

No. 24-1095

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RODNEY D. PIERCE and MOSES MATTHEWS,
Plaintiffs-Appellants,

v.

THE NORTH CAROLINA STATE BOARD OF ELECTIONS, et al.,
Defendants-Appellees.

From the United States District Court for
the Eastern District of North Carolina
The Honorable James E. Dever III (No. 4:23-cv-193-D-RN)

**PLAINTIFFS-APPELLANTS' MOTION FOR LEAVE TO FILE REPLY IN
SUPPORT OF PETITION FOR REHEARING EN BANC**

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LOCAL RULE 27(a) STATEMENT

Pursuant to Local Rule 27(a), counsel for Defendants-Appellees have been informed of Plaintiffs-Appellants' intent to seek the relief requested in this motion. Counsel for the Legislative Defendant Appellees advised that they do not consent to the motion and intend to file a response. Counsel for the State Board Defendant Appellees state that they take no position on the motion and do not plan to file a response.

Plaintiffs-Appellants Rodney Pierce and Moses Mathews respectfully move under Federal Rule of Appellate Procedure 27 for leave to file a reply in support of their pending petition for rehearing en banc.

The Federal Rules of Appellate Procedure and this Court's rules neither permit nor prohibit replies in support of petitions for rehearing en banc. The Federal Rules, however, typically provide the party seeking relief with an opportunity to reply to any response. *See, e.g.*, Fed. R. App. P. 28(c). This Court has granted motions for leave to file replies in support of en banc petitions. *See, e.g.*, Order, *United States v. Brewbaker*, No. 22-4544 (4th Cir. Feb. 13, 2024), Doc. 66.

Plaintiffs seek leave to file a reply to provide this Court with the current status of the proceedings below. The parties submitted scheduling proposals on April 1, 2024. The district court has not yet entered a schedule in this case, or set a trial date. As a result, Legislative Defendants' representations that a February 2025 trial is "likely," Opp. 6, are tenuous at best. Legislative Defendants' Opposition also mischaracterizes the posture and reasoning of *Allen v. Milligan*, 599 U.S. 1 (2023), as well as the panel opinion here. To ensure that the Court has complete and accurate information needed to make an appropriate decision on Plaintiffs' pending petition, a brief reply is justified.

WHEREFORE, Plaintiffs respectfully request that the Court grant Plaintiffs leave to file the attached reply in support of their petition for rehearing en banc.

Dated: May 17, 2024

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Federal Rules of Appellate Procedure 27(d)(2)(A) and 32(g)(1) because it contains 248 words.

2. This motion complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2024, the foregoing was electronically filed with the Court via the appellate CM/ECF system, and that copies were served on counsel of record by operation of the CM/ECF system on the same date.

/s/ R. Stanton Jones _____

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This Court should hear this appeal now to correct legal errors in the district court's and panel majority's decisions, and to ensure relief for the 2026 elections. Absent en banc review now, Legislative Defendants will eventually argue that *Purcell* bars relief for 2026, just as it barred relief for the 2024 elections. That would be a travesty—over one hundred thousand Black North Carolinians repeatedly denied an opportunity to elect Senate candidates of their choice because it is always too close to the next election.

Legislative Defendants do not confront any of the actual evidence in this case and cannot reconcile the district court's and panel majority's *Gingles* Three holding with that evidence. Instead, they insist that all the panel did was bless the district court's so-called "reliability" determination to ignore the uncontested results of dozens of statewide elections establishing that Black-preferred candidates would usually lose in Districts 1 and 2. Such a holding would in fact be worthy of this Court's en banc review. District courts are not permitted to arbitrarily ignore expert analysis that no one disputed below on the basis of a purported reliability issue that does not plausibly affect that aspect of the analysis. *See Easley v. Cromartie*, 532 U.S. 234, 251-52 (2001). If Legislative Defendants had any argument at all that the results the district court ignored are factually incorrect, they would say so—but they do not.

In any event, the panel’s 55-page opinion belies Legislative Defendants’ conclusion; it says those elections may be ignored because the district court could properly consider the absence of a “district effectiveness analysis” and because they are exogenous—not because the elections don’t actually result in Black-preferred candidates losing.

It is easy for legislators to draw maps that violate the VRA, and it is exceptionally time-consuming, expensive, and expert-intensive to bring a lawsuit challenging such maps. The Court should not lightly let stand a decision allowing district courts to interpose additional and legally erroneous barriers to relief.

I. As in *Milligan*, It is Appropriate to Grant Preliminary Injunctive Relief for the 2026 Elections

Legislative Defendants puzzlingly argue that rehearing could not change the outcome of this appeal. Opp. 4. But the *Purcell* holding they cite does not apply to the 2026 elections, and none of the other issues they raise would justify denying a preliminary injunction if this Court were to conclude that Plaintiffs are likely to succeed on the merits. Legislative Defendants’ “racial gerrymandering” argument was rejected in *Allen v. Milligan*; moving for a preliminary injunction and filing 3 expert reports in 28 days is not remotely a reason to *deny* relief; and *Allen* also confirms that there is no

“status quo” exception to a preliminary injunction if the normal factors are met, *see Robinson v. Ardoin*, 86 F.4th 574, 599 (5th Cir. 2023).

The parties submitted scheduling proposals on April 1, 2024. The district court has not yet entered a schedule in this case, or set a trial date. As a result, Legislative Defendants’ representations that a February 2025 trial is “likely,” Opp. 6, are tenuous at best. Even if that is the trial date, Legislative Defendants notably do not dispute that they intend to argue that there will be insufficient time under *Purcell* to obtain a remedy for the 2026 elections. And their argument that there can be no irreparable harm two years before an election likewise runs up against *Allen*, which took up a case on the merits in January 2022 and ultimately affirmed the lower court’s injunction for the 2024 elections. On Legislative Defendants’ theory, the Supreme Court in *Allen* was required to reverse, not affirm.

Legislative Defendants note that one of the *Allen* cases was a direct appeal, but so is this. Nor did the Supreme Court “have” to hear the case, Opp. 6; if Legislative Defendants were correct that the timing foreclosed irreparable harm, the Supreme Court would have summarily reversed rather than noting probable jurisdiction.

As for *Robinson* (cited at Opp. 7), in that case defense counsel had offered a merits trial within a few months—rather than insisting on a trial nearly a year from now. Moreover, North Carolina’s primaries are very early and Legislative Defendants have argued in the past that new districts are needed months before any primary-related date. Redistricting is not a game, and the Court should not indulge Legislative Defendants’ transparent effort to avoid review now on the theory that it is unnecessary, when they do not dispute that, if review is denied, they will subsequently argue that it is too late for relief in 2026.

If the Court denies review on the theory that there is no longer any probability of irreparable harm, it should also vacate the panel decision and the district court decision.

II. The Court Should Grant En Banc Review

The panel majority opinion rests on multiple legal errors that warrant immediate correction.

1. The panel’s holding about a “district effectiveness analysis”—by which the panel meant a calculation of the precise BVAP level at which a district will elect Black-preferred candidates—warrants review. Pet. 11-15. Legislative Defendants argue that the dissent and the majority only disagreed

as to “whether the district court’s” district effectiveness analysis discussion “mattered.” Opp. 10. But they do not respond to the petition’s arguments about why the *panel’s* discussion of a district effectiveness analysis matters. It does, because it is premised on an erroneous legal conclusion that contravenes *Cooper v. Harris*. And it invites the district court (and other district courts within this Circuit) to wrongly reject VRA claims by citing the absence of an analysis that does not actually bear on the *Gingles* standard and that no court has ever suggested is probative at the liability stage.

2. The upshot of the panel’s opinion is that, even though undisputed evidence showed that the Black-preferred candidate loses in Districts 1 and 2 based on the results of (at least) 30 of 31 elections from 2020 and 2022, and 27 out of 27 statewide races, the third *Gingles* precondition isn’t satisfied. Pet. 8-9. Legislative Defendants do not dispute that such a conclusion would be wrong and worthy of en banc review; they instead argue that the panel reached no such conclusion on the theory that all it did was validate the district court’s decision to disregard these election results as “unreliable.”

But the panel decision does not discuss the statewide elections, much less hold that the district court properly ignored them as unreliable. It addresses the one Senate election that involved uncontested races that was the

subject of Dr. Barreto’s supplemental declaration, and speculates that perhaps Dr. Barreto’s analysis of three “other state Senate and House races” might change. Op. 28. The panel notably does not affirm on the basis that the table reporting the performance of SD1 and SD2 using statewide contested elections was unreliable or that the district court properly so held. Nor does the panel offer any explanation as to how the district court could have permissibly concluded that such a table was unreliable, when those results are literally a matter of basic addition and when the Legislative Defendants did not *dispute* below that in fact the Black-preferred candidate loses in SD1 and SD2 under every single one of those elections—and decline to dispute that on appeal in this Court, because (as they also do not dispute) *their own website reports the same results*. See NC Gen. Assembly, SL 2023-146, https://www.ncleg.gov/Files/GIS/Plans_Main/Senate_2023/SL%202023-146%20Senate%20-%20StatPack2023_S.pdf.

Instead, the panel held that the district court could ignore those results based on a variety of legally erroneous theories, including the erroneous legal conclusion that a district court evaluating a reconstituted election analysis may ignore dozens of statewide elections in favor of one prior legislative election in

a *differently-comprised* district. That conclusion is profoundly problematic both going forward in this case and for future VRA cases.

3. Dr. Barreto found white bloc voting at levels of 85 percent or higher, and Legislative Defendants' own expert confirmed this analysis. JA280-81, JA674, JA678. The panel's holding that this level of racial polarization can never, on its own, establish legal significance gets *Covington* backwards. Pet. 11-13. Legislative Defendants ignore this point.

Their observation that the district court "found high levels of white crossover voting in the region of North Carolina at issue," Opp. 12, only confirms the need for review. This "finding" was not a factual conclusion based on any evidence in *this* case, but a legally erroneous assumption that prior cases discussing white crossover voting in districts that contained many counties and cities that are *not* part of the districts at issue here is somehow probative of white crossover voting in the districts at issue here. For instance, the prevalence of white crossover voting in a district with "appendages stretching ... into Durham," *Cooper v. Harris*, 581 U.S. 285, 293 (2017), has no bearing on this case. Legislative Defendants' argument that the panel endorsed this approach supports review.

Dated: May 17, 2024

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I hereby certify that on May 17, 2024, I electronically filed the foregoing document and accompanying materials with the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ R. Stanton Jones

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