No. 103A06 TENTH DISTRICT

NORTH CAROLINA SUPREME COURT

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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

From Wake County
(Three Judge Panel on Redistricting)

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PLAINTIFF APPELLANTS' BRIEF

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Questions Presented

I. Did the Three Judge Panel Err in finding that creating two split county House districts was permissible under Article II, Section 5(3) of the North Carolina Constitution and the holdings in *Stephenson I&II*?

II. Did the Three Judge Panel err in finding that Section 2 of the Voting Rights Act required creating a district in which neither the total minority population nor percentage of voters constitutes a numerical majority?

Statement of the Case

This matter was commenced by Appellants filing an action in Wake County Superior Court on May 14, 2004. The Plaintiffs were Pender County, and its Board of Commissioners in both their individual and official capacities. Because this was a case challenging the 2003 redistricting of the North Carolina House, it was assigned to a three judge panel appointed by former Chief Justice Lake pursuant to N.C.G.S. 1-267.1. The three judge panel appointed on May 24, 2004 consisted of the Honorable Howard E. Manning, Jr., the Honorable W. Erwin Spainhour, and the Honorable Quentin T. Sumner. The Panel conducted a hearing on a motion for preliminary injunction and denied the motion verbally, entering a written Order in September, 2004. No appeal was taken from the denial of the preliminary injunction.

After completion of discovery, appellants and appellees each filed motions for summary judgment on February 25, 2005. The three Judge panel conducted a hearing on August 30, 2005, entering a partial order on December 2, 2005. A Notice of Appeal was taken from the partial grant and denial of summary judgment on December 30, 2005. The parties entered a joint stipulation, after which the Panel entered a final Order and Judgment,

incorporating its earlier Order, on January 9, 2006. This Order found that because the Whole County provision of the North Carolina Constitution did not have to be adhered to because Section 2 of the Federal Voting Rights Act required the creation of a House district which did not contain a majority of either minority residents or voters. A notice of Appeal was filed on February 2, 2006, from the final Order. The parties settled the record on appeal on February 10, 2006. The settled Record on appeal was served on Febraury 24, 2006 and the printed record was mailed by the Honorable Clerk of the North Carolina Supreme Court on March 2, 2006.

Subsequent to the mailing of the Record on Appeal, Appellants Pender County, the Pender County Commissioners in their official capacity, F.D. Rivenbark and Eugene Meadows have withdrawn from this appeal. The remaining appellants are Dwight Strickland, Steve Holland and David Williams, who are citizens and registered voters in Pender County.

Statement of the Grounds for Appellate Review

This matter involves a challenge to an act of the North Carolina General Assembly redistricting legislative districts and was heard by a Three Judge Panel pursuant to N.C.G.S. 267.1. Pursuant to N.C.G.S. 120-2.5 appeal from the final ruling of the Three Judge Panel is directly to this Honorable Court.

Statement of the Facts

This case involves a challenge to the redistricting plan adopted by the North Carolina General Assembly during a special session on redistricting on November 25, 2003. R. p. 15. The Senate redistricting plan is not at issue, and the only House districts which have been challenged are districts 16 and 18. District 16 and district 18 are each comprised of a portion of Pender County and a portion of New Hanover County. R. p. 16

This Court is familiar with the history of legislative redistricting after the 2000 decennial census as reflected in *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (*Stephenson I*) and *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2002) (*Stephenson II*) and Appellants will not repeat it in great detail here. 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. R p. 34 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. R p. 13 In the redistricting plan proposed by the General Assembly in 2001, Pender County was to be split among 5 House and 3 Senate districts. R p. 14 This splintering of the County resulted in Pender County

submitting an amicus brief in *Stephenson I*. The majority opinion in *Stephenson I* recognized the plight in which Pender County was placed by the balkanization of its citizens by the legislative plan. 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). R p. 14

In November of 2003, the Pender County Board of Commissioners learned that legislative leaders were considering enacting a redistricting 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. R p. 27 The 2003 House redistricting plan which was adopted on November 25, 2003 split Pender County between House districts 16 and 18.

Pender County's 2000 census population of 41,082 is approximately 61.25% of the population needed for an ideal House district. R p. 37 Pender County and New Hanover County combined have sufficient population to support three house districts and have been "clustered" in the 2003 House plan. R p. 17 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. R. p. 16 Pender County is divided almost exactly in half, with 19,607 citizens in district 16 and 21,475 in district 18. It would have been possible to draw three districts in the Pender-New Hanover cluster and only have one district which crossed county lines by creating two within New Hanover County and one comprising all of Pender County and a portion of New Hanover County. R p. 18 Appellees contend that creating two split districts was necessary in order to comply with Section 2 of the Federal Voting Rights Act (42 U.S.C. 1973). District 18 has total Black population of 42. 89% and total Black voting age population of 39.36%. R p. 48.

ARGUMENT

The essential issue in this case, and for future legislative redistricting, is whether Section 2 of the Voting Rights Act (*42 U.S.C. 1973*) requires the creation of a district in which minority voters are neither a majority of the population or the voters. Appellants contend that the test for applying the VRA as set forth in *Thornburg v. Gingles,* 478 U.S. 30, 50-51, 106 S.Ct. 2752, 2766, 92 L.Ed.2d 25 (1986) establishes a bright line requiring a numerical majority. The Three Judge Panel agreed with Appellees that a bright line test should not be applied. However, the Panel also very frankly acknowledged that if it applied "the first prong of *Gingles* as a

'bright line' requirement that the minority group seeking Section 2 VRA relief must be a numerical majority, then this case is over and District 18 as presently drawn is 'toast'." R p. 163.

I. The Three Judge Panel erred in finding that creating two split county House districts was permissible under Article II, Section 5(3) of the North Carolina Constitution and the holdings in *Stephenson I&II*.

Assignments of Error Nos 4, 6, 7, 9, R pp. 190-91.

Because the Court is well aware of its 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 here, as here, attempted to disregard the commands of Article II, Section 5(3) of the North Carolina Constitution by any means available. This Court provided the guidelines to be used by the General Assembly in formulating constitutional redistricting plans in *Stephenson II* as 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 as drawn 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,* this 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. Given the multiple failures of the 2002 plan to comply with the *Stephenson* criteria, the findings with regard to the 18th district and the cutting of the New Hanover County boundary line in three locations were not necessary to find the plan as a whole invalid, but none of the conclusions made by Judge Jenkins were overturned by this Court. The findings are significant, however, because they establish that maximizing the percentage of minority voters does not justify ignoring the redistricting criteria set forth by the holdings in *Stephenson I&II.*

Here there can be no serious contention that absent the requirements of the VRA, addressed below, Pender County should be kept whole. The two county cluster of Pender-New Hanover has almost the exact population for three House districts. With Pender County having 61% of the population for a single House district, the clear requirement of the WCP and the holdings in *Stephenson I&II* is for two districts to be drawn in New Hanover County and one district to be comprised of all of Pender County and a portion of New Hanover County. This would result in a single split district, which is the minimum possible, and the maximum permitted under the WCP and *Stephenson I&II.*

II. The Three Judge Panel erred in finding that Section 2 of the Voting Rights Act required creating a district in which neither the total

> minority population nor percentage of voters constitutes a numerical majority.

Assignments of Error Nos. 3, 5, 8 10, R pp. 190-91

Under Article II, Section 5(3) of the North Carolina Constitution and the holdings in *Stephenson I&II*, Pender County must be placed in a single House district unless federal law requires otherwise. The only contested legal issue presented by this appeal is whether Section 2 of the Voting Rights Act requires that Pender County be split in order to draw a district more favorable for a minority candidate. The overwhelming majority of federal case law on this point makes it clear that Pender County need not be split in order to abide by Section 2 of the VRA.

There are three potential types of minority districts which could be found to exist under Section 2: (1) Majority-Minority Districts; (2) Coalition or Ability to Elect Districts; and (3) Influence Districts. *See Hall v. Virginia*, 276 F.Supp 2d 528, 533-34, *aff'd*, 385 F.3d 421 (4th Cir., 2004), *pet. disc. rev. denied*, 125 S.Ct. 1725, 161 L.Ed.2d 602, 73 USLW 3372, 73 USLW 3589, 73 USLW 3593 (2005). The second and third type of districts arise in situations where a minority group cannot constitute a numerical majority of an electoral district and are variations on the same theory. *Id.* For ease of discussion the "coalition/ability to elect" classification will be

referred to as a "coalition" district and the situation where there is not an actual ability to elect will be addressed as an "influence" district.

A. The percentage of minority voters fails to establish a Majority-Minority District.

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. Appellants readily acknowledge 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 leading case for determining when a minority majority district is required arose in North Carolina and established an initial 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). *Growe* also established that the three part test applies to single member districts. At the risk of belaboring the obvious, district 18 does not qualify as a majority minority district given that its Black population is 42.89%, Black voting age population is 39.09% and Black registered voters comprise 39.36% of the district.[1] Obviously, the first prong of the *Gingles* test is not met by district 18 if the test it is applied as stated by the United States Supreme Court.

The *Gingles* test is itself the first part of a two part process. After satisfying the three prongs of *Gingles*, a successful Section 2 plaintiff "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). For purposes of this appeal, Appellants are not contesting the other two prongs of the *Gingles* test or the totality of the circumstances criteria; therefore these criteria will not be addressed in this Brief.

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[1] Considerable analysis may be employed as to which population measure to use in determining whether a majority has been established, especially where a significant non-citizen population is involved, but given that under no measure is the 50% threshold reached, this issue need not be addressed. *See Valdespino v. Alamao Heights*, 168 F.3d 848, 853 (5th Cir. 1999)(evaluating which population measures have been used) *cert. denied*, 528 U.S. 1114 (2000).

B. Coalition Districts are not required under Section 2 of the VRA.

The Fourth Circuit Court of Appeals recently joined every other Federal Circuit Court of Appeals to make a final ruling on the issue of whether ability to elect districts are required by Section 2 of the VRA. *Hall v. Virginia*, 385 F.3d 421 (4th Cir., 2004), *pet. disc. rev. denied*, 125 S.Ct. 1725, 161 L.Ed.2d 602, (2005) . *Hall* involved a challenge in which the Plaintiffs contended that a redistricting plan which reduced the black voting age population of a district from 37.8% to 32.3 percent violated Section 2 of the VRA. The Fourth Circuit held "that Gingles establishes a numerical majority requirement for all Section 2 claims" and affirmed dismissal of the claim under Rule 12(b)(6). *Id.* at 423. The three judge panel declined to follow *Hall* because the opinion has not yet been affirmed by the United States Supreme Court, but the overwhelming weight of judicial authority supports the reasoning of the Fourth Circuit.

In addition to the Fourth Circuit decision in *Hall* the Fifth, Sixth, Seventh, Ninth and Eleventh Circuits have rejected arguments that the VRA requires creation of a district in which the minority population was not a majority: *Valdespino v. Alamao Heights*, 168 F.3d 848, 853 (5th Cir. 1999)(rejecting claim for district where Hispanics would make up less than

majority of the district) *cert. denied*, 528 U.S. 1114 (2000); *Cousin v. Sundquist*, 145 F.3d 818 (6th Cir. 1998) *cert. denied* 525 U.S. 1138 (1999) (rejecting claim that VRA required creation of district with 34% minority voting age population); *McNeil v. Springfiled Park District*, 851 F.2d 937 (7th Cir. 1988), *cert. denied*, 490 U.S. (1989)(VRA did not require district with 44% Black voting age population); *Romero v. Pomona*, 883 F.2d 1418, 1424 (9th Cir. 1989)("We are aware of no successful voting rights claim ever made without a showing that the minority group was capable of a majority vote in a designated single district."); *Negron v. City of Miami Beach*, 113 F.2d 1418, 1424 (11th Cir. 1989). One Circuit Court did remand for full discovery in order to keep the issue open. *Metts v. Murphy,* 347 F.3d 346 (1st Cir. 2003), *vacated and replaced by* 363 F.3d 8 (1st Cir. 2004) (*en banc*). While there is considerable discussion of Section 2 by the Metts Court, the First Circuit actually deferred reaching any decision, preferring to wait for the development of a complete record. *Id.* at 12 ("perhaps summary judgment will suffice depending on how the evidence develops and the ultimate theory or theories offered by both sides--theories that hopefully will go beyond dueling claims as to what *Gingles* means.") The virtually uniform rejection of influence or coalition districts by Circuit Courts[2] is based on the

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[2] The Supreme Court of the State of New Jersey in a 4-3 decision in *McNeil v.*

precedent established by Gingles, the impossibility of a meaningful standard in the absence of the majority test, and review of the language of Section 2 itself, which is discussed below.

The plain language of Section 2 of the VRA does not support a conclusion that coalition districts are required. The statute simply prohibits "voting qualification or prerequisite to voting or standard, practice or procedure which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42. U.S.C. Sec. 1973(a). A violation occurs when it is shown that the members of the protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42. U.S.C. Sec. 1973(b). Because Section 2 speaks only in terms of the protected class, any argument which incorporates members outside the class, such as crossover voters, necessarily falls outside the plain language of

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Legislative Apportionment Comm'n, 828 A.2d 840 (N.J. 2003), *cert. Denied,* 540 U.S. 1107, 157 L. Ed. 2d 893 (2004) held in dicta that the bright line test was not to be followed. *McNeil* involved a challenge to the creation of three state senate districts in the Newark and Jersey City areas, instead of the two required by the New Jersey Constitution. The Court first determined that the one person one vote standard required a redistricting plan which disregarded the municipal boundary provision of the New Jersey constitution. The denial of certiorari by the United States Supreme Court has no impact on the VRA issue because there were three independent grounds upon which the New Jersey Supreme Court based its ruling. It also bears mentioning that unlike the North Carolina Supreme Court, the New Jersey Supreme Court determined to simply invalidate the county and city line restrictions imposed by the New Jersey constitution. There was no attempt to combine the provisions of the state constitution with federal requirements as was done in the *Stephenson* cases.

the statute. *Nixon v. Kent County*, 76 F.3d 1381, 1392 (6th Cir. 1996)(requiring bi-racial coalition districts would "transform the VRA from a statute that levels the playing field for all races to one that forcibly advances contrived interest group coalitions"). Appellees do not argue that the 2003 plan permits members of the protected class to elect the candidate of their choosing, instead arguing that the plan permits the minority group to join with members of a non-protected class to jointly elect a candidate upon whom both groups agree. Such biracial coalitions are not protected under the plain language of the VRA.

The final reason for this Court to follow the overwhelming majority of Courts which have considered the issue of coalition districts is that it avoids a conflict with the Fourth Circuit in the interpretation of a federal statute. To adopt the position of the Three Judge Panel will be to create a situation in which the a complaint which asserts a right under of a federal statute will be subject to dismissal on the pleadings, while that same complaint will be entitled to a full trial in our State courts. Given that the VRA exists because of the fear that the rights of minority citizens will not be protected by the States, such a holding would entirely invert the Statute. Rejecting the bright line test will force our courts to attempt to perform the impossible calculus of what percentage of minority voters as well as non-minority voters will be

required to create a safe coalition district. The result will be never ending litigation which can be avoided by following the *Stephenson* criteria and a bright line test.

C. Influence Districts are not required under Section 2 of the VRA.

The final type of district which has been deemed possible under Section 2 of the VRA, at least in academic circles, is an influence district. In an influence district, the minority group merely has to have sufficient numbers to influence an election, but would not be required to show that it could elect a candidate of its choosing even with the addition of reliable crossover votes. *Hall v. Virginia*, 276 F.Supp 2d 528, 533-34, *aff'd*, 385 F.3d 421 (4th Cir., 2004), *pet. disc. rev. denied*, 125 S.Ct. 1725, 161 L.Ed.2d 602, 73 USLW 3593 (2005). A three judge panel considering a challenge to the redistricting of the New York Senate agreed "with the nearly universal opinion of federal courts that section 2 of the VRA does not require the creation of influence districts where minority voters will not be able to elect candidates of choice." *Rodriguez v. Pataki,* 308 F.Supp. 2d 324, 378, *aff'd* 125 S.Ct. 627, 160 L.Ed.2d 454, 73 USLW 3122, 73 USLW 3315, 73 USLW 3321 (2004). Federal Courts have refused to permit influence claims because of the complete lack of standards for determining what

constitutes influence would make such claims judicially unmanageable. *Id.* While the three judge panel did not hold and Appellees did not argue below that district 18 would be required as a mere influence district, the issue is addressed out of abundance of caution.

CONCLUSION

Appellants ask that this Court remand to the three judge panel for entry of an Order finding that districts 16 and 18 do not comply with the North Carolina Constitution because Section 2 of the voting rights act does not require creating a minority majority district where the minority population does not constitute a numerical majority. Upon remand, the three judge panel should permit the North Carolina General Assembly sufficient time to redraw districts 16 and 18 in compliance with Article II, Section 5(3) of the North Carolina Constitution and the holdings in *Stephenson I&II*.

Respectfully submitted, this the 3rd day of April, 2006.

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Certificate of Service

I hereby certify, pursuant to Rule 26 of the Rules of Appellate Procedure, that as Counsel for Plaintiffs/Appellants I have this day served a copy of the Appellants' Brief on counsel for Defendants/Appellees via Unites States Mail, postage prepaid, at the address listed below:

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This the 3rd day of April, 2006.

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