IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

RODNEY D. PIERCE and MOSES MATTHEWS, Plaintiffs, v. THE NORTH CAROLINA STATE BOARD OF ELECTIONS, *et al*., Defendants.	Case No. 4:23-cv-193-D

PLAINTIFFS' MEMORANDUM OF AUTHORITIES ON ANTICIPATED CONTESTED ISSUES OF LAW AND EVIDENTIARY QUESTIONS

Plaintiffs Rodney D. Pierce and Moses Matthews, by and through undersigned counsel, and pursuant to Local Civil Rule 39.1, file this Memorandum of Authorities on Anticipated Contested Issues of Law and Evidentiary Questions. This Memorandum is offered for the purpose of complying with Local Civil Rule 39.1(a)(1) and is not intended to comprehensively brief all the legal or evidentiary issues in this case. Nothing in this memorandum is intended to waive any legal, factual, or evidentiary argument. Plaintiffs maintain that the evidence at trial will show that the 2023 enacted Senate map violates Section 2 of the Voting Rights Act (VRA).

INTRODUCTION

Northeastern North Carolina includes a number of counties that are part of the "Black Belt," a region that today refers to the counties with the largest Black populations in a number of Southern states, including North Carolina. Thanks to the Voting Rights Act, for the three-plus decades between the U.S. Supreme Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986) and the 2020 redistricting cycle, Black voters in North Carolina's Black Belt counties were consistently represented by their candidates of choice in the North Carolina Senate. Following the

2020 redistricting cycle, however, the General Assembly enacted Senate maps that crack Black voters across four different senate districts, ensuring that voters in only one of those districts have an opportunity to elect their preferred candidate. That violates the VRA. It is possible to draw an additional majority-minority district in the Black Belt region, an area where voting is severely polarized along racial lines, and the totality of the circumstances show that the political process is not equally open to Black voters.

CONTESTED ISSUES OF LAW

The parties set out the legal issues in this case in the proposed pretrial order filed on December 20, 2024. The parties agree that this dispute is governed by Section 2 of the Voting Rights Act as interpreted in the U.S. Supreme Court's decision in *Thornburg v. Gingles* and its progeny. Those cases hold that a state legislature must draw an additional legislative district in which Black voters have the opportunity to elect their candidate of choice when the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district," the minority group "is politically cohesive," "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate, and the totality of the circumstances demonstrate that the political process is not equally open to participation by members of the minority group. *Gingles*, 478 U.S. at 46, 50–51. The parties dispute whether the plaintiffs have standing and, if so, whether the enacted plan violates Section 2.

I. Plaintiffs Have Article III Standing

For purposes of Article III standing, the relevant injury-in-fact in a Section 2 case "goes beyond the boundaries of a single district." *LULAC v. Abbott*, 604 F. Supp. 3d 463, 486 (W.D. Tex. 2022) (quoting *Perez v. Abbott*, 267 F. Supp. 3d 750 (W.D. Tex. 2017), *rev'd in part on other grounds*, 138 S. Ct. 2305 (2018)). The Article III injury is "Defendants' failure to draw the plaintiff into a *hypothetical* opportunity district that was not drawn" in the enacted map. *Id.* Plaintiffs here,

Rodney Pierce and Moses Matthews, both live in the area that Plaintiffs assert should have contained an additional minority-opportunity district, and both would be part of that opportunity district under each of Plaintiffs' demonstration plans. Plaintiffs thus have Article III standing to challenge the enacted map.

II. Plaintiffs Satisfy All Three *Gingles* Preconditions

The first *Gingles* precondition is satisfied when Plaintiffs offer a demonstration map showing that the minority population is "sufficiently large and geographically compact to constitute a majority in a reasonably configured district." *Allen v. Milligan*, 599 U.S. 1, 18 (2023) (quoting *Wis. Legis.* v. *Wis. Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022) (per curiam)). Although Plaintiffs need only introduce one such map to satisfy the first *Gingles* precondition, Plaintiffs have produced at least three.

It should be undisputed that Plaintiffs satisfy the numerosity requirement. Demonstration Districts A and C have Black Voting Age Populations (BVAPs) over 50%, and Demonstration Districts A, C, and D have Black Citizen Voting Age Populations (BCVAPs) over 50%. Legislative Defendants do not contest that Demonstration Districts A and C have BVAPs above 50%. And it is widely recognized that a BCVAP of over 50% is sufficient to satisfy the first *Gingles* precondition. *See, e.g.*, *LULAC v. Perry*, 548 U.S. 399, 429 (2006); *Pope v. Cnty. of Albany*, 2014 WL 316703, at *13 (N.D.N.Y. Jan. 28, 2014). The minority population is thus sufficiently large to satisfy the first *Gingles* precondition.

Plaintiffs' demonstration districts are also reasonably configured and geographically compact. Plaintiffs' districts are more compact than enacted Senate Districts 1 and 2, preserve the Black Belt community of interest better than the enacted map, are contiguous, and divide no VTDs. Demonstration District A splits no counties at all, and Demonstration Districts C and D split only one county. The county clusters drawn around the Demonstration Districts comply with (and are

required by) *Stephenson*'s county clustering rule, which means those clusters are by definition reasonably configured under North Carolina law. *Stephenson v. Bartlett*, 562 S.E.2d 377, 396–97 (2002). Plaintiffs thus satisfy the first *Gingles* precondition.

The second and third *Gingles* preconditions are satisfied when the minority group "is politically cohesive" and "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50–51. Plaintiffs' racially polarized voting expert will demonstrate, and Legislative Defendants' experts have not disputed, that voting in northeastern North Carolina is polarized along racial lines, and starkly so. Black voters' political cohesion in the region is above 95%, and white voters unite to oppose Black-preferred candidates in Senate District 1 and 2 at rates of between 80 and 85% in recent years, and at rates approaching 90% in the area where most Black voters live and where an opportunity district could be drawn (which Plaintiffs' expert refers to as the Demonstration Area).

Plaintiffs' performance analysis showed that these levels of racial polarization result in blocking Black-preferred candidates from succeeding in almost every single analyzed race, and in every single race in 2018, 2020, and 2022. That is the end of the racial polarization inquiry. Plaintiffs' showing of racially polarized voting cannot be defeated by evidence that a Black-preferred candidate could be elected in a hypothetical district with slightly less than 50% BVAP. *See Gingles*, 478 U.S. at 50–51; *Covington v. North Carolina*, 316 F.R.D. 117, 170 (M.D.N.C. 2016), *aff'd*, 581 U.S. 1015 (2017); *Cooper v. Harris*, 581 U.S. 285, 306 (2017). The opposite is true: a performing crossover district with a BVAP of less than 50% *can* provide an effective VRA remedy. *Cooper*, 581 U.S. at 306. Plaintiffs satisfy all three *Gingles* preconditions.

III. The Totality of the Circumstances Supports a VRA Violation

The ultimate inquiry in a Section 2 case, once the *Gingles* preconditions are satisfied, is whether the totality of the circumstances demonstrate that the political process is not equally open

to participation by members of the minority group. *Gingles*, 478 U.S. 46. "It will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of circumstances." *Harris v. McCrory*, 159 F. Supp. 3d 600, 623 (M.D.N.C. 2016), *aff'd sub nom. Cooper v. Harris*, 581 U.S. 285, 137 (2017) (quoting *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1135 (3d Cir. 1993)). This is not that unusual case. It is a typical case in which the evidence will show that the totality of the circumstances confirm that the cracking of Black voters between districts denies them equal participation in the political process. The Senate factors uniformly support that conclusion.

ANTICIPATED EVIDENTIARY QUESTIONS

I. Redacting Plaintiffs' Expert Reports is Unnecessary

On December 18, 2024, the Court granted Legislative Defendants' Motion to Exclude "Demonstration District E." D.E. 91. Plaintiffs will make an offer of proof at trial and will raise this issue on appeal. Because certain of Plaintiffs' expert rebuttal reports contain information related to Demonstration District E, Plaintiffs propose that the Court simply admit those reports "subject to its prior ruling excluding Demonstration District E," or using similar language. Given that this is a bench trial, Plaintiffs suggest that this approach would avoid the unnecessary creation of redacted copies and avoid the need to enter multiple copies of the reports in the record, some with redactions and some without, which might make review more cumbersome for the Fourth Circuit. Because the Court has already seen the full expert reports in question and will disregard the excluded elements, Plaintiffs suggest that this approach is simplest and will not prejudice any party. Plaintiffs will of course work with Legislative Defendants to agree on redacted versions if the Court requires them, however.

II. Legislative Defendants' Legislative Hearing Exhibits are Inadmissible Hearsay

Legislative Defendants apparently plan to offer five exhibits containing transcripts of legislative sessions, three exhibits containing transcripts of public comment sessions, along with eight corresponding audio recordings of those sessions. *See* LD005-12; LD63-70. Together, those transcripts span hundreds of pages and contain statements about a wide variety of topics from numerous legislators and members of the public. But these documents contain extensive hearsay. For example, Senator Daniel offered testimony about the purported reasons why the mapmakers concluded that it was unnecessary to draw a VRA district in northeastern North Carolina. LD10 at 23-25. Senator Daniel declined to respond to discovery requests or to be deposed on the ground of legislative privilege, *see* Ex. A at 1, and specifically stated as part of those objections that "he does not speak for the entire Senate Redistricting Committee or any of its other members," *see* Ex. B at 2.

These documents do not fall under the public records exception to hearsay. Statements by members of the public at a comment session or individual legislators at a legislative hearing are not "[a] record or statement of a public office" at all, nor do they set out "the office's activities." Fed. R. Evid. 803(8)(A)(i).[1] Furthermore, the circumstances here—partisan legislative hearings—are not consistent with the trustworthiness considerations that underlie the public records exception. Nor would it be appropriate to allow unsworn statements into the record from legislators who invoked their legislative privilege to refuse to be questioned about those statements. *Singleton v. Merrill*, 576 F. Supp. 3d 931, 940-42 (N.D. Ala. 2021) (stating that legislators cannot "seek to use their unique position as HB1's principal drafters as a sword to defend the law on its merits, but intermittently seek to retreat behind the shield of legislative privilege when it suits them").

[1] The exceptions in (ii) and (iii) are also not applicable on their face.

III. Legislative Defendants' Draft Maps are Irrelevant and Otherwise Inadmissible

Plaintiffs object to Legislative Defendants' exhibits 14 through 18. These documents are unsourced printouts of draft maps that were apparently produced by the General Assembly's legislative staff as part of the redistricting process, many of which contain various percentages layered on top of districts without any indication or explanation of what those percentages even are. These unsourced maps are not relevant for any purpose under Section 2, which centers on the discriminatory effects of the enacted plan. *See Milligan*, 599 U.S. at 25 ("we have reiterated that § 2 turns on the presence of discriminatory effects, not discriminatory intent."). The draft plans say nothing about the enacted map's discriminatory effects and thus have no legal relevance to Plaintiffs' claims or Legislative Defendants' defenses. Plaintiffs also object to these exhibits on the grounds of hearsay, foundation, and authenticity, and will address those objections as they arise at trial.

IV. Legislative Defendants' U.S. Census Bureau Reports Lack Foundation and Are Otherwise Inadmissible

Plaintiffs object to Legislative Defendants' exhibits 25 through 28 and 33 through 40. Many of these documents appear to be printouts from the U.S. Census Bureau, but many are not self-explanatory or are likely to confuse, and Plaintiffs do not anticipate that Legislative Defendants have identified a witness who will explain their significance, Fed. R. Evid. 901(a), (b)(1), among other objections.

V. Other Evidentiary Issues

Plaintiffs have additional objections to Legislative Defendants' proposed exhibits, as indicated on the exhibit list attached to the pre-trial order, but have focused on some key categories in this brief. Plaintiffs will reserve these arguments for trial and will raise them depending how and for what purpose Legislative Defendants' evidence is offered.

Respectfully submitted this, the 27th day of January, 2025.

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**Appeared via Special Notice*
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of Court using the cm/ecf system, which will send notification of such filing to all counsel and parties registered in said system.

Respectfully submitted this, the 27th day of January, 2025.

/s/ Orion de Nevers
Orion de Nevers

Exhibit A

From: Alyssa Riggins
To: Jones, Stanton; Cassie Holt; Phil Strach; Raile, Richard; Jordan Koonts; Lewis, Patrick T.; McKnight, Katherine L.; Babb, Mary Carla (Hollis); Stanley, Trevor M.; Prouty, Erika Dackin; Hooper, Rachel Palmer; Doyle, Ty; Steed, Terence
Cc: Theodore, Elisabeth; Ferenc, Sam; espeas@poynerspruill.com
Subject: RE: Pierce v. NCSBE -- Plaintiff experts
Date: Thursday, June 20, 2024 6:02:34 PM
Attachments: image001.png

External E-mail

Stanton,
We are authorized to accept service for Representative Hall and Senators Daniel, Newton, and Hise. However, neither Representative Hall, nor Senators Daniel or Newton will be waiving their legislative privilege in this matter. Likewise, neither Senator Berger nor Speaker Moore will be waiving their legislative privilege. If you'd like to schedule a time to discuss this, please let us know some times you are available later this week or early next.
As to the depositions—we do intend to seek depositions of the 11 individuals referenced in your earlier email. We are considering seeking depositions of other members, local officials, and potentially members of the State Board. We can let you know once decisions are made in accordance with the applicable rules. Our logic behind the 15 number was that it covered the 11 we already knew about, plus a few more to account for the others we are considering. We are, of course, willing to make any increase reciprocal.
Best,
Alyssa

ALYSSA RIGGINS SENIOR ASSOCIATE
alyssa.riggins@nelsonmullins.com
301 HILLSBOROUGH STREET | SUITE 1400
RALEIGH, NC 27603
T **919.329.3810** F **919.329.3799**
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From: Jones, Stanton
Sent: Wednesday, June 19, 2024 10:55 AM
To: Alyssa Riggins ; Cassie Holt ; Phil Strach ; Raile, Richard ; Jordan Koonts ; Lewis, Patrick T. ; McKnight, Katherine L. ; Babb, Mary Carla (Hollis) ; Stanley, Trevor M. ; Prouty, Erika Dackin ; Hooper, Rachel Palmer ; Doyle, Ty ; Steed, Terence
Cc: Theodore, Elisabeth ; Ferenc, Sam ; espeas@poynerspruill.com
Subject: RE: Pierce v. NCSBE -- Plaintiff experts
Thanks Alyssa. We're going to serve subpoenas for depositions and documents on the chairs of the Senate and House redistricting committees – namely, Senators Daniels, Hise, and Newton, and Representative Hall. Will you all accept service of the subpoenas on their behalf? If not, do you know if they are represented in this matter, and if so by whom?

On your request regarding depositions, we don't object in principle to allowing more than 10 depositions per side in this case, but we'd like this to be a reciprocal arrangement allowing an appropriate number of depositions based on who each side intends to call as a witness at trial. Your initial disclosures list Senators Daniels, Hise, and Newton, but also have a broad catch-all category for "County Election Directors and/or County Elected Officials or leaders in counties that include a majority-minority legislative district," which could cover many dozens (or hundreds) of people. Can you tell us who you intend to call within that group? Also, to help us evaluate your request for up to 15 depositions, please let us know who you plan to depose besides the two Plaintiffs, Plaintiffs' four experts, and the five current or former legislators listed in Plaintiffs' initial disclosures (which is 11 people total).

Also, if any legislators intend to invoke legislative privilege to resist discovery in this case, we are open to discussing an arrangement whereby we take discovery only from any legislator(s) whom Defendants may call to testify at trial (or from whom you may otherwise present evidence).

We are happy to arrange a call to discuss any or all of these issues.

Regards,

Stanton

From: Alyssa Riggins <alyssa.riggins@nelsonmullins.com>
Sent: Wednesday, June 19, 2024 10:20 AM
To: Cassie Holt <cassie.holt@nelsonmullins.com>; Jones, Stanton <Stanton.Jones@arnoldporter.com>; Phil Strach <phil.strach@nelsonmullins.com>; Raile, Richard <rraile@bakerlaw.com>; Jordan Koonts <jordan.koonts@nelsonmullins.com>; Lewis, Patrick T. <plewis@bakerlaw.com>; McKnight, Katherine L. <kmcknight@bakerlaw.com>; Babb, Mary Carla (Hollis) <MCBabb@ncdoj.gov>; Stanley, Trevor M. <tstanley@bakerlaw.com>; Prouty, Erika Dackin <eprouty@bakerlaw.com>; Hooper, Rachel Palmer <rhooper@bakerlaw.com>; Doyle, Ty <tgdoyle@bakerlaw.com>; Steed, Terence <Tsteed@ncdoj.gov>
Cc: Theodore, Elisabeth <Elisabeth.Theodore@arnoldporter.com>; Ferenc, Sam <Sam.Ferenc@arnoldporter.com>; espeas@poynerspruill.com
Subject: RE: Pierce v. NCSBE -- Plaintiff experts

External E-mail

Stanton,

Hope you had a nice weekend. We wanted to check back in on our proposal from Friday afternoon to increase the number of depositions. Could you please let us know Plaintiffs' position at your earliest convenience?

Best,

Alyssa

ALYSSA RIGGINS SENIOR ASSOCIATE

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From: Cassie Holt <cassie.holt@nelsonmullins.com>
Sent: Friday, June 14, 2024 4:40 PM
To: Jones, Stanton <Stanton.Jones@arnoldporter.com>; Alyssa Riggins <alyssa.riggins@nelsonmullins.com>; Phil Strach <phil.strach@nelsonmullins.com>; Raile, Richard <rraile@bakerlaw.com>; Alex Bradley <alex.bradley@nelsonmullins.com>; Lewis, Patrick T. <plewis@bakerlaw.com>; McKnight, Katherine L. <kmcknight@bakerlaw.com>; Babb, Mary Carla (Hollis) <MCBabb@ncdoj.gov>; Stanley, Trevor M. <tstanley@bakerlaw.com>; Prouty, Erika Dackin <eprouty@bakerlaw.com>; Hooper, Rachel Palmer <rhooper@bakerlaw.com>; Doyle, Ty <tgdoyle@bakerlaw.com>; Steed, Terence <Tsteed@ncdoj.gov>
Cc: Theodore, Elisabeth <Elisabeth.Theodore@arnoldporter.com>; Ferenc, Sam <Sam.Ferenc@arnoldporter.com>; espeas@poynerspruill.com
Subject: RE: Pierce v. NCSBE -- Plaintiff experts

Dear Stanton,

Absent an intervening Scheduling Order, Legislative Defendants intend to serve expert reports and data on July 12, 2024 in accordance with our proposed schedule.

We have also reviewed Plaintiffs' Initial Disclosures. Given that the number of Plaintiffs, fact witnesses, and experts disclosed by Plaintiffs exceeds the number of depositions agreed to in this matter (10), Legislative Defendants propose increasing the number of depositions to 15. Please let us know your position on that proposal.

Additionally, please find attached for service Legislative Defendants' First Set of Discovery to Plaintiffs.

Thank you,

Cassie

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From: Steed, Terence <Tsteed@ncdoj.gov>
Sent: Thursday, June 13, 2024 2:33 PM
To: Jones, Stanton <Stanton.Jones@arnoldporter.com>; Alyssa Riggins <alyssa.riggins@nelsonmullins.com>; Phil Strach <phil.strach@nelsonmullins.com>; Raile, Richard <rraile@bakerlaw.com>; Cassie Holt <cassie.holt@nelsonmullins.com>; Alex Bradley <alex.bradley@nelsonmullins.com>; Lewis, Patrick T. <plewis@bakerlaw.com>; McKnight, Katherine L. <kmcknight@bakerlaw.com>; Babb, Mary Carla (Hollis) <MCBabb@ncdoj.gov>; Stanley, Trevor M. <tstanley@bakerlaw.com>; Prouty, Erika Dackin <eprouty@bakerlaw.com>; Hooper, Rachel Palmer <rhooper@bakerlaw.com>; Doyle, Ty <tgdoyle@bakerlaw.com>
Cc: Theodore, Elisabeth <Elisabeth.Theodore@arnoldporter.com>; Ferenc, Sam <Sam.Ferenc@arnoldporter.com>; espeas@poynerspruill.com

Subject: RE: Pierce v. NCSBE -- Plaintiff experts

Stanton,

State Board Defendants will not have any experts.

Thanks,

Terence Steed
Special Deputy Attorney General
919-716-6567
Please note messages to or from this address may be public records.

From: Jones, Stanton <Stanton.Jones@arnoldporter.com>
Sent: Thursday, June 13, 2024 2:23 PM
To: Alyssa Riggins <alyssa.riggins@nelsonmullins.com>; Phil Strach <phil.strach@nelsonmullins.com>; Steed, Terence <Tsteed@ncdoj.gov>; Raile, Richard <rraile@bakerlaw.com>; Cassie Holt <cassie.holt@nelsonmullins.com>; Alex Bradley <alex.bradley@nelsonmullins.com>; Lewis, Patrick T. <plewis@bakerlaw.com>; McKnight, Katherine L. <kmcknight@bakerlaw.com>; Babb, Mary Carla (Hollis) <MCBabb@ncdoj.gov>; Stanley, Trevor M. <tstanley@bakerlaw.com>; Prouty, Erika Dackin <eprouty@bakerlaw.com>; Hooper, Rachel Palmer <rhooper@bakerlaw.com>; Doyle, Ty <tgdoyle@bakerlaw.com>
Cc: Theodore, Elisabeth <Elisabeth.Theodore@arnoldporter.com>; Ferenc, Sam <Sam.Ferenc@arnoldporter.com>; espeas@poynerspruill.com
Subject: RE: Pierce v. NCSBE -- Plaintiff experts

Counsel: We write to confirm that Defendants will serve their expert disclosures/reports by July 12 per the proposed scheduling orders submitted by both parties on April 1. Also, please confirm that, at the time of serving the expert reports, you will provide the experts' backup data including any computer code.

While these questions are primarily for Legislative Defendants, as we anticipate that State Board Defendants will not have any experts, we would appreciate if all Defendants will confirm promptly. Thank you.

Regards,

Stanton

From: Theodore, Elisabeth <Elisabeth.Theodore@arnoldporter.com>
Sent: Friday, May 31, 2024 11:14 PM
To: Alyssa Riggins <alyssa.riggins@nelsonmullins.com>; Phil Strach <phil.strach@nelsonmullins.com>; Steed, Terence <Tsteed@ncdoj.gov>; Raile, Richard <rraile@bakerlaw.com>; Cassie Holt <cassie.holt@nelsonmullins.com>; Alex Bradley <alex.bradley@nelsonmullins.com>; Lewis, Patrick T. <plewis@bakerlaw.com>; McKnight, Katherine L. <kmcknight@bakerlaw.com>; Babb, Mary Carla (Hollis) <MCBabb@ncdoj.gov>; Stanley, Trevor M. <tstanley@bakerlaw.com>; Prouty, Erika Dackin <eprouty@bakerlaw.com>; Hooper, Rachel Palmer <rhooper@bakerlaw.com>; Doyle, Ty <tgdoyle@bakerlaw.com>
Cc: Ferenc, Sam <Sam.Ferenc@arnoldporter.com>; Jones, Stanton <Stanton.Jones@arnoldporter.com>; espeas@poynerspruill.com
Subject: Pierce v. NCSBE -- Plaintiff experts

Counsel:

We are disclosing Blake Esselstyn, Loren Collingwood, Traci Burch, and Jonathan Mattingly as experts under Rule 26. You should shortly receive an email with a link to download their reports as well as backup data, except that Dr. Collingwood is on a flight that has been delayed, so we'll send his report

as soon as we are able. Please let us know if you have any trouble accessing it.

Best,

Elisabeth

This communication may contain information that is legally privileged, confidential or exempt from disclosure. If you are not the intended recipient, please note that any dissemination, distribution, or copying of this communication is strictly prohibited. Anyone who receives this message in error should notify the sender immediately by telephone or by return e-mail and delete it from his or her computer.

_____

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Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

RODNEY D. PIERCE and MOSES MATTHEWS, Plaintiffs, v. THE NORTH CAROLINA STATE BOARD OF ELECTIONS, *et al.*, Defendants.	Case No. 4:23-cv-193-D

SENATOR WARREN DANIEL'S OBJECTIONS TO PLAINTIFFS' SUBPOENA FOR THE PRODUCTION OF DOCUMENTS

Senator Warren Daniel, in his official capacity ("Sen. Daniel"), by and through undersigned counsel and pursuant to Rules 26 and 45 of the Federal Rules of Civil Procedure, serves his objections to Plaintiffs' Subpoena to Produce Documents or Information, served on Sen. Daniel via email on August 27, 2024 in the above-captioned matter, as follows:

RESERVATION OF RIGHTS

Sen. Daniel makes the following answers, responses, and objections to Plaintiffs' Subpoena to Produce Documents or Information ("Document Requests"). Each of the following responses is made subject to any and all objections as to competence, relevance, or other grounds that would require exclusion of such statement if made by a witness present and testifying in court. Any and all such objections and grounds are expressly reserved and may be interposed at the time of the trial.

Since the Federal Rules of Civil Procedure prohibit discovery of privileged matters, Sen. Daniel has attempted to interpret each Document Request to call for discoverable matter only. To

the extent any response or produced document contains or refers to matters otherwise protected from discovery by the work product doctrine, the attorney-client privilege, or the legislative privilege, no waiver is intended; nor is any waiver intended as to any other matters that are or may be subject to such protection or otherwise privileged.

These objections and responses are provided solely for the purpose of and in relation to this action.

REQUESTS FOR DOCUMENTS

1. Produce all documents and communications relating to, identifying, describing, or discussing the boundaries of Districts 1 and/or 2 in 2023 SL 146.

RESPONSE: Sen. Daniel objects to this Document Request to the extent it calls for information covered by the attorney-client privilege, legislative privilege, or any other applicable privileges or protections. Sen. Daniel further objects to this Document Request on the grounds that it is overbroad, unduly burdensome, and is not relevant or proportionate to the needs of the case because it purports to seek documents from an undefined and potentially limitless group of individuals regarding district boundary considerations prior to the introduction of the legislation at issue in this matter, regardless of if these individuals and their creation or consideration of the district(s) was even for a private, fleeting moment, and regardless of if the district(s) were ever introduced to the Senate Redistricting Committee. Sen. Daniel further objects to this Document Request on the grounds that he does not speak for the entire Senate Redistricting Committee or any of its other members. Sen. Daniel also objects to this Document Request to the extent it seeks information contained in the legislative record that is publicly known and equally available to Plaintiffs.

2. Produce all documents and communications relating to, identifying, describing, or discussing any criteria that were used in drawing, revising, or otherwise creating the district boundaries in 2021 SL 173, 2022 SL 2, and/or 2023 SL 146.

RESPONSE: Sen. Daniel objects to this Document Request on the grounds that it is duplicative of Plaintiffs' other Document Requests. Sen. Daniel further objects to this to the extent it calls for information covered by the attorney-client privilege, legislative privilege, or any other applicable privileges or protections. Sen. Daniel further objects to this Document Request on the grounds that it is overbroad, unduly burdensome, and is not relevant or proportionate to the needs of the case because it purports to seek documents from an undefined and potentially limitless group of individuals regarding district boundary considerations prior to the introduction of the legislation at issue in this matter regardless of if these individuals and their creation or consideration of the district(s) was even for a private, fleeting moment. Moreover, as drafted this Document Request appears to seek information regarding all potential Senate district boundaries, regardless of if the district(s) were ever introduced to the Senate Redistricting Committee or challenged here, and purports to seek discovery into maps that are not challenged in the present matter, which were subject to adjudication in separate cases. Sen. Daniel further objects to this Document Request on the grounds that he does not speak for the entire Senate Redistricting Committee or any of its other members. Sen. Daniel also objects to this Document Request to the extent it seeks information contained in the legislative record that is publicly known and equally available to Plaintiffs.

Subject to and without waiving the foregoing objections, and in accordance with the Rule 26(f) Report, Dkt. no. 82, Sen. Daniel refers Plaintiffs to the redistricting criteria for the 2023 Senate Plan is publicly available on the General Assembly's website, at: https://webservices.ncleg.gov/ViewDocSiteFile/81644. Regarding this Document Request's reference to prior plans other than the one challenged in this case, Sen. Daniel refers Plaintiff to the

publicly available legislative record(s) for those plans, as well as the dockets and opinions for in *Harper v. Hall*, 384 N.C. 292, 886 S.E.2d 393 (2023), *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584 (N.C. Super. Ct. Sep. 03, 2019), *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016), *aff'd*, 581 U.S. 1015, 137 S. Ct. 2211, 198 L. Ed. 2d 655 (2017), and *Cooper v. Harris*, 581 U.S. 285, 137 S. Ct. 1455, 197 L. Ed. 2d 837 (2017), as applicable.

3. Produce all documents and communications, including any reports, studies, or analyses, regarding or relating to whether any or all of the three *Gingles* preconditions are satisfied in North Carolina that were considered by, conducted by, reviewed by, presented to, or sent to or from you, the Senate Redistricting Committee, or any legislative staff in connection with any redistricting of North Carolina from 2020 to the present.

RESPONSE: Sen. Daniel objects to this Document Request to the extent it calls for information covered by the attorney-client privilege, legislative privilege, or any other applicable privileges or protections. Sen. Daniel further objects to this Document Request on the grounds that it is overbroad, unduly burdensome, and is not relevant or proportionate to the needs of the case because it purports to seek discovery into maps that are not challenged in the present matter, and which were subject to adjudication in separate cases. Sen. Daniel further objects to this Document Request on the grounds that he does not speak for the entire Senate Redistricting Committee, any of its other members, or all legislative staff. Sen. Daniel also objects to this Document Request to the extent it seeks information contained in the legislative record that is publicly known and equally available to Plaintiffs. Sen. Daniel further objects to this Document Request as premature to the extent it seeks the disclosure of expert opinions in this matter ahead of the disclosure time contemplated in the court's scheduling order. [Dkt. no. 81].

Subject to and without waiving the foregoing objections, and in accordance with the Rule 26(f) Report, Dkt. no. 82, Sen. Daniel directs Plaintiffs to the publicly available legislative record for the Senate Plan and the expert reports of Dr. Jeffrey Lewis in the consolidated matters of *North*

Carolina League of Conservation Voters v. Hall, Wake Cnty. Super. Ct. No. 21CVS015426 and *Harper v. Hall*, Wake Cnty. Super. Ct. No. 21CVS50085, all of which are publicly available, already in the possession of Plaintiffs' counsel, and which speak for themselves.

4. Produce all documents and communications, including any reports, studies, or analyses, regarding or relating to the presence or absence of racially polarized voting in North Carolina or any part of North Carolina that were considered by, conducted by, reviewed by, presented to, or sent to or from you, the Senate Redistricting Committee, or any legislative staff in connection with any redistricting of North Carolina from 2020 to the present.

RESPONSE: Sen. Daniel objects to this Document Request to the extent it calls for information covered by the attorney-client privilege, legislative privilege, or any other applicable privileges or protections. Sen. Daniel further objects to this Document Request on the grounds that it is overbroad, unduly burdensome, and is not relevant or proportionate to the needs of the case because it purports to seek discovery into maps that are not challenged in the present matter, and which were subject to adjudication in separate cases. Sen. Daniel further objects to this Document Request on the grounds that he does not speak for the entire Senate Redistricting Committee, any of its other members, or all legislative staff. Sen. Daniel also objects to this Document Request to the extent it seeks information contained in the legislative record that is publicly known and equally available to Plaintiffs. Sen. Daniel further objects to this Document Request as premature to the extent it seeks the disclosure of expert opinions in this matter ahead of the disclosure time contemplated in the court's scheduling order. [Dkt. no. 81].

Subject to and without waiving the foregoing objections, and in accordance with the Rule 26(f) Report, Dkt. no. 82, Sen. Daniel directs Plaintiffs to the publicly available legislative record for the Senate Plan and the expert reports of Dr. Jeffrey Lewis in the consolidated matters of *North Carolina League of Conservation Voters v. Hall*, Wake Cnty. Super. Ct. No. 21CVS015426 and

Harper v. Hall, Wake Cnty. Super. Ct. No. 21CVS50085, all of which are publicly available, already in the possession of Plaintiffs' counsel, and which speak for themselves.

5. Produce all documents and communications, including any reports, studies, or analyses, regarding or relating to the performance or anticipated or potential performance of the Senate plans enacted by 2021 SL 173, 2022 SL 2, and/or 2023 SL 146, or of any individual districts in any of those Senate plans.

RESPONSE: Sen. Daniel objects to this Document Request to the extent it calls for information covered by the attorney-client privilege, legislative privilege, or any other applicable privileges or protections. Sen. Daniel further objects to this Document Request that it is vague and ambiguous, as the terms "performance" and "anticipated or potential performance" are undefined, subject to multiple meanings and interpretations. Sen. Daniel further objects on the grounds that it is overbroad, unduly burdensome, and is not relevant or proportionate to the needs of the case because it purports to seek discovery into maps and individual districts that are not challenged in the present matter, and which were subject to adjudication in separate cases. Sen. Daniel also objects to this Document Request to the extent it seeks information contained in the legislative record that is publicly known and equally available to Plaintiffs. Sen. Daniel further objects to this Document Request as premature to the extent it seeks the disclosure of expert opinions in this matter ahead of the disclosure time contemplated in the court's scheduling order. [Dkt. no. 81].

Subject to and without waiving the foregoing objections, and in accordance with the Rule 26(f) Report, Dkt. no. 82, Sen. Daniel directs Plaintiffs to the publicly available legislative record for each of these maps, as well as the public case documents and authors of relevant expert opinions in *Harper v. Hall*, 384 N.C. 292, 886 S.E.2d 393 (2023), *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584 (N.C. Super. Ct. Sep. 03, 2019), *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016), *aff'd*, 581 U.S. 1015, 137 S. Ct. 2211, 198 L. Ed. 2d 655 (2017), and *Cooper v.*

Harris, 581 U.S. 285, 137 S. Ct. 1455, 197 L. Ed. 2d 837 (2017), all of which are publicly available, and which speak for themselves.

6. Produce all documents and communications, including any reports, studies, or analyses, regarding or relating to whether any or all of the Senate Factors are satisfied for North Carolina or any part of North Carolina that were considered by, conducted by, reviewed by, presented to, or sent to or from you, the Senate Redistricting Committee, or any legislative staff in connection with any redistricting of North Carolina from 2020 to the present.

RESPONSE: Sen. Daniel objects to this Document Request to the extent it calls for information covered by the attorney-client privilege, legislative privilege, or any other applicable privileges or protections. Sen. Daniel further objects to this Document Request on the grounds that it is overbroad, unduly burdensome, and is not relevant or proportionate to the needs of the case because it purports to seek discovery into maps that are not challenged in the present matter, and which were subject to adjudication in separate cases. Sen. Daniel also objects to this Document Request on the grounds that it is vague and ambiguous, as the phrase "whether any or all of the Senate Factors are satisfied" is a question for the court to determine. Sen. Daniel further objects to this Document Request on the grounds that he does not speak for the entire Senate Redistricting Committee, any of its other members, or all legislative staff. Sen. Daniel also objects to this Document Request to the extent it seeks information contained in the legislative record that is publicly known and equally available to Plaintiffs. Sen. Daniel further objects to this Document Request as premature to the extent it seeks the disclosure of expert opinions in this matter ahead of the disclosure time contemplated in the court's scheduling order. [Dkt. no. 81].

Subject to and without waiving the foregoing objections, and in accordance with the Rule 26(f) Report, Dkt. no. 82, Sen. Daniel directs Plaintiffs to the publicly available legislative record for

the 2021, 2022, and 2023 Senate Redistricting Committee regarding the 2021, 2022, and 2023 districting process.

7. Produce all draft maps or portions of draft maps reflecting or containing one or more actual or potential Senate districts containing one or more of the Majority Black Counties that were created or considered in connection with, or in anticipation of, the introduction and enactment of 2023 SL 146, whether or not presented to or by the Senate Redistricting Committee.

RESPONSE: Sen. Daniel objects to this Document Request to the extent it calls for information covered by the attorney-client privilege, legislative privilege, or any other applicable privileges or protections. Sen. Daniel further objects to this Document Request on the grounds that it is vague and ambiguous as the phrase "created or considered" as used in the Document Request is undefined and subject to multiple meanings and interpretations. Sen. Daniel further objects to this Document Request on the grounds that it is overbroad and unduly burdensome, and is not relevant or proportionate to the needs of the case because it purports to seek documents from an undefined and potentially limitless group of individuals regarding district boundary considerations prior to the introduction of the legislation at issue in this matter, regardless of if these individuals and their creation or consideration of the district(s) was even for a private, fleeting moment, and regardless of if the district(s) were ever introduced to the Senate Redistricting Committee. Read literally, this Document Request seeks identification of every single district line move or proposed move, even prior to the introduction of the legislation at issue here, a request which by its very nature is overbroad and unduly burdensome. Furthermore, as written, this Document Request seeks all maps created by any other person to which Sen. Daniel does not have knowledge of that may have been considered by any member of the General Assembly regarding the introduction and enactment of the 2023 Senate Plan. Sen. Daniel simply cannot ascertain the knowledge or actions of all other persons, and does not speak for the entire Senate Redistricting Committee or any of its other members. Sen. Daniel also

objects to this Document Request to the extent it seeks information contained in the legislative record that is publicly known and equally available to Plaintiffs.

This the 9th day of September, 2024.

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* *Appeared via Special Notice*

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CERTIFICATE OF SERVICE

I hereby certify that the forgoing document was served by email on all counsel of record in this action.

This the 9th day of September, 2024.

NELSON MULLINS RILEY & SCARBOROUGH LLP

/s/ Alyssa M. Riggins
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