. The
22 first is whether the House plan, the Senate plan and the
23 Congressional plan are unconstitutional racial
24 gerrymanders in violation of the Equal Protection Clauses
25 of the United States and North Carolina Constitutions.

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1 The law with respect to the order and burdens of proof on
2 those racial gerrymander issues is clear and
3 well-established in various Supreme Court cases.

4 The Plaintiffs must first prove that race
5 was the predominant factor that determined the path of
6 the boundaries of the challenged districts. And the
7 focus here, Your Honor, is on the path of the boundaries
8 of the districts. If the Plaintiffs carry that burden,
9 then strict scrutiny applies and the burden shifts to the
10 Defendants to prove that each of the challenged districts
11 was narrowly tailored to achieve a compelling interest.

12 The second issue before the court is
13 related. It is whether Defendants assigned citizens to
14 divided precincts in the House and Senate plans based on
15 the color of their skin or in a manner that violated the
16 fundamental right of citizens to vote on equal terms and
17 with substantially equal voting power.

18 As with the first issue, the burden is on
19 the Plaintiffs to prove that the Defendants assigned
20 citizens to divided precincts based on the color of their
21 skin or in a manner that violated their right to vote on
22 equal terms. If we carry -- Plaintiffs carry that
23 burden, strict scrutiny applies, and the Defendants have
24 the burden of proving that the precincts were divided for
25 narrowly tailored reasons that serve a compelling

Ranae McDermott, RMR, CRR
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