STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
04-CVS-0696

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 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; RICHARD T. MORGAN, 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; ROY COOPER, in His Official Capacity as Attorney General of the State of North Carolina;

DEFENDANTS

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY AND PERMANENT INJUNCTION

Plaintiffs submit this memorandum in support of their application to this Court for an injunction prohibiting the use of the 16th and 18th districts as drawn in the 2003 Special Session of the General Assembly in the 2004 primary and general elections.

Injunctive relief offers Plaintiffs the only effective remedy to the denial of their constitutional rights. Plaintiffs are requesting that the Court grant a permanent injunction given prohibiting the use of NC House districts which divide Pender County in violation of the North Carolina Constitution. Given that the relevant facts are not in dispute and that the law clearly requires the General Assembly to enact constitutional districts which do not divide Pender County, summary judgment is appropriate. In the alternative, it is requested that a preliminary injunction be entered forbidding the use of the 16th and 18th districts in the upcoming primary and general elections.

Plaintiffs are in the unusual position of moving for a permanent injunction, with a preliminary injunction sought as an alternative because of the critical timing of this case, and because there are indisputable geographic and demographic facts to which the statutory and constitutional law must be applied. Given that the factual issues basically are locked into place by the data contained in the "DistrictBuilder" system, the application of law to the established facts may be performed by the Court without any additional delay. If this Court were to grant a permanent injunction, the General Assembly could be afforded an additional opportunity to draft constitutional districts (as required by G.S. 120-2.4), and an election held for the districts by no later than the runoff election presently set for August 17, 2004. Unless a runoff for one of the House districts was required, that timing would permit the November general election to move forward without further disruption. Given that the 2002 elections were run on a much shorter schedule (See Attachment to Pinion Affidavit), a permanent injunction at this point provides much less disruption than was experienced in the 2002 elections.

Alternatively, a preliminary injunction would, at a minimum, prevent the confusion which would be caused by permitting the unconstitutional districts to be used.

FACTUAL BACKGROUND

The factual issues of this case are not in any real dispute. Pender County is a fast growing coastal county, which experienced growth of 42.4% between 1990 and 2000 according to the United States decennial census. This was the sixth fastest rate of growth in the State of North Carolina. Until 2003, No Pender County resident had served in the North Carolina General Assembly since the provision permitting each county a representative was abolished in the 1960's. In the redistricting plan proposed by the General Assembly in 2001, Pender County was to be split among 5 House and 3 Senate districts. This splintering of the County resulted in Pender County submitting an amicus brief in *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002)(*Stephenson I*). The majority opinion in *Stephenson I* recognized the plight in which Pender County was placed by the balkanization of its citizens. The 2002 interim plan imposed by Judge Jenkins kept Pender County within a single House district (as did the 2002 plan proposed by the General Assembly).

In November of 2003, the Pender County Board of Commissioners learned that legislative leaders were considering enacting a plan which would split Pender County among two House districts. Accordingly, a presentation was made before the Chairmen of the House and Senate redistricting committees, even though the plans had not been made available to the public. The 2003 House redistricting plan was adopted on November 25, 2003.

Pender County's 2000 census population of 41,082 is approximately 61.25% of the population needed for an ideal House district. Pender County and New Hanover County combined have sufficient population to support three house districts and have been "clustered" in the 2003 House plan. Of the three house districts formed in the Pender/New Hanover cluster, one, the 19th, lies solely in New Hanover County, while both the 16th and 18th are composed of parts of Pender County and New Hanover County. Pender county is divided almost exactly in half, with 19,607 citizens in district 16 and 21,475 in district 18.

Because 40 North Carolina counties are covered by Section 5 of the Voting Rights Act, the 2003 redistricting plan was subject to review by the United States Attorney General. On March 30, 2004, the Attorney General indicated that there would be no objection to the plan on Section 5 grounds. As part of his ruling in the *Stephenson I* case, Judge Jenkins had entered a permanent injunction against the named State Defendants in that case, most of whom also are defendants in the instant action, prohibiting the use of districts which divided more counties than were required by the VRA or one person one vote criteria. The *Stephenson* plaintiffs moved for an order enforcing the injunction and finding the 2003 plan in violation of *Stephenson I&II*. A separate declaratory action was brought on behalf of members of the General Assembly with regard to portions of the redistricting bill dealing with the three judge panel (*Morgan v. Stephenson*). On April 22, 2004, the North Carolina Supreme Court ruled that the *Stephenson* litigation was at an end and that challenges to the 2003 redistricting plan should be brought before the three Judge panel created by 1-267.

Morgan v. Stephenson and Stephenson v. Bartlett, 595 S.E.2d 112 (2004). The instant action was commenced on May 19, 2004.

ARGUMENT

Based upon the answer filed by Defendants, it appears abundantly clear that the only basis upon which Defendants rely in defending the split of Pender County is Section 2 of the Voting Rights Act. Accordingly, the focus of this memorandum will be the impact of the VRA. Because Pender County is seeking equity from the Court, analysis of why the Court's equitable powers should be employed also will be discussed.

The Court is well versed in the standard for granting summary judgment pursuant to Rule 56. Given the Answer filed by the Defendants, the affidavits and the stipulated demographic and geographic information, there simply is no material question of fact which is in dispute. The only issue raised by Defendants involves application of law to the undisputed facts; therefore summary judgment is proper. *Dixie Chemical Corporation v. Edwards*, 68 N.C.App. 714, 716, 315 S.E.2d 747, 750 (1984).

1. The Whole County Provision is a Constitutional Mandate

As the Court is well aware of the holdings in *Stephenson I&II*, the history and holdings of those cases will not be explored in great detail. Suffice to say that the State Defendants there, as here, attempted to disregard the commands of the North Carolina Constitution by any means available. Instead of summarizing and quoting from the opinions, the summary which the N.C. Supreme Court provided of the guidelines to be used in formulation redistricting plans in *Stephenson II* is set forth below:

After a lengthy analysis of these constitutional provisions and applicable federal law, we outlined in *Stephenson I* the following requirements that must be present in any constitutionally valid redistricting plan:

[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, as herein established ....*

[2.] 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.

[3.] In counties having a 2000 census population sufficient to support the formation of one non-VRA legislative district ..., the WCP requires that the physical boundaries of any such non-VRA legislative district not cross or traverse the exterior geographic line of any such county.

[4.] When two or more non-VRA legislative districts may be created within a single county, ... single-member non-VRA districts shall be formed within said county. *Such non-VRA districts shall be compact and shall not traverse the exterior geographic boundary of any such county.*

[5.] In counties having a non-VRA population pool which cannot support at least one legislative district ... or, alternatively, counties having a non-VRA population

pool which, if divided into districts, would not comply with the ... "one-person, one-vote" standard, 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. Within any such contiguous multi-county grouping, compact districts shall be formed, consistent with the at or within plus or minus five percent standard, whose boundary lines do not cross or traverse the "exterior" line of the multi-county grouping;* provided, however, that the resulting interior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard.

[6.] 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*[.]

[7.] ... *[C]ommunities of interest should be considered in the formation of compact and contiguous electoral districts.*

[8.] ... [M]ulti-member districts shall not be used in the formation of legislative districts unless it is established that such districts are necessary to advance a compelling governmental interest.

[9.] Finally, we direct that any new redistricting plans, including any proposed on remand in this case, *shall depart from strict compliance with the legal*

requirements set forth herein only to the extent necessary to comply with federal law. *Stephenson I,* 355 N.C. at 383-84, 562 S.E.2d at 396-98 (emphasis added).

Stephenson II, at 305-307, 582 S.E.2d 247, 250-51. Judge Jenkins reviewed the 18th district in the 2002 House Plan and found that it was among the districts which "are not compact and fail to strictly comply with *Stephenson.*" *Stephenson* II, at 313, 582 S.E.2d 247, 253. Judge Jenkins also observed that "[I]n New Hanover County, [defendants' revised House Plan] cuts the county boundary three times; plaintiffs' House Plan crosses New Hanover's county line only one time." Id. at 312, 582 S.E.2d 247, 253. In *Stephenson II,* the Court concluded "that the evidence supports the trial court's findings of fact, which establish numerous instances where the 2002 revised redistricting plans are constitutionally deficient. We further conclude that these findings of fact adequately support the trial court's conclusion that the 2002 revised redistricting plans fail to attain "strict compliance with the legal requirements set forth" in *Stephenson I* and are unconstitutional." *Id.* at 314, 582 S.E.2d 247, 254. In all candor to the Court, it is not completely clear that the specific findings with regard to the 18th district and the cutting of the New Hanover County boundary line in three locations were necessary to upholding the rejection of the 2002 plan given the numerous findings of violations which were made, but none of the conclusions made by Judge Jenkins were overturned by the Court. This finding is significant, because it establishes that maximizing the percentage of minority voters does not justify ignoring the redistricting criteria set forth by the Supreme Court in *Stephenson I&II.*

2. SECTION 2 OF THE VOTING RIGHTS ACT DOES NOT REQUIRE SPLITTING PENDER COUNTY.

Under Article II, Section 5(3) of the North Carolina Constitution and the holdings in *Stephenson I&II*, Pender County should be placed in a single house district unless federal law requires otherwise. Based on the answer filed by Defendants, the only contested legal issue appears to be whether Section 2 of the Voting Rights Act (*42 U.S.C. 1973*) requires that Pender County be split. The controlling case law on this point is abundantly clear that Pender County need not be split in order to abide by Section 2 of the VRA.

In evaluating this issue, it must first be noted that the case law dealing with retrogression under Section 5 of the VRA is wholly inapplicable to a Section 2 case. *Reno v. Bossier Parish School Board* (*Bossier II*), 528 U.S. 320, 334, 120 S. Ct. 866, 875, 145 L.Ed.2d 845 (2000). Neither Pender nor New Hanover County are covered by Section 5 of the VRA. To the extent the Defendants attempt to rely on cases interpreting retrogression for Section 5 purposes, the reliance is unjustifiable. Pender County wholeheartedly agrees that Section 2 of the VRA applies to all jurisdictions in the United States and that federal law is supreme, but nothing in any federal law, including Section 2 of the VRA, requires drawing districts 16 and 18 as the General Assembly has done.

The first issue which should be disposed of is the creation of a "minority majority" district under Section 2. At the risk of belaboring the obvious, district 18 does not qualify as a majority minority district given that it has a black voting age population of 39.09% and black registered voters comprise only 36.1% of the district.

The leading case for determining when a minority majority district is required arose in North Carolina and established a three-part vote-dilution test. *Thornburg v. Gingles,* 478 U.S. 30, 50-51, 106 S.Ct. 2752, 2766, 92 L.Ed.2d 25 (1986).

"In *Thornburg v. Gingles, supra,* this Court held that plaintiffs claiming vote dilution through the use of multimember districts must prove three threshold conditions. First, they must show that the minority group " 'is sufficiently large and geographically compact to constitute a majority in a single-member district.' " Second, they must prove that the minority group " 'is politically cohesive.' " Third, the plaintiffs must establish " 'that the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate.' " *Growe v. Emison,* 507 U.S. 25, 40, 113 S.Ct. 1075, 1084, 122 L.Ed.2d 388, 61 USLW 4163 (1993) (quoting *Gingles, supra,* 478 U.S., at 50-51, 106 S.Ct., at 2766). *Growe* also established that the three part test applies to single member districts. Obviously the first prong of the *Gingles* test is not met by district 18 if the test it is applied as stated.

The *Gingles* test is itself the first part of a two part process. After satisfying *Gingles*, a successful Section 2 plaintiff must establish that "must also demonstrate that the totality of the circumstances supports a finding that the voting scheme is dilutive." *Johnson v. DeGrandy,* 512 U.S. 997, 1011, 114 S.Ct. 2647, 2657, 129 L.Ed.2d 775 (1994). As will be shown, below, no such finding can be made.

3. EVEN IF, ARGUENDO, SECTION 2 REQUIRES MINORITY INFLUENCE DISTRICTS, SPLITTING PENDER COUNTY IS NOT REQUIRED.

Given that District 18 clearly fails the *Gingles* test, Defendants may attempt to argue that the district must be created as a minority influence district. The United States Supreme Court has never held that minority influence districts must be created in order to avoid a violation of Section 2 of the VRA. *Reno v. Bossier Parish School Board* (*Bossier II*), 528 U.S. 320, 334, 120 S. Ct. 866, 875, 145 L.Ed.2d 845 (2000). The Supreme Court, however, has used the three part *Gingles* test for evaluating a district in which a minority group did not comprise a majority of the district, assuming *arguendo* that the failure to create minority influence districts could state a cause of action under Section 2. *Voinovich v. Quilter*, 507 U.S. 146, 152, 113 S. Ct. 1149, 1154-55, 122 L.Ed2d 500 (1993). The Court in Voinovich discussed a dilution claim and reached a result which is applicable here:

> Had the District Court employed the *Gingles* test in this case, it would have rejected appellees' § 2 claim. Of course, the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim. For example, the 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. We need not decide how *Gingles'* first factor might apply

here, however, because appellees have failed to demonstrate *Gingles'* third precondition--sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice.

Id. at. 158, 113 S. Ct. 1149, 1157-58. Thus, only where it can be shown that white majority bloc voting will defeat the election of a candidate favored by the minority group does Section 2 require creation of a district which overrides ordinary districting principles. The burden of establishing this dilution is on the party asserting a violation of Section 2. *Id.*

In establishing a dilution violation under Section 2 there is no comparison with a prior plan or procedure, which is in contrast to a regression claim under Section 5 which "by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan." *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 478, 117 S.Ct. 1491, 1497, 137 L.Ed. 2d (1997)(*Bossier Parish I*). Section 2, on the other hand, applies in *all* jurisdictions and uses as its benchmark for comparison in vote dilution claims a hypothetical, undiluted plan. *Id.* Accordingly, it is appropriate to review whether the proposed district 18 is required in order to prevent the minority group from being able to elect a candidate of their choosing. A review of recent elections establishes beyond any doubt that minority candidates can be elected without requiring a rejection of the Whole County Provision.

The data contained in the "DistrictBuilder" system clearly includes results from the 2000 and 2002 elections which establish that Pender County need not be split in order to permit the minority group's candidate of choice to be elected. Given that an incumbent black legislator resides in New Hanover County, Plaintiffs used the

"DistrictBuilder" software to create a district solely within New Hanover County which maximized minority voting strength (JLL08A). This district would have a total black voting registration of 29.05%. When actual voting is reviewed, it becomes clear that candidates favored by the black minority can be elected in this New Hanover only district. Election results for black candidates in the two most recent elections establish that black candidates, presuming they are the choice of a majority of black voters in the district, can be elected quite easily. In 2002 Justice Butterfield received 58.82% of the vote in this possible district. In the 2000 election, Justice Frye received 59.05% of the vote and State Auditor Ralph Campbell received 61.33% of the vote. At this point in time, neither Pender County nor this Court is required to draw a district, and it is possible that a district comprised of all of Pender and part of New Hanover County also could be used to create a minority influence district. (See JLL07A) This district would have a greater black voter registration (34.46%). The actual election results vary little between the two districts, however Frye (59.33%), Campbell (62.55%) and Butterfield (59.25%) all received within 1.5% of the same amount of the vote in each of the two potential districts, and a landslide majority in all cases. Which district to use, and either clearly passes muster under the Section 2 of the VRA, should be made by the General Assembly, giving consideration to normal redistricting criteria. *Voinovich, supra.*

Defendants may accurately contend that either whole county district does not create a district with as strong a minority percentage as is created by a split district, and none of the proposed districts create as strong a minority voter percentage as the district adopted by Judge Jenkins or the 2002, which was found to be invalid under traditional redistricting principles. The New Hanover only district, for instance, has a black voter

registration of 29.05%, which is less than the 36.1% black voter registration in the 2003 plan. The identified black candidates also receive 3-5% greater vote in district 18 under the 2003 plan. The U.S. Supreme Court repeatedly has recognized, however, that preserving political boundaries is a legitimate state interest which need not be overridden by the requirement of one person one vote created by the Equal Protection Clause of the Fourteenth Amendment or Section 2 of the VRA. *Voinovich*, *supra* (preserving county boundaries could justify greater than 10% population deviation); *Mahan v. Howell,* 410 U.S. 315, 328, 93 S.Ct. 979, 986, 35 L.Ed.2d 320 (1973) (finding 16% deviation acceptable to preserve political boundaries). If race is made too predominant a factor in drawing a district in disregard of other principles, then a constitutional violation occurs.

While the General Assembly may properly take race into account in drawing legislative districts, it may not sacrifice all other redistricting criteria in order to do so. *See Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816, 125 L.Ed.2d 511 (1993). *Shaw* and its progeny led to the additional redistricting principle that although a legislature may be race conscious in drafting districts, race may not be a predominant factor in drawing districts absent a compelling state interest. *See Shaw v. Hunt*, 517 U.S. 899, 116 S. Ct. 1894, 135 L.Ed.2d 207 (1996). Moreover, a jurisdiction which drafts redistricting plans using traditional redistricting principles avoids violating the Fourteenth Amendment by not permitting race to be a predominant factor in drafting districts. *See Hunt v. Cromartie*, 526 U.S. 541, 119 S. Ct. 1545, 143 L.Ed.2d 731 (1999); *Miller v. Johnson*, 515 U.S. 900, 115 S. Ct. 2475, 132 L.Ed.2d 762 (1995); *Bush v. Vera*, 517 U.S. 952, 116 S. Ct. 1941, 135 L.Ed.2d 248 (1996). While Section 2 expressly does not require

proportional results, Courts do look to numbers by way of comparison. Given that blacks account for 14.45% of the registered voters contained within the two county New Hanover/Pender cluster, creating one district out of three in which they comprise 29.05% of the voters, and in which black candidates have carried the district by nearly 20% of the vote in the past two general elections hardly can be called vote dilution such that Section 2 of the VRA is violated.

The Supreme Court has made clear that in evaluating a Section 2 claim, the standard is not what past districts provided. More importantly, nothing in Section 2 requires that other valid redistricting criteria, such as the whole county provision of the North Carolina Constitution, be abandoned to maximize a minority influence district so long as the minority group may join with non-minority voters to elect a preferred candidate. Given that the election results establish that a minority candidate could be elected without splitting Pender County, the third prong of the Gingles test cannot be satisfied.

Defendants continue to treat the whole county provision as if it as an inconvenient afterthought which must yield to any interest which the General Assembly finds more malleable, and therefore more to its liking. Despite the best efforts of the Defendants, the North Carolina Supreme Court infused the WCP with life and, as it is a constitutional mandate, it may be overridden only where required by the supremacy of federal law or the United States Constitution. While creating a minority influence district can be a legitimate state interest, it has never been held by the United States Supreme Court that such districts are mandated under Section 2 of the VRA. Given that an influence district is but one of many legitimate interests which the State may

further in redistricting, it must yield to the mandate of Article II, Section 5(3)of the North Carolina Constitution.

4. THE EQUITIES SUPPORT GRANTING INJUNCTIVE RELIEF.

In evaluating whether to exercise its equitable powers it is proper for the Court to evaluate the nature of the injury which will be suffered by Plaintiffs if the injunction is not issued versus the harm which will be suffered by the Defendants. *A.E.P. Industries, v. McClure*, 308 NC 302 S.E.2d 754 (1983); *Williams v. Greene*, 36 NC App. 80, 243 S.E.2d 156, disc rev. denied, 295 NC 471, 246 S.E.2d 12 (1978). "It is well settled in this State that 'the right to vote on equal terms is a fundamental right.'" *Stephenson I* at 378, S.E.2d 377, 393 (citations omitted). The decision in *Stephenson I* clearly establishes that injunctive relief is a proper remedy for the irreparable loss of the opportunity to vote in a House district which complies with the North Carolina Constitution.

Given the clarity of the guidance provided by *Stephenson* I, and the complete lack of any authority to support a conclusion that a minority influence district is required under Section 2 of the VRA, the Defendants' only real hope for defeating injunctive relief is to convince the Court that it is impractical or unduly burdensome to delay the primaries. The Defendants' arguments undoubtedly will echo those made in the *Stephenson* case. Despite protestations that the republic surely would fall if the original gerrymandered districts were not used for the 2002 elections, elections were held with filing periods which began on July 19th. Under the present circumstances, the General Assembly could very quickly draw new districts for the two county

Pender/New Hanover cluster. So long as the new districts did not divide Pender County, this case would be rendered moot, and the elections could proceed.

While Pender County seeks only to prevent the primary and general elections in the 16th and 8th districts from being held using unconstitutional districts, the General Assembly may have to change parts of its newly enacted legislation or face postponement of all the elections set for a primary on July 20, 2004. As part of the special session which enacted the redistricting plan, the General Assembly provided a limitation on the authority of the Board of Elections to make changes resulting from delays to the normal election calendar "Any postponement of the candidate filing period or the primary shall apply to all offices whose primary elections are regularly scheduled on primary day, so that there is one candidate filing period for all those offices and one primary election for all those offices. The postponement shall also apply to any elections to local office held on that date (such as elections for boards of education under G.S. 115C-37) and the filing period for those offices." Section 5(c)(2), SL2003-004. Further, G.S. 163-1 was amended by adding a new subsection (d) which provides "If primaries for the State Senate or State House of Representatives are temporarily moved from the date provided in subsection (b) of this section for any election year, all primaries shall be held on the same day." Id. While Pender County is certainly not seeking to delay all the elections statewide and does not urge such an interpretation of the perhaps hasty changes, it may be an unintended consequence of the General Assembly's election reforms. Of, course, the General Assembly could easily remedy this problem by amending the statutes.

5. PENDER COUNTY BROUGHT THIS ACTION IN A TIMELY MANNER.

Defendants also contend that laches bars equitable relief, at least as regards the 2004 election cycle. "As a general rule, equity protects the vigilant, and not those who sleep on their rights, and courts of equity discourage laches and unreasonable delay in the enforcement of rights." *N.C. Bd of Architecture v. Lee*, 264 N.C. 602, 612, 142 S.E.2d 643, (1965). Pender County submits that it did not intentionally sleep on its rights given the uncertainties surrounding the redistricting process. First, the 2003 plans were not given clearance by the United States Department of Justice until March 30, 2004. Until that occurred, there was no certainty that the 2003 plan would be the plan which would be challenged. For example, a challenge could have required that Pender be clustered with Onslow County, which is covered by Section 5 of the VRA. Second, the companion cases of *Morgan v. Stephenson and Stephenson v. Bartlett*, 595 S.E.2d 112 (2004) were not decided until April 22, 2004. While uncertainty over whether the creation of this new panel would be upheld was an issue, much more problematic was that Judge Jenkins had issued "a permanent injunction that prevented the Stephenson conducting future legislative elections under any redistricting plans that violate the North Carolina Constitution." Id., at 595 S.E.2d 112, 114. Given that the *Stephenson* plaintiffs were pursuing their action and that a permanent injunction was in place, bringing the instant action prior to some resolution or clarification of the status of Stephenson could have been premature. Given that *Stephenson* had been filed on behalf of Republican voters statewide, a very real possibility existed that the instant action could have been stayed because *Stephenson* constituted a prior pending action. A major reason to avoid multiplicity of actions is the need to avoid potentially

inconsistent verdicts, which certainly could have occurred if, for instance, the broad challenge mounted by the *Stephenson* plaintiffs were to be rejected by a single judge in Johnston County, while the narrow challenge asserted by Pender County were to be upheld by this three judge panel, or vice versa. The decision in *Stephenson III and Morgan* was released on April 22, 2004, and this action was filed on May 19, 2004. A delay of less than 30 days hardly constitutes Plaintiffs' sitting on their rights. It also is disingenuous for the Defendants to complain about delay. The General Assembly adjourned on July 20, 2003, and did not reconvene until November 24, 2003, in order to adopt the redistricting plan on November 25, 2003. Had the General Assembly acted more quickly to adopt the new districts, then the clearance from the U.S. Department of Justice and well as resolution of the *Morgan and Stephenson III* challenges could have been resolved much sooner.

6. PLAINTIFFS HAVE SHOWN THEY ARE LIKELY TO SUCCEED ON THE MERITS AND WILL SUFFER IRREPARABLE HARM.

The Court clearly is familiar with the requirement for granting a preliminary injunction (1) that the Plaintiff has shown a likelihood of success on the merits; and (2) that the Plaintiff will suffer irreparable harm if the injunction is not issued. *A.E.P. Industries, v. McClure*, 308 NC 302 S.E.2d 754 (1983). Plaintiffs respectfully submit that those criteria have been met as set forth above. The grant or denial of a preliminary injunction is addressed to the sound discretion of the Court which which should balance the equities. Id. The harm which will be suffered not just by the parties, but by the public at large also may be considered by the Court. *Huggins v. Wake County Bd. of Education*, 272 N.C. 33, 157 S.E.2d 703 (1967). It could cost Pender

County and New Hanover County in excess of $100,000.00 to conduct additional elections, or the cost could be minimal depending on timing and whether a runoff is required. Given tight budget times, the cost is not something Plaintiffs want the counties to incur, but the Defendants created a situation in which protecting constitutional rights may cost innocent taxpayers.

Normally a preliminary injunction is sought in order to preserve the status quo. *A.E.P. Industries, v. McClure*, 308 NC 302 S.E.2d 754 (1983). While Defendants argue that Pender County seeks a change to the status quo, that simply is not correct. Pender County seeks to maintain the status quo of all its citizens being in a single NC House district, as currently exists under the Interim House plan. The General Assembly in enacting a redistricting plan which ignored the WCP has attempted to effectuate a change from both the Sutton 5 plan and the Interim Plan. A preliminary injunction would provide any time the Court feels is needed to permit a final hearing on the merits and preserve the status quo until that is concluded.

CONCLUSION

Pender County has established that the 2003 House plan violates Article II, Section 5(3) of the North Carolina Constitution by improperly splitting Pender County between two House districts. The Defendants' claim that Section 2 of the VRA requires splitting Pender County fails both legally and factually, even assuming arguendo a legal claim can be stated for an influence district. *Stephenson I* establishes that injunctive relief is the proper remedy to address a redistricting plan which violates the dictates of the North Carolina Constitution. While a preliminary injunction would prevent immediate harm, the better solution, given the lack of factual issues to be

determined, is for the Court to grant summary judgment an enter a permanent injunction forbidding Defendants from conducting elections which violate the constitutional rights of the voters of Pender County.

Respectfully submitted,

This the 11th day of June, 2004.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing document in this action on counsel for all other parties by:

E-mail and mailing a copy hereof, via U.S. Mail, first class postage prepaid, addressed to:

Tiare B. Smiley, Esq.
Alexander McC. Peters, Esq.
Post Office Box 629
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This the 11th day of June, 2004.

Carl W. Thurman III
Pender County Attorney