MCCRORY V. HARRIS: CONSTITUTIONAL PROHIBITIONS ON RACIAL CLASSIFICATIONS AND THE REQUIREMENTS OF THE VOTING RIGHTS ACT IN REDISTRICTING

ALEX DIETZ*

INTRODUCTION

Every ten years, states are required to draw new electoral districts. State legislatures across the country draw new district lines based on many competing considerations, including race. The use of race in redistricting is a contentious issue and poses many potential difficulties for would-be map drawers. Redistricting plans must not rely on too much race-based line drawing to avoid violating the Equal Protection Clause in the Constitution,[1] while at the same time also must rely on enough to meet the requirements of the Voting Rights Act[2] (VRA). State plans are regularly challenged in court, with plaintiffs alleging the state failed to strike the appropriate balance between too much and too little use of race as a redistricting criteria. These challenges are a daunting task for courts to resolve because they require careful consideration of the often competing concerns of potential vote dilution of minority voting strength, the relationship between politics and race, the level of deference owed to state legislatures, the reliance state legislatures place on the courts' decisions, and how difficult it will be for courts to evaluate future redistricting challenges.

* J.D. Candidate, Duke University School of Law, Class of 2018.

1. U.S. CONST. amend. XIV, § 1.
2. 52 U.S.C. § 10101.

In *McCrory v. Harris*,[3] the Supreme Court must decide whether the redistricting plan for North Carolina's first and twelfth congressional districts, CD1 and CD12, violates the Equal Protection Clause. The First and Twelfth Congressional Districts in North Carolina have been the subjects of numerous prior Supreme Court rulings regarding the use of race in redistricting.[4] Faced with another challenge to North Carolina's CD1 and CD12, the Court must determine that either the North Carolina legislature struck the appropriate balance while relying on race as a redistricting criterion, or produced a map with impermissibly racially gerrymandered districts. This challenge is further complicated by the fact that there is similar litigation currently in progress in the North Carolina state court system that has resulted in the opposite findings the lower court arrived at in *McCrory*.[5]

This Commentary argues that the Supreme Court should affirm that both North Carolina's CD1 and CD12 are the result of impermissible racial gerrymanders in violation of the Equal Protection Clause. The procedural concerns raised by North Carolina concerning the state court litigation do not justify any change to the Court's standard of review in this case. The Court should find both CD1 and CD12 to be impermissible racial gerrymanders because the district court's findings that race predominated over traditional redistricting criteria, and the district court's conclusion that such predominance fails strict scrutiny analysis, were not clear error.

I. FACTS

Following the 2010 decennial census, the North Carolina General Assembly began drawing new congressional districts to adjust for changes in population.[6] The State House and Senate established redistricting committees, which together were responsible for preparing a plan for new congressional districts.[7] The Chairmen of these committees, Senator Rucho and Representative Lewis, hired Dr.

3. 136 S. Ct. 2512 (2016).

4. *See* Brief for Appellants at 5, McCrory v. Harris, NO. 15-1262 (U.S. Sept. 12, 2016) [hereinafter Brief for Appellants] ("[T]his case marks the fifth occasion on which this Court has considered racial gerrymandering challenges to North Carolina's First and/or Twelfth Districts.").

5. *See* Dickson v. Rucho, 781 S.E.2d 404, 410–11 (N.C. 2015) *petition for cert. filed* (U.S. June 30, 2016) (No. 16-24) ("[W]e affirm the ruling of the three-judge panel that the predominant factors in their creation were the traditional and permissible redistricting principles.").

6. Brief for Appellants, *supra* note 4, at 8.

7. *Id.*

Thomas Hofeller to design and draw the 2011 congressional plan.[8] The Chairmen provided the sole instructions for Dr. Hofeller about how to redesign the electoral districts.[9] The general priorities were to comply with the one-person, one-vote requirement[10] and to draw maps to favor Republican candidates.[11] For CD1, the specific instructions were to draw CD1 "with a black voting-age population in excess of 50 percent because of the Strickland case."[12] For CD12, the instructions were to make CD12 a more Democratic district to "help Republican candidates in the surrounding districts,"[13] and not to "use race in any form except perhaps with regard to Guilford County."[14]

When the plan was made public, Senator Rucho and Representative Lewis stated that they had intentionally made CD1 a majority-minority district, and also stated that "because of the presence of Guilford County in the Twelfth District, we have drawn our proposed Twelfth District at a black voting age level that is above the percentage of black voting age population found in the current Twelfth District."[15] The plan raised the black voting age population (BVAP) in CD1 from 47.76% to 52.65% and raised the BVAP in CD12 from 43.77% to 50.66%.[16] The redistricting plan, including the new CD1 and CD12 districts, was approved by the North Carolina legislature, submitted to the DOJ for preclearance under section 5 of the VRA, and was approved.[17]

The new maps faced almost immediate challenge in state court as illegal racial gerrymanders.[18] Multiple plaintiffs, including the North Carolina Conference of Branches of the NAACP, challenged the plan, and all of the challenges were consolidated in to one case.[19] That case, *Dickson v. Rucho*,[20] has gone through the entirety of the state court

8. *Id.* at 9.
9. Harris v. McCrory, 159 F. Supp. 3d 600, 607 (M.D.N.C. 2016).
10. Brief for Appellants, *supra* note 6, at 10. The 2010 census revealed that CD1 was extremely under populated. *Id.*
11. *Id*.
12. *Harris*, 159 F. Supp. 3d at 613.
13. Brief for Appellants, *supra* note 4, at 10.
14. *Harris*, 159 F. Supp. 3d at 619 (emphasis in original).
15. *Id.* at 608 (quotation marks and citations omitted).
16. Brief for Appellees at 2, McCrory v. Harris, NO. 15-1262 (U.S. Oct. 12, 2016) [hereinafter Brief for Appellees].
17. *Harris*, 159 F. Supp. 3d at 608–09.
18. *Id.* at 609.
19. *Id.*
20. 781 S.E.2d 404 (N.C. 2015) *petition for cert. filed* (U.S. June 30, 2016) (No. 16-24).

system and was also heard by the Supreme Court.[21] In *Dickson*, the state trial court below found that CD1 had been drawn using race as the predominant factor, but that it passed strict scrutiny, and that CD12 had not been drawn using race as the predominant factor, therefore concluding that neither district was an impermissible gerrymander.[22] The North Carolina Supreme Court upheld the district court's findings, and then reaffirmed after the United States Supreme Court vacated that result.[23] The plaintiffs in the state court litigation have petitioned the United States Supreme Court again for certiorari,[24] but the fate of the state court litigation is likely to be bound up in the outcome of *McCrory*.

McCrory began when Appellees David Harris and Christine Bowser,[25] registered voters in CD1 and CD12, respectively, claimed that North Carolina used the VRA as a pretext to unconstitutionally dilute minority voting strength by packing African Americans in to CD1 and CD12.[26] A three-judge panel presided over the trial, during which substantial testimony was heard from Dr. Hofeller, the Congressman representing CD1, the former Congressman representing CD12, and from expert witnesses for each side.[27]

During his testimony, Dr. Hofeller admitted to implementing a racial floor of fifty percent plus one person for CD1, and that sometimes, while adding voters to CD1, "it wasn't possible to adhere to some of the traditional redistricting criteria."[28] Hofeller also testified that while drawing CD12, he only viewed political data,[29] but that "in order to be cautious and draw a plan that would pass muster under the Voting Rights Act, it was decided to reunite the black community in Guilford County into the Twelfth."[30]

---

21. *Harris*, 159 F. Supp. 3d at 609.
22. *Id.*
23. *Id.* The result was vacated so that the North Carolina Supreme Court could further consider the matter in light of new doctrine in *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015).
24. Petition for Writ of Certiorari, Dickson v. Rucho, 781 S.E.2d 404 (N.C. 2015) (No. 14-839).
25. Neither was a plaintiff in the state court litigation. *Harris*, 159 F. Supp. 3d at 609. In fact, they did not even know the state case existed at the time they filed suit. Brief for Appellees, *supra* note 16, at 52.
26. *Harris*, 159 F. Supp. 3d at 609.
27. Brief for Appellants, *supra* note 4, at 15.
28. *Harris*, 159 F. Supp. 3d at 611–12.
29. Brief for Appellants, *supra* note 4, at 10.
30. *Harris*, 159 F. Supp. 3d at 619.

The panel also heard testimony from Congressman G.K. Butterfield, representative of CD1, and former Congressman Mel Watt, who formerly represented CD12.[31] Both representatives had tremendous success as the African-American preferred candidate in their respective districts prior to the implementation of the 2011 plan, even though neither district was a majority-minority district.[32] Former Congressman Watt also testified that Senator Rucho explicitly told him that the goal for CD12 was to increase the BVAP "up to over 50 percent to comply with the Voting Rights Law."[33]

Both Appellants and Appellees offered expert reports and testimony during the trial. Appellants offered reports prepared for the State legislature concluding that racially polarized voting occurs in North Carolina, and specifically in the counties and districts in and around CD1.[34] Appellees produced expert reports based on voter registration data in support of the idea that race best explains the line drawing in the 2011 version of CD12.[35]

Following the trial, the district court produced a lengthy opinion holding North Carolina's 2011 redistricting plan unconstitutional for violating the Equal Protection Clause of the Fourteenth Amendment and ordered the drawing of new districts.[36] After denying a motion to stay the district court's order pending appeal,[37] the Supreme Court noted probable jurisdiction.[38]

II. LEGAL BACKGROUND

Both procedural law concerning collateral estoppel and the standard of review, and substantive law concerning the Equal Protection Clause of the Fourteenth Amendment and the VRA, are at issue in *McCrory*.

31. *Id.* at 628 (Cogburn, J., concurring).
32. *Id.* at 606–07.
33. *Id.* at 617 (quotation marks omitted). Senator Rucho was present at the trial, but was never called to testify to rebut this contention. *Id.* at 617–18.
34. Brief for Appellants, *supra* note 4, at 9.
35. *See Harris*, 159 F. Supp. 3d at 620 ("This conclusion is further supported circumstantially by the findings of the plaintiffs' experts, Drs. Peterson and Ansolabehere.").
36. *Id.* at 604.
37. McCrory v. Harris, 136 S. Ct. 1001, 1001 (2016).
38. McCrory v. Harris, 136 S. Ct. 2512, 2512 (2016).

A. Procedural Law: Collateral Estoppel and the Standard of Review

The doctrine of collateral estoppel prohibits relitigation of issues that have been decided in certain cases.[39] Specifically, any issue of fact or law decided in one case precludes the parties to that case from relitigating the issue.[40] In general, this preclusive effect applies to issues decided in either federal or state courts.[41] Collateral estoppel may not be claimed against a party that did not have a "full and fair opportunity to litigate that issue in the earlier case."[42]

Review of a lower court's factual findings is governed by Rule 52(a) of the Federal Rules of Civil Procedure.[43] A reviewing court must not set aside factual findings unless they are "clearly erroneous."[44] This means that the reviewing court may not set aside factual findings "[i]f the district court's account of the evidence is plausible . . . even though convinced that had it been sitting as the trier of fact it would have weighed the evidence differently."[45] This "clearly erroneous" standard of review applies in cases concerning a finding of racial predominance, even though obtaining a finding of racial predominance requires meeting a demanding standard at the trial court level.[46]

B. Substantive Law: The Equal Protection Clause and the VRA

The Fourteenth Amendment was created with the goal of eliminating racial discrimination emanating from official state sources.[47] When challenged in court, racially gerrymandered redistricting plans are constitutionally suspect and subject to strict scrutiny, a court's toughest standard of constitutional review.[48] A district is racially gerrymandered if race is the predominant factor motivating the placement of district lines.[49] Proving that race was the predominant factor in a redistricting plan requires showing "the legislature subordinated traditional race-neutral districting principles .

39. Allen v. McCurry, 449 U.S. 90, 94 (1980).
40. *Id.*
41. *Id.* at 95.
42. *Id.* (quotation marks omitted).
43. Fed. R. Civ. P. 52(a).
44. *Id.* 52(a)(6).
45. Anderson v. Bessemer City, 470 U.S. 564, 573–74 (1985).
46. Easley v. Cromartie, 532 U.S. 234, 241–42 (2001).
47. Shaw v. Hunt, 517 U.S. 899, 907 (1996) (citations omitted).
48. Miller v. Johnson, 515 U.S. 900, 920 (1995).
49. *Id.* at 916.

. . to racial considerations."[50] The burden of proving racial predominance may be satisfied through either "circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose."[51] This is often easier said than done, especially in cases where "majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation."[52] The Supreme Court faced such a case in *Easley v. Cromartie*,[53] wherein the Court found that "[t]he evidence taken together . . . does not show that racial considerations predominated."[54] The Court attempted to clarify the standard by stating that "[i]n a case such as this one . . . the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles."[55]

Once a districting plan is held to be a racial gerrymander under the racial predominance standard, it becomes subject to strict scrutiny.[56] Proving that the redistricting legislation is narrowly tailored to a compelling interest is the only way for the state to satisfy strict scrutiny.[57] The Supreme Court has indicated that a racially gerrymandered districting plan can pass strict scrutiny when the challenged district is "reasonably necessary under the constitutional reading and application" of federal law.[58] Furthermore, a racially gerrymandered plan may also pass strict scrutiny if a state has "a strong basis in evidence to use racial classifications in order to comply with a statute," meaning "good reasons to believe such use is required, even if a court does not find that the actions were necessary."[59] The Supreme Court has assumed, but not decided, that a state's interest in complying with the VRA could justify a racially gerrymandered districting plan.[60] When analyzing a VRA claim, the Court looks at whether the plan

50. *Id.*
51. *Id.*
52. Easley v. Cromartie, 532 U.S. 234, 258 (2001).
53. *Id.*
54. *Id.* at 257.
55. *Id.* at 258.
56. *Miller*, 515 U.S. at 920.
57. *Id.*
58. *Id.* at 921.
59. Ala. Legis. Black Caucus v. Alabama, 135 S. Ct. 1257, 1274 (2015) (emphasis in original) (quotation marks omitted).
60. Shaw v. Hunt, 517 U.S. 899, 915 (1996).

racially placed voters in certain districts to comply with section 2 prohibitions against vote dilution.[61]

A section 2 violation is determined by a two-part totality of the circumstances test.[62] The first part of the test requires meeting a set of preconditions, now known as the *Gingles* factors.[63] The preconditions are that a minority group must be sufficiently large, politically cohesive, and a white majority must vote sufficiently as a bloc to enable it to usually defeat the minority's preferred candidate.[64] Failure to meet any one of the preconditions is fatal to the section 2 claim.[65] If the reviewing court finds that the VRA claims would have failed if brought against the previous district map, it will find that a new racially gerrymandered map does not survive strict scrutiny.[66] This is what happened in the federal district court.

III. HOLDING

The federal district court held that CD1 and CD12 in the North Carolina 2011 redistricting plan violated the Fourteenth Amendment because race was the predominant consideration in both districts and the districts did not pass strict scrutiny.[67] The court found that there was no need for an alternative map to prove racial predominance because the direct and circumstantial evidence in the case, taken as a whole, clearly showed racial predominance.[68] Assuming arguendo that a state's interest in complying with the VRA may justify racial gerrymandering, the court also found that there was no strong basis in evidence for concluding that the racially gerrymandered districts at issue must be majority-minority districts for North Carolina to be in compliance with the VRA.[69]

---

61. Harris v. McCrory, 159 F. Supp. 3d 600, 605 (M.D.N.C. 2016).
62. Thornburg v. Gingles, 478 U.S. 30, 43–46 (1986).
63. *Id.* at 50–51.
64. *Id.*
65. *Id. See also* Bartlett v. Strickland, 556 U.S. 1, 24 (2009) ("Majority-minority districts are only required if all three *Gingles* factors are met and if § 2 applies based on a totality of the circumstances.").
66. *See, e.g.*, Shaw v. Hunt 517 U.S. 899, 918 (1996) ("We hold, therefore, that District 12 is not narrowly tailored to the State's asserted interest in complying with § 2 of the Voting Rights Act.").
67. Harris v. McCrory, 159 F. Supp. 3d 600, 604 (M.D.N.C. 2016). It is important to note that the district court's opinion does not address the procedural issue of collateral estoppel because that claim was rejected through an order in response to North Carolina's pretrial motion on the issue and was not raised during trial. Brief for Appellees, *supra* note 16, at 51.
68. *Harris*, 159 F. Supp. 3d at 621.
69. *Id.* at 622–23.

IV. ARGUMENTS

The parties in *McCrory* disagree on three major questions. First, does collateral estoppel bar the Appellees' claims or impact the standard of review? Second, was race the predominant factor in the drawing of district lines in North Carolina's CD1 and CD12? Third, if race was the predominant factor, does its use survive strict scrutiny?

A. Does Collateral Estoppel Bar the Appellees' Claims or Impact the Standard of Review?

Appellants argue that the claims against North Carolina's redistricting plan should have been barred from federal court because they were already decided in state court at the time the suit was filed.[70] Appellants asserts that Appellees are members of the North Carolina NAACP, and that the North Carolina NAACP's suit in state court bars members like Appellees from relitigating the issues in federal court.[71] Even if Appellees' claims are not precluded, Appellants argue that fairness requires that the prior state court findings be considered when reviewing the decision of the federal district court.[72]

In response, Appellees argue that the district court rejected the collateral estoppel argument before trial, and that Appellees are not members of the North Carolina NAACP, making claim preclusion inapplicable to them.[73] Appellees further argue that Appellants did not properly preserve the issue of collateral estoppel for appeal, and therefore it would be improper for the Court to review it or allow it to affect their ruling.[74]

B. Did the District Court Commit Clear Error by Holding that Race was the Predominant Factor in Drawing the District Lines for North Carolina's CD1 and CD12?

Appellants argue that neither CD1 nor CD12 was designed with race as the predominant factor.[75] Appellants' main legal claim, that the evidence was insufficient to prove racial predominance, relies heavily on the argument that the "alternative ways" requirement outlined in *Easley* requires an alternative district map in all redistricting cases

70. Brief for Appellants, *supra* note 4, at 19.
71. *Id.* at 19–20.
72. *Id.* at 22–23.
73. Brief for Appellees, *supra* note 16, at 51–52.
74. *Id.*
75. Brief for Appellants, *supra* note 4, at 17–18.

where a plaintiff claims districts are impermissible racial gerrymanders.[76]

For CD1, Appellants claim that the lower court clearly erred in finding racial predominance because the record did not show that traditional redistricting principles were disregarded in order to prioritize race.[77] Appellants further claim that Appellees failed to show racial predominance because they did not provide a required alternative district map that met the legislature's concerns about complying with the VRA without relying on race as a predominant factor.[78]

For CD12, Appellants claim that the lower court clearly erred in finding racial predominance because CD12 was created with political affiliation as the predominant factor, rather than race.[79] Appellants rely on the strong correlation between race and political affiliation to explain how CD12 became a majority-minority district.[80] According to Appellants, the instructions given to and followed by Dr. Hofeller demonstrate that political affiliation was the primary concern.[81] Furthermore, Appellants claim the public statement made by Representative Lewis and Senator Rucho—that CD12 was created as a majority-minority district because of the presence of Guilford County—merely describes the results of the redistricting plan, rather than the motives for its creation.[82] Appellants also deny that Senator Rucho ever said he needed to ramp up the BVAP in CD12, and argue that even if such a comment had been made, the instructions given to Dr. Hofeller did not include a mandatory racial percentage.[83] Additionally, Appellants argue that Appellees' expert witness testimony and reports should be disregarded because they rely on voter registration data, rather than on actual voting results.[84] Finally, Appellants argue that Appellees' failure to provide an alternative map that satisfied the legislatures' legally permissible political goals without

76. *Id.* at 32, 46.
77. *Id.* at 45.
78. *Id.* at 46.
79. *Id.* at 17.
80. *Id.* at 26.
81. *Id.* at 28–29.
82. *Id.* at 35–36.
83. *Id.* at 41–42
84. *Id.* at 38. Appellants also argue that the reports do not actually offer strong support for Appellees' argument because the results did not consistently support a finding of racial predominance. *Id.* at 40.

establishing the same majority-minority district meant that they failed to meet their burden of proof that race predominated.[85]

Appellees argue that the district court ruling finding both CD1 and CD12 were drawn with race as the predominant factor was not clear error.[86] Appellees claim that the alternative map argument relied on by Appellants does not apply in cases where other evidence sufficiently supports a finding that race predominated.[87] For both CD1 and CD12, Appellees offer support for the district court's factual findings that supported the conclusion that race predominated.

For CD1, Appellees rely on both direct and circumstantial evidence to support the ruling of the lower court, but depend most heavily on Dr. Hofeller's testimony.[88] According to Appellees, Dr. Hofeller's admission that traditional redistricting criteria were subordinated to the goal of drawing CD1 as a majority-minority district qualified as strong direct evidence that race predominated.[89] Appellees point to circumstantial evidence regarding the final shape and demographics of CD1 and the surrounding districts to support the direct evidence of racial predominance.[90]

For CD12, Appellees again argue that both direct and circumstantial evidence support the district court's finding of racial predominance.[91] Disagreeing with Appellant's interpretation, Appellees argue that the public statement by Senator Rucho and Representative Lewis strongly indicates that Guilford County was added to CD12 *because* that would make CD12 a majority-minority district.[92] Additionally, Appellees argue that even though Dr. Hofeller was told to base districting decisions in CD12 on politics, he was also told that he should make an exception for Guilford County, and to add Guilford County to CD12 to meet the requirements of section 5 of the VRA.[93] Appellees also point to circumstantial evidence from their experts, evidence showing that race best explains CD12's boundaries,

85. *Id.* at 31.
86. Brief for Appellees, *supra* note 16, at 4–5.
87. *Id.* at 33.
88. *Id.* at 12.
89. *Id.*
90. *Id.* at 14.
91. *Id.* at 18, 22.
92. *Id.* at 20.
93. *Id.*

that they claim provides support for the district court's finding that race predominated in CD12.[94]

C. Did the District Court Commit Clear Error by Holding CD1 and CD12 do not Survive Strict Scrutiny Review?

There is no dispute regarding CD12—Appellants provide no argument that CD12 survives strict scrutiny—but Appellants vigorously contest the district court's holding that CD1 does not survive strict scrutiny.[95] Appellants argue the North Carolina legislature had good reasons to think section 2 of the VRA required CD1 to be drawn as a majority-minority district: the legislature received evidence that all the *Gingles* factors were met,[96] and *Bartlett* requires the creation of majority-minority districts.[97] Appellants point to studies and testimony the legislature received stating that racially polarized voting still happens in North Carolina's CD1 as proof that the second and third *Gingles* factors were satisfied.[98] Because Appellants argue that the correct interpretation of *Bartlett* requires the creation of majority-minority districts when all the *Gingles* factors are satisfied,[99] they conclude that there was clearly good reason for the legislature to create CD1 as a majority-minority district.[100]

Appellees argue that Appellants and the North Carolina state legislature have misinterpreted *Bartlett*,[101] and that the evidence relied upon by the state legislature concerning racially polarized voting is not the proper evidence to rely on when analyzing the third *Gingles* precondition.[102] Instead, argue Appellees, the legislature should have relied on actual electoral outcomes.[103] According to Appellees, the actual electoral outcomes in the prior version of CD1 showed that the African-American minority had high levels of success in electing their candidates, despite not being a majority-minority district.[104] Therefore,

94. *Id.* at 28.
95. Brief for Appellants, *supra* note 4, at 47.
96. *Id.* at 53.
97. *Id.* at 50.
98. *Id.* at 53. The first *Gingles* factor was, as Appellants put it, obviously satisfied given that CD1 had at some point been a majority-minority district. *Id.* at 52.
99. *Id.* at 45.
100. *Id.* at 52.
101. Brief for Appellees, *supra* note 16, at 50.
102. *See id.* at 45 ("Consideration of past election results is the well-established means by which courts assess whether the third *Gingles* precondition is met.").
103. *Id.* at 40.
104. *Id.* at 44.

the third *Gingles* factor was not satisfied, and the North Carolina legislature did not have good reason to believe it needed to make CD1 a majority-minority district.[105]

V. ANALYSIS

While the evidence in this case presented a challenge to the district court, the correct path for the Supreme Court is fairly clear. Appellants' attempt to bar the case or modify the standard of review due to the state court litigation is unsupported by any court precedent. While it may seem somewhat arbitrary that the federal case happened to reach the court on its merits first, there is no exception in Rule 52(a), which states quite clearly that the standard of review of factual findings is for clear error.[106] Since Appellees were not a party to the state court litigation, collateral estoppel cannot be applied, even though the case raises similar policy concerns.[107]

The appropriate response to Appellants' claim that Appellees must provide an alternative district map is similarly clear: no map should be required in this case. The *Easley* requirement that a party show alternative ways the "legislature could have achieved its legitimate political objectives"[108] should not be interpreted to require a map. An alternative map could be one way to show racial predominance, but that does not make it the only way. In cases where other evidence is sufficient to show whether or not race was the predominant factor, a map requirement adds no value. Even in cases where an alternative map may arguably be necessary, there is nothing to stop a legislature from simply asserting that the proposed alternative map was politically infeasible or insufficient, regardless of the map. The Supreme Court should not overturn the district court ruling because of the lack of alternative district maps.

The evidence that CD1 is an impermissible racial gerrymander is overwhelming. The person responsible for drawing CD1 admitted to subordinating traditional redistricting criteria to race,[109] the very definition of racial predominance.[110] Appellants' attempt to justify

105. *Id.* at 50.
106. Fed. R. Civ. P. 52(a).
107. *See, e.g.*, Smith v. Bayer Corp., 564 U.S. 299, 316–17 (2011) (holding that nonparties being bound by prior court orders violates the rule against nonparty preclusion).
108. Easley v. Cromartie, 532 U.S. 234, 258 (2001).
109. Harris v. McCrory, 159 F. Supp. 3d 600, 612 (M.D.N.C. 2016).
110. Miller v. Johnson, 515 U.S. 900, 916 (1995).

creating the gerrymander depended on interpreting *Bartlett* to require majority-minority districts when the *Bartlett* Court specifically warned against interpreting the case to require majority-minority districts.[111]

The district court's analysis of CD12 is not as overwhelmingly persuasive as for CD1, but because the standard of review is for clear error, the Supreme Court should affirm that CD12 is also an impermissible racial gerrymander. The most persuasive pieces of evidence supporting a finding that CD12 is an impermissible racial gerrymander are Senator Rucho's statement saying the goal was to increase the BVAP in CD12 and the joint public statement made by Senator Rucho and Representative Lewis explaining the placement of Guilford County in CD12. Because Senator Rucho denies making the statement about CD12's BVAP, the issue becomes whether the Supreme Court should accept the district court's finding that the statement did in fact happen. Credibility determinations are a prerogative of the trial court, and "can virtually never be clear error."[112] It is not clearly unreasonable to have credited this statement, especially given the joint public statement made about Guilford County. While the public statement could be interpreted to be describing the results of the redistricting or the motivation behind it, the district court's interpretation is not obviously incorrect. Therefore, the Supreme Court should not overturn the district court's conclusion that CD12 is an impermissible racial gerrymander.

The Court will most likely uphold the findings of the lower court, but it is possible that the Court may overturn the finding of racial predominance in CD12. If it would apply anywhere in this case, the "alternative ways" requirement from *Easley* would apply to CD12. The Court could decide that an alternative district map should have been required for CD12 because the evidence was not overwhelmingly persuasive without such a map. *Easley* did not state exactly how persuasive or compelling the evidence of racial predominance would need to be before the alternative district map is no longer needed. The Court could decide to clarify that standard in a way that favored legislatures by requiring the map unless the other evidence is overwhelmingly persuasive. There is no precedent to support either a strict or loose interpretation, and so it is possible that it could go either way. But, given the policy arguments discussed above regarding the

111. *See* Bartlett v. Strickland, 556 U.S. 1, 23 (2009) ("Our holding also should not be interpreted to entrench majority-minority districts by statutory command.").

112. Anderson v. Bessemer City, 470 U.S. 564, 575 (1985).

efficacy of the alternative district map, the Court should and likely will decide that an alternative map was not required to prove racial predominance in CD1 or CD12.

CONCLUSION

The Supreme Court should affirm the district court ruling that North Carolina's CD1 and CD12 are the result of impermissible racial gerrymanders. Though Appellants argue that politics and the attempts to comply with the VRA justify the districts, the district courts findings and conclusions are not clearly erroneous, and therefore should not be overturned. North Carolina must remedy CD1 and CD12 of their unconstitutional racially gerrymandered boundaries.