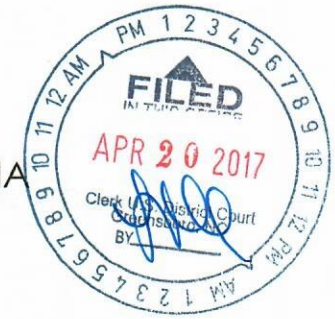

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

Russell F. Walker, Plaintiff	)	
vs.	)	
North Carolina State Board of Elections	)	C.A. NO. 1:17CV78
and	)	
Hoke County Board of Elections, Defendants	)	

MOTION IN OPPOSITION TO HOKE COUNTY BOARD ELECTIONS MOTION TO DISMISS

COMES NOW, Russell Walker, plaintiff and responds to the Hoke County Board of Elections Motion to Dismiss

The Hoke Elections brief follows the law school adage, "When weak on the facts, argue the law. When weak on the law argue the facts. When weak on both argue loudly."

While Hoke Elections lists factual allegations on pp 2-3 of its brief, it fails to contradict so much as one plaintiff asserted fact. The next thing is that Hoke Elections proffers no case later than 2009. Granted chronology is not a determining factor legally but in this case I

believe it shows an intent not warranted by existing law, to fail to mention cases damaging to its interests in violation of Rule 11(b)(2). The fact that in Hoke County there are approximately 50% white voters and one white commissioner out of five (20%), is a conclusive "result" that voter dilution has occurred. Walker does not need to show anything more.

The simple fact of the matter is that since Shelby County v. Holder (2013) that the 4th Circuit Court has taken a distinctly enhanced view of voter discrimination and dilution.

The amended complaint started out with this opening paragraph from RALEIGH WAKE CITIZENS v. BOARD OF ELECTIONS, 827 F.3d 333 (CA 4th - 2016)

> "The right to vote is "fundamental," and once that right "is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." Bush v. Gore, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). "It must be remembered that" the right to vote "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise." Id. (quoting Reynolds v. Sims, 377 U.S. 533, 555, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964))."

It is the same attorney, Craig D. Schauer of Brooks Pierce, who defended the Wake County Board of Elections in that case, who is defending the Hoke County Board of Elections in this case. You would think that Craig might mention this very recent case in his brief. Why not? Because his client lost, that is why.

Hoke Elections appears to rely on the concept of "Zimmer Factors" from Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973). How weak to rely on a 44 year old case from the 5th Circuit while ignoring Raleigh Wake Citizens and Wright v. North Carolina, two very recent 4th Circuit cases.

> From Wikipedia – "Senate Judiciary Committee Chairman Strom Thurmond and House Speaker Tip O'Neill responded by passing an amendment to the Civil Rights Act, and President Ronald Reagan signed it into law on June 29, 1982. Congress's amended Section 2 to create a **"results" test**, which prohibits any voting law that has a discriminatory effect irrespective of whether the

law was intentionally enacted or maintained for a discriminatory purpose."

Well when a 50% population white county elects 20% white members on a Board of Commissioners, then this fact alone shows a lack of Equal Protection voter dilution result.

> "To the extent Plaintiffs' claims do "not fall within the four corners of our prior case law," this "does not justify dismissal under Rule 12(b)(6). On the contrary, Rule 12(b)(6) dismissals `are especially disfavored in cases where the complaint sets forth a **novel legal theory** that can best be assessed after factual development.'" *McGary v. City of Portland*, 386 F.3d 1259, 1270 (9th Cir. 2004) (quoting *Baker v. Cuomo*, 58 F.3d 814, 818-19 (2d Cir.1995), vacated in part on other grounds, 85 F.3d 919 (2d Cir.1996) (en banc)). *See also* 5B Charles Alan Wright & Arthur R. Miller et al., *Federal Practice & Procedure* § 1357 (3d ed.2015) (noting that courts should "be especially reluctant to dismiss on the basis of the pleadings when the asserted theory of liability" is "novel" and thus should be "explored"). Indeed, as the law "firm[s] up" in unsettled areas, "it may be more feasible to dismiss weaker cases on the pleadings;" otherwise, plaintiffs should be given "an opportunity to develop evidence before the merits are resolved." *Metts v. Murphy*, 363 F.3d 8, 11 (1st Cir. 2004).
>
> Finally, we bear in mind that "`a complaint is to be construed liberally so as to do substantial justice.'" *Pub. Employees' Ret. Ass'n of Colo. v. Deloitte & Touche LLP*, 551 F.3d 305, 311 (4th Cir. 2009) (quoting 5 Charles Alan Wright & Arthur R. Miller et al., *Federal Practice and Procedure* § 1202 (3d ed.2004)). *See also, e.g., Anderson v. Found. for Advancement, Educ. & Emp't of Am. Indians*, 155 F.3d 500, 505 (4th Cir.1998) (noting that

"pleading standards require that the complaint be read liberally in favor of the plaintiff").

Wright v. North Carolina 787 F.3d 256, 263 (2015) CA 4th" (emphasis added)

Russell F. Walker

CERTIFICATE OF SERVICE

I certify that I have placed a copy of this Reply in the U.S. mail, postage prepaid on 18 April 2017 to:

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