RECORD NOS. 16-1270(L); 16-1271

In The

United States Court of Appeals

For The Fourth Circuit

RALEIGH WAKE CITIZENS ASSOCIATION; JANNET B. BARNES; BEVERLEY S. CLARK; WILLIAM B. CLIFFORD; BRIAN FITZSIMMONS; GREG FLYNN; DUSTIN MATTHEW INGALLS; AMY T. LEE; ERWIN PORTMAN; SUSAN PORTMAN; JANE ROGERS; BARBARA VANDENBERGH; JOHN G. VANDENBERGH; AMYGAYLE L. WOMBLE; PERRY WOODS; CALLA WRIGHT; WILLIE J. BETHEL; AJAMU G. DILLAHUNT; ELAINE E. DILLAHUNT; LUCINDA H. MACKETHAN; ANN LONG CAMPBELL; CONCERNED CITIZENS FOR AFRICAN-AMERICAN CHILDREN, d/b/a Coalition of Concerned Citizens for African-American Children,

Plaintiffs – Appellants,

v.

WAKE COUNTY BOARD OF ELECTIONS,

Defendant – Appellee,

and

CHAD BAREFOOT, in his official capacity as Senator and primary sponsor of SB 181; PHILLIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; TIM MOORE, in his official capacity as Speaker of the North Carolina House of Representatives; STATE OF NORTH CAROLINA,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA AT RALEIGH

BRIEF OF APPELLEE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 16-1270 Caption: RALEIGH WAKE CITIZENS ASSOCIATION et al. v. WAKE COUNTY BOARD OF ELECTIONS

Pursuant to FRAP 26.1 and Local Rule 26.1,

Wake County Board of Elections
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Charles F. Marshall Date: 3/25/2016

Counsel for: Wake County Board of Elections

CERTIFICATE OF SERVICE

****

I certify that on 3/25/2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Charles F. Marshall (signature) 3/25/2016 (date)

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STATEMENT OF THE CASE

I. Legislative History of SB 325 and SB 181

A. Senate Bill 325

On March 13, 2013, Senators Neal Hunt and Chad Barefoot introduced Senate Bill 325 ("SB 325") to redistrict the Wake County Board of Education ("BOE"), a nonpartisan elected board, from nine single-member districts to seven numbered single-member districts and two lettered single-member "superdistricts" overlapping the numbered districts. Joint Appendix ("J.A.") at 158–60; *see* J.A. at 1063. The maximum population deviation between the numbered districts was 7.11% and the maximum deviation between the superdistricts was 9.8%. J.A. at 165.

During the legislative debate on SB 325, Senator Hunt and Representative Paul Stam stated that the purposes of SB 325 were to (1) move the elections to

even-numbered years to increase voter turnout, and (2) increase the number of School Board representatives that a voter could elect from one to two. J.A. at 606–07, 626–29, 961. Representative Stam stated that the ability to elect two members would improve representation across districts because "[t]here was a feeling for a long time that if . . . your child went to [school in] one district and you lived in another district, that you just weren't being represented." J.A. at 961.

During the legislative process, Representative Stam introduced an amendment to the district maps that would realign the district lines to put two incumbents, a registered Republican and a registered Democrat, in districts that they "have a decent chance of winning." J.A. at 288–290, 526, 630.

On June 13, 2013, SB 325, as amended, was ratified and chaptered as Session Law 2013-110. J.A. at 127, 1063–76.

B. Senate Bill 181

On March 4, 2015, Senator Barefoot introduced Senate Bill 181 ("SB 181") to redistrict the Wake County Board of County Commissioners ("BOCC") districts by adopting the same district lines that were enacted by SB 325. J.A. at 134, 687.

During the legislative debate, Senator Barefoot stated that the purpose of the bill was to increase representation and geographic diversity on the Wake County Board of Commissioners. J.A. at 663–66. He further noted that SB 181 aligns the BOCC districts and the BOE districts and "does not draw any lines." J.A. at 687.

Representative Stam stated during the legislative debate that the bill proposed to replace the existing at-large districts with single-member districts, because

> at large elections are just a bad idea unless it's a small town or a small county because at large elections submerge the views of any kind of minority. Whether it's racial, gender, political, rural, urban, they're just a bad idea, because they don't give true representation close to the voters . . . .

J.A. at 733. During the legislative debate, Representative Stam noted that countywide elections under the pre-existing at-large system were expensive, J.A. at 961, and that SB 181 explicitly adopted the same districts enacted by SB 325 to protect the districts from legal challenges and decrease administrative expense and confusion. J.A. at 733–35.

On April 2, 2015, SB 181 was ratified and chaptered as Session Law 2015-4. J.A. at 140, 1077.[1]

II. Procedural History of the Litigation

On August 22, 2013, Plaintiffs filed the complaint in *Wright* challenging the constitutionality of SB 325 by alleging violations of the "one-person, one-vote" principle under the Fourteenth Amendment to the United States Constitution and Article 1, Section 19 of the North Carolina Constitution. J.A. at 27–49.

The District Court dismissed the State pursuant to Rule 12(b)(1), denied a motion to amend the complaint, and dismissed the case for failure to state a claim

[1] SB 325 and SB 181 are also referred to collectively as the "Plans."

under Rule 12(b)(6). *Wright v. North Carolina*, 975 F. Supp. 2d 539, 547 (E.D.N.C. 2014).

On May 27, 2015, a divided panel of this Court reversed the dismissal under 12(b)(6), affirmed the dismissal of the State, and remanded the case to the District Court. *Wright v. North Carolina*, 787 F.3d 256 (4th Cir. 2015).

On June 5, 2015, Plaintiffs filed the Amended Complaint in *Raleigh Wake Citizens Association* challenging the constitutionality of SB 181 by alleging violations of the "one-person, one-vote" principle under the Fourteenth Amendment to the United States Constitution and Article 1, Section 19 of the North Carolina Constitution, as well as alleging a claim for racial gerrymandering as to District 4 of SB 181. J.A. at 69-87.

The cases were consolidated for a three-day bench trial from December 16 to 18. J.A. at 105–06, 192–514. Plaintiffs proffered the testimony of fifteen witnesses, including five lay witnesses, two elected members of the BOE, two elected members of the BOCC, four legislators who had opposed the bills, and two expert witnesses, Dr. Jowei Chen and Anthony Fairfax. *Id.*; *see also* J.A. at 519.

The parties proffered 481 exhibits—most of which were joint exhibits and all of which were admitted into evidence—including transcripts of the legislative proceedings of SB 325 and SB 181, election-related data for the districts enacted

by SB 325 or SB 181 (the "Plans" or the "Enacted Districts") and maps of the Enacted Districts. *Id.*

A. The District Court's Opinion

On February 26, 2016, the District Court issued a detailed 108-page opinion upholding the constitutionality of the Enacted Districts.

1. One Person, One Vote Claims

The District Court found that Plaintiffs failed to carry their burden of proof (both their prima facie and ultimate burden) to show that SB 325 or SB 181 violated the one-person, one-vote requirement of the United States or North Carolina Constitutions. J.A. at 542–75. Specifically, the District Court found that the Plaintiffs had not presented a prima facie case of bad faith, arbitrariness, or "invidious discrimination," the burden imposed on Plaintiffs because the maximum population deviation between the Enacted Districts was below 10%.[2] *Id.*

As an initial matter, the Court found that the bill sponsors' stated purposes for enacting SB 325 and SB 181 were rationally related to legitimate interests. Regarding SB 325, the District Court found that the sponsors stated that a goal of the bill was "to allow voters to elect two [BOE] members as opposed to one" and

[2] On April 20, 2016, the Supreme Court issued its decision in *Harris v. Arizona Independent Redistricting Commission*, 578 U.S. __, No. 14-232 (Apr. 20, 2016). As this Brief will explain in detail below, the Plaintiffs failed to meet their evidentiary burden under either the applicable legal precedent at the time of trial or the standard articulated in *Harris*.

that the "legislative goal of improving [BOE] representation via [SB 325] is a rational state policy." J.A. at 553–554. The District Court found that the evidence presented by Plaintiffs suggesting that the Enacted Districts would not accomplish the stated goals was largely anecdotal, and did not undermine the rational basis for the BOE plan. J.A. at 554. Further, the District Court exercised its discretion as the factfinder to choose not to credit the statements of the bill sponsors as opposed to the testimony of legislative opponents. J.A. at 554, 562–63.

Regarding SB 181, the District Court found that the bill sponsors' stated goals of improving representation and enhancing geographic diversity on the BOCC, as well as avoiding litigation, reducing administrative costs, and reducing voter confusion by using the same districts enacted by SB 325, were rational state policies supporting the law, and credited as rational the bill sponsor's statement that the law would reduce election costs. J.A. at 567–68. The District Court discredited Plaintiffs' witnesses' opinion testimony that the law would not reduce administrative costs, campaign costs, or voter confusion. J.A. at 568.

The District Court further found that Plaintiffs failed to prove that the stated goal of SB 325 to improve voter representation was a pretext for disadvantaging Democrats who support "progressive" education policies. The District Court found that the Plaintiffs' representation of what constituted "progressive" or

"conservative" policies was not reflected in the legislative record, and further that the policy identified as "progressive" was supported by both a registered Republican BOE member and a registered Democratic BOE member. J.A. at 555–56. The District Court found that Plaintiffs "failed to provide a judicially discernable standard on how to distinguish a 'conservative' education policy from a 'progressive' education policy." J.A. at 556.

The District Court declined to credit the testimony and report of Plaintiffs' expert Anthony Fairfax, noting a number of material methodological flaws and other errors that undermined his conclusions and the inferences Plaintiffs seek to draw from them. J.A. at 559–562, 571–72. For instance, in projecting whether the Enacted Districts were likely to favor Republican or Democratic candidates, Mr. Fairfax limited his analysis to 2004 and 2008 presidential election data, despite the availability of 2012 presidential election data, more recent and relevant state and local election data, election data from nonpartisan races, voter registration data, and the impact of the large number of unaffiliated voters in Wake County. *See* J.A. at 561.

The District Court also found that the existence of one alleged Democratic Enacted District and one alleged Republican Enacted District belied Mr. Fairfax's assertion of "a marked pattern of overpopulation in Democratic-performing districts, and underpopulation in Republican-performing districts." J.A. at 564,

805. As to Mr. Fairfax's testimony regarding population deviation, compactness measures, split precincts, and split municipalities, the District Court found that Mr. Fairfax's data merely supported a conclusion that "better" plans were possible, as opposed to supporting an inference that the Plans were motivated by impermissible partisanship. J.A. at 560, 571.

The District Court also considered the testimony, report, and opinions offered by Plaintiffs' expert witness Dr. Jowei Chen, which purported to be in the nature of statistical analysis. The District Court concluded that Dr. Chen's methodologies were so "materially flawed" that his results, and opinions based upon them, were "unhelpful," and that Dr. Chen was "not credible" as an expert witness. J.A. at 557–59, 570–71, 579–580.

The basic premise of Dr. Chen's methodology is that it is possible to make inferences about the Enacted Districts—including partisan or racial motivations—by comparing them to a large number of randomly generated simulated districting plans meant to represent the range of plans likely be created in the absence of improper motivations. J.A. at 769. Dr. Chen, however, required his simulated districting plans to meet criteria that the General Assembly was not required to follow in drawing the Enacted Districts—including a maximum population deviation of 1%, minimal split municipalities, no split precincts, and

"maximize[ed]" compactness. J.A. at 476–77, 557, 769–72. Dr. Chen's methodology ignored partisan considerations. *Id.*

The District Court rejected Dr. Chen's methodology. J.A. at 557–59, 570–71, 579–580. The District Court concluded that Dr. Chen's simulation methods produced a set of districting plans that were not representative of all plans that could be validly enacted, but were only a subset of such plans. *See* J.A. at 557. Accordingly, the District Court rejected Dr. Chen's opinion that meaningful or reliable statistical inferences could be drawn by comparing the enacted and simulated districts. *See* J.A. at 557, 579; *compare* David H. Kaye & David A. Freeman, *Reference Guide on Statistics*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 211, 217 (Fed. Judicial Center 3d. ed. 2011) ("Inferences from the part to the whole are justified *when the sample is representative*." (emphasis added)). The District Court also noted several other flaws in Dr. Chen's methodology, including Dr. Chen's failure to use relevant election results to predict the partisan performance of the Enacted Districts in local BOE and BOCC elections. J.A. at 558.

The District Court further found that the Plaintiffs failed to prove that the Plans impermissibly favor rural over urban voters. Specifically, the District Court found that, unlike *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (per curiam), *summarily aff'd*, 542 U.S. 947 (2004), Plaintiffs failed to prove that the

General Assembly treated the 10% deviation as an absolute safe harbor, disregarded all traditional districting principles, and created districts not rationally related to a permissible, rational state policy. J.A. at 566. Further, the District Court found that Supreme Court precedent allowed the General Assembly to consider communities of interest in urban, suburban, or rural areas. J.A. at 569.

The District Court dismissed any remaining contentions that the Plans resulted from impermissible partisanship, finding that the they "fit[] comfortably within the 'rough political fairness' rationale that the Supreme Court approved in *Gaffney*." J.A. at 572 (quoting *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973)). In so finding, the District Court noted that one of the alleged Democratic districts is underpopulated, while one of the alleged Republican districts is overpopulated; that historic election data for statewide office showed as many as six of the nine Enacted Districts electing the Democratic candidate; and that the previous districting plan, while designed to favor Republicans, did not result in that outcome. J.A. at 564. Ultimately, the District Court concluded that the districts were, at most, "an attempt for 'rough political fairness,' leaving the ultimate outcome of who is elected . . . squarely in the hands of Wake County voters." J.A. at 565, 573.

2. Racial Gerrymandering Claim

As to the Plaintiffs' claim that District 4 as enacted in SB 181 constituted racial gerrymandering, the Court found that the Plaintiffs failed to prove that race predominated above all traditional race-neutral districting principles. J.A. at 575–80. The Court found that statements from bill sponsors on the legislative floor about at-large versus single member districts were "more nuanced" than the Plaintiffs contended and did not directly address the creation of District 4. J.A. at 578.

The District Court further found that the flaws pervading Dr. Chen's analysis of partisanship carried over to his analysis of racial motivation and invalidated his conclusions. J.A. at 579. Moreover, Dr. Chen's simulations produced majority African-American districts even under the tight constraints imposed by Dr. Chen's methodology. J.A. at 579; *see* J.A. at 783–84. Further, Dr. Chen admitted that districts with even greater percentage African-American population would be possible if those constraints were relaxed. J.A. at 579. The District Court found these facts materially undermined Dr. Chen's racial gerrymandering analysis and opinion, J.A. at 579, and rejected his opinion. J.A. at 580.

In sum, after a thorough and careful consideration of the evidence, the District Court found that:

- Plaintiffs failed to prove a prima facie case that the 2013 BOE Plan or the 2015 BOCC Plan was "the product of bad faith, arbitrariness, or discrimination." J.A. at 566, 573.

- Plaintiffs failed to prove their ultimate burden to show that the 2013 BOE Plan or the 2015 BOCC Plan was "the product of bad faith, arbitrariness, or discrimination." J.A. at 566, 573.

- The General Assembly acted in good faith in enacting the BOE Plan and the BOCC Plan. J.A. at 566, 573.

- The General Assembly did not act arbitrarily or with invidious discriminatory intent in enacting the BOE Plan or the BOCC Plan. J.A. at 566, 573.

- The population deviations in the BOE Plan and the BOCC Plan were not the product of bad faith, arbitrariness, or invidious discrimination and do not substantially dilute the voting strength of voters in Wake County's more populated districts, of Wake County's urban voters, or of voters who support registered Democrats who support "progressive" education policies (in the case of the BOE Plan) or Democratic candidates (in the case of the BOCC Plan). J.A. at 566, 573.

- The Plaintiffs failed to prove that race was "the predominant factor motivating the 2015 General Assembly's districting decision concerning District 4 in the 2015 Wake County Commissioners Plan." J.A. at 580.

SUMMARY OF ARGUMENT

1. The District Court's finding that Plaintiffs failed to meet their prima facie or ultimate burden to prevail on their one person, one vote claim is supported by the evidence and is not clearly erroneous.

The District Court faithfully applied the burden of proof established by this Court by *Daly* and *Wright* to require Plaintiffs to prove that the Plans were "the product of bad faith, arbitrariness, or invidious discrimination." The Supreme Court's decision in *Harris* requires Plaintiffs to prove that illegitimate districting factors predominated over legitimate considerations. Because Plaintiffs failed to prove that the Plans were the product of arbitrariness or invidious discrimination, they failed to prove the Plans were the result of any illegitimate districting considerations, much less prove that illegitimate considerations predominated over legitimate ones.

The District Court found that the Plans were rationally related to the General Assembly's stated motives—including allowing voters to choose two BOE members to represent them, improving geographic diversity on the BOCC, reducing the costs of campaigns and elections, and using the same districts for both BOE and BOCC elections. The District Court also found that the Plans accounted for communities of interest and reflected political fairness. These findings are adequately supported by the evidence. The District Court's decision to credit the stated motives of the legislators rather than testimony of opponents of the Plans was within the province of the factfinder.

The District Court also found that the Plans did not impermissibly favor Republican or rural interests. Political considerations are inevitable and legitimate

factors in districting decisions, and Plaintiffs did not—and cannot—proffer a workable judicial standard to distinguish between permissible and prohibited partisan considerations. Plaintiffs' efforts to show an impermissible degree of partisanship through the predictive performance of the Enacted Districts failed not only because of the elusive nature and historical failure of such predictions, but because Plaintiffs' experts selectively considered limited election results and failed to consider more recent and relevant election results, registration data, and the impact of unaffiliated voters. The District Court also found that the Enacted Districts did not impermissibly disfavor Democratic incumbents because, among other things, the Plans allowed "paired" incumbents to run in Districts.

The District Court properly found that, if anything, partisan considerations reflected a degree of rough political fairness, including the election of the Democratic candidate for Superintendent of Public Instruction in 6 of the 9 Enacted Districts, the election of the Democratic candidate for Attorney General in 9 of the 9 Enacted Districts, and voter registration statistics showing a Democratic majority in 5 of the 9 the Enacted Districts. J.A. at 561, 564 (citing Tr. Ex. 252 at 5, 8, 14, 16). Further, the General Assembly approved an amendment to the BOE Plan to allow both a Democratic and Republican BOE Member an opportunity to be in a more competitive district.

The District Court's findings that the Plans did not impermissibly favor rural interests or substantially dilute the weight of urban voters are also supported by the law and the evidence. Legislatures may consider communities of interest in fashioning districting plans, and the Plans here create one superdistrict that includes mostly urban areas and one superdistrict that includes mostly rural and suburban areas. Unlike *Larios*, the Plans did not use deviations to systematically underpopulate or overpopulate districts in entire regions of a state, did not impact the total number of districts allocated to rural or urban regions of a state, did not rely on deviations under 10 percent as a safe harbor, and did not lack any legitimate districting criteria. And, unlike the Georgia legislature in *Larios*, the Plans were rationally related to legitimate policies stated by the bill sponsors.

2. The District Court correctly found that the Plans did not violate the one person, one vote rule under state law. The North Carolina Supreme Court generally follows the federal equal protection analysis to resolve state equal protection claims, and it has allowed a five percent deviation from the ideal population—per district—in an attempt to comport with the federal one person, one vote standard without further justification.

The cases cited by Plaintiffs applying a more stringent standard do not involve challenges to single-member districts with a population deviation less than five percent and do not support a departure from the federal one person, one vote

standard. The fact that a districting plan may have a presumptively constitutional ten percent maximum deviation between districts under federal law yet fail the five percent per-district threshold under state law is of no moment because the Plans satisfy both thresholds.

3. The District Court's findings that Plaintiffs failed to prove that race predominated over legitimate districting criteria in the drawing of District 4 for the BOCC Plan in 2015 is supported by the evidence. Plaintiffs failed to challenge the original drawing of District 4 in the BOE Plan, and the General Assembly adopted the BOE Plan for the BOCC Districts. Because the General Assembly did not draw any Districts in the BOCC Plan, Plaintiffs cannot prove any racial motive, much less a predominantly racial motive regarding BOCC District 4.

The District Court also properly rejected Plaintiffs' claim because it sought to prove racial predominance in the enactment of the Plan as a whole rather than an individual district as required by *Alabama Legislative Black Caucus v. Alabama*, __ U.S. __, 135 S. Ct. 1257 (2015). Further, Plaintiffs' reliance on isolated statements from the bill's sponsor criticizing the impact of at large elections on "any kind of minority" is insufficient to show racial predominance as to BOCC District 4, and the the District Court properly found that the General Assembly sought to achieve several other unrelated goals through SB 181. Finally, the District Court properly rejected Plaintiffs' attempt to rely on the shape of District 4

to establish a racial motive given the fact that Plaintiffs' own expert admitted that he could not opine on racial motive based solely on the shape of District 4.

For these reasons set forth in more detail below, and for all of the reasons set forth in the District Court's carefully considered opinion, the judgment of the District Court should be affirmed.

ARGUMENT

STANDARD OF REVIEW

This Court reviews the judgment of the District Court "under a mixed standard: factual findings are reviewed for clear error, whereas conclusions of law are reviewed de novo." *Helton v. AT&T, Inc.*, 709 F.3d 343, 350 (4th Cir. 2013). The District Court's findings of fact "must not be set aside unless clearly erroneous." FED. R. CIV. P. 52(a)(6). The Supreme Court in *Anderson v. Bessemer City* described the bounds of this Court's review under Rule 52:

> [A] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.
>
> This is so even when the district court's findings do not rest on credibility determinations, but are based instead

> on physical or documentary evidence or inferences from other facts.

470 U.S. 564, 573–74 (1985) (citations omitted). The trier of fact is the "sole judge of the credibility of the witness," *United States v. Beidler*, 110 F.3d 1064, 1070 (4th Cir. 1997), and, "[i]n cases in which a district court's factual findings turn on assessments of witness credibility or the weighing of conflicting evidence during a bench trial, such findings are entitled to even greater deference." *Helton*, 709 F.3d at 350 (citing *Evergreen Int'l, S.A. v. Norfolk Dredging Co.*, 531 F.3d 302, 308 (4th Cir. 2008)).

With respect to expert testimony, "[e]valuating the credibility of experts and the value of their opinions is a function best committed to the district courts, and one to which appellate courts must defer." *Hendricks v. Cent. Reserve Life Ins. Co.*, 39 F.3d 507, 513 (4th Cir. 1994); *see United States v. Hall*, 664 F.3d 456, 462 (4th Cir. 2012). To admit expert testimony under Fed. R. Evid. 702, the district court "need not determine that the expert testimony a litigant seeks to offer into evidence is irrefutable or certainly correct." *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999). Rather, "[a]s with all other admissible evidence, expert testimony is subject to being tested by 'vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.'" *Id.* (quoting *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 596 (1993)). Thus, when a district court admits expert testimony, it remains free as the trier of fact to

discount or disregard testimony it finds to be the product of an unreliable methodology or otherwise doubtful. *See, e.g.*, *AVX Corp. v. United States*, 518 F. App'x 130, 136 (4th Cir. 2013); *F.C. Wheat Mar. Corp. v. United States*, 663 F.3d 714, 724 (4th Cir. 2011); *United States v. Rockett*, 432 F. App'x 194, 195 (4th Cir. 2011) (per curiam).[3]

The District Court's findings were documented in a 108-page opinion supported by detailed references to the evidence presented at trial, documented determinations of the weight and credibility of the evidence presented, and a thorough analysis and application of legal principles. The careful consideration of the evidence reflected in the District Court's exhaustive analysis far exceeds the requirements of Rule 52. There is, therefore, no merit to Plaintiffs' contentions or suggestions, e.g., Plaintiffs' Br. at 44–45, 49, 51–52, that the District Court's order was lacking in its full and fair consideration of the evidence or that the Court somehow failed to understand the testimony presented.

[3] Plaintiffs incorrectly characterize the evidence Plaintiffs presented at trial as "unrebutted." *See, e.g.*, Plaintiffs' Br. at 4, 7, 9, 10, 11, 18. Testimony elicited on cross-examination not only constitutes evidence, it can be an important means of rebutting witness testimony, *e.g.*, *Ridge v. Cessna Aircraft Co.*, 117 F.3d 126, 130 (4th Cir. 1997). The parties also introduced stipulations and joint exhibits, as well as exhibits offered by each party without objection.

I. THE DISTRICT COURT'S FINDINGS THAT PLAINTIFFS FAILED TO PROVE THAT THE PLANS VIOLATE THE ONE PERSON, ONE VOTE RULE UNDER THE FOURTEENTH AMENDMENT ARE SUPPORTED BY THE EVIDENCE.

A. Introduction – Standard of Proof

In two cases decided this month, the Supreme Court reaffirmed the presumptive constitutionality of state and local redistricting plans that contain maximum population deviations less than 10%. *Harris v. Ariz. Ind. Redistricting Comm'n*, 578 U.S. __, __, No. 14-232, slip op. at 4 (Apr. 20, 2016) ("[W]e have refused to require states to justify deviations of 9.9%); *Evenwel v. Abbott*, 578 U.S. __, __, No. 14-940, slip op. at 3 (Apr. 4, 2016) ("Where the maximum population deviation between the largest and smallest district is less than 10%, the Court has held, a state or local legislative map presumptively complies with the one-person, one-vote rule.").

This presumption is rooted in the Supreme Court's desire to avoid being dragged into a "vast, intractable apportionment slough" to intervene in sovereign districting decisions committed to state legislatures. *See Gaffney*, 412 U.S. at 745-751 (1973) (upholding deviations of 7.38 percent); *Miller v. Johnson*, 515 U.S. 900, 915 (1995) ("Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions"). The presumption also reflects that deviations up 10% do not "substantially dilute the weight of individual

votes in the larger districts so as to deprive individuals in these districts of fair and effective representation." *White v. Regester*, 412 U.S. 755, 764 (1973).

To overcome this presumption, this Court requires proof that the redistricting plan has "a taint of arbitrariness or discrimination" by establishing that it "was the product of bad faith, arbitrariness, or invidious discrimination." *Daly v. Hunt*, 93 F.3d 1212, 1220, 1222 (4th Cir. 1996) (citation omitted); *id.* at 1228 (requiring a showing that the plan was "the result of bad faith, arbitrariness, or invidious discrimination); *see also Wright v. North Carolina*, 787 F.3d 256, 265, 266 (4th Cir. 2015).

Last week, the Supreme Court in *Harris* described the standard of proof required to overcome the presumption of constitutionality as follows:

> In sum, in a case like this one, those attacking a state-approved plan must show that it is more probable than not that a deviation of less than 10% reflects the predominance of illegitimate reapportionment factors rather than "legitimate considerations" to which we have referred in *Reynolds* and later cases.

578 U.S. at __, slip op. at 5.

Harris pointedly recognizes the high bar of proof that Plaintiffs have under this standard: "Given the inherent difficulty of measuring and comparing factors that may legitimately account for small deviations from strict mathematical equality, we believe that attacks on deviations under 10% will succeed only rarely, in unusual cases." 578 U.S. at __, slip op. at 5. Indeed, federal courts have

repeatedly upheld districts against claims of invidious discrimination—including plans that push up against the ten percent limit. *See* J.A. at 535–36 (collecting cases upholding plans with maximum deviations of 9.9%, 9.38%, 9.78%, 9.84%, and 9.97%).

Under the standard of proof announced in *Harris*, Plaintiffs were required to prove not only that the Plans were the result of illegitimate apportionment factors—i.e., to prove "bad faith, arbitrariness, or invidious discrimination" under *Daly* and *Wright*—but also that those factors predominated over legitimate criteria.[4]

The District Court faithfully applied the *Daly* and *Wright* standard requiring proof that the Plans were the product of "bad faith, arbitrariness or invidious discrimination," and the District Court found that Plaintiffs failed to meet their burden of proof both as a prima facie matter and by a preponderance of the evidence. *See* J.A. at 566, 573. By failing to prove that the Plans were the product

[4] In light of the burden of proof explained in *Harris*, there is no merit to Plaintiffs' argument that *Wright* "did not require that Plaintiffs prove that the challenged plans were enacted with invidious discrimination." Plaintiffs' Br. at 21. Plaintiffs' argument is belied by the language of *Wright* itself. 787 F.3d at 266 ("To survive summary judgment, the plaintiff would have to produce further evidence to show that the apportionment process had a 'taint of arbitrariness or discrimination.' Thus, in *Daly*, rather than dismiss the plaintiffs' claims, we remanded the matter, stating that '[w]hether Plaintiffs can produce any credible evidence to establish that the apportionment plan at issue here was the product of bad faith, arbitrariness, or invidious discrimination should be addressed on remand.'" (citations omitted)).

of bad faith, arbitrariness or invidious discrimination, Plaintiffs necessarily failed to show the Plans were the result of "illegitimate apportionment considerations" under *Harris*.

Not only did the District Court not find that the General Assembly acted in bad faith in enacting the Plans, the District Court found that the General Assembly acted in good faith in enacting the Plans, that the Plans were rationally related to the stated goals of the bill sponsors, and that the Plans reflected the use of legitimate districting criteria, including but not limited to consideration of communities of interest and "rough political fairness."

B. THE DISTRICT COURT'S FINDINGS THAT PLAINTIFFS FAILED TO PROVE THAT THE PLANS WERE THE PRODUCT OF BAD FAITH, ARBITRARINESS, OR INVIDIOUS DISCRIMINATION ARE SUPPORTED BY THE EVIDENCE.

1. The District Court's Findings that the Plans Were Rationally Related to Legitimate State Interests Are Supported By the Evidence.

Although the General Assembly was not required to justify the minor population deviations at issue, the District Court nonetheless considered and weighed the evidence in the record and found that the General Assembly's stated goals for the SB 325 and SB 181 constituted rational state policies.[5]

[5] The Court correctly noted that, under a rational basis review, the legislature is never required to articulate its reasons for enacting a law, and the Court is free to infer any plausible reason for the legislation. Nevertheless, the

A stated goal of the sponsors of SB 325 was to improve school board representation by allowing voters to elect two BOE Members—one member who represents the voter's district and one member to represent the voter's superdistrict. J.A. at 553, 589, 593, 597, 607. The District Court credited statements from the bill sponsors during legislative debate explaining that the ability to elect an additional BOE Member would particularly help families who live in one school district but whose child goes to school in a different district. J.A. at 553. The District Court considered the BOE maps, the demographics and locations of Wake County public schools, and the base attendance area maps for the Wake County public schools, and it found that SB 325 was "rationally related to improving [BOE] representation." J.A. at 554. The District Court also found that Plaintiffs did not provide evidence to show that, as a general matter, allowing voters the ability to elect two BOE Members rather than one—and therefore have two different lines of communication to the BOE—would *not* improve BOE representation. J.A. at 554–55.

Similarly, the District Court found that the stated purposes of SB 181 were to improve representation by switching from at-large to single-member BOCC districts, to reduce the costs of election for both candidates and the Board of

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District Court was presented with multiple public legislative statements from the sponsors of SB 325 and SB 181 during the debate on the bills, and the District Court properly considered and credited those statements as stating a rational basis for both bills. J.A. at 554, 567.

Elections, and to enhance the geographic diversity on the Commission by providing communities outside of Raleigh the ability to elect their own representative. J.A. at 567. The District Court also found that it was rational for the sponsors of SB 181 to use the same districts enacted in SB 325. *Id.*

Plaintiffs argue that the District Court should have credited testimony from Plaintiffs' witnesses purporting to show that the Plans were not necessary or that the stated goals could be achieved through plans more acceptable to Plaintiffs. Plaintiffs' Br. at 27. But the District Court's decision to credit and give weight to the statements of the bill sponsors as opposed to what it described as "anectodal opinion testimony" of Plaintiffs' witnesses, including legislative opponents of the Plans, is squarely within its discretion as the finder of fact. J.A. at 553–54; *see Anderson*, 470 U.S. at 574 ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

The District Court as the trier of fact can properly consider a witness's "bias[] or prejudice for or against either side," *United States v. Muse*, 83 F.3d 672, 676–77 (4th Cir. 1996), a consideration that is relevant in assessing the reliability of testimony of legislative opponents regarding the motivation of legislative sponsors. *Veasey v. Abbott*, 796 F.3d 487, 502 (5th Cir. 2015), *reh'g granted*, No. 14-41127, 2016 U.S. App. LEXIS 4419 (5th Cir. Mar. 9, 2016) ("Conjecture by the opponents of SB 14 as to the motivations of those legislators supporting the

law is not reliable evidence."); *Butts v. New York*, 779 F.2d 141, 147 (2d Cir. 1985) ("The Supreme Court has, however, repeatedly cautioned -- in the analogous context of statutory construction -- against placing too much emphasis on the contemporaneous views of the bill's opponents. . . . [T]he speculations and accusations of the . . . law's few opponents simply do not support an inference . . . of racial animus." (citations omitted)).

Contrary to Plaintiffs' suggestion, Appellants' Br. 26–27, the District Court did not find that it was required to reject such testimony as a matter of law. Rather, the District Court cited decisions supporting the lack of reliability of such testimony in similar contexts where legislative opponents testified regarding the intent of the legislature. J.A. at 554. The fact that some cases involved statutory construction makes them no less persuasive regarding the difficulty in relying on legislative opponents rather than the bill sponsors to determine underlying purposes and motivations behind legislation. *See NLRB v. Fruit & Vegetable Packers & Warehousemen*, 377 U.S. 58, 66 (1964) ("But we have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach."); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394–95 (U.S. 1951) ("The fears and doubts of the opposition are no authoritative guide to the construction of legislation."). The District Court was well within its

discretion to credit the statements of the bill sponsors against the testimony of their opponents.

In any event, Plaintiffs' proffered evidence does not contradict the District Court's finding that the Plans were rationally related to its stated goals—including allowing voters to elect an additional BOE Member. For example, the District Court believed BOE witnesses who testified that they do their best to respond to any parent regardless of whether the parent lives in the BOE Member's district, but the District Court properly found that "such sentiments do not undermine the rational basis for the [BOE Plan]." *See* J.A. at 554. Similarly, although Plaintiffs' witnesses offered anecdotal testimony regarding the alleged non-alignment of five school districts and the Enacted Districts, such testimony does not contradict the District Court's finding that the Plans improve school board representation—in part by assuring additional representation where a child attended a school outside of his or her family's BOE District. J.A. at 961. And evidence that the General Assembly may have achieved its goals through alternative means, such as Representative Gill's plan, does not undermine the District Court's finding that those goals also could be achieved through the Plans. *See Daly*, 93 F.3d at 1221 ("The Supreme Court has expressly rejected the argument that the possibility of drafting a 'better' plan alone is sufficient to establish a violation of the one person, one vote principle." (citing *Gaffney*, 412 U.S. at 740–41))

In addition to finding that the stated purposes of SB 325 and SB 181 reelected rational policies, the District Court also further found that the Plans reflected other neutral and legitimate districting criteria, such as accounting for the needs of urban, rural, and suburban communities and achieving rough political fairness. J.A. at 564, 569–70.

Plaintiffs bore the burden to prove that the presence of illegitimate factors predominated over legitimate criteria. As detailed below, because Plaintiffs failed to prove that the Plans were the product of bad faith, arbitrariness, or invidious discrimination, they cannot meet their burden to prove illegitimate factors in the first instance, and, therefore, the District Court's decision may be affirmed on that basis.

2. The District Court Properly Found That Plaintiffs' Proffered Evidence of Political Considerations Did Not Constitute Bad Faith, Arbitrariness or Invidious Discrimination.

Neither the law nor the evidence supports Plaintiffs' efforts to prove impermissible partisanship through the predictive partisan performance of the Enacted Districts and other evidence. First, the Supreme Court recognizes that political considerations are acceptable and inevitable in redistricting, and Plaintiffs failed to articulate any standard by which the District Court could distinguish improper from proper political motivations. Second, the District Court's findings that Plaintiffs' evidence was insufficient to show impermissible partisanship was

not clearly erroneous. Third, the District Court's alternative finding that any evidence of partisan motivation reflected the traditional and permissible redistricting goal of achieving rough political fairness was supported by the evidence.

a. Political Considerations Are Inevitable and Legitimate Components of Redistricting Plans.

Political considerations are inevitable and legitimate factors in redistricting. *See Ala. Legis. Black Caucus v. Alabama*, __ U.S. at __, 135 S. Ct. at 1270 (listing "political affiliation" among "traditional race-districting principles"); *Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting) ("In the recent decision in *Vieth v. Jubelirer*, 541 U.S. 267 [2004] . . . all but one of the Justices agreed that ['politics as usual'] *is* a traditional criterion, and a constitutional one, so long as it does not go too far.") (emphasis in original); *Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004) (plurality opinion) (stating that redistricting is "root-and-branch a matter of politics"); *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) ("Our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering").

The Supreme Court's decision *Gaffney*—itself a one person, one vote case—underscores the Supreme Court's unwillingness to wade into the political thicket to review minor population deviations in light of claims of partisanship:

> It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. Our cases indicate quite the contrary. . . . The very essence of districting is to produce a different -- a more "politically fair" -- result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats. Politics and political considerations are inseparable from districting and apportionment. The political profile of a State, its party registration, and voting records are available precinct by precinct, ward by ward. These subdivisions may not be identical with census tracts, but, when overlaid on a census map, it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another. It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences.

412 U.S. at 752–53 (citations omitted).

Neither the Supreme Court nor this Court has delineated what level or degree of partisan considerations alone (if any) could rise to the level of bad faith, arbitrariness or invidious discrimination in a one person, one vote case. *Harris* passed on this question, but it reaffirmed that maintaining "competitive balance

among political parties" is a legitimate redistricting criterion. 578 U.S. at __, slip op at 4, 10.[6]

The Supreme Court's inability to identify and adopt a workable standard for evaluating political gerrymandering claims proves just how difficult is for courts to evaluate the difference between permissible and prohibited partisanship in any redistricting dispute. *See Vieth*, 541 U.S. 267 (plurality opinion) (rejecting political gerrymandering claim). The *Vieth* plurality accurately reasoned that ever-shifting partisan allegiances, split voting, and wide discrepancies in the quality of candidates make it "impossible to assess the effects of partisan gerrymandering, to fashion a standard for evaluating a violation, and finally to craft a remedy" for the "lawful and common practice" of partisan districting. *Id.* at 286–87. Justice Kennedy's concurrence allowed for the possibility of a viable political gerrymandering claim in the future, but he confessed that "[o]ur attention has not been drawn to statements of principled, well-accepted rules of fairness that should govern districting, or to helpful formulations of the legislator's duty in drawing district lines." *Id*. at 309 (Kennedy, J., concurring).

[6] *Larios* also declined to answer this question, 300 F. Supp. 2d at 1352, but in a subsequent challenge to Georgia's redrawn districts, the district court rejected allegations of political motivation as sufficient to prove bad faith in challenging a one person, one vote claim. *See Kidd v. Cox*, No. 1:06-CV-0997-BBM, 2006 U.S. Dist. LEXIS 29689, at *34 (N.D. Ga. May 16, 2006) (reasoning that "the presence of partisan considerations in redistricting does not necessarily equate with bad faith on the part of the Georgia General Assembly in passing SB 386").

Further, as the District Court accurately noted in this case, the disconnect between purported partisan *motivations* and actual partisan *outcomes* plagues the judiciary's ability to fashion a test to measure the level of partisanship in a particular redistricting plan. J.A. at 565 n. 31. That is because "[p]olitical affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the same party line." *Vieth*, 541 U.S. at 285 (plurality opinion). The starkest example of this disconnect between predicted and actual partisan outcomes arose from a decision in this Circuit where a lower court in North Carolina held that the statewide elections for Superior Court judges resulted in "a consistent and pervasive lack of success" for Republican candidates. *Republican Party of North Carolina v. Hunt*, No. 94-2410, 1996 U.S. App. LEXIS 2029, at *2 (4th Cir. Feb. 12, 1996) (per curiam). But just five days after the lower court's decision was entered, every Republican candidate for Superior Court judge prevailed in the statewide results. *Id*. This Court remanded the case back to the lower court because the actual election results were "directly at odds" with the prediction of the lower court and therefore "cast significant doubt" on the lower court's ruling. *Id*. at *7, *13.

This same disconnect was revealed during the trial in this case. Plaintiffs' witnesses testified that a previous BOE map drawn in 2011 favored Republicans. But as the District Court noted, in the first election under that 2011 map,

Democrats captured four of the five seats up for election. J.A. at 157, 564, 891–92. In 2013 Democrats won three of the four seats up for election. J.A. at 157. Similarly, a review of the election results in 2004 and 2008 further reveals the shifting allegiances of voters between elections for different offices on the same ballot. *See generally* J.A. 1037, 1047 (reflecting election outcomes for 2004 and 2008 elections in Wake County). Several Republican candidates won election in 5 of the 9 new districts under the Plans, but the Democratic candidate for Superintendent for Public Schools won in 6 of the 9 districts and the Democratic Attorney General won in all 9 districts. J.A. at 561, 564 (citing Tr. Ex. 252 at 5, 8, 14, 16). Those results reveal that predicting the current partisan bent of a particular district plan is difficult enough—to say nothing of predicting future partisan outcomes.

The District Court also accurately noted that Plaintiffs failed to provide a judicially discernible standard on how to distinguish "conservative" education policy from "progressive" education policy—and, in any event, Plaintiffs failed to prove that the Plan targeted any particular "progressive" education policy. J.A. at 555–56. Two witnesses who are current School Board members testified that the School Board's socioeconomic-diversity policy does not necessarily correlate with political party registration. J.A. at 264, 272–73, 288. The District Court's decision also posed a series of questions—unanswered by any of Plaintiffs' evidence—

highlighting the difficulty, if not impossibility, of labeling certain policy education policy preferences as "progressive" or "conservative." J.A. at 556.

The "inherent difficulty" of measuring competing legitimate and illegitimate districting criteria in one person, one vote cases, *Harris*, 578 U.S. at __, slip op. at 5, is amplified by the lack of any judicial standards to evaluate permissible and prohibited forms of partisanship. Plaintiffs failed to offer any such standard in this case, and as a result, the District Court properly rejected their claims of partisanship as evidence of arbitrariness or discrimination.

b. The District Court Properly Found that Plaintiffs' Proffered Evidence of Partisanship Was Insufficient to Prove Bad Faith, Arbitrariness, or Invidious Discrimination and, Alternatively, Reflected Rough Political Fairness.

Even assuming that certain degrees of partisanship could rise to the level of an illegitimate redistricting factor—i.e., bad faith, arbitrariness, or invidious discrimination—there was no proof of such illegitimate partisanship in this case. Rather, the District Court properly found that, if anything, any political considerations reflected a degree of rough political fairness countenanced by *Gaffney*, 412 U.S. 735. *See Harris*, 578 U.S. at __, slip op. at 4 (listing the "competitive balance" among political parties as legitimate districting criteria (citing *Gaffney*, 412 U.S. at 752)).

The District Court noted that the evidence did not reveal the "systematic" underpopulation of alleged Republican Districts alleged by Plaintiffs because one of the 5 alleged Republican Districts is overpopulated and one of the 4 alleged Democratic Districts is underpopulated. J.A. at 564. The evidence further reveals that the underpopulation of both an alleged Democratic District (5) and alleged Republican District (1) was an unintentional consequence of a politically-neutral districting decision to help promote continuity on the school board by keeping a Democratic and a Republican incumbent in districts they "have a decent chance of winning." J.A. at 162, 165, 630.

The District Court further noted that voter registration data revealed that Democrats are in a majority 5 of the 9 enacted Districts. J.A. at 561–62. The Court acknowledged that courts should not rely on voter registration statistics alone because they do not always correspond to party preferences. J.A. at 562 n. 26. But the District Court also found that election results for certain statewide offices revealed that Democrats prevailed in a majority of the enacted Districts—in 2008, the Democratic candidate for Superintendent of Public Schools won 6 of the 9 Enacted Districts and the Democratic candidate for Attorney General carried all 9 of the 9 Enacted Districts. J.A. at 558–59, 564.

Plaintiffs claim that the Plans "subvert[] political fairness"[7] by having the Republicans "control" 5 of the 9 Districts as opposed to 4 of 9 Districts under the previous 2011 BOE map, Plaintiffs' Br. at 30, but the District Court found that the evidence was insufficient to show that Republicans would control 5 of the 9 Enacted Districts in future elections. The District Court reasonably discredited Plaintiffs' expert, Anthony Fairfax, for relying solely on 2004 and 2008 national presidential election data to predict voter preferences in local and nonpartisan elections in 2016 and beyond. J.A. at 561, 571. The District Court faulted both Fairfax and Dr. Chen for failing to consider (i) more relevant and recent election results for the BOCC and local nonpartisan races such as school board, local judgeships, and Soil and Water Conservation District, (ii) partisan elections for more relevant statewide offices such as Superintendent of Public Schools, which "at least … concerns education" with respect to the BOE Districts, and (iii) the

[7] There is no merit to Plaintiffs' suggestion that the Plans were required to assure that Democrats control a majority of the districts because presidential election results "demonstrate that voters have preferred Democratic candidates by significant margins." Plaintiffs' Br. at 29. In *Davis v. Bandemer*, a plurality of the Court explained that that "[o]ur cases . . . clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." 478 U.S. 109, 130 (1986) (plurality opinion). In any event, Plaintiffs again refer to 2008 presidential election data in local and nonpartisan races but fail to establish how such results have more predictive value that more relevant and recent races for local and state offices, or even current voter registration data.

large number of unaffiliated voters in Wake County or voter registration statistics. *See, e.g.*, J.A. at 558, 561.

The District Court also properly discredited Dr. Chen's attempt to infer partisan motivations by comparing the Plans against computer-simulated districting plans with maximum deviations below 2% and that were devoid of any partisan considerations. Noting that the law neither requires maximum deviations of less than 2% nor prohibits any political considerations, the District Court reasonably found that Dr. Chen's methodology "does not sample simulations of other possible districting plans that could be created by a good-faith effort to equalize population among districts" and "do[es] not show a reasonable range or sample of possible alternative redistricting plans." J.A. at 557.

The District Court also discredited Mr. Fairfax's testimony regarding the impact of the Plans on incumbents as insufficient to show a partisan motive. The District Court found that of the 3 BOE Districts that paired incumbents, only one District paired two Democrats and either of those candidates had the option of running in a superdistrict so that those incumbents "could run in a district . . . without a Democratic opponent." J.A. at 560. The Court found a similar result with the BOCC Districts that paired Democrats, in which 3 Democratic incumbents in District 2 could run in Districts 2, A, and B, respectively. J.A. at 571–72. But the BOCC Districts fail to show a partisan motive for the more

fundamental reason that they were not "drawn" at all—the General Assembly simply adopted the Districts from the BOE Plan. The District Court also noted the current status of many of the "paired" Districts no longer contain such incumbent pairings, which further demonstrates the elusiveness of predicting partisan outcomes as time marches on. J.A. at 560.

Finally, the District Court considered and declined to credit e-mails from Donna Williams to SB 325 sponsors and legislative staff as proof of partisanship regarding the BOE Enacted Districts. J.A. at 563. Instead, the District Court reasonably read Ms. Williams' e-mail as revealing her concern that registered Republican candidates would not win a majority of the BOE seats. *Id.*

For all of these reasons, the District Court properly found that Plaintiffs failed to prove that the Plans were the product of bad faith, arbitrariness, or invidious discrimination, and that, at most, the Plans reflected a degree of rough political fairness.

3. The District Court Properly Found That Plaintiffs' Proffered Evidence of Geographic Considerations Did Not Rise to the Level of Arbitrariness or Invidious Discrimination.

Legislatures may account for the competing needs and interests of different urban, suburban, and regional communities in a redistricting plan. *See Dusch v. Davis*, 387 U.S. 112, 115-117 (1967) (redistricting plan reflected a "détente" to resolve "the complex problems of the modern megalopolis in relation to the city,

the surburbia, and the rural countryside"). Although such considerations cannot substantially dilute the weight of individual votes, *see Reynolds v. Sims*, 377 U.S. 533, 568 (1964), deviations under 10 percent do not result in the substantial dilution of individual votes. *See White*, 412 U.S. at 764 (affirming 9.9 percent deviations in state legislative districts and finding that the plan did not "substantially dilute the weight of individual votes in the larger districts so as to deprive individuals in these districts of fair and effective representation"); *Abate v. Mundt*, 403 U.S. 182, 185 (1971) (affirming deviations of 11.9 to preserve political subdivisions).[8]

The District Court properly found that the General Assembly's goal of enhancing geographic diversity on the BOCC is a rational state policy and that the General Assembly "permissibly considered" communities of interest within Wake County's urban, rural, and suburban areas before it enacted the 2015 Wake County Commissioners Plan. J.A. at 569–70. The District Court credited the statements of the bill sponsors of SB 181 that the General Assembly intended to enhance geographic diversity by, for example, giving residents in non-Raleigh an opportunity to elect a BOCC member within their community of interest. *See* J.A. at 567.

[8] Plaintiffs' reliance on *Morris v. Board of Estimate*, 647 F. Supp. 1463, 1470 (1986) (Plaintiffs' Br. at 32) is misplaced because the deviations in that place were 132.9 percent.

The District Court further found that the different urban, rural, and suburban communities across Wake County's 857 square miles have different priorities and concerns with respect to issues such as schools, transportation, housing, development, land use, and agriculture. *See Dusch*, 387 U.S. at 114, 117 ("[f]inding no invidious discrimination" where stated goal of plan was "to assure there will be members of the City Council with some general knowledge of rural problems to the end that this heterogeneous city will be able to give due consideration to questions presented throughout the entire area"). Plaintiffs' own witnesses testified to the appropriateness of considering the characteristics of certain communities of interest. For example, Representative Darren Jackson testified that, in a legislative redistricting process, he "led an effort to try to get Knightdale, Wendell and Zebulon combined into a House District to start with, because they were communities of interest." J.A. at 369.

Plaintiffs admit that they are not arguing that the District Court erred in recognizing Raleigh and non-Raleigh communities of interest, but they argue that "population deviations cannot be used to afford different electoral power between two different communities of interest." Plaintiffs' Br. at 31-32. Plaintiffs rely on *Larios* in this regard, but the facts here are a far cry from *Larios* because there is no evidence the General Assembly "used" population deviations to create geographical distinctions to "systematically" under- or over- populate the total

number of districts apportioned to particular geographical regions. *See* 300 F. Supp. 2d at 1338, 1341.

In *Larios*, legislative leaders and staff candidly admitted that they used the 10% maximum deviations as an offensive sword to pack districts as close to the maximum deviations as possible to (i) intentionally and systematically increase the number of rural and urban districts at the expense of suburban districts and (ii) to target certain Republican incumbents. 300 F. Supp. 2d at 1328–29.

For example, Senator Brown testified in *Larios* that:

> When I looked at the southern part of the state, there was one paramount concern, and that was that we not lose any more districts than would absolutely be necessary.

Id. at 1342.

Linda Meggers, the legislative staff tasked with creating the districts, testified to the same effect:

> I took all of south Georgia and lassoed it in as if it were one big district, and we had the population, and the deviation, and how many seats. So I knew how many seats I could draw and be within five percent.
>
> ***
>
> With the numbers we had, we knew that [at] a minimum they were going to lose seven seats, and my job was to keep from doing that . . . . They wanted me to help them see if they could draw a plan that held it to seven, if at all possible.

Id. at 1328.

Far from a producing a "détente" among urban, rural, and suburban areas, the Georgia legislative plan used a 10 percent deviation cap to produce a carefully orchestrated windfall of representation to the urban and rural sections of the state:

> In other words, the drafters redrew the majority of south Georgia's districts, which were generally very underpopulated going into the reapportionment process, by taking only as much as was needed to get within a - 5 percent population deviation. Test. of Sen. Brown, Tr. at 651 ("Once they would come within that range as far as the population is concerned, that would be as far as they would need to go. And when you consider that if you take up even more population, that means that you are constricting the number of districts that you are going to have in the south Georgia area.").

Id.

Here, however, Plaintiffs presented no evidence that the General Assembly used any maximum population deviations themselves to produce any particular result. In fact, the evidence reflects just the opposite: The General Assembly drew lines for legitimate purposes—*e.g.*, to increase geographic diversity, reflect communities of interest, reflect rough political fairness, or conform to existing court rulings—and the resulting district lines contained minor and inevitable[9] population deviations. A notable example is the Stam Amendment to SB 325 that kept a Democrat and a Republican incumbent in "winnable" districts resulting in

[9] Even the alternative plans submitted by Representative Gill contained population deviations. J.A. at 79.

both an alleged Democratic District and an alleged Republican District being underpopulated. J.A. at 162, 165, 630.

Further, unlike in *Larios*, there is no evidence that the General Assembly set out to intentionally and systematically reduce or inflate the number of districts that would be drawn within a particular geographic region. *Compare Larios*, 300 F. Supp. 2d at 1328 ("With the numbers we had, we knew that [at] a minimum they were going to lose seven seats, and my job was to keep from doing that . . . . They wanted me to help them see if they could draw a plan that held it to seven, if at all possible."). Rather, the Plans kept the same number of total districts (9) by creating seven single-member districts and 2 superdistricts. The two new superdistricts created one "urban" and one "rural" superdistrict. No "region" in Wake County gains or loses any total number of districts as in *Larios*. And the fact that deviations in the two superdistricts approach 10 percent does not "substantially dilute" any individual vote or otherwise render the Plan any less constitutional. *See White*, 412 U.S. at 764 (affirming 9.9 percent deviations in state legislative districts and finding that the plan did not "substantially dilute the weight of individual votes in the larger districts so as to deprive individuals in these districts of fair and effective representation").

Given that the General Assembly achieved Plans that reflected communities of interest with maximum population deviations below 10 percent, the District

Court's finding that Plaintiffs failed to prove that the Plans impermissibly favor or substantially dilute the votes of urban residents is adequately supported by the evidence. J.A. at 566, 570. The District Court also correctly noted that, unlike the evidence in *Larios*, the evidence in this case reflects that the General Assembly did not use the 10% deviation as a safe harbor, considered legitimate and neutral districting principles, and enacted Districts that were rationally related to a permissible state policy. J.A. at 566, 570.

II. THE DISTRICT COURT CORRECTLY FOUND THAT PLAINTIFFS FAILED TO PROVE THAT THE PLANS VIOLATED THE NORTH CAROLINA CONSTITUTION.

The North Carolina Supreme Court has indicated that equal protection analysis under the North Carolina Constitution (Art. I, Sec. 19), "generally follows" analogous federal analysis. *Blankenship v. Bartlett*, 363 N.C. 518, 522, 681 S.E.2d 759, 762 (2009). The equal right to vote under Art I, Section 19 is not the right to precise mathematical equality but to "substantially equal voting power." *See Stephenson v. Bartlett*, 355 N.C. 354, 382, 562 S.E.2d 377, 396 (2002) (emphasis added). Accordingly, with respect to evaluating minor population deviations, the Supreme Court has required the General Assembly to create districts within "plus or minus five percent" of the ideal population (per district) to assure such districts would be in compliance with the federal one person, one vote standard. *Id*. at 383, 562 S.E.2d at 397 ("In forming new

legislative districts, any deviation from the ideal population for a legislative district shall be at or within plus or minus five percent for purposes of compliance with federal 'one-person, one-vote' requirements.").

None of the cases that Plaintiffs' cite support a conclusion that the North Carolina Supreme Court would apply a stricter standard of review to a districting plan with deviations within plus or minus five percent of ideal population equality. *Stephenson* applied a stricter standard only where the redistricting plan included both single- and multi-member districts, 355 N.C. at 383–84, 562 S.E.2d at 396–98, but did not require any justification for single-member districts within plus or minus five percent. *Northampton County Drainage District Number One v. Bailey* applied strict scrutiny to an electoral scheme for a two-county drainage district that allowed landowners in one county to vote to elect the Superior Court Clerk who appointed the commissioners of the drainage district while landowners in the other county could not. 326 N.C. 742, 747, 392 S.E.2d 352, 356 (1990). And in *Blankenship v. Bartlett*, the plan at issue created judicial districts in which some districts could elect four or five times as many judges per resident. Finding that Plaintiff made "a prima facie showing of considerable disparity" in voting power—a factor of four or five—"between similarly situated districts," the Court applied a heightened scrutiny. 363 N.C. at 527–28, 681 S.E.2d at 766.

None of these cases involved challenges to single-member districts that were within five percent of the population ideal, and nothing in the decisions contradicts *Stephenson*'s recognition of a de minimis population deviation threshold rooted in federal one-person, one-vote jurisprudence. Plaintiffs suggest that the five percent standard per district in *Stephenson* could arguably be stricter than the ten percent maximum deviation under federal law in certain circumstances. Appellants' Br. at 15 (citing *Dean v. Leake*, 550 F. Supp. 2d 594, 598 n.7 (E.D.N.C. 2008)). But that is not the case here. The Enacted Districts contain no district with a deviation greater than five percent from the ideal and the maximum deviations are less than ten percent.

III. THE COURT SHOULD UPHOLD THE DISTRICT COURT'S FINDING THAT PLAINTIFFS FAILED TO MEET THEIR PRIMA FACIE AND ULTIMATE BURDEN TO PROVE THAT DISTRICT 4 OF THE SB 181 PLAN WAS RACIALLY GERRYMANDERED.

A. The Court Applied the Correct Standard of Proof to the Plaintiffs' Racial Gerrymandering Claim.

To prevail on their claim that District 4 was racial gerrymandered in the 2015 BOCC Plan, Plaintiffs were required to prove that race was the "predominant factor" motivating the legislature to place certain voters in within that "particular district." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). In other words, Plaintiffs were required to show that the "legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect

for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.* Given both the difficulty in distinguishing between race conscious and racially motivated districting and the "sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments," federal courts exercise "extraordinary caution" in adjudicating racial gerrymandering claims. *Miller*, 515 U.S. at 915–16.

The legislature's motivation for creating a particular district is a question of fact. *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999). The District Court's finding that Plaintiffs' evidence failed to show that race predominated in the drawing of District 4 in 2015 is not clearly erroneous.

1. Plaintiffs Cannot Prove Any Motivation for the Drawing of District 4 in 2015 Because the General Assembly Did Not Draw Any New Districts for SB 181.

It is undisputed that SB 181 adopted the same districts as SB 325. The District Court credited the legislative testimony of bill proponents that the reason for adopting the SB 325 districts was because those districts had been upheld by the District Court. The bill sponsors further believed that adopting the same districts would reduce voter confusion and be more cost-effective. *See, e.g.*, J.A. at 578–80, 687, 733–34, 1077.

Because SB 181 did not "draw" any lines for District 4 or any other Enacted District, but rather adopted the SB 325 Districts in their entirety, Plaintiffs have no

basis to claim that District 4 was drawn with race as the predominant motive. In any event, there is no evidence that the adoption of the SB 325 districts was motivated by any purposes other than the stated purposes to use districts that were court-approved at that time, to reduce voter confusion, and cut administration costs. *See, e.g.*, J.A. at 687, 733–34, 980.

Contrary to Plaintiffs' assertions, *Harris v. McCrory*, 2016 U.S. Dist. LEXIS 14581 (M.D.N.C. Feb. 5, 2016), and *Page v. Virginia State Board Of Elections*, 2015 U.S. Dist. LEXIS 73514 (E.D. Va. June 5, 2015), do not stand for the proposition that a district drawn to be identical to a prior district can be found to be an unconstitutional racial gerrymander, even if the prior district was not. In both *Harris v. McCrory* and *Page*, the legislators did not maintain existing district boundaries, but deliberately rearranged existing district lines with a target African-American voting age population informing the shape of the district. *Harris v. McCrory*, 2016 U.S. Dist. LEXIS 14581, at **23–24, 37 (citing testimony that reflected a "quota" of "50-percent-plus-one-person" African-American voting age population for one district, and amendments to the other challenged district to increase the African-American voting age population "above the percentage of black voting age population found in the current [ ] District"); *Page*, 2015 U.S. Dist. LEXIS 73514, at *27 (stating that "legislators were conscious of maintaining a 55% BVAP floor" in drawing new districts).

2. The Court Properly Found that Plaintiffs' Proffered Evidence Did Not Meet Their Burden of Proof.

The District Court properly found that Plaintiffs' reliance on isolated statements of a bill sponsor and the shape of the district itself were insufficient to prove the race was the predominant motive in the drawing of District 4.

During legislative debates of SB 181, Representative Paul Stam argued that BOCC elections would be better served by single-member districts because at large districts tend to "submerge the views of any kind of minority," "whether it's racial, gender, political, rural, urban . . . ." J.A. at 733; *see also* J.A. 735, 980, 1001–02. The bill sponsors also stated that single-member districts would lead to less expensive elections and increase geographic diversity. *See, e.g.*, J.A. at 663-66, 736.

Contrary to Plaintiffs' assertion, Plaintiffs' Br. at 42–44, Representative Stam's passing reference to "race" is wholly insufficient to prove the predominance of a racial motive for several reasons. First, any evidence of racial predominance must point to the use of race in creating that <u>particular</u> district—not a redistricting plan as a whole. *Ala. Legis. Black Caucus*, __ U.S. at __, 135 S. Ct. at 1265. Representative Stam's statements discussed the plan as a whole.

Second, Representative Stam criticized at large districts for prejudicing "any kind of minority", including "racial, gender, political, rural, urban," without prioritizing the need to protect a specific minority group. *See* J.A. 733.

Representative Stam's statements are, at most, akin to the statement by then-Senator Roy Cooper referenced in *Easley v. Cromartie* to undermine the Plaintiffs' argument that race predominated. 532 U.S. 234, 253–54 (2001) ("I think that overall [the districts] provide[] for a fair, geographic, racial and partisan balance . . . ."). The Supreme Court found then-Senator Cooper's statement to be insufficient evidence of racial predominance.

Third, the bill sponsors' statements during the debates identify many other goals of SB 181 unrelated to the problem of at large districts submerging certain minority voices, including an increase in geographic diversity, improved representation, and more affordable elections. *See generally* J.A. at 663-66, 733 ("[T]here's no accountability when you're elected at large . . . ."), 735, 980, 1002.

Similarly, the District Court also rejected Plaintiffs' attempt to rely on the shape of District 4 as evidence of racial predominance. Specifically, the District Court properly rejected Plaintiffs' reliance on Dr. Chen's opinion that race predominated in the creation of District 4—including his use of the same simulated districts that he produced for his analysis of partisanship. J.A. at 487, 782. The District Court found that, just as Dr. Chen's unnecessarily restrictive criteria had undermined the credibility of his partisanship conclusions, those same flaws invalidated his conclusions regarding the predominance of racial motivation. J.A. at 579. The District Court also found that the simulations produced majority

African-American districts even under the tight constraints imposed by Dr. Chen's methodology J.A. at 579, 783–84. Perhaps most fatal to his analysis, Dr. Chen admitted that it would be feasible for districts drawn with relaxed but still constitutional criteria to produce even more majority-minority districts. J.A. at 493–94, 579. The District Court properly found these facts materially undermined Dr. Chen's racial gerrymandering analysis and opinion. J.A. at 579.

Contrary to Plaintiffs' assertion that "the district court wholly ignored the racial density map in Dr. Chen's report (Figure 7)," Plaintiffs' Br. at 44–45, the District Court's opinion demonstrates a careful and scrutinizing consideration of Dr. Chen's report and trial testimony. The District Court's failure to mention one figure does not mean the court "ignored" that evidence. *Newport News Holdings Corp. v. Virtual City Vision*, 650 F.3d 423, 434 n.7 (4th Cir. 2011) ("Courts are not required to identify every piece of evidence they consider in making a decision."). Further, contrary to Plaintiffs' claim, Dr. Chen did not opine that the map "demonstrate[s] . . . how the General Assembly drew District 4 to pack as many black voters . . . into the district as possible." Plaintiffs' Br. at 44–45. Rather, Dr. Chen opined that the map is "suggestive . . . although . . . certainly not conclusive evidence of *any racial motivation*," and that nothing more definitive could be said without further analysis. J.A. at 782 (emphasis added). In other words, Plaintiffs

ask this Court to find the District Court clearly erred by not drawing from the racial density map conclusion their own expert stated could not be drawn.

Similarly, the District Court properly rejected the testimony of Jannet Barnes regarding the motivations behind District 4. Ms. Barnes did not testify that she has any knowledge of the actual motives of any members of the General Assembly. Instead, she testified that, from looking at the map, it appeared to her that the district lines were drawn to capture parts of the African-American population. J.A. at 513. But, as mentioned, Plaintiffs' own expert witness found that no conclusive evidence of racial motivation could be found in the appearance of the District alone. The District Court's rejection of the contradictory testimony from Ms. Barnes, a lay witness, cannot be clearly erroneous.

Finally, the District Court did not clearly err in comparing the shape and demographics of District 4 to other districts challenged for racial gerrymandering. J.A. at 580. To reach a conclusion as to whether a district shape is "highly irregular," *see Shaw v. Reno*, 509 U.S. 630, 646–47 (1993), a rather amorphous standard standing independently, a court must have some basis for what would be considered "regular."

CONCLUSION

For the reasons set forth above, the Wake County Board of Elections respectfully requests that the Court affirm the ruling of the Court below and find that judgment properly was entered in its favor.

Respectfully submitted this the 25th day of April, 2016.

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Dated: April 25, 2016

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 25th day of April, 2016, I caused this Brief of Appellee to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 25th day of April, 2016, I caused the required copies of the Brief of Appellee to be hand filed with the Clerk of the Court.

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