IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Consolidated Civil Action

RALEIGH WAKE CITIZENS ASSOCIATION, et al. Plaintiffs, v. WAKE COUNTY BOARD OF ELECTIONS, Defendant.	No. 5:15-cv-156

CALLA WRIGHT, et al., Plaintiffs, v. THE STATE OF NORTH CAROLINA, et al., Defendants.	No. 5:13-cv-607

NOTICE OF FILING EMERGENCY PETITION FOR WRIT OF MANDAMUS

The Plaintiffs in these consolidated cases hereby give notice pursuant to Rule 21(a)(1) of the Federal Rules of Appellate Procedure of their having filed the attached Emergency Petition for Writ of Mandamus and its exhibits today with the Fourth Circuit Court of Appeals.

Respectfully submitted this 8th day of August, 2016.

/s/ Anita S. Earls
Anita S. Earls
N.C. State Bar No. 15597
Allison J. Riggs
N.C. State Bar No. 40028
SOUTHERN COALITION
FOR SOCIAL JUSTICE
1415 West Highway 54, Suite 101
Durham, NC 27707
919-794-4198
anita@southerncoalition.org
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing NOTICE OF FILING EMERGENCY PETITION FOR WRIT OF MANDAMUS with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel and parties of record herein.

This the 8th day of August, 2016.

/s/ Anita S. Earls
Anita S. Earls
N.C. State Bar No. 15597
Southern Coalition for Social Justice
1415 W. Highway 54, Suite 101
Durham, NC 27707
Telephone: (919) 323-3380
Facsimile: (919) 323-3942
Email: Anita@southerncoalition.org
Counsel for Plaintiffs

No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

IN RE RALEIGH WAKE CITIZENS ASSOCIATION; JANNET B. BARNES; WILLIE J. BETHEL; ANN LONG CAMPBELL; BEVERLEY S. CLARK; WILLIAM B. CLIFFORD; AJAMU G. DILLAHUNT; ELAINE E. DILLAHUNT; BRIAN FITZSIMMONS; GREG FLYNN; DUSTIN MATTHEW INGALLS; AMY T. LEE; LUCINDA H. MACKETHAN; ERVIN PORTMAN; SUSAN PORTMAN; JANE ROGERS; BARBARA VANDENBERGH; JOHN G. VANDENBERGH; AMYGAYLE L. WOMBLE; PERRY WOODS; CALLA WRIGHT; and CONCERNED CITIZENS FOR AFRICAN-AMERICAN CHILDREN, d/b/a Coalition of Concerned Citizens for African-American Children,

Petitioners,

v.

WAKE COUNTY BOARD OF ELECTIONS,

Respondents.

On Appeal from the United States District Court
for the Eastern District of North Carolina

EMERGENCY PETITION FOR WRIT OF MANDAMUS

I. RELIEF SOUGHT

Pursuant to Rule 21 of the Federal Rules of Appellate Procedure and Local Rule 21(a), Plaintiffs-Appellants respectfully move this Court to enter a writ of

mandamus to execute its mandate issued August 3, 2016 in *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, Nos. 16-1270 & -1271, Doc. No. 63 (4th Cir. July 1, 2016) (slip op., at 44) (hereinafter "*RWCA*"), or in the alternative, to remand the matter to another Judge of the United States District Court for the Eastern District of North Carolina to execute immediately the mandate of this court.

As more fully detailed below, this Court was clear in its written opinion issued July 1, 2016 that the trial court was to enter an *immediate* injunction on Plaintiffs' one-person, one-vote claims. *RWCA*, No. 16-1270, Doc. No. 63 (4th Cir. July 1, 2016) (slip op., at 44). Further, the Court was clear that it saw no reason why elections in 2016 should proceed under the election systems found to be unconstitutional by this Court. *Id.* (slip op., at 44 n.13). Finally, in its earlier opinion in these consolidated appeals this Court explained that, should the Plaintiffs prevail, additional parties were not required to implement a remedy and the trial court could "mandate that the Board of Elections conduct the next election according to the scheme in place prior to the Session Law's enactment until a new and valid redistricting plan is implemented." *Wright v. North Carolina*, 787 F.3d 256, 262 (4th Cir. 2015).

Following this Court's denial of the Appellee's Petition for Rehearing En Banc, the mandate issued August 3, 2016, but the trial court has, as of this date,

failed to issue the injunction required on Plaintiffs' claims. Despite an in-person status conference and two rounds of briefing by Plaintiffs, the trial court has failed to enjoin the use of the unconstitutional election systems for 2016, putting in jeopardy the ability of Plaintiffs to have a remedy that vindicates their rights. Indeed, despite Defendant's representation that August 10 is the date by which a filing period must close so that ballots may be prepared in time for the November general election, the trial court's most recent order continues to seek further information about matters that Plaintiffs contend are beyond the court's jurisdiction in these circumstances.

Because time is of the essence, and the court below has failed to faithfully carry out the letter and spirit of this Court's mandate in this case, Plaintiffs have no other recourse but to seek a writ from this Court directing the trial court to enter an immediate order declaring the statutes establishing new systems of election for the Wake County Board of Education and the Wake County Board of County Commissioners to be unconstitutional and enjoining the use of those districts for any future elections. Further, the trial court should order the Wake County Board of Elections to return to the prior, constitutional systems of election for both bodies and:

1. Declare the primary held for County Commission super-districts A & B in March 2016 to be void as held under unconstitutional districts;

2. Direct the Wake County Board of Elections to immediately administer open a one-week filing period for the five seats on the Wake County Board of Education that were last elected in 2011 for election by plurality on November 8, 2016.

3. Direct the Wake County Board of Elections to seek the assistance of the North Carolina State Board of Elections to slightly modify administrative deadlines to allow the Wake County Board of Elections to comply with the court's order.

II. ISSUES PRESENTED

A. Has the trial court failed to implement this Court's mandate in *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, No. 16-1270 (4th Cir. July 1, 2016).

B. Are the districts found to be unconstitutional in *RWCA*, severable from the remaining portions of the statutes implementing new election methods for the Wake County Board of Education and Wake County Board of County Commissioners where there is no severability clause and the remaining provisions cannot be implemented without them?

C. Does the trial court have the authority to impose a new district system proposed by individual legislators where there already exist duly enacted, constitutional districts and election systems for the Board of Education and Board of County Commissioners?

III. STATEMENT OF FACTS

On August 22, 2013 Plaintiffs in *Wright v. North Carolina* filed suit seeking to enjoin the use of a new election system for the Wake County Board of Education enacted by the North Carolina General Assembly over the objection of a majority of the Board on the grounds that the districts violated the one-person, one-vote requirement of the equal protection clauses of the Fourteenth Amendment to the U.S. Constitution and Article 1, § 19 of the North Carolina Constitution. 5:13-cv-607, ECF No. 1 (E.D.N.C. Aug. 22, 2013) (Complaint). Following dismissal of the action on March 17, 2014, Plaintiffs appealed. *Wright*, No. 5:13-cv-607, ECF Nos. 38 (Order), 40 (Notice of Appeal). While that appeal was pending, the North Carolina General Assembly enacted legislation requiring the use of the same system for the Wake County Board of County Commissioners on April 2, 2015. *See* 2015 N.C. Sess. Laws 4. On April 9, 2015 the Raleigh Wake Citizens Association and another set of individual voters filed suit challenging that legislation on similar one-person, one-vote grounds and raised an additional claim that racial considerations predominated in the drawing of one of the districts.

Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections, No. 5:15-cv-156, ECF. No. 1 (E.D.N.C. Apr. 9, 2015) (Complaint) (hereinafter "*Raleigh Wake Citizens Ass'n*").

On May 27, 2015 the Fourth Circuit issued its ruling reversing the lower court's dismissal of Plaintiffs' claims in the first case. *Wright v. North Carolina*, 787 F.3d 256 (4th Cir. 2015). The two cases were consolidated and a bench trial was held on December 16-18, 2015. *Raleigh Wake Citizens Ass'n*, ECF No. 36 (Oct. 1, 2015 Order). On February 26, 2016, the trial court ruled for Defendant on all claims and Plaintiffs appealed. *Id.*, ECF No. 64 (Order); ECF No. 66 (Notice of Appeal). On expedited review, the Fourth Circuit reversed in part and affirmed in part with an opinion issued July 1, 2016. *RWCA*, No. 16-1270, Doc. No. 51 (Opinion).

On July 8, 2016, the District Court issued an Order requesting the parties' views on how the court should proceed on remand, including the parties' views on the issues of remedy and a schedule for devising, considering, and adopting any court-ordered remedial plan. *Raleigh Wake Citizens Ass'n*, ECF No. 78 at 8-9 (Order Requesting Remedy Responses) (filed herewith as Exhibit A); *see also id.*, ECF Nos. 82 (Pls.' Response), 83 (Def.'s Response) (filed herewith as Exhibits B-C). The Court also directed service of the Order on non-parties the North Carolina Board of Elections, Speaker of the House, and the President Pro Tempore of the

Senate, asking the Speaker and President Pro Tempore to advise the court, and asking the State Board of Elections to indicate its "willingness to act under North Carolina General Statute § 163-22.2 to ensure the timely election of the Wake County School Board and Wake County Board of Commissioners." *Id.*; *see also id.*, ECF No. 81 (SBE Response) (filed herewith as Exhibit D).

On July 14, 2016, Defendant petitioned the Fourth Circuit for rehearing en banc, Plaintiffs filed a motion asking the court to issue the mandate forthwith, and the Speaker of the House and the President Pro Tempore of the Senate of the North Carolina General Assembly filed a motion to intervene. *RWCA*, Doc. Nos. 53 (Pet. for Reh'g), 56-1 (Mot. to Issue Mandate Forthwith), 55-1 (Mot. to Intervene). This Court denied the petition for rehearing en banc on July 26, 2016 and on August 3, 2016 denied the motion to intervene. *RWCA*, Doc. Nos. 62 (denying Pet. for Reh'g), 64 (denying Mot. to Intervene). The mandate issued per normal procedure on August 3, 2016. *RWCA*, Doc. No. 63.

In the meantime, the District Court had issued an Order on July 27, 2016, setting a status conference concerning the applicable remedy for Tuesday, August 2, 2016. *Raleigh Wake Citizens Ass'n*, ECF No. 86 at 1 (Order Setting Hr'g) (filed herewith as Exhibit E). In that Order, the court requested that the counsel for the Speaker of the House and President Pro Tempore of the Senate be present and address the court concerning when they would be able to submit illustrative maps

to the court. *Id.* The court also requested that counsel for the North Carolina State Board of Elections, also not parties in the case, indicate when they would be able to submit a proposed remedial plan. *Id*. at 2.

At the August 2, 2016 status conference, counsel for Plaintiffs argued that the Opinion in this case was clear concerning the need to issue an immediate injunction upon issuance of this Court's forthcoming mandate, preventing any future use of the unconstitutional election districts. *See* Tr. of 8/2/16 Hr'g at 22:19-24:7 (filed herewith as Exhibit F). Further, counsel for Plaintiffs argued that where fully constitutional districts already exist for both bodies and the legislature has not acted to adopt alternative plans, the prior, constitutional district system should be reinstituted because the trial court does not have the authority to adopt its own set of districts. *See id.* at 19:2-14. The Court granted Speaker Moore and President Pro Tem Berger leave to submit "illustrative maps" for the Wake County School Board and County Commission. *Id.* at 41:7-23. Defendant Wake County Board of Elections stated that while there "may be a little bit of give" in the 30-day period required to prepare ballots and that the State Board of Elections has the authority to modify these deadlines, August 10 was the date by which, under current law without any modifications, the Wake County Board of Elections would need to have final ballot information including candidate names and whether there are potential write-in candidates. *Id.* at 7:10-9:4.

Plaintiffs argued in court and in their briefing that the districts are not severable from the remainder of the statutes in each instance, and also outlined a process for returning to the prior methods of election for the Wake County School Board and Board of County Commissioners. *See id.* at 25:15-26:15, 27:17-28:11, 45:18-23; *Raleigh Wake Citizens Ass'n*, ECF Nos. 82 (Pls.' Response to July 8 Order) (filed herewith as Exhibit B), 87 (Pls.' Response to July 27 Order) (filed herewith as Exhibit G), 96 (Pls.' Response to August 4 Order) (filed herewith as Exhibits H).

Following the status conference, on August 3, Speaker Moore and President Pro Tem Berger filed with the trial court maps, statistics, and electronic files purporting to document an alternative set of seven single-member districts and two super districts in Wake County. *Raleigh Wake Citizens Ass'n*, ECF No. 91 (Notice). On August 4, 2016 the trial court issued an Order "declaring that the population deviations in the redistricting plans in Session Law 2013-110 for the Wake County School Board and Session Law 2015-4 for the Wake County Board of Commissioners violate the equal protection clauses of the Fourteenth Amendment to the United States Constitution and Article 1 § 19 of the North Carolina Constitution." *Raleigh Wake Citizens Ass'n*, ECF No. 93 (Order) (filed herewith as Exhibit I). The Order does not enjoin the use of the election systems established by those laws. Instead, the trial court invited yet more submissions

from the parties, and from the non-parties Speaker Moore and President Pro Tem Berger and the State Board of Elections on the remedy, "including the nature and scope of injunctive relief." *Id.* at 2. On August 5, Plaintiffs filed a motion to strike the filing of an illustrative set of districts by non-parties to the case that were not enacted by the North Carolina General Assembly, and also filed a second, supplemental memorandum of law concerning the trial court appropriate jurisdiction in these circumstances. *Raleigh Wake Citizens Ass'n*, ECF Nos. 94 (Mot. to Strike), 95 (Mem. in Support). No other parties or non-parties filed further material in response to the Court's August 4 Order.

On Sunday, August 7, 2016, the trial court issued another Order inviting the Defendant Wake County Board of Elections, but not Plaintiffs, to file a response with the court ranking four possible scenarios for the November 2016 elections in terms of their feasibility. *Raleigh Wake Citizens Ass'n*, ECF No. 97 (Aug. 7, 2015 Order) (filed herewith as Exhibit J). One of the four scenarios on which the court requested information would "use the redistricting plan that the Fourth Circuit declared unconstitutional." *Id.* at 2. The trial court also invited the Defendant Wake County Board of Elections to inform the court "if it is infeasible or impossible to have orderly elections on November 8, 2016 under any of the four options." *Id.* Thus, to date, the District Court has failed to follow the mandate of this Court.

IV. REASONS WHY THE WRIT SHOULD ISSUE

The party seeking a writ of mandamus must demonstrate each and every one of the following requirements: (1) he has a clear and indisputable right to the relief sought; (2) the responding party has a clear duty to do the specific act requested; (3) the act requested is an official act or duty; (4) there are no other adequate means to attain the relief he desires; and (5) the issuance of the writ will effect right and justice in the circumstances. *Earley v. Braxton (In re Braxton)*, 258 F.3d 250, 261 (4th Cir. 2001).

Here, the Petitioners are entitled to the immediate relief established by this Court's order and mandate in *RWCA*. "Once a case has been decided on appeal and a mandate issued, the lower court may not 'vary it [the mandate] or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.'" *Stamper v. Baskerville*, 724 F.2d 1106, 1107 (4th Cir. 1984) (quoting *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255–56, 16 S.Ct. 291, 293, 40 L.Ed. 414 (1895)); *see also, Doe v. Chao*, 511 F.3d 461 (4th Cir. 2007); *Redic v. Gary H. Watts Realty Co.*, 862 F.2d 314 (4th Cir. 1988).

Not only must the district court follow the express terms of the mandate, the court must also implement the spirit of the mandate. "When this court remands for

further proceedings, a district court must, except in rare circumstances, implement both the letter and spirit of the mandate, taking into account our opinion and the circumstances it embraces." *United States v. Pileggi*, 703 F.3d 675, 679 (4th Cir. 2013) (internal alteration, quotation marks, and citation omitted).

A. THE TRIAL COURT HAS FAILED TO IMPLEMENT THIS COURT'S MANDATE

To date, the only relief that the trial court has ordered, despite being on notice of this Court's opinion since July 1, 2016, and on notice of the denial of rehearing en banc since July 26th, is an order declaring the deviations in the districts to be unconstitutional. Ex. I at 2. Enjoining merely the deviations in the unconstitutional plans is not the relief ordered by the Court of Appeals, and has not been the relief routinely afforded to prevailing plaintiffs in one person, one vote cases. *See, e.g., Larios v. Cox*, 300 F. Supp. 2d 1320, 1356 (N.D. Ga.), summarily aff'd, 124 S. Ct. 2806 (2004) (enjoining further use of the challenged districts, not just their population deviations, in future elections).

Plaintiffs are entitled to complete relief on their one person, one vote claims, including relief from the clearly "pretextual" fruits of the unconstitutional tree. *RWCA*, No. 16-1270 (slip. op., at 34). As the Fourth Circuit has recently ruled: "courts are tasked with shaping '[a] remedial decree . . . to place persons' who have been harmed by an unconstitutional provision 'in the position they would have occupied in the absence of [discrimination].'" *N.C. State Conf. of the NAACP*

v. North Carolina, No. 16-1468, 2016 U.S. App. LEXIS 13797, *73 (July 29, 2016) (quoting *United States v. Virginia*, 518 U.S. 515, 547 (1996)). Here, the discrimination by the General Assembly was on the basis of partisan affiliation, but the principle remains the same. Just as in other civil rights actions involving claims of discrimination, "the proper remedy for a legal provision enacted with discriminatory intent is invalidation." *Id.* In this case it means Plaintiffs are entitled to a declaration that the two statutes challenged in this case are unconstitutional under the equal protection clauses of the North Carolina and United States Constitutions.

As noted in the July 8, 2016 Order, the Fourth Circuit remanded "with instruction to enter immediately judgment for Plaintiffs, granting both declaratory relief and a permanent injunction, as to the one person, one vote claims." *RWCA*, 2016 U.S. App. LEXIS 12136, at *45 (footnote omitted). This instruction is further reinforced by the accompanying footnote which states "[w]e see no reason why the November 2016 elections should proceed under the unconstitutional plans we strike down today." *Id.*, at*45 n.13.

The District Court is also bound by the instructions from the Fourth Circuit when this issue arose in the context of whether the Wake County Board of Elections was a sufficient defendant to allow Plaintiffs full relief should they prevail on any of their claims. *See Wright*, 787 F. 3d at 262-63. The ruling of the

Fourth Circuit did not call for inquiry into the opinions of non-parties for the implementation of a remedy. The Fourth Circuit ruled that the Board of Elections is a sufficient party for a remedy and that no new districts need to be drawn in order for a valid election to occur if Plaintiffs succeed. *Id*. Specifically, the Court held:

> Plaintiffs counter that if the Proposed Defendants are not party to their suit, there will be no mechanism for forcing a constitutionally valid election, should they succeed in enjoining the Session Law. This assertion is, however, incorrect. The district court could, for example, mandate that the Board of Elections conduct the next election according to the scheme in place prior to the Session Law's enactment until a new and valid redistricting plan is implemented.

Id. Accordingly, Plaintiffs seek a writ of mandamus to require the trial court to implement this Court's mandate and enjoin the use of the method of election established by the unconstitutional statutes and to clarify for the Defendant Wake County Board of Elections that they should conduct the next elections in 2016 "according to the scheme in place prior to the Session Law's enactment." *Wright*, 787 F.3d at 262.

Once the mandate of the Fourth Circuit Court of Appeals was issued in this case on August 2, 2016, the District Court was obligated to implement the Fourth Circuit's judgment and enjoin the use of the unconstitutional election systems established by Session Law 2013-110 and Session Law 2015-4.

B. <u>THE UNCONSTITUTIONAL DISTRICTS ARE NOT SEVERABLE FROM THE REST OF THE STATUTE</u>

With regard to both of the statutes found unconstitutional, because the remainder of the statute cannot be implemented without the districts at issue, the entire statute is unconstitutional. State law determines the severability of unconstitutional portions of a state law in federal court. *Sons of Confederate Veterans v. Vehicles*, 288 F.3d 610, 627 (4th Cir. 2002); *Environmental Tech. Council v. Sierra Club*, 98 F.3d 774, 788 (4th Cir. 1996); *see also Department of Treasury v. Fabe*, 508 U.S. 491, 509-10 (1993) (state law governs severability of a state statute). Under North Carolina law, when one portion of a statute is declared unconstitutional or is otherwise stricken, the surviving portion will be given effect only if it is severable. *See Flippin v. Jarrell*, 301 N.C. 108, 117-18, 270 S.E.2d 482, 488-89 (1980); *Constantian v. Anson County*, 244 N.C. 221, 227-28, 93 S.E.2d 163, 168 (1956).

In *State ex rel. Andrews v. Chateau X, Inc.*, 296 N.C. 251, 259-60, 250 S.E.2d 603, 608 (1979), the North Carolina Supreme Court identified two factors to be considered in assessing severability: (1) whether the remaining portions of the statute are capable of being enforced on their own; and (2) whether there is legislative intent to enforce the remainder, "particularly . . . whether that body would have enacted the valid provisions if the invalid ones were omitted." Moreover, the North Carolina Supreme Court has emphasized the second factor, holding that when a portion of a statute is stricken, the whole must fall absent a

clear legislative intent to the contrary: "when the statute, or ordinance, could be given effect had the invalid portion never been included, it will be given such effect if it is apparent that the legislative body, had it known of the invalidity of the one portion, would have enacted the remainder alone." Jackson v. Guilford Cnty. Bd. of Adjustment, 275 N.C. 155, 168-69, 166 S.E.2d 78, 87 (1969); see also Pope v. Easley, 354 N.C. 544, 556 S.E.2d 265 (2001) (applying *Jackson* to a state statute that had a severability clause).

In determining severability, the intent of General Assembly may be indicated by the inclusion of a severability clause. *Fulton Corp. v. Faulkner*, 345 N.C. 419, 421, 481 S.E.2d 8, 9 (1997). However, even where there is a severability clause, the court looks to the act as a whole and will not use a severability clause to "vary and contradict" the express terms of a statute. *Sheffield v. Consolidated Foods Corp.*, 302 N.C. 403, 421-22, 276 S.E.2d 422, 434-35 (1981).

Here, neither of the statutes at issue contains a severability clause. See 2013 N.C. Sess. Laws 110; 2015 N.C. Sess. Laws 4. The districts that were declared unconstitutional are an integral part of the election systems established by the statutes. It is not possible to implement the new system without district boundaries. In these circumstances, there is no part of the statute that is severable, and there is no indication whatsoever that the North Carolina General Assembly

intended that any portion of either statute be implemented without the districts they drew. Thus, neither statute meets the Jackson test for severability under North Carolina law.

Contrary to this straightforward application of state law, the trial court's approach to the relief in this case assumes severability and therefore does not comply with this Court's mandate. In affording Plaintiffs declaratory relief only as the numerical deviations resulting from the unconstitutional redistricting plans, the trial court is deciding the question of whether the challenged session laws are severable without addressing it. At the very least, the trial court must consider North Carolina law on severability, examine the statutes at issue, and review whether the legislature would have enacted the statutes without the unconstitutional districts.

C. THE TRIAL COURT CANNOT IMPOSE ITS OWN DISTRICTS

Any new plan not duly enacted by the North Carolina General Assembly cannot be imposed as a remedial plan. Where there already exist fully constitutional and previously implemented districts for the Wake County School Board and Board of County Commissioners, the Court has no power or authority to order any remedial districts and to do so could be reversible error. *See Cleveland Cnty. Assoc. for Gov't by the People v. Cleveland Cnty. Bd. of Comm'rs*, 142 F.3d 468 (D.C. Cir. 1998) (vacating decree entered where existing method of election

was not contrary to federal law); *see also, McGhee v. Granville Cnty,* 860 F.2d 110, 120 (4th Cir. 1988) (court cannot impose its own plan instead of the county's remedial plan unless the county's plan is itself unconstitutional).

Where there already is a constitutional redistricting plan for the election of members of the Wake County Board of Education and Board of County Commissioners, it is important to recall the frequent exhortations of the United States Supreme Court that redistricting "be undertaken by a district court only as a last resort." *Lawyer v. Dep't of Justice*, 521 U.S. 567, 586 (1997) (citing *White v. Weiser*, 412 U.S. 783 (1973))." Because constitutional districts already exist, the trial court need not, and indeed, should not take that last resort of drawing its own plan. For a recent example of a court ordering such a reversion to prior constitutional plans in the one person, one vote context, the Court need look no farther than the Middle District of North Carolina, where plaintiffs challenging a local redistricting plan enacted by the same legislature obtained a preliminary injunction prohibiting the challenged session law's implementation and ordering that the prior plans be used for upcoming elections. *See City of Greensboro v. Guilford Cnty. Bd. of Elections*, 120 F. Supp. 3d 479 (M.D. N.C. 2015).

The judiciary's reasons for assiduously avoiding unnecessary engagement in redistricting are multiple. Federal court redistricting represents "a serious intrusion on the most vital of local functions." *Miller v. Johnson*, 515 U.S. 900, 915 (1995).

It is well settled that 'reapportionment is primarily the duty of and responsibility of' the legislature or legislative body that traditionally conducts redistricting. *Chapman v. Meier* 420 US 1, 27 (1975). Thus, judicial redistricting by federal courts is an "unwelcome obligation," *Connor v. Finch*, 431 U.S. 407, 415 (1977), and should be avoided if not absolutely necessary. For the trial court to arbitrarily choose one state legislator's plan over another's, that is, for example, to choose Senator Berger and Representative Moore's plan over Representative Gill's plan, represents the court deciding what districts and what election method should be used rather than the entities under state law authorized to make that choice.

It is widely acknowledged that redistricting is a political matter that is properly left to the political branches and that redistricting by the courts is to be avoided. *See Hall v. Louisiana*, 108 F. Supp. 3d 419, 423 (M.D. La. 2015) ("To be sure, the U.S. Supreme Court has made clear that redistricting is primarily within the province of the state legislature."); *See also, Abrams v. Johnson*, 521 U.S. 74, 101 (1997) ("[t]he task of redistricting is best left to state legislatures, elected by the people and as capable as the courts, if not more so, in balancing the myriad factors and traditions in legitimate districting policies."); *White v. Weiser*, 412 U.S. 783, 794 (1973) ("From the beginning, we have recognized that 'reapportionment is primarily a matter for legislative consideration and determination."). It would be highly improper for the trial court to select a redistricting plan and method of

election to replace the system already in place that has been used by Wake County voters since 2011.

The prior districts are part of a plan that is entirely constitutional and should be implemented by the District Court. Typically in redistricting cases, the prior redistricting plan is also unconstitutional because it no longer complies with one-person, one-vote using the most current census data. However, in this unusual case where a mid-decade re-redistricting has occurred, the prior plan is a constitutional plan and can be used. The prior districts represent the judgment of the bodies involved regarding how their districts should be drawn. They are known to the voters and have previously been implemented by the Defendant Board of Elections. In these circumstances, the District Court was obligated to allow the State Board of Elections to administratively return to the prior system of election and newly drawn districts for the school board and county commission were not required. The only remedy the District Court had the authority to implement was a permanent injunction prohibiting the use of the unconstitutional election systems and a writ of prohibition is necessary to regulate the District Court to its proper authority.

D. TIME IS OF THE ESSENCE AND PETITIONERS HAVE NO OTHER MEANS OF OBTAINING RELIEF

Because elections for both the Board of Education and Board of Commissioners are imminent and the court's mandate has yet to be followed, it is

critical that this writ issue. The trial court's four orders to date since this Court's finding that the statutes at issue are unconstitutional make clear that the trial court is not carrying out the spirit or the letter of the law of this case. All of the arguments and authorities presented in this Petition have been brought to the attention of the trial court, to no avail. This is not a situation where Petitioners can await a final judgment from the trial court implementing the mandate and proceed with an appeal at that time to obtain the necessary relief.

Returning to the prior method of election for both governing bodies in Wake County is straightforward and feasible if done immediately. For the Board of County Commissioners, the changes required at this point to return to the prior constitutional method of election are minimal. In order to return that Board to the structure and system in place before Session Law 2015-4 was enacted, this year's at-large elections for the three commission seats from residency districts should proceed, electing those members to four-year terms. The filing period has already closed for candidates for the at-large seats from existing residency districts for the Board of Commissioners. Those seats are using the prior, constitutional districts, see 2015 N.C. Sess. Laws 4 § 1.(b), and there is no need to reopen filing or do anything different to change that election process already underway. By virtue of the mandate issuing in this case, the primary that occurred in super-districts A and B in March 2015 is void because those are unconstitutional districts.

For the Wake County School Board, the State Board of Elections should direct the local board to take steps to return to the prior constitutionally permissible system, which included odd-year elections with staggered terms, using the single-member districts enacted in 2011. To accomplish this, the five school board seats elected in 2011 should be open for election in November 2016 for three-year terms to prevent those members from holding over any longer and to prevent the entire board from being up for election at the same time. Cf. N.C. Gen. Stat. § 115C-37(a) ("The terms of office of the members [of county boards of education] shall be staggered so as nearly equal to one half as possible shall expire every two years."). The four seats elected in 2013 can be open for election in the fall of 2017 according to the normal schedule that they would have had before Session Law 2013-110. This would return the Board to a 5-4 stagger of four-year terms each. The November 2016 election would allow for an August filing period, and would require non-partisan election by plurality rather than a run-off. This procedure provides the most efficient return to the prior systems with the least disruption possible for voters.

The right to vote is one of the most fundamental rights in our democracy and is thus afforded special protections. *See Reynolds*, 377 U.S. at 554-55, 563; *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined."). As such, any impediment or

abridgment of the right to vote is an irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). There are already constitutional plans available from 2011 for use and proceeding under the proposed plan will cause Plaintiffs and other Wake County voters to suffer irreparable injury if they are forced to participate in elections using unconstitutional districts. *See Larios v. Cox*, 305 F. Supp. 2d 1335, 1344 (N.D. Ga. 2004) ("If the court permits a stay, thereby allowing the 2004 elections also to proceed pursuant to unconstitutional plans, the plaintiffs and many other citizens in Georgia will have been denied their constitutional rights in two of the five elections to be conducted under the 2000 census figures. ... Accordingly, we find that the plaintiffs will be injured if a stay is granted because they will be subject to one more election cycle under unconstitutional plans.").

Granting the writ is will secure Plaintiffs' rights and serve the public interest. It will minimize voter confusion and disruption to the election process by ensuring that this litigation is concluded very close to the fast approaching existing deadline of August 10 for ballot preparation. This is the last deadline that proceeds the planned mailing of military, overseas and absentee ballots by the Wake County Board of Elections on September 9. The Writ should issue with all possible haste so that the election may proceed with a lawful remedy that adheres to the decisions already made by the Fourth Circuit.

CONCLUSION

For these reasons Petitioners respectfully move this Court to enter a writ of mandamus as specified above.

Respectfully submitted this 8th day of August, 2016.

/s/ Anita S. Earls___
Anita S. Earls
N.C. State Bar No. 15597
anita@southerncoalition.org
Allison J. Riggs
N.C. State Bar No. 40028
allison@southerncoalition.org
SOUTHERN COALITION
FOR SOCIAL JUSTICE
1415 W. Highway 54, Suite 101
Durham, NC 27707
Telephone: 919-323-3380
Facsimile: 919-323-3942

Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

****

I certify that on August 8, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Charles F. Marshall, III
Matthew B. Tynan
Jessica Thaller-Moran
Brooks Pierce McLendon Humphrey & Leonard, LLP
PO Box 1800
150 Fayetteville St.
1600 Wells Fargo Capitol Center
Raleigh, NC 27601
919-839-0300
cmarshall@brookspierce.com

Counsel for Defendant-Appellee

/s/ Anita S. Earls
Anita S. Earls

August 8, 2016
(date)

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Consolidated Civil Action

RALEIGH WAKE CITIZENS ASSOCIATION, et al.,	)	
Plaintiffs,	)	
v.	)	No. 5:15-CV-156-D
WAKE COUNTY BOARD OF ELECTIONS,	)	
Defendant.	)	
CALLA WRIGHT, et al.,	)	
Plaintiffs,	)	
v.	)	No. 5:13-CV-607-D
STATE OF NORTH CAROLINA,	)	
Defendant.	)	

ORDER

Plaintiffs challenged the North Carolina General Assembly's ("General Assembly") 2013 redistricting plan for electing the Wake County School Board ("2013 Wake County School Board Plan") and the General Assembly's 2015 redistricting plan for electing the Wake County Board of Commissioners ("2015 Wake County Commissioners Plan"). Plaintiffs contended that the 2013 Wake County School Board Plan and the 2015 Wake County Commissioners Plan violate the one person one vote principle in the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article I, § 19 of the North Carolina Constitution. Plaintiffs conceded,

however, that the maximum population deviation in the 2013 Wake County School Board Plan and the 2015 Wake County Commissioners Plan was below 10% and conceded that such a deviation is a "minor deviation" under governing Supreme Court precedent. Specifically, in both redistricting plans, the maximum population deviation in the seven single-member districts was 7.11% and in the two super districts was 9.8%. As for the 2013 Wake County School Board Plan, plaintiffs contended that the plan resulted from the General Assembly's partisan desire (1) to disadvantage incumbents on the non-partisan Wake County Board of Education ("Wake County Board of Education" or "Wake County School Board") who are registered Democrats who support "progressive" education policies and (2) to favor suburban and rural voters over urban voters. As for the 2015 Wake County Commissioners Plan, plaintiffs contended that the plan resulted from the General Assembly's partisan desire (1) to favor suburban and rural voters over urban voters and (2) to favor voters who favor Republican candidates over voters who favor Democratic candidates on the Wake County Board of Commissioners. Plaintiffs also contended that the 2015 General Assembly racially gerrymandered District 4 in the 2015 Wake County Commissioners Plan and thereby violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

Defendant Wake County Board of Elections ("defendant" or "Wake County Board of Elections") is the local election board responsible for administering elections in Wake County, North Carolina, including elections for the Wake County Board of Education and the Wake County Board of Commissioners. The Wake County Board of Elections had nothing to do with the General Assembly's decision to enact the 2013 Wake County School Board Plan or the 2015 Wake County Commissioners Plan, but the United States Court of Appeals for the Fourth Circuit has held that the Wake County Board of Elections is the proper defendant. See Wright v. North Carolina, 787 F.3d 256, 261–63 (4th Cir. 2015). Moreover, although the Wake County Board of Elections does not take

a position on whether the General Assembly should have adopted the 2013 Wake County School Board Plan or the 2015 Wake County Commissioners Plan, the Wake County Board of Elections has defended the constitutionality of the redistricting plans as a legal and institutional matter.

On December 16–18, 2015, the court held a bench trial in this consolidated action. In their complaints and at the end of the trial, plaintiffs asked this court to declare the 2013 Wake County School Board Plan and the 2015 Wake County Commissioners Plan unconstitutional, to enjoin the Wake County Board of Elections from administering elections under either plan, to hold elections under a court-ordered remedial plan, and to give the General Assembly another opportunity to redistrict the Wake County School Board and Wake County Board of Commissioners consistent with the United States and North Carolina Constitutions.

On February 26, 2016, the court found that plaintiffs had not proven their case, entered judgment for the Wake County Board of Elections, and declined to enjoin the Wake County Board of Elections from administering elections under either the 2013 Wake County School Board Plan or the 2015 Wake County Commissioners Plan. See [D.E. 64, 65]. Plaintiffs appealed. See [D.E. 66].

On April 20, 2016, the Supreme Court of the United States decided Harris v. Arizona Independent Redistricting Commission, 136 S. Ct. 1301 (2016). In Harris, the Supreme Court clarified the standard governing one person one vote challenges where the maximum population deviation in a redistricting plan is less than 10%. See id. at 1307. "[I]n a case like this one, those attacking a state-approved plan must show that it is more probable than not that a deviation of less than 10% reflects the predominance of illegitimate reapportionment factors rather than the legitimate considerations to which we have referred in Reynolds [v. Sims, 377 U.S. 533 (1964)] and later cases." Id. (quotation omitted). In Harris, the Court also stated: "Given the inherent difficulty of

measuring and comparing factors that may legitimately account for small deviations from strict mathematical equality, we believe that attacks on deviations under 10% will succeed only rarely, in unusual cases." Id.

On July 1, 2016, the United States Court of Appeals for the Fourth Circuit, in a 2-1 decision, resolved the appeal in this case. As for plaintiffs' racial gerrymandering claim, the Fourth Circuit unanimously rejected plaintiffs' racial gerrymandering claim. See RWCA v. Wake Cty. Bd. of Elections, No. 16-1270, No. 16-1271, 2016 WL 3568147, at *13–15 (4th Cir. July 1, 2016). As for plaintiffs' one person one vote claim, the Fourth Circuit applied Harris and found that this case was the "rare[ ]" and "unusual" case referenced in Harris. See id. at *12. Thus, even though the maximum population deviation in each plan was below 10%, the Fourth Circuit found it more probable than not that the deviation of less than 10% reflects the predominance of an illegitimate reapportionment factor (i.e., improper partisanship) over legitimate considerations. Id. Accordingly, the Fourth Circuit held that each plan violated the one person one vote principle in the United States Constitution and the North Carolina Constitution. Id. at *12–13. The Fourth Circuit remanded "with instructions to enter immediately judgment for Plaintiffs, granting both declaratory relief and a permanent injunction, as to the one person, one vote claims." Id. at *15 (footnote omitted). The Fourth Circuit added that it saw "no reason why the November 2016 elections should proceed under the unconstitutional plans we strike down today." Id. at *15 n.13.

The Fourth Circuit's mandate has not yet issued, and, absent another order from the Fourth Circuit, will not issue any earlier than July 22, 2016. See Fed. R. App. P. 40(a)(1), 41(b). "The mandate is the document by which [the appellate court] relinquishes jurisdiction and authorizes the originating district court . . . to enforce the judgment of [the appellate court]." United States v. Campbell, 168 F.3d 263, 266 n.3 (6th Cir. 1999) (quotation omitted); see United States v. DeFries,

129 F.3d 1293, 1302 (D.C. Cir. 1997) (per curiam); see also Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982) (per curiam). Nevertheless, once the mandate issues, this court will issue the mandated declaratory relief and permanent injunction. When this court does so, the court must address the remedy. The people in Wake County deserve and will have elections for the Wake County School Board and the Wake County Board of Commissioners on November 8, 2016. Notably, the terms of office of three County Commissioners and nine School Board members will expire shortly after the November 2016 election.

Not later than July 18, 2016, the Wake County Board of Elections will notify the court of any applicable deadlines that must be met in order to hold an election on November 8, 2016, under a new plan or plans for the Wake County School Board and the Wake County Board of Commissioners. The deadlines include, but are not limited to: (1) any applicable dates for the beginning and ending of qualification period for candidates and filing period for candidates; (2) the date when early voting starts; (3) the date when military, overseas, and other absentee ballots must be mailed; and, (4) the date when ballots must be printed. The Wake County Board of Elections also will advise the court whether a primary election for the Wake County Board of Commissioners is feasible.

Not later than July 18, 2016, the court requests that the Speaker of the House and the President Pro Tempore of the Senate of the North Carolina General Assembly notify the court whether the General Assembly will devise a new redistricting plan or plans and when the General Assembly will provide that new plan or plans to the court. Cf. Lawyer v. Dep't of Justice, 521 U.S. 567, 575–76 (1997) (holding that a federal court should give a state a reasonable opportunity to meet constitutional requirements by adopting a substitute redistricting plan that corrects the constitutional deficiency in an invalidated plan); Growe v. Emison, 507 U.S. 25, 34–37 (1993) (same); Wise v. Lipscomb, 437 U.S. 535, 540 (1978) (same); Chapman v. Meier, 420 U.S. 1, 26–27 (1975) (same);

Case 5:15-cv-00156-D Document 76 Filed 07/08/16 Page 5 of 9

White v. Weiser, 412 U.S. 783, 794–97 (1973) (same); Ely v. Klahr, 403 U.S. 108, 114–15 & n.6 (1971) (same). In doing so, the court takes judicial notice that the General Assembly adjourned on July 1, 2016, and is not scheduled to reconvene until January 2017.

If the General Assembly is unable or unwilling to submit a new plan or plans for the Wake County School Board and Wake County Board of Commissioners, a mechanism exists under North Carolina law for the North Carolina Board of Elections to act. Specifically, North Carolina General Statute § 163-22.2 provides:

> In the event . . . any State election law or form of election of any county board of commissioners, local board of education, or city officer is held unconstitutional or invalid by a State or federal court . . . and such ruling adversely affects the conduct and holding of any pending primary or election, the State Board of Elections shall have authority to make reasonable interim rules and regulations with respect to the pending primary or election as it deems advisable so long as they do not conflict with any provisions of Chapter 163 of the General Statutes and such rules and regulations shall become null and void 60 days after the convening of the next regular session of the General Assembly. The State Board of Elections shall also be authorized, upon recommendation of the Attorney General, to enter into agreement with the courts in lieu of protracted litigation until such time as the General Assembly convenes.

Pursuant to section 163-22.2, it appears that the North Carolina Board of Elections could, for example, take the existing plans and equalize the population in the two super districts and equalize the population in the seven single-member districts. Such a remedy would appear to address the one person one vote violation, while otherwise preserving the legitimate legislative choices in the 2013 Wake County School Board Plan and 2015 Wake County Commissioners Plan. Cf. Harris, 136 S. Ct. at 1306 ("The Fourteenth Amendment's Equal Protection Clause requires States to make an honest and good faith effort to construct legislative districts as nearly of equal population as is practicable.") (alterations and quotations omitted)); Newsome v. N.C. State Bd. of Elections, 105 N.C. App. 499, 506–08, 415 S.E.2d 201, 204–06 (1992) (affirming the action of the North Carolina Board of Elections under North Carolina General Statute § 163-22.2 where its remedial plan

corrected the defect in the statute, but otherwise "carried out the clear intention of the General Assembly").

Not later than July 18, 2016, the court requests that the North Carolina Board of Elections advise the court of its willingness to act under North Carolina General Statute § 163-22.2 to ensure the timely election of the Wake County School Board and Wake County Board of Commissioners. If the North Carolina Board of Elections will act, the court also requests notice of when the North Carolina Board of Elections will provide a new plan or plans to the court or provide some other proposed remedy.

If neither the General Assembly nor the North Carolina Board of Elections plans to act and the mandate issues, this court will have to address the remedy. If the court's injunction bars the use in the November 2016 election of the plans that the Fourth Circuit invalidated, the effect of the injunction will be to cancel the votes cast in the March 2016 primary election for the Wake County Board of Commissioners and to void the primary election of March 15, 2016, to void the candidate filing for the Wake County Board of Commissioners, which closed on December 17, 2015, and to void the candidate filing for the Wake County School Board, which closed on July 1, 2016. The court will have to address the propriety of such a remedy and address whether footnote 13 in the Fourth Circuit's opinion mandates such a remedy. Cf. Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006) (per curiam); Upham v. Seamon, 456 U.S. 37, 44 (1982) (per curiam); Ely, 403 U.S. at 114–15; Reynolds, 377 U.S. at 585–86; S.W. Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 919 (9th Cir. 2003) (en banc) (per curiam). The parties will provide the court their views on these issues not later than July 18, 2016.

Finally, if the General Assembly or the North Carolina Board of Elections does not act and this court concludes that the Fourth Circuit has mandated that the invalidated plans not be used in

Case 5:15-cv-00156-D Document 76 Filed 07/08/16 Page 7 of 9

the November 2016 election, the court will have to devise, consider, and adopt a court-ordered remedial plan or plans. McGhee v. Granville Cty., 860 F.2d 110, 115 (4th Cir. 1988) ("If the legislative body fails to respond or responds with a legally unacceptable remedy, the responsibility falls on the District Court to exercise its discretion in fashioning a near optimal plan.") (citations and quotations omitted)). If this court does so, the Supreme Court has stated that "modifications of a state plan are limited to those necessary to cure [the] constitutional . . . defect." Upham, 456 U.S. at 43; see Perry v. Perez, 132 S. Ct. 934, 941–44 (2012) (per curiam); Abrams v. Johnson, 521 U.S. 74, 98–101 (1997); Weiser, 412 U.S. at 795–97; Cook v. Luckett, 735 F.2d 912, 918–20 (5th Cir. 1984). Moreover, a court-drawn plan should employ "single-member over multimember districts, absent persuasive justification to the contrary." Wise, 437 U.S. at 540; see Connor v. Finch, 431 U.S. 407, 414–15 (1977); Mahan v. Howell, 410 U.S. 315, 333 (1973) (same); Connor v. Johnson, 402 U.S. 690, 692 (1971) (per curiam) (same). Furthermore, a court-drawn plan "must ordinarily achieve the goal of population equality with little more than de minimis variation." Chapman, 420 U.S. at 26–27 (footnote omitted); see Abrams, 521 U.S. at 98–100 (same); Connor, 431 U.S. at 414 (same).

The parties will provide the court their views on these issues and a schedule for devising, considering, and adopting any court-ordered remedial plan or plans not later than July 18, 2016. Additionally, the court recognizes that the Speaker of the House and the President Pro Tempore of the Senate of the North Carolina General Assembly and the North Carolina Board of Elections are not parties to this case. The court therefore DIRECTS the clerk of court to serve this order upon the office of the North Carolina Attorney General and DIRECTS the office of the North Carolina Attorney General to ensure proper service of this order on the Speaker of the House and the President

Pro Tempore of the Senate of the North Carolina General Assembly and on the North Carolina Board of Elections.

SO ORDERED. This 8 day of July 2016.

JAMES C. DEVER III
Chief United States District Judge

Case 5:13-cv-00156-D Document 76 Filed 07/08/16 Page 9 of 9

Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Consolidated Civil Action

RALEIGH WAKE CITIZENS ASSOCIATION, et al. Plaintiffs, v. WAKE COUNTY BOARD OF ELECTIONS, Defendant.	No. 5:15-cv-156

CALLA WRIGHT, et al., Plaintiffs, v. THE STATE OF NORTH CAROLINA, et al., Defendants.	No. 5:13-cv-607

PLAINTIFFS' SUBMISSION ON APPROPRIATE REMEDIES

Pursuant to this Court's Order issued July 8, 2016, ECF No. 78,[1] Plaintiffs in these consolidated cases, by and through their undersigned counsel, respectfully submit the following points and authorities.

I. INTRODUCTION

Contrary to the assertion in the Court's Order of July 8, 2016, ECF No. 78 at 3, Plaintiffs have never asked this Court to devise and order the use of a remedial redistricting plan for use by the Wake County Board of County Commissioners or the Wake County Board of Education, and are not now asking the Court to do so. Instead, Plaintiffs contend that in the circumstances of this case, where fully constitutional and legally enforceable districting plans exist already for both bodies based on 2010 Census Data, this Court does not have the legal authority to impose its own plans. The redistricting plans that were duly enacted and in effect in 2011, and that were used until the 2013 and 2015 legislation was passed changing the method of election, are the last legally enforceable election systems and now are the appropriate districts to be used for the upcoming elections. Once the mandate of the Fourth Circuit Court of Appeals issues in this case, unless and until the North Carolina General Assembly enacts other redistricting plans or methods of election, the State Board of Elections and the Defendant here, the Wake County Board of Elections, are legally obligated to enforce the election system previously in place. There is no need, and no legal justification, for this Court to do anything beyond implementing the mandate by issuing a permanent injunction enjoining the Defendant Wake County Board of Elections from holding elections under the statutes ruled unconstitutional in this case.

II. STATEMENT OF CASE

[1] Unless otherwise noted, all citations to documents filed in this consolidated action are to the lead case, *Raleigh Wake Citizens Assoc. et al., v. Wake Cty. Bd. of Elections, et al.,* No. 5:15-cv-156.

On August 22, 2013 Plaintiffs in *Wright v. North Carolina*, No. 13-cv-607, filed suit seeking to enjoin the use of a new election system for the Wake County Board of Education enacted by the North Carolina General Assembly over the objection of a majority of the Board on the grounds that the districts violated the one-person, one-vote requirement of the equal protection clauses of the Fourteenth Amendment to the U.S. Constitution and Article 1, § 19 of the North Carolina Constitution. Following dismissal of the action on March 14, 2014, Plaintiffs appealed. While that appeal was pending, the North Carolina General Assembly enacted legislation requiring the use of the same system for the Wake County Board of County Commissioners on April 2, 2015. On April 19, 2015 the Raleigh Wake Citizens Association and another set of individual voters filed suit challenging that legislation on similar one-person, one-vote grounds and raised an additional claim that racial considerations predominated in the drawing of one of the districts. *Raleigh Wake Citizens Ass'n. v. Wake Cnty. Bd. of Elections,* No. 15-156 (E.D.N.C.) ("RWCA").

On May 27, 2015 the Fourth Circuit issued its ruling reversing the lower court's dismissal of Plaintiffs' claims in the first case. *Wright v. North Carolina,* 787 F.3d 256 (4th Cir. 2015). The two cases were consolidated and a bench trial was held on December 16-18, 2015. On February 26, 2016, the trial court ruled for Defendant on all claims and Plaintiffs appealed. On expedited review, the Fourth Circuit reversed in part and affirmed in part with an opinion issued July 1, 2016. On July 14, 2016 the Defendant petitioned the Fourth Circuit for rehearing *en banc*, Plaintiffs filed a motion asking the court to issue the mandate forthwith, and the Speaker of the House and the President Pro Tempore of the Senate of the North Carolina General Assembly filed a motion to intervene. The motions and the petition are pending with the Fourth Circuit Court of Appeals as of the date of this pleading.

III. STATEMENT OF FACTS

In 2011 both the Wake County School Board and the Wake County Board of County Commissioners, pursuant to authorities granted to them under N. C. Gen. Stat. §§ 115C-37 and 153A-22, redrew their election districts and residency districts respectively, to account for population imbalances as indicated by the 2010 census data. *RWCA v. Wake County Bd. of Elections,* Nos. 16-1270 and 16-1271, 2016 U.S. App. LEXIS 12136 *3 (July 1, 2016). The Wake County School Board was a nine-member board elected in non-partisan elections in odd-numbered years with staggered terms. *Id.* The Board of County Commissioners was a seven-member board elected at-large with partisan elections in even-numbered years from residency districts and with staggered terms. *See* 1981 N. C. Sess. Laws 983.

In 2011 elections were held in five of the nine single-member school board districts using the new districts adopted by that board. *See* Pls.' Trial Exs. 58, 59. In 2013, elections were held in the other four districts. *See* Pls.' Trial Ex. 56. No school board district elections were held in 2015. *See* 2013 N.C. Sess. Laws 110 § 1 ("No election for members of the Wake County Board of Education shall take place in 2015.") While a filing period was conducted for elections in all nine districts for the school board in 2016 using the newly enacted seven-two district system that has now been declared unconstitutional, no school board primaries or elections have been held to date. *See* Candidate List Grouped by Contest, Wake County Board of Elections, http://msweb03.co.wake.ne.us/bordelec/downloads/6candidate/6candidatelist/2016EDUandSW.pdf (last visited July 18, 2016).

In 2012, at-large elections were held in three county commission residency districts using the 2011 districts and in 2014, at-large elections were held in the other four county commission 2011 districts. *See* Pls.' Trial Exs. 55, 57. In March 2016 a contested primary was held in super-

district B established by the unconstitutional law. *See* March 15, 2016 Election Results, Wake County Board of Elections, http://wakegov.com/elections/data/Past%20Election%20Results/2016-03-15%20-%20Primary%20Election/20160315Summary.htm (last visited July 18, 2016). No at-large primary elections were held in March 2016 for residency districts 4, 5, and 6 under the prior district system because those primary races were uncontested. *See id.* The district 5 seat is also uncontested in the general election. *See* 2016 Candidate Detail List, Wake County Board of Elections, http://msweb03.co.wake.nc.us/bordelec/downloads/6candidate/6candidatelist/2016General.pdf (last visited July 18, 2016. There have been no final elections under the new system for county commission.

The statutes that the Court of Appeals has found violate the one person, one vote requirement do not contain severability clauses. *See* 2013 N.C. Sess. Laws 110 and 2015 Sess. Laws 4. The statutes and the systems of election they create cannot be implemented without defined district boundaries, the very element that has been ruled unconstitutional.

IV. ARGUMENT

Once the mandate of the Fourth Circuit Court of Appeals is issued in this case, this Court is obligated to implement the Fourth Circuit's judgment and enjoin the use of the unconstitutional election systems established by Session Law 2013-110 and Session Law 2015-4. In each case, because the remainder of the statute cannot be implemented without the districts at issue, the entire statute is unconstitutional. Typically in redistricting cases, the prior redistricting plan that was in effect is also unconstitutional because it no longer complies with one-person, one-vote using the most current census data. However, in this unusual case where a mid-decade

re-redistricting has occurred, the prior plan is a constitutional plan and can be used. The prior districts represent the judgment of the bodies involved regarding how their districts should be drawn. They are known to the voters and have previously been implemented by the Defendant Board of Elections. In these circumstances, the Court is obligated to allow the State Board of Elections to administratively return to the prior system of election and newly drawn districts for the school board and county commission are not required. The only remedy this Court has the authority to implement is a permanent injunction prohibiting the use of the unconstitutional election systems.

A. PLAINTIFFS ARE NOT ASKING THIS COURT TO ORDER INTERIM REMEDIAL DISTRICTS

In Plaintiffs' original complaint in *Wright,* the specific relief Plaintiffs sought was "a permanent injunction enjoining Defendant, its agents, officers and employees, from enforcing or giving any effect to the provisions of Session Law 2013-110 that relate to the method of election of members of the Wake County Board of Education." Complaint, ECF No. 1, at 22 ¶3 (Aug. 22, 2013). In addition, Plaintiffs asked the Court to declare that unless the North Carolina General Assembly acts, the Board of Education itself has the authority under state law to adopt districts that comply with the one-person, one-vote requirement. *Id.,* ¶4. The identical relief was sought with regard to the county commission in *RWCA*. *See* Amended Complaint, ECF No. 22, at 17 ¶¶4, 6, (June 5, 2014).[2]

More importantly and binding on this Court, is the direction from the Fourth Circuit when this issue arose in the context of whether the Wake County Board of Elections was a

[2] Indeed, Plaintiffs still contend that if new districts did need to be drawn for the county commission and school board, and the General Assembly did not act to do so, the proper entity under state law to draw such districts are the local governments themselves, *see* N.C. Gen. Stat. §§ 115C-37 and 153A-22, and they are the parties that should be given the initial opportunity to fashion an appropriate remedy. *See, e.g., McGee v. Granville Cty.,* 860 F.2d 110, 121 (4th Cir. 1988) (court erred in not deferring to the County's proposed remedial plan).

sufficient defendant to allow Plaintiffs full relief should they prevail on any of their claims. *See Wright,* 787 F. 3d at 262-63. The Fourth Circuit ruled that the Board of Elections is a sufficient party for a remedy and that no new districts need to be drawn in order for a valid election to occur if Plaintiffs succeed. *Id.* Specifically, the Court held:

> Plaintiffs counter that if the Proposed Defendants are not party to their suit, there will be no mechanism for forcing a constitutionally valid election, should they succeed in enjoining the Session Law. This assertion is, however, incorrect. **The district court could, for example, mandate that the Board of Elections conduct the next election according to the scheme in place prior to the Session Law's enactment until a new and valid redistricting plan is implemented.** State law also provides, for example, that the State Board of Elections can make reasonable interim rules with respect to pending elections. N.C. Gen. Stat. § 163-22.2 ("In the event . . . any State election law . . . is held unconstitutional or invalid by a State or federal court or is unenforceable . . ., the State Board of Elections shall have authority to make reasonable interim rules and regulations with respect to the pending primary or election."). Without question, then, a valid election could take place if Plaintiffs succeed on the merits and successfully enjoin the Session Law.

Id. (footnote omitted) (emphasis added). As the State Board of Elections made clear in its letter to this Court dated July 16, 2016, that Board has exercised its authority under N.C. Gen. Stat. § 163-22.2 in the past to implement procedural rule changes necessary to conduct elections and is not equipped to itself draw new districts.[3] State Board of Elections Letter, ECF No. 81 (July 16, 2016).

In light of the directions in *Wright* on this question, and the role of the State Board of Elections as exercised in the past, it is clear that once the mandate in this case issues, so long as the General Assembly does not act, the prior constitutional and legally enforceable election systems should be implemented for the school board and county commission. Plaintiffs are not

[3] In *Newsome v. N.C. State Bd. of Elections,* 105 N.C. App. 499, 506-08, 415 S.E.2d 201, 204-06 (1992), the North Carolina Court of Appeals upheld the actions of the State Board of Elections exercised under the authority of N.C. Gen. Stat. § 163-22.2. In that instance, the State Board did not draw districts, but rather instructed the local board to reschedule an election that had been delayed because of the Section 5 preclearance process. *See Newsome,* 105 N.C. App. at 503, 415 S.E.2d at 203. That same administrative authority is all that is needed in this case to schedule elections in the prior, constitutionally-drawn districts.

asking this court "to hold elections under a court-ordered remedial plan." Order, ECF No. 78 at 3 (July 8, 2016). Instead, Plaintiffs seek an order enjoining the use of the method of election established by the unconstitutional statutes and to clarify for the Defendant Wake County Board of Elections that they should conduct the next elections in 2016 "according to the scheme in place prior to the Session Law's enactment." *Wright,* 787 F.3d at 262.

B. RETURING TO THE PRIOR METHOD OF ELECTION IS STRAIGHTFORWARD AND SIMPLE TO IMPLEMENT

For the Board of County Commissioners, the changes required at this point to return to the prior constitutional method of election are minimal. In order to return that Board to the structure and system in place before Session Law 2015-4 was enacted, this year's at-large elections for the three commission seats from residency districts should proceed, electing those members to four-year terms. The 2016 filing period has already closed for candidates for the at-large seats from existing residency districts for the Board of Commissioners. Those seats are using the prior, constitutional districts, *see* 2015 N.C. Sess. Laws 4 § 1.(b), and there is no need to reopen filing or do anything different to change that election process already underway. By virtue of the mandate issuing in this case, the primary that occurred in super-districts A and B in March 2015 is void because those are unconstitutional districts.

With regard to 2016 elections for the Wake County School Board, the State Board of Elections should direct the local board to take steps to return to the prior constitutionally permissible system, which included odd-year elections with staggered terms, using the single-member districts enacted in 2011. To accomplish this, the five school board seats elected in 2011 should be open for election in November 2016 for three-year terms to prevent those members from holding over any longer and to prevent the entire board from being up for election at the same time. *Cf.* N.C. Gen. Stat. § 115C-37(a) ("The terms of office of the members [of

county boards of education] shall be staggered so as nearly equal to one half as possible shall expire every two years.") The four seats elected in 2013 can be open for election in the fall of 2017 according to the normal schedule that they would have had before Session Law 2013-110. This would return the Board to a 5-4 stagger of four-year terms each. The November 2016 election would allow for an August filing period, and would require non-partisan election by plurality rather than a run-off. This procedure provides the most efficient return to the prior systems with the least disruption possible for voters. *Cf., Dillard v. Baldwin Cnty. Comm'n*, 222 F. Supp. 2d 1283, 1287 (M.D. Ala. 2002) (having ruled that a change in the method of election was not required by federal law, ordering that "the Baldwin County Commission shall return to the system of four members elected at-large used before the court's 1988 injunction").

C. THIS COURT IS BOUND BY THE RULING OF THE FOURTH CIRCUIT COURT OF APPEALS

Once the mandate issues, this Court must comply with the Fourth Circuit's ruling. "Once a case has been decided on appeal and a mandate issued, the lower court may not 'vary it [the mandate] or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.'" *Stamper v. Baskerville*, 724 F.2d 1106, 1107 (4th Cir. 1984) (*quoting In re Sanford Fork & Tool Co.,* 160 U.S. 247, 255–56 (1895)); *see also Doe v. Chao*, 511 F.3d 461 (4th Cir. 2007); *Redic v. Gary H. Watts Realty Co.,* 862 F.2d 314 (4th Cir. 1988). As noted in the July 8, 2016 Order, the Fourth Circuit remanded "with instruction to enter immediately judgment for Plaintiffs, granting both declaratory relief and a permanent injunction, as to the one person, one vote claims." *RWCA,* 2016 U.S. App. LEXIS 12136, at *45 (footnote omitted). This statement is further reinforced by the footnote to this

direction which states "[w]e see no reason why the November 2016 elections should proceed under the unconstitutional plans we strike down today." *Id.,* at *45 n.13.

Not only must the district court follow the express terms of the mandate, the court must also implement the spirit of the mandate. "When this court remands for further proceedings, a district court must, except in rare circumstances, implement both the letter and spirit of the mandate, taking into account our opinion and the circumstances it embraces." *United States v. Pileggi*, 703 F.3d 675, 679 (4th Cir. 2013) (internal alteration, quotation marks, and citation omitted). Thus, it is Plaintiffs view that this Court does not have the authority to "address the propriety of such a remedy and address whether footnote 13 in the Fourth Circuit's opinion mandates such a remedy." Order, ECF No. 78 at 7 (citations omitted). The Fourth Circuit has spoken in clear terms that the initial stages of the 2016 elections under unconstitutional plans are void, and elections in 2016 should not proceed under the plans struck down by the Fourth Circuit.

Such a result is only fair to the Plaintiffs who have sought to expedite the final resolution of this case on the merits and the intent of the Fourth Circuit to make a remedy possible in the 2016 election cycle is further reinforced by the fact that the court granted Plaintiffs-Appellants' motion for expedited review of the trial court's opinion. *See RWCA,* No. 16-1270, ECF No. 35 (4th Cir. Apr. 5, 2016) (granting motion to expedite).

Furthermore, even if Defendant files a petition for certiorari with the United States Supreme Court, that fact also does not justify any action by this Court to avoid the implementation of the mandate, and the use of the prior method of election, for the November 2016 elections. It is clear that a district court in the Fourth Circuit does not have the authority to, in effect, stay the Fourth Circuit's ruling pending Supreme Court review. In *United States v.*

Lentz, 352 F. Supp. 2d 718, 726-27 (E.D. Va. 2005), it was noted that, "a stay of this case pending filing of Lentz's certiorari petition would violate the 'mandate rule,' as it would contravene the spirit of the Fourth Circuit's mandate in this case." *Id*. at 727. The court in *Lentz* held that it had no jurisdiction to stay the Fourth Circuit's mandate to enable the defendant to file a petition for certiorari, reasoning that, because 28 U.S.C. § 2101(f) grants that authority to "a judge of the court rendering the judgment or decree or . . . a justice of the Supreme Court," that authority clearly doesn't belong to the district courts. *Id.* at 725. Here, to allow the 2016 elections to proceed using the unconstitutional system that violates Plaintiffs' right to an equal vote would effectively be a stay of the Fourth Circuit's ruling, which is beyond this Court's power to grant.

D. IN EACH CASE, THE ENTIRE STATUTE AND METHOD OF ELECTION IS UNCONSTITUTIONAL

State law determines the severability of unconstitutional portions of a state law in federal court. *Sons of Confederate Veterans v. Vehicles*, 288 F.3d 610, 627 (4th Cir. 2002); *Environmental Tech. Council v. Sierra Club*, 98 F.3d 774, 788 (4th Cir. 1996); *see also Department of Treasury v. Fabe*, 508 U.S. 491, 509-10 (1993) (state law governs severability of a state statute). Under North Carolina law, when one portion of a statute is declared unconstitutional or is otherwise stricken, the surviving portion will be given effect only if it is severable. *See Flippin v. Jarrell*, 301 N.C. 108, 117-18, 270 S.E.2d 482, 488-89 (1980); *Constantian v. Anson County*, 244 N.C. 221, 227-28, 93 S.E.2d 163, 168 (1956).

In *State ex rel. Andrews v. Chateau X, Inc.*, 296 N.C. 251, 259-60, 250 S.E.2d 603, 608 (1979), the North Carolina Supreme Court identified two factors to be considered in assessing severability: (1) whether the remaining portions of the statute are capable of being enforced on their own; and (2) whether there is legislative intent to enforce the remainder, "particularly . . .

whether that body would have enacted the valid provisions if the invalid ones were omitted." Moreover, the North Carolina Supreme Court has emphasized the second factor, holding that when a portion of a statute is stricken, the whole must fall absent a clear legislative intent to the contrary: "when the statute, or ordinance, could be given effect had the invalid portion never been included, it will be given such effect if it is apparent that the legislative body, had it known of the invalidity of the one portion, would have enacted the remainder alone." *Jackson v. Guilford Cnty. Bd. of Adjustment*, 275 N.C. 155, 168-69, 166 S.E.2d 78, 87 (1969); *see also Pope v. Easley,* 354 N.C. 544, 556 S.E.2d 265 (2001) (applying *Jackson* to a state statute that had a severability clause).

In determining severability, the intent of General Assembly may be indicated by the inclusion of a severability clause. *Fulton Corp. v. Faulkner,* 345 N.C. 419, 421, 481 S.E.2d 8, 9 (1997). However, even where there is a severability clause, the court looks to the act as a whole and will not use a severability clause to "vary and contradict" the express terms of a statute. *Sheffield v. Consolidated Foods Corp.,* 302 N.C. 403, 421-22, 276 S.E.2d 422, 434-35 (1981).

Here, neither of the statutes at issue contains a severability clause. *See* 2013 N.C. Sess. Laws 110, 2015 N.C. Sess. Laws. The districts that were declared unconstitutional are an integral part of the election systems established by the statutes. It is not possible to implement the new system without district boundaries. In these circumstances, there is no part of the statute that is severable, and there is no indication whatsoever that the North Carolina General Assembly intended that any portion of either statute be implemented without the districts they drew. Thus, neither statute meets the *Jackson* test for severability under North Carolina law.

E. <u>THIS COURT SHOULD NOT DRAW AND THEN ORDER THE USE OF ENTIRELY NEW DISTRICTS WHERE IT IS NOT NECESSARY TO DO SO</u>

Where there exists a constitutional redistricting plan for the election of members of the Wake County Board of Education and Board of County Commissioners, this court should recall the frequent exhortations of the United States Supreme Court that redistricting "be undertaken by a district court only as a last resort." *Lawyer v. Dep't. of Justice*, 521 U.S. 567, 586 (1997) (citing *White v. Weiser*, 412 U.S. 783 (1973))." Because constitutional districts already exist, the Court need not take that last resort of drawing its own plan.

The judiciary's reasons for assiduously avoiding unnecessary engagement in redistricting are multiple. Federal court redistricting represents "a serious intrusion on the most vital of local functions." *Miller v. Johnson*, 515 U.S. 900, 915 (1995). It is well settled that 'reapportionment is primarily the duty of and responsibility of" the legislature or legislative body that traditionally conducts redistricting. *Chapman v. Meier* 420 US 1, 27 (1975). Thus, judicial redistricting by federal courts is an "unwelcome obligation," *Connor v. Finch*, 431 U.S. 407, 415 (1977), and should be avoided if not absolutely necessary.

F. IF THE COURT NEVERTHELESS DOES DRAW REMEDIAL DISTRICTS, THE COURT'S DISCRETION IS LIMITED

If, contrary to the mandate in this case and the clear instructions of the Fourth Circuit, the court does move forward to develop a new redistricting plan, this court operates under more stringent restrictions than would the General Assembly, the State Board of Elections or the county boards themselves. Most significantly, court-drawn plans must abide by a stricter standard of population equality than plans drawn by a legislative body. As the Court has explained on several occasions, "unless there are persuasive justifications, a court ordered reapportionment plan of a state legislature . . . must ordinarily achieve the goal of population equality with little more than de minimis variation." *Chapman*, 420 U.S. at 26-27; *see also Connor*, 431 U.S. at 414-15 ("[A] state legislature is the institution that is by far the best situated

to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality. The federal courts by contrast possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name.").

Thus, a court-ordered plan "must be held to higher standards than a State's own plan. With a court plan, any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features."). *Chapman,* 420 U.S. at 27; *see also Johnson v. Miller*, 922 F. Supp. 1556, 1561 (S.D. Ga. 1995) ("Since federal courts are held to stricter standards than legislatures in redistricting, we were particularly constrained to create a remedy with the lowest population deviation practicable.") (citation omitted); *Burton v. Sheheen*, 793 F. Supp. 1329, 1343 (D.S.C. 1992), *judgment vacated on other grounds by Statewide Reapportionment Advisory Comm. v. Theodore*, 508 U.S. 968 (1993) ("Given that compliance with the principles of one man, one vote is the preeminent concern of court-ordered plans, the very real possibility exists that certain state policies will be compromised in a court-ordered plan which could have been better served had judicial intervention not been necessary.").

Additionally, a court ordering a redistricting plan should not factor in political considerations at all, as opposed to the latitude afforded to legislative bodies to do so. "[T]he judicial remedial process in the reapportionment area -- as in any area -- should be a fastidiously neutral and objective one, free of all political considerations and guided only by the controlling constitutional principle of strict accuracy in representative apportionment." *White*, 412 U.S. at 799 (Marshall, J., concurring in part). Moreover, a court constructing its own plan should take care not to double-bunk or draw incumbents out of their districts. *See, e.g., Arizonans for Fair Representation v. Symington*, 828 F.Supp. 684, 688-89 (D. Ariz. 1992) (three-judge court) ("The

court [plan] also should avoid unnecessary or invidious outdistricting of incumbents. Unless outdistricting is required by the Constitution or the Voting Rights Act, the maintenance of incumbents provides the electorate with some continuity. The voting population within a particular district is able to maintain its relationship with its particular representative and avoids accusations of political gerrymandering.").

G. PLAINTIFFS' PROPOSED SCHEDULE FOR IMPLEMENTATION OF A REMEDY

In response to the Court's invitation to address timing issues, the Plaintiffs' position is that the transition back to the election systems in place for both the school board and county commission should be implemented immediately upon the issuance of the Fourth Circuit's mandate in this case. Indeed,

> [O]nce a State's…apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan.

Reynolds v. Sims, 377 U.S. 533, 585 (1964). As explained above, the steps needed to return to the prior constitutional system are minimal and should be taken immediately. There is no need to have a primary for the county commission or school board seats that should be elected this year. A filing period should be set for the five school board seats that should be elected in November 2016.

There is no justification for delay in implementing this return to the prior election system. Such a delay would be equivalent to granting a stay of the judgment. The right to vote is one of the most fundamental rights in our democracy and is thus afforded special protections. *See Reynolds*, 377 U.S. at 554-55, 563; *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined."). As such, any impediment or abridgment of the right to vote is an irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373

(1976). Plaintiffs and other Wake County voters will suffer irreparable injury if they are forced to participate in elections using unconstitutional districts. *See Larios v. Cox*, 305 F. Supp. 2d 1335, 1344 (N.D. Ga. 2004) ("If the court permits a stay, thereby allowing the 2004 elections also to proceed pursuant to unconstitutional plans, the plaintiffs and many other citizens in Georgia will have been denied their constitutional rights in two of the five elections to be conducted under the 2000 census figures. … Accordingly, we find that the plaintiffs will be injured if a stay is granted because they will be subject to one more election cycle under unconstitutional plans.").

Recently a three-judge panel in the Middle District of North Carolina denied a stay of a remedy for the General Assembly's unconstitutional racial gerrymandering of two congressional districts. *Harris v. McCrory*, No. 1:13-cv-949, ECF No. 148 (M.D.N.C. Feb. 9, 2015) (Order Denying Emergency Motion to Stay). The court in that case denied a stay and implemented an immediate remedy, even though voting had already begun in the congressional primaries. That court recognized that the balance of equities and public interest tipped heavily in favor putting a remedial plan into place immediately. *Id.* at 4.

Indeed, courts have consistently acted to ensure that voters already constitutionally harmed by illegal redistricting plans do not further suffer irreparable harm. *See, e.g., Vera v. Bush*, 933 F. Supp. 1341, 1352-53 (S.D. Tex. 1996) (ordering a remedial plan on August 6, 1996, for November 1996 elections); *Johnson v. Mortham*, 926 F. Supp. 1540, 1542 (N.D. Fla. 1996) (denying motion to stay a May 22, 1996, deadline for the legislature to enact a remedial plan for the November 1996 congressional election); *Busbee v. Smith*, 549 F. Supp. 494, 518-19 (D.D.C. 1982) (ordering a court-drawn remedial plan on August 24, 1982, for two congressional

districts), *aff'd* 459 U.S. 1166 (1983); *Keller v. Gilliam*, 454 F.2d 55, 57-58 (5th Cir. 1972) (approving the shortening of terms of office as a remedy for a voting rights violation).

Moreover, the fact that the primaries for the unconstitutional super-district seats on the county commission have already been conducted is no barrier to providing Plaintiffs with a remedy this year. It is clear that "a district court has power to void and order new elections for violations of the Voting Rights Act of 1965, 42 U.S.C.S. § 1973, and the Constitution." *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 357 F.3d 260 (2d Cir. 2004); *see also, Hadnott v. Amos,* 394 U.S. 358 (1969) (federal courts have the power to invalidate elections held under constitutionally infirm conditions); *Pope v. County of Albany*, 687 F.3d 565, 569-70 (2d Cir. 2012) (citing *Bell v. Southwell*, 376 F.2d 659, 665 (5th Cir. 1967) (holding that district court has power to void and order new elections for violations of Voting Rights Act and Constitution)); *Stewart v. Taylor*, 104 F.3d 965, 970 (7th Cir. 1997) (stating that, despite holding of challenged election, court could order new election if plaintiff's motion for preliminary injunction has merit); *Hamer v. Campbell*, 358 F.2d 215, 222 (5th Cir. 1966) ("[H]aving concluded that the … election should have been enjoined, we now must set it aside in order to grant appellants full relief in the same manner as if the said election had been enjoined." (internal quotation marks omitted)).

Reliance on *Purcell v. Gonzalez,* 549 U.S. 1 (2006)*, Upham v. Seamon,* 456 U.S. 37 (1982), *Ely v. Klahr,* 403 U.S. 108, (1971)*, Reynolds v. Sims* 377 U.S. 533 (1964)*,* or *S.W. Voter Registration Educ. Project v. Shelley,* 344 F.3d 914 (9th Cir. 2003) for the proposition that it is acceptable for elections to proceed under an unconstitutional plan is misplaced. As an initial matter, this case is different for two important reasons: First, as noted above, in this case there is a clear and direct instruction from the Court of Appeals that this Court is bound to follow

requiring immediate issuance of a permanent injunction. *See, e.g., Doe v. Chao,* 511 F.3d 461, 465 (4th Cir. 2007) ("The mandate rule likewise restricts the district court's authority on remand from the court of appeals. First, 'any issue conclusively decided by this court on the first appeal is not remanded,' and second, 'any issue that could have been but was not raised on appeal is waived and thus not remanded.'" (citations omitted)). Second, constitutionally-drawn districts have been in place and used for both bodies since 2011. None of the cases listed above involved a re-redistricting of a local governing body. The federal judiciary's general preference for legislatively-enacted plans over court-drawn plans operates here to eliminate the need for further proceedings to implement a remedy and the prior districts can be used immediately.

Moreover, *Purcell,* dealing with a voter identification requirement, *id.,* 549 U.S. at 2, and *S.W. Voter,* dealing with the use of punch card machines, *id.,* 344 F.3d at 916, both involved whether preliminary relief should be granted prior to any final judgment on the merits. *Upham, Ely* and *Reynolds* all involved redistricting plans drawn before the widespread use of computer technology and GIS-software, which have made redistricting a very different matter than it is today. Indeed, the computer software that speeds the drawing of redistricting plans did not exist in the 1960's or 70's. Today, by state law, the General Assembly is actually required to enact a remedial statewide redistricting plan within two weeks. *See* N.C. Gen. Stat. § 120-2.4. Thus, some of the equitable factors that may have weighed into the Supreme Court's decision to delay implementation of new legislative redistricting plans in 1970 are not at play here with regard to districts for a local governing body.

In more recent redistricting cases across the country, immediate implementation of remedial redistricting plans has been ordered, despite the unavoidable burden that such implementation would have on jurisdictions. *See Vera v. Bush*, 933 F. Supp. 1341, 1342, 1344

(S.D. Tex. 1996) (Supreme Court invalided congressional redistricting plan on June 13, 1996, three-judge panel in Texas drew a remedial plan on August 6, 1996, for use in November 1996); *Buskey v. Oliver*, 574 F. Supp. 41, 41-42 (M.D. Ala. 1983) (June 10, 1983 order enjoining elections scheduled for October 11, 1983). This is because administrative burden on the government, which is part and parcel of election administration of any sort, does not outweigh irreparable harm to the fundamental right to vote of the citizens that elect that government.

Also instructive are the court's actions in *Johnson v. Halifax County*, 594 F. Supp. 161 (E.D.N.C. 1984), where the court entered a preliminary injunction in July 1984 in relation to elections scheduled to be held in November 1984. Candidate filing for the primary elections had already been held, *see Johnson v. Halifax County*, No. 83-48-civ-8, 1984 U.S. Dist. LEXIS 15267 (E.D.N.C. Jul. 3, 1984) (order declaring prior candidate filings void). Nevertheless, the court held that "the black citizens of Halifax County will suffer irreparable harm in, once again, they are unable to have an equal opportunity to elect county commissioners of their choice," *Johnson*, 594 F. Supp. at 171. The court further remarked that while a implementing a remedial plan would "place administrative and financial burdens" on defendants, those burdens were outweighed by the irreparable harm to plaintiffs. *Id.*

Finally, the public interest lies with using fairly drawn, constitutional districts that give equal weight to each voter's vote. When, as here, the Constitution is violated, "the public as a whole suffers irreparable injury." *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1363 (M.D. Ala. 1986). *See also, Clark v. Roemer,* 725 F. Supp. 285, 305-306 (M.D. La. 1988) ("The public interest is clearly in favor of the discontinuing of an election system which the court has found illegal and surely in a balance of equities, where the court has found encroachments on the exercise of the civil liberties … the state can have no legitimate interest in continuing with a

system that causes such encroachment.")

V. CONCLUSION

Plaintiffs request that upon issuance of the mandate of the Fourth Circuit Court of Appeals in this matter, this Court immediately enjoin the use of the election methods set out in the two unconstitutional statutes and direct the Defendants to implement the prior election methods in the 2016 elections for the Wake County School Board and Board of County Commissioners.

Respectfully submitted this 18th day of July, 2016.

/s/ Anita S. Earls
Anita S. Earls
N.C. State Bar No. 15597
Allison J. Riggs
N.C. State Bar No. 40028
SOUTHERN COALITION
FOR SOCIAL JUSTICE
1415 West Highway 54, Suite 101
Durham, NC 27707
919-323-3380
anita@southerncoalition.org
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing PLAINTIFFS SUBMISSION ON APPROPRIATE REMEDIES with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel and parties of record.

Additionally, I have served an electronic copy by email to the following:

Charles F. Marshall
Matthew Tynan
Jessi Thaller-Moran
Brooks Pierce
150 Fayetteville St., Ste. 1600
Raleigh, NC 27601
cmarshall@brookspierce.com

Counsel for Wake County Board of Elections

This the 18th day of July, 2016.

/s/ Anita S. Earls
Anita S. Earls
N.C. State Bar No. 15597
Southern Coalition for Social Justice
1415 W. Highway 54, Suite 101
Durham, NC 27707
Telephone: (919) 323-3380
Facsimile: (919) 323-3942
Email: Anita@southerncoalition.org
Counsel for Plaintiffs

Exhibit C

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

RALEIGH WAKE CITIZENS ASSOCIATION, et al. *Plaintiffs,* *v.* WAKE COUNTY BOARD OF ELECTIONS, *Defendant.*	)	No. 5:15-cv-156
CALLA WRIGHT, et al. *Plaintiffs,* *v.* STATE OF NORTH CAROLINA, et al. *Defendant.*	)	No. 5:13-cv-607

DEFENDANT'S RESPONSE TO JULY 8, 2016 ORDER

Defendant Wake County Board of Elections ("WBOE") respectfully submits the following response to this Court's Order entered on July 8, 2016 (D.E.[1] 78).

Applicable Deadlines

A calendar of the applicable 2016 election deadlines, with citations to the applicable election laws in Chapter 163 of the North Carolina General Statutes, is attached as Exhibit A to the Declaration of Gary Sims ("Sims Decl.").

These election deadlines currently apply to the WBOE unless they are modified by the North Carolina State Board of Elections ("SBOE") pursuant to its statutory authority. The SBOE

[1] Cites to "D.E." refer to docket entries in 5:15-cv-156.

has authority to issue temporary interim rules modifying certain deadlines in response to a court order as long as such rules are consistent with Chapter 163 (*see* Notice from Kimberly Strach (D.E. 81)). The WBOE cannot presently predict whether and how such interim rules would come into play with respect to any modifications to the electoral districts that were declared to be invalid by the Fourth Circuit. Absent such modifications, the WBOE is without authority to adopt or devise a different election schedule.

Regarding the specific deadlines requested by the Court, the WBOE highlights the following:

1. Filing Periods.

(a) The filing period for election to the Wake County Board of County Commissioners ended on **December 21, 2015**. *See* S.L. 2015-258, §2(b).

(b) The filing period for the Wake County Board of Education began on June 13, 2016 and ended on **July 1, 2016**. *See* S.L. 2013-110, § 2.

(c) The date by which an unaffiliated candidate had to petition to have his name printed on the general election ballot was **June 24, 2016**. *See* G.S. § 163-122 (stating deadline as last Friday in June preceding the general election).

2. Qualification Periods. Upon the receipt of a notice of candidacy, the WBOE immediately inspects the registration records of the county to determine whether the candidate meets the constitutional or statutory qualifications for office. *See* G.S. § 163-106(g); *see also* G.S. § 163-127.2 (providing for 10-day period to challenge a candidate's qualifications).

3. Deadline to Request a Write-In Option. The date by which individuals may request that space be added to a ballot for a write-in option for a particular office is currently **August 10,**

2016. *See* G.S. § 163-123(c) ("These petitions must be filed on or before noon on the 90th day before the general election . . . .").

4. Military, Overseas and Other Absentee Ballots. The date when military, overseas, and other absentee ballots must be mailed is currently **September 9, 2016**. G.S. §§ 163-227.3 (absentee ballots); 163-258.9 (transmission of military-overseas ballots). The SBOE may modify this deadline in certain circumstances and subject to federal requirements. *See* G.S. § 163-22(k); *see also* 52 U.S.C. § 20302 (federal requirements for military and overseas absentee ballots). To date, the SBOE has not exercised such authority with respect to the November 8, 2016 election. *See* Sims Decl. ¶ 7.

5. Printing Ballots. Ballots are printed between the deadline to request a write-in candidacy option (**August 10, 2016**) and the deadline for mailing military, overseas and other absentee ballots (**September 9, 2016**). During this 30-day time period, the WBOE must verify the content to be printed on the ballots, prepare and test ballot templates, print and test ballots, and obtain appropriate certifications or approvals from the State Board of Election. *See* Sims Decl. ¶¶ 26–30.

6. Early Voting. Early voting for the General Election begins on October 27, 2016. *See* G.S. § 227.2(b) (one-stop voting begins on the second Tuesday before the election).

* * *

The critical deadline currently in place with respect to the General Election is **August 10, 2016**, which is the deadline for petitioning for space on the ballot for a write-in candidate. That is the last act necessary to begin the preparation of ballots in anticipation of complying with the date to mail military, overseas and absentee ballots by the current deadline of **September 9, 2016**.

Impact of Deadlines on Affected Elections

1. Board of County Commissioners Numbered Districts. There are 3 seats up for election for the Wake County Board of County Commissioners on November 8, 2016. Those seats are residency districts 4, 5, and 6 used by the Wake County Board of County Commissioners in the 2014 election from which candidates were elected at-large ("2014 Districts"). *See* S.L. § 2015-4, § 1(b). The primary election for these seats was scheduled for March 15, 2016, but those races were uncontested. The WBOE is prepared to proceed with the at-large election for these three residency districts.

2. Board of County Commissioners Lettered Districts. If revisions are made to lettered districts A and B, it will not be feasible to hold a primary election for the Wake County Board of County Commissioners for those revised districts in time for the General Election. In order for a primary election to be held before August 10, 2016, the WBOE would need to do all of the following before August 10, 2016: (i) receive a revised district map[2] from the General Assembly, the SBOE, or the Court, (ii) code revised districts in order to identify the addresses within each district,[3] (iii) provide a notice of a new filing period for the revised districts so that individuals can identify and assess their districts for purposes of a potential candidacy, (iv) open and close a candidate filing period, (v) provide a notice of election, and (vi) hold a primary election, including an early voting period, and canvass the results of that election. *See* Sims Decl. ¶¶ 16–

[2] Receipt of a "map" refers to a shape file that includes the shape of the district boundaries as an overlay to the map of the county. If the WBOE does not receive a shape file map, it will need to coordinate with the county GIS department to generate a shape file map before coding the new districts. *See* Sims Decl. ¶ 23.

[3] The time required to code the districts would depend upon the amount of changes made to the districts and the nature of those changes. *See* Sims Decl. ¶ 23.

21. The WBOE understands from the SBOE that a truncated or expedited candidate filing period is typically at least one week. *See* Sims Decl. ¶ 16.

3. Board of Education. In order for elections to be held on November 8, 2016, for revised districts for the Wake County Board of Education, the WBOE would need to do all of the following before August 10, 2016: (i) receive a revised district map from the General Assembly, the State Board of Elections, or the Court, (ii) code revised districts in order to identify the addresses within each district, (iii) provide a notice of a new filing period for the new districts so that individuals can identify and assess their districts for purposes of a potential candidacy, and (iv) open and close a candidate filing period.

The WBOE does not have further views on the propriety of the effect of an injunction that would bar the use in the November 2016 election of the plans that the Fourth Circuit invalidated, except that (i) it is not feasible to hold a new primary election for revised lettered districts A and B for the Board of County Commissioners in time for the November 8, 2016 election, and (ii) any revised districts for the Wake County Board of Education would need to be drawn, implemented, and subject to reasonable notice and filing periods before the current deadline of August 10, 2016, in accordance with authorization and instructions from the SBOE.

Given the election deadlines currently in place, the SBOE's authority to provide interim rules and other modifications in response to a Court order, and the WBOE's duty to follow such rules and modifications, the WBOE will take all necessary and feasible steps to comply with, and implement, any schedule adopted by the Court or the SBOE regarding a Court-ordered remedial plan.

Respectfully submitted the 18th of July, 2016.

/s/ Charles F. Marshall
Charles F. Marshall
Matthew B. Tynan
Jessica Thaller-Moran
BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.
1700 Wells Fargo Capitol Center
150 Fayetteville Street
Raleigh, NC 27601
(919) 839-0300
cmarshall@brookspierce.com
mtynan@brookspierce.com
jthaller-moran@brookspierce.com
Counsel for Wake County Board of Elections

CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and have verified that such filing was sent electronically using the CM/ECF system to the following:

Anita S. Earls
Allison Jean Riggs
Southern Coalition for Social Justice
1415 West Highway 54, Suite 101
Durham, NC 27707
919-323-3380 x115
Fax: 919-323-3942
anita@southerncoalition.org
allison@southerncoalition.org
Counsel for Plaintiffs-Appellants

Respectfully Submitted,

/s/ Charles F. Marshall
Charles F. Marshall

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Consolidated Civil Action

RALEIGH WAKE CITIZENS ASSOCIATION, et al. *Plaintiffs,* *v.* WAKE COUNTY BOARD OF ELECTIONS, *Defendant.*	)	No. 5:15-cv-156
CALLA WRIGHT, et al. *Plaintiffs,* *vs.* STATE OF NORTH CAROLINA, et al. *Defendant.*	)	No. 5:13-cv-607

DECLARATION OF GARY SIMS

NOW COMES Gary Sims, who under penalty of perjury states as follows:

1. I am over 18 years of age, legally competent to give this declaration, and have personal knowledge of the facts set forth in it.

2. I am the Director of Elections for Wake County, North Carolina, a position I have held since July 2015. In my role as Director, it is my responsibility to ensure that Wake County elections are orderly, fair, and open; that elections comply with all requirements set forth in the North Carolina General Statutes, or by the North Carolina State Board of Elections ("SBOE"); and that elections are conducted in a manner that will preserve the integrity of the democratic process.

Before I was appointed Director, I served for eight years as Deputy Director of Elections for Wake County. I have worked in elections since 1999.

3. The Board is responsible for conducting all elections held in Wake County. These responsibilities, largely dictated by North Carolina statutes, include facilitating local elections; establishing election precincts and voting sites; appointing and training precinct officials; preparing and distributing ballots and voting equipment; cavassing and certifying the ballots cast in elections; investigating any voting irregularities; maintaining voter registration and participation records; and providing election information to members of the public.

4. As Director of the Wake County Board of Elections, I am familiar with the procedures for elections in this County.

OVERVIEW OF STATUTORY REQUIREMENTS FOR THE GENERAL ELECTION

5. In administering any general election, special election, or primary election, Wake County is bound by the timelines set forth in the North Carolina General Statutes, as administered by the SBOE.

6. The General Election will be on **November 8, 2016**. The deadlines listed below all have been calculated in reference to that date. Attached for the Court's reference as **Exhibit A** is a chart detailing the applicable statutory deadlines in relation to the November 8 General Election.

7. I have referenced the relevant sections of the General Statutes that I believe to be applicable. Ultimately, the WBOE follows the guidance and instructions of the SBOE with respect to the implementation of the election process, including applicable deadlines. I understand that the SBOE has authority to modify election deadlines in certain circumstances. To date, I am not aware that the SBOE has exercised any such authority with respect to any of the deadlines discussed below.

8. The candidate filing period for the Wake County Board of Education, which is neither a primary-based election nor a municipal election, historically has been dictated by session law. According to Session Law 2013-110, the candidate filing period begins at 12:00 noon on the second Monday in June, and ends at 12:00 noon on the first Friday in July. For 2016, these dates fell on **June 13 and July 1**.

9. Pursuant to N.C. Gen. Stat. § 163-122, a qualified voter who seeks to have his name printed on a general election ballot as an unaffiliated candidate for a county office must file written petitions with the Board on or before the last Friday in June. For 2016, this deadline fell on **Friday, June 24**.

10. Pursuant to N.C. Gen. Stat. § 163-258.16, not later than 100 days before a regularly scheduled election, and as soon as practicable in the case of an election not regularly scheduled, the Board must prepare an election notice to be used in conjunction with the federal write-in absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act. The notice must contain a list of all the ballot measures and federal, state, and local offices that, as of that date, are expected to be on the election ballot. In reference to the regularly scheduled election on November 8, 2016, this deadline falls on **July 31, 2016**.

11. Pursuant to N.C. Gen. Stat. § 163-123, a candidate seeking to have write-in votes counted towards electing him to a county office—and therefore, to have a space for a write-in vote printed on the ballot—must file written petitions with the county board of elections on or before the 90th day before the General Election. This deadline falls on Wednesday, **August 10, 2016**. This is the final deadline for content to be included on a ballot. All subsequent deadlines address voter information and access.

12. Pursuant to N.C. Gen. Stat. §§ 163-227.3 and 163-258.9, absentee ballots must be made available to all covered voters, i.e., all voters who submit a valid military-overseas ballot application or are otherwise qualified to vote by absentee ballot, no later than 60 days prior to a statewide general election in even-numbered years, unless the SBOE authorizes a shorter period under N.C. Gen. Stat. § 163-22(k) that is consistent with federal law. For the statewide general election occurring on November 8, 2016, this deadline falls on **September 9, 2016**.

13. Pursuant to N.C. Gen. Stat. § 163-128, the Board must publish notice of any changes of voting precincts and/or voting places no later than 45 days prior to the next primary or general election. For purposes of the November elections, this date falls on **September 24, 2016**.

14. Pursuant to N.C. Gen. Stat. § 163-227.2, early voting takes place between the second Thursday before an election and the last Saturday before that election. For the 2016 general election, this time period runs from **October 27, 2016**, until **November 5, 2016**.

15. Voters must be registered no later than 25 days prior to any election or primary. For the November 2016 elections, this deadline falls on **October 14, 2016**. N.C. Gen. Stat. § 163-82.6.

OVERVIEW OF STATUTORY REQUIREMENTS FOR ANY PRIMARY ELECTION

16. A primary election is subject to many of the same requirements detailed above. The Board must prepare an election notice not less than 100 days before any primary, or as soon as practicable if the election is not regularly scheduled. N.C. Gen. Stat. § 163-258.16. The notice of candidate filing period, and the candidate filing period itself, are dictated in part by the SBOE and in part by N.C. Gen. Stat. § 163-106(f). To my knowledge, the SBOE has not recently implemented a filing period that lasted less than five business days.

17. Pursuant to N.C. Gen. Stat. § 163-287, any election must be noticed 45 days before the election date. Additionally, as with any general election, the Board must publish notice of any changes of voting precincts and/or voting places no later than 45 days prior to the next primary. N.C. Gen. Stat. § 163-128.

18. A candidate seeking a party primary nomination for any county office, including the Wake County Board of County Commissioners, must file a notice of candidacy in accordance with applicable law or instruction from the SBOE.[1] For 2016, the North Carolina General Assembly established a candidate filing period that concluded on December 21, 2015.

19. In accordance with N.C. Gen. Stat. § 163-227.2, early voting for a primary takes place between the second Thursday before an election and the last Saturday before that election.

20. Pursuant to N.C. Gen. Stat. § 163-227.3, absentee ballots must be made available to all covered voters no later than 50 days before any primary, or 45 days if authorized by the SBOE.

21. After any primary or special election is held, the Board must complete the canvass of the votes cast and authenticate the count in every ballot item, culminating in the authentication of the official election results seven days after the election. N.C. Gen. Stat. § 163-182.5. Thus, for example, for ballot information to be completed in accordance with the statutory requirements listed above, it is important that any primary election take place no later than seven days prior to the current August 10, 2016 deadline.

[1] The SBOE has the authority under N.C. Gen. Stat. § 163-22.2 to make reasonable rules and regulation with regard to any primary or election. N.C. Gen. Stat. §§ 163-22; 163-22.2.

OVERVIEW OF WAKE COUNTY BOARD OF ELECTIONS PROCEDURES

22. Approximately ten percent of the state's registered voters reside in Wake County. To comply with the above-referenced statutory requirements and to adequately serve the large number of voters residing in Wake County, the Board begins to prepare for the election process several months before Election Day.

23. At the beginning of this process, the Board must code any applicable Wake County districts to identify the addresses that are part of the individual districts. The time required to code the districts depends on a variety of factors, such as whether the Board receives a "shape file" of the districts and the extent and nature of the changes required to be made to implement new districts. For example, if the Board does not receive a "shape file," which is a visual representation of the districts on a map, the Board will coordinate with the county Geological Information System department to generate such a file before coding the new districts.

Polling Places

24. As the election approaches, the Board takes steps to adequately staff all identified polling places. To competently serve Wake County voters, the Board must recruit and train approximately 650 workers to serve at polling places during the early voting period. The Board must recruit and train approximately 2,600 workers to serve at polling places on Election Day. It takes several sessions and significant resources to train these workers, making it very logistically difficult to simultaneously train both groups.

25. Due to the amount of space required, the Board—like many other bodies charged with administering elections—typically works with facilities such as schools and churches to identify and schedule polling places. To accommodate school, child care, and/or church schedules, these polling places are identified and booked several months in advance. Under state law, the

polling places must be finalized and formally noticed no later than 45 days prior to the election. N.C. Gen. Stat. § 163-128(a).

Creating and Printing Ballots

26. Because of the importance of accuracy on the ballot and the need to avoid any processing complications, both the Board and the SBOE conduct an extensive editing and testing process to ensure complete accuracy of the ballots to be used in any election.

27. Immediately after the deadline to petition for write-in space on a ballot, which is 90 days before the election (this year, **August 10, 2016**), the SBOE begins to proofread all ballot content for non-local races. At the same time, the Board begins to craft the template for the Wake County ballot. The Board then inserts the information from the SBOE on the non-local races into its template before conducting an extensive proofreading and testing process to ensure accuracy.

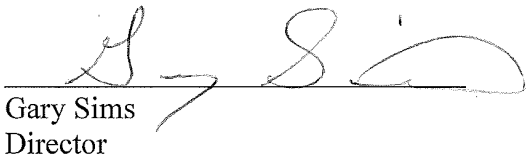
28. The Board then submits the completed Wake County template—which by then holds information for all local, state, and federal positions that voters will elect in the upcoming election—for approval from the SBOE. The SBOE is responsible for reviewing the ballot templates of all 100 counties, and does so on a "first come, first serve" basis.

29. To print the ballots, the Board submits a template to an outside vendor listing the candidates for all elections that will be held on that date, including local, state, and national elections. After the vendor returns the printed ballots to the Board, the Board must then test those ballots to ensure that there will be no problems with the ballots being processed by the vote-counting software.

30. The Board generally utilizes the entire period of time between the deadline to petition for a write-in space and the deadline for the submission of absentee ballots to conduct this process.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge.

Executed this 18th day of July, 2016.



Gary Sims
Director
Wake County Board of Elections

DATE	TIME	EVENT	Election	REFERENCE (N.C. GEN. STAT.)	RULE
2/29/16		Standard deadline to file notice of candidacy if seeking party primary nomination for any county office	2016 Gen	163-106(c)	The last business day in February preceding the primary.
6/24/16	12:00 PM	Deadline to file petitions with the Wake County Board of Elections to have name included on general election ballot as unaffiliated candidate for county election	2016 Gen	163-122	The last Friday in June preceding the general election.
07/26/16	5:00 PM	Write-in Candidacy Petition Deadline - deadline to have signatures verified by county board	2016 Gen	163-123	15 days before the date petition is due to be filed with the State Board of Elections
07/26/16		Deadline to Submit Precinct Change Proposal	2016 Gen	163-132.3	105 days prior to the next election that the new precinct boundaries will be in effect.
07/31/16		Publication of UOCAVA Election Notice	2016 Gen	163-258.16	Not later than 100 days before election day
08/05/16	12:00 PM	Deadline for Unaffiliated Presidential Candidate to provide VP name for ballot	2016 Gen	163-209	No later than 12:00 noon on the first Friday in August of presidential election year
08/10/16	12:00 PM	Verified Write-in Candidacy Petition Deadline - State Board of Elections Contests	2016 Gen	163-123	90 days before the general election date in even-numbered years
08/10/16	12:00 PM	Write-in Candidacy Petition Deadline - County Board Contests	2016 Gen	163-123	90 days before the general election date in even-numbered years
09/09/16		Party Nominee's right to withdraw as candidate	2016 Gen	163-113	No later than the date absente ballots become available
09/09/16		Absentee Voting - Date By Which Absentee Ballots Must be Available	2016 Gen	163-227.3(a) &163-258.9	60 days prior to a statewide general election
09/24/16		Notice of Precinct/Voting Place Change	2016 Gen	163-128(a)	45 days prior to next primary or election
09/24/16		Publish legal notice of any special election	2016 Gen	163-287	45 days prior to the special election date
09/24/16		Publish Election Notice 1	2016 Gen	163-33(8)	Publish weekly during the 20 day period before the voter registration deadline. (Start 21 days before deadline)
09/24/16		Mail Second Incomplete Notice	2016 Gen	163-82.4(e)	Within 45 days of the date of a general election
09/30/16		Publish Election Notice 2	2016 Gen	163-33(8)	Publish weekly during the 20 day period before the voter registration deadline. (Start 21 days before deadline)
10/07/16		Publish Election Notice 3	2016 Gen	163-33(8)	Publish weekly during the 20 day period before the voter registration deadline. (Start 21 days before deadline)
10/09/16		Last day to mail notice of polling place changes.	2016 Gen	163-128	No later than 30 days prior to the primary or election
10/09/16		Notification to Voters of Precinct/Voting Place Change	2016 Gen	163-128(a)	30 days prior to the primary or election
10/14/16	5:00 PM	Voter Registration Deadline	2016 Gen	163-82.6(c)	25 days before the primary or election day
10/14/16		Voter Challenge Deadline - last day to challenge before Election Day	2016 Gen	163-85	No later than 25 days before an election.
10/19/16		Voter Registration Deadline - Exception for missing or unclear postmarked forms or forms submitted electronically by deadline	2016 Gen	163-82.6(c) ; 163-82.6(c1)	No later than 20 days before the election
10/27/16		Absentee One Stop Voting Begins	2016 Gen	163-227.2(b)	Not earlier than the second Thursday before an election
11/01/16	5:00 PM	Last day to request an absentee ballot by mail.	2016 Gen	163-230.1(a)	Not later than 5:00 p.m. on the Tuesday before the election
11/01/16	5:00 PM	Late absentee requests allowed due to sickness or physical disability	2016 Gen	163-230.1(a1)	After 5:00 p.m. on the Tuesday before the election but not later than 5:00 p.m. on the day before the election.

DATE	TIME	EVENT	Election	REFERENCE (N.C. GEN. STAT.)	RULE
11/03/16	10:00 AM	Election Day Observer/Runner List Due	2016 Gen	163-45(b)	By 10:00 a.m. on the 5th day prior to Election Day
11/05/16	1:00 PM	Absentee One Stop Voting Ends	2016 Gen	163-227.2(b)	Not later than 1:00 p.m. on the last Saturday before the election
11/07/16	5:00 PM	UOCAVA Voter Registration Deadline	2016 Gen	163-258.6	No later than 5:00 p.m. on the day before election day.
11/07/16	5:00 PM	UOCAVA Absentee Ballot Request Deadline	2016 Gen	163-258.7	No later than 5:00 p.m. on the day before election day.
11/08/16	5:00 PM	Civilian Absentee Return Deadline	2016 Gen	163-231(b)(1)	Not later than 5:00 p.m. on day of the primary or election
11/08/16	5:00 PM	Begin Counting Absentee Ballots (Cannot announce before 7:30 p.m.)	2016 Gen	163-234	5:00 p.m. on election day unless an earlier time was set by resolution
11/08/16		Distribute Election Day Absentee Abstract to SBOE	2016 Gen	163-234(6)	Election Day
11/08/16	7:30 PM	UOCAVA absentee ballot return deadline - electronic	2016 Gen	163-258.10	Close of polls on Election Day
11/08/16	12:00 PM	Period to challenge an absentee ballot	2016 Gen	163-89	No earlier than noon or later than 5:00 p.m. on Election Day
11/08/16	6:30 AM	ELECTION DAY	2016 Gen	163-1	Tuesday after the first Monday in November
11/09/16		Sample Audit Count - Precincts Selection	2016 Gen	163-182.1(b)(1)	Within 24 hours of polls closing on Election Day
11/14/16	5:00 PM	Civilian Absentee Return Deadline - Mail Exception	2016 Gen	163-231(b)(2)	If postmarked on or before election day and received not later than three days after the election
11/17/16	12:00 PM	Deadline for provisional voters subject to VIVA ID to provide ID to county board	2016 Gen	163-166.13; 163-182.1A(c)	Not later than 12:00 noon the day prior to the time set for the county canvass.
11/17/16	5:00 PM	UOCAVA Absentee Ballot Return Deadline - Mailed	2016 Gen	163-258.12	By end of business on the business day before the county canvass.
11/18/16	11:00 AM	County Canvass	2016 Gen	163-182.5(b)	10 days after statewide general election
11/18/16		Mail Abstract to State Board of Elections	2016 Gen	163-182.6	10 days after statewide general election
11/18/16		Deadline for election protest concerning votes counted or tabulation of results	2016 Gen	163-182.9(b)(4)a	Before the beginning of the county canvass
11/21/16	5:00 PM	Deadline for candidates in CBE jurisdictional contests to request recount	2016 Gen	163-182.7(b)	5:00 p.m. on the first business day after the canvass
11/22/16	5:00 PM	Deadline for candidates in SBOE jurisdictional contests to request recount	2016 Gen	163-182.7(c); 163-182.4(b)(5)	5:00 p.m. on the second business day after the canvass
11/22/16	5:00 PM	Deadline to file election protest concerning manner in which votes were counted or results were tabulated and there is cause for delay in filing	2016 Gen	163-182.9(b)(4)b	5:00 p.m. on the second business day after the county canvass
11/22/16	5:00 PM	Deadline to file election protest concerning any other irregularity than votes or tabulation of results	2016 Gen	163-182.9(b)(4)c	5:00 p.m. on the second business day after the county canvass
11/28/16		CBE issues certificates of nomination or election if no protest is pending	2016 Gen	163-182.15(a); 163-301	Six days after the county canvass (In a Municipal Election, the rule is no earlier than 5 days and no later than 10 days after the certification of the election.)
11/29/16		State Canvass	2016 Gen	163-182.5(c)	11:00 a.m. on the Tuesday three weeks after election day.
12/05/16		SBOE Issues Certification of Nomination or Election	2016 Gen	163-182.15	6 days after the State Canvass
01/07/17		Report Results by Voting Tabulation Districts (VTD)	2016 Gen	163-132.5G	No later than 60 days after Election Day

Exhibit D

Mailing Address:
P.O. Box 27255
Raleigh, NC 27611-7255

Phone: (919) 733-7173
Fax: (919) 715-0135

NORTH CAROLINA
State Board *of* Elections

July 15, 2016

HAND-DELIVERY

The Honorable James C. Dever III
Chief United States Judge
United States District Court (E.D.N.C.)

Re: Administrative authority under N.C. GEN. STAT. § 163-22.2.

Your Honor:

The Court has requested that the North Carolina State Board of Elections ("State Board") provide information regarding the agency's authority to enact remedial measures under Section 163-22.2 of the North Carolina General Statutes ("G.S."). The State Board is a bipartisan and independent agency tasked with overall supervision of elections administration throughout North Carolina. As such, we take seriously our obligation to ensure compliance with state and federal law, and to reconcile the two when so directed.

The General Assembly has authorized the State Board to implement temporary procedures necessary to avoid delays otherwise caused by court orders affecting elections. *See* G.S. § 163-22.2. Our exercise of this limited authority has been procedural in nature,[1] and invoked most frequently as a stopgap measure in the days of preclearance under Section 5 of the Voting Rights Act. In those instances, as in the present, G.S. § 163-22.2 prohibits remedial measures that conflict with other provisions of Chapter 163 and imposes a strict expiration requirement 60 days into the next session of the General Assembly. Indeed, temporary rules established under the statute would be void on March 12, 2017.

While temporal limits may discourage our reliance on G.S. § 163-22.2 as a redistricting tool, the State Board stands ready to implement special procedures necessary to effectuate any remedy fashioned under the broader jurisdiction of the Court. With respect to technological capabilities, the agency does not presently possess redistricting software or expertise applying traditional redistricting principles, that may be necessary to preserve otherwise legitimate legislative choices referenced in your Order. We would, however, make every effort to seek resources as needed to comply with any order of this Court.

Sincerely,

Kim Westbrook Strach

Kim Westbrook Strach
Executive Director, N.C. State Board of Elections

[1] The State Board most recently relied upon G.S. § 163-22.2 to establish a five-day candidate filing period and primary election date after a three-judge panel of the Wake County Superior Court enjoined the agency's enforcement of a retention election option for incumbent justices sitting on the North Carolina Supreme Court. *See* S.B.E. Temporary Order 2016-03 responding to *Faires v. State Bd. of Elections*, 15 CVS 15903, 2016 WL 865472 (N.C.Super.), *aff'd per curiam* 784 S.E.2d 463 (N.C. 2016).

Cc.: Anita S. Earls, Southern Coalition for Social Justice (*via* anita@scsj.org)
Charles Marshall, Brooks Pierce (*via* cmarshall@brookspierce.com)
James Bernier, N.C. Department of Justice (*via* jbernier@ncdoj.gov)
Andrew Tripp, for President Pro Tempore Philip Berger (*via* andrew.tripp@ncleg.net)
Bart Goodson, for Speaker of the House Tim Moore (*via* bart.goodson@ncleg.net)

Exhibit E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Consolidated Civil Action

RALEIGH WAKE CITIZENS ASSOCIATION, et al.,	)	
Plaintiffs,	)	
v.	)	No. 5:15-CV-156-D
WAKE COUNTY BOARD OF ELECTIONS,	)	
Defendant.	)	
CALLA WRIGHT, et al.,	)	
Plaintiffs,	)	
v.	)	No. 5:13-CV-607-D
STATE OF NORTH CAROLINA,	)	
Defendant.	)	

ORDER

Absent another order from the United States Court of Appeals for the Fourth Circuit, the mandate will not issue until August 2, 2016. See Fed. R. App. P. 41(b). When the mandate issues, this court will have jurisdiction. The court will hold a status conference concerning the remedy on Tuesday, August 2, 2016, at 4:00 p.m. in Courtroom One of the Terry Sanford Federal Building and United States Courthouse, Raleigh, North Carolina. Counsel for the parties shall be present. The court also requests that counsel for the North Carolina State Board of Elections and counsel for the legislative leaders be present.

At the status conference, the court intends to discuss the submissions of July 18, 2016, and a proposed schedule concerning the remedy. See [D.E. 81, 82, 83, 84]. The court would like to know (among other things) when the North Carolina State Board of Elections will be able to submit a proposed remedial plan (see [D.E. 81]) and when the legislative leaders will be able to submit the illustrative maps referenced in their submission. See [D.E. 84] 8. Furthermore, the court understands from plaintiffs that they want the court to adopt as court-ordered remedial plans the plans that were in effect in 2011. See [D.E. 82] 2.

The court DIRECTS the clerk of court to serve this order upon the office of the North Carolina Attorney General and DIRECTS that office to ensure proper service on counsel for the North Carolina State Board of Elections and counsel for the legislative leaders.

SO ORDERED. This 27 day of July 2016.

JAMES C. DEVER III
Chief United States District Judge

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

RALEIGH WAKE CITIZENS ASSOCIATION, et al.,

Plaintiffs,

vs. No. 5:15-CV-156-D

BAREFOOT, et al.,

Defendant.
_____/

CALLA WRIGHT, et al.

Plaintiffs,

vs. No. 5:15-CV-607-D

STATE OF NORTH CAROLINA, et al.,

Defendant.
_____/

PROCEEDINGS BEFORE THE HONORABLE
JAMES C. DEVER, III
CHIEF UNITED STATES DISTRICT COURT JUDGE

Tuesday, August 2, 2016
4:00 p.m. - 5:10 p.m.

United States District Court
For the Eastern District of North Carolina
310 New Bern Avenue
Seventh Floor, Courtroom One
Raleigh, North Carolina

Stenographically Reported By:
Denise Y. Meek, Court Reporter

APPEARANCES

FOR THE PLAINTIFFS:

ANITA EARLS, ESQ.
ALLISON RIGGS, ESQ.
Southern Coalition for Social Justice
1415 West Highway 54, Suite 101
Durham, NC 27707
919-323-3380
anita@southerncoalition.org
allison@southerncoalition.org

FOR THE DEFENDANT:

CHARLES F. MARSHALL, III, ESQ.
JESSICA THALLER-MORAN, ESQ.
Brooks Pierce McLendon Humphrey & Leonard, LLP
150 Fayetteville Street
1600 Wells Fargo Capitol Center
Raleigh, NC 27601
919-839-0300
cmarshall@brookspierce.com
jthaller-moran@brookspierce.com

FOR THE NORTH CAROLINA STATE BOARD OF ELECTIONS:

JAMES BERNIER, JR., ESQ.
Assistant Attorney General
North Carolina Department of Justice
114 West Edenton Street
Raleigh, NC 27603
919-716-6523
jbernier@ncdoj.gov

JOSH LAWSON, ESQ.
General Counsel
North Carolina State Board of Elections
441 North Harrington Street
Raleigh, NC 27603
919-733-7173
joshua.lawson@ncsbe.gov

APPEARANCES CONTINUED

FOR THE LEGISLATIVE LEADERS:

THOMAS A. FARR, ESQ.
PHILLIP J. STRACH, ESQ.
Ogletree Deakins Nash Smoak & Stewart, PC
4208 Six Forks Road, Suite 1100
Raleigh, NC 27609
919-787-9700
thomas.farr@ogletreedeakins.com
phil.strach@ogletreedeakins.com

BART GOODSON, ESQ.
General Counsel
Office of the Speaker of the
North Carolina House of Representatives

- - -

THE BAILIFF: All rise.

Court is now back in session, the Honorable Chief Judge James C. Dever, III presiding.

Please be seated and come to order.

THE COURT: Good afternoon. Welcome to the United States District Court For the Eastern District of North Carolina.

We're here for a status conference in the Raleigh Wake Citizens Association vs. Barefoot. It's a consolidated case.

The mandate, actually, has not yet issued from the Fourth Circuit. It has been seven days under the rules. The mandate is something that is necessary for this Court to have jurisdiction in the ordinary course. It's my understanding that the mandate will issue first thing in the morning, but since we're all here, we should go ahead and discuss remedial issues in connection with this case while recognizing that I don't have jurisdiction until and unless the mandate issues.

I do thank counsel for plaintiffs and counsel for the defendant Wake County Board of Elections for the submissions they made in connection with

my order of July 8th, the submissions of July 18th, and then another order on July 27th, and I received a submission this afternoon from plaintiffs. I have had a chance to review all of those.

And the submission, Mr. Marshall, that y'all made --

Well, before we do that, I'd like to note: Who represents the Board of Elections?

MR. BERNIER: Good afternoon, Your Honor. James Bernier from the Attorney General's Office here on behalf of the State Board of Elections.

THE COURT: Okay.

MR. LAWSON: Josh Lawson, general counsel for the State Board.

THE COURT: Thank you.

And then we have counsel for the Legislative Leaders here?

MR. FARR: Good morning, Your Honor. Tom Farr and Phil Strach from Ogletree Deakins. We're here representing the Legislative Leaders. Also, Bart Goodson, who is the general counsel for the Speaker. And we're hoping that one of the lawyers from the Senate, Brent Woodcox, will be here shortly.

Thank you, Your Honor.

THE COURT: Good to see y'all.

And, of course, I know Ms. Earls and Ms. Riggs and Mr. Marshall and Ms. Thaller-Moran.

The submission that was made by the Wake County Board of Elections sets forth a variety of deadlines that need to be met at Docket Entry 83. And then there's an affidavit or a declaration from Mr. Sims under 82-1 and a whole host of dates under 83-2 of the submission there.

Mr. Marshall, did you want to add anything to those dates or deadlines?

MR. MARSHALL: Your Honor, I don't think so other than due to a Fourth Circuit ruling a few days ago on the Voter ID Act, my understanding is that may push the early voting dates back another seven days.

THE COURT: Okay. And is that something that the State Board is reviewing? Is that your understanding?

MR. BERNIER: Your Honor, it's my understanding that is correct.

MR. MARSHALL: Other than that, Your Honor, I believe we're okay on the submissions filed.

THE COURT: And those submissions work off of

the idea that whatever plan or plans to be implemented, that you needed those, your client needed those by August 10th?

MR. MARSHALL: That's right, Your Honor.

THE COURT: And how much if any give is there in that date? Is that a hard date?

MR. MARSHALL: Well, Your Honor, I think it depends on where we're backing up from, and I'll give you an example.

The current date to mail absentee ballots is September the 9th. And in order to have the absentee ballots printed and ready to mail, the Wake County Board of Elections generally starts that process immediately after the deadline for a petition for a write-in candidate expires, which is August 10th.

So historically they have used that 30-day period between August 10th and September 9th to test and prepare the ballots and get certifications or approvals from the State Board of Board of Elections.

Mr. Sims is here, and if it's helpful to the Court at some point, I'm happy to tender him as a witness to answer questions. I believe that there may be a little bit of give in that 30-day

period, but my understanding is they've never had to operate with less than 30 days, so I don't know that historically we have a lot of benchmarks and data points to be able to say whether they could do it in, say, 25 versus 20 versus 15.

It is my understanding as well, Your Honor, and I think I mentioned this at the beginning of our submission that, and this may be a question for the State Board, but many of these deadlines are able to be modified, obviously, in response to a court order and sometimes at the discretion of the State Board. Were any of those deadlines to be modified, clearly that would change the schedule we've presented, but unless and until those modifications occurred, we didn't want to speculate.

THE COURT: So that would be modifications under NC Gen Stat 163-22.2?

MR. MARSHALL: That's right, Your Honor.

So, again, tagging the August 10th date off of September 9th, if the September 9th deadline was modified, then, obviously, that may allow the August 10th date to be modified, and things may move as a block, but I thought given the current

deadlines that are in place that have not been modified, I wanted to let the Court know what the County Board's historical practice would have been.

THE COURT: All right. Anything else?

MR. MARSHALL: That's it.

THE COURT: Okay. I will hear now from Ms. Earls on behalf of the plaintiffs.

And, again, I thank you for your submissions. And, obviously, the -- well, did you have any preliminary remarks?

MS. EARLS: Yes. Thank you very much, Your Honor. We appreciate your time this afternoon and your attention to this matter.

Just to be clear, I want to make sure something I heard a minute ago is correct. The August 10th date is the date by which the County Board of Elections would need to know the names that are going to be on the ballot and whether or not there would be a write-in. So they would need to have a filing period that closes that date, and they would need to know what the districts are at some number of dates -- at least, I think five days before that date -- to stay -- without any other alteration of the

deadlines. So I just wanted to make -- I wasn't sure that I heard that come out that way.

THE COURT: Mr. Marshall, do you want to --

MR. MARSHALL: Yes, Your Honor, and I apologize. Most of that was in my submission about what has to happen before certain dates. But it is true that the August 10th date would require, if there are new districts, it requires a new filing period to open and close before that August 10th date or whatever the date is by which the write-in deadline occurs.

THE COURT: And that date, absent either an order from this court or some change in that date under 163-22.2 would be what date?

MR. MARSHALL: August the 10th.

THE COURT: Okay.

MR. MARSHALL: So as we sit here today, Your Honor, there would have to be a filing period that would open and close before that date, which would also require the County Board to have received new maps and then coded the new maps, and then have a notice of filing period and a filing period.

THE COURT: So if you get the maps on the 10th, do you need them before the 10th?

MR. MARSHALL: Well before the 10th.

And Ms. Earls made a good point. The way to think about it is the write-in petition deadline is the deadline by which the names of all of the candidates on the ballot will be filed. And so in order to have the names on the ballot, we have to know who the candidates are; in order to know who the candidates are, we have to know who is filed to run in the districts; in order to know who is filed to run in the districts, we have to know what the districts are; in order to know what the districts are, we would need the map.

THE COURT: Have those dates all passed? I mean, if it's not -- if it's some -- you said it's some date before August 10th. What date before August 10th?

MR. MARSHALL: Well, there isn't a set deadline by which -- well, the filing period has already opened and closed, obviously.

THE COURT: Right. Right.

MR. MARSHALL: So you would have to -- you would have to open a new -- we would have the authority to open a new filing period, and that would have to occur before August 10th. And in order, operationally, in order to have a filing

period, we would have to have new maps, and then Mr. Sims would have to code those maps, which is not a long process, but it's -- the order of events would be receive the new map, code the new map, open and close the filing period, and under the current deadlines that would be August 10th.

THE COURT: So just looking at the submission at Docket Entry 83-2 on page two which is attached to Mr. Sims' declaration, just so that I have that understanding, this deadline for verified write-in candidacy petition deadline under 163-123 arises from that statute.

MR. MARSHALL: That's right.

THE COURT: Okay. And so the State Board would have the authority under 163-22.2 to change that date.

MR. MARSHALL: Yes, that's my understanding; they have the authority.

And I should have mentioned earlier, Your Honor, I note that some of your last order was questions directed towards the State Board and the Legislative Leaders, and I'm happy to deal with it at any time, but I certainly don't want to be speaking for them. I might ask Mr. Lawson to weigh in and make sure I haven't misspoken

about their authority to change that date.

MR. LAWSON: So under 22, just 22, not point two, subdivision K, we have the authority to push back the absentee period up until, federal law kicks in at 45 days, but it's 60 days. So if there was a nudge in the calendar, it would be to the absentee, most likely not to the write-in. The write-in would require the 22.2 invocation, versus the absentee, which could be done under 20, sub A.

THE COURT: All right. Ms. Earls?

MS. EARLS: Thank you, Your Honor.

I would like to address three points. First, this threshold question of what the scope of this Court's remedial power is in this context, which we've raised in our papers and I'd like to address; secondly, I would like to talk about who is appropriate at this point in time to address those issues; and then, thirdly, to provide you plaintiffs' understanding and interpretation of what the deadlines that are currently operating, what they mean in terms of this case.

So first on the question of what the scope of the Court's remedial powers are, I suggest to you first that we look to what the Fourth Circuit has

said in this case about what might happen on remand. And the first time they addressed that question is when the Wright vs. North Carolina case was appealed, and the question was whether or not defendants, other than the Wake County Board of Elections, could be sued in this matter, and plaintiffs argued at that point in time that the legislature needed to be a party in the case in order to implement a remedy if plaintiffs were successful. And the Fourth Circuit said -- and I'm just going to read from the opinion. This is at pages 262 to 263: "Plaintiffs counter that if the proposed defendants are not party to their suit, there will be no mechanism for forcing a constitutionally valid election should they succeed in enjoining the Session Law. This assertion is, however, incorrect." That's the Fourth Circuit; we were incorrect. "The District Court could, for example, mandate that the Board of Elections conduct the next election according to the scheme in place prior to the Session Law's enactment until a new and valid redistricting plan is implemented. State law also provides, for example, that the State Board of Elections can make reasonable interim rules with respect to

pending elections." And then they cite the statute we've been talking about. "Without question, then, a valid election could take place if the plaintiffs succeed on the merits and successfully enjoin the Session Law."

So if initially --

THE COURT: But your submission says that it has to be a remedy and that the Court, at least that's the way I read it, and it's interesting, that you said that the Court has no authority to do anything other than that.

MS. EARLS: Well, in these circumstances, the Court has no authority to do anything other than enjoin the statutes that have been found to be --

THE COURT: I understand -- I understand the injunction is different than what the remedy is. I read, and maybe I misread your papers, and I'd like you to tell me, I thought you cited the Cleveland County case today for -- the two cases that I thought y'all cited for the proposition that this Court lacks authority to do anything other than implement the old plans were the Dillard County and the Cleveland County case.

MS. EARLS: Yes, Your Honor, I believe that is the implication and the force of the Cleveland

County case. And the reason is, and what makes this case so different from so many other one-person-one-vote cases and other redistricting cases is that here we have a constitutionally valid set of districts for both the County Commission and the School Board that have already been enacted and already been used.

In most cases where a one-person-one-vote claim is brought, and this is the Larios vs. Cox instance, the claim is being brought against a plan that was drawn immediately after the Census. So the previous plan in place in the prior decade is no longer constitutional under one-person-one-vote grounds, the new plan was not constitutional under one-person-one-vote grounds, so there was essentially no plan that was constitutional that could be used.

In those circumstances, the Court's obligation is to give the jurisdiction the first opportunity to redraw; and if they are unable to do so, then the Court's remedial authority to either appoint a special master, as many courts do, but their authority to implement the Court-ordered plan kicks in.

THE COURT: See, but that's where you're then

reading Cleveland County to say that I have no authority to do anything. Cleveland County is really a case about the authority of Cleveland County. Right? It was -- the ultimate holding in that case from the DC Circuit was that there was no Voting Rights Act violation.

MS. EARLS: Right.

THE COURT: It was a consent decree with no violation, and the County Commission lacked authority under state law to effectuate the remedy that was in the consent decree, but you read that as a limit on the power and discretion of the United States District Court.

MS. EARLS: Correct, Your Honor, because what was reversed, what was essentially summary judgment granted was that the District Court's order implementing that consent decree was without force and power. And it contrasted that to the Moore vs. Beaufort County case, again, a consent decree, a limited voting method of election not authorized under state law. The difference there in the Moore County case where the Court enforced the consent decree was that the parties had stipulated that there was a violation of the Voting Rights Act.

THE COURT: Right, but isn't that a key legal difference, though, that where the Fourth Circuit has found a violation to then say that notwithstanding a constitutional violation, that a District -- that a United States District Court has no power, other to do this one thing? That just -- it just -- it strikes me as odd.

MS. EARLS: Well, because, Your Honor, in this circumstance we have an existing plan that's been put in place pursuant to state law.

THE COURT: Right, but there's a difference between perhaps it could be a remedy and saying it has to be the remedy as a matter of law.

Like the Dillard case that y'all cited, also, that case is a case where a District Court found a violation, enjoined an electoral scheme in Alabama, created I think a seven-member County Commission instead of four-member County Commission, who had the authority to create seven single-member districts, ultimately reversed itself, dissolved the injunction and then said, "Now that I've dissolved this federal injunction, the law that was in effect becomes enforceable again." Right? And so that also doesn't seem to be analogous, and so I wanted to hear what your

take on that was.

MS. EARLS: So our position, Your Honor, is that if there was something unconstitutional about the 2011 plans, and the jurisdiction could not remedy the situation, then this Court's remedial powers would kick in. And that's clear from the Supreme Court cases. The Court implementing a map is a last resort.

Here we have a fully constitutional election scheme for both these bodies, and that's the scheme that you would have to find is unconstitutional in order for there to be a situation where there is no plan in place enacted legally under state law that can be used.

THE COURT: But isn't it different if in essence those -- it's different if they have been supplanted by legislation, right? You don't think that that matters?

MS. EARLS: Well, I think that there a number of cases in the Section 5 context which is very analogous where the Court says --

THE COURT: But is it really? I mean, is it that analogous? Because Section -- under the days of Section 5, until you got free clearance, it wasn't enforceable.

MS. EARLS: Right.

THE COURT: Right? And so the other plan was always the law and never stopped being the law as opposed to a legislature enacting new legislation and repealing old legislation.

I mean, I understand the argument, but I was just trying to understand the proposition, not that the Court has the discretion to adopt that as a remedy, but the notion that as a matter of law under either Cleveland County or Dillard, those are the two cases that you seem to cite that that's mandated.

MS. EARLS: And our position, Your Honor, is that this Court's authority to order a remedial plan only kicks in if there isn't an existing plan that's been duly put in place consistent with state law and is constitutional. In that last resort, then the Court's power kicks in.

But here we have a plan that can be used and has been used. And the Section 5, there are several Section 5 cases. Riley vs. Kennedy is one that we did not cite in the supplemental filing, but Riley vs. Kennedy is a US Supreme Court case from 2008, where the jurisdiction had started implementing the change even though it

had not been precleared, and the Court said that it's not effective because it hadn't -- it was not constitutional.

But I think --

THE COURT: But it was not precleared.

MS. EARLS: It had not -- it was not -- it did not comply with federal law, and federal law is superior. But the general proposition is that the Court only --

And then another case that we do cite is McGhee vs. Granville County, which is another example of, there was a violation found, there was no legal and constitutional plan or system to go back to, but in McGhee vs. Granville County, a Fourth Circuit case, the District Court implemented the plaintiff's proposed remedy over what the jurisdiction had proposed because in the Court's view it was a more complete remedy, and the Fourth Circuit said that the Court doesn't have that discretion. If the jurisdictions put forward a constitutional, legal plan, then unless the Court finds something infirm about that, it's the one that needs to be used.

And so my position is that in these circumstances, where we have a constitutional

plan in place for both of these bodies, the Court doesn't have, in essence, the option to reject those, that it has to go back to the plans that have been in place that were passed pursuant to state law. Until the General Assembly acts, or in the case of the County Commission, which has under state law the authority by referendum to change its method of election, the County Commission could enact a change.

And that's the significance of the language in the Cleveland County case. The DC Circuit says North Carolina state law is very specific about how you have to go about changing your method of election. And if you don't have a violation of the existing system, there's no power or authority of a federal court to come in and order something different. So that's our position there.

And I think, as I started to say, not only is the Fourth Circuit's opinion in Wright instructive here, because it very clearly suggests that that's what should happen here. But the most recent opinion where the Court concludes its opinion in the slip opinion at page star 45: "We remand with instructions to enter

immediately judgment for plaintiffs granting both declaratory relief and a permanent injunction as to the one-person-one-vote claims." The Court didn't say, "We remand for consideration consistent with this opinion, we remand for consideration of whether or not there's time to implement a remedy," it clearly said --

THE COURT: But you would also agree that nowhere it says, "We remand and instruct that the plans in effect in 2011 we could use." I mean, had it said that, had it said that in plain language, then y'all wouldn't have to be here.

MS. EARLS: Well, except, Your Honor, I think they already said it. I think they said that in 2015 in the first opinion in this case where they said the District Court could mandate --

THE COURT: But they also then cross-referenced the order, the state order under 163-22.2, in that passage you read.

MS. EARLS: Right, to make the administrative changes that are necessary to implement -- to go back to the prior system. Because to be sure, there are a couple of administrative changes, particularly with regard to the Board of Education. And I think it is important to

consider the two bodies separately because the County Commission elections are at a different stage and a different status than the Board of Education elections. But there are administrative changes that need -- we're not in a situation to simply proceed exactly as state law currently provides.

So let me -- and the final thing I'll say is that the Perez vs. Perry case of the US Supreme Court also stands for this proposition. The Supreme Court in 2012 said: "Redistricting is 'primarily the duty and responsibility of the State.' The failure of a State's newly enacted plan to gain preclearance prior to an upcoming election does not, by itself, require a court to take up the State legislature's task. That is because, in most circumstances, the State's last enacted plan simply remains in effect until the new plan receives clearance."

THE COURT: Right. I guess that runs into that whole issue of is, is even under what you propose, under the -- when we talk about a last enacted plan and scheme, there were odd-year elections in the School Board.

MS. EARLS: Right.

THE COURT: We have nine seats that are going to expire. They're going to be out of office on December 5, 2016. Right? The nine School Board members?

MS. EARLS: Well, under the new statute. And that's where our arguments about staggerability I think are also relevant.

THE COURT: But, again, even under your theory, you want to nix -- you don't want to really go all the way back and have odd-year elections and, what, have the Court order that the current School Board just stay in place unelected and then be elected in odd years and then...

MS. EARLS: No, no, Your Honor, what we've said in our papers is that with regard to the School Board elections, the most -- the most efficacious way to return to the prior system is to have the five districts that were elected in 2011 elected for three-year terms in 2016. And then next year in 2017, the four districts that were elected in 2013 will again be up for election as they would have been under the old system. And then you will have it staggered, you'll have a nine-member board, staggered terms,

elected in odd years.

THE COURT: But that would then require this Court to order that they be, assuming if they want to, to stay in place for another year, right, for those four?

MS. EARLS: No. Well, not if we are in the old system. The only thing that that requires is the State Board to administratively say we will have -- in essence, we're having a delayed election that should have happened in 2015; we are now having it in November 2016, and that it would be three-year terms instead of a four-year term. And that's the administrative adjustment that would return us back to the old system for the School Board.

THE COURT: Okay. Anything else?

MS. EARLS: Yes. I want to just preserve for the record the plaintiffs' position that the legislative defendants have not -- they filed a motion to intervene with the Court of Appeals which hasn't been ruled on. Plaintiffs filed a motion, or filed a response opposing that motion, and we continue to take the position that it's not appropriate for them to intervene in this matter. And so we don't want to -- we want to

preserve our continuing objection to their addressing anything substantively.

We did not file anything seeking to strike what they filed in response to the order because it seemed to us to be us akin to a news brief, and that's not inappropriate, but for them to participate today as a party, we don't want to be in any way waiving our objection to them intervening in this case.

The final thing I wanted to say is that the deadlines that currently exist with regard to the election schedule for 2016 can be best met by using the existing districts. The voters have been assigned to those districts in the past. It's the easiest to implement. The shapefiles are already at the Board of Elections.

And the, particularly with the County Commission election system, the only thing that -- enjoining the use of the new system simply means that the primaries for the A and B Districts would be void, and the current elections for the County Commission districts where there were primaries would proceed --

THE COURT: Districts 4, 5 and 6.

MS. EARLS: Correct.

-- would proceed as they are already underway.

So that's actually, for the County Commission, it's actually very little that implicates the election schedule. But for the School Board, for those five districts that we contend should be elected this year, to get that School Board back on the staggered schedule in odd years, those district elections can proceed if a filing period is opened in the next day or two.

So not only would I submit to you is, going back to the prior election method, what is required in these circumstances from a pragmatic point of view is also the easiest to implement and the easiest to administer, and the least confusion for voters; they've already been using these districts. It truly is, for all the parties involved, the best way to proceed in these circumstances.

Thank you.

THE COURT: Thank you.

MR. BERNIER: Your Honor, we're here from the State Board.

THE COURT: Y'all can come up to the table,

if you'd like.

Again, I thank you for the submission that y'all made at Docket Entry 81 in which you describe the State Board accurately as an independent bipartisan board with its remedial authority under 163-22.2, and then as the North Carolina Court of Appeals interpreted it in the Newsome case.

Do you have any preliminary remarks?

MR. BERNIER: Your Honor, not anything other than I believe Your Honor already knows.

First, I'm general counsel, I'm counsel to the Attorney General's Office. General counsel for the State Board is also present, along with Executive Director Strach. They are available to answer any of Your Honor's questions.

And, in fact, as to the details and the timing and the schedule, I would defer to Attorney Lawson, who is present here at counsel table to my left. But just preliminarily, Your Honor, as we said in our submission, that 163-22.2, Your Honor, we believe is more of the administrative organizations of the State Board to adjust the scheduling and timing of the processes involved in the election, more so than

the redrawing of district lines.

In a prior order Your Honor had asked whether the State Board would be willing to redraw district lines and was -- the State Board is -- can't take the position that it is neither willing or unwilling, but for practical purposes at this point in time we can't just because of the lack of the software, the training, the staff, everything that's needed to actually pull together the district lines, to redraw district lines.

Your Honor, Attorney Lawson is here to answer any of Your Honor's questions. The timing, it's my understanding that, as Mr. Marshall said earlier, there is some flexibility as to the deadline of the absentee ballots, which would then impact the deadline for the write-in ballots. But as to a particular position or a particular remedy, Your Honor, I don't believe the State Board has a particular position on which remedy is a proper one, just that we need it sooner rather than later so we can implement as needed.

THE COURT: All right. I'll hear from Mr. Lawson.

Mr. Lawson, is it the State Board's position that you do have the authority under 163-22.2 to remedy the constitutional defect?

Again, if you look at just the two plans at issue, which, of course, is the same plans. You have an ideal population in each district of 128,713 people, and an ideal population in the two super districts of 450,497 people, and then you have a statute that I think the General Assembly enacted in 1981 that says in the event any state election law or form of election of any County Board of Commissioners or local Board of Education is held unconstitutional by a state or federal court, and such ruling adversely affects the conduct and holding of any pending primary election, the State Board of Elections shall have authority to make reasonable interim rules and regulations with respect to pending primary elections as deemed advisable so long as they do not conflict with any provision of Chapter 163 of the General Statutes. And such rules and regulations shall become null and void 60 days after convening of the next regular session of the General Assembly. And then the Court of Appeals interpreted that statute as a remedial

statute in the Newsome case. So do you think you have the authority to do it?

MR. LAWSON: So following Director Strach's admission to the Court, on the 18th, the State Board had a meeting, which we have transcripts of if Your Honor would like those submitted, the State Board at that time did not take a vote on the particular questions, but at a number of references there was a general meeting of about four members indicating that they think it's best done and left to the legislative side of our government.

Secondarily, though, there was the distinction drawn between any type of action taken under 22.2 versus action taken on the request of the Court and through the jurisdiction, it's much broader of your bench-crafted appropriate relief and remedy in this case.

So there were kind of two pieces. One was a historic look at 22.2 and the fact that it had not been used for anything in the scale of redistricting.

Secondarily, when used, there is an expiration date that is automatic and built into

the statute such that there was uncertainty in the Board's discussion as to whether that was appropriately seen as a tool for redistricting. Districts, of course, optimally are not temporary in nature.

So while we did not take a definitive stand one way or the other on the permissibility of 22.2 as a tool, there was a general expression from members of the Board that they wished to do whatever the Court believed they should do, and preference expressed by a couple of them that we act within the Court's remedial jurisdiction rather than 22.2.

I would enter, also, Your Honor, that under 163-22, sub L, our decisions can be brought into Superior Court in Wake County where they are reviewed on a deferential agency type review. However, final decisions of our agency could transfer jurisdiction if not acting directly under your authority but rather under our general statutory authority.

THE COURT: All right. Anything else?

MR. LAWSON: Your Honor, our objections to logistics. We have done some further digging, getting some price points with different vendors

of software that we know are in use in other states.

Our GIS specialist is in India until the 22nd and will be back to work on the 23rd. We only have one GIS specialist, and he would be our point person for any type of software based redistricting.

THE COURT: And that's the person in India? Is that the one person that you have, and that one person is in India?

MR. LAWSON: It's the one that we have in-house, sir.

THE COURT: Oh, okay.

MR. LAWSON: Yes, sir. This was a leave approved, a yearly visit to his family, it got approved back in April, but he has been there and is still there.

But we did some pricing around, and it looks as though we would have to go through state procurement at a competitive bidding process because there are alternative vendors out there that substantially would perform the same functions, unless you were to direct the legislative resources coordinate with us or others, but we would have to leave that to you.

This process takes upwards of eight weeks even when expedited.

The reason that we think that that's important is because while we don't have technical skill in-house at present to be able to perform the redistricting, we also have not had experience applying traditional redistricting principles, especially if you throw into it things like communities of interest and political subdivisions, also are requiring that we adhere as closely as possible to permissible legislative intent that you referenced in your order, I believe the July 5th.

MR. BERNIER: 8th.

MR. LAWSON: 8th. Pardon me.

THE COURT: Okay. Anything else?

MR. LAWSON: No, sir.

THE COURT: Okay. Thank you.

Mr. Farr, if you would just come up.

Again, I've reviewed all of the submissions, the submissions that y'all made at Docket Entry 84. Would like to make any remarks?

Or Mr. Strach?

MR. FARR: Thank you very much, Your Honor. I have a few comments; although, I'll try not to

repeat what we've filed with the Court.

First of all, Your Honor, I want to clarify that the legislature was never a party in any of these cases. The legislature and the Legislative Leaders were not defendants in the first case, which I think was the School Board case. The legislature or the Legislative Leaders were not represented in that case.

It's my understanding that plaintiffs did make the Legislative Leaders as a defendant in the second case, the Commissioners case, and that the plaintiffs took a voluntary dismissal of the legislators in that case after the Fourth Circuit ruling. So I just want to make sure that everyone understands that the legislature was never a defendant in either one of these cases.

Next, Your Honor, we strongly do not believe that the State Board of Elections has the authority to do redistricting plans to remedy violations found by courts. The Court is very well aware of the myriad number of cases that we've had in North Carolina, and that statute has never been interpreted to give the State Board the authority to draw up redistricting plans in a situation like this. It's interpreted to give

the State Board the authority to change election schedules.

And consistent with that, Your Honor, you've heard the State Board attorney just referenced the fact that they do not have the software that's typically used to draw the plans, they don't have anyone on their staff that's ever drawn plans. The one person who might be able to learn how to draw plans, I think I heard him say that he is out of the country until August 22nd. So if something is going to happen this year, the plans are not going to be drawn by the State Board of Elections, nor should they be drawn by the State Board of Elections.

Your Honor, I don't want to belabor the point, but we have made our statement that we do not think it's proper to go back to the 2013 plans because they do not represent the most recent policy decisions made by the legislature.

The Legislative Leaders do have an illustrative plan available, Your Honor, which we could file with the Court tomorrow, if the Court would like to see an illustrative plan. We think that plan remedies the constitutional problems found by the Fourth Circuit, and we'll be happy

to provide that to you, and all of the information that goes along with that.

As far as election schedule, Your Honor, we basically think that given where we are, it's going to be very, very difficult to have elections under a different plan in time for the November general election. We do defer to the State Board of Elections as having superior expertise on all the nuances that go into scheduling an election, Your Honor.

But one thing we want to be very strong about, Your Honor, is that we do not think there should be a new election schedule that reduces the amount of time for voters in Wake County to cast absentee ballots. We had a discussion or we heard a discussion about that today from some of the counsel. For example, we don't think that it's fair to the voters of Wake County in a presidential year for them to have some of the time for absentee voting cut back 45 days when everyone else in the state is permitted 60 days to do absentee voting. So we would be strongly opposed to any election schedule that would do that.

THE COURT: What do you have to say about

Footnote 13 of the Fourth Circuit's opinion just in terms of this whole issue of debriefing on the mandate rule and whether the circuit has mandated the injunction?

MR. FARR: Well, Your Honor, I think -- I wasn't there at the oral argument, but it does not seem as though anybody briefed or argued the position about what the appropriate remedy would be at this point in time in the election cycle.

The footnote I think says that the Fourth Circuit sees no reason why elections should go forward under the plans they found unconstitutional, but this didn't really consider what those reasons may or may not be.

And I think in one of your orders, Your Honor, you cited a couple of cases where the Supreme Court has held that on issues like this, it's appropriate for the District Court to be the entity that analyzes what the facts and circumstances are at this point in time in the election cycle and then make a decision based upon your exercise and your discretion on what was appropriate given where we are today.

So I do not think you've been -- I don't think the elections under the plans have been

declared illegal and have been ruled out. Depending on what the circumstances are, if the Court and the State Board of Elections thinks that we can still get a new plan in time within the filing period and have an appropriate amount of time for absentee voting, we do have an illustrative plan that we could give the Court tomorrow.

THE COURT: And you just -- so the mandate rule cases that the plaintiffs cite, you just don't think that the footnote encompasses a mandate to issue that injunction? Obviously, that's got to be logically your position, right?

MR. FARR: No, sir, Your Honor, I think if they, if that's what they intended, they would have been more specific about what you could or could not do. They all said that based upon the record that was in front of them, they saw no reasons why elections should go forward under the plans ruled unconstitutional, but no one explained what the circumstances were.

We're at a very, very late time in the election cycle, and I know the Court is very well aware of, for example, the Shaw case where we have a finding by a US Supreme Court that

Congressional District 12 is illegal. But the mandate came out even earlier, I think, than what we're seeing here, and a three-judge court and this court ruled that it was too late to change things at the end of the July for 1996 election cycle.

So I think you have a very hard job, Your Honor, and I think it's one where you have to exercise your discretion in a way that would protect the voting rights of all of those of Wake County. And if you conclude that there needs to be an election, and if there's enough time, we will have an illustrative plan available for you to review tomorrow should you ask to receive it.

THE COURT: Well, certainly, assuming the mandate issues, and I have jurisdiction, you can file it. I'll try to get information so that when I finally have jurisdiction I can exercise my discretion.

Anything else?

MR. FARR: May we file that tomorrow, Your Honor?

THE COURT: You may. You may.

MR. FARR: Unless you have further questions, Your Honor, we have nothing else.

THE COURT: All right.

MS. EARLS: Your Honor, I just have to note for the record, we do object to illustrative maps being filed by entities that aren't parties and with the Legislative Leaders not able to speak for the legislature. They are just individual legislators. There may be other legislators who have illustrative maps. In fact, there were illustrative maps in the record that were presented to the legislature. And to have a process whereby in 24 hours two legislative leaders who have been invited by the Court to submit something, we will object to that as not a fair process, Your Honor.

THE COURT: That's fine.

MS. EARLS: And I also want to, if I may, respond to the comments that were made regarding the mandate. As you know, our position is that the mandate is clear.

Counsel's reference to the Shaw case is not applicable for at least two reasons. First of all, that was a congressional district which encompasses numerous counties. The prospect of what it takes to change district lines across several counties in a congressional district is

very different from what it takes administratively to put in place a plan for the Wake County Board of Education. So that's all we're talking about here is the Board of Education.

Secondly, the fact that in that case there was no constitutional plan passed pursuant to state law and fully compliant with federal law available to be used in those circumstances, in the Shaw case, where as here there is.

So those are two very important reasons why the fact that -- and it was actually the very end of July of that year the federal court said that there was not time to make a change with regard to a congressional district. That does not apply to the circumstances you face here today with regard to the Wake County Board of County Commissioners and the School Board.

THE COURT: Tell me again your proposal about how long -- who gets elected to the School Board under your proposal in November? The Wake County voters only get to vote for five instead of all nine, even though by statute all nine are supposed to be out of office on December 5th?

MS. EARLS: Well, Your Honor, again, you keep

saying by statute. That statute is unconstitutional.

THE COURT: The redistricting --

MS. EARLS: There is no severability clause in that statute, Your Honor. The entire statute is unconstitutional.

THE COURT: That goes back to the whole issue of remedial discretion, right? And in terms of all of those cases that you're familiar with, that we're all familiar with is, is the declaration a declaration the entire statutory scheme, or is it a declaration of the one-person-one-vote violation of the difference in populations?

MS. EARLS: And we laid out the applicable law, which I would say was, and was reaffirmed by the Fourth Circuit's analysis in the NAACP case that they just decided. That is to say, severability is determined by reference to state law firm. Under North Carolina law, you look not only to whether or not there's a severability clause but also to whether or not the provision that's being challenged can be and was intended to be implemented on its own.

Here we have for better or worse, an election

scheme. It changed the date of the election, it changed the size of the Board in one instance, it changed the districts. You can't take the districts out of that and implement the rest of the statute. That's our contention.

THE COURT: But my question, again, is: If you were going back in time, then isn't the theory of the plaintiffs that all these elections to the School Board should be in odd years?

MS. EARLS: Correct, Your Honor, but you have -- you have --

THE COURT: Well, that's what I'm trying to understand. Why is that -- why is that policy preference that's in Session Law 2013-110 implemented in a remedy when the theory seems to be that we're going back in time to what was the scheme in 2011, which was odd-year elections.

MS. EARLS: Your Honor, what we are saying is that because the districts are not severable from the rest of the statute, the statute is unconstitutional, it's a violation of my clients' rights to try to implement that statute, so you go back to the last system that was in place.

THE COURT: And that's my question. If we go back to that system, then, logically, and that's

what I'm trying to understand, you must think that I have some discretion, because, logically, under your position, the people of Wake County don't get to vote for anyone on the School Board this year because historically we've always only voted in odd years, and this isn't an odd year. And so we just basically tell all the -- and we have -- we have a population in Wake County that's larger than the population of six states, and telling the people of Wake County that they don't get to vote for all nine School Board members, I'm really trying to understand why that is.

MS. EARLS: Your Honor, in 2011, five members of the School Board were elected. They've actually had five-year terms now.

THE COURT: Right, by virtue of that statute.

MS. EARLS: Correct. So our position is that the most logical way to return to odd-year elections is to, for those people who have already been in office for five years, is to -- in essence, there is now a delayed election. It should have been in 2015 under the old system; it's now 2016.

And I think that the remedy in the case that

you cited, Newsome vs. North Carolina State Board of Elections, back in 1992, where the State Board had to make administrative rules for the timing of an election applied here.

So, in essence, what the State Board is faced with is for reasons having to do with the litigation schedule and when these laws were found unconstitutional, an election that should have happened in 2015 did not happen. So when should that election happen? At the next available election date, and that's 2016.

There are four members of the School Board who were elected in 2013. Typically, under the old scheme, you have four-year terms. Those four board members can be elected in 2017. So we're not --

THE COURT: But when they were elected, did those people know that they were being elected for three-year terms?

MS. EARLS: When the School Board elections happened in 2013, I believe that was before this statute was passed; or at least initially, the election process started.

But the bottom line is, getting back to the prior system of staggered terms elected in odd

years, those members elected in 2014 or 2013 would have four-year terms and be reelected or those seats would be up for election again in 2017.

THE COURT: And you're saying that you think that I should use my -- or do you think I have the authority to do that?

MS. EARLS: Your Honor, we've said, again, and I'm sorry, our position, Your Honor, is that your authority is to enjoin the existing statute. Then the State Board of Elections' authority kicks in to make the administrative changes. Not to draw new maps; to make the administrative changes regarding --

THE COURT: Well, that's what I'm talking about, the administrative change of extending a person in office for a year.

MS. EARLS: But that's already happened. They're not extending anyone's term, Your Honor.

THE COURT: I thought you just said that what you wanted to have happen was to have the people who were elected in 2011, when they were elected, they were elected to a four-year term. As I understand it, and correct me if I'm wrong, as I understand it, they were elected to a four-year

term, and Session Law 2013-110 extended their office for a year. I don't think any of them did, but whatever. The legislature said, "You're now going to be in office until December 5, 2016. That's when your office ends." And then the people in 2013 who got elected got elected, and you said you don't think that they knew they were being elected to a three-year term.

MS. EARLS: But in any case, Your Honor, we're not suggesting that the State Board of Elections would be extending any terms; to the contrary. We're saying they can use their administrative authority to schedule the timing of elections and to have those five seats up for election in 2016, the five seats, the five people who were elected in 2011. That is an administrative change. The State Board of Elections would not be extending anyone's terms in that regard.

THE COURT: What about the four people who were elected in 2013?

MS. EARLS: Under the prior system the customary term was four years. So that is not a change for them to then be elected in 2017.

THE COURT: Let me hear what the State Board

has to say about that. If you have a position on it. Or if you want to reflect on it, you can also tell me that.

MR. LAWSON: Your Honor, we have not voted on the severability position. We would note, though, that if the Court was to direct us to use that administrative authority, first, of course, that it still could make its way into Wake County Superior Court effectively transferring jurisdiction.

Secondly, in Session Law 2013-110, section 2, there's a specification about a primary versus a runoff election system. Those types of determinations certainly are not of the type that we would be happy to make. Ordinarily, under 22.2, the pieces of the statute that we like to enforce are not enforced. So our one request, the one request that was mentioned by our Board at its meeting was that the directive or the order or request, depending on how you frame it, to us be very specific.

THE COURT: And so you want -- the State Board wants the Court to, what, to address that issue and to say whether the Wake County voters get to vote for nine members of the School Board

this November or not? Or not? Or do y'all want to make that decision?

MR. LAWSON: It would certainly be unprecedented for us to use 22.2 to try and extend the terms or otherwise to decide the severability of pieces of the plan enacted in 2012 versus the one after.

If we were called upon to do that, our board has decided that it will try as best it can to comply but recognizes the necessity of also implementing permissive legislative intent. It is not ordinarily a place that we like to be to the outcome determinative to that extent.

THE COURT: And Ms. Earls, you're just not sure one way or the other whether the people who got elected in 2013 knew they were being elected to a three-year term or not? You just don't know? And you can -- you can supplement tomorrow. I know you're a very careful and thoughtful lawyer and you don't want to guess. You just aren't sure?

MS. EARLS: Your Honor, I'm not entirely certain of the dates of the election and the date of the passage of the statute. It may be that there's a difference in terms of the filing

periods. So they have may have filed at a time when it was a four-year term. I just -- I would really prefer to be able to be clear about the dates and the passage of the dates of the election.

THE COURT: Because, at least, again, the trial exhibit was Exhibit 438, which was the Session Law, and it said that it was "read and ratified this, the 13th day of June, 2013," which would at least suggest that if the elections to the School Board were in October of 2013, then the people who ran knew they were getting elected to three years. But y'all can check that. That's at least what -- that's -- and, again, that was a joint exhibit that y'all had submitted at the trial, which was just a copy of that legislation. Which, again -- but you seem to suggest -- it sure seems like more than an administrative thing of the State Board of Elections when you're talking about saying some School Board member who signed up, if they did, for a three-year term, and then all of a sudden saying that the State Board is using its authority to extend them for a year.

MS. EARLS: Well, if it's helpful to the

Court, Your Honor, I recall the testimony of the School Board members who said how disruptive it is to have all nine School Board members up for election at the same time, and that at least from the perspective of the School Board, they prefer staggered terms because of issues of continuity of policy and otherwise. So I do recall that testimony in the record.

THE COURT: Right. But there was also a lot of testimony about the general concerns of the voters of Wake County. So with all due respect to all nine School Board members who all give their very best every day in that capacity, but that's also another issue for the state, in terms of thinking about the voters' interests of having a chance to vote.

Anything else from the plaintiffs? And y'all can, y'all can check, if you would like to make that, check that and make a submission.

Again, I appreciate y'all's responses and coming here. As I said at the outset, because of the mandate rule and because the Fourth Circuit did not issue its mandate forthwith on July 1st, this Court did not have jurisdiction and still doesn't until presumably tomorrow when the

mandate issues. But also I realize that the election is coming up quickly.

So anything else from the plaintiffs?

MS. EARLS: No. Thank you, Your Honor.

THE COURT: Thank you.

Anything else from the County Board?

MR. MARSHALL: Very briefly, Your Honor.

Not only do I think it's improper for you to consider the remedy and enter a remedy, I want to thank you for holding this hearing today because I think my client is going to be in a very tough predicament in light of Footnote 13 and the Court of Appeals opinion. What I was concerned about was without further guidance from the District Court in terms of a remedy, we would be in a position of having to potentially try to make a judgment call about what to do in November, which could very well set the board up for additional litigation from Ms. Earls, potentially from Mr. Farr, in terms of what the appropriate remedy would be based on Footnote 13, Your Honor.

THE COURT: What do you think Footnote 13 means? Now that you're standing up and we're talking about it. If you care to --

MR. MARSHALL: Well, no, I don't have --

Footnote 13, I think it means what it says. And I think that Mr. Farr is correct in that I didn't argue remedies before you during the trial, I didn't argue it in the Fourth Circuit, the plaintiffs didn't argue remedy; it's true that that issue never came up. So the Fourth Circuit certainly did not have anything in the record to address the remedy. And I think what Footnote 13 says is, I think I have to read it for what it says, we do not think that -- and I don't have it in front of me.

Tom, do you mind handing it to me, please? It's right there.

We see no reason why the November '16 election should proceed under the unconstitutional plans we spoke about today. It doesn't answer the fundamental question we're here today, which is: So what do we do in November? Do we have no election in November? Do we have elections on the districts that have been struck down within the District Court's discretion based on factors you may or may not find? Do we have districts that are drawn by the Court or the State Board if they felt like they had the authority?

You've heard me say over and over, my client has no position on what the District should or shouldn't be. They didn't have that before the litigation, they don't have it after the litigation, but they certainly are in dire need of guidance about what they need to do, especially the staff and employees, between today and November 8th, because the last thing they want to do is start coding a map that's going to be challenged by another party, and then we're all back in court again, except now it's September or October, and then they have to un code the map.

THE COURT: So at this point no one at the State Board, I mean the Wake County Board, has coded a map?

MR. MARSHALL: They have coded the map for the districts that were struck down by the Fourth Circuit.

THE COURT: That work was going on like in June or something?

MR. MARSHALL: Right, because if you remember, Your Honor, they had to open and close the filing period in June, which they did.

THE COURT: Right, for the Board of

Education.

MR. MARSHALL: Right. So those maps were previously coded. And, obviously, they've historically coded the previous maps as well. But at some point they've got to make a decision moving forward for November 8th about what is and isn't possible. And the last thing I wanted to have happen was for us to be in September and October and have other parties arguing to us about what the Wake County Board of Elections should or shouldn't be doing with respect to districts and maps absent any further guidance from the Court.

So, again, I just want to thank you for calling all the potentially interested parties together to try to get a head start on the remedial phase.

And then finally, one other point I didn't make earlier, but we did set it out in our submission. And because the question of deadlines has come up, the ability to hold a primary for the County Commissioner Districts A and B that had been struck down, if new districts were drawn for A and B, holding a primary in advance of holding a general election on the

current calendar, we used the word "infeasible" in our submission, and that is certainly true as for the deadlines as they're in place. And I'm not sure, and I don't want to speak for Mr. Sims, but it may not be feasible at all.

THE COURT: Not possible.

MR. MARSHALL: Correct.

THE COURT: That's at least how I read it.

MR. MARSHALL: Right.

THE COURT: I do think y'all used the word "feasible," but looking at all the dates in Mr. Sims' submission, which was very detailed, and I appreciate it, it didn't seem possible to do that.

MR. MARSHALL: Right, because of all that goes into a primary, which is -- it's a election. And everything that goes into holding an election would have to occur. It's not just a filing period. So much of what we've discussed today has been about the November 8th election and what needs to be done before then, and I just wanted to point out that we had in our submission highlighted the real problem of a primary on top of that.

Other than that, Your Honor, we do not -- we

don't take any position, as we mentioned, on the propriety of any particular remedy but wanted to make sure the Court had everything that you needed in terms of operational issues.

THE COURT: Okay. Mr. Lawson, final thoughts?

MR. LAWSON: Just one point only. I'm informed by my predecessor who had been general counsel for 15 years that in the days of preclearance, if Your Honor was to indicate that we should be moving back absentee voting or to allow for more time, the Justice Department had indicated a preference in 2004 that absentee ballots for everything else that had a federal contest on it go out and then separately send out any type of straggler absentee ballots. So we would have to contemplate a two-step absentee process with the School Board or school commissioner, whatever that ends up being, being counted manually when they're brought back to the Board of Elections because of the voting systems.

THE COURT: Under either scenario, you see that happening?

MR. LAWSON: If we were asked to by Your Honor to push the absentee ballot deadline such

that we could allow for Wake to code more, I wanted to note.

Thank you.

THE COURT: Thank you.

Mr. Farr, anything else?

MR. FARR: Just to thank you, Your Honor, for inviting us, but also I can't help but comment about what Mr. Lawson just said. I cannot imagine a more confusing election process for people voting absentee if they got two different absentee ballots. We think that with all due respect to the Justice Department and their position under Section 5, I think that would be a disaster.

And, again, Your Honor, thank you for inviting us to participate today.

THE COURT: I thank counsel for their work here today.

We will be in recess until tomorrow.

THE BAILIFF: All rise. This court now stands in recess.

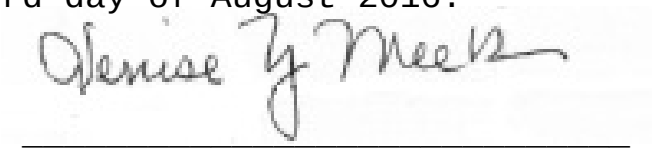
(Hearing concluded at 5:10 p.m.)

COURT CERTIFICATE

NORTH CAROLINA)
WAKE COUNTY)

I, DENISE Y. MEEK, Court Reporter, certify that I was authorized to and did report the foregoing proceedings, and that the transcript is a true and complete record of my stenographic notes.

Dated this 3rd day of August 2016.



DENISE Y. MEEK, FPR
Court Reporter

J

T

Y

Exhibit G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Consolidated Civil Action

RALEIGH WAKE CITIZENS ASSOCIATION, et al. Plaintiffs, v. WAKE COUNTY BOARD OF ELECTIONS, Defendant.	No. 5:15-cv-156

CALLA WRIGHT, et al., Plaintiffs, v. THE STATE OF NORTH CAROLINA, et al., Defendants.	No. 5:13-cv-607

PLAINTIFFS' RESPONSE TO COURT ORDER OF JULY 27, 2016 and TO JULY 18, 2016 FILINGS

To clarify their position and preserve their claims herein, Plaintiffs submit this short memorandum of authorities in response to this Court's Order issued July 27, 2016, (ECF No.

86[1]), and in response to the various filings by parties and non-parties to this action on July 18, 2016 (ECF Nos. 81, 83, 84). Plaintiffs continue to rely upon, and incorporate herein, the arguments and authorities in Plaintiffs' Submission on Appropriate Remedies, July 18, 2016 (ECF No. 82).

1. **THIS COURT DOES NOT HAVE THE AUTHORITY TO ORDER THE USE OF REMEDIAL DISTRICT PLANS**

This Court's Order of July 27, 2016, (ECF No. 86 at 2) states that Plaintiffs "want the Court to adopt as court-ordered remedial plans the plans that were in effect in 2011." While the practical outcome is virtually the same, Plaintiffs' position is that in the circumstances of this case, where there already exist fully constitutional and previously implemented districts for the Wake County School Board and Board of County Commissioners, the Court has no power or authority to order any remedial districts and to do so could be reversible error. *See Cleveland Cnty. Assoc. for Gov't by the People v. Cleveland Cnty. Bd. of Comm'rs,* 142 F.3d 468 (D.C. Cir. 1998) (vacating decree entered where existing method of election was not contrary to federal law). Plaintiffs urge the Court to issue an injunction barring the defendant Wake County Board of Elections, the only proper party in this case, *see Wright v. North Carolina,* 787 F.3d 256, 262-63 (4th Cir. 2015), from implementing the statutes held unconstitutional by the Court of Appeals. Indeed, that court's instruction is clear and unambiguous: "We remand with instructions to enter immediately judgment for Plaintiffs, granting both declaratory relief and a permanent injunction, as to the one person, one vote claims." *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections,* No. 15-156, U. S. App. LEXIS 12136 at *45, July 1, 2016.

Once that injunction issues, the State Board of Elections has the legal authority to make administrative adjustments to election schedules to proceed with elections under the prior, legal

[1] Unless otherwise noted, all citations to documents filed in these consolidated cases are to the lead case, *Raleigh Wake Citizens Assn. et al., v. Wake Cty. Bd. of Elections, et al.,* No. 5:15-cv-156.

method of election. N.C. Gen. Stat. § 163-22.2. Thus, Plaintiffs' position is that until, pursuant to state law, either the North Carolina General Assembly acts to change the method of election for the Wake County School Board and Board of County Commissioners, or, pursuant to state law, the County Commission itself changes its structure and manner of election, *see* N. C. Gen. Stat. § 153A-58, or until the prior systems are found to be contrary to federal statutory or constitutional law, this Court has no authority to order remedial districts.

The U.S. Supreme Court has been clear that "[f]rom the beginning, we have recognized that reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." *White v. Weiser*, 412 U.S. 783, 794-795 (1973) (citations omitted). The Supreme Court's recent opinion in *Perry v. Perez,* 132 S. Ct. 934 (2012) reaffirms that a court does not have the authority to order remedial redistricting plans where the existing plans can be implemented. In that case, arising in the Section 5 context, the Court explained:

> Redistricting is 'primarily the duty and responsibility of the State.' *Chapman v. Meier*, 420 U.S. 1, 27, 95 S. Ct. 751, 42 L. Ed. 2d 766 (1975). The failure of a State's newly enacted plan to gain preclearance prior to an upcoming election does not, by itself, require a court to take up the state legislature's task. That is because, in most circumstances, the State's last enacted plan simply remains in effect until the new plan receives preclearance.

Perry v. Perez, 132 S. Ct. at 940. Similarly, in this case, the last enacted plan for the school board and county commission simply remains in effect until such time as a new system is properly adopted pursuant to state law.

2. **REVERTING TO THE PRIOR ELECTION METHOD FOR 2016 ELECTIONS IS POSSIBLE WITHOUT SIGNIFICANT DISRUPTION**

Plaintiffs contend that based on the representations of the Wake County Board of Elections, the current election deadlines, unless they are modified by the North Carolina State Board of Elections, require that candidate filings, including potential write-in candidates, be concluded by August 10, 2016. *See* Def's Resp. to July 8, 2016 Order at 3, 5, July 18, 2016, ECF No. 83. It is entirely possible to open a short filing period for the five school board district seats that were elected in 2011 in advance of the August 10th deadline, and to proceed with elections for those seats.

The legislators, filing a pleading in this case, argue that because different plaintiffs in an entirely different lawsuit regarding the potential for new (rather than existing) districts to be implemented for state legislative seats, made representations concerning the deadlines that might be applicable in those circumstances, similar deadlines should thus apply in this case. However, the circumstances here, dealing with a redistricting plan within a single county, and using districts that have been used in the past, are completely different.

Moreover, the legislators are asking this Court to blatantly disregard the direction of the Court of Appeals, which is not ambiguous, and to order elections in 2016 using the unconstitutional district system they enacted. This is contrary to law. This court is bound by the Court of Appeals decision in this case, and must act in a manner designed to ensure protection of the fundamental right to an equal vote. As the Supreme Court stated "[t]his Court has consistently held in a long series of cases, that in situations involving elections, the States are required to insure that each person's vote counts as much, insofar as it is practicable, as any other person's." *Hadley v. Junior College Dist.*, 397 U.S. 50, 54 (1970). Deprivation of a fundamental right, even for a short period of time, is irreparable harm. *Personhuballah v. Alcorn*, 2016 U.S.

Dist. LEXIS 2054 (E.D. Va. Jan. 7, 2016) ("Deprivation of a fundamental right, such as limiting the right to vote in a manner that violates the Equal Protection Clause, constitutes irreparable harm.") (citing *Elrod v. Burns*, 427 U.S. 347, 373-74, (1976); *Johnson v. Mortham*, 926 F. Supp. 1540, 1543 (N.D. Fla. 1996)). Indeed, the "[p]otential injury of an election in which citizens are deprived of their right to vote negates any damage that may be sustained by [the jurisdiction] in the potential delay of elections." *Dye v. McKeithen*, 856 F. Supp. 303, 306 (W.D. La. 1994).

In this case there is no need for interim maps or court-drawn maps. The 2011 districts previously enacted pursuant to state law and implemented for both bodies can be used for the 2016 elections with minimal disruption to existing election deadlines. There is no justification to disregard the clear direction of the Court of Appeals and implement the unconstitutional statutes enacted by the General Assembly for Wake County elections in 2016. In these circumstances, this court does not have the authority to draw its own districts or to require any other entity to do so. Plaintiffs' rights to an equal vote can be vindicated only by the declaratory and injunctive relief they seek barring the use of the unconstitutional systems enacted by the General Assembly in 2013 and 2015.

Respectfully submitted this 2nd day of August, 2016.

/s/ Anita S. Earls
Anita S. Earls
N.C. State Bar No. 15597
Allison J. Riggs
N.C. State Bar No. 40028
SOUTHERN COALITION
FOR SOCIAL JUSTICE
1415 West Highway 54, Suite 101
Durham, NC 27707
919-794-4198
anita@southerncoalition.org
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing PLAINTIFFS' RESPONSE TO COURT ORDER OF JULY 27, 2016 and TO JULY 18, 2016 FILINGS with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel and parties of record.

This the 2nd day of August, 2016.

/s/ Anita S. Earls
Anita S. Earls
N.C. State Bar No. 15597
Southern Coalition for Social Justice
1415 W. Highway 54, Suite 101
Durham, NC 27707
Telephone: (919) 323-3380
Facsimile: (919) 323-3942
Email: Anita@southerncoalition.org
Counsel for Plaintiffs

Exhibit H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Consolidated Civil Action

RALEIGH WAKE CITIZENS ASSOCIATION, et al., Plaintiffs, v. WAKE COUNTY BOARD OF ELECTIONS, Defendant.	)	**No. 5:15-cv-156**
CALLA WRIGHT, et al., Plaintiffs, v. THE STATE OF NORTH CAROLINA, et al., Defendants.	)	**No. 5:13-cv-607**

PLAINTIFFS' RESPONSE TO COURT ORDER OF AUGUST 4, 2016

All Plaintiffs in this consolidated action, by and through counsel, respectfully submit the following points and authorities regarding the appropriate remedy in these cases in response to this Court's Order of August 4, 2016. No. 5:15-cv-156, ECF No. 93.

1. **The Declaratory Relief in the Court's Order Is Not the Full Relief to which Plaintiffs Are Entitled.**

In remanding these cases on July 1, 2016, the United States Court of Appeals for the Fourth Circuit instructed this Court to "enter immediately judgment for Plaintiffs, granting both

declaratory relief and a permanent injunction, as to the one person, one vote claims" under the United States Constitution and North Carolina Constitution. *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, No. 16-1270 (4th Cir. July 1, 2016) (slip op., at 44) (hereinafter "*RWCA"*). Plaintiffs' one person, one vote claims for relief sought a declaration that Session Law 2013-110 and Session Law 2015-4 were unconstitutional because they violated equal protection guarantees of the state and federal constitutions, and sought an injunction prohibiting enforcement of those session laws. No. 5:15-cv-156, ECF No. 22 at 17-18 (Am. Compl.); No. 5:13-cv-607, ECF No. 1 at 21-22 (Compl.). In accordance with Plaintiffs' claim that the session laws should be stricken in their entirety as a result of the one person, one vote violation, the Fourth Circuit concluded that the legislature's stated rationales for the challenged redistricting plans were no more than "pretextual" cover-ups for unconstitutional conduct, *RWCA,* No. 16-1270 (slip. op., at 34), a finding supported by the fact that an alternative plan in the record would have met "all of the stated rationales . . . while creating only miniscule deviations," *Id.* at 35-36.

However, rather than declaring the challenged session laws unconstitutional and enjoining their enforcement, this Court in its August 4 Order merely "declare[d] that the *population deviations* in the redistricting plans in Session Law 2013-110 for the Wake County School Board and Session Law 2015-4 for the Wake County Board of Commissioners violate the equal protection clauses of the Fourteenth Amendment to the United States Constitution and Article I, § 19 of the North Carolina Constitution." No. 5:15-cv-156, ECF No. 93 at 2 (Aug. 4 2016 Order) (emphasis added). This is contrary to the Court of Appeals' clear instructions. *RWCA,* No. 16-1270 (slip op., at 44). Enjoining merely the deviations in the unconstitutional plans is not the relief ordered by the Court of Appeals, and has not been the relief routinely afforded to prevailing plaintiffs in one person, one vote cases. *See, e.g., Larios v. Cox*, 300 F.

Supp. 2d 1320, 1356 (N.D. Ga.), *summarily aff'd*, 124 S. Ct. 2806 (2004) (enjoining further use of the challenged districts, not just their population deviations, in future elections).

Plaintiffs are entitled to complete relief on their one person, one vote claims, including relief from the clearly "pretextual" fruits of the unconstitutional tree. *RWCA,* No. 16-1270 (slip. op., at 34). As the Fourth Circuit has recently ruled: "courts are tasked with shaping '[a] remedial decree . . . to place persons' who have been harmed by an unconstitutional provision 'in the position they would have occupied in the absence of [discrimination].'" *N.C. State Conf.of the NAACP v. North Carolina,* No. 16-1468, 2016 U.S. App. LEXIS 13797, *73 (July 29, 2016) (quoting *United States v. Virginia*, 518 U.S. 515, 547 (1996)). Here, the discrimination by the General Assembly was on the basis of partisan affiliation, but the principle remains the same. Here, as in other civil rights actions involving claims of discrimination, "the proper remedy for a legal provision enacted with discriminatory intent is invalidation." *Id.* In this case it means Plaintiffs are entitled to a declaration that the two statutes challenged in this case are unconstitutional under the equal protection clauses of the North Carolina and United States Constitutions.

2. The Statutory Provisions Are Not Severable.

Relatedly, in affording Plaintiffs relief as to only the numerical deviations resulting from the unconstitutional redistricting plans, this Court is deciding the question of whether the challenged session laws are severable without addressing this point. Notably, neither Session Law 2013-110 nor Session Law 2015-4 contains a severability clause. *See* 2015 N.C. Sess. Laws 4; 2013 N.C. Sess. Laws 110. At the very least, this court must consider North Carolina law on severability, examine the statute at issue, and review whether the legislature would have enacted the statute without the unconstitutional districts. *See Flippin v. Jarrell*, 301 N.C. 108,

117-18, 270 S.E.2d 482, 488-89 (1980) (when a portion of a statute is declared unconstitutional, the remainder will be given effect only if severable); *Jackson v. Guilford Cnty. Bd. of Adjustment,* 275 N.C. 155, 168-69, 166 S.E.2d 78, 87 (1969) (when a portion of a statute is stricken, the whole must fall absent a clear legislative intent to the contrary); *see also N.C. State Conf. of the NAACP v. North Carolina*, No. 16-1468, 2016 U.S. App. LEXIS 13797, *72 (4th Cir. July 29, 2016) ("In North Carolina, severability turns on whether the legislature intended that the law be severable, and whether provisions are so interrelated and mutually dependent on others that they cannot be enforced without reference to another." (internal citations and quotation marks omitted)).

3. The Court Cannot Reject the Use of the Prior Districts Without Finding Them Unconstitutional or Otherwise Contrary to Federal Law.

Finally, Plaintiffs reiterate their objections to entry of a court-imposed map at this stage. *See* No. 5:15-cv-156, ECF No. 90 (Pls.' Post-Hearing Mem.); ECF No. 87 (Pls.' Response to Court Order); ECF No. 82 (Pls.' Submission on Appropriate Remedies). The Supreme Court's guidance on this point is clear: "judicial relief becomes appropriate *only* where a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so."[1] *White v. Weiser*, 412 U.S. 783, 794-95 (1973) (emphasis added). Particularly where a prior constitutional plan exists and can be readily implemented, this Court lacks the authority to order a new plan. *See Perry v. Perez*, 132 S. Ct. 934, 940 (2012) (reaffirming that a court does not have authority to order new plans where existing constitutional

[1] Requiring deliberation and enactment by a full legislative body promotes an open legislative process, whereas eschewing the legislative process may result in non-transparent attempts at legislation-by-judge as seen in this action. *See, e.g.*, No. 5:15-cv-156, ECF No. 91 (Legislative Leaders' Notice of Filing) (accompanied by external storage drive containing files inaccessible even to GIS professionals using the recommended Maptitude redistricting software); ECF No. 95-1 (Declaration of Frederick G. McBride).

plans can be implemented). For a recent example of a court ordering such a reversion to prior constitutional plans in the one person, one vote context, the Court need look no farther than the Middle District of North Carolina, where plaintiffs challenging a local redistricting plan enacted by the same legislature obtained a preliminary injunction prohibiting the challenged session law's implementation and ordering that the prior plans be used for upcoming elections. *See City of Greensboro v. Guilford Cnty. Bd. of Elections*, 120 F. Supp. 3d 479 (M.D. N.C. 2015).

It is clear that "a district court has power to void and order new elections for violations of the Voting Rights Act of 1965, 42 U.S.C.S. § 1973, and the Constitution." *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 357 F.3d 260 (2nd Cir. 2004); *see also Hadnott v. Amos,* 394 U.S. 358 (1969) (federal courts have the power to invalidate elections held under constitutionally infirm conditions); *Pope v. County of Albany*, 687 F.3d 565, 569-70 (2nd Cir. 2012) (citing *Bell v. Southwell*, 376 F.2d 659, 665 (5th Cir. 1967) (holding that district court has power to void and order new elections for violations of VRA and Constitution)); *Stewart v. Taylor*, 104 F.3d 965, 970 (7th Cir. 1997) (stating that, despite holding of challenged election, court could order new election if plaintiff's motion for preliminary injunction has merit); *Hamer v. Campbell*, 358 F.2d 215, 222 (5th Cir. 1966) ("[H]aving concluded that the . . . election should have been enjoined, we now must set it aside in order to grant appellants full relief in the same manner as if the said election had been enjoined." (internal quotation marks omitted)). However, the court's power to impose its own choice of districts is limited to the circumstance where there exists no legally enforceable set of districts drawn by the governmental entity with authority to do so under state law.

In conclusion, Plaintiffs in this consolidated action respectfully request that the Court enjoin Session Law 2013-110 and Session Law 2015-4 in their entirety and order that the

constitutional election systems in effect for the Wake County Board of Commissioners and Board of Education before the unconstitutional laws were enacted be immediately re-implemented for use in the 2016 general election.

Respectfully submitted this 5th day of August, 2016.

/s/ Anita S. Earls
Anita S. Earls
N.C. State Bar No. 15597
Allison J. Riggs
N.C. State Bar No. 40028
SOUTHERN COALITION
FOR SOCIAL JUSTICE
1415 W. Highway 54, Suite 101
Durham, NC 27707
Telephone: (919) 323-3380
Facsimile: (919) 323-3942
Email: anita@southerncoalition.org
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing **Plaintiffs' Response to Court Order of August 4, 2016** with the Clerk of Court using the CM/ECF system, which will send electronic notification of such filing to all counsel and parties of record.

This the 5th day of August, 2016.

/s/ Anita S. Earls
Anita S. Earls
N.C. State Bar No. 15597
Southern Coalition for Social Justice
1415 W. Highway 54, Suite 101
Durham, NC 27707
Telephone: (919) 323-3380
Facsimile: (919) 323-3942
Email: anita@southerncoalition.org
Counsel for Plaintiffs

Exhibit I

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Consolidated Civil Action

RALEIGH WAKE CITIZENS ASSOCIATION, et al.,	)	
Plaintiffs,	)	
v.	)	No. 5:15-CV-156-D
WAKE COUNTY BOARD OF ELECTIONS,	)	
Defendant.	)	
CALLA WRIGHT, et al.,	)	
Plaintiffs,	)	
v.	)	No. 5:13-CV-607-D
STATE OF NORTH CAROLINA,	)	
Defendant.	)	

ORDER

On August 2, 2016, the court held a status conference in anticipation of the mandate. At the status conference, the court discussed with the parties, the North Carolina State Board of Elections, and the legislative leaders of the North Carolina General Assembly the remedial proceedings, including the nature and scope of injunctive relief, necessary to implement the mandate and to have orderly elections in Wake County in November 2016 for the Wake County School Board and the Wake County Board of Commissioners. The court also discussed the information that it received

on July 18, 2016, and August 2, 2016. See [D.E. 81, 82, 83, 84, 87].[1] Additionally, the court received information from the North Carolina State Board of Elections about its remedial authority under N.C. Gen. Stat. § 163-22.2.

On August 3, 2016, the mandate of the United States Court of Appeals for the Fourth Circuit issued in this case [D.E. 89], and this court obtained jurisdiction. In accordance with the mandate, the court declares that the population deviations in the redistricting plans in Session Law 2013-110 for the Wake County School Board and Session Law 2015-4 for the Wake County Board of Commissioners violate the equal protection clauses of the Fourteenth Amendment to the United States Constitution and Article I, § 19 of the North Carolina Constitution.

Any further information on the remedy (including the nature and scope of injunctive relief) from the parties, the North Carolina State Board of Elections, or the legislative leaders of the General Assembly is due no later than Friday, August 5, 2016. Any responses are due no later than Saturday, August 6, 2016.

Beginning August 10, 2016, countless sequential deadlines must be met in order to have orderly elections in Wake County. See [D.E. 83, 83-1, 83-2]. The court promptly will review the record and the submissions, determine the appropriate remedy, and issue injunctive relief in accordance with the mandate and governing law.

SO ORDERED. This 4 day of August 2016.

JAMES C. DEVER III
Chief United States District Judge

[1] This order references docket entries as they appear in Civil Action No. 5:15-CV-156-D.

Exhibit J

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Consolidated Civil Action

RALEIGH WAKE CITIZENS ASSOCIATION, et al.,	)	
Plaintiffs,	)	
v.	)	No. 5:15-CV-156-D
WAKE COUNTY BOARD OF ELECTIONS,	)	
Defendant.	)	
CALLA WRIGHT, et al.,	)	
Plaintiffs,	)	
v.	)	No. 5:13-CV-607-D
STATE OF NORTH CAROLINA,	)	
Defendant.	)	

ORDER

In the submission of the Wake County Board of Elections of July 18, 2016, the Wake County Board of Elections noted that Wake County has a population of nearly 1,000,000 people and explained all of the logistical events that must be completed for orderly elections on November 8, 2016. See [D.E. 83, 83-1, 83-2].[1] The Wake County Board of Elections also explained that it needed to do numerous things before August 10, 2016, in order to have orderly elections on November 8, 2016, including receiving a revised district map and coding revised districts in order

[1] This order references docket entries as they appear in Civil Action No. 5:15-CV-156-D.

to identify the addresses within each district. See [D.E. 83] 4–5; [D.E. 83-1] ¶ 23; [D.E. 83-2].

The court requests that the Wake County Board of Elections advise the court of its best estimate of how long it will take the Wake County Board of Elections to code revised districts under the following scenarios for the November 2016 elections:

(1) use the redistricting plan that the Fourth Circuit declared unconstitutional; or,

(2) use the 2011 School Board redistricting plan that was used in elections in Wake County in 2011 and 2013 and use the 2011 Wake County Board of Commissioners redistricting plan that was used in elections in Wake County in 2014; or,

(3) use the Representative Gill seven single-member district redistricting plan at Trial Exhibits 471–72 and the two single-member super district redistricting plan at Trial Exhibits 473–74; or,

(4) use the illustrative seven single-member district redistricting plan and the two single-member super district redistricting plan that the legislative leaders submitted on August 3, 2016, at [D.E. 91-1, 91-2, 91-3, 91-4].

The court's focus is on having timely and orderly elections while being faithful to the Fourth Circuit's mandate and governing precedent. As such, the court requests that the Wake County Board of Elections rank the four options listed above, from most feasible to have orderly elections to least feasible to have orderly elections. If it is infeasible or impossible to have orderly elections on November 8, 2016, under any of the four options, the Wake County Board of Elections shall notify the court of this fact in its response to this order.

Given the exigent circumstances concerning the remedy in this case, the court requests that the Wake County Board of Elections rank no two options the same. The court needs this information

as soon as possible, but no later than 4:00 p.m. on Monday, August 8, 2016.

SO ORDERED. This 7 day of August 2016.

JAMES C. DEVER III
Chief United States District Judge

Case 5:15-cv-00156-D Document 97 Filed 08/07/16 Page 3 of 3