No. 103A06 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

PENDER COUNTY, DWIGHT STRICKLAND, Individually and as a Pender County Commissioner, DAVID WILLIAMS, Individually and as a Pender County Commissioner, F.D. RIVENBARK, Individually and as a Pender County Commissioner, STEPHEN HOLLAND, Individually and as a Pender County Commissioner, and EUGENE MEADOWS, Individually and as a Pender County Commissioner,	)
PLAINTIFFS,	)
v.	)
	)
GARY O. BARTLETT, as Executive Director of the State Board of Elections; LARRY LEAKE, ROBERT CORDLE, GENEVIEVE C. SIMS, LORRAINE G. SHINN, and CHARLES WINFREE, In Their Official Capacities as Members Of the North Carolina Board of Elections; JAMES B. BLACK, In His Official Capacity as Co-Speaker of the North Carolina House of Representatives; MARC BASNIGHT, In His Official Capacity as President Pro Tempore of the North Carolina Senate; MICHAEL EASLEY, in His Official Capacity as Governor of the State of North Carolina; and ROY COOPER, in His Official Capacity as Attorney General of the State of North Carolina,	)
DEFENDANTS.	)

****

DEFENDANT-APPELLEES' BRIEF

****

SUBJECT INDEX

TABLE OF CASES AND AUTHORITIES
CASES

CONSTITUTIONAL, STATUTORY AND LEGISLATIVE AUTHORITIES

OTHER AUTHORITIES

No. 103A06 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

PENDER COUNTY, DWIGHT STRICKLAND, Individually and as a Pender County Commissioner, DAVID WILLIAMS, Individually and as a Pender County Commissioner, F.D. RIVENBARK, Individually and as a Pender County Commissioner, STEPHEN HOLLAND, Individually and as a Pender County Commissioner, and EUGENE MEADOWS, Individually and as a Pender County Commissioner,	)
PLAINTIFFS,	)
v.	)
	)
GARY O. BARTLETT, as Executive Director of the State Board of Elections; LARRY LEAKE, ROBERT CORDLE, GENEVIEVE C. SIMS, LORRAINE G. SHINN, and CHARLES WINFREE, In Their Official Capacities as Members Of the North Carolina Board of Elections; JAMES B. BLACK, In His Official Capacity as Co-Speaker of the North Carolina House of Representatives; MARC BASNIGHT, In His Official Capacity as President Pro Tempore of the North Carolina Senate; MICHAEL EASLEY, in His Official Capacity as Governor of the State of North Carolina; and ROY COOPER, in His Official Capacity as Attorney General of the State of North Carolina,	)
DEFENDANTS.	)

****

DEFENDANT-APPELLEES' BRIEF

****

STATEMENT OF FACTS

I. NORTH CAROLINA'S HISTORY OF REDISTRICTING LITIGATION IN THE FEDERAL COURTS

The North Carolina General Assembly has been at the forefront as the courts, federal and state, have considered and evolved the complicated legal rules that govern the legislative task of redistricting. The instant case challenging the division of Pender County into two House districts[1] must be viewed in the context of the long line of seminal redistricting litigation that preceded it. During the redistricting process in 1981, the case of *Gingles v. Edmisten*, No. 81-803-CIV-5 (E.D.N.C.), was filed in federal court seeking to enjoin the State's legislative redistricting plans: (1) under Section 5 of the Voting Rights Act (hereinafter "VRA"), for failure to obtain preclearance of the North Carolina Constitution's whole county provisions[2] (hereinafter "WCP"); and (2) under Section 2 of the Act, for denial or abridgment of the right to vote on account of race or color based on the failure to draw minority

---

[1] The case caption continues to identify all of the original plaintiffs, although only some of the plaintiffs in their individual capacity are appealing the decision of the three-judge panel.

[2] The whole county provisions for legislative districts were added to the State Constitution in 1968. "No county shall be divided in the formation of a representative district." N.C. CONST. art. II, § 5 (3); *see also* N.C. CONST. art. II, § 3(3) ("No county shall be divided in the formation of a senate district.").

districts in various areas of the State.[3] When preclearance was sought pursuant to Section 5, the United States Department of Justice refused to preclear the whole county provisions and required the State to draw additional minority districts in order to obtain preclearance; the whole county provisions were deemed unenforceable in all 100 counties in the State. *Cavanagh v. Brock*, 577 F. Supp. 176, 182 (E.D.N.C. 1983) (three-judge court). In addition, the United States Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 92 L. Ed. 2d 25 (1986), found Section 2 violations in the precleared House and Senate redistricting plans and required the State to draw additional legislative districts which would provide black citizens in North Carolina an equal opportunity to elect representatives of their choice.

After the 1990 Census, the North Carolina General Assembly made several attempts to draw its legislative and congressional districts before the State eventually obtained Section 5 preclearance. Current House District 18's predecessor, District 98, was created in response to objections interposed by the United States Department of Justice that a minority district was required in the southeastern area of the State to comply with Section 2 of the Voting Rights Act. (R p. 160) Thereafter, the State's precleared congressional redistricting plans were the subject of four opinions by the

---

[3] For the Court's convenience, copies of sections 2 and 5 of the Voting Rights Act as amended, 42 U.S.C. §§ 1973 and 1973c are included in the Appendix. (App. pp. 6-8)

United States Supreme Court: *Shaw v. Reno*, 509 U.S. 630, 125 L. Ed. 2d 511 (1993) (*"Shaw I"*); *Shaw v. Hunt*, 517 U.S. 899, 135 L. Ed. 2d 207 (1996) (*"Shaw II"*); *Hunt v. Cromartie*, 526 U.S. 541, 143 L. Ed. 2d 731 (1999) ("*Cromartie I*"); *Easley v. Cromartie*, 532 U.S. 234, 149 L. Ed. 2d 430 (2001) (*"Cromartie II"*). In these decisions the Court grappled with the distinction between the lawful and necessary consideration of race in drawing districts and the unlawful use of race as a predominant factor in drawing district lines, unless the districting decisions were narrowly tailored to achieve a compelling interest, such as complying with the Voting Rights Act. After trials in *Gingles* and *Shaw*, the legislature was well aware of the evidentiary basis provided by the State's past racial history and its present continuing effects on black citizens that would support a claim under Section 2 of the Voting Rights Act. *See Shaw v. Hunt*, 861 F. Supp. 408, 463-65 (E.D.N.C. 1994), *rev'd, Shaw II*; *Gingles v. Edmisten*, 590 F. Supp. 345, 357-75 (E.D.N.C. 1984), *aff'd in part and rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. 30, 92 L. Ed. 2d 25 (1986). As noted by the district court in *Shaw*, "[t]his was, after all, a General Assembly with powerful, recent institutional and individual memories of the Act's rigor in redistricting matters." 861 F. Supp. at 463. Those institutional and individual memories continued to inform the General Assembly in the redistricting process in 2001.

II. NORTH CAROLINA LEGISLATIVE REDISTRICTING AFTER THE 2000 CENSUS

After the 2000 census, the General Assembly enacted legislative redistricting plans that were precleared pursuant to Section 5 of the Voting Rights Act and were not subject to any challenge in federal court. In the 2001 House Redistricting Plan[4], Pender County was divided between five districts and District 18, which was drawn for purposes of maintaining a Section 2 VRA district in the southeastern area of the State, included portions of Pender, Brunswick, Columbus and New Hanover counties. (R pp. 145-47; App. p. 2) As the three-judge panel noted, the House redistricting plan enacted in 1992 after *Gingles* remained in effect until the 2002 elections and divided Pender County among several districts, including District 98. As drawn in the 1992 Plan, District 98 was a majority black district based on total black and voting age population percentages and was identified as a VRA district by the General Assembly. (R pp. 144-45; App. p. 1) Representative Thomas Wright, a black Democrat, won election in the district each year from 1992 through 2000. (R p. 145) Although District 98 was located in non-Section 5 counties, it was originally drawn because of an objection interposed by the U.S. Department of Justice based on

[4] For the Court's convenience, copies of the 1992, 2001, 2002, Interim and 2003 Redistricting Plans discussed herein are contained in the Appendix to this brief. (App. pp. 1-5) These maps were provided to the three-judge panel in Appellant's Second Notice of Filing as part of the Stipulation of the Parties. (R pp. 91, 125-26)

Section 2 principles in that minority voting strength was not being recognized in southeastern North Carolina.[5] (R p. 146-47) In the 2001 plan, District 98 was replaced with the considerably more compact District 18 in order to comply with the principles established in the *Shaw* cases; the district was no longer majority black in total or voting age population, but was considered a VRA district which continued to provide minorities an opportunity to elect their candidate of choice because the black percentage of Democratic voter registration was more than fifty percent and the black population percentages (total population and voting age population) were both above forty percent. (R pp. 146-47; App. p. 2)

The 2001 House Plan, however, was challenged in State court with the commencement of the *Stephenson* litigation in 2001, which resulted in this Court's opinions establishing nine redistricting criteria for the legislature to follow for purposes of complying with the State Constitution. *See Stephenson v. Bartlett*, 355 N.C. 354, 383-84, 562 S.E.2d 377, 396-98 (2002) ("*Stephenson I*"); *Stephenson v. Bartlett*, 357 N.C. 301, 305-07, 582 S.E.2d 247, 250-51 (2003) ("*Stephenson II*"). After *Stephenson I*, the heretofore unenforceable whole county provisions, were again

---

[5] In 1991, the U.S. Attorney General's regulations provided that an objection would be interposed during Section 5 preclearance review to prevent a clear violation of Section 2. 28 C.F.R. §51.55(b)(2) (1996). As noted by the three-judge panel in this case, this policy was struck down in *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 137 L. Ed. 2d 730 (1997). (R p. 161)

in effect, with the understanding that Voting Rights Act districts are drawn first and to "the maximum extent practicable, such VRA districts shall also comply with the legal requirements of the WCP." 355 N.C. at 373, 562 S.E.2d at 396-97. No election was held under the 2001 Plan. (R p. 146)

During the course of the *Stephenson* litigation, the legislature redrew its legislative redistricting plans in 2002. In this House plan, Pender County was not divided, but the General Assembly continued to maintain District 18 as a Section 2 VRA district which included portions of Columbus, Brunswick and New Hanover Counties. (R pp. 147-49; App. p. 3) The black population percentages were maintained at above forty percent and the black Democratic voter registration percentage was more than fifty percent. (R p. 148) No election was held under this plan. (R p. 148)

When the 2002 Plan drawn by the General Assembly was rejected by the superior court handling the *Stephenson* litigation, an interim plan was drawn by the court and used in the 2002 elections. (R p. 149) The Interim House Plan did not divide Pender County, but continued to maintain and identify District 18 as a Section 2 VRA district that included portions of Columbus, Brunswick and New Hanover Counties similar to District 18 in the House 2002 Plan. (R p. 149; App. p. 4) The black total and voting age population percentages were over forty percent

(and slightly higher than the percentages in the 2002 Plan); the black Democratic voter registration percentage was in excess of fifty percent. (R pp. 149-50)

III. THE DRAWING OF DISTRICT 18 IN THE 2003 HOUSE PLAN

In November 2003, the General Assembly enacted the current redistricting plan for the North Carolina House. 2003 N.C. Sess. Laws 434, §§ 1-2 (Extra Session). In drawing this plan, the General Assembly sought to comply with both the Voting Rights Act and the WCP. (R pp. 45-49, 65-69, 94-96, 150-51) District 18 is contained wholly within Pender and New Hanover Counties, and the previous four-county grouping of Columbus, Brunswick, New Hanover and Pender now consists of two two-county groupings. (App. p. 5) This plan also divided the fewest counties (47 of 100 counties) in comparison to all the other plans drawn by the General Assembly, the court or the *Stephenson* plaintiffs during the redistricting process. (*Compare* App. pp. 2-5.) The minority concentration in District 18 in the 2003 Plan consists of a total black population of 42.89%, a black voting age population of 39.36%, and a black Democratic voter registration of 53.72%. (R p. 167) As the three-judge panel concluded, there is no dispute that the intent of the General Assembly in fashioning District 18 was to maintain the district as an effective black voting district so as to comply with the VRA and to avoid a challenge under Section 2. (R pp. 153, 162) An important reason for maintaining the boundaries of District

18 to provide racial minorities an equal opportunity to elect their candidate of choice is because there is no other district in the nine-county area encompassing the southeastern corner of the State which provides such an opportunity either in the State House or Senate. (R pp. 97, 182)

Based on election data and voting patterns, House districts in North Carolina with total black population percentages of 41.54% and above and black voting age population percentages of 38.37% and above provide an effective opportunity for the election of black candidates. (R pp. 46, 50) The General Assembly considered the most relevant indicator of black voting strength for purposes of drawing districts to be black Democratic voter registration; districts where the black Democratic voter registration is above fifty percent have consistently elected black Representatives. (R pp. 46-47, 53, 94-95). The results of the 2004 election, held under the 2003 Plan, demonstrated unequivocally that District 18 as currently drawn continues to be an effective minority voting district which re-elected Representative Wright, the black voter's candidate of choice. (R pp. 95) This was the conclusion reached by the three-judge panel based on the uncontradicted facts and undisputed evidence in the record. (R p. 167) Alternative plans that keep Pender County whole within the two-county grouping of Pender and New Hanover Counties would reduce the black population percentages for District 18 below the levels that have been shown in previous North

Carolina elections to provide minorities an equal opportunity to elect their candidates of choice. (R pp. 68, 94-96, 101, 119-124)

STANDARD OF REVIEW[6]

This matter was decided on undisputed facts, and appellants have not assigned error to any Findings of Fact. Review of the three judge panel's partial granting of summary judgment in favor of defendants, which was incorporated into the Final Judgment, as well as the Final Judgment, is *de novo* of the legal questions presented. *Howerton v. Arai Helmet, Ltd.,* 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004); *Humphries v. Jacksonville*, 300 N.C. 186, 265 S.E.2d 189 (1980).

ARGUMENT

I. THE THREE JUDGE PANEL PROPERLY CONCLUDED THAT THE WHOLE COUNTY PROVISIONS OF THE NORTH CAROLINA CONSTITUTION MAY NOT BE APPLIED IN CONTRAVENTION OF FEDERAL LAW.

Assignment of Error Nos. 4, 6, 7, 9 (R pp. 190-91)

Following the tenets of this Court established in the *Stephenson v. Bartlett* cases, the three-judge panel properly concluded that no county, including Pender County, is guaranteed protection from being divided based on the whole county provisions of the North Carolina Constitution when the division of counties is

---

[6] The standard of review is provided since one is not contained in Plaintiff Appellants' Brief.

necessary to comply with the Voting Rights Act and other federal mandates. (R p. 162). Indeed, while appellants choose to focus their argument solely on the division of Pender County in the 2003 House Plan, the General Assembly must take a more holistic view. The General Assembly must consider a plan as a whole, making sure not only to comply with federal law, but also to comply with *all* of the *Stephenson* critieria.

In *Stephenson I* and *Stephenson II*, this Court established legal principles, including application of the WCP, under which the legislature's redistricting authority is exercised; however, the Court properly deferred to the supremacy clauses of both the State and federal constitutions for purposes of applying the WCP. *Stephenson I*, 355 N.C. at 369-70, 562 S.E.2d at 388-89. This Court explained the supremacy of federal law as follows:

> We recognize that, like the application or exercise of most constitutional rights, the right of the people of this State to legislative districts which do not divide counties is not absolute. In reality, an inflexible application of the WCP is no longer attainable because of the operation of the provisions of the VRA and the federal "one-person, one-vote" standard, as incorporated within the State Constitution. This does not mean, however, that the WCP is rendered a legal nullity if its beneficial purposes can be preserved consistent with federal law and reconciled with other state constitutional guarantees.

Stephenson I, 355 N.C. at 371, 562 S.E.2d at 389 (citations omitted). Throughout its opinion, this Court repeatedly noted that the WCP must yield to the mandates of

federal law and the prohibition of the Voting Rights Act against diluting minority voting strength:

> [T]he State retains significant discretion when formulating legislative districts, so long as the "effect" of districts created pursuant to a "whole-county" criterion or other constitutional requirement does not dilute minority voting strength in violation of federal law.

Id. at 370, 562 S.E.2d at 389.

> [T]he WCP remains valid and binding upon the General Assembly during the redistricting and reapportionment process, as more fully explained below, except to the extent superseded by federal law.

Id. at 372, 562 S.E.2d at 390.

> Although no federal law has preempted this Court's authority to interpret the WCP as it applies statewide, we acknowledge that complete compliance with federal law is the first priority before enforcing the WCP.

Id. at 374 n.4, 562 S.E.2d at 391 n.4.

> Although we discern no congressional intent, either express or implied, to preempt the WCP through the operation of the VRA, we also recognize that the WCP may not be interpreted literally because of the VRA and "one-person, one-vote" principles.

Id. at 381, 562 S.E.2d at 396.

Finally, in establishing nine principles to be followed by the General Assembly in the drawing of legislative districts, the first criterion enumerated by this Court

expressly requires drawing districts that comply with the provisions of the Voting Rights Act:

> [1.]. . .[T]o ensure full compliance with federal law, legislative districts required by the VRA shall be formed prior to creation of non-VRA districts. . . . In the formation of VRA districts within the revised redistricting plans on remand, we likewise direct the trial court to ensure that VRA districts are formed consistent with federal law and in a manner having no retrogressive effect upon minority voters. To the maximum extent practicable, such VRA districts shall also comply with the legal requirements of the WCP. . .

Stephenson II, 357 N.C. at 305, 582 S.E.2d at 250 (citing *Stephenson I*, 355 N.C. at 383, 562 S.E.2d at 396). The ninth principle articulated by this Court referred again to compliance with federal law. *See id.* at 309, 582 S.E.2d at 252 ("any new redistricting plans . . . shall depart from strict compliance with the legal requirements set forth herein only to the extent necessary to comply with federal law").

The three-judge panel concluded that it was "undisputed" that the General Assembly intended to draw House District 18 as a VRA district and that the General Assembly believed "it was required to draw a Section 2 VRA district in the Southeastern North Carolina Region in order to comply with Section 2 of the VRA." (R p. 162).

> It is undisputed that the North Carolina General Assembly, with the consent of Representative Wright, wanted to maintain House District 18 as an effective black voting district so as to avoid a challenge under Section 2 of the VRA in the event the redistricting plan failed to contain

> an effective black voting district in the southeastern portion of North Carolina similar to former House District 98.

(R p. 153; *see also* R pp. 145-49 (panel's review of District 18 as drawn by the legislature in the 2001 and 2002 plans in order to maintain an effective minority district to comply with Section 2)) The three-judge panel characterized the General Assembly's intent to maintain House District 18 as an effective Section 2 VRA district as a "preemptive strike" in response to legislative concerns that failure to maintain the district would result in a Section 2 "lawsuit filed challenging the absence of an effective minority district in southeastern North Carolina." (R p. 162) While not using the "preemptive strike" metaphor, the United States Supreme Court has consistently sided with state legislatures attempting to comply with the VRA and has not required them to wait until a plaintiff successfully sues before taking steps to comply with Section 2 of the Voting Rights Act or to remedy discrimination.

In *Shaw I*, 517 U.S. at 910, 135 L. Ed. 2d at 222, the Court recognized that a significant state interest exists in eradicating the effects of past racial discrimination provided the State has a "strong basis in evidence to conclude that remedial action is necessary." This principle was based on earlier holdings that a state is not required to await a judicial finding that it has committed past or present discrimination before it voluntarily takes remedial action to eradicate the discrimination, so long as it has

a "strong basis in evidence for its conclusion that remedial action was necessary." *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 500, 102 L.Ed.2d 854, 886 (1989) (quoting *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 277, 90 L. Ed. 2d 260, 271 (1986)). *See also King v. State Bd. of Elections*, 979 F. Supp. 619, 622 (N.D. Ill. 1997) (where there is a strong basis in evidence of the harm being remedied, state's compelling interest extends to remedy past or present violations of federal statutes), *aff'd*, 522 U.S. 1087, 139 L. Ed. 2d 866 (1998).

Similarly, in complying with the *Stephenson* directive to draw VRA districts first, the General Assembly was not required to wait for a plaintiff to successfully sue under Section 2 before taking action to assure compliance with the VRA. Pursuant to *Stephenson*, the legislature first had to draw the necessary VRA districts, and then reach accommodation with the WCP "to the maximum extent practicable."[7] 357 N.C. at 305, 582 S.E.2d at 250. In this case, the legislature had a strong basis in evidence to conclude that maintaining House District 18 as an effective minority voting district was required by Section 2 of the Voting Rights Act. This also was the conclusion reached by the three-judge panel. (*See, e.g.*, R pp. 166-68, 182-83)

---

[7] In interpreting the term "practicable" in a non-redistricting context, this Court has recognized its connotation of "reasonable" or "feasible." *See Muncie v. Travelers Ins. Co.*, 253 N.C. 74, 82, 116 S.E.2d 474, 480 (1960) (Parker, J., concurring) (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY, 2nd Ed) ("'practicable' means 'capable of being put into practice, done or accomplished; feasible'").

Appellants, implicitly conceding that District 18 was required in some form in southeastern North Carolina[8], nevertheless urge that Pender County should be constitutionally immune from division. To support this contention, appellants point to the fact that District 18 in the judicially-adopted Interim House Plan did not divide Pender County; they neglect to mention that the court drawn plan maintained District 18 as a VRA district by cutting across three other counties. (App. p. 4) It is in making this argument that appellants fail to apply *all* of the *Stephenson* criteria.

When this Court in *Stephenson I* confirmed the supremacy of federal law, it recognized that such federal law included not only the Voting Rights Act, but also the principle of one person, one vote. *Stephenson I*, 355 N.C. at 382-83, 562 S.E.2d at 396-97 ("we also recognize that the WCP may not be interpreted literally because of the VRA and 'one-person, one-vote' principles"). It is for this reason that the Court delineated nine criteria that, when followed, implement the WCP. These criteria include the holding that when a single district or multiple districts cannot be formed wholly within a county, "the requirements of the WCP are met by combining or grouping the minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard," and

[8] Appellants offered alternative House district maps to the three-judge panel that kept Pender County whole and attempted to argue that these alternatives would provide effective minority voting districts. (R pp. 28-32, 68, 79-82, 119-24)

districts are created in such groupings "whose boundary lines do not cross or traverse the 'exterior' line of the multi-county grouping" and where interior traverses of county lines are minimized to the extent possible. *Id.* at 384, 562 S.E.2d at 397.

> The intent underlying the WCP must be enforced to the maximum extent possible; thus, only the smallest number of counties necessary to comply with the at or within plus or minus five percent "one- person, one-vote" standard shall be combined, and communities of interest should be considered in the formation of compact and contiguous electoral districts.

Id.

The 2003 House redistricting plan complied with the requirements of *Stephenson I* and preserved county lines better than any other alternatives drawn by the legislature, the superior court, or the *Stephenson* plaintiffs. By drawing District 18 in Pender and New Hanover Counties, it also replaced one four-county grouping used in other redistricting plans with two two-county groupings – thus complying with the Stephenson requirement of "grouping the minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard," while at the same time maintaining an effective minority district. (*See* App. pp. 2-5.)

Appellants would have this Court deviate from its *Stephenson* holdings by suggesting that a particular county can claim some right not to be divided. The

General Assembly, however, properly exercised its redistricting authority by finding a solution in the southeastern corner of the State that maintains an effective minority district in order to comply with Section 2 of the VRA, and at the same time complies with the WCP, as interpreted and applied in *Stephenson I* and *II*, to the maximum extent possible. No county has an absolute right not to be divided pursuant to the WCP and the three-judge panel did not err in finding that the WCP must yield to federal law. Moreover, the General Assembly enacted a districting plan that complies with all aspects and requirements of the *Stephenson* criteria. A discussion regarding the requirements of Section 2 of the Voting Rights Act as they relate to House District 18 follows in Argument II.

II. THE THREE-JUDGE PANEL CORRECTLY CONCLUDED THAT THE GENERAL ASSEMBLY WAS REQUIRED TO MAINTAIN HOUSE DISTRICT 18 AS AN EFFECTIVE MINORITY DISTRICT IN ORDER TO COMPLY WITH SECTION 2 OF THE VOTING RIGHTS ACT.

Assignment of Error Nos. 3,5,8,10 (R pp.190-91)

The three-judge panel reviewed the extensive materials provided by the parties regarding North Carolina's legislative redistricting process, voting patterns and racial history, and concluded as a matter of law, *inter alia*, that House District 18 in the 2003 House Redistricting Plan is a valid Section 2 VRA district that the legislature was required to draw; the panel further concluded that the District complies to the

maximum extent practicable with the legal requirements of the whole county provisions of the North Carolina Constitution. (R pp. 168, 183-84) The panel's decision correctly applies state and federal law regarding the plaintiffs' burden when challenging the constitutionality of statutes, the legislative responsibility for redistricting and the requirements of Section 2 of the Voting Rights Act.

A. PLAINTIFFS' BURDEN IN CHALLENGING THE CONSTITUTIONALITY OF A LEGISLATIVELY ENACTED REDISTRICTING PLAN.

Plaintiffs brought this action to challenge the constitutionality of a redistricting plan enacted by the North Carolina General Assembly. This Court has often said that "[e]very presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined *beyond reasonable doubt*." *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991) (quoting *Gardner v. Reidsville*, 269 N.C. 581, 595, 153 S.E.2d 139, 150 (1967)) (emphasis added). This is so because the acts of the legislature are the acts of the people.

> All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution.

State ex rel. Martin v. Preston, 325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989). More recently, this Court has stated the principle in this way:

> The Constitution of North Carolina is not a grant of power; rather, the power remains with the people and is exercised through the General Assembly, which functions as the arm of the electorate. An act of the people's elected representatives is thus an act of the people and is presumed valid *unless it conflicts with the Constitution*.

Pope v. Easley, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (citations omitted). The record in this case establishes that plaintiffs did not carry their heavy burden of demonstrating "beyond reasonable doubt" that the 2003 Plan in general, or House District 18 in particular, is unconstitutional. *Baker*, 330 N.C. at 334, 410 S.E.2d at 889.

B. REDISTRICTING IS A LEGISLATIVE FUNCTION ENTRUSTED BY THE CONSTITUTION OF NORTH CAROLINA TO THE GENERAL ASSEMBLY.

In examining the conclusion reached by the General Assembly that Section 2 of the Voting Rights Act required maintaining a minority district in southeastern North Carolina, note should first be taken of the fundamental concept that districting is inherently a legislative, not judicial, function. Time and again, state and federal courts, including this Court, have reiterated this truism. "At the outset, we emphasize that legislative reapportionment is primarily a matter for legislative consideration and determination." *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 824 (Fla. 2002). "[E]stablishing boundaries for legislative and representative districts is a legislative function, not a judicial one." *Beaubien v. Ryan*, 198 Ill. 2d

294, 762 N.E.2d 501, 504-05 (2001). "[W]e are moved to emphasize the obvious: redistricting remains an inherently political and legislative – not judicial – task." *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, 10, 639 N.W.2d 537, 540 (2002) (*per curiam*). "The judgments that must be made are peculiarly legislative in character." *In re 1983 Legislative Apportionment of House, Senate, & Congressional Dist.*, 469 A.2d 819, 827 (Me. 1983). "We have repeatedly emphasized that 'legislative reapportionment is primarily a matter for legislative consideration and determination . . . .'" *Connor v. Finch*, 431 U.S. 407, 414, 52 L. Ed. 2d 465, 473 (1977) (quoting *Reynolds v. Sims*, 377 U.S. 533, 586, 12 L. Ed. 2d 506, 541 (1964)).

The legislature's authority and responsibility for redistricting derives not only from the nature of the process, but also from the fundamental law of the State. In unambiguous language, North Carolina's Constitution expressly entrusts this responsibility exclusively to the General Assembly. N.C. CONST. art. II, §§ 1, 3, 5. Thus, the principle that "reapportionment is a legislative function" is both intrinsic to the process and "evident from the plain language of this state's Constitution." *In re Reapportionment Plan for Pennsylvania General Assembly*, 467 Pa. 525, 532, 442 A.2d 661, 665 (1981). In *Stephenson I*, the Supreme Court recognized that redistricting is first and foremost a legislative function by observing that the Constitution provides for redistricting to be performed by the General Assembly.

Stephenson I, 355 N.C. at 385, 562 S.E.2d at 398. And in *Stephenson v. Bartlett*, 358 N.C. 219, 595 S.E.2d 112 (2004) (*Stephenson III*), the Court again restated that "redistricting is a legislative responsibility." 358 N.C. at 230, 595 S.E.2d at 119.

Finally, it must be noted again that "[e]very presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt." *Baker*, 330 N.C. at 334, 410 S.E.2d at 889 (quoting *Gardner*, 269 N.C. at 595, 153 S.E.2d at 150). This presumption of constitutionality of legislative enactments applies to redistricting enactments, just as it does to other legislation. Indeed, in *Stephenson I*, the Court noted the "strong presumption that acts of the General Assembly are constitutional." *Stephenson I*, 355 N.C. at 362, 562 S.E.2d at 384. Thus, the legislative compromises and determinations reflected in the 2003 House Plan, which maximize adherence to the WCP and other *Stephenson* requirements while complying with the Voting Rights Act and other federal mandates such as "one-person, one-vote," are entitled to great deference by the Court.

C. THE REQUIREMENTS OF SECTION 2 OF THE VOTING RIGHTS ACT.

In *Stephenson I* and *Stephenson II*, this Court established legal principles within which the legislature's redistricting authority is to be exercised. While these principles include the WCP, the Court properly deferred to the Supremacy Clause of the Constitution of the United States by directing that "to ensure full compliance with federal law, legislative districts required by the VRA shall be formed prior to creation of non-VRA districts." *Stephenson I*, 355 N.C. at 383, 562 S.E.2d at 396-97. The Court also required, however, that "[t]o the maximum extent practicable, such VRA districts shall also comply with the legal requirements of the WCP, as herein established for all redistricting plans and districts throughout the State." *Id*. at 383, 562 S.E.2d at 397.

Voting Rights Act law is a constantly evolving and complex area of the law that a state legislature must decipher and apply while walking a tightrope of competing legal doctrines. The questions for the three-judge panel were first, whether the legislature, in a valid exercise of its redistricting discretion, had a reasonable basis to believe that federal law required continuing to draw House District 18 as an effective minority district in the Pender and New Hanover area; and second, whether there was there a strong basis in evidence justifying District 18's continued existence as a minority district in some form. *See* Argument I, *supra*.

The text of Section 2 of the Voting Rights Act forbids any "voting qualification or prerequisite to voting or standard, practice or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a) (2006). (App. p. 6) A state violates Section 2 "if, based on the totality of circumstances, it is shown that the political processes leading to the nomination or election in the State or political subdivision are not equally open to participants by members of a [protected minority]. . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b) (2006). (App. p. 6) The plain language of the statute does not state a hard and fast rule that a district must include a population of more than fifty percent minority voters in order to state a claim under Section 2. Rather, the plain language of Section 2 encompasses the creation of a district where the evidence shows an ability by a minority group to elect a representative of choice even with some modicum of white support. The "totality of circumstances" language counsels for a flexible standard based on the particular facts of each individual case.

The factors which typically are relevant to the totality of circumstances test for a Section 2 claim were specified in the Senate Report[9] accompanying the 1982 amendments to the Voting Rights Act and are summarized in *Gingles*:

> The Senate Report specifies factors which typically may be relevant to a § 2 claim: the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction. The Report notes also that evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous may have probative value. The Report stresses, however, that this list of typical factors is neither comprehensive nor exclusive. While the enumerated factors will often be pertinent to certain types of § 2 violations, particularly to vote dilution claims, other factors may also be relevant and may be considered. Furthermore, the Senate Committee observed that "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." Rather, the Committee

---

[9] The Senate Report, S. REP. No. 97-417, at 27-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, is the relevant and authoritative source of legislative intent regarding amended Section 2. *See Thornburg v. Gingles*, 478 U.S. 30, 43-44 n.7, 92 L. Ed. 2d 25, 43 n.7 (1986).

> determined that "the question whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality,'" and on a "functional" view of the political process.

Thornburg v. Gingles, 478 U.S. 30, 44-45, 92 L. Ed. 2d 25, 43 (1986) (quoting S. REP. No. 97-417, at 27-29 (1982) (citations and footnotes omitted)).

The Supreme Court provided some structure to Section 2's totality of circumstances determination and summarized the three now familiar *Gingles* factors as one possible method for establishing vote dilution that adversely affects a minority group's potential to elect a candidate of choice in the context of multi-member districts. The *Gingles* threshold factors were extended to Section 5 claims of vote dilution in the context of single-member districts in *Growe v. Emison*, 507 U.S. 25, 122 L. Ed. 2d 388 (1993). The three prongs of the *Gingles* analysis are (1) the minority challenging the district "is sufficiently large and geographically compact to constitute a majority in a [proposed] single-member district;" (2) the minority group is "politically cohesive"; and (3) sufficient racial bloc voting exists such that the [white] majority usually defeats the minority group's preferred candidate. *Gingles,* 478 U.S. at 50-51, 92 L. Ed. 2d at 46-7.

1. *Gingles'* First Prong: Ability To Elect A Minority Candidate Of Choice.

As a result of North Carolina's past racial history and background, the second and third prongs of the *Gingles* test and the totality of circumstance inquiry were easily resolved in this case by stipulation, and the three-judge panel made appropriate findings of fact. (R pp. 131-37, 176, 182-83)[10] It is *Gingles*' first prong, the numerousness requirement, that is the subject of dispute in this case. House District 18 is majority black based on black Democratic registration, but is not majority black in total population or black voting age population. (R pp. 47, 150) District 18 has proven to be a district that, despite racially polarized voting, has provided minority voters the opportunity to elect a black candidate of choice to the legislature. (R pp. 95-96, 167-68) The appellants argue that Section 2 does not require maintaining District 18 as an effective black district because they contend *Gingles* established a bright-line fifty percent majority-minority requirement. However, Justice O'Connor pointedly observed in *Gingles* that there was no difference between a Section 2 claim

[10] Because racial bloc voting and the State's past history of racial discrimination were conceded by the appellants for purposes of this case, it has not been necessary to provide this Court with the complete evidentiary record presented to the three-judge panel regarding these matters or a comprehensive summary of such facts from the record. A sample of this evidence can be found in the Record at pp. 96-99, 107-09. The lack of emphasis on these matters herein is not meant to minimize their importance in the overall decision-making process of the General Assembly's efforts to assure compliance with the Voting Rights Act.

where the minority is a majority in a proposed district and a Section 2 claim where the minority group, though not a majority in the proposed district, has the potential to elect its preferred candidate with the assistance of limited yet predictable crossover voting:

> [T]he court recognizes that when the candidates preferred by a minority group are elected in a multi-member district, the minority group has elected those candidates, even if white support was indispensable to those victories. On the same reasoning, if a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice.

Gingles, 478 U.S. at 90 n.1, 92 L. Ed. 2d at 72 n.1 (O'Connor, J., joined by Burger, J., Powell, J. and Rehnquist J., concurring in the judgment). When fashioning the three threshold prongs, the *Gingles* court expressly disclaimed mechanical application of the first prong by stating that it had "no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multi-member district impairs its ability to *influence* elections" and whether the three preconditions would apply unabated to such a claim. *Id.* at 46 n.12, 92 L. Ed. 2d at 44 n.12. Since *Gingles*, the Supreme Court has on three

separate occasions expressly continued to hold open the question of whether the *Gingles* preconditions should apply to a claim in which a minority group that does not constitute a numerical majority in a particular district but has the power to elect a candidate of its own choice. *See Johnson v. De Grandy*, 512 U.S. 997, 1008-09, 129 L. Ed.2d 775, 789-90 (1994) (where the Court declined to hold that plaintiffs could not make a Voting Rights Act claim based on influence districts); *Voinovich v. Quilter*, 507 U.S. 146, 154, 122 L. Ed. 2d 500, 511 (1993) (where the Court declined to address whether a reapportionment commission's failure to create influence districts resulted in a violation of Section 2); *Growe*, 507 U.S. at 41, 122 L. Ed. 2d at 404 (where the Court expressly declined to decide whether plaintiffs could argue influence dilution in addition to vote dilution when the *Gingles* test was not satisfied). In *Growe,* the Supreme Court explained the original rationale behind the three *Gingles* threshold factors:

> The "geographically compact majority" and "minority political cohesion" showings are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district. And the "minority political cohesion" and "majority bloc voting" showings are needed to establish that the challenged district thwarts a distinctive minority vote by submerging it in a larger white voting population. Unless these points are established, there neither has been a wrong nor can be a remedy.

507 U.S. at 39-41, 122 L. Ed. 2d at 388 (citations omitted).

In a case such as House District 18, election results have already established that minorities have the potential to elect a representative of choice in a single member district; altering the district to further reduce the minority population in the district would have the result of submerging a distinctive minority vote. Maintaining District 18 as a viable and effective minority district provides a remedy for what would constitute an otherwise wrongful dilution of minority voters if District 18 did not include portions of Pender and New Hanover Counties.[11] The mechanical application of the *Gingles* majority-minority requirement sought by the Pender County appellants, however, has not been endorsed by the Supreme Court for a case such as this one:

> [T]he first *Gingles* precondition, the requirement that the group be sufficiently large to constitute a majority in a single district, would have to be modified or eliminated when analyzing the influence-dilution claim we assume, *arguendo*, to be actionable today. The complaint in such a case is not that black voters have been deprived of the ability to constitute a majority, but of the possibility of being a sufficiently large minority to elect their candidate of choice with the assistance of cross-over votes from the white majority.

---

[11] As discussed in Argument I, *supra*, District 18 was also an effective minority district in the court drawn plan used in the 2002 elections. In addition to creating a slightly higher minority percentage of the population than the 2003 plan, however, the district as drawn by the superior court cut across three counties (Columbus, Brunswick and New Hanover) and created a four-county grouping. (R p. 149; App. p. 4) Thus, the district as drawn by the General Assembly in the 2003 Plan not only maintains an effective minority district, it better complies with the WCP and *Stephenson* criteria.

Voinovich, 507 U.S. at 158, 122 L. Ed. 2d at 514.

The *Gingles* decision that left for another day the question of the viability of an influence claim did not differentiate between crossover or coalitional claims where minorities show an ability to elect candidates of choice and claims in which plaintiffs argue only an ability to affect or influence electoral outcomes.[12] However, despite having the opportunity to do so, the United States Supreme Court has not only repeatedly declined to close the door to ability to elect claims under Section 2, but has continued to presume the viability of influence or crossover claims and to caution lower courts against the application of *Gingles* as a rigid bright-line test. *See Voinovich*, 507 U.S. at 158, 122 L. Ed. 2d at 514 ("Of course, the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim."); *De Grandy*, 512 U.S. at 1007, 129 L. Ed. 2d at 788 (same). Justice O'Connor explained that the first *Gingles* factor would have to be "modified or eliminated" when the

---

[12] Until *Georgia v. Ashcroft*, 539 U.S. 461, 156 L. Ed. 2d 428 (2003), the Courts addressed "ability to influence" claims and crossover "ability to elect" claims interchangeably as "influence" claims. *Compare De Grandy*, 512 U.S. at 1009, 129 L. Ed. 2d at 789-90 (referring to an "influence district" as a district in which members of a minority group are a potentially influential minority of voters) and *Growe*, 507 U.S. at 41 n.5, 122 L. Ed. 2d at 404 n.5 (referring to claims by minorities who have the ability to influence but not determine an election outcome) with *Voinovich*, 507 U.S. at 154, 122 L. Ed. 2d at 511 (defining an "influence-dilution claim" as one in which the minority group is numerous enough to elect their candidate of choice when their candidate attracts sufficient crossover votes).

Court considered cases in which black voters are denied "the possibility of being a sufficiently large minority to elect their candidate of choice with the assistance of crossover votes from the white majority." *Voinovich*, 507 U.S. at 158, 122 L. Ed. 2d at 514.

This same conclusion was recently reached by the First Circuit Court of Appeals in *Metts v. Murphy*, 363 F.3d 8 (1st Cir. 2004) (*en banc*) (vacating and remanding for further proceedings the trial court's dismissal of a claim by African-American voters that reduction of a district from 26 percent African-American to 21 percent violated Section 2 of the Voting Rights Act):

> First, several Supreme Court opinions after *Gingles* have offered the prospect, or at least clearly reserved the possibility, that *Gingles*' first precondition – that a racial minority must be able to constitute a "majority" in a single-member district – could extend to a group that was a numerical minority but had predictable cross-over support from other groups. . . .
>
> Second, where single member districts are at issue – as in our case – opinions have increasingly emphasized the open-ended, multi-factor inquiry that Congress intended for section 2 claims. . . . *Gingles* was in its original incarnation a mechanical first-step evaluation for a particular problem, so its rationale is not easily adapted by the lower courts to a different set of problems.

Id. at 11 (citations omitted). Other circuit courts have followed the Supreme Court's lead in not foreclosing ability to elect claims. The Ninth Circuit stated in dicta that ability to elect districts might be cognizable under Section 2, at least "in a district

where candidates are elected by plurality." *Romero v. City of Pomona*, 883 F.2d 1418, 1424 n.7 (9th Cir. 1989). The Eleventh Circuit, based on the Supreme Court's past refusal to resolve the issue, also left the question open in *Dillard v. Baldwin County Comm'rs*, 376 F.3d 1260, 1269 n.7 (11th Cir. 2004). With no resolution by the United States Supreme Court regarding ability to elect claims, the district courts are also divided on the question, but the more persuasive reasoning has allowed such claims. *See Martinez v. Bush*, 234 F. Supp. 2d 1275, 1322 (S.D. Fla. 2002) (ability to elect claims permitted); *Puerto Rican Legal Def. &. Educ. Fund v. Gantt*, 796 S. Supp. 681, 693-95 (E.D.N.Y.) (same), *appeal dismissed as moot*, 506 U.S. 801 (1992); *West v. Clinton*, 786 F. Supp. 803, 807 (W.D. Ark. 1992) (same); *Armour v. Ohio*, 775 F. Supp. 1044, 1051-52 (N.D. Ohio 1991) (same).

Typical of the rationale of courts that would prefer a bright-line fifty percent rule that would serve to discourage the filing of "meritless" claims is the opinion in *Rodriguez v. Pataki*, 308 F. Supp. 2d 346 (S.D.N.Y.), *aff'd*, 543 U.S. 997, 160 L. Ed. 2d 454 (2004):

> The bright-line rule effectuates the judicial duty to enforce voting rights while at the same time recognizing, as the Supreme Court instructed, that "the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." Without a majority-minority threshold, any redistricting scheme could be challenged when disparate minority communities could

> be pooled together in sufficient numbers to create some potential to elect.

Id. at 384. Despite stating its preference for a bright-line test in dicta, the *Rodriguez* court in fact considered evidence on all three *Gingles* prongs. However, it denied the plaintiffs' ability to elect claim *not* because the black population in the proposed district was less than fifty percent, but because plaintiffs did not meet their burden of proving "by credible and persuasive evidence that blacks would have the ability to elect candidates of choice" in plaintiffs' proposed district. *Id.* at 403. In this case there is no question about a black candidate's electability in House District 18. In 2003, the General Assembly did not have the luxury of waiting for the courts to resolve the fifty percent issue; it had to draw districts for a fast approaching election. Given the existing precedents of the United States Supreme Court and the disagreement by lower courts over the requirements of Section 2 with respect to an ability to elect claim, the General Assembly had a sound basis in law for exercising its legislative discretion to maintain House District 18 as an election opportunity for black candidates and voters. (R pp. 45-49, 94-97)

The Supreme Court's recent opinion in *Georgia v. Ashcroft*, 539 U.S. 461, 156 L. Ed. 2d 428, provides additional support for the conclusion that the failure to maintain a district which has shown the ability to elect a minority, even though not

majority-minority in strict population terms, can establish a claim under Section 2 of the Voting Rights Act. The Court in *Ashcroft* reversed the trial court because that court considered only majority-minority districts in its retrogression analysis under Section 5 of the Voting Rights Act. The Supreme Court held it is relevant to look at coalition and influence districts in assessing the ability of a minority group to elect a candidate of its choice. Although *Gingles* was decided by a 5-4 vote, all nine Justices agreed that *crossover districts* should be considered in the Section 5 analysis; the dissent objected only to the use in the retrogression analysis of those *influence districts* in which it was not clear that minority voters would have an *ability to elect* even with crossover support. If crossover or ability to elect districts are important enough to minority voters to be considered when assessing a redistricting plan under Section 5's retrogression standard, it would be an odd result if the same voters could not bring a Section 2 claim when an existing and proven crossover district is eliminated by a redistricting plan.

Because the provisions of Section 2 and Section 5 of the Voting Rights Act differ in structure, purpose and application, the non-retrogression inquiry under Section 5 is distinct from the vote-dilution inquiry under Section 2; nonetheless, "some parts of the § 2 analysis may overlap with the § 5 inquiry." *Ashcroft,* 539 U.S. at 478, 156 L. Ed. 2d at 450. The significance of an "ability to elect" coalitional

district in the retrogression analysis logically must overlap with a Section 2 dilution claim. Either a district that is less than fifty percent minority can afford minorities the ability to elect candidates of choice or it cannot. If it can, it does not matter whether a redistricting plan is being reviewed under Section 5 of the Voting Rights Act or subjected to a challenge under Section 2. This was the conclusion recently reached by the Supreme Court of New Jersey. *McNeil v. Legislative Apportionment Comm'n*, 177 N.J. 364, 387, 828 A.2d 840, 853 (2003), *cert. denied*, 540 U.S. 1107, 157 L. Ed. 2d 893 (2004) (the reasoning in *Ashcroft* supports the conclusion that a district in which minorities are able to elect preferred candidates, even if the district is not a majority-minority district, is sufficient to sustain a Section 2 claim). In New Jersey, plaintiffs objected to a legislative districting plan that created a third minority district (though less than fifty percent minority) because the plan failed to preserve municipal boundaries as required by the New Jersey Constitution. The New Jersey Supreme Court concluded that preserving municipal boundaries would result in vote dilution and violate the Voting Rights Act: "[t]he *Supremacy Clause* interdicts that result." *McNeil*, 177 N.J. at 388, 828 A.2d at 854.

At the time the General Assembly enacted the 2003 House Plan and was seeking Section 5 preclearance, the *Ashcroft* opinion had been issued. For this reason, the rationale of *Ashcroft* was an important consideration in drawing the state's

Voting Rights Act districts. (R pp. 46, 151) Although *Ashcroft* was decided in the context of Section 5 litigation, commentators and courts immediately recognized that the court's reasoning is likely to extend to Section 2 cases as well. *See The Supreme Court, 2002 Term Leading Cases*, 117 HARV. L. REV. 469, 474 (2003); Note, *The Implications of Coalitional and Influence District for Voter Dilution Litigation*, 117 HARV. L. REV. 2598, 2619 (2004); *McNeil*, 177 N.J. at 382, 828 A.2d at 851. All nine Justices of the Supreme Court agreed that it is not necessarily retrogression under Section 5 to reduce the number of majority-minority districts by substituting coalitional or crossover districts in their place.

Although the Supreme Court has explicitly left open the possibility that the first *Gingles* prong requires only "a sufficiently large minority population to elect candidates of its choice," *DeGrandy*, 512 U.S. at 1008, 129 L. Ed. 2d at 789, prior to *Ashcroft* some courts rejected vote dilution claims involving coalitional districts by rigidly requiring that minority voters be able to establish a mathematical majority in a proposed district. *See*, *e.g., Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 851-53 (5th Cir. 1996) (calling *Gingles* a "bright line test" requiring proof that a minority group constitutes more than fifty percent in a proposed district), *cert. denied*, 528 U.S. 1114, 145 L. Ed. 2d 811 (2000); *McNeil v. Springfield Park Dist.*, 851 F.2d 937 n.2, 942-43 (7th Cir. 1988) (finding the first *Gingles* prong was not

satisfied because the minority group constituted less than fifty percent of the proposed district's population), *cert. denied*, 490 U.S. 1031, 104 L. Ed. 2d 204 (1989). Even after *Ashcroft*, some courts have continued to rigidly apply *Gingles* as a mathematical majority requirement. *See e.g., Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291, 299-300 (D. Mass. 2004) (assuming the first *Gingles* prong requires the minority to constitute at least fifty percent of the population of the proposed district); *Hall v. Commonwealth of Virginia*, 385 F.3d 421, 430 (4th Cir. 2004) (accepting bright line test as an objective rule requiring a majority-minority district that plaintiffs must satisfy), *cert. denied*, 544 U.S. 961, 161 L. Ed. 2d 602 (2005).[13]

This rigid application of the *Gingles* first prong is flawed because it fails to recognize that the primary concern of Section 2 of the Voting Rights Act and *Gingles* is to ensure that minorities have a realistic opportunity to elect their preferred candidate. If blacks constitute something less than fifty percent of a district's population, yet a small but predictable fraction of white voters are willing to cross

---

[13] Although the claim in *Hall* was characterized as an "ability to elect" claim, under the facts of the case it was in reality an "influence" claim. The existing district's 37.8% black voting age population was reduced during the post 2000 census process to 32.3%; however, the district had never elected a minority candidate when the higher minority concentration existed. *Cf. Rodriguez,* 308 F. Supp. 2d at 403.

over and vote for a black candidate, voting may still be racially polarized[14], but black voters can still prevail in such a district. In light of the United States Supreme Court's "endorsement of coalitional and influence districts, courts must adopt a functional understanding of *Gingles* that is faithful to Congress's intent in amending section 2, as well as to that of the *Gingles* Court." Note, *The Implications of Coalitional and Influence Districts for Vote Dilution*, 117 HARV. L. REV. 2598, 2605-06 (2004) (footnotes omitted). In implementing Section 2 as intended by Congress, "'the question whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality,'" and a "functional view of the political process." *Gingles*, 478 U.S. at 45, 92 L. Ed. 2d at 43 (quoting S. REP. NO. 97- 417 at 29-30) (internal quotations omitted). Such a "functional view" of the political process in North Carolina confirms that House District 18 provides black citizens an opportunity to elect their candidate of choice and therefore would support a claim under Section 2 of the Voting Rights Act.

The three-judge panel reviewed the existing law and correctly declined to follow a "bright line" test requiring an absolute majority of minority voters to be

---

[14] Racially polarized voting has been documented in North Carolina and in Pender and New Hanover Counties. (R pp. 85-86, 104-116). Based on the record and stipulations of the parties, the three-judge panel found that racially polarized voting exists in Pender and New Hanover Counties sufficient to usually enable the white majority to defeat the minority voters' candidate of choice. (R p. 183)

present in a single-member district; the panel instead properly took a functional or "practical common sense approach":

> This Court is of the opinion that the first *Gingles* precondition for establishing a Section 2 VRA claim - that a minority must be able to constitute a "majority" in a single member district - depends on the political realities extant in the particular district in question, not just the raw numbers of black voters present in the general population of the district.
>
> The proper factual inquiry in analyzing a "coalition" or an "ability to elect district", in our opinion, is not whether or not black voters make up the majority of voters in the single-member district, but whether or not the political realities of the district, such as the political affiliation and number of black registered voters when combined with other related, relevant factors present within the single-member district operate to make the black voters a *de facto* majority that can elect candidates of their own choosing. Put another way, we believe the proper inquiry is whether the black voters in the district possess the political ability, through the voting booth, to elect candidates of their own choice.
>
> As a matter of practical common sense, such an inquiry must focus on the ***potential of black voters to elect representatives of their own choosing*** not merely on sheer numbers alone. Potential is not a "new" word that this Court has plucked out of thin air. Potential has been a frequently used term within the context of Section 2 VRA analysis.

(R p. 164) (emphasis in the original) This holding by the three-judge panel is consistent with the actual language of the Voting Rights Act and controlling precedents of the United States Supreme Court.[15]

2. There Existed A Basis In Evidence Sufficient To Allow The General Assembly To Conclude That House District 18 Was Required By Section 2 Of The VRA.

Because of the existing case law regarding Section 2 of the Voting Rights Act, the North Carolina General Assembly had a reasonable basis to believe that federal law required drawing House District 18 so that it continued to offer minorities in the southeastern part of the State the opportunity to elect a candidate of choice; otherwise the State would be vulnerable to a Section 2 Voting Rights Act claim.

a. House District 18 has demonstrated that it provides minority citizens the opportunity to elect their candidate of choice.

With respect to the first prong of *Gingles*, the evidentiary basis for maintaining this VRA district includes Representative Wright's electoral success in former District 98 and in District 18, as drawn by the trial court in its 2002 Interim Plan; Representative Wright was again elected under the 2003 Plan. (R pp. 47, 65-66, 95,

---

[15] The three-judge panel correctly recognized that the North Carolina courts are "not bound by decisions of the Fourth Circuit, only by a decision of the United States Supreme Court." (R p. 164) (citing *State v. McDowell*, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984))

96, 145, 149-50, 167-68) In addition, there exists a clear pattern in the State's legislative elections that demonstrates the level of minority presence necessary to allow minority voters an opportunity to elect candidates of their choice. Based on North Carolina's recent voting history, minority voters have a realistic opportunity to elect their candidates of choice when the total black population percentage is over 40% and the black Democratic registration is at least 52%. (R pp. 46, 50, 53, 94-96, 101, 167) This is not a situation unique to North Carolina. As observed in a Harvard Law Review note:

> "[T]here will likely be no black Democratic nominee in such a [coalitional] district unless the black population is sufficiently large and cohesive to nominate a black candidate in the Democratic primary." Although white Democrats are more willing to cross over and vote for a black Democrat in a general election, they may be less willing to do so in primary elections when the black Democrat is running against a white Democrat. Moreover, although there may be crossover voting in primaries, election data reveal that crossover voting rates in general elections are fairly consistent and predictable, while crossover voting rates in primaries demonstrate greater fluctuation. The consequences of these voting patterns is that while crossover votes may be relied upon in the general election, black voters will often need to constitute a near-majority, if not an outright majority, of primary voters to nominate their preferred candidates. In coalitional districts, therefore, the first *Gingles* prong might better be viewed as a different sort of majority requirement: namely, that minority voters be able to constitute a majority of primary voters (and demonstrate the ability to elect their preferred candidate in the general election in coalition with white voters).

117 HARV. L. REV. 2598, 2609 (quoting Sam Hirsch, *Unpacking Page v. Bartels: A Fresh Redistricting Paradigm Emerges in New Jersey*, 1 Election L.J. 7, at 21 (2002)) (citing Bernard Groffman, Lisa Handley, & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 138, 1419-20 (2001)).

In North Carolina, election results demonstrate that the minority population in District 18, a mathematical majority in black Democratic registration, is sufficiently large to elect its candidate of choice with the assistance of some modicum of white crossover support in the general election. As the three-judge panel concluded, the 2004 elections were "proof in the pudding" that District 18 provided minority voters an ability to elect their preferred candidate of choice:

> It is clear that Representative Wright is the black voters' candidate of choice and that they have, in House District 18, the ability to elect him to office in the General Election by means of the Democratic primary and the Democratic party.
>
> There has been no evidence presented to contradict these facts from the undisputed evidence in the record, or to call into question the only reasonable conclusion that can be drawn from the present configuration of House District 18: House District 18 is geographically compact and politically cohesive among the registered Democratic voters to be an effective, viable "ability to elect district" that is, a "coalition district" where Democrats vote for the Democratic candidate who wins the party primary and a *de facto majority* district for black voters who are able to elect the representative of their choice to the North Carolina House of Representatives.

> Accordingly, this Court concludes as a matter of law that House District 18, as presently drawn, contains a black voting age population that is "sufficiently large and geographically compact" so as to constitute a majority in House District 18 which has potential and the proven ability to elect its candidate of choice to the North Carolina House of Representatives.

(R pp. 167-68) The panel noted that the minority candidate of choice was also elected from District 18 in 2002 under the court drawn plan which, similar to District 18 in the 2003 Plan, had minority concentrations of less than fifty percent in total population and voting age population. (R p. 149; *see also* R p. 168 ("Representative Thomas Wright is clearly the candidate of choice of black voters in House District 18, as presently constituted, and as well in the previous districts.")).

By dividing additional county lines, the minority population of District 18 could be increased slightly as it was in the 2002 court drawn plan which divided the counties of Brunswick and New Hanover in a four-county grouping that included Pender. (R p. 149; App. p. 4) However, by grouping together the counties of New Hanover and Pender, and also Columbus and Brunswick, the 2003 Plan added two additional two-county groupings, a matter of concern under the *Stephenson* criteria; this configuration also shrank District 18 so that it is more compact and no longer splits three counties. (App. p. 5) In attempting to comply with the WCP to the maximum extent practicable, District 18 in the 2003 Plan divides fewer counties

overall than all other alternatives devised by the *Stephenson* parties, the superior court and its expert, or the legislature; the minority population also has been narrowly tailored to the minimum level that, based on known election patterns, maintains the potential of the minority community in District 18 to continue to elect its candidate of choice. (R pp. 46-48, 65-69, 94-96, 101) The dictates of federal law and the *Stephenson* criteria required the General Assembly to maintain District 18 as a district where minorities have an equal opportunity to elect a candidate of their choice; the 2003 House Plan's configuration of districts best meets the requirements of federal law and all of the criteria that give effect to the whole county provisions found in the North Carolina Constitution, even though as a result Pender County must be divided.

CONCLUSION

Defendant-appellees met their burden of establishing that they were entitled to summary judgment as a matter of law; by contrast, appellants failed to carry their burden of demonstrating "beyond reasonable doubt" that the 2003 House Plan is unconstitutional because Pender County is divided into two House districts. The judgment of the three-judge panel should be affirmed.

Respectfully submitted, this the 8th day of May, 2006.

ROY COOPER
Attorney General

Electronically Submitted
Tiare B. Smiley
Special Deputy Attorney General
N. C. State Bar No. 7119

Alexander McC. Peters
Special Deputy Attorney General
N.C. State Bar No. 13654

N.C. Department of Justice
P.O. Box 629
Raleigh, N.C. 27602
Telephone: (919) 716-6900
Facsimile: (919) 716-6763

Counsel for the Defendants

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing DEFENDANTS' -APPELLEES' BRIEF in the above titled action upon all other parties to this cause by:

[ ] Hand delivering a copy hereof to each said party or to the attorney thereof;
[ ] Transmitting a copy hereof to each said party via facsimile transmittal;
[x] Transmitting a copy hereof by electronic transmission to Carl W. Thurman, III at: cwtiii@aol.com;
[ ] Depositing a copy hereof with U.S. mail properly addressed to:

CARL W. THURMAN III
Pender County Attorney
3169 Wrightsville Ave.
Wilmington, North Carolina 28403
910-763-7487
cwtiii@aol.com

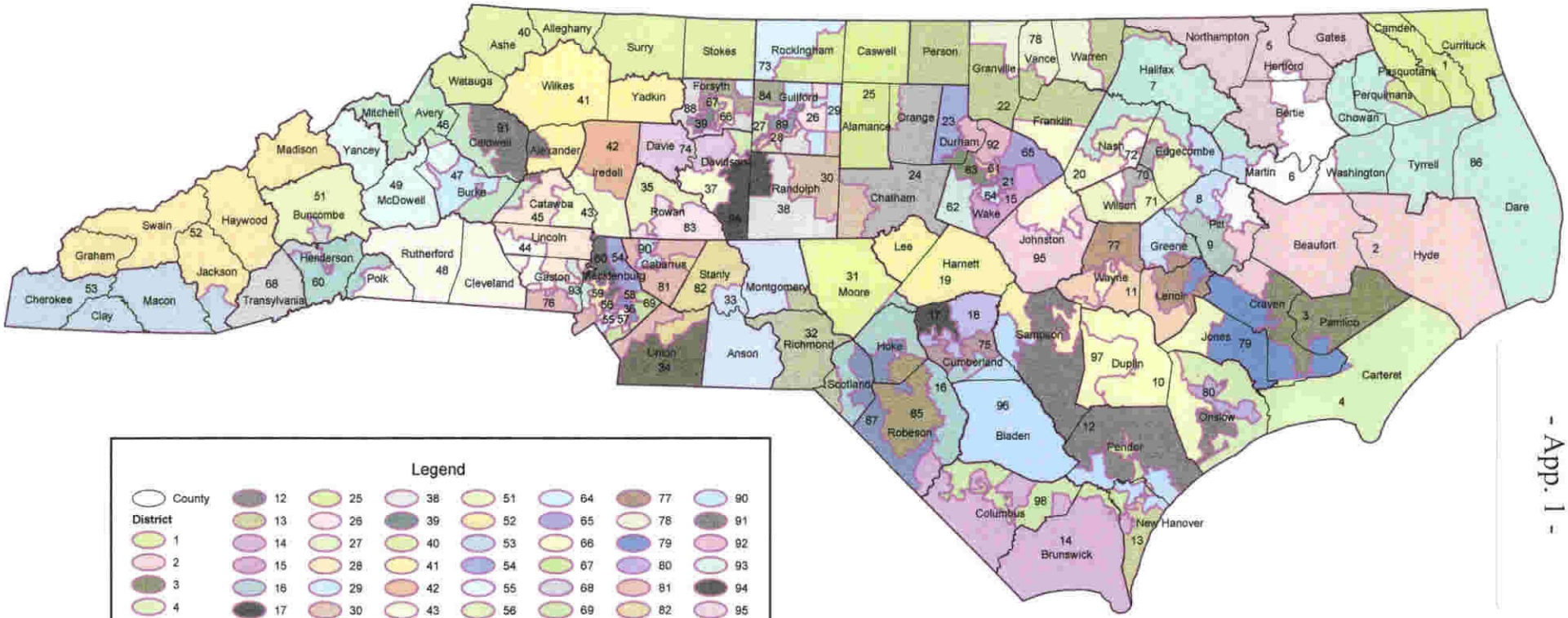
This the 8th day of May, 2006.

Electronically Submitted
Tiare B. Smiley
Special Deputy Attorney General

APPENDIX

CONTENTS OF APPENDIX

1992 NORTH CAROLINA HOUSE PLAN



Legend

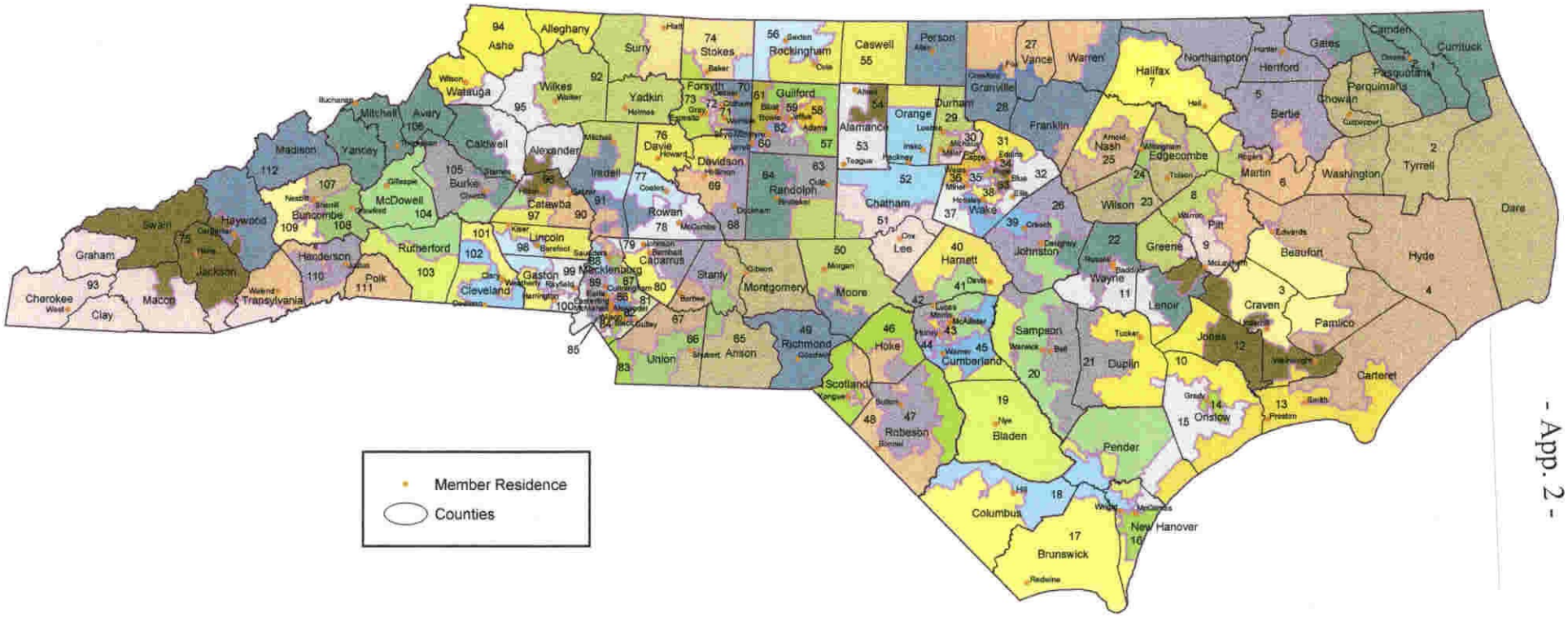
County	12	25	38	51	64	77	90	
District	13	26	39	52	65	78	91	
1	14	27	40	53	66	79	92	
2	15	28	41	54	67	80	93	
3	16	29	42	55	68	81	94	
4	17	30	43	56	69	82	95	
5	18	31	44	57	70	83	96	
6	19	32	45	58	71	84	97	
7	20	33	46	59	72	85	98	
8	21	34	47	60	73	86		
9	22	35	48	61	74	87		
10	23	36	49	62	75	88		
11	24	37	50	63	76	89		

N W E S

0 25 50 100 150 200 250

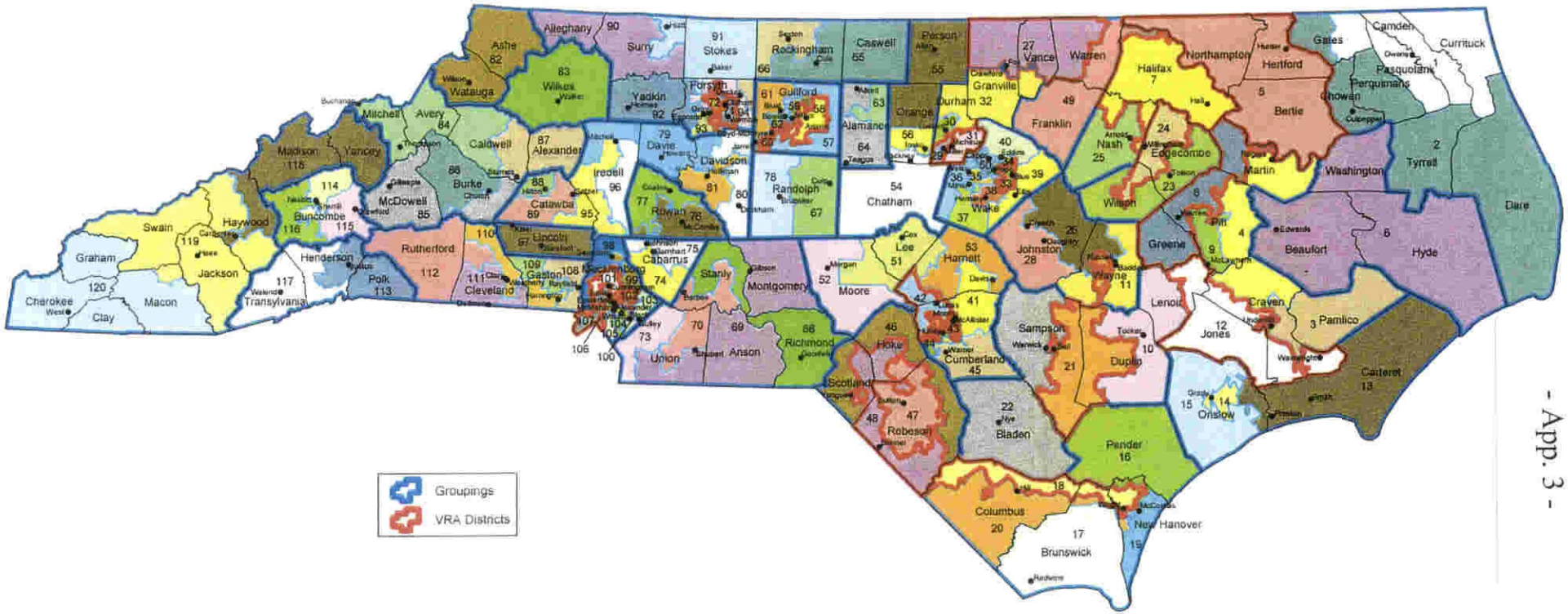
Produced by the NC General Assembly, Information Systems Division, March 23, 1998.

2001 HOUSE PLAN (SUTTON 3)



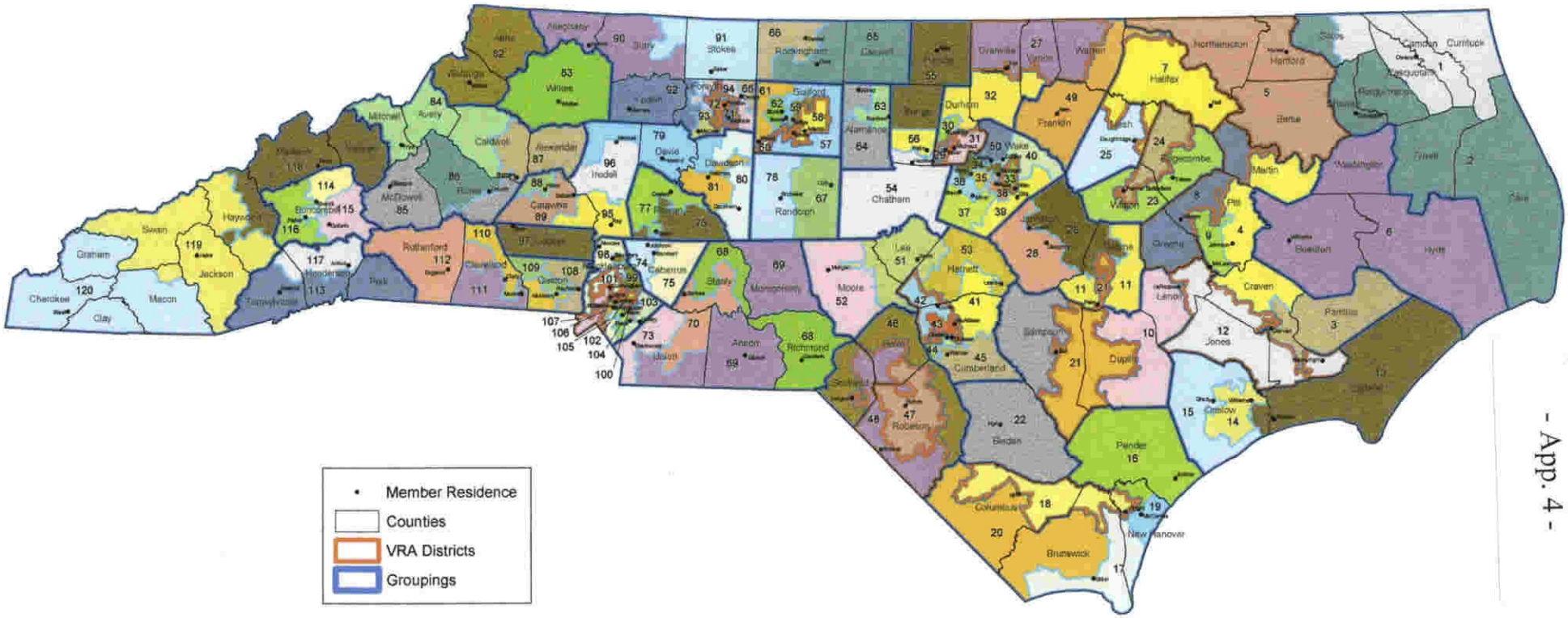
Produced by the NC General Assembly, Information Systems Division, May 19, 2002.

2002 HOUSE PLAN (SUTTON 5)



Produced by the NC General Assembly, Information Systems Division, May 19, 2002

INTERIM HOUSE REDISTRICTING PLAN FOR N.C. 2002 ELECTION

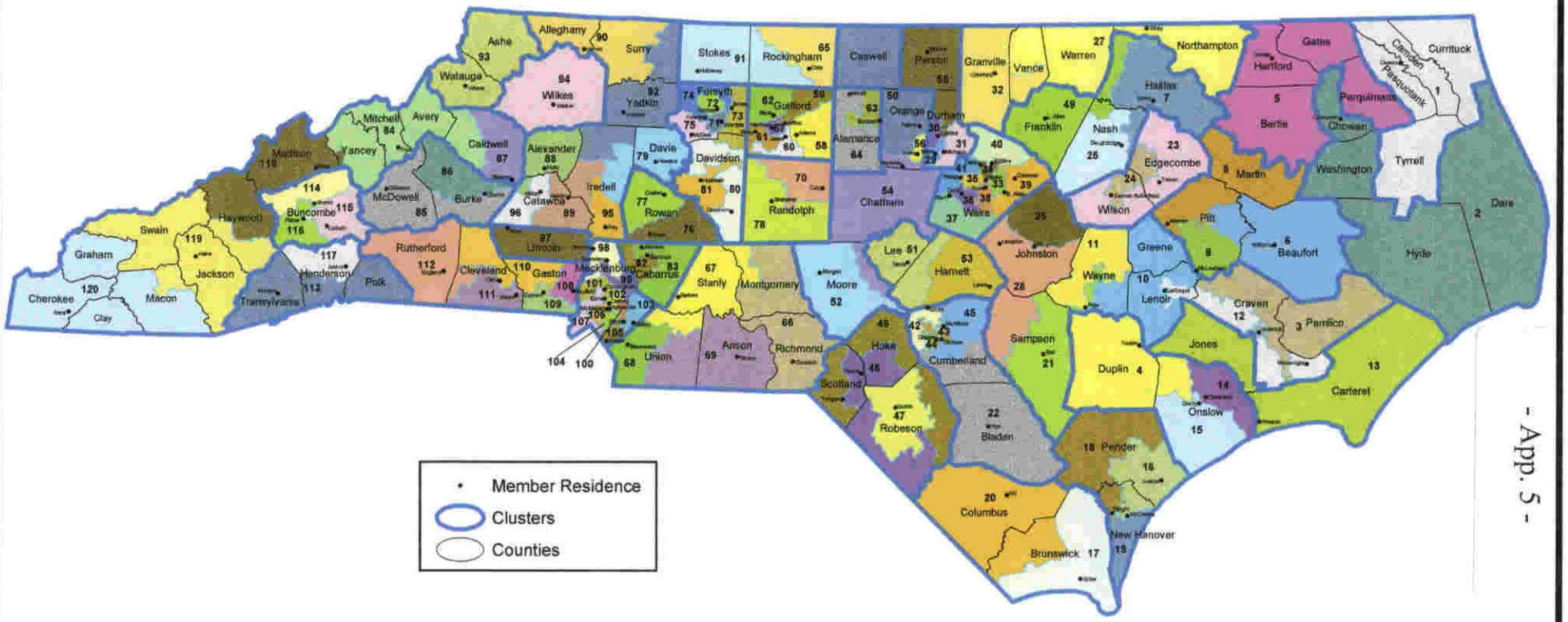


N
W E
S

0 30 60 120 180 240 Miles

Produced by the NC General Assembly, Information Systems Division, January 9, 2003.

2003 HOUSE REDISTRICTING PLAN



Produced by the NC General Assembly, Information Systems Division, December 9, 2005.

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 20. ELECTIVE FRANCHISE
ENFORCEMENT OF VOTING RIGHTS

42 USCS § 1973

§ 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [*42 USCS § 1973b(f)(2)*], as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

HISTORY:

(Aug. 6, 1965, P.L. 89-110, Title I, § 2, 79 Stat. 437; June 22, 1970, P.L. 91-285, § 2, 84 Stat. 314; Aug. 6, 1975, P.L. 94-73, Title II, § 206, 89 Stat. 402; June 29, 1982, P.L. 97-205, § 3, 96 Stat. 134.)

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 20. ELECTIVE FRANCHISE
ENFORCEMENT OF VOTING RIGHTS

42 USCS § 1973c

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [*42 USCS § 1973b(a)*] based upon determinations made under the first sentence of section 4(b) [*42 USCS § 1973b(b)*] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [*42 USCS § 1973b(a)*] based upon determinations made under the second sentence of section 4(b) [*42 USCS § 1973b(b)*] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [*42 USCS § 1973b(a)*] based upon determinations made under the third sentence of section 4(b) [*42 USCS § 1973b(b)*] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [*42 USCS § 1973b(f)(2)*], and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after

such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of *section 2284 of title 28 of the United States Code* and any appeal shall lie to the Supreme Court.

HISTORY:

(Aug. 6, 1965, P.L. 89-110, Title I, § 5, 79 Stat. 439; June 22, 1970, P.L. 91-285, § § 2, 5, 84 Stat. 314, 315; Aug. 6, 1975, P.L. 94-73, Title II, § § 204, 206, Title IV, § 405, 89 Stat. 402, 404.)