**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**
**NO. 1:15-cv-00399**

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| SANDRA LITTLE COVINGTON, *et al.*,<br><br>PLAINTIFFS,<br><br>V.<br><br>THE STATE OF NORTH CAROLINA, *et al*,<br><br>DEFENDANTS. | **PLAINTIFFS' POST-TRIAL BRIEFING ON REMEDY** |

NOW COME Plaintiffs, by and through their undersigned counsel, and pursuant to the Court's request of the parties and minute entry dated April 15, 2016, submit the following post-trial briefing on remedy and a potential remedial schedule.

## I. Should this Court Strike Down Any of the Challenged Districts, Plaintiffs Are Entitled to Relief Before the 2016 Election

Should this Court rule in Plaintiffs' favor, Plaintiffs and millions of North Carolina voters will have already been subjected to two election cycles under the unconstitutional enacted state legislative redistricting plans. Based on their pre-trial brief, ECF No. 81, and briefing in which the same Defendants unsuccessfully sought a stay in remedy in *Harris v. McCrory*, No. 1:13-cv-949, Defendants will certainly seek to delay implementation of remedy until after the 2016 elections. This Court should not allow any delay, and should act quickly to protect the right to vote of people in this state.

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). This is not an unusual case, particularly in light of North Carolina's long history of redistricting litigation and election year remedies for improper redistricting. This Court has the authority to ensure that the constitutional flaws in the enacted state legislative districts are corrected before the November 2016 election, and equity demands that those wrongs be righted immediately.

### A. The Court Will Retain Jurisdiction to Enforce a Remedy Pending Appeal

Assuming that Defendants will file an immediate appeal should this Court strike down any of the challenged districts, this Court will retain jurisdiction to enforce a remedy pending appeal. It is black letter law that a district court "does retain jurisdiction to enforce the judgment pending appeal." *NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588-89 (6th Cir. 1987) (as cited in *Greater Potater Harborplace, Inc. v. Jenkins*, 935 F.2d 267 (4th Cir. 1991) (unpublished)). Accordingly, when a district court is supervising a "continuing course of conduct," a pending "appeal from the supervisory order does not divest the district court of jurisdiction to continue its supervision." *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 827 (10th Cir. 1993) (quoting *Hoffman v. Beer Drivers & Salesman Local Union No. 888*, 536 F.2d 1268, 1276 (9th Cir. 1976)); *see also United States v. Hanover Ins. Co.*, 869 F. Supp. 950, 952 (Ct. Int'l Trade 1994) ("absent a stay

pending appeal, a court retains jurisdiction to supervise its judgments and enforce its orders."), *aff'd* 82 F.3d 1052 (Fed. Cir. 1996). Indeed, Federal Rule of Civil Procedure 62(c) expressly authorizes district courts to issue or modify an injunction during the pendency of appeal, and "even after notice of the appeal has been filed, the trial court still has jurisdiction to make an order under Rule 62(c)." 11 Fed. Prac. & Proc. Civ. § 2904 (3d ed.) (collecting cases).

Moreover, in February, the same Defendants failed to convince another three-judge panel in the Middle District of North Carolina or the United States Supreme Court to enter an emergency stay pending appeal after the three-judge panel found two congressional districts to be unconstitutional racial gerrymanders and enjoined their use in the 2016 elections. *Compare Harris v. McCrory*, 1:13-cv-949, ECF No. 145 (Feb. 8, 2015) (Def.'s Emergency Motion to Stay Final Judgment and Modify Injunction) (attached as Appendix A); *with Harris v. McCrory*, 1:13-cv-949, ECF No. 148 (Feb. 9, 2015) (Order Denying Emergency Motion to Stay) (attached as Appendix B); *and McCrory v. Harris*, 136 S. Ct. 1001 (2016) (Order Denying Emergency Stay Application). In short, the law is clear that this Court has the authority to oversee a remedy before the 2016 election.

### B. Staying a Remedy Will Cause Irreparable Harm to Plaintiffs and Is Contrary to the Public Interest

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 North Carolina voters will suffer irreparable injury if they are forced to participate in a third election under an unconstitutional redistricting plan. *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.").

Less than three months ago, a three-judge panel in the Middle District of North Carolina denied the request of these same Defendants to stay a remedy for the General Assembly's unconstitutional racial gerrymandering of two congressional districts. *Harris v. McCrory*, 1:13-cv-949, ECF No. 148 (Feb. 9, 2015) (Order Denying Emergency Motion to Stay) (Attached as Appendix B). The court there heard the exact same arguments from Defendants, and rejected them, 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 of denying the stay and putting a remedial plan into place immediately. *Id.* at 4.

Likewise, a three-judge panel in a racial gerrymandering case in Virginia late last year recognized that "individuals in [the invalidated district] whose constitutional rights

have been injured by improper racial gerrymandering have suffered significant harm" and are "entitled to vote as soon as possible for their representatives under a constitutional apportionment plan." *Personhuballah v. Alcorn*, No. 3:13-cv-678, ECF No. 171 at 49 (E.D. Va. June 5, 2015) (attached as Appendix C) (quoting *Cosner v. Dalton*, 522 F. Supp. 350, 364 (E.D. Va. 1981)). Even though the remedial process in *Personhuballah* ultimately required the engagement of a special master because the legislature failed to draw a new plan, the court has not delayed implementation of a remedy. *See Personhuballah v. Alcorn,* No. 3:13-cv-678, 2016 U.S. Dist. LEXIS 2054 (E.D. Va. Jan. 7, 2016) (copy attached as Appendix D) *stay denied sub nom. Wittman v. Personhuballah,* 136 S. Ct. 998 (2016) (holding that "the balance of equities favors our immediate imposition of a remedial redistricting plan.")

Indeed, courts have taken aggressive action 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 state legislative seats 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 (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)). Indeed, the fact that the Plaintiffs' here sought a preliminary injunction to preserve the status quo until their claims could be heard should weigh in their favor in the balance of equities. *Cf. Gjersten v. Bd. of Election Comm'rs,* 791 F.2d 472, 479 (7th Cir. 1986) (whether plaintiffs sought pre-election request for relief relevant to determination of whether, after decision on merits in their favor, an election should be set aside).

In the *Harris* case, Defendants relied heavily on *Whitcomb v. Chavis*, 396 U.S. 1064 (1970), for the proposition that it is fine for elections to proceed under an unconstitutional plan. *McCrory v. Harris*, No. 15A809, (Feb. 10, 2016) Emergency Stay Application at 21 (Attached as Appendix E). In *Whitcomb*, the Supreme Court stayed entry of a three-judge court's remedial order after that court invalidated an Indiana redistricting statute. 396 U.S. at 1064. This case is different for two important reasons. First, the question in *Whitcomb* was whether to proceed under a court-ordered remedial plan or the invalidated legislatively-enacted one for the 1970 election. *Id*. at 1064-65. Here, state law demands that the General Assembly be given a chance to enact a remedial map, and given the speed with which the legislature acted in *Harris*, there is no reason to believe it would not enact its own remedial plan here. Thus, the federal judiciary's general preference for legislatively-enacted plans over court-drawn plans, central to the *Whitcomb* holding, is not instructive here. Second, much has changed with regard to redistricting technology since 1970. The computer software that speeds the drawing of redistricting plans did not exist back then. And again, we know from recent history that this General Assembly is entirely capable of enacted a remedial redistricting plan within two weeks. Thus, some of the equitable factors that may have weighed into the Supreme Court's decision to grant a stay in 1970 are not at play here.

On the question of public interest, Defendants will undoubtedly argue that delayed primaries "result in lower voter participation and that when primaries are bifurcated, the delayed primary will have a lower turnout rate than the primary held on the regular date."

*McCrory v. Harris*, No. 15A809, Emergency Stay Application, at 17 (Attached as Appendix E). However, just last decade, in the *Stephenson* state court litigation, Mr. Farr, counsel for Defendants here, argued that a delayed primary for state legislative districts was in the public interest because "the public interest is served by all appropriate relief necessary to effect the removal of all barriers which affect the right to participate in a constitutionally sound political process." *Stephenson v. Bartlett*, No. 1 CV 02885 (Johnston Co. Sup. Ct.), Plaintiffs' Memorandum Concerning an Appropriate Remedy, at 19 (Feb. 19, 2002) (Attached as Appendix F). Mr. Farr further argued that "because new districts would not be as bizarre as the current districts and would divide substantially fewer counties and precincts, voters would be more easily educated about voting" in such a plan. *Id.* at 20. In that case, he was not wrong—courts in North Carolina have recognized that the public interest "requires the furtherance of the constitutional protections that attach to the franchise" and elections conducted under "easily understood boundaries." *Republican Party of N.C. v. Hunt*, 841 F. Supp. 722 (E.D.N.C.), *aff'd as modified on appeal*, 27 F.3d 563 (4th Cir. 1994) (unpublished opinion). 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.")

### C. Defendants Will Not Suffer Irreparable Harm from Implementing a Constitutional Remedial Redistricting Plan

Despite these Defendants' suggestions in other election cases, Defendants are not irreparably harmed merely because the State has been enjoined from giving effect to a statute that governs the time, place and manner of elections. *See Harris v. McCrory*, 1:13-cv-949, ECF No. 145 (Feb. 8, 2015) (Defs.' Emergency Motion to Stay Final Judgment and Modify Injunction) (Attached as Appendix A), and *McCrory v. Harris*, No. 15A809, Emergency Stay Application at 14 (Attached as Appendix E). The United States Supreme Court has consistently reaffirmed the role of federal courts in reviewing any legislation, including redistricting plans, which threaten the right to vote. *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 415 (2006) (Kennedy, J., separate op.) ("Although the legislative branch plays the primary role in congressional redistricting, our precedents recognize an important role for the courts when a districting plan violates the Constitution."); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) ("The power to regulate the time, place and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote … . "). And the Supreme Court's denial of the emergency stay application in *Harris* indicates that it did not find that argument compelling. *McCrory v. Harris*, 136 S. Ct. 1001 (2016) (order denying stay).

Additionally, the nature of the harm or burden felt by Defendants here is not such that it outweighs the harm to Plaintiffs and other North Carolinians. "Potential 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).

Indeed, in redistricting cases across the country, immediate implementation of remedial redistricting plans has been allowed, despite the unavoidable burden that such implementation would have on jurisdictions. *Vera v. Bush*, 933 F. Supp. 1341, 1342, 1344 (S.D. Tex. 1996) (after the Supreme Court invalided congressional redistricting plan on June 13, 1996, a 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.

In this case, it is also likely that a remedial plan could be developed that does not affect districts in certain county clusters, meaning the state will only need to conduct a special primary election in certain counties containing gerrymandered districts, not statewide. *Cf. Personhuballah v. Alcorn,* 2016 U.S. Dist. LEXIS 2054 at *7 (E.D. Va. Jan. 7, 2016) ("[O]ur chosen remedial plan should not alter any districts outside of the

Third District and those abutting it"). This will reduce the burden on the state as it implements a remedy in time for the November 2016 elections.

Finally, implementation of constitutional districts that are less torturously shaped and split fewer precincts may actually provide some cost savings to the state. Just as Mr. Farr argued in the *Stephenson* case, the cost of ballots would decrease with fewer precincts, and from an election administration standpoint, districts that are compact and make sense would be easier to implement and easier for voters to understand. Plaintiffs' Memorandum Concerning an Appropriate Remedy at 20, *Stephenson v. Bartlett*, No. 1-CV-02885 (Johnston Co. Sup. Ct., Feb. 19, 2002) (copy attached as Appendix F) (hereinafter "*Stephenson* Plaintiffs' Remedy Brief"). But regardless of the actual costs borne by the state in the implementation of a remedial plan, "administrative burden" and cost "simply cannot justify denial of plaintiffs' fundamental rights." *Johnson*, 926 F. Supp. at 1542. It is indisputable that in this case, any "expense and disruption" that may result from implementation of a remedial plan is "nothing but a consequence of the wrong that has been done" by the General Assembly in engaging in racial gerrymandering. *Jeffers v. Clinton*, 730 F. Supp. 196, 203 (E.D. Ark 1989) (three-judge court), *aff'd* 498 U.S. 1019 (1991).

## II. A Remedial Schedule Can Be Devised That Allows for Such Relief

### A. Past Election Experience in North Carolina

There is ample precedent in North Carolina for this Court to order a remedial schedule with primary elections in September, and that precedent is just from the last

decade. In 1998, this state held congressional primaries in September, after a three-judge court in *Cromartie v. Hunt*, 34 F. Supp. 2d 1029 (E.D.N.C. 1998), granted summary judgment to plaintiffs and entered an injunction on April 3, 1998. There the district court and the Supreme Court denied a stay pending appeal, even though the congressional primaries had been scheduled for May 1998 and the injunction was entered after filing had ended and ballots had been prepared. The legislatively-enacted remedial plan was precleared under the Voting Rights Act on June 8, 1998, and primaries proceeded as follows: filing finished July 20, 1998, the primary was on September 15, 1998, and the general election was conducted as planned on November 3, 1998. 1990s Redistricting Chronology, NCGA, available at http://www.ncleg.net/GIS/Download/Maps_Reports/1990_Chronology.pdf (Attached as Appendix G).

In *Johnson v. Halifax County*, 594 F. Supp. 161 (E.D.N.C. 1984), the court entered a preliminary injunction in July 1984 in relation to elections scheduled to be held in November 1984. Although it involved a single county commission electoral scheme, the *Halifax County* case is still instructive because 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), and because 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, in *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002), the plaintiffs challenged the state legislative redistricting plans enacted in 2001. After denying the plaintiffs' preliminary injunction motion, the trial court ruled for the plaintiffs on February 20, 2002, and permanently enjoined the state legislative redistricting plan that it found violated the state constitution. On March 1, 2002, the filing period for candidates closed for the 2002 elections. On March 7, 2002, the state supreme court enjoined the May 7, 2002, primary elections. Of note, the plaintiffs in *Stephenson*, represented by Mr. Farr, argued to the North Carolina Supreme Court that even though it would require bifurcated and delayed primaries for state legislative districts, it was paramount to correct the irreparable harm that flowed to plaintiffs in that case from being in districts that violated the state constitution. *Stephenson* Plaintiffs' Remedy Brief at 4, 6. On April 30, 2002, the Supreme Court declared the 2002 plans unconstitutional and directed the trial court to determine if the General Assembly could redraw plans in time to allow the November 2002 elections to proceed on schedule, and if they could not, to draw its own plan. The trial court allowed the General Assembly two weeks to redraw, which it did, but on May 31, 2002, the trial court declared the newly enacted plans unconstitutional as well. In June, the trial court drew remedial plans itself, and in July, the General Assembly enacted legislation providing for a primary date of

September 10, 2002, for state legislative districts. Those elections occurred in September, and the general election proceeded as scheduled on November 5, 2002.

**B. Areas of Agreement Among the Parties**

Pursuant to the Court's instruction, the parties have conferred by telephone conference call and email exchange to determine the extent to which there is agreement on the time lines and deadlines that might govern any possible remedial process in this case. The Plaintiffs believe the basic areas of agreement and disagreement between the parties are as follows:

The Plaintiffs' position is that it is possible to have a remedy in place for the 2016 elections because a primary for certain state house and state senate districts can be held on August 30, 2016. So long as the court rules by June 3, 2016 and the General Assembly redraws districts by June 17, 2016, a primary can be held on August 30, 2016 and all applicable federal laws would be met.

The Defendants' position is that a remedy in time for the 2016 election is impossible because any new remedial district lines would need to be enacted by Monday, May 10, 2016 in order to conduct primaries on Tuesday August 16, 2016 which is the date the Defendants' believe is the latest possible date for a primary in order to be able to conduct the general election on Tuesday, November 8, 2016.

With regard to the schedule necessary to conduct elections, the parties agree on the following points in bold, with some variances noted below certain points:

1. **A new primary is only needed in districts that are affected by any potential remedial map, and there are parts of the state where the districts will not be affected.**

   Plaintiffs believe that significant portions of the western part of the state will be unaffected by any potential remedial map and that numerous two-county clusters in the rest of the state where no districts are challenged will also remain untouched. Defendants recognize that there may be parts of the state where districts are not affected—particularly in one-county "groups" where no district is struck down—but also note the possibility that the striking down of some VRA districts could result in the need to re-group counties under *Stephenson* and therefore are not prepared to speculate on the extent of any potential ruling or the extent of any new plans, other than to say it is possible that less than the entire state will be affected.

2. **The 100 day notice requirement under state law is for ballot measures and offices that will be on the ballot, NOT for candidates, so it doesn't limit the election timing. *See* N.C. Gen. Stat 163-258.16.**

3. **The Federal UOCAVA requirement for sending overseas absentee ballots is 45 days before the election and applies only to federal**

**elections, so it does not apply to a new primary for certain state house and senate districts. *See* 52 U.S.C. § 20302 (a)(8)(A).**

4. **State law allows State Board modification of procedures for overseas absentee ballots for "other circumstances" *See* N.C. Gen. Stat. 163-258.31.**

Plaintiffs' position is that this statutory language covers a special primary held by court order and empowers the North Carolina State Board of Elections to modify state law requirements for overseas ballots. Defendants do not agree that it would be the State Board's position that a special primary under the circumstances of this case would fall within the "other circumstances" contemplated by the statute.

5. **Federal law allows state to administratively seek exemption from the 45-day requirement, NC has in the past extended the date to receive ballots to compensate for a shorter period before they are sent out. *See* 52 U.S.C. § 20302 (g).**

Plaintiffs believe that in fact, an August 30th primary date would not require any modification of federal law requirements, but even if it did because of the need to wait until after the canvass to begin ballot coding, federal law explicitly contemplates that UOCAVA deadlines might be waived where "[t]he State has suffered a delay in

generating ballots due to a legal contest." 52 U.S.C. § 20302 (g)(2)(B)(ii). Defendants do not agree that seeking such an exemption is advisable in a presidential election year, nor that it is something that the State would think appropriate or seek.

6. **County Boards of Elections need 21 days to create ballots but can send them out earlier if they are completed earlier.**

Plaintiffs believe that a maximum of 21 days is needed to code and print ballots; Defendants believe that a minimum of 21 days is needed to do so.

7. **An eight day candidate filing period is sufficient; a 5-day filing period has been used in the past for other modified elections.**

8. **The Court can eliminate second primary by specifying that candidate with the largest number of votes wins the primary.**

### C. Plaintiffs' Proposed Election Schedule

The key election schedule time periods necessary to determine what schedule is possible for a primary are, beginning from the enactment of new districts are:

1. Candidate filing period: 8 days from enactment of new districts
2. Preparation of ballots: 21 days from close of candidate filing period
3. Assignment of voters to new districts: 7-10 days from enactment of new districts
4. Mailing of absentee ballots: 60 days before election under state law (45 days under federal law for federal offices)

To calculate the time needed between the primary election and the general election, the relevant time periods from the date of the election are:

1. Preparation of ballots: 21 days

2. Mailing of absentee ballots: 60 days before election under state law, 45 days under federal law

With these relevant time periods, the following election schedule is possible:

Friday, June 3: Court rules

Friday, June 17: Deadline for General Assembly to enact remedial districts

Monday June 20 through Monday June 27: Filing period

Saturday, July 16: Primary absentee ballots ready to mail
(45 days before primary)

Tuesday, Aug. 30: Primary election in redrawn districts

Saturday, Sep. 24: General election absentee ballots must be sent
(45 days before general election, and more than 21 days after the primary for ballot preparation)

Tuesday, Nov. 8: General election

This election schedule would require this Court to also order that the primary be determined by a plurality of votes without the need for a run-off election; and that the absentee ballots for overseas voters be sent 45 days before the election (rather than 60 days before the election, which is consistent with federal law but 15 days later than required under state law).

There are two significant areas of disagreement between Plaintiffs and Defendants. First, Plaintiffs believe that seven to ten days is sufficient time for county

boards of election to assign voters to new state senate and house districts in the areas where districts have been redrawn. Defendants believe that assignment of voters to new election districts requires at least twenty-one days and that it cannot occur while the congressional primary election is being conducted from May 26th and June 7th. Second, Plaintiffs believe that the ballot coding and preparation process can begin before the canvass of votes, and that in fact that routinely happens in many counties. Defendants believe that ballot preparation cannot begin after the primary election until after the canvass and certification of election results has occurred.

Plaintiffs submit herewith evidence supporting their contentions on both of these points. First, the Declaration of Gary Bartlett, dated May 6, 2016, is attached as Appendix H, explains why it is possible to assign voters even during the primary election period, if the court were to rule earlier than June 3rd and new district lines were available prior to June 7th. Mr. Bartlett also explains that the ballot coding and preparation process can begin immediately after the primary election, even while the canvass and certification of election results is proceeding. Most significantly, since the ballot coding and printing process for the primary election in 2012 was accomplished successfully in less than three weeks after the end of the filing period, which was also a presidential election year with many offices and ballot measures on the ballot, surely ballot coding and printing for state legislative seats in fewer than all of North Carolina's counties can be completed in 2016 for a primary with only those offices on the ballot during a similar time frame. *See* Declaration of Gary Bartlett at ¶¶ 7-8.

In addition, plaintiffs submit herewith the 2012 deposition testimony of election directors Kelly Doss (Guilford County) (Attached as Appendix I); Joseph Fedrowitz (Durham County) (Attached as Appendix J) and Gary Sims (Wake County) (Attached as Appendix K) from the *Dickson v. Rucho* litigation regarding the time it takes them to assign voters to election districts. When districts are drawn using whole precincts, the process takes "just a matter of a few hours" (App. I, Doss at pg. 21, line 20-21) or can be completed "in an afternoon." (App. J, Fedrowitz at pg. 29, lines 7-8). Thus, even with some split precincts, counties are fully capable of assigning voters to the election districts in a week, while the filing period is open, and certainly during the 21-day period while the ballots are being prepared.

Therefore, Plaintiffs request that this court order a remedial schedule that allows for new primaries in the affected districts on August 30, 2016.

Respectfully submitted, this the 6th day of May, 2016.


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## CERTIFICATE OF SERVICE

I hereby certify that on this date I have electronically filed the foregoing **PLAINTIFFS' POST-TRIAL BRIEFING ON REMEDY** with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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This the 6th day of May, 2016.

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**Remedy Brief Appendices:**

Appendix A: *Harris v. McCrory*, 1:13-cv-949, ECF No. 145 (Feb. 8, 2015) (Def.'s Emergency Motion to Stay Final Judgment and Modify Injunction)

Appendix B: *Harris v. McCrory*, 1:13-cv-949, ECF No. 148 (Feb. 9, 2015) (Order Denying Emergency Motion to Stay)

Appendix C: *Personhuballah v. Alcorn*, No. 3:13-cv-678, ECF No. 171 (E.D. Va. June 5, 2015)

Appendix D: *Personhuballah v. Alcorn*, No. 3:13-cv-678, 2016 U.S. Dist. LEXIS 2054 (E.D. Va. Jan. 7, 2016)

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Appendix F: *Stephenson v. Bartlett*, No. 1 CV 02885 (Johnston Co. Sup. Ct.), Plaintiffs' Memorandum Concerning An Appropriate Remedy (Feb. 19, 2002)

Appendix G: 1990s Redistricting Chronology – NCGA website

Appendix H: Declaration of Gary Bartlett

Appendix I: Deposition Testimony of Kelly Doss

Appendix J: Deposition Testimony of Joseph Fedrowitz

Appendix K: Deposition Testimony of Gary Sims

# Appendix A:

*Harris v. McCrory*, 1:13-cv-949, ECF No. 145 (Feb. 8, 2015) (Def.'s Emergency Motion to Stay Final Judgment and Modify Injunction)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION
Civil Action No. 1:13-CV-00949

| | |
|---|---|
| DAVID HARRIS and CHRISTINE BOWSER, | ) |
| Plaintiffs, | ) |
| v. | ) |
| PATRICK MCCRORY, in his capacity as Governor of North Carolina; NORTH CAROLINA STATE BOARD OF ELECTIONS; and A. GRANT WHITNEY, JR., in his capacity as Chairman of the North Carolina State Board of Elections, | ) |
| Defendants. | ) |

**DEFENDANTS' EMERGENCY MOTION TO STAY FINAL JUDGMENT AND TO MODIFY INJUNCTION PENDING SUPREME COURT REVIEW**

Defendants respectfully move this Court to stay its Final Judgment ordering the North Carolina General Assembly to redraw a new congressional plan by February 19, 2016 and enjoining the State from conducting any elections for the office of U.S. House of Representatives until a new redistricting plan is in place. [D.E. 143] Because of the exigent nature of the circumstances, including that the 2016 primary election is already underway, and that the North Carolina General Assembly is not currently in session, Defendants request a ruling on this motion today so that Defendants can immediately seek relief in the United States Supreme Court if necessary. In support of this motion, Defendants show the Court:

1. On July 28, 2011, following the 2010 Census, the North Carolina General Assembly enacted a congressional district plan (the "Enacted Plan") for North Carolina. *See* Session Law 2011-403 (July 28, 2011) *as amended by* Session Law 2011-414 (Nov. 7, 2011)). The Enacted Plan has already been used in two previous election cycles.

2. After the Enacted Plan became law, two groups of plaintiffs, including the North Carolina State Conference of the NAACP—a group of which both Plaintiffs here are members—challenged the Enacted Plan under the same legal theory asserted by the Plaintiffs here. *See Dickson v. Rucho*, Nos. 11 CVS 16896 and 11 CVS 16940 (consolidated) (July 8, 2013) ("*Dickson*"). A three-judge panel unanimously rejected the *Dickson* plaintiffs' claims and the North Carolina Supreme Court twice affirmed the panel's decision, most recently on December 18, 2015. *See Dickson v. Rucho*, ___ S.E.2d ___, 2015 WL 9261836, at *38 (N.C. Dec. 18, 2015). The *Dickson* Plaintiffs have filed a petition for rehearing with the North Carolina Supreme Court which remains pending. If the petition for rehearing is denied, the *Dickson* Plaintiffs will then have 90 days to file a petition for writ of certiorari with the United States Supreme Court. Rule 13(3), U.S. S.Ct.

3. Candidate filing for the 2016 Elections Cycle, including the districts in the Enacted Plan, ran from noon on December 1, 2015, to noon on December 21, 2015 and elections officials began moving forward with the process of preparing for the primary election which is scheduled to occur on Tuesday, March 15, 2016. On January 18, 2016, county elections officials began issuing mail-in absentee ballots to civilian voters and those qualifying under the Uniformed and Overseas Citizens Absentee Voting Act

("UOCAVA"), which requires transmittal of ballots no later than 45 days before an election for a federal office. State Board of Elections data indicates that county elections officials have mailed 8,621 ballots to voters, 903 of whom are located outside the United States. Hundreds of those ballots have already been voted and returned.

4. Along with this Motion, Defendants have filed with this Court a Notice of Appeal to the United States Supreme Court of this Court's Order Addressing Objections [D.E. 141], Memorandum Opinion [D.E. 142], and Final Judgment [D.E. 143]. Because voting has already started in North Carolina, unless it is stayed, this Court's order requiring the General Assembly to redraw a congressional plan by February 19, 2016 and enjoining the State from conducting any elections for the office of U.S. House of Representatives until a new redistricting plan is in place is likely to cause significant voter confusion and irreparable harm to the citizens of North Carolina and the election process that is already underway. Particulars of the harm that will be caused to North Carolina's citizens and election process absent a stay are set forth in detail in the Declaration of Kimberly Westbrook Strach, which is attached to this Motion as Exhibit 1.

5. Given that two different three-judge panels have reviewed substantially the same record yet reached opposite conclusion on the merits of the same claims involving the same congressional districts and because Defendants are entitled to an appeal as of right to the United States Supreme Court of this Court's Final Judgment and related orders, this Court should stay its Final Judgment and modify the injunction contained within it to allow North Carolina to proceed with conducting elections for the U.S. House of Representatives under the Enacted Plan until the United States Supreme Court has an

opportunity to rule upon the legality of the two congressional districts at issue in this action.

6. While Defendants believe this Court's Judgment will be reversed by the United States Supreme Court on appeal, mandatory injunctions of statewide election laws, including redistricting plans, issued by lower courts at the later stages of an election cycle have consistently been stayed. *See, e.g.*, *Hunt v. Cromartie*, 529 U. S. 1014 (2000); *Voinovich v. Quilter*, 503 U.S. 979 (1992); *Wetherell v. DeGrandy*, 505 U.S. 1232 (1992); *Louisiana v. Hays*, 512 U.S. 1273 (1994); *Miller v. Johnson*, 512 U.S. 1283 (1994). The United States Supreme Court has also affirmed decisions by lower courts to permit elections under plans declared unlawful because they were not invalidated until late in the election cycle. *Watkins v. Mabus*, 502 U.S. 952 (1991) (summarily affirming in relevant part *Watkins v. Mabus*, 771 F. Supp. 789, 801, 802-805 (S.D. Miss. 1991) (three judge court)); *Republican Party of Shelby County v. Dixon*, 429 U.S. 934 (1976) (summarily affirming *Dixon v. Hassler*, 412 F. Supp. 1036, 1038 (W.D. Tenn. 1976) (three-judge court)); *Growe v. Emison*, 507 U.S. 25, 35 (1993) (noting that elections must often be held under a legislatively enacted plan prior to any appellate review of that plan).

WHEREFORE, the Court should stay its Final Judgment in this case pending Supreme Court review and modify the injunction contained within it to allow North Carolina to conduct the 2016 congressional elections under the Enacted Plan.

Respectfully submitted this 8th day of February, 2016.

NORTH CAROLINA DEPARTMENT OF JUSTICE

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## CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day electronically filed the foregoing **DEFENDANTS' MOTION TO STAY FINAL JUDGMENT AND TO MODIFY INJUNCTION PENDING SUPREME COURT REVIEW** with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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This the 8th day of February, 2016.

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# Appendix B:

*Harris v. McCrory*, 1:13-cv-949, ECF No. 148 (Feb. 9, 2015) (Order Denying Emergency Motion to Stay)

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

| | | |
|---|---|---|
| DAVID HARRIS and CHRISTINE BOWSER, | ) | |
| Plaintiffs, | ) | |
| v. | ) | 1:13CV949 |
| PATRICK MCCRORY, in his capacity as Governor of North Carolina, NORTH CAROLINA STATE BOARD OF ELECTIONS, and JOSHUA HOWARD, in his capacity as Chairman of the North Carolina State Board of Elections, | ) | |
| Defendants. | ) | |

**ORDER**

Pending before the Court is Defendants' "Emergency Motion to Stay Final Judgment and to Modify Injunction Pending Supreme Court Review." ECF No. 145. For the reasons that follow, the defendants' motion is **DENIED**.

The Court considers four factors when determining whether to issue a stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Hilton v.

Braunskill, 481 U.S. 770, 776 (1987); accord Long v. Robinson, 432 F.2d 977, 979 (4th Cir. 1970).

The Court addresses each factor in turn, keeping in mind that "[a] stay is considered 'extraordinary relief' for which the moving party bears a 'heavy burden,'" and "[t]here is no authority to suggest that this type of relief is any less extraordinary or the burden any less exacting in the redistricting context." Larios v. Cox, 305 F. Supp. 2d 1335, 1336 (N.D. Ga. 2004) (quoting Winston-Salem/Forsyth Cty. Bd. of Educ. v. Scott, 404 U.S. 1221, 1231 (Burger, Circuit Justice, 1971)).[1]

The defendants have not made a strong showing that they are likely to succeed on the merits. First, the Court has already found that Congressional Districts ("CD") 1 and 12 as presently drawn are unconstitutional. Second, the Court's holding as to liability was driven by its finding that race predominated in

[1] As with other types of cases, district courts evaluating redistricting challenges have generally denied motions for a stay pending appeal. See United States v. Hays, 515 U.S. 737, 742 (1995); McDaniel v. Sanchez, 452 U.S. 130, 136 (1981); Roman v. Sincock, 377 U.S. 695, 703 (1964); Lodge v. Buxton, 639 F.2d 1358, 1362 (5th Cir. 1981); Seals v. Quarterly Cty. Court of Madison Cty., Tenn., 562 F.2d 390, 392 (6th Cir. 1977); Cousin v. McWherter, 845 F. Supp. 525, 528 (E.D. Tenn. 1994); Latino Political Action Comm., Inc. v. City of Boston, 568 F. Supp. 1012, 1020 (D. Mass. 1983); see also Wilson v. Minor, 220 F.3d 1297, 1301 n.8 (11th Cir. 2000) (denying motion to stay district court's order implementing new plan pending appeal).

the drawing of CD 1 and 12. The Supreme Court will review - if it decides to hear this case - that finding for clear error; thus, even if the Supreme Court would have decided otherwise, it can reverse only if "[it] is 'left with the definite and firm conviction that a mistake has been committed.'" Easley v. Cromartie, 532 U.S. 234, 242 (2001) (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948)).

In addition, the defendants have failed to show that they will suffer irreparable injury. The defendants vaguely suggest that there will be irreparable harm to the "citizens of North Carolina" if the Court denies the motion. The Court does not know who the defendants are referring to when they mention, broadly, "citizens." What is clear is that the deprivation of a "fundamental right, such as limiting the right to vote in a manner that violates the Equal Protection Clause, constitutes irreparable harm." Johnson v. Mortham, 926 F. Supp. 1540, 1543 (N.D. Fla. 1996) (citing Elrod v. Burns, 427 U.S. 347, 373-74 (1976)). To force the plaintiffs to vote again under the unconstitutional plan - and to do so in a presidential election year, when voter turnout is highest, see Vera v. Bush, 933 F. Supp. 1341, 1348 (S.D. Tex. 1996) - constitutes irreparable harm to them, and to the other voters in CD 1 and 12. Therefore, the

Court finds that the second and third Long factors weigh in favor of denying the defendants' motion.

Finally, the Court finds that the public interest aligns with the plaintiffs' interests, and thus militates against staying this case. As noted, the harms to the plaintiffs would be harms to every voter in CD 1 and 12. Further, the harms to North Carolina in this case are public harms. The public has an interest in having congressional representatives elected in accordance with the Constitution. As the Supreme Court has noted, once a districting scheme has been found 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).

For these reasons, Defendants' Emergency Motion to Stay Final Judgment and to Modify Injunction Pending Supreme Court Review is **DENIED.**

This the 9th day of February, 2016.

FOR THE COURT:

William L. Osteen, Jr.

United States District Judge

# Appendix C:

*Personhuballah v. Alcorn*, No. 3:13-cv-678, ECF No. 171 (E.D. Va. June 5, 2015)

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**Richmond Division**

DAWN PAGE, et al.,

Plaintiffs,

v. Civil Action No. 3:13cv678

VIRGINIA STATE BOARD OF ELECTIONS, et al.,

Defendants.

**ORDER**

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby ORDERED that:

1. That the Commonwealth of Virginia is hereby enjoined from conducting any elections for the office of United States Representative until a new redistricting plan is adopted; and

2. That the matter of providing a redistricting plan to remedy the constitutional violations found in this case is referred to the Virginia General Assembly for exercise of its primary jurisdiction. The Virginia General Assembly should exercise this jurisdiction as expeditiously as possible, but no later than September 1, 2015, by adopting a new redistricting plan.

It is so ORDERED.

/s/
Allyson K. Duncan
United States Circuit Judge

Richmond, Virginia
Date: June 5, 2015

# Appendix D:

*Personhuballah v. Alcorn*, No. 3:13-cv-678, 2016 U.S. Dist. LEXIS 2054 (E.D. Va. Jan. 7, 2016)

1 of 1 DOCUMENT

**GLORIA PERSONHUBALLAH, et al., Plaintiffs, v. JAMES B. ALCORN, et al., Defendants.**

**Civil Action No. 3:13cv678**

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION**

**2016 U.S. Dist. LEXIS 2054**

**January 7, 2016, Decided**
**January 7, 2016, Filed**

**SUBSEQUENT HISTORY:** Stay denied by Wittman v. Personhuballah, 2016 U.S. LEXIS 973 (U.S., Feb. 1, 2016)

**PRIOR HISTORY:** Cantor v. Personhuballah, 135 S. Ct. 1699, 191 L. Ed. 2d 671, 2015 U.S. LEXIS 2204 (U.S., 2015)

**COUNSEL: [*1]** For Gloria Personhuballah, an individual, James Farkas, an individual, Plaintiffs: John Kuropatkin Roche, Perkins Coie LLP, Washington, DC; John Michael Devaney, Marc Erik Elias, PRO HAC VICE, Perkins Coie LLP (DC-NA), Washington, DC; Kevin Hamilton, PRO HAC VICE, Perkins Coie LLP, Seattle, WA; Mark Buchanan Rhoads, Robert W. Partin, McCandlish Holton PC, Richmond, VA.

For Charlie Judd, in his capacity as Chairman of the Virginia State Board of Elections, Kimberly Bowers, in her capacity as Vice-Chair of the Virginia State Board of Elections, Don Palmer, in his capacity as Secretary of the Virginia State Board of Elections, Defendants: Trevor Stephen Cox, LEAD ATTORNEY, Hunton & Williams LLP (Richmond), Richmond, VA; Mike Melis, Office of the Attorney General (Richmond), Richmond, VA.

For Robert B. Bell, Christopher Marston, Movants: Frederick W. Chockley, III, LEAD ATTORNEY, Baker & Hostetler LLP, Washington, DC; Efrem Mark Braden, PRO HAC VICE, Baker & Hostetler LLP(DC-NA), Washington, DC; Jennifer Marie Walrath, Baker & Hostetler LLP (DC), Washington, DC.

For Clerk of the Virginia Senate, Clerk of the Virginia House, Division of Legislative Services, Interested Parties: Cullen Dennis **[*2]** Seltzer, LEAD ATTORNEY, Sands Anderson PC, Richmond, VA.

For William Robert Janis, Interested Party: Frederick W. Chockley, III, LEAD ATTORNEY, Baker & Hostetler LLP, Washington, DC; Efrem Mark Braden, PRO HAC VICE, Baker & Hostetler LLP(DC-NA), Washington, DC; Jennifer Marie Walrath, Baker & Hostetler LLP (DC), Washington, DC.

For Eric Cantor, Congressman, Robert Wittman, Congressman, Bob Goodlatte, Congressman, Frank R. Wolf, Congressman, Randy Forbes, Congressman, Morgan Griffith, Congressman, Scott Rigell, Congressman, Robert Hurt, Congressman, Intervenor Defendants: John Matthew Gore, LEAD ATTORNEY, PRO HAC VICE, Jones Day (DC-NA), Washington, DC; Jonathan Andrew Berry, LEAD ATTORNEY, Michael Anthony Carvin, Jones Day, Washington, DC.

**JUDGES:** Before DIAZ, Circuit Judge, O'GRADY,

District Judge, and PAYNE, Senior District Judge. PAYNE, Senior District Judge, concurring in part and dissenting in part.

**OPINION BY:** Albert Diaz

**OPINION**

**MEMORANDUM OPINION**

DIAZ, Circuit Judge:

This court twice has found Virginia's Third Congressional District to be an unconstitutional racial gerrymander, in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. See Page v. Va. State Bd. of Elections (Page II), No. 3:13cv678, 2015 U.S. Dist. LEXIS 73514, 2015 WL 3604029 (E.D. Va. June 5, 2015); Page v. Va. State Bd. of Elections (Page I), 58 F. Supp. 3d 533 (E.D. Va. 2014), vacated sub nom. Cantor v. Personhuballah, 135 S. Ct. 1699, 191 L. Ed. 2d 671 (2015). We subsequently ordered **[*3]** the Virginia General Assembly to devise a redistricting plan to remedy the constitutional violation by September 1, 2015. The General Assembly convened but failed to act. As a result, and after considering input from the parties, we appointed Dr. Bernard Grofman[1] as special master to assist and advise the court in drawing an appropriate remedial plan. We also directed all parties and interested nonparties to submit proposed plans.

> 1 Dr. Grofman is Professor of Political Science and Jack W. Peltason Endowed Chair of Democracy Studies at the University of California, Irvine, and former Director of the UCI Center for the Study of Democracy. He has participated in over twenty redistricting cases as an expert witness or special master, and has been cited in more than a dozen Supreme Court decisions.

On November 13, 2015, the Supreme Court noted that it would hear argument in Intervenor-Defendants'[2] appeal of the liability judgment, asking the parties to additionally address whether the Intervenors have standing to bring the appeal. See Wittman v. Personhuballah, 136 S. Ct. 499, 193 L. Ed. 2d 364, 2015 WL 3867187 (U.S. 2015). After reviewing all plans submitted by parties and nonparties, Dr. Grofman filed his report on November 16, 2015. Also on that day, the Intervenor-Defendants **[*4]** moved to suspend further proceedings and to modify our injunction pending Supreme Court review. We ordered the parties to continue with their responsive briefing to the special master's report, and on December 14, 2015, we held a hearing on both the merits of the special master's recommendations and whether to stay our implementation of a remedy pending the Supreme Court's review of the liability judgment.

> 2 Intervenor-Defendants David Brat, Barbara Comstock, Robert Wittman, Bob Goodlatte, Randy Forbes, Morgan Griffith, Scott Rigell, and Robert Hurt (collectively, "the Intervenors") are the Republican Congressional representatives for the Commonwealth of Virginia.

We hold that the balance of equities favors our immediate imposition of a remedial redistricting plan. To that end, we find that one of the two plans proposed by Dr. Grofman, Congressional Plan Modification 16 ("Plan 16"), best remedies the constitutional violation that we described in Page II. Accordingly, we direct the Defendants to implement the redistricting plan attached to the court's order as Appendix A for the 2016 U.S. House of Representatives election cycle.

I.

A.

Plaintiffs Gloria Personhuballah and James Farkas[3] reside **[*5]** in Virginia's Third Congressional District. In Page I,[4] they sued the Defendants[5] in their official capacities, alleging that the Third District was racially gerrymandered in violation of the Fourteenth Amendment's Equal Protection Clause. We held that because racial considerations predominated in the drawing of the district boundaries, strict scrutiny applied. We found that the plan was not narrowly tailored to advance a compelling government interest, as required to survive strict scrutiny, because the General Assembly did not have any evidence indicating that a black voting-age population ("BVAP") of 55% was required in the Third District for the plan to comply with Section 5 of the Voting Rights Act. The Intervenors appealed to the Supreme Court, and on March 30, 2015, the Court vacated the judgment and remanded the case for reconsideration in light of Alabama Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 191 L. Ed. 2d 314

(2015). Cantor v. Personhuballah, 135 S. Ct. 1699, 191 L. Ed. 2d 671 (2015) (mem.).

3 Dawn Curry Page was also a named plaintiff at the time the suit was filed, but was later dismissed from the case.

4 The facts and history of the litigation are described fully in Page II, 2015 U.S. Dist. LEXIS 73514, 2015 WL 3604029, at *1-6. We set forth an abridged version here.

5 Defendants James B. Alcorn, Clara Belle Wheeler, and Singleton B. McAllister, are chairman, vice-chairman, and secretary of the Virginia State Board of Elections, **[*6]** respectively.

We reconsidered the case in accord with the Court's mandate, again found the Third District unconstitutional, and ordered the Virginia General Assembly to implement a new districting plan by September 1, 2015. When the General Assembly failed to act, we took up the task of drawing a remedial plan. See White v. Weiser, 412 U.S. 783, 794-95, 93 S. Ct. 2348, 37 L. Ed. 2d 335 (1973) ("[J]udicial 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." (quoting Reynolds v. Sims, 377 U.S. 533, 586, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964))).

To that end, we directed the parties and any nonparties desiring to do so to submit proposed remedial plans. The Plaintiffs submitted one plan and the Intervenors submitted two. In addition, nonparties OneVirginia2021; the Richmond First Club; Senator J. Chapman Petersen; Bull Elephant Media, LLC; the Virginia State Conference of NAACP Branches; Jacob Rapoport; and the Governor of Virginia each submitted a plan. Dr. Grofman did not consider, nor do we, the plans submitted by OneVirginia2021 and Bull Elephant Media, as the former did not include a map and the latter did not include the shape file we had required for detailed analysis. Dr. Grofman thus had eight maps to consider. **[*7]**

B.

The 2016 congressional election cycle has just begun in Virginia. Candidates were set to start seeking petitions of qualified voters on January 2, 2016, and the Defendants have explained that, while the Virginia Board of Elections will do its best to implement any judicial order, the risk of error increases the later the Board is given a new plan to implement. Although Defendants could not provide a precise date at which implementation would be impossible, they say it would be critical to have a plan in place by late March.[6]

6 If the Board were to receive the plan that late, at minimum, the primary election would have to be pushed back.

II.

We first address the Intervenors' motion to suspend our proceedings pending Supreme Court review.

All parties agree that, because our extant injunction prevents Virginia from conducting another election under the redistricting plan enacted in 2012 (the "Enacted Plan") but does not provide an alternative plan, we must either modify that injunction to allow the 2016 election to proceed under the Enacted Plan, or enter a new plan.

The Intervenors argue that the Supreme Court's decision to set oral argument in Page II has stripped us of jurisdiction to enter **[*8]** a remedial plan, or alternatively, that the balance of equities favors "suspend[ing] any remedial efforts pending the Supreme Court's decision." Intervenor-Defs.' Mem. Supp. Mot. to Suspend 2, ECF No. 271. They cite Donovan v. Richland County Ass'n for Retarded Citizens, 454 U.S. 389, 102 S. Ct. 713, 70 L. Ed. 2d 570 (1982) (per curiam), United States v. Locke, 471 U.S. 84, 105 S. Ct. 1785, 85 L. Ed. 2d 64 (1985), and United States v. Wells Fargo Bank, 485 U.S. 351, 108 S. Ct. 1179, 99 L. Ed. 2d 368 (1988), for the proposition that our jurisdiction is stripped by the filing of a notice of direct appeal. But these cases support only the claim that we could not now alter our liability decision; they do not speak to our jurisdiction to enter a remedy.

In Donovan, the plaintiff sued for a declaratory judgment that the application of the Fair Labor Standards Act to the mental health facility it operated would be unconstitutional. The district court so held, and the Ninth Circuit issued a decision affirming the district court. 454 U.S. at 389. Then, after the appellants filed their notice of appeal, the Ninth Circuit sua sponte issued a new decision reversing the district court. Id. at 390 n.2. Here, in contrast, our entering a remedy would not in any way affect the liability decision now before the Supreme

Court.

Similarly, in Locke and Wells Fargo, the Court noted that it could resolve statutory questions even though it was "the portion of the judgment declaring an Act of Congress unconstitutional **[*9]** that provides [the Court] with appellate jurisdiction" because "such an appeal brings the entire case before [the Court]." Wells Fargo, 485 U.S. at 354; accord Locke, 471 U.S. at 92. The Intervenors urge us to read this statement to mean that their appeal of the liability judgment also brings the remedial aspect of the case before the Supreme Court.

The clear meaning of the phrase "the entire case" in context, however, is that statutory claims are not stripped from the constitutional claims in a single liability case--that is, the entire liability case is before the Supreme Court on appeal. The Court's use of the phrase thus says nothing about the effect the appeal of a liability decision has on the jurisdiction of the district court charged with crafting a remedy. See Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58, 103 S. Ct. 400, 74 L. Ed. 2d 225 (1982) (per curiam) ("The filing of a notice of appeal is an event of jurisdictional significance--it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." (emphasis added)). Because the remedial phase of this case is not an "aspect[] of the case involved in the appeal," we retain jurisdiction over it.

Accordingly, we turn to the question of whether we should stay implementation of a **[*10]** remedy pending the Supreme Court's consideration of the Intervenors' appeal. We consider four factors when determining whether to issue a stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Hilton v. Braunskill, 481 U.S. 770, 776, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987); accord Long v. Robinson, 432 F.2d 977, 979 (4th Cir. 1970).

We address each factor in turn, keeping in mind that "[a] stay is considered 'extraordinary relief' for which the moving party bears a 'heavy burden,'" and "[t]here is no authority to suggest that this type of relief is any less extraordinary or the burden any less exacting in the redistricting context." Larios v. Cox, 305 F. Supp. 2d 1335, 1336 (N.D. Ga. 2004) (quoting Winston-Salem/Forsyth Cty. Bd. of Educ. v. Scott, 404 U.S. 1221, 1231, 92 S. Ct. 1236, 31 L. Ed. 2d 441 (Burger, Circuit Justice, 1971)).

A.

The Intervenors have not made a strong showing that they are likely to succeed on the merits. First, we have twice found the Third Congressional District as presently drawn to be unconstitutional, including with the benefit of the Supreme Court's guidance in Alabama. There, the Court made clear that a districting plan fails strict scrutiny when a state legislature insists on maintaining "the same **[*11]** percentage of black voters" in a majority-minority district without evidence that that percentage of black voters is required to preserve their ability to elect a candidate of choice. Alabama, 135 S. Ct. at 1272. That is precisely what the General Assembly did here.

Second, our holding as to liability was driven by our finding that racial factors predominated in the drawing of the District. The Supreme Court will review that finding for clear error; thus, even if the Court would have decided otherwise, it can reverse only if "it is 'left with the definite and firm conviction that a mistake has been committed.'" Easley v. Cromartie, 532 U.S. 234, 242, 121 S. Ct. 1452, 149 L. Ed. 2d 430 (2001) (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948)).

Third, the standard for the Supreme Court to set a case for oral argument in direct appeals is not a demanding one. Because--unlike in the context of petitions for certiorari--the Court must make a decision on the merits in direct appeals, whether the Court schedules oral argument turns on whether the proper resolution of the case is so clear from the jurisdictional statement, opposing motion, and opinions below, that further briefing and argument is unnecessary. Compare Shapiro et al., Supreme Court Practice 304 (10th ed. 2013) ("[In the direct appeal context,] [w]ith respect to the merits, the question **[*12]** is whether, after reading the condensed arguments presented by counsel in the jurisdictional statement and the opposing motion, as well as the opinions below, the Court can reasonably conclude that there is so little doubt as to how the case will be decided that oral argument and further briefing would be a waste of time."), with id. at 240 ("[T]he recent introduction of the word 'compelling' and the use of the

'importance' concept throughout Rule 10 indicate that the Court utilizes highly selective standards of review [for granting petitions for certiorari].").

Thus the Court's decision to hear oral argument indicates only that there is some doubt as to how the case will be decided. This is not enough to meet the Intervenors' burden of showing that they are likely to succeed on the merits.

B.

Nor have the Intervenors shown a personal irreparable injury that outweighs any injury to the Plaintiffs and the public. While we accept that the Intervenors who live in districts affected by our chosen remedy will have more complicated campaigns if we do not stay this case and the Court ultimately reverses, they nonetheless have the benefit of knowing the two possible maps that will be in place at the time of the elections. **[*13]** In addition, under the remedial plan we adopt today, each incumbent remains in his or her current district and no two incumbents are paired in a single district. The Intervenors can gather petition signatures primarily in those areas within their district under either map, and can prepare a contingency plan if the Supreme Court rules in their favor.

We acknowledge that even with such a contingency plan, a return to the Enacted Plan will cause hardship to some of the Intervenors' campaigns. But we are more reluctant to grant a stay with the effect of "giv[ing] appellant the fruits of victory whether or not the appeal has merit." Jimenez v. Barber, 252 F.2d 550, 553 (9th Cir. 1958). The Intervenors would have us modify our injunction to ensure the 2016 election proceeds under the Enacted Plan regardless of the outcome of the Supreme Court's review. Thus, even if the Court finds the Intervenors do not have standing to appeal or affirms our judgment on the merits, the Intervenors say that the 2016 election should proceed under the unconstitutional Enacted Plan, deferring implementation of our chosen remedy until the 2018 election. The effect would be to give the Intervenors the fruits of victory for another election cycle, even if they lose in the **[*14]** Supreme Court. This we decline to do.

C.

We also find that granting a stay will substantially injure the other parties interested in the proceeding. The Plaintiffs have twice obtained a judgment that their congressional district was racially gerrymandered. "Deprivation of a fundamental right, such as limiting the right to vote in a manner that violates the Equal Protection Clause, constitutes irreparable harm." Johnson v. Mortham, 926 F. Supp. 1540, 1543 (N.D. Fla. 1996) (citations omitted) (citing Elrod v. Burns, 427 U.S. 347, 373-74, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976)). To force the Plaintiffs to vote again under the Enacted Plan even if the Supreme Court affirms our finding that the Plan is unconstitutional-and to do so in a presidential election year, when voter turnout is highest, see Vera v. Bush, 933 F. Supp. 1341, 1348 (S.D. Tex. 1996)--constitutes irreparable harm to them, and to the other voters in the Third Congressional District.[7]

> 7 Although the Plaintiffs did not file suit until 2013, we think the delay was a greater concern leading up to the 2014 election; now that over two years have passed, the original delay in filing does not weigh in favor of our allowing another election to proceed under an unconstitutional plan. See Page I, 58 F. Supp. 3d at 554 ("Plaintiffs are largely responsible for the proximity of our decision to the November 2014 elections.").

As for the Defendants, among the imperfect choices open **[*15]** to us, staying implementation of our remedy would do them the most harm. "With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree." Reynolds, 377 U.S. at 585. If the Court affirms our judgment, the Commonwealth would either have to postpone the primary and rush to redraw districts at a much higher risk of error, or be forced to hold another election under an unconstitutional plan. By adopting a remedy now, the Commonwealth faces the lesser evil of implementing new districts at a time when it remains a relatively manageable task; then, if the Court reverses, the Commonwealth need only revert to districts that it has operated under for years--a much less daunting challenge.

D.

Finally, we find that the public interest aligns with the Plaintiffs' and Defendants' interests, and thus militates against staying implementation of a remedy. As noted, the harms to the Plaintiffs would be harms to every voter

in the Third Congressional District. In addition, the harms to the Commonwealth are **[*16]** public harms. The public has an interest in having congressional representatives elected in accordance with the Constitution. As the Supreme Court has noted, once a districting scheme has been found 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." Id.

Accordingly, we decline to stay the implementation of a remedy.

III.

We turn to the remedy. A court tasked with drawing a redistricting plan faces an "unwelcome obligation," Perry v. Perez, 132 S. Ct. 934, 940, 181 L. Ed. 2d 900 (2012) (per curiam) (quoting Connor v. Finch, 431 U.S. 407, 415, 97 S. Ct. 1828, 52 L. Ed. 2d 465 (1977)), as the conflicting interests that must be balanced are better suited to the legislative process, see White, 412 U.S. at 794-95 ("From the beginning, we have recognized that 'reapportionment is primarily a matter for legislative consideration and determination.'" (quoting Reynolds, 377 U.S. at 586)). However, given the General Assembly's failure to draw a new plan, it falls to us to do so, within the bounds set by the Constitution and federal law.

A.

First and most fundamentally, Article I, Section 2 of the Constitution "requires congressional districts to achieve population equality 'as nearly as is practicable,'" and "[c]ourt-ordered districts are held to higher standards of population equality than **[*17]** legislative ones." Abrams v. Johnson, 521 U.S. 74, 98, 117 S. Ct. 1925, 138 L. Ed. 2d 285 (1997) (quoting Wesberry v. Sanders, 376 U.S. 1, 7-8, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964)); see also Alabama, 135 S. Ct. at 1271 ("[T]he requirement that districts have approximately equal populations is a background rule against which redistricting takes place."). Thus, since no "significant state policy or unique features" require us to depart from equal population districts, Chapman v. Meier, 420 U.S. 1, 26, 95 S. Ct. 751, 42 L. Ed. 2d 766 (1975), we consider it a requirement that our remedial plan have district populations within one person of 727,366. Dr. Grofman's Plan 16 satisfies this requirement.

B.

Second, we must remedy the Shaw v. Reno, 509 U.S. 630, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993), violation that led to the invalidation of the Enacted Plan. In Page II, we found that the General Assembly's insistence on a 55% BVAP in the Third Congressional District predominated over traditional redistricting principles, and that a 55% BVAP requirement was not narrowly tailored to comply with Section 5 of the Voting Rights Act. Shaw requires that map-drawers either not subordinate "traditional districting principles" to racial considerations, id. at 642, or, if they do, the district lines must be "narrowly tailored to further a compelling governmental interest," id. at 643. Traditional districting principles in Virginia include the constitutional requirements of compactness and contiguity, Va. Const. art. II, § 6, "respect for political subdivisions," Page II, 2015 U.S. Dist. LEXIS 73514, 2015 WL 3604029, at *10 (quoting **[*18]** Shaw, 509 U.S. at 647), and "consideration of communities of interest," 2015 U.S. Dist. LEXIS 73514, [WL] at *3.[8]

> 8 The Intervenors emphasize the importance of preserving district cores. In Page II, however, we were not convinced that this was a factor driving the General Assembly's adoption of the Enacted Plan. 2015 U.S. Dist. LEXIS 73514, 2015 WL 3605029, at *12. In addition, by choosing a plan that changes the Enacted Plan only so far as necessary to remedy the constitutional violation, we have preserved district cores where possible. In any event, maintaining district cores is the type of political consideration that must give way to the need to remedy a Shaw violation.

The Third Congressional District "reflect[s] both an odd shape and a composition of a disparate chain of communities, predominantly African-American, loosely connected by the James River," 2015 U.S. Dist. LEXIS 73514, [WL] at *11, connecting the Tidewater area to the east with Richmond to the west. Our Page II decision was particularly concerned with the Third District's contorted shape and use of non-physical contiguity.

In drawing Plan 16's Third District, Dr. Grofman chose the Tidewater region as its center. To achieve population equality in the District, he was guided by the neutral goals of compactness, contiguity, and avoiding unnecessary city or county splits, rather than any racial **[*19]** considerations. Those districts abutting[9] the Third

District were then drawn to achieve equal population, following the same major considerations. The BVAP of the neutrally drawn Third District was 45.3%. Based on the record evidence, Dr. Grofman determined that a BVAP "somewhat above" 40% would preserve African-American voters' ability to elect the representative of their choice in the Third District. Report of the Special Master 37, ECF No. 272. There was thus no need for Dr. Grofman to alter Plan 16 to increase the BVAP of the Third District.

> 9 The First, Second, Fourth, and Seventh Districts abut the Third District in the Enacted Plan.

Plan 16 also vastly improves the Third District's compactness score and meaningfully improves the Plan's average compactness scores across all the affected districts. The scores only confirm what a quick look at Plan 16 makes clear. See Page II, 2015 U.S. Dist. LEXIS 73514, 2015 WL 3604029, at *10 (citing Karcher v. Daggett, 462 U.S. 725, 762, 103 S. Ct. 2653, 77 L. Ed. 2d 133 (1983) (Stevens, J., concurring)). In addition, Plan 16 relies on land contiguity; while water contiguity is permissible in Virginia, it can be abused. See 2015 U.S. Dist. LEXIS 73514, [WL] at *11 ("Here, the record establishes that, in drawing the boundaries of the Third Congressional District, the legislature used water contiguity as a means to bypass white **[*20]** communities and connect predominantly African-American populations in areas such as Norfolk, Newport News, and Hampton.").And because racial considerations did not predominate in the drawing of Plan 16, the Plan is not subject to strict scrutiny.

In contrast, the plans offered by the Intervenors do little to cure the Shaw violation. The plans draw the Third District tortuously and much like the Enacted Plan, in ways that appear to be race-based, thus likely triggering strict scrutiny. Though the plans lower the BVAP in the Third District to just over 50%, this choice remains constitutionally suspect, as the record indicates that a significantly lower BVAP would be sufficient for minority voters to be able to elect a candidate of choice. The 50% BVAP thus cannot be said to be narrowly tailored to advance a compelling government interest.

Our limited approval in Page II of the Plaintiffs' Alternative Plan, which had the same BVAP, does not suggest otherwise. We highlighted the Alternative Plan simply to disprove the claim that "the population swaps involving the Third Congressional District-and resulting locality splits-were necessary to achieve population parity in accordance with the **[*21]** constitutional mandate of the one-person-one-vote rule." 2015 U.S. Dist. LEXIS 73514, [WL] at *12. Critically, however, we did not then have the benefit of a racial bloc voting analysis; nor did the Plaintiffs have the guidance of our ruling when they drafted the plan.

C.

Third, our implementation of a remedial plan "should be guided by the legislative policies underlying the existing plan, to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act." Abrams, 521 U.S. at 79. How closely we must hew to the legislative policies depends on the scope and effect of the constitutional violation.

In Upham v. Seamon, 456 U.S. 37, 102 S. Ct. 1518, 71 L. Ed. 2d 725 (1982) (per curiam), the Court found that the district court had exceeded the bounds of its authority when only two of twenty-seven districts were objectionable, yet the court redrew districts that were hundreds of miles away from those districts. In White v. Weiser, the Court reversed, finding that the district court had before it two plans that fully remedied the constitutional violation, and without explanation chose the plan that "ignored legislative districting policy." 412 U.S. at 796. In Abrams, like here, the enacted plan was invalid because of racial gerrymandering, and the "contorted shape of the district and the undue predominance **[*22]** of race in drawing its lines" made it "unlikely the district could be redrawn without changing most or all of Georgia's congressional districts." 521 U.S. at 77. The Court therefore approved the district court's remedial plan, which "ma[de] substantial changes to the existing plan consistent with Georgia's traditional districting principles, and considering race as a factor but not allowing it to predominate." Id. at 86.

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Reading these cases together, we conclude that to best balance the need to remedy the Shaw violation with the deference otherwise due to the General Assembly's redistricting choices, our chosen remedial plan should not alter any districts outside of the Third District and those abutting it, but may make substantial changes to those districts. See id. Whereas the two misshapen districts in Abrams allowed the district court to change all eleven of Georgia's districts, here the one misshapen district only requires changes to five of Virginia's eleven congressional districts.

Plan 16 best achieves this balance, leaving untouched the districts that do not abut the Third,[10] while altering the Third and its abutting districts only as necessary to remedy the Shaw violation. In addition, Plan 16 leaves each incumbent in his or her original district, which minimizes the disruptive impact of the remedial plan. See id. at 84 (finding valid a district court's plan that considered but subordinated **[*24]** the factor of "[p]rotecting incumbents from contests with each other"). We find Plan 16 superior to the other plan drawn by Dr. Grofman, NAACP Plan 6, in this regard. While NAACP Plan 6 also remedies the Shaw violation while preserving equal population and limiting its changes to the Third District and those districts abutting it, it requires reallocating significantly more of the population in the affected districts.

> 10 Six of the submitted plans fail in this regard, making changes to districts that do not abut the Third District. For that reason, we reject the plans submitted by the Plaintiffs, the Governor of Virginia, the NAACP, Senator Petersen, Mr. Rapoport, and Richmond First.

The Intervenors argue that adopting a plan consistent with the General Assembly's policies requires maintaining an 8-3 Republican-Democratic split. That is not correct. Though Abrams found a district court's plan to be valid where the court considered, but subordinated, protecting incumbents from being paired in a single district, we have found no case holding that we must maintain a specific political advantage in drawing a new plan, and at some point political concerns must give way when there is a constitutional violation **[*25]** that needs to be remedied. See id. at 88 (allowing departure from legislative policy where "[n]o other plan demonstrated" the policy could be followed "while satisfying the constitutional requirement that race not predominate over traditional districting principles"). This is especially true given the Supreme Court's expressed concern over partisan gerrymandering. See, e.g., Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2658, 192 L. Ed. 2d 704 (2015) ("'Partisan gerrymanders,' this Court has recognized, 'are incompatible with democratic principles." (quoting Vieth v. Jubelirer, 541 U.S. 267, 292, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (2004) (plurality opinion) and id. at 316 (Kennedy, J., concurring in the judgment)) (brackets omitted)).

D.

Finally, our chosen plan should be guided by principles of federal law--in particular, the Voting Rights Act. See Abrams, 521 U.S. at 96 (explaining that "in fashioning the plan, the court should follow the appropriate Section 5 [of the Voting Rights Act] standards . . . at the very least as an equitable factor to take into account" (quoting McDaniel v. Sanchez, 452 U.S. 130, 149, 101 S. Ct. 2224, 68 L. Ed. 2d 724 (1981))); id. at 90 ("On its face, § 2 [of the Voting Rights Act] does not apply to a court-ordered remedial redistricting plan, but we will assume courts should comply with the section when exercising their equitable powers to redistrict.").

Although the Court's decision in Shelby County v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013), has called into doubt whether compliance with Section 5 is a compelling interest, **[*26]** our remedial plan need not meet strict scrutiny, as racial considerations did not predominate in Dr. Grofman's drawing of the map or in our adoption of it. In addition, the General Assembly intended to comply with Section 5 when it drafted the Enacted Plan. Thus, we think it is appropriate to consider compliance with Section 5 as an equitable factor in our remedial calculus. Cf. Shelby Cty., 133 S. Ct. at 2631 ("We issue no holding on § 5 itself, only on the coverage

formula."). Similarly, though the Intervenors urge us not to consider the requirements of Section 2,[11] as no Section 2 claim was raised in Page II, we think it appropriate to implement a plan that complies with federal policy disfavoring discrimination against minority voters.

> 11 More specifically, the Intervenors say that Dr. Grofman's decision to consider "packing" and "fragmentation" of minority voters in drawing his remedial plans is inappropriate where the Plaintiffs have not alleged such a claim. This misunderstands the point. We found a constitutional violation in Page II because the plan was not narrowly tailored to advance a compelling interest, given the General Assembly's failure to show that a 55% BVAP was necessary to preserve minority voters' ability to elect a candidate of choice **[*27]** in the Third District. In short, by "packing" more African-American voters than required into the Third District, the Enacted Plan fragmented the African-American vote in the surrounding districts. Dr. Grofman's remedial plans were drawn with our holding firmly in mind.

Section 5 "requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice." Alabama, 135 S. Ct. at 1272. Section 2 prohibits denying minority voters "an 'equal opportunity' to 'participate in the political process and to elect representatives of their choice'" where the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district" and is "politically cohesive," and where the majority "votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate." Abrams, 521 U.S. at 91 (quoting 42 U.S.C. § 1973(b) and Thornburg v. Gingles, 478 U.S. 30, 50-51, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986)).

Dr. Grofman's Plan 16 results in a BVAP of 45.3% in the Third District and 40.9% in the Fourth District. In contrast, the Enacted Plan has a BVAP of 56.3% in the Third District and 31.3% in the Fourth District. Dr. Grofman's thorough analysis of previous elections in the relevant areas of Virginia shows that the minority choice candidates would likely receive a significant majority **[*28]** vote--over 60% in each case--in the new Third District with a 45.3% BVAP. Thus Plan 16's Third District is consistent with Section 5's requirements, as articulated in Alabama. See 135 S. Ct. at 1273 ("Section 5 does not require maintaining the same population percentages in majority-minority districts as in the prior plan. Rather, Section 5 is satisfied if minority voters retain the ability to elect their preferred candidates.").

Additionally, Dr. Grofman's analysis indicates that minority voters' candidates of choice would also receive over 60% of the vote in a new Fourth District with a BVAP of 40.9%. This analysis indicates that a Section 2 challenge to the Fourth District would fail, as the ability to garner 60% of the vote with a significantly below-majority BVAP indicates that the majority does not "vote[] sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate." Abrams, 521 U.S. at 91 (quoting Thornburg, 478 U.S. at 51); see id. at 90-91 (noting that plaintiffs bringing a Section 2 claim must show all three threshold conditions). We therefore find that Plan 16 accords with the principles of Section 2.

In short, Plan 16 remedies the Shaw violation that we found in Page II by drawing districts based on neutral, traditional criteria. Additionally, it remains consistent with the Enacted **[*29]** Plan to the extent possible while remedying the Shaw violation, and honors the principles underlying Sections 2 and 5 of the Voting Rights Act. It is thus the plan that best fulfills our remedial mandate.

It is so ORDERED.

/s/ Albert Diaz

/s/ Liam O'Grady

Richmond, Virginia
Date: January 7, 2016

**CONCUR BY:** Robert E. Payne (In Part)

**DISSENT BY:** Robert E. Payne (In Part)

**DISSENT**

PAYNE, Senior District Judge, concurring in part and dissenting in part.

**I**.

I agree that the Intervenors' appeal to the Supreme Court does not divest this Court of jurisdiction to enter a remedial plan. And, I agree with the rationale offered to support that decision. **II**.

For the reasons set forth in the dissent on the merits of this case, I remain of the view that the Plaintiffs have not proved that race predominated over traditional redistricting principles in the redistricting, including that for CD3. Page v. Virginia State Bd. Of Elections, 2015 U.S. Dist. LEXIS 73514, 2015 WL 3604029, at *19-26 (E.D. Va. June 15, 2015). Therefore, I think that a remedial plan is neither required nor permitted.

That said, if the majority opinion on the merits is affirmed by the Supreme Court, I agree that the remedial plan adopted by the majority ("Congressional Modification 16") represents the most appropriate way to remedy the constitutional violation that the majority identified in its opinion **[*30]** on the merits. There is, however, one component of the majority's reasoning for rejecting the Intervenors' remedial plan as to which I take a somewhat different view. In particular, I refer to the argument made by the Intervenors that, to be consistent with the General Assembly's articulated redistricting policies, the remedial plan must maintain the 8-3 Republican-Democrat split deliberately chosen by the General Assembly.

The majority concludes "[t]hat is not correct," and I agree. But, my agreement is not predicated on the decision in Arizona State Legislature v. Arizona Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2658, 192 L. Ed. 2d 704 (2015) which cites the plurality opinion and Justice Kennedy's concurrence in Vieth v. Jubelirer, 541 U.S. 267, 292, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (2004). Rather, I read Arizona and Vieth to reflect the substantial, and unfortunate, uncertainty present in the Supreme Court's decisions respecting the legitimacy, if any, of gerrymandering for partisan political purposes.

I am of the view that, under current Supreme Court jurisprudence, "deviations from neutral redistricting principles on the basis of political affiliation or preference may not always be constitutionally permissible." Bethune-Hill v. Virginia State Bd. Of Elections, 2015 U.S. Dist. LEXIS 144511, 2015 WL 6440332, at *32 n.21 (E.D. Va. Oct. 22, 2015) (citations omitted). Nonetheless, there is considerable uncertainty on the point because the Supreme Court remains quite fractured on the legitimacy of partisan **[*31]** political gerrymandering, including whether a claim complaining of such gerrymandering is even justiciable. Michael J. Parsons, CLEARING THE POLITICAL THICKET: Why Political Gerrymandering For Partisan Advantage Is Unconstitutional 16-27 (Dec. 15, 2015), http://ssrn.com/author=2449663 (hereafter "Parsons at p. ").[12] In my view, that article clearly demonstrates that the law on political gerrymandering is unsettled and why. Unfortunately, as this case illustrates so very well, that uncertainty has led to the view among legislatures, lawyers, and even some courts that partisan political gerrymandering is constitutionally permissible in general when, as I understand it, the Supreme Court actually has approved such gerrymandering only in quite limited circumstances.

12 The author of this thorough, thoughtful, and comprehensive article is a former law clerk to the undersigned.

Neither in the merits phase in this case nor in Bethune-Hill did the Plaintiffs contend that gerrymandering for political purposes was unconstitutional. Hence, there was no need to confront that issue in deciding the merits of either case. Now, however, the Intervenors have said that, in fashioning a remedy, this Court is obligated to maintain **[*32]** the 8-3 partisan split in the Enacted Plan. To decide that contention, the Court necessarily must confront whether to effect a political gerrymander. In my view, a district court cannot do that for two reasons.

First, no district court, when confronted with the necessity of undertaking redistricting, has approached the task with the intent of conferring or maintaining a partisan political advantage. Beyond the limited context of "avoiding contests between incumbent[s]," Karcher v. Daggett, 462 U.S. 725, 740, 103 S. Ct. 2653, 77 L. Ed. 2d 133 (1983), courts have unanimously agreed that political considerations "have no place in a plan formulated by the courts." Wyche v. Madison Parish Police Jury, 769 F.2d 265, 268 (5th Cir. 1985). Indeed, in an effort to avoid political entanglements, courts have often treated incumbency protection even in this limited context as "distinctly subordinate" to constitutional and statutory imperatives as well as other, neutral redistricting criteria. Larios v. Cox, 314 F. Supp. 2d 1357, 1361 (N.D. Ga. 2004); see also Favors v. Cuomo, 2012 U.S. Dist. LEXIS 36910, 2012 WL 98223, at *16-17 (E.D.N.Y. Mar. 19, 2012); Essex v. Kobach, 874 F. Supp. 2d 1069, 1093 (D. Kan. 2012); Johnson v. Miller, 922 F. Supp. 1556, 1565 (S.D. Ga. 1995), aff'd sub nom. Abrams v. Johnson, 521 U.S. 74, 117 S. Ct. 1925, 138 L. Ed. 2d 285 (1997); Good v. Austin, 800 F. Supp. 557, 563 (E & W.D. Mich. 1992).

Second, there is a strong argument that gerrymandering purely for the purpose of achieving or maintaining partisan advantage is unconstitutional because it is a denial of the equal protection of law guaranteed by the Fourteenth Amendment. Why that is so is thoroughly explained in CLEARING THE POLITICAL THICKET. Parsons, at pp. 45-46. I could not do a better job in explaining the argument **[*33]** that gerrymandering for purely political reasons is unconstitutional. Nor is it necessary to say more on the topic now. Suffice it to say that, even if a legislature can redistrict for that purpose, a court, under Supreme Court jurisprudence, should not do so when the task of redistricting is thrust upon it.[13]

> 13 It is one thing to find, as I did on the merits of this case, and as did the majority in Bethune-Hill, that race was the not predominant reason for the Enacted Plan. That merely means that race was not shown to be the predominate reason for drawing the district; and, therefore, that the Plaintiffs did not prove the only theory of the case which they presented. On the merits, the Plaintiffs did not assert the alternate theory that the Enacted Plan was an unconstitutional political gerrymander, and it would have been improper for the Court to have decided the case on a theory neither raised nor tried. The same is true in Bethune-Hill.

**III**.

Contrary to the majority's view, I think that implementation of the remedial plan should be stayed pending resolution of the merits of the case by the Supreme Court. The four factor test set forth in Long v. Robinson, 432 F.2d 977, 979 (4th Cir. 1970) (citing Virginia Petroleum Jobbers Asso. v. Federal Power Com., 259 F.2d 921, 104 U.S. App. D.C. 106 (1958)) has, in my view, been satisfied.

**A. Likelihood [*34] of Success**

For the reasons set forth in the dissent on the merits, and as further explicated in Bethune-Hill, I think that the Intervenors have a strong likelihood of success on the merits. But, wholly apart from that view, I think that, at the least, the Intervenors have a "substantial case on the merits," and that the other stay factors militate in favor of a stay. Hilton v. Braunskill, 481 U.S. 770, 777-78, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987); Project Vote/Voting For America, Inc. v. Long, 275 F.R.D. 473, 474 (E.D. Va. 2011).

The linchpin of the majority opinion is its view about the effect of the use of a 55% BVAP threshold in the drawing of Enacted CD3. Page, 2015 U.S. Dist. LEXIS 73514, 2015 WL 3604029, at *18. Since the majority opinion was issued in this case, this Court has issued another decision that rejects the dispositive role given to that factor by the majority in this case. Bethune-Hill, 2015 U.S. Dist. LEXIS 144511, 2015 WL 6440332, at *14-15. The other key aspect of the majority opinion in this case is how to apply the principles recently announced in Alabama Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 191 L. Ed. 2d 314 (2015). On that important point, the decision in Bethune-Hill is also at odds with the tack taken in the majority opinion in this case.

In sum, this Court has decided two dispositive, but related, redistricting issues in two quite different ways. Both cases are presently pending in the Supreme Court. The two three-judge courts in this district to have decided these dispositive issues involve five judges of this **[*35]** Court.[14] Taken together, three judges agree with the majority's view on these key issues. Two judges take a quite different view. That, I respectfully submit, demonstrates a conflict on two critical issues among reasonable jurists. That, in turn, warrants a finding that there is a substantial basis on which to believe that the Intervenors have a significant likelihood of success. Hilton, 481 U.S. at 777-78.

> 14 Judge Duncan, sitting by designation, and Judge O'Grady in this case and Judge Keenan, sitting by designation in Bethune-Hill are of one view. Judge Lee and the undersigned are of a different view in Bethune-Hill, and the undersigned dissented in this case.

When there are strong arguments on both sides of a case, and where, as here, reasonable jurists have differed, in view of the balance of the equities, a stay is warranted. Florida v. United States Dept. of Health and Human Servs., 780 F. Supp. 2d 1307, 1317 (N.D. Fla. 2011); see also Scallon v. Scott Henry's Winery Corp., 2015 U.S. Dist. LEXIS 134617, 2015 WL 5772107, at *2 (D. Ore. Sept. 30, 2015); McConnell v. Fed. Election Comm'n, 253 F. Supp. 2d 18, 19 (D.D.C. 2003).

**B. Irreparable Injury**

I think that there is little doubt that irreparable hardship will be visited on the Intervenors if the remedial plan is implemented before the Supreme Court decides the merits of the case.

To begin, once the remedial plan is implemented, the landscape for the 2016 election will change immediately and irreparably. The change is so significant that, as the **[*36]** majority acknowledges, the electoral process will have to be conducted on two fronts.

In particular, the Intervenors will have to run in the districts as fixed by the Enacted Plan so that, if the case is reversed on the merits, they will be positioned to be elected in the district specified by the General Assembly. And, they will have to run in the districts under the remedial plan so that, if the merits opinion is affirmed, they will be positioned to be elected. And, of course, other candidates will have to proceed in the same fashion.

In other words, until after the Supreme Court decides the case, neither the Intervenors, nor their possible opponents, nor the electorate will know the composition of the districts that will be in effect in November 2016. With all respect to the view expressed by my colleagues in the majority, I think the two-front process is irreparable injury to the Intervenors. In fact, the solution presented by the majority (to campaign in both the old and new districts), I think, makes considerable added expense to all candidates, both incumbents and challengers, a certainty. Additionally, it is quite likely that the incumbents (Intervenors) could face different **[*37]** challengers in each district (the old and the new). Moreover, because "[a]ll politics is local,"[15] it is also likely that the issues of importance to the constituents in the old and the new districts will be somewhat different. That would be especially true in the case of CD3,[16] CD2, and CD4, where the composition, geography and demography significantly change in the remedial plan.

15 The phrase is commonly attributed to former Speaker of the House of Representatives, Thomas P. "Tip" O'Neill, but it actually was penned first in 1932 by Byron Price, Washington Bureau Chief for the Associated Press. http://www.barrypopik.com/index/new_york_city/entry/all_politics_is_local .

16 Of course, Representative Scott is not an Intervenor, but given the significant changes in composition, demography and geography of CD3 under the remedial plan, even he could encounter problems.

The prospect of running parallel campaigns under such circumstances presents a realistic, serious, and immediate threat of confusion for candidates and constituents alike that is, I submit, irreparable harm to the Intervenors. That harm is compounded by the need to fund two different campaign organizations and advertising programs, depending on who the opponent is and what the issues of most significance are. **[*38]** Given the expense of maintaining campaign organizations and of advertising, that burden is a heavy one. That burden could affect the results of the election by diverting scarce resources to a district that ultimately was not called for by the Supreme Court's decision. None of this burden need be visited upon the candidates or the electorate if we but await the Supreme Court's resolution of the merits.

In addressing irreparable injury, the majority has expressed the view that: "[t]he effect [of a stay] would be to give the Intervenors the fruits of victory for another election cycle, even if they lose in the Supreme Court." Supra at 12. With respect for that view, I do not think that, on the facts of this case, our decision on the request for a stay should be influenced by concern that the 2016 election might be conducted under the Enacted Plan if the majority decision is affirmed. On that score, we must be mindful that CD3 has existed in essentially its current form without complaint since 1999. Moreover, the Plaintiffs waited for 21 months after the Enacted Plan was adopted until they filed this action. On this record, I respectfully am unable, in assessing irreparable injury, to ascribe any import **[*39]** to the "unwarranted fruits of victory" concept.

**C. Harm to Other Parties**

I find that the possible harm to the other parties[17] does not justify the denial of a stay. I recognize that, if the Court were to stay entry of a remedial plan, regardless of whether Plaintiffs were to prevail on the merits in the Supreme Court, time constraints imposed by the federal MOVE Act, 52 U.S.C. § 20302, arguably require that the 2016 congressional elections be run under the Enacted Plan. However, the time constraints imposed on the Court and the Defendants are a direct result of Plaintiffs' choice to delay filing their Complaint until almost two years after the plan at issue was enacted. Two congressional elections have already been conducted under the Enacted Plan; at worst, Plaintiffs' relief (if they prevail on the merits) would be delayed for one more election cycle.

Given that Plaintiffs did not even file their complaint until long after the implementation of the Enacted Plan, I do not think that the additional delay represents harm to the Plaintiffs or the Defendants; and, whatever harm there may be does not, in my view, outweigh the harm to the Intervenors if the remedial plan is not stayed.

> 17 The Defendants supported **[*40]** the Enacted Plan on the merits. However, with the change of parties in the offices of Governor and Attorney-General, they have changed sides.

Moreover, the potential injury to the Plaintiffs is further mitigated by the Court's power to postpone the general elections for the affected districts, should the majority's finding of liability be affirmed. Normally, of course, federal law requires that congressional elections take place "on the Tuesday next after the 1st Monday in November, in every even numbered year[.]" 2 U.S.C. § 7. However, Congress has provided for an exception to this general rule where extraordinary circumstances so require. 2 U.S.C. § 8. Section 8 of Title 2 of the United States Code provides that "[t]he time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories." 2 U.S.C. § 8. The United States District Court for the District of Columbia, applying this section under similar factual circumstances, "construe[d] this section to mean that where exigent circumstances arising prior to or on the date **[*41]** established by Section 7 preclude holding an election on that date, a state may postpone the election until the earliest practicable date." Busbee v. Smith, 549 F. Supp. 494, 525 (1982), aff'd without opinion, 459 U.S. 1166, 103 S. Ct. 809, 74 L. Ed. 2d 1010 (1983).[18]

> 18 Although Busbee interpreted a prior version of this statutory provision, the amendments made in 2005 left the relevant text unchanged, and therefore do not alter the analysis as it applies to this case.

In Busbee, the court concluded that Georgia's reapportionment plan violated Section 5 of the Voting Rights Act, and therefore constituted "failure to elect at the time prescribed by law."[19] Id. at 525. Accordingly, the court entered an order setting an amended schedule for Georgia's congressional elections in two of the affected congressional districts, which delayed the general congressional elections in those districts until November 30, a total of 28 days. Id. The court recognized that imposing an altered schedule would "impose the burdens of a double election on employed voters [and the state]," but found that this burden was outweighed by Section 5's imperative that the electoral process proceed under a non-discriminatory plan. Id. The same is true here; should the Supreme Court agree with the Page II majority, this Court may take steps to enforce its injunction **[*42]** prohibiting elections under an unconstitutional plan and ensure timely implementation of an appropriate remedy, including, if necessary, an amended schedule for the general elections in CDs 1, 2, 3, 4, and 7.

> 19 A footnote in a later Supreme Court case seems to contemplate a potentially narrower definition of this phrase, based on the legislative history of Section 8. Foster v. Love, 522 U.S. 67, 71 n.3, 118 S. Ct. 464, 139 L. Ed. 2d 369 (1997).However, that case was decided in an entirely distinct factual context, and provides no elaboration on the meaning of that phrase beyond that brief footnote.

In sum, I can find no substantial injury to the Plaintiffs where, as here, the district at issue has remained essentially the same since 1999 and there was a lengthy delay between the redistricting and the institution of this action.[20]

> 20 That is especially so where, in the event of an affirmance by the Supreme Court, we can slightly alter the election date for CDs 1, 2, 3, 4 and 7, and have the election conducted under the remedial plan. At the merits stage, the Plaintiffs sought to explain the delay in filing suit by arguing that they could not have proceeded until after the Supreme Court decided Shelby County. That is not so because the prohibition against racial gerrymandering **[*43]** long predated the decision in Shelby County. In any event, we rejected the argument in the merits opinion. Page v. Virginia State Bd. Of Elections, 58 F. Supp. 3d 533, 554 n.24 (E.D. Va. 2014), vacated on other grounds sub nom. Cantor v. Personhuballah, 135 S. Ct. 1699, 191 L. Ed. 2d 671 (2015).

On the record in this case, I think that the balance of the equities as between the parties calls for the exercise of

our discretion to grant a stay so that the Supreme Court can decide the merits of this case before a remedial plan is implemented. It also is appropriate in assessing the injury to the Plaintiff and the balance of the equities to remain mindful of the animating force for this case. In particular, this case was spawned not by a citizen who felt that his or her constitutional rights had been violated. Instead, this case was brought at the instance of the National Democratic Redistricting Trust.[21] Indeed, Plaintiffs' initial fee application in this case contains an entry showing that it was necessary to go out and drum up a client. (ECF No. 112-4, at 6 (invoice entry for "email with [redacted] and local contacts regarding finding plaintiffs.").

> 21 See Jenna Portnoy, Virginia Redistricting Lawsuits Could Cost Taxpayers Big Bucks, WASHINGTON POST (May 23, 2015), https://www.washingtonpost.com/local/virginia-politics/virginia-redistricting-lawsuits-could-cost-taxpayers-big-bucks/2015/05/23/0e3ca55e-ffd0-11e4-833c-a2de05b6b2a4_story.html .

I do not suggest that an impropriety has occurred, but I think those facts **[*44]** are pertinent in assessing how much weight to give the assertion that the Plaintiffs have been aggrieved so long that we should not enter a stay. That is particularly so considering the fact that CD3 in essentially its current shape has remained unchallenged since 1999, and considering the 21 month delay between the redistricting and the filing of this action.

Clearly, if the majority opinion is affirmed, the Plaintiffs' rights will have been aggrieved and how the litigation vindicating those rights came to pass will be of no particular importance. But where, as here, the Plaintiffs did not originate the idea of the suit and, where, as here, there is a long delay between the alleged affront of the right and the filing of the suit, it is appropriate, in deciding whether to impose a brief stay to allow full consideration of important issues by the Supreme Court, and in assessing the injury that would result therefrom, to take real world conditions into account. After all, the Enacted Plan, if it is found by the Supreme Court to be a lawful one, reflects the rights of hundreds of thousands of Virginians to elections conducted under a plan drawn by their elected representatives. That, I **[*45]** respectfully submit, must be considered in balancing the equities.

**D. The Public Interest**

I respectfully submit that the public interest will best be served by staying implementation of the remedial plan until after the Supreme Court decides the important, and quite unsettled, issues presented in this case. As shown above, the two key issues in this case (the effect of using a 55% BVAP in redistricting CD3 and the proper application of the recent decision in Alabama) has been decided differently by two three-judge panels of this Court. Five judges have split three to two on those issues on the merits. And, one of the key positions of the Intervenors on the remedy issue (adherence to legislative partisan political objectives) is the subject of substantial uncertainty in the Supreme Court. The public interest will, I respectfully submit, be best served by awaiting word from the Supreme Court on these key issues, as to which two decisions of this Court manifest significant disagreement.

Furthermore, the practical consequences to the public of denying the stay are quite grave. Should the majority's finding of liability be reversed on appeal, the implementation of the remedial plan beforehand **[*46]** will mean that many thousands voters will have been moved out of their current districts for the third time in less than a decade if the state is permitted to revert to the Enacted Plan for 2018. This shuffling of voters will engender voter confusion, reduce voter participation, foster a disconnect between voters and their legislators, and create significant and avoidable administrative complexity and expense. With the 2016 election cycle quickly approaching, a stay pending appeal will mitigate the likelihood of public confusion during the electoral process for 2016 and potentially 2018 as well.

Finally, as explained above, there is, I think, a very real risk of voter confusion that will be caused if, as the majority posits, the Intervenors have to run campaigns in two districts. There is no need to repeat those points here, but, to me, they counsel the issuance of a stay to foreclose the confusion that could, and, in my view, likely will, skew the results of the election.

Furthermore, the public has an interest in orderly elections conducted in perspective of the guidance of the Supreme Court. In fact, we have held as much previously in this case. Page v. Virginia State Bd. of Elections, 2015 U.S. Dist. LEXIS 21346, 2015 WL 763997 (E.D. Va. Feb. 23, 2015). Admittedly, we confronted a somewhat **[*47]** different landscape there, but we recognized the important principle that, where important relevant issues

are pending before the Supreme Court, we ought to stay our hand to await the judgment of the Supreme Court. I think that principle fully applies here.

For the foregoing reasons, I would grant the Intervenors' motion to stay entry of a remedial plan until after the Supreme Court's resolution of the case on the merits.

/s/ Robert E. Payne

Richmond, Virginia
Date: January 7, 2016

# Appendix E:

*McCrory v. Harris*, No. 15A809, (Feb. 10, 2016) Emergency Stay Application at 21

NO. _____

# In The
# Supreme Court of the United States

**PATRICK MCCRORY, in his capacity as Governor of North Carolina, NORTH CAROLINA STATE BOARD OF ELECTIONS, and A. GRANT WHITNEY, JR., in his capacity as Chairman of the North Carolina State Board of Elections,**

***Petitioners*,**

**v.**

**DAVID HARRIS and CHRISTINE BOWSER,**

***Respondents.***

## ON APPLICATION FOR STAY FROM THE MIDDLE DISTRICT OF NORTH CAROLINA

## EMERGENCY APPLICATION TO STAY THE FINAL JUDGMENT OF THE THREE-JUDGE DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA PENDING RESOLUTION OF DIRECT APPEAL


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To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Fourth Circuit:

Petitioners Patrick McCrory, North Carolina State Board of Elections, and A. Grant Whitney, Jr. (collectively "Defendants") respectfully apply for a stay of the final judgment entered by the three-judge court in the above-captioned case on February 5, 2016, pending Defendants' direct appeal of the judgment. Additionally, given the short two-week deadline the three-judge court imposed on the State to draw remedial districts, the fact that absentee ballots have already been sent out, the swiftly approaching March primary date, and the impending election chaos that the three-judge court's directives are likely to unleash, the Court should expedite any response to this application and enter an interim stay pending receipt of a response.

On February 8, 2016, Defendants filed a request that the three-judge court stay its judgment. (ECF Docket No. 145, Case No. 13-cv-949)[1] Defendants also filed their Notice of Appeal from the judgment. (D.E. 144) In their stay request, Defendants requested that the three-judge court act immediately in light of the exigencies created by the fact that the 2016 primary election is already underway, and the North Carolina General Assembly, which will have to approve any redrawn congressional districts, is not currently in session. Because the North Carolina General Assembly is not in session, the Governor of North Carolina will be required to call a special session recalling all members of the General Assembly to Raleigh,

[1] ECF Docket numbers will be referred to as "D.E." and in Case No. 13-cv-949 unless otherwise indicated.

North Carolina to enact a new congressional redistricting plan by the February 19, 2016 deadline imposed by the three-judge court. N.C. Const. art. III, § 5(11). By order entered February 8, 2016, the three-judge court provided an opportunity for Plaintiffs to file a response by February 9, 2016 at 12:00 p.m. As of the printing of the instant stay application, the stay request had not been acted upon by the three-judge court but Defendants believe that the emergency circumstances presented by the three-judge court's action warrant the filing of this application with this Court. Accordingly, Defendants respectfully request this Court to act on the instant stay request as soon as practicable.

## INTRODUCTION

On February 5, 2016, a three-judge court of the United States District Court for the Middle District of North Carolina issued a Memorandum Opinion and Final Judgment declaring North Carolina Congressional District 1 ("CD 1") and Congressional District 12 ("CD 12") unconstitutional and directing the State to draw new congressional districts by February 19, 2016. The decision as to CD 1 was unanimous while the decision as to CD 12 was a 2-to-1 vote, with one judge dissenting. A copy of the Memorandum Opinion is attached as Exhibit 1. A copy of the Final Judgment is attached as Exhibit 2. (D.E. 142 and 143)

The three-judge court's opinion found that race predominated in the drawing of CD 1 and 12 and that neither district survived strict scrutiny. The three-judge court further enjoined congressional elections and directed the State to draw new congressional districts within a two-week period. But in enjoining elections and

providing only two weeks to draw new plans, the three-judge court provided no guidance to the State as to criteria it should follow for new congressional districts and sought no input from the parties regarding the massive electoral chaos and confusion to which such an order would subject North Carolina's voters. Moreover, in ordering the re-drawing of districts within a two-week period,[2] the court has all but removed the ability of the State to hold public hearings and seek the same level of robust public input that was received in enacting the challenged congressional districts.

This Court should stay enforcement of the judgment immediately. North Carolina's election process started months ago. *Thousands of absentee ballots have been distributed to voters who are filling them out and returning them*.[3] *Hundreds of those ballots have already been voted and returned.* The primary election day for hundreds of offices and thousands of candidates is less than 40 days away and, if the judgment is not stayed, it may have to be disrupted or delayed. Early voting for

[2] In setting a two-week deadline the three-judge court cited N.C. Gen. Stat. § 120-2.4, which requires the North Carolina state courts to give the legislature at least two weeks to draw remedial districts. However, the three-judge court failed to cite N.C. Gen. Stat. § 120-2.3, which directs that the court "find with specificity all facts supporting [a] declaration [of unconstitutionality], shall state separately and with specificity the court's conclusions of law on that declaration, and shall, with specific reference to those findings of fact and conclusions of law, identify every defect found by the court, both as to the plan as a whole and as to individual districts." The three-judge court in this case provided no such specificity and leaves the legislature very little time to enact remedial districts.

[3] This Court has previously taken action to prevent disruption to an ongoing election where "absentee ballots have been sent out" already. *Frank v. Walker*, No. 14A352, 135 S. Ct. 7 (U.S. Oct. 9, 2014), *vacating stay* 766 F.3d 755, 756 (7th Cir. 2014) (2014) (order vacating Seventh Circuit stay of district court injunction enjoining implementation of Wisconsin photo identification law). Here, ballots have not only already been sent out, hundreds have been voted and returned.

the primary starts in less than 30 days.[4] Candidates for Congress have relied on the existing districts for two election cycles (2012 and 2014) and filed for the current seats over two months ago.

Given that North Carolina's 2016 elections are already underway, the appropriateness of a stay of the three-judge court's judgment is quite clear. The three-judge court's failure to stay its own judgment *sua sponte* or at least seek input from the parties regarding the impact of immediate implementation of its judgment is reckless and will cause irreparable harm. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). This case was filed on October 24, 2013 and the trial was held in October 2015, yet the order of the three-judge court was not issued until the State was in the middle of the 2016 primary elections. The court's action is all the more baffling in light of the fact that a three-judge panel of the North Carolina Superior Court rejected identical claims *on nearly identical evidence* after a trial (*Dickson v. Rucho*, Nos. 11 CVS 16896 and 11 CVS 16940 (consolidated) (July 8, 2013) ("*Dickson*") (D.E. 100-4, p. 39 through 100-5, p. 142), and that decision was affirmed *twice* by the North Carolina Supreme Court. If the state courts of North Carolina were so obviously wrong in their assessment of these claims and this evidence, one would think the federal three-judge court could have said so before North Carolina became enmeshed in the 2016 election cycle.

[4] North Carolina moved its primary from May to March for this Presidential election year. The move was made to ensure North Carolina voters had a relevant voice in the Presidential primary process and to save the millions of dollars it would cost to hold a Presidential primary separately from the primary for all other offices. See http://www.newsobserver.com/news/politics-government/state-politics/article35667780.html The change in primary date was enacted on September 24, 2015 – three weeks prior to the trial in this matter. See North Carolina S.L. 2015-258.

Aside from the electoral chaos the three-judge court's order will inevitably cause, the opinion is in direct conflict with, indeed it flouts, this Court's redistricting precedents in *Easley v. Cromartie*, 532 U.S. 234 (2001) ("*Cromartie II*") and *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009), among others. Instead, the opinion ignores significant portions of the record, and mischaracterizes other key parts of it. That the court had policy preferences is no secret, as the primary concurring opinion candidly describes them at length.

Unless stayed, and ultimately reversed, the three-judge court's opinion makes redistricting in North Carolina an impossible task. The court has effectively held that attempting to comply with the Voting Rights Act ("VRA") and *Strickland* amounts to racial gerrymandering. This reasoning guts the VRA and threatens to eliminate many if not all majority black districts going forward. Only this Court can halt the immediate and long-term damage to North Carolina's electoral processes wrought by this erroneous decision.

## JURISDICTION

This Court has jurisdiction to enter a stay of the three-judge court's judgment pending Defendants' direct appeal of the judgment. *See* 28 U.S.C. § 2101(f); Sup. Ct. R. 23(2). The Court may stay the judgment in any case where the judgment would be subject to review. *See* 28 U.S.C. § 2101(f). The three-judge court had jurisdiction pursuant to 28 U.S.C. § 2284 and Defendants' appeal of the three-judge court's judgment is authorized by 28 U.S.C. § 1253.

## BACKGROUND

The history of the 2011 redistricting which produced the enacted CD 1 and CD 12, as well as the lengthy and thorough state court proceedings finding those districts constitutional, is recounted in the detailed Judgment and Memorandum Opinion issued by the *Dickson* state court three-judge panel. (D.E. 100-4, pp. 43 - 45)

The *Dickson* plaintiffs[5] challenged CD 1 and CD 12 on all of the grounds asserted by the *Harris* plaintiffs in this case. After a two-day trial, an extensive discovery process, and a voluminous record, the *Dickson* trial court issued its Opinion. Regarding CD 1, the state court made specific findings of fact and found as a matter of law that the General Assembly had a strong basis in evidence to conclude that the district was reasonably necessary to protect the State from liability under the VRA and that the district was narrowly tailored. (D.E. 100-4, pp. 47-61, 66-67; D.E. 100-5, pp. 1, 15, 48-66, 126-28)

Regarding CD 12, the state court made detailed findings of fact that the General Assembly's predominant motive for the location of that district's lines was to re-create the 2011 CD 12 as a strong Democratic-performing district, not race. (D.E. 100-5, pp. 17-20, 216-28, 132-34)[6]

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[5] Two separate actions were brought at approximately the same time, both challenging North Carolina's 2011 congressional districts. The lead plaintiff in one of those cases was Margaret Dickson. The lead plaintiff in the other action was the North Carolina Conference of Branches of the NAACP ("NC NAACP"). The cases were consolidated by the three-judge panel of the North Carolina Superior Court, and the two sets of plaintiffs are referred to collectively as "the *Dickson* plaintiffs."

[6] As noted by the North Carolina Supreme Court, the state court three-judge panel's decision was unanimous. In addition, the panel was appointed by then-Chief Justice Sarah Parker of the North Carolina Supreme Court, and in their order , the three judges describe themselves as each being

On July 22, 2013, the *Dickson* plaintiffs filed their notice of appeal from the three-judge panel's Judgment. The *Harris* Plaintiffs filed their complaint on October 24, 2013. On December 19, 2014, the North Carolina Supreme Court affirmed the judgment of the three-judge panel in *Dickson v. Rucho*, 367 N.C. 542, 761 S.E.2d 228 (2014). On January 16, 2015, the *Dickson* plaintiffs petitioned this Court for a writ of *certiorari* and on April 20, 2015, the Court granted plaintiffs' petition for a writ of *certiorari*, vacated the decision by the North Carolina Supreme Court, and remanded the case to the North Carolina Supreme Court "for further consideration in light of *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. ___ (2015)." The North Carolina Supreme Court, after further briefing and oral argument, reaffirmed its original decision on December 18, 2015. *Dickson*, 2015 WL 9261836, at *38.

The Plaintiffs in this case are members of organizations that lost the *Dickson* case. Plaintiff David Harris was recruited to serve as a plaintiff in this action by T.E. Austin, the immediate past chair of the North Carolina Democratic Party's Fourth Congressional District. (D.E. 104-2 at 14-15) Mr. Harris had not seen the Complaint in this lawsuit before it was filed and didn't know what districts were involved when he agreed to serve as a plaintiff. (*Id.* at 4, 19-20; D.E. 68-6 at 21) He has no responsibility for paying any attorneys' fees or costs associated with his participation in this action. (D.E. 68-6 at 17; D.E. 104-2 at 22)

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"from different geographic regions and each with differing ideological and political outlooks" and state that they "independently and collectively arrived at the conclusions that are set out [in their order]." *Dickson v. Rucho*, ___ S.E.2d ___, 2015 WL 9261836, at *1 n.1 (N.C. Dec. 18, 2015).

Mr. Harris joined the NAACP in 2009 or 2010 and has been a member every year since. (D.E. 68-6 at 9-11, 14-15, Ex. 6) Mr. Harris completed a membership form and sent the form and his membership dues to an address in Baltimore, Maryland. (*Id.* at 10-12, Ex. 7) Mr. Harris is also a member of the North Carolina State Conference of the NAACP. At his deposition in this action, Rev. William Barber, President of the NC NAACP confirmed that an individual who is a member of a local branch or the national NAACP is also a member of the NC NAACP. (D.E. 68-8 at 2-4) Rev. Barber also confirmed that the membership form Mr. Harris acknowledged completing is the same membership form that is available on the NC NAACP's website. (D.E. 68-8 at 5-7, 12)

Plaintiff Christine Bowser resides in CD 12 and has lived in the district since it was first drawn by the General Assembly in 1992. (D.E. 104-1 at 6-7) Ms. Bowser was recruited to serve as a plaintiff in this action by Dr. Robbie Akhere, who is the chair of the Twelfth Congressional District for the North Carolina Democratic Party. (*Id.* at 9; D.E. 68-7 at 14) She, like Mr. Harris, has no responsibility for paying her attorneys' fees or related costs in this case. (D.E. 68-7 at 20) Ms. Bowser testified that she did not think that she had seen a copy of the Complaint filed in this action before her deposition. (*Id.* at 6-7, 9)

Ms. Bowser has been involved with several organizations that are plaintiffs in *Dickson*. Specifically, Ms. Bowser testified that she has made contributions to the League of Women Voters of North Carolina "on and off" since 2004. (*Id.* at 18, Ex. 4, p. 4) Ms. Bowser also testified that she has been a member of Democracy

North Carolina for the past five years and made "periodic donations" to the organization during that time. (*Id.* at 19, Ex. 4, p. 5) Finally, Ms. Bowser has been a member of Mecklenburg County Branch of the NAACP "on and off since the 1960s" and has paid dues or made contributions to both the Mecklenburg County Branch and the national NAACP, most recently in 2013. (*Id.* at 16, 17, Ex. 4, p.4)

In the proceedings below, Plaintiffs moved for a preliminary injunction to enjoin the enacted congressional redistricting plans. That motion was denied by order dated May 22, 2014. (D.E. 65) In addition, Defendants requested that the three-judge court stay, abstain, or defer ruling in the case in light of the state trial court final judgment in *Dickson* and the fact that both Mr. Harris and Ms. Bowser were precluded by that judgment from pursuing these claims. Defendants' original motion was denied in the same order denying Plaintiffs' motion for a preliminary injunction. (D.E. 65) Defendants subsequently raised this issue in their motion for summary judgment which was denied by order dated July 29, 2014. (D.E. 85)

The federal three-judge court held a three-day trial beginning October 13, 2015.[7] On February 5, 2016, the three-judge court entered its Memorandum Opinion and Final Judgment.

By a unanimous vote, the three-judge court held that CD 1 is an unconstitutional racial gerrymander. In particular, the court stated that race predominated in the drawing of the district and that the district could not survive strict scrutiny. The court's holding on racial predominance relied primarily on the

[7] The vast majority of the evidence heard and reviewed by the federal three-judge court during the trial was evidence heard and reviewed by the state three-judge panel in *Dickson*. In fact, the parties stipulated to the introduction into evidence in this case the entire record from the *Dickson* case.

fact that Defendants drew CD 1 at the 50% BVAP level to foreclose vote dilution claims under Section 2. The court repeatedly referred to this as a "racial quota" notwithstanding *Strickland's* holding that the first precondition from *Thornburg v. Gingles*, 478 U.S. 30 (1984) requires a numerical majority to constitute a valid VRA district. While acknowledging the numerous other goals motivating the legislature in creating CD 1 – incumbency protection, partisan advantage, remedying extreme under-population, among others – the court filtered its predominance analysis through the lens of the legislature's *Strickland* standard, yet ignored the decisions of this Court requiring the legislature's use of that standard.

After finding that race predominated, the three-judge court then found that CD 1 could not survive strict scrutiny as Defendants did not have a strong basis in evidence for drawing CD 1 as a VRA district. The court characterized Defendants' evidence of racial polarization as "generalized" and ignored reams of record evidence and testimony on racial polarization in all of the specific counties in CD 1 that was before the legislature when it enacted CD 1 and which the *Dickson* court had found more than adequate to establish a strong basis in evidence. (D.E. 142 at 55) The court also incorrectly described CD 1 as being "majority white," which caused it to conclude that black candidates were regularly winning in CD 1 with support from white voters. On this point, there can be no doubt: CD 1 is not and never has been a "majority white" district. It has always been a majority black or majority minority coalition district (between African Americans and Hispanics). *See infra* at II.B.

The three-judge court simply ignored the undisputed demographic data accompanying the enacted redistricting plans.

By a 2-1 vote, the three-judge court held that race predominated in the drawing of CD 12 and the district could not survive strict scrutiny. In finding racial predominance, the court relied primarily on two statements. In the first, a June 17, 2011 joint statement by the legislative redistricting chairmen, the court found some significance in the fact that the word "districts" was plural. (D.E. 142 at 33-34) Apparently the court believed this was evidence that the legislature intended to draw two congressional VRA districts instead of just one (CD 1). In reality, however, the June 17, 2011 joint statement *never even mentions congressional districts*; it deals strictly with *legislative* districts, and it is undisputed that there were a plural number of VRA districts in the legislative plans. The second statement the court relied upon is the use of the preposition "at" in one sentence of an eight-page joint statement released by the redistricting chairmen on July 1, 2011. (D.E. 142 at 34) Based on these statements, the three-judge court did not affirmatively find that race was the predominant motive in drawing CD 12; instead, the court held that it would "decline to conclude" that it was "coincidental" that CD 12 ultimately ended up being slightly above 50% BVAP. Thus, rather than affirmatively finding that the evidence showed that race predominated in the drawing of CD 12, the court instead "declined to conclude" that it was not race that predominated in the drawing of the district. While the court acknowledged that Defendants stated that CD 12 was motivated by politics, not race, the court ignored

the direct evidence of statements made by the redistricting chairs prior to enactment of the plans that were consistent with that explanation. The court instead credited the circumstantial evidence presented by Plaintiffs' expert Dr. David Peterson, even though Dr. Peterson's analysis was consistent with Defendants' explanation, and had not been relied upon by the state three-judge panel in *Dickson*. The court also credited the circumstantial evidence presented by Plaintiffs' expert Dr. Ansolabehere, who used registration statistics instead of voting results to conclude that race and not politics explained the drawing of CD 12.

In a concurring opinion, one judge of the three-judge court lamented the alleged negative effect of gerrymandering on the "republican form of government" and that "representatives choose their voters."[8] (D.E. 142 at 64) The concurrence advocated for "independent" congressional redistricting commissions[9] and wondered aloud how voters can possibly know who their representatives are. (D.E. 142 at 65-67) In addition, even though the concurrence agreed with the majority opinion that the current legislature drew CD 12 as a racial gerrymander, the concurrence acknowledged that "CD 12 runs its circuitous route from Charlotte to Greensboro and beyond – thanks in great part to *a state legislature then controlled by Democrats*." (D.E. 142 at 66-67) The CD 12 drawn by the "state legislature then

[8] Of course, by definition, any time a legislature draws legislative districts, its members are "choosing their voters."

[9] Independent redistricting commissions do not, of course, insulate a State from gerrymandering claims. *Harris v. Independent Redistricting Comm'n*, 993 F. Supp. 2d 1042 (D. Ariz. 2014).

controlled by Democrats" was *upheld as legal* nearly two decades ago.[10] *Cromartie II*.

The majority opinion devoted approximately only two pages out of a 62-page opinion to the remedy it is imposing on the State. Rather than provide any guidance or criteria by which the State should draw a "remedial plan" the three-judge court simply noted that "the Court will require that new districts be drawn within two weeks of the entry of this opinion to remedy the unconstitutional districts." (D.E. 142 at 63) In its Final Judgment, the three-judge court enjoined the State from "conducting any elections for the office of U.S. Representative until a new redistricting plan is in place." (D.E. 143) No other guidance was provided.

## REASONS FOR GRANTING THE STAY

To obtain a stay pending this Court's review, an applicant must show "a likelihood that irreparable harm will result from the denial of a stay"; that the "equities" and "weigh[ing] [of] relative harms" favor a stay; and a "fair prospect that a majority of the Court will vote to reverse the judgment below." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). These standards are readily satisfied in this case.

### I. IRREPARABLE INJURY WILL RESULT IF THE STAY IS DENIED.

The three-judge court clearly erred in failing to give proper deference to the State's enacted redistricting plans, especially this close to impending state elections. *Purcell*, 549 U.S. at 4-5. *Voting has already begun in the North Carolina March*

[10] Of course, in drawing the 2011 CD 12, the North Carolina General Assembly was not operating on a clean slate. The 2011 legislature essentially inherited CD 12 and its long litigation history from prior General Assemblies. The concurrence appears to acknowledge this fact.

*primary*.[11] The eleventh-hour action by the three-judge court will trigger electoral turmoil, and irreparable injury to the State of North Carolina and its voters will result if the court's last-minute injunction is not stayed. Anytime a court preliminarily enjoins a state from enforcing its duly enacted statutes, that state suffers "a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). Moreover, the court's order changing the rules of North Carolina's elections *after voting has already begun* ignores this Court's admonition that lower courts should be mindful of the "considerations specific to election cases" and avoid the very real risks that conflicting court orders changing election rules close to an election may "result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5.

The citizens of North Carolina have a right to orderly elections. Voters in North Carolina have a right to understand which districts they live in and what candidates they may vote for without enduring wholesale rearrangement of those districts only days and weeks before they vote.[12] The three-judge court's decision impinges directly on this right.

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[11] For this reason, *Personhuballah v. Alcorn*, ___ F. Supp. 3d ___, 2016 WL 93849 (E.D. Va. Jan. 7, 2016) is inapposite here. There, voting had not already begun and candidates were still in the process of being qualified. *Personhuballah*, 2016 WL 93849, at *2. Moreover, the three-judge court adopted a remedial plan in that order which was well prior to the date the Virginia Board of Elections stated a new plan would have to be in place before having to postpone the congressional primary. *Personhuballah*, 2016 WL 93849, at *2 n.6. According to publicly available information, the primary in Virginia is not until June 14, 2016. *See* http://elections.virginia.gov/media/calendars-schedules/index.html.

[12] While the three-judge court's decision only specifically addresses CD 1 and CD 12, one person, one vote requirements applicable to the redrawing of congressional districts mean that those two districts cannot be redrawn without the districts that surround them, and possibly all of North Carolina's congressional districts, being redrawn as well.

Thousands of candidates in hundreds of offices on the ballot for the impending March 15, 2016 primary are relying on an orderly process. Dozens of candidates for congressional seats are relying on the existing districts in the enacted plan. (Declaration of Kim Westbrook Strach ¶¶ 4-5) (attached as Exhibit 3) All candidates are relying on the March 15 date currently set for the primary.

Significantly, the primary election process is already well underway. On January 18, 2016, county elections officials began issuing mail-in absentee ballots to civilian voters and those qualifying under the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), which requires transmittal of ballots no later than 45 days before an election for a federal office. State elections data indicates that county elections officials have already mailed *8,621 ballots* to voters, *903 of whom are located outside the United States*. Of those ballots mailed, 7,845 include a congressional contest on the voter's ballot, and *counties have already received 431 voted ballots*. And more than 3.7 million ballots have already been printed for the March primary. (*Id*. ¶¶ 14-16) Moreover, because of ballot coding issues, ballots cannot be reprinted to remove the names of congressional candidates without threatening the integrity of the entire election. (*Id*. ¶¶ 17-19) If the three-judge court's order is not stayed, there will be no way to avoid extreme voter confusion.

The three-judge court's order threatens to disrupt or delay the March primary. If the State is forced to draw and implement new congressional districts, then, at a minimum, a bifurcated primary for congressional seats will be required. A bifurcated primary would cost significant sums of taxpayer resources, a reality

that the three-judge court's decision does not address at all. A standalone primary could cost state taxpayers over $9,000,000 in taxpayer funds.[13] (*Id.* ¶¶ 28-31) Beyond hard dollar costs, a bifurcated primary would impose substantial administrative challenges. North Carolina elections require that counties secure voting locations in nearly 2,800 precincts. State elections records indicate that on election day in the 2014 general election, nearly half of all precinct voting locations were housed in places of worship or in schools, with still more located in privately-owned facilities. Identifying and securing appropriate precinct voting locations and one-stop early voting sites can require significant advance work by county board of elections staff and coordination with the State Board of Elections. Moreover, bifurcating the March primary so as to provide for a separate congressional primary would impose significant and unanticipated challenges and costs for county elections administrators and for the State Board of Elections as they develop and approve new one stop implementation plans, secure necessary voting sites, hire adequate staff, and hold public meetings to take necessary action associated with the foregoing. (*Id.* ¶¶ 32-33)

Most importantly, however, the three-judge court's order is likely to lead to the disenfranchisement of the voters it is supposedly protecting. Redistricting would require that county and state elections administrators reassign voters to new jurisdictions, a process that involves changes to each voter's geocode in the state election database called "SEIMS". Information contained within SEIMS is used to generate ballots. Additionally, candidates and other civic organizations rely on

[13] Much of these costs would be borne by North Carolina's 100 counties.

SEIMS-generated data to identify voters and engage in outreach to them. Voters must then be sent mailings notifying them of their new districts.

The public must have notice of upcoming elections. State law requires that county boards of elections prepare public notice of elections involving federal contests for local publication and for distribution to United States military personnel in conjunction with the federal write-in absentee ballot. Such notice must be issued 100 days before regularly-scheduled elections and must contain a list of all ballot measures known as of that date. On December 4, 2016, county elections officials published the above-described notice for all then-existing 2016 primary contests, including congressional races.

Beyond formal notice, voters rely on media outlets, social networks, and habit both to become aware of upcoming elections and to review the qualifications of participating candidates. Bifurcating the March primary may reduce public awareness of a subsequent, stand-alone primary. Decreased awareness of an election can suppress the number of individuals who would have otherwise participated and may narrow the number of those who do ultimately vote. (*Id.* ¶¶ 41-43)

Historical experience suggests that delayed primaries result in lower voter participation and that when primaries are bifurcated, the delayed primary will have a lower turnout rate than the primary held on the regular date. For example, a court-ordered, stand-alone 1998 September primary for congressional races resulted in turnout of roughly 8%, compared to a turnout of 18% for the regular primary held

on the regularly-scheduled May date that year. The 2002 primary was also postponed until September; that delayed primary had a turnout of only 21%. In 2004, the primary was rescheduled to July 20 because preclearance of legislative plans adopted in late 2003 had not been obtained from the United States Department of Justice in time to open filing on schedule. Both the Democratic and Republican Parties chose to forego the presidential primary that year. Turnout for the delayed primary was only 16%.

By contrast, turnout during the last comparable primary involving a presidential race with no incumbent running, held in 2008, was roughly 37%. The 2016 Presidential Preference primary falls earlier in the presidential nomination cycle, which could result in even greater turnout among certain communities because of the increased chance of influencing party nominations. Bifurcating the March primary could affect participation patterns and electoral outcomes by permitting unaffiliated voters to choose one political party's legislative primary and a different political party's primary for all other contests. State law prohibits voters from participating in one party's primary contests and a different party's second, or "runoff," primary because the latter is considered a continuation of the first primary. No such restriction would apply to limit participation in a stand-alone congressional primary. The regular registration deadline for the March primary is February 19, 2016. The second primary is set by statute: May 3, 2016, if no runoff involves a federal contest, or May 24, 2016 if any runoff does involve a federal contest. State law directs that "there shall be no registration of voters between the

dates of the first and second primaries." N.C. Gen. Stat. § 163-111(e); *see also* North Carolina S.L. 2015-258, § 2(d).

A separate congressional primary held after March 15, 2016, but before or on the above noted dates in May could reduce registration levels normally expected in the lead-up to a primary election involving federal contests. Unregistered individuals may become aware of a legislative primary but fail to understand that they must have registered months earlier—far in excess of the usual deadline 25 days before the election. In the event of a runoff involving the United States Senate, regular registration would remain closed for a period of 95 days (February 19, 2016 through May 24, 2016). Thus, requiring a separate congressional primary could result in persons eligible to vote being unable to do so because of registration restrictions. (*Id.* ¶¶ 44-47)

Finally, a delayed primary could require delaying the November 2016 general election for congressional districts. (*Id.* ¶ 25) A second general election after November 2016 would be extraordinarily chaotic and burdensome for North Carolina and its taxpayers and voters, and it would invariably depress turnout as noted above.[14] It would also create uncertainty concerning the composition of the United States Congress. It is not apparent that the three-judge court considered or weighed any of these concerns in the two-page remedial section of its decision.

[14] It would also put North Carolina in the untenable position of being in violation of the federal election day statute. 2 U.S.C.A. § 7.

## II. THE BALANCE OF EQUITIES FAVORS A STAY.

This Court has consistently stayed mandatory injunctions of statewide election laws, including redistricting plans, issued by lower courts at the later stages of an election cycle. *See*, *e.g.*, *Hunt v. Cromartie*, 529 U.S. 1014 (2000)[15]; *Voinovich v. Quilter*, 503 U.S. 979 (1992); *Wetherell v. DeGrandy*, 505 U.S. 1232 (1992); *Louisiana v. Hays*, 512 U.S. 1273 (1994); *Miller v. Johnson*, 512 U.S. 1283 (1994). This Court has also affirmed decisions by lower courts to permit elections under plans declared unlawful because they were not invalidated until late in the election cycle. *Watkins v. Mabus*, 502 U.S. 952 (1991) (summarily affirming in relevant part *Watkins v. Mabus*, 771 F. Supp. 789, 801, 802-805 (S.D. Miss. 1991) (three judge court)); *Republican Party of Shelby County v. Dixon*, 429 U.S. 934 (1976) (summarily affirming *Dixon v. Hassler*, 412 F. Supp. 1036, 1038 (W.D. Tenn. 1976) (three-judge court)); *Growe v. Emison*, 507 U.S. 25, 35 (1993) (noting that elections must often be held under a legislatively enacted plan prior to any appellate review of that plan).

[15] Plaintiffs may cite to one aspect of the procedural history in *Cromartie* that is inapposite here. In 1998, this Court initially declined to stay a decision by the three-judge court granting summary judgment for the plaintiffs finding that the 1997 version of CD 12 was an illegal racial gerrymander. The facts there were distinguishable in that there the legislature had enacted the 1997 version of CD 12 to replace the 1992 version that had been previously declared unlawful. Thus the 1997 plan was a remedial plan enacted to remedy constitutional violations found by this Court. In contrast, the three-judge court's decision here strikes down two districts previously found to be *constitutional* by the North Carolina Supreme Court and there has been no prior ruling of illegality by a federal court. It is also worth noting that in 2000 this Court did in fact stay a judgment entered by the district court following a trial and eventually upheld the 1997 version of CD 12. The 2011 CD 12 is based upon the same criteria used to draw the 1997 version and the three-judge court below invalidated the 2011 version using the same evidence rejected previously by this Court—registration statistics and not actual election results. This warrants even more heavily in favor of this Court entering a stay.

This Court's decision in *Whitcomb v. Chavis*, 396 U.S. 1064 (1970), is instructive. The three-judge court in that case invalidated an Indiana apportionment statute and gave the State until October 1, 1969 to enact a legislative remedy. *See* 396 U.S. at 1064 (Black, J., dissenting). The State did not adopt a legislative remedy by that date, and the three-judge court entered a judicial remedy on December 15, 1969. *Id.* This Court thereafter noted probable jurisdiction and granted a stay of the three-judge court's remedial order, even though the stay "forced" the plaintiffs "to go through" the 1970 election cycle under the enacted plan that had been "held unconstitutional by the District Court." *Id.* at 1064-65. This Court deemed that outcome preferable to conducting the 1970 election "under the reapportionment plan of the District Court" where this Court's review of liability remained pending. *Id.* at 1064. The Court further denied the plaintiffs' later motion to modify or vacate the stay to require the 1970 election to be conducted under the judicial remedy. *Id.*

The three-judge court below did not cite or mention *Whitcomb* or any of the other decisions from this Court that have repeatedly emphasized this balance of the equities. Instead, the three-judge court simply stated that individuals in CD 1 and CD 12 have had their constitutional rights "injured" and therefore "the Court will require that new districts be drawn within two weeks of the entry of this opinion to remedy the unconstitutional districts." Of course, the "injured" constitutional rights of individuals in allegedly unconstitutional districts are interests that are present in *all* the prior cases in which this Court has granted a stay—and yet it has been

emphasized that neither being "forced . . . to go through" an election cycle under an enacted plan that has been "held unconstitutional by the District Court," nor the general public interest in constitutional elections, is sufficient to rebalance the equities against entry of a stay. *Whitcomb*, 396 U.S. at 1064-65 (Black, J., dissenting); *see also Karcher v. Daggett*, 455 U.S. 1303, 1306-07 (1982) (Brennan, J.).

## III. THERE IS A FAIR PROSPECT THAT A MAJORITY OF THE COURT WILL VOTE TO REVERSE THE JUDGMENT BELOW.

There is more than a "fair prospect that a majority of the Court will vote to reverse" the three-judge court's erroneous opinion. *Hollingsworth*, 558 U.S. at 190. The three-judge court ignored and mischaracterized the record evidence consistent with its preference, as reflected in the concurring opinion, for redistricting by an independent commission rather than legislators. In doing so, the three-judge court paid lip service to the "demanding" burden this Court has said plaintiffs must bear in redistricting cases, especially where, as here, the evidence shows that race correlates highly with party affiliation. *Cromartie II*, 532 U.S. at 241. It completely ignored this Court's admonition that "deference is due to [states'] reasonable fears of, and to their reasonable efforts to avoid, Section 2 liability." *Bush v. Vera*, 517 U.S. 952, 978 (1996) ("*Vera*").

### A. The three-judge court's racial predominance analysis fails to conform to this Court's redistricting precedents.

In finding racial predominance in CD 1 and 12, the three-judge court relied on evidence that has been specifically discredited by this Court as not probative of

racial predominance. Notably, this Court's prior rulings have come out of North Carolina, so this Court is familiar with redistricting in this State.

*First*, the three-judge court *presumed* racial predominance from the type of statements this Court has previously held do *not* show racial predominance. For instance, the three-judge court relied on the fact that in the June 17, 2011 joint statement by the legislative redistricting chairmen, the word "districts" was plural. (D.E. 142 at 33-34) While it was already a speculative leap to conclude that the plural form of one word in an eight-page statement constitutes evidence of racial predominance, the reality is that the June 17, 2011 joint statement *never even mentions congressional districts*; it deals strictly with *legislative* districts and it is undisputed that there were a plural number of VRA districts in the legislative plans. The three-judge court also relied on a second statement in which the redistricting chairmen use the preposition "at" in one sentence of an eight-page joint statement. (D.E. 142 at 34) Based on these statements, the three-judge court did not affirmatively find that race was the predominant motive in drawing CD 12; instead, the court expressed skepticism that it was "coincidental" that CD 12 ultimately ended up being slightly above 50% BVAP. (D.E. 142 at 35)

The three-judge court's reliance on these statements is in direct conflict with this Court's decision in *Cromartie II*. There, in reversing the district court, this Court rejected as evidence of racial predominance an email from a staff member to the legislative leadership that "refer[ed] specifically to categorizing a section of Greensboro as 'Black'" and the fact that the referenced section would be included in

then-CD 12. 532 U.S. at 420. This Court also rejected as evidence of racial predominance the district court's skepticism about the state's explanation of the percentage of black population in the 1997 CD 12 being "sheer happenstance." *Id.* at 420, n. 8.

*Second*, the three-judge court credited testimony of Dr. Ansolabehere, who used registration statistics instead of voting results to conclude that race and not politics explained the drawing of CD 12. Again, this runs afoul of this Court's decision in *Hunt v. Cromartie*, 526 U.S. 541 (1999) ("*Cromartie I*") and *Cromartie II*. In *Cromartie II*, this Court repeatedly criticized the district court for relying on registration statistics instead of election results. This Court noted that "registration figures do not accurately predict preference at the polls." 532 U.S. at 245. The Court had previously criticized the district court for relying on registration statistics in *Cromartie I* explaining that:

> party registration and party preference do not always correspond. (citing *Cromartie I*, 526 U.S. at 550-51). In part this is because white voters registered as Democrats "crossover" to vote for a Republican candidate more often than do African Americans who register and vote Democratic between 95% and 97% of the time . . . . A legislature trying to secure a safe Democratic seat is interested in Democratic voting behavior. Hence, a legislature may, by placing reliable Democratic precincts within a district without regard to race, end up with a district containing more heavily African American precincts, but the reasons would be political rather than racial.

532 U.S. at 245. In this case, the three-judge court cited the following testimony from Dr. Ansolabehere as why it would rely on registration statistics: "registration data was a good indicator of voting data and it 'allowed [him] to get down to [a deeper] level of analysis.'" (D.E. 142 at 44-45) (quoting testimony of Dr.

Ansolabehere) Dr. Ansolabehere's "explanation," however, is a non sequitur that *directly contradicts* this Court's admonition about using registration data to predict voting behavior *in North Carolina*.[16]

*Third*, the three-judge court ignored evidence that politics completely explained CD 12 and partially explained CD 1, even though the evidence of political motivation here greatly exceeded the evidence this Court found sufficient in *Cromartie II*. The legislature repeatedly emphasized the political changes it was making as a result of making CD 1 and, especially, CD 12 stronger Democratic districts. The 1997 and 2001 versions of CD 12 were drawn by a Democratic-controlled General Assembly while the 2011 version was drawn by a Republican-controlled General Assembly. The 2011 General Assembly accomplished its political goals by moving voters who supported Republican presidential candidate, John McCain, in 2008 out of the district and replacing them with voters in other 2001 congressional districts who supported President Obama in 2008. The State used this criterion because the 2011 General Assembly intended to create districts that adjoined the 2011 CD 12 that were better for Republicans than the adjoining versions enacted by Democratic-controlled General Assembly in 1997 and 2001. While the 1997 and the 2001 General Assemblies intended to make CD 12 a strong Democratic district, they also intended to make the districts adjoining CD 12 more favorable for Democrats. Politics was the prime motivation for this district in 1997, 2001, and 2011, but the political interests of the 1997 and 2001 Democratic-

[16] The court compounded this error by excluding testimony from the State's expert, Dr. Hofeller, refuting a correlation analysis by Dr. Ansolabehere that had not been revealed previously in the discovery phase of the case.

controlled General Assemblies were different than the Republican-controlled General Assembly in 2011. (Tr. pp. 477-93)[17] The three-judge court simply ignored these facts, as well as the fact that in the last two election cycles, the election results in the congressional districts surrounding CD 12 (and CD 1) bear out the legislature's political motives and demonstrates that politics was indeed the prime factor.

*Fourth*, the three-judge court simply assumed that race and not politics predominated in CD 12 because the percentage of BVAP increased in the enacted CD 12. This assumption, however, once again defies *Cromartie II*. The fact that the percentage of BVAP for this district increased in 2011, as compared to the 2001 version, is strictly a result of making the 2011 version an even stronger Democratic-performing district. Nothing has changed since *Cromartie II*. It remains undisputed that there is a very high correlation between African American voters and voters who regularly vote a straight Democratic ticket and support national Democratic candidates.

Significantly, the three-judge court completely relieved Plaintiffs in this case of this Court's requirement in *Cromartie* that plaintiffs propose alternative plans which would have achieved the legislature's goal of making the districts surrounding CD 12 (or CD 1) more competitive for Republicans while making CD 12 (or CD 1) allegedly more racially balanced. Where politics and race are highly correlated, this Court has never allowed the lower courts to simply presume racial predominance without a showing that the plan could have been drawn another way.

[17] "Tr." refers to the transcript of the trial held in this matter from October 13-15, 2015.

Rather than putting Plaintiffs to the kind of proof this Court has required, the three-judge court allowed Plaintiffs to substitute circumstantial evidence from their experts, Dr. Peterson and Dr. Ansolabehere. Dr. Peterson admitted that he *did not and could not* conclude that race was the predominant motive in drawing the districts. (Tr. 233) Rather, Dr. Peterson rendered the limited opinion that race "better accounts for" the boundaries of those districts than the political party of voters. (*Id.*) Dr. Peterson's statement that race better explains CD 12 than politics is contradicted by his own analysis. Out of twelve studies conducted by Dr. Peterson of CD 12, six favored the race hypothesis and six did not favor it. (Tr. 242-43) Thus, Dr. Peterson's own data demonstrates that as between race and party, his study was inconclusive. Moreover, in those instances in which Dr. Peterson's data was unequivocal, the race-versus-party explanation was at best a tie. (Tr. 243-44) Dr. Peterson even conceded that the race and political hypotheses have *equal* support under his segment analysis and that one could therefore not better account for the boundary than the other. (*Id.*) More importantly, when limited to the information that the legislature's mapdrawing consultant, Dr. Hofeller, actually used during the mapdrawing process (voting age population and election results for President Obama in 2008), Dr. Peterson's own data shows that the *party* hypothesis is a *better* explanation for the boundaries of CD 12. Notably, in the district Defendants admittedly drew to protect the State against a vote dilution claim (CD 1), Dr. Peterson's data show that the race hypothesis and the party hypothesis are tied. (Tr. 247-48)

Similarly, despite Dr. Ansolabehere's expert testimony in another case (where he analyzed actual election results instead of registration data), and his review of the percentage of McCain voters in VTDs moved into and out of North Carolina's CD 12, he did not review or explain in his expert reports any election results – either as the 2001 version of CD 1 and CD 12 compared to the 2011 versions or in the VTDs moved out of or into either district. (Tr. 347, 348, 389, 407)[18] Instead, Dr. Ansolabehere attempted to prove racial predominance by evaluating racial and registration statistics. (Tr. 341, 348) Dr. Ansolabehere admitted that African Americans who vote for Democratic candidates tend to be in the 90 percent range (Tr. 379), but white Democrats vote for Democratic candidates at a "much lower rate" than African American voters. (Tr. 380) He also agreed that all African American voters vote for the Democratic candidate at a much higher rate than all white voters. (Tr. 381) Despite these admissions, Dr. Ansolabehere testified (which the three-judge court apparently and incredibly credited) that an equal number of white and black voters should be moved into or out of CD 1 and CD 12 if the motive of the map drawer was to make a stronger Democratic district. (D.E. 18-1, p. 9, ¶¶ 20, 21; Tr. 382-83). The three-judge court also credited Dr. Ansolabehere's testimony despite his failure to examine the political policy goals of

[18] Nor did Dr. Ansolabehere compare how election results were different in the 2001 versus the 2011 versions of the districts that adjoined CD 12. In those districts, following the re-draw of CD 12 in 2011, Republican challengers replaced Democratic incumbents in the 2012 general election.

the 2011 General Assembly or prepare a map less reliant on race that would still achieve the policy goals of the 2011 General Assembly. (Tr. 358-59, 363)[19]

*Finally*, and perhaps most significantly, as to CD 1 at least, the three-judge court again *presumed* racial predominance based solely on the fact that Defendants drew CD 1 at the 50% BVAP level to foreclose vote dilution claims under Section 2. The court repeatedly referred to this as a "racial quota," notwithstanding *Strickland's* holding that the first precondition from *Thornburg v. Gingles*, 478 U.S. 30 (1984) requires a numerical majority to constitute a valid VRA district.[20] While acknowledging the numerous other goals motivating the legislature in creating CD 1 – incumbency protection, partisan advantage, remedying extreme under-population, among others – the court filtered its predominance analysis through the lens of the legislature's *Strickland* standard without recognizing that standard's place in the precedent of this Court.

This presumption flouts this Court's precedent as recently clarified in *Alabama*: general legislative goals for VRA districts do not prove that race was the predominant motive for a specific district. *Alabama*, 135 S. Ct. at 1270-71. This is because predominant motive cannot be established because a legislature enacted a

[19] A different three-judge court in *Bethune-Hill* thoroughly rejected Dr. Ansolabehere's testimony in that case. See *Bethune-Hill v. Virginia State Board of Elections*, No. 3:14cv852, ___ F. Supp. 3d ___, 2015 WL 644032, at *41-42, 45 (Oct. 22, 2015).

[20] The three-judge court does not explain what it would not consider to be a "racial quota." If the General Assembly had drawn CD 1 in 2011 to be the same BVAP as in 2001, would that be a "racial quota"? If African American members of the General Assembly had advised the legislature to draw CD 1 at a specific numeric BVAP percentage just shy of 50%, and the legislature complied, would that have been a "racial quota"? It is difficult to understand how following *Strickland* and drawing a district to protect the State against a vote dilution claim can constitute an unconstitutional "racial quota."

district with a "consciousness of race" or created a majority black district to comply with federal law. *Vera*, *supra.* Moreover, unlike the 70%+ black VAP district at issue in *Alabama*, the North Carolina General Assembly used other criteria besides equal population and race to construct CD 1. CD 1 is based upon several legitimate districting principles which were not subordinated to race. The record amply demonstrates that the district is not unexplainable but for race, a conclusion which the three-judge court ignored in favor of its erroneous "racial quota" construct.

### B. The three-judge court's strict scrutiny analysis defies this Court's redistricting precedents.

The three-judge court's strict scrutiny analysis is directly contrary to this Court's holding in *Alabama*. There, this Court clearly held that a state has a compelling reason for using race to create districts that are reasonably necessary to protect the state from liability under the VRA. *Alabama*, 135 S. Ct. at 1272-73. However, the Court ruled that the district court had erred in approving the only district evaluated by the Supreme Court (Alabama's Senate District 26) under Section 5 because Alabama did not provide a strong basis in evidence to support the creation of a super-majority black district with black VAP in excess of 70%. Section 5 does not mandate super-majority districts but instead only requires that states adopt racial percentages for each VRA district needed to "maintain a minority's ability to elect a preferred candidate of choice." *Id.* The Alabama legislature's policy of maintaining super-majority black districts had no support in applicable case law and represented an improper "mechanically numerical view as to what constitutes forbidden retrogression." *Id.* at 1272. Alabama cited no evidence in the

legislative record to support the need for super-majority districts. Therefore, the Court found it unlikely that the ability of African-American voters to elect their preferred candidate of choice could have been diminished in this district if the percentage of BVAP had been reduced from a super-majority of over 70% to a lower super-majority of 65%. *Id.* at 1272-74.

The Court qualified its ruling by stating that it was not "insist[ing] that a legislature guess precisely what percentage reduction a court or the Justice Department might eventually find to be retrogressive." *Id.* at 1273. This is because "[t]he law cannot insist that a state legislature, when redistricting, determine precisely what percent minority population § 5 demands." *Id.* Federal law cannot "lay a trap for an unwary legislature, condemning its redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place a few too many minority voters in a districts or (2) retrogressive under § 5 should the legislature place a few too few." *Id.* at 1274 (citing *Vera*, 517 U.S. at 977).

Based upon these concerns, the Court held that majority black districts would survive strict scrutiny, including any narrow tailoring analysis, when a legislature has "a strong basis in evidence in support of the race-based choice it has made." *Id.* at 1274 (citations omitted). This standard of review "does not demand that a State's action actually is necessary to achieve a compelling state interest in order to be constitutionally valid." *Id.* Instead, a legislature "may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have good reasons to believe such a use is required, even if a court does not find

that the actions were necessary for statutory compliance." *Id.* Nothing in the legislative record explained why Senate District 26 needed to be maintained with a BVAP in excess of 70% as opposed to a lower super-majority-minority percentage. Therefore the Court could not accept the district court's conclusion that District 26 served a compelling governmental interest or was narrowly tailored. *Id.* at 1273-74.

Here, North Carolina followed specific guidance for Section 2 districts *set by this Court*. In *Strickland*, this Court held that establishing a bright-line majority benchmark for a Section 2 district provides a judicially manageable standard for courts and legislatures alike. It also relieves the State from hiring an expert to provide opinions on the minimum BVAP needed to create a district that could be controlled by African American voters. *Strickland*, 556 U.S. at 17. Any such expert would have to predict the type of white voters that would need to be added to or subtracted from a district (to comply with one person, one vote) who would support the minority group's candidate of choice, the impact of incumbency, whether white voters retained in the district would continue to support the minority group's candidate of choice after new voters were added, and other "speculative" factors. *Id.* The holding in *Strickland* is consistent with the holding in *Alabama* that legislatures are not obligated to create majority black districts with the exact correct percentage of BVAP. *Alabama*, 135 S. Ct. at 1272-74.

Despite this Court's clear holding in *Strickland*, the three-judge court passed over the overwhelming evidence in the record (in this case and in *Dickson*) of significant racially polarized voting in the specific counties covered by CD 1. In

*Dickson*, the state court made extensive findings that the legislative record provided a strong basis for the General Assembly to conclude that racially polarized voting continues to exist in the area of the State encompassed by the 2011 CD 1. (D.E. 100-5, pp. 47-63, F.F. No. 1-35; D.E. 100-5, pp. 63-66, F.F. No. 36a-h; D.E. 100-5, pp. 126-28, F.F. No. 165-71)

The three-judge court, however, misread statistical data in contending that racially polarized voting could not be present in CD 1 because it had a "white majority." (D.E. 142 at 55) From 1991 through 2001, no prior version of CD 1 was a majority white district. All prior versions were majority black in total population and majority minority coalition districts in VAP. Significantly, and completely ignored by the court, by the time of the 2010 Census, the 2001 CD 1 was a functional majority black district because African Americans constituted a majority of all registered voters. (Tr. 373) Further, the three-judge court ignored that non-Hispanic whites have *never* been in the majority in past versions and none of the past versions were majority white crossover districts. Even without equal turnout rates by black and white voters, contrary to Plaintiffs' argument, whites have never been able to vote as a bloc to defeat the African American candidate of choice because non-Hispanic whites have never enjoyed majority status in CD 1.

Nor does the fact that African American incumbents have won in the district since 1992 prove the absence of racially polarized voting. The three-judge court ignored evidence of the *two experts* who submitted reports to the General Assembly *finding the existence of racially polarized voting in all of the counties encompassed*

*by CD 1.* (D.E. 100-5, pp. 52-56, 63-65, F.F. No. 10-21, 36 f and g) Their findings were consistent with the *twenty-year history* of CD 1 being established as a Section 2 VRA district. Further, it was undisputed that the incumbent for CD 1 has won elections by margins that were less than the amount by which CD 1 was underpopulated in 2010. The State court in *Dickson* made specific factual findings regarding CD 1 related to all of these points and this evidence is in the record of the instant case. (D.E. 100-5, pp. 50-51, 126-28, F.F. Nos. 6, 7, 165, 166-67, 169, 170)

Indeed, after submitting their evidence on racially polarized voting during the 2011 legislative redistricting process, the three *NC NAACP* organizational plaintiffs and their counsel submitted a congressional map with two majority minority congressional districts and legislative plans that included majority black or majority minority coalition districts in every area of the State in which the General Assembly enacted majority black districts, including almost all of the counties encompassed by the enacted CD 1. The NAACP legislative plans, as well as all of the other alternative legislative plans, even proposed majority black or majority minority coalition senate and house districts for Durham County, a portion of which is included in CD 1. (D.E. 31-3, pp. 4-5, 7-8, ¶¶ 9, 18; D.E. 31-4, pp. 81; D.E. 44-1, p. 22, ¶¶ 98, 99; D.E. 44-2, p. 10, ¶¶ 282, 283)

Plaintiffs' own witness in this case, Congressman Butterfield, explained that based on his decades of political experience in the areas covered by CD 1, racially polarized voting exists at high levels. In fact, he testified that, in his opinion, only one out of three white voters in eastern North Carolina will ever vote for a black

candidate. (Tr. 199) There can be no doubt that the General Assembly had good reasons to believe that racially polarized voting continues to exist in the counties included in CD 1. If this is not sufficient evidence of racially polarized voting to justify drawing a district just barely over 50% BVAP, then the three-judge court has eviscerated the State's ability to ever draw majority black districts and attempt to foreclose future Section 2 vote dilution claims.[21]

### C. The three-judge court's opinion effectively makes redistricting impossible in North Carolina for any entity, including an independent redistricting commission.

Unless stayed, and ultimately reversed, the three-judge court's opinion makes redistricting in North Carolina an impossible task. The three-judge court has effectively held that attempting to comply with the VRA and *Strickland* amounts to racial gerrymandering. This reasoning guts the VRA and threatens to eliminate all majority black districts going forward. It also subjects the State to future liability for vote dilution which it cannot foreclose through the adoption of districts that have been authorized by this Court's precedents. If the evidence before the General Assembly about racially polarized voting in this case results in racial gerrymanders, then there is no amount of evidence of polarized voting that

[21] Regarding compactness as it relates to CD 1, Dr. Ansolabehere conceded that a Reock score of over .20 is not considered "non-compact." (Tr. 354, 358) Dr. Ansolabehere confirmed that the Reock score for the 2011 CD 1 (.29) was higher than the Reock score for the 1992 CD 1 (0.25). (Tr. 352) He could provide no legal authority that the 2011 CD 1 is "substantially" less compact than the 2001 CD 1 which had a Reock score of .39. (Tr. 352-53) In *Cromartie II*, the Reock score for the 1997 version of CD 1 was .317. *Cromartie II*, 133 F. Supp. 2d at 416. In *Cromartie II*, the district court found that the 1997 CD 1 satisfied all of the *Thornburg* conditions, including the Court's opinion that it was based upon a compact minority population. *Id.* at 423. Dr. Ansolabehere agreed that he would not consider a decline in a Reock score from .319 to .29 to be "substantial." (Tr. 356) Thus, compactness was certainly no reason for the three-judge court to conclude that CD 1 would fail strict scrutiny.

would ever justify any majority black districts. The three-judge court has trapped North Carolina in the "competing hazards of liability" that this Court has expressly held is not permissible. *Vera*, 517 U.S. at 977 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 291 (1986) (O'Connor, concurring in part and concurring in judgment)).

### D. The remedy Plaintiffs seek has no support in Supreme Court decisions.

The three-judge court should have rejected Plaintiffs' claims because they essentially amount to claims of loss of political influence. This Court has yet to find any legislative or congressional redistricting plan unconstitutional because it deprived any group, political or racial, of "influence." Indeed, such claims may even be non-justiciable. *See League of United Latin American Citizens v. Perry*, 548 U.S. 399, 413-23 (2006) ("*LULAC*") (plurality opinion) (plaintiffs failed to identify a judicially manageable standard to adjudicate claim of political gerrymandering); *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion holding that political gerrymandering claims are non-justiciable because no judicially discernable standards for adjudicating such claims exist); *Cromartie I*, 526 U.S. at 551 n.7. (Court has not agreed on standards to govern claims of political gerrymandering). Despite this history, Plaintiffs have asked the federal courts essentially to recognize an "influence" claim on behalf of African American Democrats by requiring the State retain a very high percentage of minority population in the congressional districts, but only at an elevated level that Plaintiffs believe is "sufficient." There is no basis whatsoever for any such claim under the Constitution.

This Court has warned against the constitutional dangers underlying Plaintiffs' influence theories. In *LULAC*, the Court rejected an argument that the Section 2 "effects" test might be violated because of the failure to create a minority "influence" district. The Court held that "if Section 2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *LULAC*, 548 U.S. at 445-46 (citing *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring)). Recognizing a claim on behalf of African American Democrats for influence or crossover districts "would grant minority voters 'a right to preserve their strength for the purposes of forging an advantageous political alliance,'" a right that is not available to any other group of voters. *Strickland*, 556 U.S. at 15 (citing *Hall v. Virginia*, 385 F.3d 421, 431 (4th Cir. 2004), *cert. denied*, 544 U.S. 961 (2005)). This argument also raises the question of whether such a claim would itself run afoul of the equal protection guarantees of the Fourteenth Amendment. Nothing in federal law "grants special protection to a minority group's right to form political coalitions." *Strickland*, 556 U.S. at 15. Nor does federal law grant minority groups any right to the maximum possible voting strength. *Id.* at 15-16.[22]

[22] The claims of both Plaintiffs are barred by the doctrines of *res judicata* and collateral estoppel because the same claims and issues have already been litigated and decided by the three-judge panel in *Dickson*. The ruling in *Dickson* is a "final judgment on the merits" for purposes of claim and issue preclusion. *See Pharmacia & Upjohn Co. v. Mylan Pharms., Inc.*, 170 F.3d 1373, 1381 (Fed. Cir. 1999) (suggesting that the "Fourth Circuit follows '[t]he established rule in the federal courts . . . that a final judgment retains all of its res judicata consequences pending decision of the appeal.'"); *C.F. Trust, Inc. v. First Flight Ltd. P'ship*, 140 F. Supp. 2d 628, 641 (E.D. Va. 2001) ("The established rule in the federal courts is that a final judgment retains all of its preclusive effect pending appeal."), *aff'd*, 338 F.3d 316 (4th Cir. 2003). Where an association is a party to litigation, federal courts have held that members of the association are precluded under the doctrines of *res judicata* and collateral estoppel from re-litigating claims or issues raised in previous actions by an association in which they

## CONCLUSION

The Court should stay execution of the judgment below pending the resolution of Defendants' direct appeal. Additionally, given the short two-week deadline the three-judge court imposed on the State to draw remedial districts, the fact that absentee ballots have already been sent out, the swiftly approaching March primary date, and the impending election chaos that the three-judge court's directives are likely to create, the Court should require an expedited response and enter an interim stay pending receipt of a response.

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are a member. *See*, *e.g.*, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1081-84 (9th Cir. 2003) (holding that individual members of an unincorporated association were bound by prior litigation involving the association and other members and finding that "if there is no conflict between the organization and its members, and if the organization provides adequate representation on its members' behalf, individual members not named in a lawsuit may be bound by the judgment won or lost by their organization."); *Murdock v. Ute Indian Tribe of Uintah and Ouray Reservation*, 975 F.2d 683, 688-89 (10th Cir. 1992). As members of the NC NAACP, Mr. Harris and Ms. Bowser are bound by the judgment of the trial court in *Dickson*. *See*, *e.g.*, *Murdock*, 975 F.2d at 688. Allowing Plaintiffs to avoid being bound by the state court's judgment when they are both members of at least one of the plaintiff organizations in *Dickson* is contrary to law and opens the door for endless legal challenges to the districts at issue here. *See Tahoe-Sierra Preservation Council*, 322 F.3d at 1084 (internal citations and quotations omitted) ("If the individual members of the Association were not bound by the result of the former litigation, the organization would be free to attack the judgment *ad infinitum* by arranging for successive actions by different sets of individual member plaintiffs, leaving the Agency's capacity to regulate the Tahoe properties perpetually in flux. The Association may not avoid the effect of a final judgment in this fashion.").

Respectfully submitted,

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# EXHIBIT 1

**UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

| | | |
|---|---|---|
| DAVID HARRIS, CHRISTINE BOWSER, and SAMUEL LOVE,<br><br>Plaintiffs,<br><br>v.<br><br>PATRICK MCCRORY, in his capacity as Governor of North Carolina, NORTH CAROLINA STATE BOARD OF ELECTIONS, and JOSHUA HOWARD, in his capacity as Chairman of the North Carolina State Board of Elections,<br><br>Defendants. | ) | Case No. 1:13-cv-949 |

**MEMORANDUM OPINION**

Circuit Judge Roger L. Gregory wrote the majority opinion, in which District Judge Max O. Cogburn, Jr., joined and filed a separate concurrence. District Judge William L. Osteen, Jr., joined in part and filed a dissent as to Part II.A.2:

"[T]he Framers of the Fourteenth Amendment . . . desired to place clear limits on the States' use of race as a criterion for legislative action, and to have the federal courts enforce those limitations." Richmond v. J.A. Croson Co., 488 U.S. 469, 491 (1989). For good reason. Racial classifications are, after all, "antithetical to the Fourteenth Amendment, whose 'central purpose' was 'to eliminate racial discrimination emanating from

official sources in the States.'" Shaw v. Hunt, 517 U.S. 899, 907 (1996) (Shaw II) (quoting McLaughlin v. Florida, 379 U.S. 184, 192 (1964)).

The "disregard of individual rights" is the "fatal flaw" in such race-based classifications. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978); see also J.A. Croson Co., 488 U.S. at 493 (explaining that the "'rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights'" (quoting Shelley v. Kraemer, 334 U.S. 1, 22 (1948))). By assigning voters to certain districts based on the color of their skin, states risk "engag[ing] in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" Miller v. Johnson, 515 U.S. 900, 911–12 (1995) (quoting Shaw v. Reno, 509 U.S. 630, 647 (1993) (Shaw I)). Quotas are especially pernicious embodiments of racial stereotypes because they threaten citizens' "'personal rights' to be treated with equal dignity and respect." J.A. Croson Co., 488 U.S. at 493.

Laws that classify citizens based on race are constitutionally suspect and therefore subject to strict scrutiny; racially gerrymandered districting schemes are no different, even when adopted for benign purposes. Shaw II, 517

U.S. at 904–05. This does not mean that race can never play a role in redistricting. Miller, 515 U.S. at 916. Legislatures are almost always cognizant of race when drawing district lines, and simply being aware of race poses no constitutional violation. See Shaw II, 517 U.S. at 905. Only when race is the "dominant and controlling" consideration in drawing district lines does strict scrutiny apply. Id.; see also Easley v. Cromartie, 532 U.S. 234, 241 (2001) (Cromartie II).

This case challenges the constitutionality of two North Carolina congressional districts as racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment. Specifically, this case concerns North Carolina's Congressional District 1 ("CD 1") and Congressional District 12 ("CD 12") as they stood after the 2011 redistricting. The plaintiffs contend that the congressional map adopted by the North Carolina General Assembly in 2011 violates the Fourteenth Amendment: race was the predominant consideration with respect to both districts, and the General Assembly did not narrowly tailor the districts to serve a compelling interest. The Court agrees.

After careful consideration of all evidence presented during a three-day bench trial, the parties' findings of fact and conclusions of law, the parties' arguments, and the applicable law, the Court finds that the plaintiffs have shown

that race predominated in both CD 1 and CD 12 and that the defendants have failed to establish that its race-based redistricting satisfies strict scrutiny. Accordingly, the Court holds that the general assembly's 2011 Congressional Redistricting Plan is unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment.

Having found that the 2011 Congressional Redistricting Plan violates the Equal Protection Clause, the Court will require that new congressional districts be drawn forthwith to remedy the unconstitutional districts. See Wise v. Lipscomb, 437 U.S. 535, 539-40 (1978).

Before turning to a description of the history of the litigation and an analysis of the issues it presents, the Court notes that it makes no finding as to whether individual legislators acted in good faith in the redistricting process, as no such finding is required. See Page v. Va. Bd. of Elections, No. 3:13-cv-678, 2015 WL 3604029, at *7 (E.D. Va. June 5, 2015) ("[T]he good faith of the legislature does not excuse or cure the constitutional violation of separating voters according to race."). Nevertheless, the resulting legislative enactment has affected North Carolina citizens' fundamental right to vote, in violation of the Equal Protection Clause.

I.

A.

The North Carolina Constitution requires decennial redistricting of the North Carolina Senate and North Carolina House of Representatives, subject to several specific requirements. The general assembly is directed to revise the districts and apportion representatives and senators among those districts. N.C. Const. art. II, §§ 3, 5. Similarly, consistent with the requirements of the Constitution of the United States, the general assembly establishes North Carolina's districts for the U.S. House of Representatives after every decennial census. See U.S. Const. art. I, §§ 2, 4; N.C. Const. art. II, §§ 3, 5; 2 U.S.C. §§ 2a, 2c.

Redistricting legislation must comply with the Voting Rights Act of 1965 ("VRA"). "The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting . . . ." South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966), abrogated by Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612 (2013). Enacted pursuant to Congress's enforcement powers under the Fifteenth Amendment, see Shelby Cnty., 133 S. Ct. at 2619–21, the VRA prohibits states from adopting plans that would result in vote dilution under section 2, 52 U.S.C. § 10301, or in covered jurisdictions, retrogression under section 5, 52 U.S.C. § 10304.

Section 2(a) of the VRA prohibits the imposition of any electoral practice or procedure that "results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color." 52 U.S.C. § 10301(a). A section 2 violation occurs when, based on the totality of circumstances, the political process results in minority "members hav[ing] less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Id. § 10301(b).

Section 5 of the VRA prohibits a state or political subdivision subject to section 4 of the VRA from enforcing "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," unless it has obtained a declaratory judgment from the District Court for the District of Columbia that such change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or has submitted the proposed change to the U.S. attorney general and the attorney general has not objected to it. Beer v. United States, 425 U.S. 130, 131-32 (1976). By requiring that proposed changes be approved in advance, Congress sought "'to shift the advantage of time and inertia from the perpetrators of the evil to its victim,' by 'freezing election procedures in the covered areas

unless the changes can be shown to be nondiscriminatory.'" Id. at 140 (quoting H.R. Rep. No. 94–196, pp. 57–58 (1970)). The purpose of this approach was to ensure that "no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Holder v. Hall, 512 U.S. 874, 883 (1994). Section 5, therefore, prohibits a covered jurisdiction from adopting any change that "has the purpose of or will have the effect of diminishing the ability of [the minority group] . . . to elect their preferred candidates of choice." 52 U.S.C. § 10304(b).

In November 1964, several counties in North Carolina met the criteria to be classified as a "covered jurisdiction" under section 5. See id. §§ 10303–10304. As such, North Carolina was required to submit any changes to its election or voting laws to the U.S. Department of Justice ("DOJ") for federal preapproval, a process called "preclearance." See id. § 10304(a). To obtain preclearance, North Carolina had to demonstrate that a proposed change had neither the purpose nor effect "of denying or abridging the right to vote on account of race or color." Id.

The legal landscape changed dramatically in 2012, when the Supreme Court held unconstitutional the coverage formula used to determine which states are subject to the section 5 preclearance requirement. See Shelby Cnty., 133 S. Ct. at 2612. As a result

of the invalidation of the coverage formula under section 4, North Carolina is no longer obligated to comply with the preclearance requirements of section 5.[1] See id. at 2631.

B.

For decades, African-Americans enjoyed tremendous success in electing their preferred candidates in former versions of CD 1 and CD 12 regardless of whether those districts contained a majority black voting age population ("BVAP")—that is the percentage of persons of voting age who identify as African–American.

The general assembly first drew CD 1 in an iteration of its present form in 1992. Pls.' Ex. 64. Between 1997 and 2011, the BVAP fell below 50 percent. The BVAP stood at 46.54 percent, for example, for the plan in place from 1997 to 2001. Pls.' Ex. 110. After the 2000 census, the general assembly enacted the 2001 Congressional Redistricting Plan (now referred to as the "benchmark" or "benchmark plan") that redrew CD 1, modestly increasing the BVAP to 47.76 percent. Pls.' Ex. 111.

The BVAP of former CD 12 mirrored that of former CD 1. Initially in 1991, to comply with the DOJ's then-existing "maximization" policy — requiring majority-minority districts

[1] Nothing in Shelby County affects the continued validity or applicability of section 2 to North Carolina. 133 S. Ct. at 2619. And both sections 2 and 5 were still in full effect when the legislation in this case was enacted.

wherever possible — CD 12 was drawn with a BVAP greater than 50 percent. Pls.' Ex. 72. After years of litigation and the U.S. Supreme Court's repudiation of the maximization policy, see Miller, 515 U.S. at 921–24, the general assembly redrew the district in 1997 with a BVAP of 32.56 percent. Pls.' Ex. 110. The general assembly thus determined that the VRA did not require drawing CD 12 as a majority African-American district. See Cromartie v. Hunt, 133 F. Supp. 2d 407, 413 (E.D.N.C. 2000) ("District 12 [was] not a majority-minority district"). The 2001 benchmark version of CD 12 reflected a BVAP of 42.31 percent. Pls.' Ex. 111.

Despite the fact that African-Americans did not make up a majority of the voting-age population in these earlier versions of CD 1 or CD 12, African-American preferred candidates easily and repeatedly won reelection under those plans. Representative Eva Clayton prevailed in CD 1 in 1998 and 2000, for instance, winning 62 percent and 66 percent of the vote, respectively. Pls.' Ex. 112. Indeed, African-American preferred candidates prevailed with remarkable consistency, winning at least 59 percent of the vote in each of the five general elections under the version of CD 1 created in 2001. Id. Representative G.K. Butterfield has represented that district since 2004. Id. Meanwhile, in CD 12, Congressman Mel Watt won every general election in CD 12 between 1992 and 2012. Id. He never received

less than 55.95 percent of the vote, gathering at least 64 percent in each election under the version of CD 12 in effect during the 2000s. Id.

No lawsuit was ever filed to challenge the benchmark 2001 version of CD 1 or CD 12 on VRA grounds. Trial Tr. 46:2-7, 47:4-7 (Blue).

C.

Following the census conducted April 1, 2010, leaders of the North Carolina House of Representatives and Senate independently appointed redistricting committees. Each committee was responsible for recommending a plan applicable to its own chamber, while the two committees jointly were charged with preparing a redistricting plan for the U.S. House of Representatives North Carolina districts. Senator Rucho and Representative Lewis were appointed chairs of the Senate and House Redistricting Committees, respectively, on January 27 and February 15, 2011. Parties' Joint Actual Stipulation, ECF No. 125 ¶ 3.

Senator Rucho and Representative Lewis were responsible for developing a proposed congressional map. Id. In Representative Lewis's words, he and Senator Rucho were "intimately involved" in the crafting of these maps. Pls.' Ex. 136 at 17:21–24 (Joint Committee Meeting July 21, 2011).

Senator Rucho and Representative Lewis engaged private redistricting counsel and a political consultant. Specifically, Senator Rucho and Representative Lewis engaged the law firm of Ogletree, Deakins, Nash, Smoak & Stewart, P.C. ("Ogletree") as their private redistricting counsel. In December 2010, Ogletree engaged Dr. Thomas Hofeller, who served as redistricting coordinator for the Republican National Committee for the 1990, 2000, and 2010 redistricting cycles, to design and draw the 2011 Congressional Redistricting Plan under the direction of Senator Rucho and Representative Lewis. Trial Tr. 577:1-23; 587:14-25; 588:1-2 (Hofeller). Dr. Hofeller was the "principal architect" of the 2011 Congressional Redistricting Plan (as well as the state senate and house plans). Id. 586:13-15.

Senator Rucho and Representative Lewis were the sole sources of instruction for Dr. Hofeller regarding the design and construction of congressional maps. See Trial Tr. 589:3-19 (Hofeller). All such instructions were provided to Dr. Hofeller orally – there is no written record of the precise instructions Senator Rucho and Representative Lewis gave to Dr. Hofeller. Id. at 589:14-590:10. Dr. Hofeller never received instructions from any legislator other than Senator Rucho and Representative Lewis, never conferred with Congressmen Butterfield or Watt, and never conferred with the Legislative Black Caucus (or any of its individual members) with respect to the preparation of the

congressional maps. Trial Tr. 48:23-25; 49:1-5 (Blue); 588:3-589:13 (Hofeller). Representative Lewis did not make Dr. Hofeller available to answer questions for the members of the North Carolina Senate and House Redistricting Committees. Pls.' Ex. 136 at 23:3-26:3 (Joint Committee Meeting July 21, 2011).

Throughout June and July 2011, Senator Rucho and Representative Lewis released a series of public statements describing, among other things, the criteria that they had instructed Dr. Hofeller to follow in drawing the proposed congressional map. As Senator Rucho explained at the July 21, 2011, joint meeting of the Senate and House Redistricting Committees, those statements "clearly delineated" the "entire criteria" that were established and "what areas we were looking at that were going to be in compliance with what the Justice Department expected us to do as part of our submission." Id. at 29:2–9.

In their June 17, 2011, public statement, Senator Rucho and Representative Lewis highlighted one criterion in their redistricting plan:

> In creating new majority African American districts, we are obligated to follow . . . the decisions by the North Carolina Supreme Court and the United States Supreme Court in Strickland v. Bartlett, 361 N.C. 491 (2007), affirmed, Bartlett v. Strickland, 129 S.Ct. 1231 (2009). Under the Strickland decisions, districts created to comply with section 2 of the Voting Rights Act, must be

> created with a "Black Voting Age Population" ("BVAP"), as reported by the Census, at the level of at least 50% plus one. Thus, in constructing VRA majority black districts, the Chairs recommend that, where possible, these districts be drawn at a level equal to at least 50% plus one "BVAP."

Defs. Ex. 5.11 at 2 (emphasis added).

On July 1, 2011, Senator Rucho and Representative Lewis made public their first proposed congressional plan, entitled "Rucho-Lewis Congress," and issued a public statement. Pls.' Ex. 67. The plan was drawn by Dr. Hofeller and contained two majority-BVAP districts, namely CD 1 and CD 12. With regard to proposed CD 1, Senator Rucho and Representative Lewis stated that they had included a piece of Wake County (an urban county in which the state capital, Raleigh, is located) because the benchmark CD 1 was underpopulated by 97,500 people. Senator Rucho and Representative then added:

> Because African Americans represent a high percentage of the population added to the First District from Wake County, we have also been able to re-establish Congressmen Butterfield's district as a true majority black district under the Strickland case.

Pls.' Ex. 67 at 4.

With regard to CD 12, Senator Rucho and Representative Lewis noted that although the 2001 benchmark district was "not a Section 2 majority black district," there "is one county in the Twelfth District that is covered by Section 5 of the Voting

Rights Act (Guilford)." Pls.' Ex. 67 at 5. Therefore, "[b]ecause of the presence of Guilford County in the Twelfth District, we have drawn our proposed Twelfth District at a black voting age level that is above the percentage of black voting age population found in the current Twelfth District." Id.

On July 28, 2011, the general assembly enacted the congressional and legislative plans, which Dr. Hofeller had drawn at the direction of Senator Rucho and Representative Lewis. ECF No. 125 ¶ 5; see Session Law 2011-403 (July 28, 2011) (amended by curative legislation, Session Law 2011-414 (Nov. 7, 2011)). The number of majority-BVAP districts in the 2011 Congressional Redistricting Plan increased from zero to two when compared to the benchmark 2001 Congressional Redistricting Plan. The BVAP in CD 1 increased from 47.76 percent to 52.65 percent, and in CD 12 the BVAP increased from 43.77 percent to 50.66 percent. Pls.' Exs. 106-107.

Following the passage of the 2011 Congressional Redistricting Plan, the general assembly, on September 2, 2011, submitted the plan to the DOJ for preclearance under section 5 of the VRA. See Pls.' Ex. 74 at 10-11. On November 1, 2011, the DOJ precleared the 2011 Congressional Redistricting Plan.

D.

1.

Two sets of plaintiffs challenged the 2011 Congressional Redistricting Plan in state court for illegal racial gerrymandering. See N.C. Conference of Branches of the NAACP v. State of North Carolina, Amended Complaint (12/9/11), ECF No. 44 at Exs. 1-2; Dickson v. Rucho, Amended Complaint (12/12/11), ECF No. 4 at Exs. 3-4. A three-judge panel consolidated the two cases.

The state court held a two-day bench trial on June 5 and 6, 2013. See Dickson v. Rucho, J. and Mem. of Op. [hereinafter "State Court Opinion"], ECF No. 30 at Exs. 1-2. On July 8, 2013, the court issued a decision denying the plaintiffs' pending motion for summary judgment and entering judgment for the defendants. Id. The court acknowledged that the general assembly used race as the predominant factor in drawing CD 1. Nonetheless, applying strict scrutiny, the court concluded that North Carolina had a compelling interest in avoiding liability under the VRA, and that the districts had been narrowly tailored to avoid that liability. With regard to CD 12, the court held that race was not the driving factor in its creation, and therefore examined and upheld it under rational-basis review.

The state court plaintiffs appealed, and the North Carolina Supreme Court affirmed the trial court's judgment. Dickson v.

Rucho, 766 S.E.2d 238 (N.C. 2014). The U.S. Supreme Court, however, granted certiorari, vacated the decision, and remanded the case to the North Carolina Supreme Court for further consideration in light of Alabama Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015). On December 18, 2015, the North Carolina Supreme Court reaffirmed the trial court's judgment.

2.

Plaintiffs David Harris and Christine Bowser are U.S. citizens registered to vote in CD 1 or CD 12, respectively. Neither was a plaintiff in the state-court litigation.

Plaintiffs brought this action on October 24, 2013, alleging, among other things, that North Carolina used the VRA's section 5 preclearance requirements as a pretext to pack African–American voters into North Carolina's Congressional Districts 1 and 12 and reduce those voters' influence in other districts. Compl. ¶ 3, ECF No. 1.

Plaintiffs sought a declaratory judgment that North Carolina's Congressional Districts 1 and 12, as drawn in the 2011 Congressional Redistricting Plan, was a racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment. Id. ¶¶ 1, 6. Plaintiffs also sought to permanently enjoin the defendants from giving effect to the boundaries of the First and Twelfth Congressional Districts, including barring

the defendants from conducting elections for the U.S. House of Representatives based on the 2011-enacted First and Twelfth Congressional Districts. Id. at 19.

Because the plaintiffs' action "challeng[ed] the constitutionality of the apportionment of congressional districts" in North Carolina, 28 U.S.C. § 2284(a), the chief judge of the U.S. Court of Appeals for the Fourth Circuit granted the plaintiffs' request for a hearing by a three-judge court on October 18, 2013. ECF No. 16

A three-day bench trial began on October 13, 2015. After the bench trial, this Court ordered the parties to file post-trial briefs. The case is now ripe for consideration.

II.

"[A] State may not, absent extraordinary justification, . . . separate its citizens into different voting districts on the basis of race." Miller, 515 U.S. at 911-12 (internal quotations and citations omitted). A voting district is an unconstitutional racial gerrymander when a redistricting plan "cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." Shaw I, 509 U.S. at 649.

In a racial gerrymander case, the "plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." Miller, 515 U.S. at 916. "To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." Id. Public statements, submissions, and sworn testimony by the individuals involved in the redistricting process are not only relevant but often highly probative. See, e.g., Bush v. Vera, 517 U.S. 952, 960-61 (1996) (examining the state's preclearance submission to the DOJ and the testimony of state officials).

Once plaintiffs establish race as the predominant factor, the Court applies strict scrutiny, and "the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." Miller, 515 U.S. at 920. If race did not predominate, then only rational-basis review applies.

For the reasons that follow, the Court finds that the plaintiffs have presented dispositive direct and circumstantial evidence that the legislature assigned race a priority over all other districting factors in both CD 1 and CD 12. There is strong evidence that race was the only nonnegotiable criterion and that traditional redistricting principles were subordinated to race. In fact, the overwhelming evidence in this case shows that a BVAP-percentage floor, or a racial quota, was established in both CD 1 and CD 12. And, that floor could not be compromised. See Shaw II, 517 U.S. at 907 ("Race was the criterion that, in the State's view, could not be compromised; respecting communities of interest and protecting Democratic incumbents came into play only after the race-based decision had been made."). A congressional district necessarily is crafted because of race when a racial quota is the single filter through which all line-drawing decisions are made, and traditional redistricting principles are considered, if at all, solely insofar as they did not interfere with this quota. Id. Accordingly, the Court holds that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." Miller, 515 U.S. at 916.

Because race predominated, the state must demonstrate that its districting decision is narrowly tailored to achieve a

compelling interest. Even if the Court assumes that compliance with the VRA is a compelling state interest, attempts at such compliance "cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application" of federal law. Id. at 921; see also Bush, 517 U.S. at 977. Thus, narrow tailoring requires that the legislature have a "strong basis in evidence" for its race-based decision, that is, "good reasons to believe" that the chosen racial classification was required to comply with the VRA. Alabama, 135 S. Ct. at 1274. Evidence of narrow tailoring in this case is practically nonexistent; the state does not even proffer any evidence with respect to CD 12. Based on this record, as explained below, the Court concludes that North Carolina's 2011 Congressional Redistricting Plan was not narrowly tailored to achieve compliance with the VRA, and therefore fails strict scrutiny.

A.

As with any law that distinguishes among individuals on the basis of race, "equal protection principles govern a State's drawing of congressional districts." Miller, 515 U.S. at 905. "Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which

race no longer matters . . . ." Shaw I, 509 U.S. at 657. As such, "race-based districting by our state legislatures demands close judicial scrutiny." Id.

To trigger strict scrutiny, the plaintiffs first bear the burden of proving that race was not only one of several factors that the legislature considered in drawing CD 1 and CD 12, but that race "predominated." Bush, 517 U.S. at 963. Under this predominance test, a plaintiff must show that "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." Miller, 515 U.S. at 916; see also Alabama, 135 S. Ct. at 1271 ("[T]he 'predominance' question concerns which voters the legislature decides to choose, and specifically whether the legislature predominantly uses race as opposed to other, 'traditional' factors when doing so."). When a legislature has "relied on race in substantial disregard of customary and traditional districting principles," such traditional principles have been subordinated to race. Miller, 515 U.S. at 928 (O'Connor, J., concurring).

When analyzing the legislative intent underlying a redistricting decision, there is a "presumption of good faith that must be accorded legislative enactments." Id. at 916. This presumption "requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." Id. Such restraint is

particularly warranted given the "complex interplay of forces that enter a legislature's redistricting calculus," id. at 915–16, making redistricting possibly "the most difficult task a legislative body ever undertakes," Smith v. Beasley, 946 F. Supp. 1174, 1207 (D.S.C. 1996). This presumption must yield, however, when the evidence shows that citizens have been assigned to legislative districts primarily based on their race. See Miller, 515 U.S. at 915–16.

1.

CD 1 presents a textbook example of racial predominance. There is an extraordinary amount of direct evidence – legislative records, public statements, instructions to Dr. Hofeller, the "principal architect" of the 2011 Congressional Redistricting Plan, and testimony – that shows a racial quota, or floor, of 50-percent-plus-one-person was established for CD 1. Because traditional districting criteria were considered, if at all, solely insofar as they did not interfere with this 50-percent-plus-one-person minimum floor, see Shaw II, 517 U.S. at 907, the quota operated as a filter through which all line-drawing decisions had to pass. As Dr. Hofeller stated, "[S]ometimes it wasn't possible to adhere to some of the traditional redistricting criteria in the creation of [CD 1]" because "the more important thing was to . . . follow the instructions that I ha[d] been given by the two chairmen [to

draw the district as majority-BVAP]." Trial Tr. 626:19-627:1 (Hofeller) (emphasis added). Indeed. The Court therefore finds that race necessarily predominates when, as here, "the legislature has subordinated traditional districting criteria to racial goals, such as when race is the single immutable criterion and other factors are considered only when consistent with the racial objective." Bethune-Hill v. Va. State Bd. of Elections, 14-cv-852, 2015 WL 6440332, at *63 (Oct. 22, 2015) (Keenan, J., dissenting) (citing Shaw II, 517 U.S. at 907).

a.

The legislative record is replete with statements indicating that race was the legislature's paramount concern in drawing CD 1. During legislative sessions, Senator Rucho and Representative Lewis made clear that CD 1 "[w]as required by Section 2" of the VRA to have a BVAP of at least 50 percent plus one person. See Pls.' Ex. 139 at 8:19-9:6 (July 25, 2011 Senate Testimony of Rucho) (CD 1 was "required by Section 2" of the VRA to contain a majority BVAP, and "must include a sufficient number of African-Americans so that [CD 1] can re-establish as a majority black district"); id. 17:23-25 (CD 1 "has Section 2 requirements, and we fulfill those requirements"); see also Pls.' Ex. 140, at 30:2-4 (July 27, 2011 House Testimony of Lewis) (Representative Lewis stating that CD 1 "was drawn with race as a consideration, as is required by the [VRA]"); Trial

Tr. 57:24-58:6 (Blue) (Senator Blue, describing conversation with Senator Rucho in which Senator Rucho explained "his understanding and his belief that he had to take [districts of less than 50 percent BVAP] all beyond 50 percent because Strickland informed him that that's what he's supposed to do"); Defs.' Ex. 100 at 29:2-7 (July 22, 2011, House Committee Tr. Lewis) ("In order to foreclose the opportunity for any Section 2 lawsuits, and also for the simplicity of this conversation, we elected to draw the VRA district at 50 percent plus one . . . .").

b.

The public statements released by Senator Rucho and Representative Lewis also reflect their legislative goal, stating that, to comply with section 2 of the VRA, CD 1 must be established with a BVAP of 50 percent plus one person. See, e.g., Defs.' Ex. 5.11 at 2 (June 17, 2011 Joint Public Statement); Pls.' Ex. 67 at 3-4 (July 1, 2011 Joint Public Statement); Pls.' Ex. 68 at 3 (July 19, 2011 Joint Public Statement). Further, in its preclearance submission to the DOJ, North Carolina makes clear that it purposefully set out to add "a sufficient number of African-American voters in order to" draw CD 1 "at a majority African-American level." Pls.' Ex. 74 at 12; see also id. at 13 ("Under the enacted version of District 1, the . . . majority African-American status of the

District is corrected by drawing the District into Durham County.").

c.

In light of this singular legislative goal, Senator Rucho and Representative Lewis, unsurprisingly, instructed Dr. Hofeller to treat CD 1 as a "voting rights district," Trial Tr. 478:25-479:11 (Hofeller), meaning that he was to draw CD 1 to exceed 50-percent BVAP. Id. 480:21-481:1 ("My understanding was I was to draw that 1st District with a black voting-age population in excess of 50 percent because of the Strickland case."); see also id. 573:1-6 (Dr. Hofeller's instructions were to draw CD 1 at "50 percent [BVAP] plus one person"); id. 610:3-8 ("[T]he instruction was to draw District 1 with a black VAP level of 50 percent or more."); id. 615:15-21 ("I received an instruction that said . . . that District 1 was a voting rights district."); id. 572:6-17 ("[T]he 1st District was drawn to be a majority minority district."); id. at 615:20–21 ("[B]ecause of the Voting Rights Act, [CD 1] was to be drawn at 50 percent plus."); id. 620:5-11 ("Once again, my instructions from the chairman of the two committees was because of the Voting Rights Act and because of the Strickland decision that the district had to be drawn at above 50 percent."); id. 620:17-20 (agreeing that his "express instruction" was to "draw CD 1 as 50 percent black voting-age population plus one").

The Court is sensitive to the fact that CD 1 was underpopulated; it is not in dispute that CD 1 was underpopulated by 97,500 people and that there were efforts to create districts with approximately equal population. While equal population objectives "may often prove 'predominant' in the ordinary sense of that word," the question of whether race predominated over traditional raced-neutral redistricting principles is a "special" inquiry: "It is not about whether a legislature believes that the need for equal population takes ultimate priority," but rather whether the legislature placed race above nonracial considerations in determining which voters to allocate to certain districts in order to achieve an equal population goal. Alabama, 135 S. Ct. at 1270-71.

To accomplish equal population, Dr. Hofeller intentionally included high concentrations of African-American voters in CD 1 and excluded less heavily African-American areas from the district. During cross-examination, Dr. Hofeller, in response to why he moved into CD 1 a part of Durham County that was "the heavily African-American part" of the county, stated, "Well, it had to be." Trial Tr. 621:3-622:19 (Hofeller); see id. 620:21-621:15; id. 640:7-10; see also Bush, 517 U.S. at 962 ("These findings – that the State substantially neglected traditional districting criteria such as compactness, that it was committed from the outset to creating majority-minority districts, and

that it manipulated district lines to exploit unprecedentedly detailed racial data – together weigh in favor of the application of strict scrutiny." (emphasis added)). Dr. Hofeller, after all, had to "make sure that in the end it all adds up correctly" – that is, that the "net result" was a majority-BVAP district. See Trial Tr. 621:3-622:19 (Hofeller); see also id. 620:21-621:15; id. 640:7-10.

Dr. Hofeller certainly "ma[de] sure that in the end it add[ed] up correctly." Id. 621:7. The BVAP substantially increased from 47.76 percent, the BVAP in CD 1 when the benchmark plan was enacted, to 52.65 percent, the BVAP under the 2011 Congressional Plan – an increase of nearly five percentage points. Pls.' Ex. 69 at 111. And, while Dr. Hofeller had discretion, conceivably, to increase the BVAP to as high as he wanted, he had no discretion to go below 50-percent-plus-one-person BVAP. See Trial Tr. 621:13-622:19 (Hofeller). This is the very definition of a racial quota.

d.

The Supreme Court's skepticism of racial quotas is longstanding. See generally J.A. Croson Co., 488 U.S. at 469 (minority set-aside program for construction contracts); Bakke, 438 U.S. at 265 (higher education admissions). The Court, however, has yet to decide whether use of a racial quota in a legislative redistricting plan or, in particular, use of such a

quota exceeding 50 percent, establishes predominance as a matter of law under Miller.[2] See Bush, 517 U.S. at 998 (Kennedy, J., concurring) (reserving the question). But see League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 517 (2006) (Scalia, J., concurring in the judgment in part and dissenting in part) ("[W]hen a legislature intentionally creates a majority-minority district, race is necessarily its predominant motivation and strict scrutiny is therefore triggered.").[3] The Court recently has cautioned against "prioritizing mechanical racial targets above all other districting criteria" in redistricting. Alabama, 135 S. Ct. at 1267, 1272–73. Although the Court in Alabama did not decide whether the use of a racial quota exceeding 50 percent, standing alone, can establish predominance as a matter of law, the Court made clear that such "mechanical racial targets" are highly suspicious. Id. at 1267.

There is "strong, perhaps overwhelming" direct evidence in this case that the general assembly "prioritize[ed] [a] mechanical racial target[] above all other districting criteria" in redistricting. See id. at 1267, 1272–73. In order to

[2] This Court need not reach this question because there is substantial direct evidence that traditional districting criteria were considered, if at all, solely insofar as they did not interfere with this 50-percent-plus-one-person quota.

[3] Chief Justice Roberts, Justice Thomas, and Justice Alito appear to agree with Justice Scalia's statement. Id.

achieve the goal of drawing CD 1 as a majority-BVAP district, Dr. Hofeller not only subordinated traditional race-neutral principles but disregarded certain principles such as respect for political subdivisions and compactness. See Stephenson v. Bartlett, 562 S.E. 2d 377, 385-89 (N.C. 2002) (recognizing "the importance of counties as political subdivisions of the State of North Carolina" and "observ[ing] that the State Constitution's limitations upon redistricting and apportionment uphold what the United States Supreme Court has termed 'traditional districting principles' . . . such as 'compactness, contiguity, and respect for political subdivisions'" (quoting Shaw I, 509 U.S. at 647)).

Dr. Hofeller testified that he would split counties and precincts when necessary to achieve a 50-percent-plus-one-person BVAP in CD 1. Trial Tr. 629:17-629:24 (Hofeller); see also Pls.' Ex. 67 at 7 (July 1, 2011 Joint Public Statement) ("Most of our precinct divisions were prompted by the creation of Congressman Butterfield's majority black First Congressional District."). Dr. Hofeller further testified that he did not use mathematical measures of compactness in drawing CD 1. Pls.' Ex. 129 (Hofeller Dep. 44:19-45:12). Had he done so, Dr. Hofeller would have seen that the 2011 Congressional Redistricting Plan reduced the compactness of CD 1 significantly. Pls.' Ex. 17, Table 1; see also Trial Tr. 689:22-690:1-11 (Ansolabehere).

Apparently seeing the writing on the wall, the defendants make the passing argument that the legislature configured CD 1 to protect the incumbent and for partisan advantage.[4] Defs.' Findings of Fact, ECF No. 138 at 74. The defendants, however, proffer no evidence to support such a contention. Id. There is nothing in the record that remotely suggests CD 1 was a political gerrymander, or that CD 1 was drawn based on political data. Compare Trial Tr. 479:4-479:22 (Hofeller) ("Congressional District 1 was considered by the chairs to be a voting rights district . . . so it had to be drawn in accordance with the fact that it needed to be passed through . . . Section 2 and also Section 5."); with id. ("[M]y instructions from the two chairmen were to treat the 12th District as . . . a political [district]."). It cannot seriously be disputed that the predominant focus of virtually every statement made, instruction given, and action taken in connection with the redistricting effort was to draw CD 1 with a BVAP of 50 percent plus one person to comply with the VRA. See, e.g., Trial Tr. 479:4-479:22 (Hofeller).

[4] The defendants have suggested that CD 1's configuration was necessary to add voters to the district to equalize population. Defs.' Findings of Fact, ECF No. 138 at 74. As discussed earlier, Alabama squarely forecloses this argument as a matter of law, holding that "an equal population goal is not one factor among others to be weighed against the use of race to determine whether race predominates." 135 S. Ct. at 1270.

e.

Even if the Court assumes, arguendo, that this is a "mixed-motive suit" - in which a state's conceded goal of "produc[ing] majority-minority districts" is accompanied by "other goals, particularly incumbency protection" - race can be the predominant factor in the drawing of a district without the districting revisions being "purely race-based." Bush, 517 U.S. at 959 (emphasis omitted). Indeed, the Supreme Court has observed that "partisan politicking" may often play a role in a state's redistricting process, but the fact "[t]hat the legislature addressed these interests [need] not in any way refute the fact that race was the legislature's predominant consideration." Shaw II, 517 U.S. at 907; see also Alabama, 135 S. Ct. at 1271 (remanding to trial court to determine whether race predominated even though "preserving the core of the existing district, following county lines, and following highway lines played an important boundary-drawing role"); Bush, 517 U.S. at 962 (finding predominant racial purpose where state neglected traditional districting criteria such as compactness, committed itself to creating majority-minority districts, and manipulated district lines based on racial data); Clark v. Putnam Cnty., 293 F.3d 1261, 1270 (11th Cir. 2002) ("[The] fact that other considerations may have played a role in . . . redistricting does not mean that race did not predominate.").

As the Supreme Court has explained, traditional factors have been subordinated to race when "[r]ace was the criterion that, in the State's view, could not be compromised," and when traditional, race-neutral criteria were considered "only after the race-based decision had been made." Shaw II, 517 U.S. at 907. When a legislature has "relied on race in substantial disregard of customary and traditional districting practices," such traditional principles have been subordinated to race. Miller, 515 U.S. at 928 (O'Connor, J., concurring). Here, the record is unequivocally clear: the general assembly relied on race – the only criterion that could not be compromised – in substantial disregard of traditional districting principles. See, e.g., Trial Tr. 626:19-627:1 (Hofeller).

Moreover, because traditional districting criteria were considered, if at all, solely insofar as they did not interfere with this 50-percent-plus-one-person minimum floor, see Shaw II, 517 U.S. at 907, the quota operated as a filter through which all line-drawing decisions had to pass. Such a racial filter had a discriminatory effect on the configuration of CD 1 because it rendered all traditional criteria that otherwise would have been "race-neutral" tainted by and subordinated to race. Id. For these reasons, the Court holds that the plaintiffs have established that race predominated in the legislative drawing of

CD 1, and the Court will apply strict scrutiny in examining the constitutionality of CD 1.

2.

CD 12 presents a slightly more complex analysis than CD 1 as to whether race predominated in redistricting. Defendants contend that CD 12 is a purely political district and that race was not a factor even considered in redistricting. Nevertheless, direct evidence indicating racial predominance combined with the traditional redistricting factors' complete inability to explain the composition of the new district rebut this contention and leads the Court to conclude that race did indeed predominate in CD 12.

a.

While not as robust as in CD 1, there is nevertheless direct evidence supporting the conclusion that race was the predominant factor in drawing CD 12. Public statements released by Senator Rucho and Representative Lewis reflect this legislative goal. In their June 17, 2011, statement, for example, Senator Rucho and Representative Lewis provide,

> In creating new majority African American districts, we are obligated to follow . . . the decisions by the North Carolina Supreme Court and the United States Supreme Court . . . . Under the[se] decisions, districts created to comply with section 2 of the Voting Rights Act, must be created with a "Black Voting Age Population" ("BVAP"), as reported by the Census, at the level of at

> least 50% plus one. Thus, in constructing VRA majority black districts, the Chairs recommend that, where possible, these districts be drawn at a level equal to at least 50% plus one "BVAP."

Defs.' Ex. 5.11 at 2 (emphasis added). This statement describes not only the new CD 1, as explained above, but clearly refers to multiple districts that are now majority minority. This is consistent with the changes to the congressional map following redistricting: the number of majority-BVAP districts in the 2011 plan, compared to the benchmark 2001 plan, increased from zero to two, namely CD 1 and CD 12. Tr. 59:25-60:6 (Blue). The Court cannot conclude that this statement was the result of happenstance, a mere slip of the pen. Instead, this statement supports the contention that race predominated.

The public statement issued July 1, 2011, further supports this objective. There, Senator Rucho and Representative Lewis stated, "Because of the presence of Guilford County in the Twelfth District [which is covered by section 5 of the VRA], we have drawn our proposed Twelfth District at a black voting age level that is above the percentage of black voting age population found in the current Twelfth District." Pls.' Tr. Ex. 67 at 5 (emphasis added). As explained, section 5 was intended to prevent retrogression; to ensure that such result was achieved, any change was to be precleared so that it did "not have the purpose and [would] not have the effect of denying

or abridging the right to vote on account of race or color." Beer, 425 U.S. at 131-33. Despite the fact that nothing in section 5 required the creation of a majority-minority district in CD 12,[5] this statement indicates that it was the intention in redistricting to create such a district—it was drawn at a higher BVAP than the previous version. This statement does not simply "show[] that the legislature considered race, along with other partisan and geographic considerations," Cromartie II, 532 U.S. at 253; instead, reading the text in its ordinary meaning, the statement evinces a level of intentionality in the decisions regarding race. The Court will again decline to conclude that it was purely coincidental that the district was now majority BVAP after it was drawn.

Following the ratification of the revised redistricting plan, the North Carolina General Assembly and attorney general submitted the plan to the DOJ for preclearance under section 5. Pls.' Ex. 74. The submission explains,

> One of the concerns of the Redistricting Chairs was that in 1992, the Justice Department had objected to the 1991 Congressional Plan because of a failure by the state to create a second majority minority district combining the African-American community in Mecklenburg County with African-American and Native American voters residing in south central and southeastern North Carolina.

[5] See infra Part II.B.

Id. at 14. The submission further explains that Congressman Watt did not believe that African-American voters in Mecklenburg County were politically cohesive with Native American voters in southeastern North Carolina. Id. The redistricting committee accordingly drew the new CD 12 based on these considerations, id. at 15, including DOJ's 1992 concern that a new majority-minority district be created—a concern that the U.S. Supreme Court handily rejected in Miller, when it repudiated the maximization policy, see 515 U.S. at 921–24. The discussion of CD 12 in the DOJ submission concludes, "Thus, the 2011 version maintains, and in fact increases, the African-American community's ability to elect their candidate of choice in District 12." Pls.' Ex. 74 at 15. Given the express concerns of the redistricting committee, the Court will not ascribe the result to mere coincidence and instead finds that the submission supports race predominance in the creation of CD 12.

b.

In addition to the public statements issued, Congressman Watt testified at trial that Senator Rucho himself told Congressman Watt that the goal was to increase the BVAP in CD 12 to over 50 percent. Congressman Watt testified that Senator Rucho said "his leadership had told him that he had to ramp up the minority percentage in [the Twelfth] Congressional District up to over 50 percent to comply with the Voting Rights Law."

Trial Tr. 108:23-109:1 (Watt). Congressman Watt sensed that Senator Rucho seemed uncomfortable discussing the subject "because his leadership had told him that he was going to have to go out and justify that [redistricting goal] to the African-American community." Id. at 109:2-3; see also id. at 136:5-9 ("[H]e told me that his leadership had told him that they were going to ramp -- or he must ramp up these districts to over 50 percent African-American, both the 1st and the 12th, and that it was going to be his job to go and convince the African-American community that that made sense.").

Defendants argue that Senator Rucho never made such statements to Congressman Watt, citing Senator Rucho and Congresswoman Ruth Samuelson's testimony in the Dickson trial. Defs.' Proposed Findings of Fact, ECF No. 138, at 40 (citing Dickson Tr. 358, 364). Nevertheless, after submitting Congressman Watt to thorough and probing cross-examination about the specifics of the content and location of this conversation, the defendants declined to call Senator Rucho or Congresswoman Samuelson to testify, despite both being listed as defense witnesses and being present throughout the trial. The Court is thus somewhat crippled in its ability to assess either Senator Rucho or Congresswoman's Samuelson's credibility as to their claim that Senator Rucho never made such statements. Based on its ability to observe firsthand Congressman Watt and his

consistent recollection of the conversation between him and Senator Rucho, the Court credits his testimony and finds that Senator Rucho did indeed explain to Congressman Watt that the legislature's goal was to "ramp up" CD 12's BVAP.

And, make no mistake, the BVAP in CD 12 was ramped up: the BVAP increased from 43.77 percent to 50.66 percent. Pls.' Exs. 106-107. This correlates closely to the increase in CD 1. Such a consistent and whopping increase makes it clear that the general assembly's predominant intent regarding district 12 was also race.

c.

The shape of a district is also relevant to the inquiry, as it "may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." Miller, 515 U.S. at 913. CD 12 is a "serpentine district [that] has been dubbed the least geographically compact district in the Nation." Shaw II, 517 U.S. at 906.

Under the benchmark 2001 plan, CD 12 had a Reock score[6] of .116, the lowest in the state by far. Pls.' Ex. 17, Expert

[6] The Reock score is "a commonly used measure of compactness that is calculated as the ratio of the area of a district to the area of the smallest inscribing circle of a district." Pls.'

Report of Stephen Ansolabehere, at 22. Under the new plan, the Reock score of CD 12 decreased to .071, remaining the lowest in the state by a good margin. Id. A score of .071 is low by any measure. At trial, Dr. Ansolabehere testified that a score of .2 "is one of the thresholds that [is] commonly use[d] . . . one of the rules of thumb" to say that a district is noncompact. Trial Tr. 354:8-13.

Defendants do not disagree. At trial, Dr. Hofeller testified that in redrawing CD 12, he made the district even less compact. Id. 658:3-5; see also id. at 528:1 (Hofeller) ("I have no quarrel whatsoever with [Ansolabehere's] Reock scores."); id. at 656:20-21 (Hofeller) ("When I calculated the Reock scores, I got the same scores he did. So, obviously, we're in agreement."). And importantly, Dr. Hofeller did not "apply the mathematical measures of compactness to see how the districts were holding up" as he was drawing them. Pls.' Ex. 129 (Hofeller Dep. 45:3-7). Nevertheless, Dr. Hofeller opined that "District 12's compactness was in line with former versions of District 12 and in line with compactness as one would understand it in the context of North Carolina redistricting . . . ." Id. (Hofeller Dep. 45:20-23). While he did not recall

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Ex. 17, Expert Report of Stephen Ansolabehere, at 5. As "[t]he circle is the most compact geometric shape," the Reock score of a perfect square "would be the ratio of the area of a square to the area of its inscribing circle, or .637." Id. n.1.

any specific instructions as to compactness, he was generally "to make plans as compact as possible with the goals and policies of the entire plan," id. (Hofeller Dep. 44:25-45:2)—that is, as the defendants claim, to make the state more favorable to Republican interests, a contention to which the Court now turns.

d.

Defendants claim that politics, not race, was the driving factor behind the redistricting in CD 12. The goal, as the defendants portray it, was to make CD 12 an even more heavily Democratic district and make the surrounding counties better for Republican interests. This goal would not only enable Republican control but also insulate the plan from challenges such as the instant one. See Cromartie II, 532 U.S. at 258; Cromartie I, 526 U.S. at 551-52 ("Evidence that blacks constitute even a supermajority in one congressional district while amounting to less than a plurality in a neighboring district will not, by itself, suffice to prove that a jurisdiction was motivated by race in drawing its district lines when the evidence also shows a high correlation between race and party preference.").

Dr. Hofeller testified to this singular aim time and again at trial: "My instructions from the two chairman [Senator Rucho and Congressman Lewis] were to treat District 12 as a political

district and to draw it using political data and to draw it in such a manner that it favorably adjusted all of the surrounding districts." Trial Tr. 495:12-15 (Hofeller); see also, e.g., id. 479:20-22 ("So my instructions from the two chairmen were to treat the 12th District exactly as it has been treated by the Democrats in 1997 and 2001 as a political draw."); id. 496:10-13, 15-22 ("It really wasn't about -- totally about the 12th District. It was about what effect it was having on the surrounding districts. . . . [T]he 6th District needed to be made better for Republican interests by having more Democratic votes removed from it, whereas the 5th District had a little more strength in it and could take on some additional Democratic areas in -- into it in Forsyth County.").

Dr. Hofeller testified that he complied with Senator Rucho and Representative Lewis's instructions and did not look at race at all when creating the new districts. Using Maptitude,[7] Dr. Hofeller provided, "On the screen when I was drawing the map was the Obama/McCain race shaded in accordance with the two-party vote, which excluded the minor party candidates, and that was the sole thematic display or numeric display on the screen except for one other thing, and that was the population of the precinct because of one person, one vote," id. 526:3-8

[7] Software commonly used in redistricting. Trial Tr. 343:14 (Ansolabehere).

(Hofeller); see also id. at 496:4-5 ("[T]he thematic was based on the two-party presidential vote in 2008 Obama versus McCain."); id. at 662:1-17 (stating that only one set of election results can be on the screen at a time and that the only results Dr. Hofeller had on his screen were the 2008 Obama election results). Hofeller testified that it was only after the fact that he considered race and what impact it may or may not have had. Id. at 644:24–45:1 ("[W]hen we checked it, we found out that we did not have an issue in Guilford County with fracturing the black community.").

Despite the defendants' protestations, the Court is not persuaded that the redistricting was purely a politically driven affair. Parts of Dr. Hofeller's own testimony belie his assertions that he did not consider race until everything was said and done. At trial, he testified that he was "aware of the fact that Guilford County was a Section 5 county" and that he "was instructed [not] to use race in any form except perhaps with regard to Guilford County." Id. at 608:23–24, 644:12-13 (emphasis added). Dr. Hofeller also testified in his deposition that race was a more active consideration: "[I]n order to be cautious and draw a plan that would pass muster under the Voting Rights Act, it was decided to reunite the black community in Guilford County into the Twelfth." Pls.' Ex. 129 (Hofeller Dep. 75:13-16); see id. (Hofeller Dep. 37:7-16) ("[M]y understanding

of the issue was because Guilford was a Section 5 county and because there was a substantial African-American population in Guilford County, that if the portion of the African-American community was in the former District 13 . . . which was a strong Democratic district was not attached to another strong Democratic district [and] that it could endanger the plan and make a challenge to the plan.").[8]

Moreover, Senator Rucho and Representative Lewis themselves attempted to downplay the "claim[] that [they] have engaged in extreme political gerrymandering." Pls.' Ex. 68 at 1. In their joint statement published July 19, 2011, they assert that these claims are "overblown and inconsistent with the facts." Id. The press release continues to explain how Democrats maintain a majority advantage in three districts and a plurality advantage in the ten remaining districts. Id. at 2. This publication serves to discredit their assertions that their sole focus was to create a stronger field for Republicans statewide.

That politics not race was more of a post-hoc rationalization than an initial aim is also supported by a series of emails presented at trial. Written by counsel for

[8] Moreover, Dr. Hofeller's assertion that he, the "principal architect," considered no racial data when drawing the maps rings a somewhat hollow when he previously served as the staff director to the U.S. House Subcommittee on the Census leading up to the 2000 census. See Defs.' Ex. 129, Hofeller Resume, at 6.

Senator Rucho and Representative Lewis during the redistricting, the first email, dated June 30, 2011, was sent to Senator Rucho, Representative Lewis, Dr. Hofeller, and others involved in the redistricting effort, providing counsel's thoughts on a draft public statement "by Rucho and Lewis in support of proposed 2011 Congressional Plan." See Pls.' Ex. 13. "Here is my best efforts to reflect what I have been told about legislative intent for the congressional plans. Please send me your suggestions and I will circulate a revised version for final approval by [Senator Rucho] and [Representative Lewis] as soon as possible tomorrow morning," counsel wrote. Id. In response, Brent Woodcox, redistricting counsel for the general assembly, wrote, "I do think the registration advantage is the best aspect to focus on to emphasize competitiveness. It provides the best evidence of pure partisan comparison and serves in my estimation as a strong legal argument and easily comprehensible political talking point." Id. Unlike the email at issue in Cromartie II, which did not discuss "the point of the reference" to race, Cromartie II, 532 U.S. at 254, this language intimates that the politics rationale on which the defendants so heavily rely was more of an afterthought than a clear objective.

This conclusion is further supported circumstantially by the findings of the plaintiffs' experts, Drs. Peterson and Ansolabehere. At trial, Dr. Peterson opined that race "better

accord[ed] with" the boundary of CD 12 than did politics, based on his "segment analysis." Trial Tr. 211:21-24 (Peterson); see id. 220:16-18, 25. This analysis looked at three different measures of African-American racial representation inside and outside of the boundary of CD 12, and four different measures of representations of Democrats for a total of twelve segment analyses. Id. at 213:24-214:2, 219:5, 9-11. Four of the twelve studies supported the political hypothesis; two support both hypotheses equally; while six support the race hypothesis—"and in each of these six, the imbalance is more pronounced than in any of the four studies favoring the Political Hypothesis." Pls.' Ex. 15, Second Aff. of David W. Peterson Ph.D., at 6; see also Trial Tr. 219-20 (Peterson).

Using different methods of analysis, Dr. Ansolabehere similarly concluded that the new districts had the effect of sorting along racial lines and that the changes to CD 12 from the benchmark plan to the Rucho-Lewis plan "can be only explained by race and not party." Trial Tr. 314, 330:10-11.

Defendants argue that these findings are based on a theory the Supreme Court has rejected—that is, Dr. Ansolabehere used only party registration in his analysis, and the Supreme Court has found that election results are better predictors of future voting behavior. Defs.' Findings of Fact, ECF No. 128, at 79 (citing Cromartie I and II). But Dr. Ansolabehere stated that

he understood the Supreme Court's finding and explained why in this situation he believed that using registration data was nonetheless preferable: registration data was a good indicator of voting data and it "allowed [him] to get down to [a deeper] level of analysis." Trial Tr. 309:7-8, 349:2-3 (Ansolabehere). Moreover, Defendants themselves appear to have considered registration data at some point in the redistricting process: in their July 19, 2011, statement, Senator Rucho and Representative Lewis consider the numbers of registered Democrats, Republicans, and unaffiliated voters across all districts. Pls.' Ex. 68 at 2.

While both studies produce only circumstantial support for the conclusion that race predominated, the plaintiffs were not limited to direct evidence and were entitled to use "direct or circumstantial evidence, or a combination of both." Cromartie I, 526 U.S. at 547; see also id. at 546 ("The task of assessing a jurisdiction's motivation, however, is not a simple matter; on the contrary, it is an inherently complex endeavor, one requiring the trial court to perform a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" (quoting Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977))). The defendants' argument that Dr. Peterson's analysis is "of little to no use" to the Court, as he "did not and could not conclude" that race

predominated, Defs.' Proposed Findings of Fact, ECF No. 138, at 77 (emphasis omitted), is unavailing in this regard.

The defendants contend that, to show that race predominated, the plaintiffs must show "alternative ways" in which "the legislature could have achieved its legitimate political objectives" that were more consistent with traditional districting principles and that resulted in a greater racial balance. Cromartie II, 532 U.S. at 258; see Defs.' Proposed Findings of Fact, ECF No. 138, at 62. The Supreme Court, however, limited this requirement to "a case such as [the one at issue in Cromartie II]," id.—that is, a case in which "[t]he evidence taken together . . . [did] not show that racial considerations predominated," id. Here, the evidence makes abundantly clear that race, although generally highly correlative with politics, did indeed predominate in the redistricting process: "the legislature drew District 12's boundaries because of race rather than because of political behavior." Id. Redistricting is inherently a political process; there will always be tangential references to politics in any redistricting—that is, after all, the nature of the beast. Where, like here, at the outset district lines were admittedly drawn to reach a racial quota, even as political concerns may have been noted at the end of the process, no "alternative" plans are required.

e.

In light of all of the evidence, both direct and circumstantial, the Court finds that race predominated in the redistricting of CD 12. Traditional redistricting principles such as compactness and contiguity were subordinated to this goal. Moreover, the Court does not find credible the defendants' purported rationale that politics was the ultimate goal. To find that otherwise would create a "magic words" test that would put an end to these types of challenges. See Dickson v. Rucho, No. 201PA12, 2015 WL 9261836, at *53 (N.C. Dec. 18, 2015) (Beasley, J., dissenting) ("To justify this serpentine district, which follows the I–85 corridor between Mecklenburg and Guilford Counties, on partisan grounds allows political affiliation to serve as a proxy for race and effectively creates a "magic words" test for use in evaluating the lawfulness of this district.") To accept the defendants' explanation would "create[] an incentive for legislators to stay "on script" and avoid mentioning race on the record." Id. The Court's conclusion finds support in light of the defendants' stated goal with respect to CD 1 to increase the BVAP of the district to 50 percent plus one person, the result of which is consistent with the changes to CD 12.

B.

The fact that race predominated when the legislature devised CD 1 an CD 12, however, does not automatically render the districts constitutionally infirm. Rather, if race predominates, strict scrutiny applies, but the districting plan can still pass constitutional muster if narrowly tailored to serve a compelling governmental interest. Miller, 515 U.S. at 920. While such scrutiny is not necessarily "strict in theory, but fatal in fact," Johnson v. California, 543 U.S. 499, 514 (2005), the state must establish the "most exact connection between justification and classification." Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007).

The Court's strict-scrutiny analysis for CD 12 is straightforward. The defendants completely fail to provide this Court with a compelling state interest for the general assembly's use of race in drawing CD 12. Accordingly, because the defendants bear the burden of proof to show that CD 12 was narrowly tailored to further a compelling interest, and the defendants failed to carry that burden, the Court concludes that

CD 12 is an unconstitutional racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment.[9]

The defendants do, however, point to two compelling interests for CD 1: the interest in avoiding liability under the "results" test of VRA section 2(b) and the "nonretrogression" principle of VRA section 5. Although the Supreme Court has yet to decide whether VRA compliance is a compelling state interest, it has assumed as much for the purposes of subsequent analyses. See, e.g., Shaw II, 517 U.S. at 915 ("We assume, arguendo, for the purpose of resolving this suit, that compliance with § 2 [of the VRA] could be a compelling interest. . . ."); Bush, 517 U.S. at 977 ("[W]e assume without deciding that compliance with the results test [of the VRA] . . . can be a compelling state interest."). The Court, therefore, will assume, arguendo, that compliance with the VRA is a compelling state interest. Even with the benefit of that assumption, the 2011 Congressional Redistricting Plan does not survive strict scrutiny because the defendants did not have a "strong basis in evidence" for concluding that creation

[9] Even assuming, arguendo, that there was a compelling interest under the VRA, the Court finds, for principally the same reasons discussed in its analysis of CD 1, that the defendants did not have a "strong basis in evidence" for concluding that creation of a majority-minority district – CD 12 - was reasonably necessary to comply with the VRA. Alabama, 135 S. Ct. at 1274.

of a majority-minority district – CD 1 - was reasonably necessary to comply with the VRA. Alabama, 135 S. Ct. at 1274. Accordingly, the Court holds that CD 1 was not narrowly tailored to achieve compliance with the VRA, and therefore fails strict scrutiny.

1.

a.

"The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." Thornburg v. Gingles, 478 U.S. 30, 47 (1986). Section 2 of the VRA forbids state and local voting procedures that "result[ ] in a denial or abridgement of the right of any citizen of the United States to vote on account of race[.]" 52 U.S.C. § 10301(a). "Vote dilution claims involve challenges to methods of electing representatives - like redistricting or at-large districts - as having the effect of diminishing minorities' voting strength." League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 239 (4th Cir. 2014); see also Shaw II, 517 U.S. at 914 ("Our precedent establishes that a plaintiff may allege a § 2 violation . . . if the manipulation of districting lines fragments politically cohesive minority voters among several districts or packs them into one district or a

small number of districts, and thereby dilutes the voting strength of members of the minority population.").

The question of voting discrimination vel non, including vote dilution, is determined by the totality of the circumstances. Gingles, 478 U.S. at 43-46. Under Gingles, however, the Court does not reach the totality-of-the-circumstances test unless the challenging party is able to establish three preconditions. Id. at 50-51; see also Bartlett v. Strickland, 556 U.S. 1, 21 (2009) ("[T]he Gingles requirements are preconditions, consistent with the text and purpose of § 2, to help courts determine which claims could meet the totality-of-the-circumstances standard for a § 2 violation."); Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ., 4 F.3d 1103, 1135 (3d Cir. 1993) ("[I]t will be only the very unusual case in which the plaintiffs can establish the existence of the three Gingles factors but still have failed to establish a violation of § 2 under the totality of circumstances.").

Unlike cases such as Gingles, in which minority groups use section 2 as a sword to challenge districting legislation, here the Court is considering the general assembly's use of section 2 as a shield. The general assembly, therefore, must have a "strong basis in evidence" for finding that the threshold conditions for section 2 liability are present: "first, 'that

[the minority group] is sufficiently large and geographically compact to constitute a majority in a single member district'; second, 'that [the minority group] is politically cohesive'; and third, 'that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.'" Growe v. Emison, 507 U.S. 25, 40 (1993) (quoting Gingles, 478 U.S. at 50–51). A failure to establish any one of the Gingles factors is fatal to the defendants' claim. Gingles, 478 U.S. at 50–51; see also Overton v. City of Austin, 871 F.2d 529, 538 (5th Cir. 1989). For the reasons stated below, the Court finds that the defendants fail to show the third Gingles factor, that the legislature had a "strong basis in evidence" of racially polarized voting in CD 1 significant enough that the white majority routinely votes as a bloc to defeat the minority candidate of choice.

b.

"[R]acial bloc voting . . . never can be assumed, but specifically must be proved." Shaw I, 509 U.S. at 653. Generalized assumptions about the "prevalence of racial bloc voting" do not qualify as a "strong basis in evidence." Bush, 517 U.S. at 994 (O'Connor, J., concurring). Moreover, the analysis must be specific to CD 1. See Alabama, 135 S. Ct. at 1265. Thus, evidence that racially polarized voting occurs in pockets of other congressional districts in North Carolina does

not suffice. The rationale behind this principle is clear: simply because "a legislature has strong basis in evidence for concluding that a § 2 violation exists [somewhere] in the State" does not permit it to "draw a majority-minority district anywhere [in the state]." Shaw II, 517 U.S. at 916–17 ("[The argument] that the State may draw the district anywhere derives from a misconception of the vote-dilution claim. To accept that the district may be placed anywhere implies that the claim, and hence the coordinate right to an undiluted vote (to cast a ballot equal among voters), belongs to the minority as a group and not to its individual members. It does not.").

Strikingly, there is no evidence that the general assembly conducted or considered any sort of a particularized polarized-voting analysis during the 2011 redistricting process for CD 1. Dr. Hofeller testified that he did not do a polarized voting analysis for CD 1 at the time he prepared the map. Trial Tr. 639:21-25 (Hofeller). Further, there is no evidence "'that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.'" Growe, 507 U.S. at 40 (quoting Gingles, 478 U.S. at 51). In fact, based on the defendants' own admission, "African American voters have been able to elect their candidates of choice in the First District since the district was established in 1992." Defs.' Memo. of Law in Opp. to Pls.' Mot. for Sum. J. (June 23, 2014),

ECF No. 76, at 2, 8. This admission, in the Court's view, ends the inquiry. In the interest of completeness, the Court will comment on an argument the defendants' counsel made at trial and in their posttrial brief.

The defendants contend that there is some evidence that the general assembly considered "two expert reports" that "found the existence of racially polarized voting in" North Carolina. Defs.' Findings of Fact, ECF No. 138 at 93. These generalized reports, standing alone, do not constitute a "strong basis in evidence" that the white majority votes as a bloc to defeat the minority's preferred candidate of choice in CD 1. Moreover, it is not enough for the general assembly to simply nod to the desired conclusion by claiming racially polarized voting showed that African-Americans needed the ability to elect candidates of their choice without asserting the existence of a necessary premise: that the white majority was actually voting as a bloc to defeat the minority's preferred candidates. See, e.g., Rodriguez v. Pataki, 308 F. Supp. 2d 346, 438-39 (S.D.N.Y. 2004) (rejecting an "analysis [that] examines racially polarized voting without addressing the specifics of the third Gingles factor, which requires white majority bloc voting that usually defeats the [minority]-preferred candidate" and noting that "[e]ven if there were racially polarized voting, the report does not speak—one way or the other—to the effects of the polarized

voting"), aff'd, 543 U.S. 997 (2004); Moon v. Meadows, 952 F. Supp. 1141, 1149-50 (E.D. Va. 1997) (state could not justify redistricting plan under section 2 where "white bloc voting does not prevent blacks from electing their candidates of choice" as "black candidates . . . were elected despite the absence of a black majority district"). "Unless [this] point[] [is] established, there neither has been a wrong nor can be a remedy." Growe, 507 U.S. at 40.

Contrary to the defendants' unfounded contentions, the composition and election results under earlier versions of CD 1 vividly demonstrate that, though not previously a majority-BVAP district, the white majority did not vote as a bloc to defeat African-Americans' candidate of choice. In fact, precisely the opposite occurred in these two districts: significant crossover voting by white voters supported the African-American candidate. See Strickland, 556 U.S. at 24 ("In areas with substantial crossover voting it is unlikely that the plaintiffs would be able to establish the third Gingles precondition – bloc voting by majority voters" and thus "[i]n those areas majority-minority districts would not be required in the first place").[10] The

[10] The defendants' reliance on Strickland is misplaced. A plurality in Strickland held that section 2 did not require states to draw election-district lines to allow a racial minority that would make up less than 50 percent of the voting age population in the new district to join with crossover voters

suggestion that the VRA would somehow require racial balkanization where, as here, citizens have not voted as racial blocs, where crossover voting has naturally occurred, and where a majority-minority district is created in blatant disregard for fundamental redistricting principles is absurd and stands the VRA on its head. As the defendants fail to meet the third Gingles factor, the Court concludes that section 2 did not require the defendants to create a majority-minority district in CD 1.

2.

Turning to consider the defendants' section 5 defense, the Supreme Court has repeatedly struck down redistricting plans that were not narrowly tailored to the goal of avoiding "'a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" Bush, 517 U.S. at 983 (quoting Miller, 515 U.S. at 926); see also Shaw II, 517 U.S. at 915–18 (concluding that districts were not

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to elect the minority's candidate of choice. 556 U.S. at 25 (plurality). That is, section 2 does not compel the creation of crossover districts wherever possible. This is a far cry from saying that states must create majority-BVAP districts wherever possible - in fact, the case stands for the opposite proposition: "Majority-minority districts are only required if all three Gingles factors are met and if § 2 applies based on a totality of the circumstances." Id. at 24 (emphasis added). As extensively discussed, the general assembly did not have a "strong basis in evidence" to conclude that the threshold conditions for section 2 liability were present.

narrowly tailored to comply with the VRA). Indeed, "the [VRA] and our case law make clear that a reapportionment plan that satisfies § 5 still may be enjoined as unconstitutional," as section 5 does not "give covered jurisdictions carte blanche to engage in racial gerrymandering in the name of nonretrogression." Shaw I, 509 U.S. at 654–55. "A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." Id. Applying that principle below, it is clear that CD 1 is not narrowly tailored to the avoidance of section 5 liability.

a.

In Alabama, the Supreme Court made clear that section 5 "does not require a covered jurisdiction to maintain a particular numerical minority percentage." 135 S. Ct. at 1272. Rather, section 5 requires legislatures to ask the following question: "To what extent must we preserve existing minority percentages in order to maintain the minority's present ability to elect its candidate of choice?" Id. at 1274. There is no evidence that the general assembly asked this question. Instead, the general assembly directed Dr. Hofeller to create CD 1 as a majority-BVAP district; there was no consideration of why the general assembly should create such a district.

While the Court "do[es] not insist that a legislature guess precisely what percentage reduction a court or the Justice Department might eventually find to be retrogressive," the legislature must have a "strong basis in evidence" for its use of racial classifications. Id. at 1273–74. Specifically, the Supreme Court noted that it would be inappropriate for a legislature to "rel[y] heavily upon a mechanically numerical view as to what counts as forbidden retrogression." Id. at 1273. That is precisely what occurred here: the general assembly established a mechanical BVAP target for CD 1 of 50 percent plus one person, as opposed to conducting a more sophisticated analysis of racial voting patterns in CD 1 to determine to what extent it must preserve existing minority percentages to maintain the minority's present ability to elect its candidate of choice. See id. at 1274.

b.

Although CD 1 has been an extraordinarily safe district for African-American preferred candidates of choice for over twenty years, the 2011 Congressional Redistricting Plan increased CD 1's BVAP from 47.76 percent to 52.65 percent. Despite the fact that African-Americans did not make up a majority of the voting-age population in CD 1, African-American preferred candidates easily and repeatedly won reelection under earlier congressional plans, including the 2001 benchmark plan. Representative Eva

Clayton prevailed in CD 1 in 1998 and 2000, for instance, winning 62 percent and 66 percent of the vote, respectively. Pls.' Ex. 112. Indeed, African-American preferred candidates prevailed with remarkable consistency, winning at least 59 percent of the vote under each of the five general elections under the benchmark version of CD 1. Id. In 2010, Congressman Butterfield won 59 percent of the vote, while in 2012 – under the redistricting plan at issue here – he won by an even larger margin, receiving 75 percent of the vote. Id.

In this respect, the legislature's decision to increase the BVAP of CD 1 is similar to the redistricting plan invalidated by the Supreme Court in Bush. See 517 U.S. at 983. In Bush, a plurality of the Supreme Court held that increasing the BVAP from 35.1 percent to 50.9 percent was not narrowly tailored because the state's interest in avoiding retrogression in a district where African–American voters had successfully elected their representatives of choice for two decades did not justify "substantial augmentation" of the BVAP. Id. Such an augmentation could not be narrowly tailored to the goal of complying with section 5 because there was "no basis for concluding that the increase to a 50.9% African–American population . . . was necessary to ensure nonretrogression." Id. "Nonretrogression is not a license for the State to do whatever it deems necessary to ensure continued electoral success; it

merely mandates that the minority's opportunity to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions." Id. While the BVAP increase here is smaller than that in Bush, the principle is the same. Defendants show no basis for concluding that an augmentation of CD 1's BVAP to 52.65 percent was narrowly tailored when the district had been a safe district for African-American preferred candidates of choice for over two decades.

In sum, the legislators had no basis - let alone a strong basis - to believe that an inflexible racial floor of 50 percent plus one person was necessary in CD 1. This quota was used to assign voters to CD 1 based on the color of their skin. "Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin." Shaw I, 509 U.S. at 657.

For these reasons, the Court finds that CD 1 cannot survive strict scrutiny. Accordingly, the Court is compelled to hold that CD 1 violates the Equal Protection Clause of the Fourteenth Amendment.

III.

Having found that the 2011 Congressional Redistricting Plan violates the Equal Protection Clause, the Court now addresses

the appropriate remedy. Plaintiffs have requested that we "determine and order a valid plan for new congressional districts." Compl., ECF No. 1 at 19. Nevertheless, the Court is conscious of the powerful concerns for comity involved in interfering with the state's legislative responsibilities. As the Supreme Court has repeatedly recognized, "redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." Wise, 437 U.S. at 539. As such, it is "appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise . . . its own plan." Id. at 540. Under North Carolina law, courts must give legislatures at least two weeks to remedy defects identified in a redistricting plan. See N.C. Gen. Stat. § 120-2.4.

The Court also recognizes that individuals in CD 1 and CD 12 whose constitutional rights have been injured by improper racial gerrymandering have suffered significant harm. "Those citizens 'are entitled to vote as soon as possible for their representatives under a constitutional apportionment plan.'" Page, 2015 WL 3604029, at *18 (quoting Cosner v. Dalton, 522 F. Supp. 350, 364 (E.D. Va. 1981)). Therefore, the Court will require that new districts be drawn within two weeks of the

entry of this opinion to remedy the unconstitutional districts. In accordance with well-established precedent that a state should have the first opportunity to create a constitutional redistricting plan, see, e.g., Wise, 437 U.S. at 539-40, the Court allows the legislature until February 19, 2016, to enact a remedial districting plan.

IV.

Because the plaintiffs have shown that race predominated in CD 1 and CD 12 of North Carolina's 2011 Congressional Redistricting Plan, and because the defendants have failed to establish that this race-based redistricting satisfies strict scrutiny, the Court finds that the 2011 Congressional Redistricting Plan is unconstitutional, and will require the North Carolina General Assembly to draw a new congressional district plan. A final judgment accompanies this opinion.

**SO ORDERED.**

2/5/16

Roger L. Gregory
United States Circuit Judge

COGBURN, District Judge, concurring:

I fully concur with Judge Gregory's majority opinion. Since the issue before the court was created by gerrymandering, and based on the evidence received at trial, I write only to express my concerns about how unfettered gerrymandering is negatively impacting our republican form of government.

Voters should choose their representatives. Mitchell N. Berman, Managing Gerrymandering, 83 Tex. L. Rev. 781 (2005). This is the "core principle of republican government." Id. To that end, the operative clause of Article I, § 4 of the United States Constitution, the Elections Clause, gives to the states the power of determining how congressional representatives are chosen:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of chusing Senators.

U.S. Const. art. I, § 4, cl. 1. As redistricting through political gerrymander rather than reliance on natural boundaries and communities has become the tool of choice for state legislatures in drawing congressional boundaries, the fundamental principle of the voters choosing their representative has nearly vanished. Instead, representatives choose their voters.

Indeed, we heard compelling testimony from Congressman G. K. Butterfield (CD 1) and former Congressman Mel Watt (CD 12) that the configuration of CD 1 and CD 12 made it nearly impossible for them to travel to all the communities comprising their districts. Not only has political gerrymandering interfered with voters selecting their representatives, it has interfered with the representatives meeting with those voters. In at least one state, Arizona, legislative overuse of political gerrymandering in redistricting has caused the people to take congressional redistricting away from the legislature and place such power in an independent congressional redistricting commission, an action that recently passed constitutional muster. See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, ___ U.S. ___, 135 S. Ct. 2652, 192 L. Ed. 2d 704 (2015).

Redistricting through political gerrymandering is nothing new. Starting in the year the Constitution was ratified, 1788, state legislatures have used the authority under the Elections Clause to redraw congressional boundaries in a manner that favored the majority party. For example, in 1788, Patrick Henry persuaded the Virginia legislature to remake its Fifth Congressional District to force Henry's political foe James Madison to run against James Monroe. Madison won in spite of

this, but the game playing had begun. In 1812, Governor Elbridge Gerry signed a bill redistricting Massachusetts to benefit his party with one district so contorted that it was said to resemble a salamander, forever giving such type of redistricting the name gerrymander. Thus, for more than 200 years, gerrymandering has been the default in congressional redistricting.

Elections should be decided through a contest of issues, not skillful mapmaking. Today, modern computer mapping allows for gerrymandering on steroids as political mapmakers can easily identify individual registrations on a house-by-house basis, mapping their way to victory. As was seen in Arizona State Legislature, supra, however, gerrymandering may well have an expiration date as the Supreme Court has found that the term "legislature" in the Elections Clause is broad enough to include independent congressional redistricting commissions. 135 S. Ct. at 2673.

To be certain, gerrymandering is not employed by just one of the major political parties. Historically, the North Carolina Legislature has been dominated by Democrats who wielded the gerrymander exceptionally well. Indeed, CD 12 runs its circuitous route from Charlotte to Greensboro and beyond -- thanks in great part to a state legislature then controlled by

Democrats. It is a district so contorted and contrived that the United States Courthouse in Charlotte, where this concurrence was written, is five blocks within its boundary, and the United States Courthouse in Greensboro, where the trial was held, is five blocks outside the same district, despite being more than 90 miles apart and located in separate federal judicial districts. How a voter can know who their representative is or how a representative can meet with those pocketed voters is beyond comprehension.

While redistricting to protect the party that controls the state legislature is constitutionally permitted and lawful, it is in disharmony with fundamental values upon which this country was founded. "[T]he true principle of a republic is, that the people should choose whom they please to govern them." Powell v. McCormack, 395 U.S. 486, 540–41, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969) (quoting Alexander Hamilton, 2 Debates on the Federal Constitution 257 (J. Elliot ed. 1876)). Beyond taking offense at the affront to democracy caused by gerrymandering, courts will not, however, interfere with gerrymandering that is philosophically rather than legally wrong. As has been seen in Arizona, it is left to the people of the state to decide whether they wish to select their representatives or have their representatives select them.

OSTEEN, JR., District Judge, concurring in part and dissenting in part:

I concur with the majority in finding that Plaintiffs have met their burden of proving that race predominated in the drawing of North Carolina's First Congressional District ("CD 1") and that Defendants have failed to show that the legislature's use of race in the drawing of that district was narrowly tailored to serve a compelling governmental interest. I also concur with the majority with respect to North Carolina's Twelfth Congressional District ("CD 12") in that, if race was a predominant factor, Defendants did not meet their burden to prove that CD 12 was narrowly tailored to serve a compelling state interest. However, I respectfully dissent from the majority in that I find that Plaintiffs have not met their burden of proving that race predominated in the drawing of CD 12. As a result, I conclude that the district is subject to and passes the rational basis test and is constitutional. I differ with the well-reasoned opinion of my colleagues only as to the degree to which race was a factor in the drawing of CD 12.

## I. CONGRESSIONAL DISTRICT I

With respect to my concurring opinion, I only add that I do not find, as Plaintiffs have contended, that this legislative effort constitutes a "flagrant" violation of the Fourteenth Amendment. The majority opinion makes clear that bad faith is

not necessary in order to find a violation. (Maj. Op. at 4.) Although Plaintiffs argued that the actions of the legislature stand in "flagrant" violation of Fourteenth Amendment principles (See Pls.' Trial Br. (Doc. 109) at 7.), Plaintiffs also conceded at trial they did not seek to prove any ill-intent. (Trial Tr. at 16:20-25.) Nevertheless, I wish to emphasize that the evidence does not suggest a flagrant violation. Instead, the legislature's redistricting efforts reflect the difficult exercise in judgment necessary to comply with section 5 of the Voting Rights Act ("VRA") in 2010, prior to the Supreme Court's decision in Shelby County v. Holder, ____ U.S. ____, 133 S. Ct. 2612 (2013). Shelby struck down as unconstitutional the formula created under section 4 of the VRA and, resultingly, removed those covered jurisdictions from section 5. Id.

In Shelby, the Supreme Court recognized the success of the VRA. Id. at 2626 ("The [Voting Rights] Act has proved immensely successful at redressing racial discrimination and integrating the voting process."). However, the Court also described its concern with an outdated section 4 formula and the restrictions of section 5:

> Yet the Act has not eased the restrictions in § 5 or narrowed the scope of the coverage formula in § 4(b) along the way. Those extraordinary and unprecedented features were reauthorized — as if nothing had changed. In fact, the Act's unusual remedies have grown even stronger. When Congress reauthorized the

> Act in 2006, it did so for another 25 years on top of the previous 40 — a far cry from the initial five-year period. Congress also expanded the prohibitions in § 5. We had previously interpreted § 5 to prohibit only those redistricting plans that would have the purpose or effect of worsening the position of minority groups. In 2006, Congress amended § 5 to prohibit laws that could have favored such groups but did not do so because of a discriminatory purpose, even though we had stated that such broadening of § 5 coverage would "exacerbate the substantial federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about § 5's constitutionality." In addition, Congress expanded § 5 to prohibit any voting law "that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States," on account of race, color, or language minority status, "to elect their preferred candidates of choice." In light of those two amendments, the bar that covered jurisdictions must clear has been raised even as the conditions justifying that requirement have dramatically improved.

Shelby Cnty., 133 S. Ct. at 2626-27 (internal citations omitted).

Although no court has held that compliance with section 5 is a compelling state interest, the Supreme Court has generally assumed without deciding that is the case. See Bush v. Vera, 517 U.S. 952, 977 (1996); Shaw v. Hunt, 517 U.S. 899, 915 (1996) ("Shaw II"). Compliance with section 5 was, in my opinion, at least a substantial concern to the North Carolina legislature in 2011, a concern made difficult by the fact that, at least by 2013 and likely by 2010, see Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193 (2009), coverage was "based on decades-

old data and eradicated practices" yet had expanded prohibitions. Shelby, 133 S. Ct. at 2617.

As a result, while I agree with my colleagues that CD 1, as drawn, violates the Fourteenth Amendment, I do not find that violation to be flagrant, as argued by Plaintiffs. (See Pls.' Trial Brief (Doc. 109) at 7.) Instead, I simply find the violation as to CD 1 to be the result of an ultimately failed attempt at the very difficult task of achieving constitutionally compliant redistricting while at the same time complying with section 5 and receiving preclearance from the Department of Justice. In drawing legislative districts, the Department of Justice and other legislatures have historically made similar mistakes in their attempts to apply the VRA. See generally, e.g., Ala. Legislative Black Caucus v. Alabama, ____ U.S. ____, 135 S. Ct. 1257 (2015); Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993) ("Shaw I"); Page v. Va. State Bd. of Elections, Civil Action No. 3:13cv678, 2015 WL 3604029 (E.D. Va. June 5, 2015). Further, the difficult exercise of judgment involved in the legislature's efforts to draw these districts is reflected in the differing conclusions reached by this court and the North Carolina Supreme Court. See generally Dickson v. Rucho, No. 201PA12-3, 2015 WL 9261836 (N.C. Dec. 18, 2015). Contrary to Plaintiffs' suggestion, I find nothing

flagrant or nefarious as to the legislature's efforts here, even though I agree that CD 1 was improperly drawn using race as a predominant factor without sufficient justification.

## II. CONGRESSIONAL DISTRICT 12

Turning to my dissent regarding whether Plaintiffs have carried their burden of showing that race was the dominant and controlling consideration in drawing CD 12, a brief history of redistricting efforts in the state will provide helpful context to the current situation. In 1991, North Carolina enacted a Congressional Districting Plan with a single majority-black district — the 1991 version of CD 1. The 1991 version of CD 1 was a majority single-race-black district in both total population and voting age population ("VAP"). The State filed for preclearance from the Department of Justice for the 1991 plan under section 5 of the VRA, and there was no objection to the 1991 version of CD 1 specifically. See Shaw II, 517 U.S. at 902, 912; (Defs.' Ex. 126, Tab 1, "Section 5 Submission for 1991 Congressional Redistricting Plan".) There was, however, a preclearance objection to the 1991 Congressional Plan overall because of the State's failure to create a second majority-minority district running from the southcentral to southeastern region of the State. Shaw II, 517 U.S. at 902, 912.

As a result of this objection, the General Assembly drew a new Congressional Plan in 1992. The 1992 plan included a different version of CD 1 that was majority minority but did not include any portion of Durham County. The General Assembly also created a second majority-minority district (CD 12) that stretched from Mecklenburg County to Forsyth and Guilford Counties and then all the way into Durham County. The Attorney General did not interpose an objection to the 1992 Congressional Plan.

Under the 1992 Congressional Plan, CD 12 was drawn with a single-race total black population of 56.63% and a single-race black VAP ("BVAP") of 53.34%. (Defs.' Ex. 126, Tab 2, "1992 Congressional Base Plan #10"; Defs.' Ex. 4.1A; Defs.' Ex. 4.) Under a mathematical test for measuring the compactness of districts called the "Reock" test (also known as the dispersion test), the 1992 CD 12 had a compactness score of 0.05. (Trial Tr. at 351:24-352:16.)

The 1992 districts were subsequently challenged under the VRA, and in Shaw I, the Supreme Court found that the 1992 versions of CD 1 and 12 were racial gerrymanders in violation of the Fourteenth Amendment. 509 U.S. 630 (1993). The case was remanded for further proceedings. Id. On appeal again after remand, in Shaw II, the Supreme Court again found that the 1992

version of CD 12 constituted a racial gerrymander. 517 U.S. at 906.

Following the decision in Shaw II, in 1997 the North Carolina General Assembly enacted new versions of CD 1 and CD 12. The 1997 version of CD 12 was drawn with a black total population of 46.67% and a black VAP of 43.36%. (Defs.' Ex. 126, Tab 3, "97 House/Senate Plan A".)

The plan was yet again challenged in court, and in Cromartie v. Hunt, 34 F. Supp. 2d 1029 (E.D.N.C. 1998) (three-judge court), rev'd, 526 U.S. 541 (1999) ("Cromartie I"), a three-judge panel held on summary judgment that the 1997 version of CD 12 also constituted a racial gerrymander in violation of the Fourteenth Amendment, although the decision was reversed by the Supreme Court on appeal.

On remand, the district court again found the 1997 version of CD 12 to be an unconstitutional racial gerrymander in violation of the Fourteenth Amendment, Cromartie v. Hunt, 133 F. Supp. 2d 407 (E.D.N.C. 2000) (three-judge court), a ruling that the State again appealed, Hunt v. Cromartie, 529 U.S. 1014 (2000). The Supreme Court reversed the district court, finding that politics, not race, was the predominant motive for the

district. Easley v. Cromartie, 532 U.S. 234 (2001) ("Cromartie II").[1]

In 2001, the North Carolina General Assembly enacted the Congress Zero Deviation Plan for redistricting based upon the 2000 Census ("2001 Congressional Plan"). (Defs.' Ex. 126, Tab 5, "Congress Zero Deviation 2000 Census"; Defs.' Ex. 4.4A; Defs.' Ex. 4.4.)

Under the 2000 Census, the 2001 version of CD 12 was drawn with a single-race black total population of 45.02% and an any-part black total population of 45.75%. (Pls.' Ex. 80.) Single-race black VAP was 42.31% and any-part black VAP was 42.81%. (Id.)

In every election held in CD 12 between 1992 and 2010, without exception, the African-American candidate of choice, Congressman Mel Watt, prevailed with no less than 55.95% of the vote, regardless of whether the black VAP in CD 12 exceeded 50%, and regardless of any other characteristic of any specific

[1] They reversed the trial court despite evidence such as: (1) the legislature's statement in its 1997 DOJ preclearance submission that it drew the 1997 CD 12 with a high enough African-American population to "provide a fair opportunity for incumbent Congressman Watt to win election"; (2) the admission at trial that the General Assembly had considered race in drawing CD 12; and (3) the district court's rejection of evidence that the high level of black population in CD 12 was sheer happenstance.

election, demonstrating clearly that African-Americans did not require a majority of the VAP to elect their chosen candidate. The relevant election results are set forth in the following table:

**Twelfth Congressional District Election Results and Black Voting**

| Year | BVAP | Percent of Vote | Candidate |
|---|---|---|---|
| **1992** | 53.34% | 70.37% | Mel Watt |
| **1994** | 53.34% | 65.80% | Mel Watt |
| **1996** | 53.34% | 71.48% | Mel Watt |
| **1998** | 32.56% | 55.95% | Mel Watt |
| **2000** | 43.36% | 65.00% | Mel Watt |
| **2002** | 42.31% | 65.34% | Mel Watt |
| **2004** | 42.31% | 66.82% | Mel Watt |
| **2006** | 42.31% | 67.00% | Mel Watt |
| **2008** | 42.31% | 71.55% | Mel Watt |
| **2010** | 42.31% | 63.88% | Mel Watt |

**A. The 2011 Redistricting Process**

Following the 2010 Census, Senator Robert Rucho and Representative David Lewis were appointed chairs of the Senate and House Redistricting Committees, respectively, on January 27, 2011, and February 15, 2011. (See Parties' Joint Factual Stipulation (Doc. 125) ¶ 3.)

Jointly, Senator Rucho and Representative Lewis were responsible for developing a proposed congressional map based upon the 2010 Census. (Id.) Under the 2010 Census, the 2001

version of CD 12 was overpopulated by 2,847 people, or 0.39%. (Defs.' Ex. 4.5 at 3.)

They hired Dr. Thomas Hofeller to be the architect of the 2011 plan, and he began working under the direction of Senator Rucho and Representative Lewis in December 2010.[2] Senator Rucho and Representative Lewis were the sole source of instructions for Dr. Hofeller regarding the criteria for the design and construction of the 2011 congressional maps.

Throughout June and July of 2011, Senator Rucho and Representative Lewis released a series of public statements describing, among other things, the criteria that they had used to draw the proposed congressional plan. As Senator Rucho explained at the July 21, 2011 joint meeting of the Senate and House Redistricting Committees, those public statements "clearly delineated" the "entire criteria" that were established and "what areas [they] were looking at that were going to be in compliance with what the Justice Department expected [them] to do as part of [their] submission." (Pls.' Ex. 136 at 29:2-9 (7/21/11 Joint Committee Meeting transcript).)

[2] Dr. Hofeller had served as Redistricting Coordinator for the Republican National Committee for the 1990, 2000, and 2010 redistricting cycles. (See Trial Tr. at 577:1-23 (Testimony of Dr. Thomas Hofeller).)

### B. The Factors Used to Draw CD 12[3]

On July 1, 2011, Senator Rucho and Representative Lewis made public the first version of their proposed congressional plan, Rucho-Lewis Congress 1, along with a statement explaining the rationale for the map. Specifically with regard to CD 12, Senator Rucho and Representative Lewis noted that although the 2001 benchmark version of CD 12 was "not a Section 2 majority black district," there "is one county in the Twelfth District that is covered by Section 5 of the Voting Rights Act (Guilford)." (Pls.' Ex. 67 at 5.) Therefore, "[b]ecause of the presence of Guilford County in CD 12, we have drawn our proposed Twelfth District at a black voting age level that is above the percentage of black voting age population found in the current Twelfth District." (Id.) Although the proposed map went through several iterations, CD 12 remained largely unchanged from Rucho-Lewis 1 throughout the redistricting process. (Compare Defs.' Ex. 4.7 (Rucho Lewis 1), with Defs.' Ex. 4.11 (Rucho Lewis 3).)

[3] CD 12 contains pieces of six counties: Mecklenburg, Cabarrus, Rowan, Davidson, Forsyth, and Guilford. A line of precincts running through Cabarrus, Rowan, and Davidson counties connects population centers in Mecklenburg (Charlotte), Forsyth (Winston Salem), and Guilford (Greensboro). CD 12 splits thirteen cities and towns. (Pls.' Ex. 17 ¶ 17.)

It is clear from both this statement and the record that race was, at the very least, one consideration in how CD 12 was drawn. These instructions apparently came, at least in part, from concerns about obtaining preclearance from the DOJ. (See Trial Tr. at 645:4-20 (Dr. Hofeller: "[M]y understanding of the issue was because Guilford was a Section 5 county and because there was a substantial African-American population in Guilford County, . . . that it could endanger the plan" unless Guilford County was moved into CD 12.); see also Pls.' Ex. 129 (Hofeller Dep. 75:13-16) ("So in order to be cautious and draw a plan that would pass muster under the VRA it was decided to reunite the black community in Guilford County into the 12th.").) Testimony was elicited at trial that Dr. Hofeller was in fact told to consider placing the African-American population of Guilford County into CD 12 because Guilford County was a covered jurisdiction under section 5 of the VRA. (See Trial Tr. at 608:19-24 (Dr. Hofeller "was instructed [not] to use race in any form [in drawing CD 12] except perhaps with regard to Guilford County" (emphasis added)).)[4]

[4] I share the majority's concern over the fact that much of the communication regarding the redistricting instructions given to Dr. Hofeller were provided orally rather than in writing or by email. (Maj. Op. at 11.) As a result, the process used to draw CD 12 is not particularly transparent in several critical areas.

That race was at least present as a concern in the General Assembly's mind is further confirmed when looking to the General Assembly's 2011 preclearance submission to the Department of Justice. There it explained that it drew "District 12 as an African-American and very strong Democratic district that has continually elected a Democratic African American since 1992," and also noted that CD 12 had been drawn to protect "African-American voters in Guilford and Forsyth." (Pls.' Ex. 74 at 15 (emphasis added).)

The DOJ preclearance submission also explained that the General Assembly had drawn CD 12 in such a way to mitigate concerns over the fact that "in 1992 the Justice Department had objected to the 1991 Congressional Plan because of a failure by the State to create a second majority-minority district combining the African-American community in Mecklenburg County with African American and Native American voters residing in south central and southeastern North Carolina." (Id. at 14.) The preclearance submission further stated that "the 2011 version [of CD 12] maintains and in fact increases the African American community's ability to elect their candidate of choice." (Id. at 15.) I note that I interpret this statement slightly differently from the majority. (See Maj. Op. at 36). I conclude that this statement describes one result of how the

new district was drawn, rather than the weight a particular factor was given in how to draw the district in the first place. Essentially, I would find this statement is an explanation by legislature that because they chose to add Guilford County back into CD 12, the district ended up with an increased ability to elect African- American candidates, rather than the legislature explaining that they chose to add Guilford County back into CD 12 because of the results that addition created.

However, while it is clear that race was a concern, it is also clear that race was not the only concern with CD 12. In their July 19, 2011 Joint Statement, Senator Rucho and Representative Lewis stated that the version of CD 12 in Rucho-Lewis Congress 2, the second map that they put forward, was based upon the 1997 and 2001 versions of that district and that the 2011 version was again drawn by the legislative leaders based upon political considerations. According to them, CD 12 was drawn to maintain that district as a "very strong Democratic district . . . based upon whole precincts that voted heavily for President Obama in the 2008 General Election." (Defs.' Ex. 72 at 40-44 "19 July Joint Statement" (noting that the co-chairs also "[understood] that districts adjoining the Twelfth District [would] be more competitive for Republican candidates"); Trial

Tr. at 491:2-493:13; Defs.' Ex. 26.1 at 21-22, Maps 2 and 3.)[5] The co-chairs stated that by making CD 12 a very strong Democratic district, adjoining districts would be more competitive for Republicans. (Id.)

Further, Dr. Hofeller testified that he constructed the 2011 version of CD 12 based upon whole Voting Tabulation Districts ("VTDs") in which President Obama received the highest vote totals during the 2008 Presidential Election, indicating that political lean was a primary factor. (Trial Tr. at 495:20-496:5, 662:12-17.) The only information on the computer screen used by Dr. Hofeller in selecting VTDs for inclusion in the CD 12 was the percentage by which President Obama won or lost a particular VTD. (Trial Tr. at 495:20-496:5, 662:12-17.) Dr. Hofeller has also stated that there was no racial data on the screen when he constructed the district, providing some support for the conclusion that racial concerns did not predominate over politics. (Trial Tr. at 526:3-11.)

Although Plaintiffs argue that the primary difference between the 2001 and 2011 versions of CD 12 is the increase in

[5] The use of election results from the 2008 presidential election was the subject of some dispute at trial. However, regardless of the merits of either position, I find nothing to suggest those election results should not be properly considered in political issues or political leanings as described hereinafter.

black VAP, allegedly due to the predominance of race as a factor, Defendants contend that by increasing the number of Democratic voters in the 2011 version of CD 12 located in Mecklenburg and Guilford Counties, the 2011 Congressional Plan created districts that were more competitive for Republican candidates as compared to the 2001 versions of these districts, including Congressional Districts 6, 8, 9, and 13, a stated goal of the redistricting chairs. (See Trial Tr. at 491:2-495:19; Defs.' Ex. 26.1 at 22-23, maps 2 and 3; Defs.' Ex. 126, Tab 6, Tab 12.)[6] Defendants argue that the principal differences between the 2001 and 2011 versions of CD 12 are that the 2011 version: (1) adds more strong Democratic voters located in Mecklenburg and Guilford Counties; (2) adds more Democratic voters to the 2011 version of CD 5 because it was able to accept additional Democrats while remaining a strong Republican district; (3) removes Democratic voters from the 2011 CD 6 in Guilford County and places them in the 2001 CD 12; and (4) removes Republican voters who had formerly been assigned to the 2001 CD 12 from the corridor counties of Cabarrus, Rowan,

[6] Plaintiffs did not dispute persuasively that CD 5, CD 6, CD 8, and CD 13 became more competitive for Republican candidates. Dr. Stephen Ansolabehere's analysis was limited to movement into and out of CD 12, without regard to the effects in surrounding districts.

Davidson and other locations. (Trial Tr. at 491:6-493:13, 495:9-19, 561:5-562:14; Defs.' Ex. 31 at 220, 247-49.)

Defendants also contend, or at least intimate, that the final black VAP of the 2011 version of CD 12 resulted in part from the high percentage of African-Americans who vote strongly Democrat. They note that, both in previous versions of CD 12 and in alternative proposals that were before the General Assembly in 2010, African-Americans constituted a super-majority of registered Democrats in the district, citing the 2001 Twelfth Congressional Plan (71.44%); the Southern Coalition for Social Justice Twelfth Congressional Plan (71.53%); and the "Fair and Legal" Twelfth Congressional Plan (69.14%). (Defs.' Ex. 2 ¶ 27; Defs.' Ex. 2.64; Defs.' Ex. 2.66; Defs.' Ex. 2.67.)[7] Defendants are apparently making the same argument the State has made several times previously: the percentage of African-Americans added to the district is coincidental and the result of moving Democrats who happen to be African-American into the district.

**C. Racial Concerns did not Predominate**

Equal protection principles deriving from the Fourteenth Amendment govern a state's drawing of electoral districts.

[7] In comparison, the statewide percentage of Democrats who are African-American is 41.38%. (Defs.' Ex. 62 at 83-84, F.F. No. 173.)

Miller, 515 U.S. at 905. The use of race in drawing a district is a concern because "[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters." Shaw I, 509 U.S. at 657. To prove a claim of racial gerrymandering, Plaintiffs first have the burden to prove that race was the predominant factor in the drawing of the allegedly gerrymandered districts. Id. at 643; see also Page, 2015 WL 3604029, at *6. Predominance can be shown by proving that a district "is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles," (i.e., proving predominance circumstantially), Shaw I, 509 U.S. at 642, or by proving that "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines. . . . [and] that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations" (i.e., proving predominance directly), Miller, 515 U.S. at 913, 916.

Plaintiffs can meet this burden through direct evidence of legislative purpose, showing that race was the predominant factor in the decision on how to draw a district. Such evidence

can include statements by legislative officials involved in drawing the redistricting plan and preclearance submissions submitted by the state to the Department of Justice. Shaw I, 509 U.S. at 645; Clark v. Putnam Cty., 293 F.3d 1261, 1267-68, 1272 (11th Cir. 2002); Page, 2015 WL 3604029, at *9. Plaintiffs can also meet this burden through circumstantial evidence such as the district's shape, compactness, or demographic statistics. See, e.g., Shaw II, 517 U.S. at 905. Circumstantial evidence can show that traditional redistricting criteria were subordinated and that a challenged district is unexplainable on grounds other than race. Plaintiffs do not need to show that race was the only factor that the legislature considered, just that it predominated over other factors. Clark, 293 F.3d at 1270 ("The fact that other considerations may have played a role in . . . redistricting does not mean that race did not predominate.").

If race is established as the predominant motive for CD 12, then the district will be subject to strict scrutiny, necessitating an inquiry into whether the use of race to draw the district was narrowly tailored to meet a compelling state interest. See Bush, 517 U.S. at 976. The Supreme Court has assumed without deciding that compliance with sections 2 and 5 of the VRA is a compelling state interest. Shaw II, 517 U.S. at

915; Bush, 517 U.S. at 977. Defendants in this case contend that, if the court finds that either district was drawn predominantly based on race, their maps are narrowly tailored to avoid liability under these sections in satisfaction of strict scrutiny.

Just as with CD 1, the first hurdle Plaintiffs must overcome is to show that racial concerns predominated over traditional criteria in the drawing of CD 12. As stated above, it is in this finding that I dissent from the majority.

Most importantly, as compared to CD 1, I find that Plaintiffs have put forth less, and weaker, direct evidence showing that race was the primary motivating factor in the creation of CD 12, and none that shows that it predominated over other factors.[8] Plaintiffs first point to several public statements that they argue demonstrate the State's intent to

[8] In their Proposed Findings of Fact and Conclusions of Law, Plaintiffs point to the increase in black VAP from 42.31% to 50.66% as direct evidence of racial intent. (See Pls.' Proposed Findings of Fact and Conclusions of Law, supp. pt. 3 (Doc. 137-2) ¶ 103.) I disagree, and would find that on these facts, the black VAP increase is a result, not an explanation, and thus is at most circumstantial evidence of a legislature's intent in drawing the district. While CD 12 certainly experienced a large increase in black VAP, it is still Plaintiffs' burden (especially given the high correlation between the Democratic vote and the African-American vote) to prove that race, not politics, predominated and that the increase is not coincidental and subordinate to traditional political considerations.

draw CD 12 at a majority black level and argue that this stated goal demonstrates that race predominated. However, I find that the statements issued by the redistricting chairs show only a "consciousness" of race, rather than a predominance, and by themselves do not show an improperly predominant racial motive. See Bush, 517 U.S. at 958.

First, Plaintiffs cite to the July 1, 2011 press release where the redistricting chairs explained that:

> Because of the presence of Guilford County [a section 5 jurisdiction under the VRA] in the Twelfth District, we have drawn our proposed Twelfth District at a black voting age level that is above the percentage of black voting age population found in the current Twelfth District. We believe this measure will ensure preclearance of the plan.

(Pls.' Ex. 67 at 5.) This statement seems similar to, and perhaps slightly more persuasive than, the statements that the Supreme Court found unpersuasive in Cromartie II. In Cromartie II, the Supreme Court considered a statement by the mapmaker that he had "moved [the] Greensboro Black Community into the 12th, and now need to take about 60,000 out of the 12th." See 532 U.S. at 254. The Court in that case noted that while the statement did reference race, it did not discuss the political consequences or motivation for placing the population of Guilford County in the 12th district. Id. Here, while the statement by the co-chairs does reference political consequences

(ensuring preclearance), it still does not rise to the level of evidence that the Supreme Court has found significant in other redistricting cases. See Bush, 517 U.S. at 959 (O'Connor, J., principal opinion) (Texas conceded that one of its goals was to create a majority-minority district); Shaw II, 517 U.S. at 906 (recounting testimony that creating a majority-minority district was the "principal reason" for the 1992 version of District 12); Miller, 515 U.S. at 907 (State set out to create majority-minority district). While this statement, like the statement in Cromartie II, provides some support for Plaintiffs' contention, it does not rise to the level of showing predominance. It does not indicate that other concerns were subordinated to this goal, merely, that it was a factor.[9]

The co-chairs' later statement that this result would help to ensure preclearance under the VRA similarly falls short of explaining that such actions were taken in order to ensure preclearance, or that a majority BVAP (or even an increase in BVAP) was a non-negotiable requirement.[10] In fact, the co-chairs

[9] The statement by Dr. Hofeller, set out below, furthers this finding in that he testified that Guilford County was placed in CD 12 as a result of an effort to re-create the 1997 CD 12.

[10] The State's DOJ submission is in a similar stance, in that while it explains that the BVAP of CD 12 increased, it does

explicitly state in the same release that CD 12 was created with "the intention of making it a very strong Democratic district" and that that it was not a majority black district that was required by section two (insinuating that it became so as a result of the addition of Guilford County, rather than Guilford being added in order to achieve that goal), belying that there was any mechanical racial threshold of the sort that would lend itself to a finding of predominance. (Pls.' Ex. 67 at 5.)

Further, regarding the placement of Guilford County into CD 12, Dr. Hofeller testified as follows:

> My instructions in drawing the 12th District were to draw it as it were a political district, as a whole. We were aware of the fact that Guilford County was a Section 5 county. We were also aware of the fact that the black community in Greensboro had been fractured by the Democrats in the 2001 map to add Democratic strengths to two Democratic districts. During the process, it was my understanding that we had had a comment made that we might have a liability for fracturing the African-American community in Guilford County between a Democratic district and a Republican district. When the plan was drawn, I knew where the old 97th, 12th District had been drawn, and I used that as a guide because one of the things we needed to do politically was to reconstruct generally the 97th district; and when we checked it, we found out that we did not have an issue in Guilford County with fracturing the black community.

(Trial Tr. at 644:11-645:1 (emphasis added).)

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not show that the State had any improper threshold or racial goal. (See Pls.' Ex. 74 at 15.)

Dr. Hofeller's testimony shows that, while the map drawers were aware that Guilford County was a VRA county and that there were possibly some VRA concerns surrounding it, the choice to place Guilford County in CD 12 was at least in part also based on a desire to reconstruct the 1997 version of CD 12 for political reasons and doing so also happened to eliminate any possible fracturing complaint. This is furthered by Dr. Hofeller's deposition testimony, in which he explained that while the redistricting chairs were certainly concerned about a fracturing complaint over Guilford County, "[his] instruction was not to increase [the black] population. [His] instruction was to try and take care of [the VRA] problem, but the primary instructions and overriding instruction in District 12 was to accomplish the political goal." (Pls.' Ex. 129 at 71:19-24.)[11]

[11] It should be noted that Guilford County had been placed in District 12 before but had been moved into the newly-created District 13 during the 2001 redistricting process. This occurred as a result of North Carolina gaining a thirteenth congressional seat and needing to create an entirely new district. As Dr. Hofeller testified, in 2011, CD 13, which in 2001 had been strongly Democratic, was being moved for political reasons, and thus the districts surrounding District 13 would necessarily be different than they had been in 2001. As the legislature wished for these districts to be strongly Republican, moving Guilford County, which is strongly Democratic, into the already Democratic CD 12 only made sense. (Pls.' Ex. 129 at 71:6-18.) Given that as a result of CD 13's move, Guilford County was going to end up being moved anyways, the decision to re-create the 1997 version of CD 12 as a way to avoid a VRA claim does not persuade me that the choice to move

Compare these statements with those made about CD 1, where Dr. Hofeller repeatedly testified that he was told "to draw that 1st District with a black voting-age population in excess of 50 percent because of the Strickland case." (See Trial Tr. at 480:21-481:1.) He also testified that this goal for CD 1 could not be compromised, explaining that while he had some leeway in how high he could take the BVAP of the district, he could not go lower than 50% plus 1. (Trial Tr. at 621:13-622:19.) These are the sorts of statements that show predominance, rather than consciousness, of race and are clearly distinguishable from those made about CD 12, where there is only evidence that race was one among several factors.

Based upon this direct evidence, I conclude that race was a factor in how CD 12 was drawn, although not a predominant one. A comparison of the legislative statements as to CD 12 with those made with respect to CD 1 is illustrative, given that the legislature clearly stated its intention to create a majority-minority district within CD 1.

Compared with such open expressions of intent, the statements made with respect to CD 12 seem to be more a description of the resulting characteristics of CD 12 rather

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Guilford County to CD 12 was in and of itself predominantly racial.

than evidence about the weight that the legislature gave various factors used to draw CD 12. For example, as the majority points out, in the public statement issued July 1, 2011, Senator Rucho and Representative Lewis stated, "[b]ecause of the presence of Guilford County in the Twelfth District [which is covered by section 5 of the VRA], we have drawn our proposed Twelfth District at a black voting age level that is above the percentage of black voting age population found in the current Twelfth District." (Pls.' Tr. Ex. 67 at 5; (Maj. Op. at 35).) While the majority reaches an imminently reasonable conclusion that this is evidence of an intention to create a majority-minority district, I, on the other hand, conclude that the statement reflects a recognition of the fact the black VAP voting age was higher in the new district because of the inclusion of a section 5 county, not necessarily that race was the predominant factor or that Guilford County was included in order to bring about that result. It seems clear to me that some recognition of the character of the completed CD 12 to the Department of Justice addressing the preclearance issue was necessary. However, that recognition does not necessarily reflect predominant, as opposed to merely significant, factors in drawing the district.

Plaintiffs also point to circumstantial evidence, including the shape of the district, the low compactness scores, and testimony from two experts who contend that race, and not politics, better explains the choices made in drawing CD 12.

As regards the district's shape and compactness, as Defendants point out, the redistricting co-chairs were not working from a blank slate when they drew the 2011 version of CD 12. CD 12 has been subject to litigation almost every single time it has been redrawn since 1991, and, although Plaintiffs are correct that it has a bizarre shape and low compactness scores, it has always had a bizarre shape and low compactness scores. As such, pointing out that these traditional criteria were not observed by the co-chairs in drawing CD 12 is less persuasive evidence of racial predominance than it might otherwise be, given that to create a district with a more natural shape and compactness score, the surrounding districts (and likely the entire map) would have to be redrawn. It is hard to conclude that a district that is as non-compact as CD 12 was in 2010 was revised with some specific motivation when it retains a similar shape as before and becomes slightly less compact than the geographic oddity it already was.

As for Plaintiffs' expert testimony, I first note that Dr. David Peterson's testimony neither establishes that race was

the predominant motive for the drawing of CD 12 nor does it even purport to. As Dr. Peterson himself stated, his opinion was simply that race "better accounts for" the boundaries of CD 12 than does politics, but he did not have an opinion on the legislature's actual motivation, on whether political concerns predominated over other criteria, or if the planners had non-negotiable racial goals. (Trial Tr. at 233:17-234:3.)

Further, when controlling for the results of the 2008 presidential election, the only data used by the map's architect in drawing CD 12, Dr. Peterson's analysis actually finds that politics is a better explanation for CD 12 than race. (Defs.' Ex. 122 at 113-15.) As such, even crediting his analysis, Dr. Peterson's report and testimony are of little use in examining the intent behind CD 12 in that they, much like Plaintiffs' direct evidence, show at most that race may have been one among several concerns and that politics was an equal, if not more significant, factor.

As for Dr. Ansolabehere, his testimony may provide some insight into the demographics that resulted from how CD 12 was drawn. However, even assuming that his testimony is to be

credited in its entirety, I do not find that it establishes that race predominated as a factor in how CD 12 was drawn.[12]

First, as Defendants point out, Dr. Ansolabehere relied on voter registration data, rather than actual election results, in his analysis. (Trial Tr. at 307:4-308:9.) Even without assuming the Supreme Court's admonishment about the use of registration data as less correlative of voting behavior than actual election results remains accurate, Dr. Ansolabehere's analysis suffers from a separate flaw. Dr. Ansolabehere's analysis says that race better explains the way CD 12 was drawn than does political party registration. However, this is a criterion that the state did not actually use when drawing the map. Dr. Hofeller testified that when drawing the districts, he examined only the 2008 presidential election results when deciding which precincts to move in and out of a district.[13] (See

[12] I note that Dr. Ansolabehere testified that he performed the same analysis in Bethune-Hill v. Virginia State Board of Elections, Civil Action No. 3:14CV852, 2015 WL 6440332 (E.D. Va. Oct. 22, 2015), and that the three-judge panel in that case rejected the use of his analysis. Id. at *41-42.

[13] While Plaintiffs criticize this use of an admittedly unique electoral situation, the fact that the 2008 presidential election was the only election used to draw CD 12 does not, in and of itself, establish that politics were merely a pretext for racial gerrymandering. In my opinion, the evidence does not necessarily establish the correlation between the specific racial identity of voters and voting results; instead, a number of different factors may have affected the voting results.

Trial Tr. at 495:20-502:14.) This fact is critical to the usefulness of Dr. Ansolabehere's analysis because, absent some further analysis stating that race better explains the boundaries of CD 12 than the election results from the 2008 presidential election, his testimony simply does not address the criteria that Dr. Hofeller actually used. Plaintiffs contend that the legislature's explanation of political motivation is not persuasive because, if it were the actual motivation, Dr. Ansolabehere's analysis would show that the boundaries were better explained by voter registration than by race. However, because Defendants have explained that they based their political goals on the results of the 2008 presidential election, rather than voter registration, Dr. Ansolabehere's analysis is simply not enough to prove a predominant racial motive.

This is particularly true when the other evidence that might confirm Dr. Ansolabehere's analysis is less than clear,

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(Compare, e.g., Trial Tr. at 325:7-9 ("There's huge academic literature on this topic that goes into different patterns of voting and how Obama changed it . . .") with Trial Tr. at 403:17-18 ("you can't tell at the individual level how individuals of different races voted"); id. at 503:7-10 ("we're looking for districts that will hold their political characteristics, to the extent that any districts hold them, over a decade rather than a one or two year cycle.").) As a result, I do not find the use of the 2008 presidential election to be pretext for racial gerrymandering.

and in fact provides some hesitation as to the analysis, rather than corroborating it. Specifically, Dr. Ansolabehere applied his envelope analysis to CD 12, a district that was originally drawn in order to create a majority-minority district, has retained a substantial minority population in the twenty years since its creation, and was extremely non-compact when originally drawn. Therefore, absent some consideration of other factors - the competitiveness of surrounding, contiguous districts and the compactness of those districts - it is difficult to place great weight on Dr. Ansolabehere's analysis. In other words, if a district starts out as an extremely gerrymandered district, drawn with race as a predominant factor, I do not find compelling a subsequent study concluding that race, and not politics, may be a better predictor of the likelihood of voter inclusion in a modification of the original district. See Bethune-Hill, 2015 WL 6440332 at *42 ("If a district is intentionally designed as a performing district for Section 5 purposes, there should be little surprise that the movement of VTDs into or out of the district is correlated - even to a statistically significant degree - with the racial composition of the population.").

As the Supreme Court has explained, Plaintiffs' burden of proving that racial considerations were "dominant and

controlling" is a demanding one. See Miller, 515 U.S. at 913, 929. In my opinion, Plaintiffs have not met that burden here as to CD 12. Plaintiffs' direct evidence shows only that race was a factor in how CD 12 was drawn, not the "dominant and controlling" factor. As for their circumstantial evidence, Plaintiffs must show that the district is unexplainable on grounds other than race. Id. at 905. Here, Defendants explain CD 12 based on the use of political data that Plaintiffs' experts do not even specifically address. As the Court in Cromartie II explained, in cases where racial identification correlates highly with political affiliation, Plaintiffs attacking a district must show "at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles [and] that those districting alternatives would have brought about significantly greater racial balance." Cromartie II, 532 U.S. at 234, 258. Plaintiffs have not done so here. In essentially alleging that political goals were pretext, they have put forth no alternative plan that would have made CD 12 a strong Democratic district while simultaneously strengthening the surrounding Republican districts and not increasing the black VAP. As such, they have not proven that politics was mere pretext in this case.

Finally, mindful of the fact that the burden is on Plaintiffs to prove "that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations" (i.e., proving predominance directly), Miller, 515 U.S. at 913, 916, it is not clear whether compliance with section 5, although it necessarily involved consideration of race, should be considered a "neutral" redistricting principle or a purely racial consideration. Although I reach the same decision regardless, I conclude that actions taken in compliance with section 5 and preclearance should not be a factor that elevates race to a "predominant factor" when other traditional districting principles exist, as here, supporting a finding otherwise. As a result, the fact that certain voters in Guilford County were included in CD 12 in an effort to comply with section 5, avoid retrogression, and receive preclearance does not persuade me that race was a predominant factor in light of the other facts of this case.

As Plaintiffs have failed to show that race was the predominant factor in the drawing of CD 12, it is subject to a rational basis test rather than strict scrutiny. Because I find that CD 12 passes the rational basis test, I would uphold that district as constitutional.

# EXHIBIT 2

**UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

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|---|---|---|
| DAVID HARRIS, CHRISTINE BOWSER, and SAMUEL LOVE,<br><br>Plaintiffs,<br><br>v.<br><br>PATRICK MCCRORY, in his capacity as Governor of North Carolina, NORTH CAROLINA STATE BOARD OF ELECTIONS, and JOSHUA HOWARD, in his capacity as Chairman of the North Carolina State Board of Elections,<br><br>Defendants. | ) | Case No. 1:13-cv-949 |

**FINAL JUDGMENT**

For the reasons given in the accompanying memorandum opinion, this Court finds that Congressional Districts 1 and 12 as drawn in the 2011 Congressional Redistricting Plan are unconstitutional. Therefore, North Carolina is ordered to redraw a new congressional district plan by February 19, 2016. North Carolina is further enjoined from conducting any elections for the office of U.S. Representative until a new redistricting plan is in place.

Pursuant to Federal Rule of Civil Procedure 58, the Court enters final judgment in favor of Plaintiffs.

It is so ordered.

2/5/16

Roger L. Gregory
United States Circuit Judge

# EXHIBIT 3

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**
**NO. 1:13-CV-00949**

| | | |
|---|---|---|
| DAVID HARRIS; CHRISTINE BOWSER; and SAMUEL LOVE,<br><br>Plaintiffs,<br><br>v.<br><br>PATRICK MCCRORY, in his capacity as Governor of North Carolina; NORTH CAROLINA STATE BOARD OF ELECTIONS; and JOSHUA HOWARD, in his capacity as Chairman of the North Carolina State Board of Elections,<br><br>Defendants. | ) | **DECLARATION OF KIM WESTBROOK STRACH** |

**NOW COMES** Kim Westbrook Strach, 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 Executive Director of the North Carolina State Board of Elections ("State Board"), a position I have held since May 2013. My statutory duties as Executive Director of the State Board include staffing, administration, and execution of the State Board's decisions and orders. I am also the Chief Elections Officer for the State of North Carolina under the National Voter Registration Act of 1993 ("NVRA"). As Executive Director of the State Board, I am responsible for the administration of elections in the State of North Carolina. The State Board has supervisory responsibilities for the 100 county

boards of elections, and as Executive Director of the State Board, I provide guidance to the directors of the county boards.

3. As the Executive Director of the State Board and Chief Elections Officer for the State of North Carolina, I am familiar with the procedures for registration and voting in this State. I am also responsible for implementing the laws passed by the North Carolina General Assembly, supervising the conduct of orderly, fair, and open elections, and ensuring that elections in North Carolina are administered in such a way as to preserve the integrity of and protect the public confidence in the democratic process.

## I. OVERVIEW OF 2016 ELECTION CYCLE

4. The 2016 Elections Cycle requires the commitment of significant administrative resources by state- and county-level elections officials, who must coordinate primary (if required) and general election contests for the following:

| | |
|---|---|
| Federal:<br>(15 races) | President and Vice-President of the United States<br>United States Senate (1 seat)<br>United States Congress (13 seats) |
| Statewide:<br>(184 races) | Governor of North Carolina<br>Council of State (9 seats)<br>State Senate (50 seats)<br>State House of Representatives (120 seats)<br>Supreme Court (1 seat)<br>Court of Appeals (3 seats) |
| County/Local:<br>(~770 races) | Superior Court (13 seats)<br>District Court of North Carolina (152 seats)<br>District Attorney (5 Seats)<br>County/local officials (approx. 600 seats) |

5. The 2016 Election Cycle involves 1,942 candidates, including 46 congressional candidates, distributed as follows:

| Congressional District | Candidates |
|---|---|
| 1 | C. L. Cooke; G. K. Butterfield |
| 2 | Adam Coker; Frank Roche; Jim Duncan; Kay Daly; Renee Ellmers; Tim D'Annunzio |
| 3 | David Hurst; Phil Law; Taylor Griffin; Walter B. Jones |
| 4 | David Price; Sue Googe; Teiji Kimball |
| 5 | Josh Brannon; Pattie Curran; Virginia Foxx |
| 6 | B. Mark Walker; Bruce Davis; Chris Hardin; Jim Roberts; Pete Glidewell |
| 7 | David Rouzer; J. Wesley Casteen; Mark D. Otto; |
| 8 | Richard Hudson; Thomas Mills |
| 9 | Christian Cano; George Rouco; Robert Pittenger |
| 10 | Albert L. Wiley, Jr.; Andy Millard; Jeffrey D. Gregory; Patrick McHenry |
| 11 | Mark Meadows; Rick Bryson; Tom Hill |
| 12 | Alma Adams; Gardenia Henley; Juan Antonio Marin, Jr.; Leon Threatt; Ryan Duffie |
| 13 | George Holding; John P. McNeil; and Ron Sanyal. |

6. On September 30, 2015, the North Carolina General Assembly designated March 15, 2016 as the date for the 2016 primary election, including the presidential preference primary (herein, collectively, the "March Primary"). *See* S.L. 2015-258.

7. On October 1, 2015, my office issued Numbered Memo 2015-05 outlining recent legislative changes and providing guidance for counties regarding necessary preparations in advance of the March Primary and providing a link to the Master Election Calendar. True and accurate copies of Numbered Memo 2015-05 and an updated Master Election Calendar are attached as Exhibit A and Exhibit B, respectively.

8. Numbered Memo 2015-05 also included technical instructions regarding the Statewide Elections Information Management System (herein "SEIMS"); the candidate

filing period and procedures; ballot coding, proofing, and printing; education and training of election officials; and deadlines for one-stop early voting implementation plans.

9. On December 6, 2015, county elections administrators were required to publish notice of the March Primary pursuant to the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"). That notice included information indicating that congressional primaries would be held on March 15, 2016.

10. Candidate filing for the 2016 Elections Cycle ran from noon on December 1, 2015, to noon on December 21, 2015.

11. At the close of the filing period on December 21, 2015, the State Board Office established the order by which candidates' names will appear on the ballot during the March Primary.

12. State officials, county-level elections administrators, and certified voting system vendors began work in earnest on December 21, 2015 to load all candidates and contests into SEIMS, produce and proof ballots, and code ballot tabulation and touch-screen voting machines for use throughout the state's 100 counties.

13. North Carolina allows voters to cast their ballots in-person at early voting locations beginning March 3, 2016. During the 2012 May Primary—the most recent comparable election cycle—more than 492,000 voters made use of this early voting opportunity. Utilization may be higher in March due to the open presidential race and a perceived opportunity to influence the presidential nomination process earlier in the cycle.

## II. BALLOTS PRINTED, ISSUED, AND VOTED

14. On January 25, 2016, county elections officials began issuing mail-in absentee ballots to civilian voters and those qualifying under UOCAVA, which requires transmittal of ballots no later than 45 days before an election for a federal office. North Carolina law requires mail-in absentee ballots to be transmitted no later than 50 days prior to a primary election.

15. SEIMS data indicates that county elections officials have mailed 8,621 ballots to voters, 903 of whom are located outside the United States. Of those absentee ballots mailed, 7,845 include a congressional contest on the voter's ballot. County boards of elections have already received back 431 voted ballots. Figures are current as of February 7, 2016.

16. Upon information and belief, more than 3.7 million ballots have already been printed for the March Primary.

17. Every county board of elections must issue unique ballots printed to display the appropriate combination of statewide and district contests for each political party and electoral districts within the county. These "ballot styles" ensure every voter obtains a single ballot that includes all contests in which that voter is eligible to participate. Because North Carolina recognizes three political parties (Democrat, Libertarian, and Republican), there are potentially three primary contests for each partisan office on the ballot, resulting in vastly more ballot styles in an even-year primary than in a general elections. There are more than 4,500 unique ballot styles slated for use during the March Primary. The process

of generating and proofing ballot styles is highly complex and involves multiple technical systems and quality control checkpoints that go far beyond mere printing.

18. Ballot specifications must be exact in order to ensure accurate reading by vote tabulating machines, which contain digital media cards that must be individually coded to detect the placement of each contest on every ballot style within the county. Results are written onto those cards and fed into our agency's SEIMS network. Because ballot coding for the March Primary has been finalized, results in congressional primary races will appear in the SEIMS system and are a matter of public record. Additionally, The State Board's system for displaying election results to the public is built around SEIMS and would include results in congressional primary races. Reprograming the public reporting tool at this late juncture would not allow for the testing time we believe is important to ensure the tool fully and accurately reports results.

19. Based on my experience at this agency for more than 15 years, I believe there is no scenario under which ballots for the March Primary can be reprinted to remove the names of congressional candidates without compromising safeguards needed to ensure the administrative integrity of the election. Accordingly, congressional candidates will remain on ballots issued to voters via mail-in absentee, at early voting locations, and on Election Day on March 15, 2016.

## III. COUNTY-LEVEL CHALLENGES

### *Implementing New Congressional Districts*

20. In order for county boards of elections to implement newly drawn congressional districts, each board's staff must reassign jurisdictional boundaries in

SEIMS. This is predominately a manual process that requires county elections officials to review physical maps and determine how particular address ranges are affected by changed jurisdictional boundaries. The State Board has implemented jurisdictional audit protocols, but these audits can be performed only *after* counties have completed jurisdictional reassignments and updated voter records within SEIMS.

21. Numbered Memo 2015-05, issued on October 1, 2015, provided a directive to county boards of elections regarding jurisdictional changes. It stated that all jurisdictions should be confirmed and no changes should be made to jurisdictions after December 18, 2015. The purpose of the deadline was to ensure ballots were accurately assigned to voters. Coding for ballots and voting equipment is based on information contained in SEIMS, and changes made to jurisdictions after ballots have been coded runs a risk that voters receive an incorrect ballot style containing contests in which the voter is ineligible to participate. As a safeguard against such errors, ballot styles must regenerate every time a jurisdictional change is entered. With ballot styles now set, we do not have the option to regenerate based on new lines.

22. Every ballot style is assigned a number in order for poll workers to pull and issue the correct ballot to a voter. These ballot style numbers are not generated in SEIMS but in separate voting tabulation software, which are then manually entered into SEIMS and made available to the poll worker in an electronic poll book. This is a particularly significant tool during early voting, when there could be more than 300 unique ballot styles in a single voting location. It is critical that poll workers are able to correctly identify the

ballot style to provide the voter. Regenerating ballot styles at this point could compromise the processes our state has put in place to ensure voters receive the correct ballot.

23. Bifurcating the primary for the purpose of implementing new congressional districts will likely require changes to jurisdictions for many voters. The timing of these changes is significant for several reasons. If the General Assembly has created newly drawn congressional districts by February 19, it would not only be unadvisable to make those changes during a current election due to the potential for voters to receive incorrect ballots, but it would otherwise be nearly impossible for county boards of elections to have the time to make these changes at a time they are preparing for the March primary. February 19 is the voter registration deadline. Historically, county boards of elections receive an influx of voter registration applications on or around that deadline. All timely received applications must be processed in order for newly registered voters to appear on the March Primary poll books, beginning with early voting (March 3-12). Staffing levels at county boards of elections vary widely across the state, but even amply staffed offices are stretched during the months and weeks leading up to the election.

24. State Board technical staff have provided me with the following time estimates for critical aspects of a new congressional election process, depending on the number of counties affected by redistricting: Jurisdictional updates (2 weeks); audit election modules in voter registration database (3 to 5 days); ballot coding and proofing (1 to 3 weeks); ballot tabulation logic and accuracy testing (1 to 2 weeks); mock election and results publication audit (held at least 2 weeks before early voting begins to resolve any

failures identified). Presumably, the legislature would provide also for a new candidate filing period, which must be completed before ballot coding and proofing may begin.

25. Putting aside election notice requirements, the UOCAVA requires the transmittal of absentee ballots no later than 45 days before an election to facilitate participation by U.S. service members, their families, and other U.S. citizens residing abroad. If a second primary in the congressional races is required, it is possible those contests would not appear on the general election ballot for November, which must be mailed no later than September 9.

26. Election professionals are accustomed to working on nonnegotiable deadlines. However, it is my belief that important safeguards meant to ensure the integrity of elections process require time that we would not have if asked to reassign many voters to new congressional jurisdictions and hold a first primary for congressional candidates on May 24, the statutory date for a *second primary* involving federal contests.

27. If the legislature designates a date after May 24—a necessity in my view—affected counties would be required to fund an unanticipated, stand-alone first primary for congress, with the possibility of a second primary in certain contests, resulting in a possible total of five separate elections within nine months.

***Early Voting Locations & Hours-matching***

28. In April 2015, State Board staff surveyed counties to ascertain the amount of variable costs borne by the counties in the 2014 General Election. The State Board provided counties with the following examples of variable costs: printing and counting ballots, securing one-stop sites, mail-in absentee, Election Day operations, and canvassing.

With 99 counties reporting, the variable costs borne by the counties in the 2014 General Election were as follows:

| | |
|---|---|
| Total Variable Costs: | $9,511,716.13 |
| One-stop Early Voting: | $2,651,455.54 (state average of $103.56 per early-voting-hour with a wide range $13.41—$551.75 per early-voting-hour between counties) |

The above figures represent the most current estimates of local variable costs associated with a North Carolina election, and do not include state-level costs.

29. Elections administration within a county are funded pursuant to budgets passed by county boards of commissioners earlier this year. It is my understanding that the statutory deadline for county governing boards to adopt budget ordinances was July 1, 2015.

30. In 2013, the General Assembly enacted the Voter Information Verification Act, 2013 Session Laws 381 ("VIVA"), which introduced new requirements for one-stop early voting. S.L. 2013-381, § 25.2. At a minimum, counties are now required to offer one-stop early voting consistent with the following, unless hours reductions are approved unanimously by the county board of elections and by the State Board: One-stop early voting hours for the Presidential Preference Primary and all March Primaries must meet or exceed cumulative early voting hours for the 2012 Presidential Preference Primary (24,591.5 hours statewide).

During the 2012 May Primary, counties offered 24,591.5 hours of one-stop early voting. Applying reported cost estimates from the 2014 General Election, State Board staff

estimates that one-stop early voting in the March Primary will cost counties approximately $2,546,695.74 ($103.56 x 24,591.5 hours). *See* Paragraph 28, *supra*.

31. Bifurcating the 2016 primary would trigger a statutory requirement that counties offer additional one-stop early voting opportunities according to the following formula, unless hours reductions are approved unanimously by the county board of elections and by the State Board: One-stop early voting hours must meet or exceed cumulative early voting hours for the 2010 primary election (19,901 hours statewide).

Accordingly, county-level costs arising from one-stop early voting for an additional, congressional primary are estimated to reach $2,060,947.56 ($103.56 x 19,901 hours), based on available estimates. *See* Paragraph 28, *supra*. The number of one-stop sites across the state has steadily risen over past elections cycles, as seen below:

2010: Primary (215 sites) General (297 sites)
2012: Primary (275 sites) General (365 sites)
2014: Primary (289 sites) General (367 sites)

32. Costs beyond one-stop early voting include expenses associated with critical aspects of elections administration and may range from securing precinct voting locations, printing ballots, coding electronic tabulators and voting systems, mail-in absentee operations, and the hiring and training temporary precinct officials for Election Day, among other line-items. The staff-estimate for county-level costs involving an unanticipated primary is roughly $9.5 million, though actual costs may rise depending on the amount of notice counties are given to secure sites for an election on a date certain.

33. North Carolina elections require that counties secure voting locations in nearly 2,800 precincts. State Board records indicate that on Election Day in the

2014 General Election, nearly half of all precinct voting locations were housed in places of worship or in schools, with still more located in privately-owned facilities. Identifying and securing appropriate precinct voting locations and one-stop early voting sites can require significant advance work by county board of elections staff and coordination with the State Board.

34. Bifurcating the March Primary so as to provide for a separate congressional primary would impose significant and unanticipated challenges and costs for county elections administrators and for the State Board as they develop and approve new one-stop implementation plans, secure necessary voting sites, hire adequate staff, and hold public meetings to take necessary action associated with the foregoing.

***Training***

35. Training of election officials is most effective when conducted in close proximity to the election the election official is administering. The vast majority of Election Day poll workers only serve on Election Day and, therefore, knowledge of election processes and protocol may not play a major role in their daily lives. North Carolina voters will have the opportunity to vote in-person at early voting locations on March 3, 2016. With this date only weeks away, the 100 county boards of elections and their staff are aggressively training poll workers.

36. The 2016 primary elections will be the first elections in North Carolina to include a photo ID requirement. For the better part of the last three years, the State Board of Elections has been preparing for the rollout of photo ID during the 2016 primary elections. In order to train poll workers effectively and to ensure uniform implementation

of photo ID requirements across the state, the State Board has produced and mandated the use of standardized training tools in every voting site in North Carolina.

37. Timing has played a major role in the agency's preparations for the rollout of photo ID requirements. Our agency's training approach is rooted in the understanding that training should occur far enough in advance to provide the best opportunity for thoroughness and appropriate repetition, but not so far removed from the election itself that memories fade. North Carolina conducted municipal primaries in September, October and November of 2015—all elections without photo ID requirements. Our agency began training in January 2016 as part of a concerted effort to avoid confusion for poll workers ahead of the March Primary. More than 1,400 election officials in January attended regional training sessions and webinars hosted by State Board staff regarding proper poll worker training.

38. State law requires our agency to hold a statewide training conference in advance of every primary or general election. Attendance by all counties is mandatory. The most recent mandatory training conference was recently held on February 1-2, 2016, and was attended by more than 500 supervisory election officials. The principal focus was on procedures for the March Primary. The next mandatory statewide conference is scheduled for August 8-9, 2016. If primary elections were to be held at a time later than March 15, 2016, it would not likely be feasible for the State or county boards of elections to hold an additional statewide conference prior to that time.

39. The State Board of Elections has dedicated staff to engage in meaningful voter outreach. This includes assisting voters with obtaining acceptable photo

identification, educating voters on current election laws and ensuring voters know when they can cast a ballot and make their voices heard in North Carolina. The voter outreach team has conducted voter education presentations statewide that provide voters information on the election schedule for the March Primary.

***Poll Worker Recruitment***

40. For the past several election cycles, poll worker recruitment has posed a significant challenge for county-level elections administrators. State statutes impose requirements regarding the partisan make-up for judges of elections in each precinct. Often county political parties find it difficult to find individuals that are willing to serve as precinct officials on Election Day. County elections officials have found it necessary to spend more and more time recruiting early voting and Election Day poll workers, especially because technological advances in many counties now require that elections workers be familiar with computers.

## III. AFFECT ON VOTER EXPECTATIONS & PARTICIPATION

41. Redistricting would require that county and state elections administrators reassign voters to new jurisdictions, a process that involves changes to each voter's geocode in SEIMS. Information contained within SEIMS is used to generate ballots. Additionally, candidates and other civic organizations rely on SEIMS-generated data to identify and outreach to voters. Voters must them be sent mailings notifying them of their new districts.

42. The public must have notice of upcoming elections. State law requires that county boards of elections prepare public notice of elections involving federal contests for

local publication and for distribution to United States military personnel in conjunction with the federal write-in absentee ballot. Such notice must be issued 100 days before regularly-scheduled elections and must contain a list of all ballot measures known as of that date. On December 4, 2016, county elections officials published the above-described notice for all then-existing 2016 primary contests, including congressional races.

43. Beyond formal notice, voters rely on media outlets, social networks, and habit both to become aware of upcoming elections and to review the qualifications of participating candidates. Bifurcating the March Primary may reduce public awareness of a subsequent, stand-alone primary. Decreased awareness of an election can suppress the number of individuals who would have otherwise participated and may narrow the demographic of those who do ultimately vote. Each could affect electoral outcomes.

44. Historical experience suggests that delayed primaries result in lower voter participation and that when primaries are bifurcated, the delayed primary will have a lower turnout rate than the primary held on the regular date. For example, a court-ordered, stand-alone 1998 September Primary for congressional races resulted in turnout of roughly 8%, compared to a turnout of 18% for the regular primary held on the regularly-scheduled May date that year. The 2002 primary was also postponed until September; that delayed primary had a turnout of only 21%. In 2004, the primary was rescheduled to July 20 because preclearance of legislative plans adopted in late 2003 had not been obtained from the United States Department of Justice in time to open filing on schedule. Both the Democratic and Republican Parties chose to forego the presidential primary that year. *See* Exhibit D. Turnout for the delayed primary was only 16%.

45. By contrast, turnout during the last comparable primary involving a presidential race with no incumbent running, held in 2008, was roughly 37%. The 2016 Presidential Preference Primary falls earlier in the presidential nomination cycle, which could result in even greater turnout because of the increased chance of influencing party nominations.

46. Bifurcating the March Primary could affect participation patterns and electoral outcomes by permitting unaffiliated voters to choose one political party's congressional primary and a different political party's primary for all other contests. State law prohibits voters from participating in one party's primary contests and a different party's second, or "runoff," primary because the latter is considered a continuation of the first primary. No such restriction would apply to limit participation in a stand-alone congressional primary.

47. The regular registration deadline for the March Primary is February 19, 2016. The Second Primary is set by statute: May 3, 2016, if no runoff involves a federal contest, or May 24, 2016 if any runoff does involve a federal contest. State law directs that "there shall be no registration of voters between the dates of the first and second primaries." G.S. § 163-111(e), *see also* S.L. 2015-258, § 2(d). Bifurcating the regular and congressional primary dates—with second primaries possible—could create voter confusion over whether registration is open or closed.

## IV. VOTER INFORMATION & EXPECTATIONS

48. The State Board has printed more than 4.3 million copies of the *2016 Primary Election Voter Guide*, which is sent by mail to every residential address across the state.

Upon information and belief, the guides have already been delivered in certain areas. The *Guide* identifies key election dates to ensure voters are properly informed of deadlines. I believe the risk of voter confusion over alternative voting procedures or a stand-alone congressional primary is significant, especially given our agency's efforts to inform voters of then-accurate deadlines.

49. The now-occurring congressional contest is the third held under present district boundaries. Widespread redistricting ahead of a stand-alone primary election presents a significant public education challenge, as voters have grown accustomed to current district boundaries, incumbents and candidates, and the relative importance or unimportance of a primary within their existing district.

50. Notice regarding electoral boundaries and constituent makeup typically inform an individual's decision to pursue office. It is common for legislative primary candidates to organize their voter outreach strategies and even to plan advertising well in advance of the primary election date. Often, those interested in pursuing congressional office will proactively work to raise their profile within a particular electoral district long before declaring candidacy. This exposure can, in turn, allow voters and the press early opportunities to interact with the individual and assess his or her fitness for a position of public trust. Last-minute changes to congressional districts can result in the pool of participating candidates changing from those who have cautiously worked to build credibility or name-recognition within their district communities.

51. In order to campaign effectively, a candidate must know the parameters of the district he or she is seeking to represent. Knowing the constituency is essential to

evaluating the prospects of a candidacy, and factors such as political and grassroots support, fund-raising potential, and ability to communicate with the voters. Without adequate time to prepare, raise money and campaign, potential candidates may forego seeking election.

52. Jurisdictional boundaries and election dates drive our work at the State Board. Even slight changes can trigger complex and interwoven statutory requirements and involve nonobvious logistical burdens and costs borne by North Carolina's 100 counties. Our agency takes seriously its obligation to enforce fully both legislative and judicial mandates, and to work diligently to ensure decision-makers are apprised of collateral effects that may attend those decisions.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 8th day of February, 2016.

Kim Westbrook Strach
Executive Director
North Carolina State Board of Elections

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**KIM WESTBROOK STRACH**
***Executive Director***

NORTH CAROLINA
State Board *of* Elections

# Numbered Memo 2015-05

**TO:** County Boards of Elections

**FROM:** Kim Strach, Executive Director

**RE:** **2016 Primary Election**

**DATE:** October 1, 2015

Yesterday evening, Governor Pat McCrory signed House Bill 373 ("HB 373"). We can now move forward with preparations for holding all 2016 Primary Election contests on a single date: Tuesday, March 15, 2016. The purpose of this Numbered Memo is to provide information about many of the processes required in preparation for the 2016 Primary Election.

## Background on HB 373

HB 373 reunites the Presidential Preference Primary and the general Primary for 2016 only. Under the revised calendar, the 2016 Primary Election will be held March 15. If a second primary is required for any federal contest, all second primaries will be held May 24 (in the absence of any federal runoffs, the second primary date will be May 3). Candidate filing and campaign finance deadlines are adjusted, with temporary power given to the State Board to suspend, change or add requirements where necessary to facilitate implementation of the new timeline.

## SEIMS Preparations

The State Board of Elections will enter an "election event" date for March 15, 2016, which should be available tomorrow. Our staff will setup the following contests:

- Presidential Preference Primary
- U.S. Senate
- U.S. House of Representatives
- Governor
- Lieutenant Governor
- Secretary of State
- Auditor
- Treasurer
- Superintendent of Public Instruction
- Attorney General

- Commissioner of Agriculture
- Commissioner of Labor
- Commissioner of Insurance
- NC Senate
- NC House
- NC Supreme Court
- NC Court of Appeals
- District Attorney
- Clerk of Superior Court (county jurisdictional contest) (new)
- Register of Deeds (county jurisdictional contest) (new)
- Sheriff (county jurisdictional contest) (new)
- Coroner (county jurisdictional contest) (new)

This will be the first time State Board staff will enter certain county-level contests into SEIMS. Affected contests are noted above. We will not enter county commissioners, soil & water conservation district supervisors or any other local contests. Your office must be aware of all contests within your county; please contact local governing bodies to confirm your information regarding any seat that has become vacant or that has been filled by appointment pending an election to fill that vacancy. These seats may be subject to an unexpired term contest.

All contests entered in SEIMS under the 2016 General Election event will be set up as being subject to a primary. This arrangement will permit SEIMS to create both General Election and Primary contests. Contests that are not in fact subject to a primary will be deleted from Election Setup at the appropriate time after the close of the candidate filing period. Please enter all of your contests into SEIMS no later than October 16. State Board staff will begin entering the above-listed contests after the canvass of November municipal elections.

Additional updates regarding SEIMS applications will be forthcoming.

## Candidate Filing Period

The candidate filing period will begin at noon on Tuesday, December 1, 2015 and end at noon on Monday, December 21, 2015. Counties conducting November municipal elections should note that the candidate filing period will begin three weeks after the November canvass.

December is customarily a time in elections when we catch our breath, but we will not have that opportunity this year. You must begin preparation now – if you have not already – to ensure full coverage of the office throughout the entire candidate filing period. We will provide all counties with candidate filing packets that include voter outreach materials. These materials are on order and will be made available to you as soon as they are delivered to the State Board of Elections Office.

Candidate filing forms and information regarding current filing fees for state offices are updated and available online: www.ncsbe.gov/ncsbe/candidate-filing. Please ensure your website includes the *current filing forms* with *current filing fee* information. Refer to G.S. § 163-107 to determine

the filing fee amount to set for local offices (usually 1% of the actual salary of the elected position). You should confirm the current salary of any county or local office that will be on your county's ballot in 2016.

HB 373 provides that a candidate is eligible to file a Notice of Candidacy for a partisan primary only if that individual has affiliated with that political party for 75 days. A candidate who changed party affiliation on or before September 17 will be able to file at any time during the candidate filing period. Otherwise, you should refer to the following schedule to determine the earliest date a candidate may file for a partisan contest after changing party affiliation. Note that if an eligibility date falls on a weekend, the candidate must wait until the upcoming Monday or later to file for a partisan primary contest.

### Filing Schedule

| Change of Party Date | Eligible to File as of: |
|---|---|
| 9/17/2015 | Tuesday, December 1, 2015 |
| 9/18/2015 | Wednesday, December 2, 2015 |
| 9/19/2015 | Thursday, December 3, 2015 |
| 9/20/2015 | Friday, December 4, 2015 |
| 9/21/2015 | Saturday, December 5, 2015 (file as of 12/7/15) |
| 9/22/2015 | Sunday, December 6, 2015 (file as of 12/7/15) |
| 9/23/2015 | Monday, December 7, 2015 |
| 9/24/2015 | Tuesday, December 8, 2015 |
| 9/25/2015 | Wednesday, December 9, 2015 |
| 9/26/2015 | Thursday, December 10, 2015 |
| 9/27/2015 | Friday, December 11, 2015 |
| 9/28/2015 | Saturday, December 12, 2015 (file as of 12/14/15) |
| 9/29/2015 | Sunday, December 13, 2015 (file as of 12/14/15) |
| 9/30/2015 | Monday, December 14, 2015 |
| 10/1/2015 | Tuesday, December 15, 2015 |
| 10/2/2015 | Wednesday, December 16, 2015 |
| 10/3/2015 | Thursday, December 17, 2015 |
| 10/4/2015 | Friday, December 18, 2015 |
| 10/5/2015 | Saturday, December 19, 2015 (file as of 12/21/15) |
| 10/6/2015 | Sunday, December 20, 2015 (file as of 12/21/15) |
| 10/7/2015 | Monday, December 21, 2015 |

## Ballot Coding, Proofing and Printing

Accurate ballot coding is critical to ensuring successful primary elections. We all have important roles in this process. In order for State Board staff to ensure the accuracy of all data within SEIMS, it is necessary that you complete all relevant geocode changes no later than Friday, December 18. You must verify that all of your jurisdictional assignments are correct. Following the November municipal elections, you will receive a new DRR report from our voting systems staff. You will be required to review the report and either confirm that your geocode is accurate or notify State Board staff that you will be making changes, which must be completed no later than December 18.

If you have questions about any of your jurisdictional boundaries, please contact us immediately. Once all changes have been made in SEIMS, State Board staff will provide the jurisdictional database to Print Elect for use in ballot coding.

The State Board of Elections will determine a method of random selection for the order of candidate names on the ballot after the close of the candidate filing period. You will then be able to arrange the order of your candidates on the ballot. Counties must have all contests and candidates properly arranged by Monday, January 4.

As required under HB 373, the State Board of Elections will meet on Tuesday, January 5 to nominate presidential candidates for the 2016 Primary Election. Following that meeting, State Board staff will provide election imports to Print Elect. It is critical that all ballot preparations be completed on time so that ballots are thoroughly proofed, printed, and available for absentee voting on Monday, January 25. This deadline requires that everyone involved works accurately and timely. Please expect additional information on this very important process as the candidate filing period approaches.

## Education and Training of Election Officials

Comprehensive and uniform training of our precinct officials and early voting workers is essential and is required of every county board of elections. Every voter should expect to be treated the same way by one-stop early voting workers and by Election Day precinct officials, regardless of where and when they vote throughout our state. To accomplish this goal, we are producing training videos and additional training materials. We understand your need to have these materials well in advance of training sessions. All training materials should be in your possession at the beginning of the candidate filing period.

## Master Election Calendar

In an effort to provide a single access-point for all critical dates, we have developed a Master Election Calendar that contains dates related to election administration and campaign finance: ftp://alt.ncsbe.gov/sboe/MasterElectionSchedule.xlsx. We have made every effort to verify the information contained in the calendar on short order. The document is meant as a guide and is subject to further revision. Please bear in mind that HB 373 gave the State Board special authority to issue orders and alter requirements as necessary to implement the new primary date. Please let us know whether you have any questions or spot any issues.

## One-Stop/Early Voting Implementation Plans

The one-stop early voting hours matching requirements in place last year will again apply in 2016 pursuant to G.S. § 163-227.2(g2). For the 2016 Primary, each county must offer at least as many cumulative early voting hours as provided in the 2012 May Primary. Therefore, each county must offer as many cumulative early voting hours for the 2016 General Election as were provided in the 2012 General Election. Hour totals for 2012 elections are posted online for your reference: ftp://alt.ncsbe.gov/One-Stop_Early_Voting/OS_sites_2010_2012.xlsx. One-stop Implementation Plans are due to the State Board of Elections no later than Friday, January 15.

Counties that would seek a reduction in the number of required hours under G.S. § 163-227.2(g3) must understand that a request by a county board of elections must be unanimous. State Board approval must also be unanimous. Counties seeking such a reduction must submit the request no later than Thursday, December 31, 2015.

Further details about One-Stop Implementation Plans for the 2016 Primary will be communicated in a separate Numbered Memo. Counties that have not already begun planning early voting schedules for the 2016 Primary Election should do so soon.

## Mock Election

We will conduct a Mock Election on Thursday, February 18. Please mark this date on your calendar and stay tuned for preparation details.

## Campaign Finance Reporting Schedule

HB 373 includes a change to the campaign finance reporting schedule that is made necessary by the primary date change:

- For 2016, the First Quarter Plus Report has been replaced by a report that will be due on Monday, March 7, and will cover the time period from January 1 through February 29.
- The Second Quarter report will cover the time period from March 1, 2016 through June 30.
- The 48-Hour reporting period will begin on March 1, 2016 and will end on March 15.

The candidate filing packets will include these changes to the schedule and an explanation of required reports. All dates relevant to campaign finance responsibilities will be included in the Master Election Calendar.

## State Board Training

We have very few windows for training prior to March 15. Due to these scheduling constraints, we are working hard to find an appropriate venue on dates that will not conflict with other required election events. We will inform you of the date and location as soon as we have that information.

Given new election procedures that take effect in 2016, pending court decisions that could affect those changes, and the adjournment of the General Assembly this week, our best efforts are being dedicated to provide you clear, complete, accurate information and guidance as soon as possible.

From Murphy to Manteo, county election directors face challenging deadlines, and we face them here in Raleigh. Success depends upon our working together, so please know that we are working with your concerns in mind.

| DATE | DATE2 | TIME | EVENT | ELECTION EVENT TYPE | EVENT SUBTYPE | REFERENCE | RULE |
|---|---|---|---|---|---|---|---|
| 09/27/15 | Sunday, September 27, 2015 | | District Relations Report distributed to counties | Statewide Primary | VOTING SYSTEMS | Best Practice | 120 days before start of absentee voting by |
| 09/28/15 | Monday, September 28, 2015 | | Pre-Election Report Due Date (if in 2nd primary) | October Municipal | CF REPORTING | | |
| 09/28/15 | Monday, September 28, 2015 | | Pre-Election Report Due Date | October Municipal | CF REPORTING | | |
| 09/28/15 | Monday, September 28, 2015 | | Pre-Primary Report Due Date (if applicable) | October Municipal | CF REPORTING | | |
| 09/28/15 | Monday, September 28, 2015 | | Pre-Referendum Report Due Date | October Municipal | CF REFERENDUM REPORTING | | |
| 09/28/15 | Monday, September 28, 2015 | | CBE issues certificates of nomination or election if no | September Municipal Primary | CANVASS | 163-182.15(a); 163-301 | Six days after the county canvass (In a |
| 09/29/15 | Tuesday, September 29, 2015 | | 35-Day Report Due Date | November Municipal | CF REPORTING | | |
| 09/29/15 | Tuesday, September 29, 2015 | 5:00 PM | Absentee Board Meeting 3 | October Municipal | ABSENTEE | 163-230.1(c1) | Each Tuesday at 5:00 p.m., commencing on |
| 09/29/15 | Tuesday, September 29, 2015 | 5:00 PM | Last day to request an absentee ballot by mail. | October Municipal | ABSENTEE | 163-230.1(a) | Not later than 5:00 p.m. on the Tuesday |
| 09/29/15 | Tuesday, September 29, 2015 | 5:00 PM | Late absentee requests allowed due to sickness or | October Municipal | ABSENTEE | 163-230.1(a1) | After 5:00 p.m. on the Tuesday before the |
| 09/29/15 | Tuesday, September 29, 2015 | | 35-Day Report Due Date (if not in primary) | October Municipal | CF REPORTING | | |
| 09/29/15 | Tuesday, September 29, 2015 | | Finalize Voter History | September Municipal Primary | POST-ELECTION | Best Practice | 7 days after county canvass |
| 09/29/15 | Tuesday, September 29, 2015 | | Confirm with polling place contacts use of facility | Statewide Primary | PRECINCTS | Best Practice | 24 weeks prior to election day |
| 10/01/15 | Thursday, October 01, 2015 | 10:00 AM | Election Day Observer/Runner List Due | October Municipal | OBSERVERS | 163-45(b) | By 10:00 a.m. on the 5th day prior to Election |
| 10/02/15 | Friday, October 02, 2015 | | Publish Election Notice 3 | November Municipal | LEGAL NOTICE | 163-33(8) | Publish weekly during the 20 day period |
| 10/02/15 | Friday, October 02, 2015 | | Absentee Voting - Date By Which Absentee Ballots Must | November Municipal | ABSENTEE | 163-227.3(a); 163-302 | No later than 30 days before a municipal |
| 10/03/15 | Saturday, October 03, 2015 | 1:00 PM | Absentee One Stop Voting Ends | October Municipal | ABSENTEE ONESTOP | 163-227.2(b) | Not later than 1:00 p.m. on the last Saturday |
| 10/04/15 | Sunday, October 04, 2015 | | CBE gives public notice of buffer zone information | November Municipal | PRECINCTS | 163-166.4(c) | No later than 30 days before each election |
| 10/04/15 | Sunday, October 04, 2015 | | Deadline for UOCAVA Absentee Ballots to be Available | November Municipal | ABSENTEE | 163-258.9; 163-302 | No later than 30 days before a municipal election, if absentee voting is permitted. |
| 10/04/15 | Sunday, October 04, 2015 | | Last day to mail notice of polling place changes. | November Municipal | PRECINCTS | 163-128 | No later than 30 days prior to the primary or |
| 10/04/15 | Sunday, October 04, 2015 | | Notification to Voters of Precinct/Voting Place Change | November Municipal | PRECINCTS | 163-128(a) | 30 days prior to the primary or election |
| 10/05/15 | Monday, October 05, 2015 | | Receive voter registration totals and add them to vote | October Municipal | VOTING SYSTEMS | | 1 day before election day |
| 10/05/15 | Monday, October 05, 2015 | 5:00 PM | UOCAVA Absentee Ballot Request Deadline | October Municipal | ABSENTEE | 163-258.7 | No later than 5:00 p.m. on the day before |
| 10/05/15 | Monday, October 05, 2015 | 5:00 PM | UOCAVA Voter Registration Deadline | October Municipal | VOTER REGISTRATION | 163-258.6 | No later than 5:00 p.m. on the day before |
| 10/05/15 | Monday, October 05, 2015 | 5:00 PM | Absentee Board Meeting Pre-Election Day | October Municipal | ABSENTEE | | After 5:00 p.m. on the Monday before |
| 10/06/15 | Tuesday, October 06, 2015 | 12:00 PM | Absentee Ballot Challenge - Time for filing a challenge to | October Municipal | CHALLENGES | 163-89 | No earlier than 12:00 noon on election day. |
| 10/06/15 | Tuesday, October 06, 2015 | 5:00 PM | Begin Counting Absentee Ballots (Cannot announce | October Municipal | ABSENTEE | 163-234 | 5:00 p.m. on election day unless an earlier |
| 10/06/15 | Tuesday, October 06, 2015 | 5:00 PM | Civilian Absentee Return Deadline | October Municipal | ABSENTEE | 163-231(b)(1) | Not later than 5:00 p.m. on day of the primary |
| 10/06/15 | Tuesday, October 06, 2015 | 10:00 AM | Distribute Certified Executed Absentee List | October Municipal | ABSENTEE | 163-232 | No later than 10:00 a.m. on election day |
| 10/06/15 | Tuesday, October 06, 2015 | | Distribute Election Day Absentee Abstract to SBOE | October Municipal | ABSENTEE | 163-234(6) | Election Day |
| 10/06/15 | Tuesday, October 06, 2015 | 6:30 AM | ELECTION DAY | October Municipal | ELECTION DAY | 163-279 | Fourth Tuesday before the Tuesday after the |
| 10/06/15 | Tuesday, October 06, 2015 | 10:00 AM | Election Day Tracking (10 am, 2 pm, 4 pm) | October Municipal | ADMINISTRATION | | Election Day at 10 am, 2 pm and 4 pm |
| 10/06/15 | Tuesday, October 06, 2015 | 8:30 PM | Election Night Finalize Activities | October Municipal | VOTING SYSTEMS | | Election Night |
| 10/06/15 | Tuesday, October 06, 2015 | 7:30 PM | UOCAVA Absentee Ballot Return Deadline - Electronic | October Municipal | ABSENTEE | 163-258.10 | Close of polls on Election Day |
| 10/07/15 | Wednesday, October 07, 2015 | | Update NVRA Survey Report | Administration | NVRA | 163-82.20 | By the 7th of each month |
| 10/07/15 | Wednesday, October 07, 2015 | | Sample Audit Count - Precincts Selection | October Municipal | CANVASS | 163-182.1(b)(1) | Within 24 hours of polls closing on Election |
| 10/07/15 | Wednesday, October 07, 2015 | | Latest date that prospective candidate may change party | Statewide Primary | CANDIDATE FILING | HB 373 | 75 days before last day of candidate filing |
| 10/08/15 | Thursday, October 08, 2015 | | Mock Election | November Municipal | VOTING SYSTEMS | Best Practice | 14 days before absentee one-stop begins in a |
| 10/09/15 | Friday, October 09, 2015 | | Voter Challenge Deadline - last day to challenge before | November Municipal | CHALLENGES | 163-85 | No later than 25 days before an election. |
| 10/09/15 | Friday, October 09, 2015 | 5:00 PM | Voter Registration Deadline | November Municipal | VOTER REGISTRATION | 163-82.6(c) | 25 days before the primary or election day |
| 10/09/15 | Friday, October 09, 2015 | 5:00 PM | Civilian Absentee Return Deadline - Mail Exception | October Municipal | ABSENTEE | 163-231(b)(2) | If postmarked on or before election day and |
| 10/09/15 | Friday, October 09, 2015 | 5:00 PM | UOCAVA Absentee Ballot Return Deadline - Mailed | October Municipal | ABSENTEE | 163-258.12 | By end of business on the business day before |
| 10/09/15 | Friday, October 09, 2015 | | Final Referendum Report End Date | October Municipal | CF REFERENDUM REPORTING | | |
| 10/10/15 | Saturday, October 10, 2015 | | Send Late Registration Notices until Election Day | November Municipal | VOTER REGISTRATION | Best Practice | Starting day after voter registration deadline |
| 10/12/15 | Monday, October 12, 2015 | 5:00 PM | Deadline for provisional voters subject to HAVA ID to | October Municipal | CANVASS | 163-166.12(c); 163-82.4(e) | By 5:00 p.m. on the day before the county |
| 10/12/15 | Monday, October 12, 2015 | | FEDERAL HOLIDAY - COLUMBUS DAY (NO MAIL) | | | | |
| 10/13/15 | Tuesday, October 13, 2015 | 5:00 PM | Absentee Board Meeting 1 | November Municipal | ABSENTEE | 163-230.1(c1) | Each Tuesday at 5:00 p.m., commencing on |
| 10/13/15 | Tuesday, October 13, 2015 | 11:00 AM | County Canvass | October Municipal | CANVASS | 163-182.5(b) | Seven days after each election (except a |
| 10/13/15 | Tuesday, October 13, 2015 | | Deadline for election protest concerning votes counted | October Municipal | CANVASS | 163-182.9(b)(4)a | Before the beginnning of the county canvass |
| 10/13/15 | Tuesday, October 13, 2015 | 10:00 AM | Distribute Supplemental Certified Executed Absentee List | October Municipal | ABSENTEE | 163-232.1; 163-234 (10) | No later than 10:00 a.m. of the next business |
| 10/13/15 | Tuesday, October 13, 2015 | | Acknowledgement of No Photo ID | September Municipal Primary | POST-ELECTION | HB589 | 4 weeks after Election Day |
| 10/14/15 | Wednesday, October 14, 2015 | | Voter Registration Deadline - Exception for missing or | November Municipal | VOTER REGISTRATION | 163-82.6(c) ; 163-82.6(c1) | No later than 20 days before the election |
| 10/14/15 | Wednesday, October 14, 2015 | 5:00 PM | Deadline for candidates in CBE jurisdictional contests to | October Municipal | CANVASS | 163-182.7(b) | 5:00 p.m. on the first business day after the |
| 10/15/15 | Thursday, October 15, 2015 | | Remove Ineligible Voters | Administration | LIST MAINTENANCE | 163-82.14 | 15th of each month |
| 10/15/15 | Thursday, October 15, 2015 | | Complete Logic & Accuracy Testing | November Municipal | VOTING SYSTEMS | Best Practice | 7 days before the start of one-stop voting |
| 10/15/15 | Thursday, October 15, 2015 | 5:00 PM | Deadline for candidates in SBOE jurisdictional contests to | October Municipal | CANVASS | 163-182.7(c); 163-182.4(b)(5) | 5:00 p.m. on the second business day after |
| 10/15/15 | Thursday, October 15, 2015 | 5:00 PM | Deadline to file election protest concerning any other | October Municipal | CANVASS | 163-182.9(b)(4)c | 5:00 p.m. on the second business day after |

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|---|---|---|---|---|---|---|---|
| 10/15/15 | Thursday, October 15, 2015 | 5:00 PM | Deadline to file election protest concerning manner in | October Municipal | CANVASS | 163-182.9(b)(4)b | 5:00 p.m. on the second business day after |
| 10/15/15 | Thursday, October 15, 2015 | | Mail Abstract to State Board of Elections | October Municipal | CANVASS | 163-300 | Within 9 days after a municipal primary or |
| 10/16/15 | Friday, October 16, 2015 | | Final Referendum Report Due Date | October Municipal | CF REFERENDUM REPORTING | | |
| 10/17/15 | Saturday, October 17, 2015 | 10:00 AM | One-stop Observer List Due | November Municipal | OBSERVERS | 163-45(b) | By 10:00 a.m. on the 5th day prior to start of |
| 10/19/15 | Monday, October 19, 2015 | | Pre-Election Report End Date | November Municipal | CF REPORTING | | |
| 10/19/15 | Monday, October 19, 2015 | | Pre-Runoff Report End Date (if in runoff) | November Municipal | CF REPORTING | | |
| 10/19/15 | Monday, October 19, 2015 | | Pre-Referendum Report End Date | November Municipal | CF REFERENDUM REPORTING | | |
| 10/19/15 | Monday, October 19, 2015 | | CBE issues certificates of nomination or election if no | October Municipal | CANVASS | 163-182.15(a); 163-301 | Six days after the county canvass (In a |
| 10/19/15 | Monday, October 19, 2015 | | Pre-Election Report End Date (if not in 2nd primary) | October Municipal | CF REPORTING | | |
| 10/20/15 | Tuesday, October 20, 2015 | 5:00 PM | Absentee Board Meeting 2 | November Municipal | ABSENTEE | 163-230.1(c1) | Each Tuesday at 5:00 p.m., commencing on |
| 10/20/15 | Tuesday, October 20, 2015 | | Publish Absentee Resolution | November Municipal | ABSENTEE | 163-234 | Once a week for two weeks prior to the |
| 10/20/15 | Tuesday, October 20, 2015 | | Finalize Voter History | October Municipal | POST-ELECTION | Best Practice | 7 days after county canvass |
| 10/22/15 | Thursday, October 22, 2015 | | Absentee One Stop Voting Begins | November Municipal | ABSENTEE ONESTOP | 163-227.2(b) | Not earlier than the second Thursday before |
| 10/26/15 | Monday, October 26, 2015 | | Pre-Election Report Due Date | November Municipal | CF REPORTING | | |
| 10/26/15 | Monday, October 26, 2015 | | Pre-Runoff Report Due Date (if in runoff) | November Municipal | CF REPORTING | | |
| 10/26/15 | Monday, October 26, 2015 | | Pre-Referendum Report Due Date | November Municipal | CF REFERENDUM REPORTING | | |
| 10/26/15 | Monday, October 26, 2015 | | Pre-Election Report Due Date (if not in 2nd primary) | October Municipal | CF REPORTING | | |
| 10/27/15 | Tuesday, October 27, 2015 | 5:00 PM | Absentee Board Meeting 3 | November Municipal | ABSENTEE | 163-230.1(c1) | Each Tuesday at 5:00 p.m., commencing on |
| 10/27/15 | Tuesday, October 27, 2015 | 5:00 PM | Last day to request an absentee ballot by mail. | November Municipal | ABSENTEE | 163-230.1(a) | Not later than 5:00 p.m. on the Tuesday |
| 10/27/15 | Tuesday, October 27, 2015 | 5:00 PM | Late absentee requests allowed due to sickness or | November Municipal | ABSENTEE | 163-230.1(a1) | After 5:00 p.m. on the Tuesday before the |
| 10/29/15 | Thursday, October 29, 2015 | 10:00 AM | Election Day Observer/Runner List Due | November Municipal | OBSERVERS | 163-45(b) | By 10:00 a.m. on the 5th day prior to Election |
| 10/31/15 | Saturday, October 31, 2015 | 1:00 PM | Absentee One Stop Voting Ends | November Municipal | ABSENTEE ONESTOP | 163-227.2(b) | Not later than 1:00 p.m. on the last Saturday |
| 11/01/15 | Sunday, November 01, 2015 | | Complete election setup tasks | Statewide General Election | VOTING SYSTEMS | Best Practice | 30 days before start of candidate filing |
| 11/01/15 | Sunday, November 01, 2015 | | Confirm local office salaries for candidate filing | Statewide General Election | CANDIDATE FILING | Best Practice | 30 days before candidate filing begins |
| 11/01/15 | Sunday, November 01, 2015 | | Prepare candidate filing materials | Statewide General Election | CANDIDATE FILING | Best Practice | 30 days before candidate filing begins |
| 11/02/15 | Monday, November 02, 2015 | | Receive voter registration totals and add them to vote | November Municipal | VOTING SYSTEMS | | 1 day before election day |
| 11/02/15 | Monday, November 02, 2015 | 5:00 PM | UOCAVA Absentee Ballot Request Deadline | November Municipal | ABSENTEE | 163-258.7 | No later than 5:00 p.m. on the day before |
| 11/02/15 | Monday, November 02, 2015 | 5:00 PM | UOCAVA Voter Registration Deadline | November Municipal | VOTER REGISTRATION | 163-258.6 | No later than 5:00 p.m. on the day before |
| 11/02/15 | Monday, November 02, 2015 | 5:00 PM | Absentee Board Meeting Pre-Election Day | November Municipal | ABSENTEE | | After 5:00 p.m. on the Monday before |
| 11/03/15 | Tuesday, November 03, 2015 | 12:00 PM | Absentee Ballot Challenge - Time for filing a challenge to | November Municipal | CHALLENGES | 163-89 | No earlier than 12:00 noon on election day. |
| 11/03/15 | Tuesday, November 03, 2015 | 5:00 PM | Begin Counting Absentee Ballots (Cannot announce | November Municipal | ABSENTEE | 163-234 | 5:00 p.m. on election day unless an earlier |
| 11/03/15 | Tuesday, November 03, 2015 | 5:00 PM | Civilian Absentee Return Deadline | November Municipal | ABSENTEE | 163-231(b)(1) | Not later than 5:00 p.m. on day of the primary |
| 11/03/15 | Tuesday, November 03, 2015 | 10:00 AM | Distribute Certified Executed Absentee List | November Municipal | ABSENTEE | 163-232 | No later than 10:00 a.m. on election day |
| 11/03/15 | Tuesday, November 03, 2015 | | Distribute Election Day Absentee Abstract to SBOE | November Municipal | ABSENTEE | 163-234(6) | Election Day |
| 11/03/15 | Tuesday, November 03, 2015 | 6:30 AM | ELECTION DAY | November Municipal | ELECTION DAY | 163-279 | Tuesday after the first Monday in November |
| 11/03/15 | Tuesday, November 03, 2015 | 10:00 AM | Election Day Tracking (10 am, 2 pm, 4 pm) | November Municipal | ADMINISTRATION | | Election Day at 10 am, 2 pm and 4 pm |
| 11/03/15 | Tuesday, November 03, 2015 | 8:30 PM | Election Night Finalize Activities | November Municipal | VOTING SYSTEMS | | Election Night |
| 11/03/15 | Tuesday, November 03, 2015 | 7:30 PM | UOCAVA Absentee Ballot Return Deadline - Electronic | November Municipal | ABSENTEE | 163-258.10 | Close of polls on Election Day |
| 11/03/15 | Tuesday, November 03, 2015 | | Acknowledgement of No Photo ID | October Municipal | POST-ELECTION | HB589 | 4 weeks after Election Day |
| 11/04/15 | Wednesday, November 04, 2015 | | Sample Audit Count - Precincts Selection | November Municipal | CANVASS | 163-182.1(b)(1) | Within 24 hours of polls closing on Election |
| 11/04/15 | Wednesday, November 04, 2015 | | Schedule precinct official training schedule | Statewide Primary | PRECINCT OFFICIALS | Best Practice | 120 days prior to start of one-stop voting |
| 11/06/15 | Friday, November 06, 2015 | 5:00 PM | Civilian Absentee Return Deadline - Mail Exception | November Municipal | ABSENTEE | 163-231(b)(2) | If postmarked on or before election day and |
| 11/06/15 | Friday, November 06, 2015 | | Final Referendum Report End Date | November Municipal | CF REFERENDUM REPORTING | | |
| 11/07/15 | Saturday, November 07, 2015 | | Update NVRA Survey Report | Administration | NVRA | 163-82.20 | By the 7th of each month |
| 11/09/15 | Monday, November 09, 2015 | 5:00 PM | Deadline for provisional voters subject to HAVA ID to | November Municipal | CANVASS | 163-166.12(c); 163-82.4(e) | By 5:00 p.m. on the day before the county |
| 11/09/15 | Monday, November 09, 2015 | 5:00 PM | UOCAVA Absentee Ballot Return Deadline - Mailed | November Municipal | ABSENTEE | 163-258.12 | By end of business on the business day before |
| 11/10/15 | Tuesday, November 10, 2015 | | Deadline for election protest concerning votes counted | November Municipal | CANVASS | 163-182.9(b)(4)a | Before the beginning of the county canvass |
| 11/10/15 | Tuesday, November 10, 2015 | 10:00 AM | Distribute Supplemental Certified Executed Absentee List | November Municipal | ABSENTEE | 163-232.1; 163-234 (10) | No later than 10:00 a.m. of the next business |
| 11/10/15 | Tuesday, November 10, 2015 | 11:00 AM | County Canvass | November Municipal | CANVASS | 163-182.5(b) | Seven days after each election (except a |
| 11/11/15 | Wednesday, November 11, 2015 | | STATE HOLIDAY - VETERANS DAY | | | | |
| 11/12/15 | Thursday, November 12, 2015 | 5:00 PM | Deadline for candidates in CBE jurisdictional contests to | November Municipal | CANVASS | 163-182.7(b) | 5:00 p.m. on the first business day after the |
| 11/12/15 | Thursday, November 12, 2015 | | Mail Abstract to State Board of Elections | November Municipal | CANVASS | 163-300 | Within 9 days after a municipal primary or |
| 11/13/15 | Friday, November 13, 2015 | 5:00 PM | Deadline for candidates in SBOE jurisdictional contests to | November Municipal | CANVASS | 163-182.7(c); 163-182.4(b)(5) | 5:00 p.m. on the second business day after |
| 11/13/15 | Friday, November 13, 2015 | 5:00 PM | Deadline to file election protest concerning any other | November Municipal | CANVASS | 163-182.9(b)(4)c | 5:00 p.m. on the second business day after |
| 11/13/15 | Friday, November 13, 2015 | 5:00 PM | Deadline to file election protest concerning manner in | November Municipal | CANVASS | 163-182.9(b)(4)b | 5:00 p.m. on the second business day after |
| 11/13/15 | Friday, November 13, 2015 | | Final Referendum Report Due Date | November Municipal | CF REFERENDUM REPORTING | | |
| 11/14/15 | Saturday, November 14, 2015 | | Report Results by Voting Tabulation Districts (VTD) | September Municipal Primary | VOTING SYSTEMS | 163-132.5G | No later than 60 days after Election Day |
| 11/15/15 | Sunday, November 15, 2015 | | Remove Ineligible Voters | Administration | LIST MAINTENANCE | 163-82.14 | 15th of each month |
| 11/16/15 | Monday, November 16, 2015 | | Publish Notice of Candidate Filing | Administration | CANDIDATE FILING | Best Practice | 14 days before the start of candidate filing |

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|---|---|---|---|---|---|---|---|
| 11/16/15 | Monday, November 16, 2015 | | CBE issues certificates of nomination or election if no | November Municipal | CANVASS | 163-182.15(a); 163-301 | Six days after the county canvass (In a |
| 11/17/15 | Tuesday, November 17, 2015 | | Finalize Voter History | November Municipal | POST-ELECTION | Best Practice | 7 days after county canvass |
| 11/17/15 | Tuesday, November 17, 2015 | | Confirm with polling place contacts use of facility | Second Primary - No Federal | PRECINCTS | Best Practice | 24 weeks prior to election day |
| 11/21/15 | Saturday, November 21, 2015 | | Presentation to CBE of petitions for nomination of | Presidential Preference Primary | VOTING SYSTEMS | HB 373 | No later than 10 days before start of |
| 11/26/15 | Thursday, November 26, 2015 | | STATE HOLIDAY - THANKSGIVING | | | | |
| 11/27/15 | Friday, November 27, 2015 | | STATE HOLIDAY - THANKSGIVING | | | | |
| 11/29/15 | Sunday, November 29, 2015 | | Petition in lieu of filing fee deadline - Submission to CBE | Statewide General Election | CANDIDATE FILING | 163-107.1(b), (c) | 15 days prior to Monday preceding the filing |
| 12/01/15 | Tuesday, December 01, 2015 | | Acknowledgement of No Photo ID | November Municipal | POST-ELECTION | HB589 | 4 weeks after Election Day |
| 12/01/15 | Tuesday, December 01, 2015 | 12:00 PM | Candidate filing period begins | Statewide General Election | CANDIDATE FILING | HB 373 | No earlier than 12:00 noon on the second |
| 12/01/15 | Tuesday, December 01, 2015 | | Deadline to submit precinct change proposal | Statewide Primary | PRECINCTS | 163-132.3 | 105 days prior to the next election that the |
| 12/01/15 | Tuesday, December 01, 2015 | | District Relations Report approval needed from counties | Statewide Primary | VOTING SYSTEMS | Best Practice | Start of candidate filing |
| 12/05/15 | Saturday, December 05, 2015 | | Report Results by Voting Tabulation Districts (VTD) | October Municipal | VOTING SYSTEMS | 163-132.5G | No later than 60 days after Election Day |
| 12/06/15 | Sunday, December 06, 2015 | | Publication of UOCAVA election notice | Statewide Primary | ABSENTEE | 163-258.16 | Not later than 100 days before election day |
| 12/07/15 | Monday, December 07, 2015 | | Update NVRA Survey Report | Administration | NVRA | 163-82.20 | By the 7th of each month |
| 12/08/15 | Tuesday, December 08, 2015 | | Confirm with polling place contacts use of facility | Second Primary - Federal Contest | PRECINCTS | Best Practice | 24 weeks prior to election day |
| 12/14/15 | Monday, December 14, 2015 | 12:00 PM | Petition in lieu of filing fee deadline | Statewide General Election | CANDIDATE FILING | 163-107.1(b), (c) | Not later than 12:00 noon on Monday |
| 12/15/15 | Tuesday, December 15, 2015 | | Remove Ineligible Voters | Administration | LIST MAINTENANCE | 163-82.14 | 15th of each month |
| 12/16/15 | Wednesday, December 16, 2015 | | Chair of political party must submit list of presidential | Presidential Preference Primary | VOTING SYSTEMS | HB 373 | No later than 12/16/2015 |
| 12/16/15 | Wednesday, December 16, 2015 | 5:00 PM | Deadline to withdraw Notice of Candidacy | Statewide General Election | CANDIDATE FILING | 163-294.2(d); 163-106(e) | No later than prior to the close of business on |
| 12/21/15 | Monday, December 21, 2015 | 12:00 PM | Candidate filing period ends | Statewide General Election | CANDIDATE FILING | HB 373 | No later than 12:00 noon on the last business |
| 12/22/15 | Tuesday, December 22, 2015 | | Complete contest and candidate ordering | Statewide General Election | VOTING SYSTEMS | Best Practice | By the first business day after the end of |
| 12/23/15 | Wednesday, December 23, 2015 | | STATE HOLIDAY - CHRISTMAS | | | | |
| 12/24/15 | Thursday, December 24, 2015 | | STATE HOLIDAY - CHRISTMAS | | | | |
| 12/25/15 | Friday, December 25, 2015 | | STATE HOLIDAY - CHRISTMAS | | | | |
| 12/26/15 | Saturday, December 26, 2015 | | District Relations Report approval needed from counties | Statewide Primary | VOTING SYSTEMS | Best Practice | 30 days before start of absentee voting by |
| 12/29/15 | Tuesday, December 29, 2015 | | CBE sends certification to the State Board of Elections of | Statewide General Election | CANDIDATE FILING | 163-108 | Within three days after the close of candidate |
| 12/29/15 | Tuesday, December 29, 2015 | | SBE certification of notices of candidacy filed with SBE to | Statewide General Election | CANDIDATE FILING | 163-108 | Within three days after the close of candidate |
| 12/31/15 | Thursday, December 31, 2015 | | Year End Semi Annual Report End Date | November Municipal | CF REPORTING | | |
| 12/31/15 | Thursday, December 31, 2015 | | Final Supplemental Referendum Report End Date | November Municipal | CF REFERENDUM REPORTING | | |
| 12/31/15 | Thursday, December 31, 2015 | | Year End Semi Annual Report End Date | October Municipal | CF REPORTING | | |
| 12/31/15 | Thursday, December 31, 2015 | | Final Supplemental Referendum Report End Date | October Municipal | CF REFERENDUM REPORTING | | |
| 12/31/15 | Thursday, December 31, 2015 | | Year End Semi Annual Report End Date | September Municipal Primary | CF REPORTING | | |
| 12/31/15 | Thursday, December 31, 2015 | | Final Supplemental Referendum Report End Date | September Municipal Primary | CF REFERENDUM REPORTING | | |
| 12/31/15 | Thursday, December 31, 2015 | | Candidate challenge deadline | Statewide General Election | CHALLENGES | 163-127.2 | No later than 10 days after the time for filing |
| 12/31/15 | Thursday, December 31, 2015 | | SBE certifies to CBE chairman in each county the names | Statewide General Election | CANDIDATE FILING | 163-108 | No later than 10 days after the close of |
| 12/31/15 | Thursday, December 31, 2015 | | One-stop hours reduction requests due | Statewide Primary | ABSENTEE ONESTOP | 163-227.2 | Numbered Memo 2015-05 |
| 01/01/16 | Friday, January 01, 2016 | | STATE HOLIDAY - NEW YEARS DAY | | | | |
| 01/02/16 | Friday, January 02, 2015 | | Counties List Maintenance Mailings | Administration | LIST MAINTENANCE | 163-82.14 | 1st business day after New Year's Day |
| 01/02/16 | Saturday, January 02, 2016 | | Report Results by Voting Tabulation Districts (VTD) | November Municipal | VOTING SYSTEMS | 163-132.5G | No later than 60 days after Election Day |
| 01/04/16 | Monday, January 04, 2016 | | Send NCOA Mailings | Administration | LIST MAINTENANCE | 163-82.14 | January 1 and July 1 of each calendar year. |
| 01/04/16 | Monday, January 04, 2016 | | Remove Inactive Voters; Remove Temporary Voters | Administration | LIST MAINTENANCE | 163-82.14 | 1st business day after New Year's Day |
| 01/04/16 | Monday, January 04, 2016 | 5:00 PM | Presidential nomination by petition due to be filed with | Presidential Preference Primary | CANDIDATE FILING | HB 373 | No later than 5:00 pm on 1/4/2016 |
| 01/05/16 | Tuesday, January 05, 2016 | | Nomination of Presidential candidates by SBE | Presidential Preference Primary | CANDIDATE FILING | HB 373 | SBE must convene in Raleigh on January 5, |
| 01/07/16 | Thursday, January 07, 2016 | | Update NVRA Survey Report | Administration | NVRA | 163-82.20 | By the 7th of each month |
| 01/07/16 | Thursday, January 07, 2016 | | Final Supplemental Referendum Report | November Municipal | CF REFERENDUM REPORTING | | |
| 01/07/16 | Thursday, January 07, 2016 | | Final Supplemental Referendum Report Due Date | October Municipal | CF REFERENDUM REPORTING | | |
| 01/07/16 | Thursday, January 07, 2016 | | Final Supplemental Referendum Report Due Date | September Municipal Primary | CF REFERENDUM REPORTING | | |
| 01/11/16 | Monday, January 11, 2016 | | Begin Budget Preparations; Prepare Training Schedule | Administration | ADMINISTRATION | Best Practice | Second Monday in January |
| 01/14/16 | Thursday, January 14, 2016 | | Notices of Report Due mailed for Year End Semi Annual Report | Administration | CAMPAIGN FINANCE | 163-278.23; 163-278.40H | Must be sent no later than 5 days before report is due. County candidate notices can be sent as early as 30 days before due date; municipal candidate notices can be sent as early as 15 days before due date. |
| 01/15/16 | Friday, January 15, 2016 | | Remove Ineligible Voters | Administration | LIST MAINTENANCE | 163-82.14 | 15th of each month |
| 01/15/16 | Friday, January 15, 2016 | | 17-year olds who will be 18 by date of general election | Statewide General Election | VOTER REGISTRATION | 163-59 | No earlier than 60 days prior to the partisan |
| 01/15/16 | Friday, January 15, 2016 | | One-stop Implementation Plans due | Statewide Primary | ABSENTEE ONESTOP | 163-227.2 | Numbered Memo 2015-05 |
| 01/18/16 | Monday, January 18, 2016 | | STATE HOLIDAY - MLK DAY | | | | |
| 01/25/16 | Monday, January 25, 2016 | | Absentee ballots must be available | Statewide Primary | ABSENTEE | 163-227.3(a), 163-258.9 | 50 days prior to election day |

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|---|---|---|---|---|---|---|---|
| 01/26/16 | Tuesday, January 26, 2016 | | Update county board website of election schedule and | Statewide Primary | PRECINCTS | Best Practice | 7 weeks prior to election day |
| 01/29/16 | Friday, January 29, 2016 | | Year End Semi Annual Report Due Date | November Municipal | CF REPORTING | | |
| 01/29/16 | Friday, January 29, 2016 | | Year End Semi Annual Report Due Date | October Municipal | CF REPORTING | | |
| 01/29/16 | Friday, January 29, 2016 | | Year End Semi Annual Report Due Date | September Municipal Primary | CF REPORTING | | |
| 01/29/16 | Saturday, January 30, 2016 | | Begin period to publish weekly election notices | Statewide Primary | LEGAL NOTICE | 163-33(8) | Publish weekly during the 20 day period |
| 01/29/16 | Friday, January 29, 2016 | | 2015 Year End Semi Annual Reports Due | Administration | CAMPAIGN FINANCE | 163-278.9(a)(6) | |
| 01/30/16 | Saturday, January 30, 2016 | | Notice of Precinct/Voting Place Change | Statewide Primary | PRECINCTS | 163-128(a) | 45 days prior to next primary or election |
| 01/30/16 | Saturday, January 30, 2016 | | Publish legal notice of any special election | Statewide Primary | LEGAL NOTICE | 163-287 | 45 days prior to the special election date |
| 02/04/16 | Thursday, February 04, 2016 | | Receive election coding from VS vendor target date | Statewide Primary | VOTING SYSTEMS | Best Practice | 28 days before one-stop begins |
| 02/07/16 | Sunday, February 07, 2016 | | Update NVRA Survey Report | Administration | NVRA | 163-82.20 | By the 7th of each month |
| 02/12/16 | Friday, February 12, 2016 | | Notification to voters of precinct/polling place change | Statewide Primary | PRECINCTS | 163-128(a) | 30 days prior to election |
| 02/12/16 | Friday, February 12, 2016 | | End period to publish weekly election notices | Statewide Primary | LEGAL NOTICE | 163-33(8) | Publish weekly during the 20 day period |
| 02/12/16 | Friday, February 12, 2016 | | Deadline for public notice of buffer zone information | Statewide Primary | PRECINCTS | 163-166.4(c) | No later than 30 days before each election |
| 02/15/16 | Monday, February 15, 2016 | | Remove Ineligible Voters | Administration | LIST MAINTENANCE | 163-82.14 | 15th of each month |
| 02/15/16 | Monday, February 15, 2016 | | FEDERAL HOLIDAY - WASHINGTON'S BIRTHDAY (NO MAIL) | | | | |
| 02/16/16 | Tuesday, February 16, 2016 | | Prepare machine delivery schedule/chain of custody plan | Statewide Primary | PRECINCTS | Best Practice | 4 weeks before Election Day |
| 02/18/16 | Thursday, February 18, 2016 | | Mock Election | Statewide Primary | VOTING SYSTEMS | Best Practice | 14 days before absentee one-stop begins in a |
| 02/18/16 | Thursday, February 18, 2016 | | Send SBOE Certification of Late or Delinquent Campaign | Administration | CAMPAIGN FINANCE | 163-278.22(11) | Certification forms available in County |
| | Friday, February 19, 2016 | | Voter Registration deadline | Statewide Primary | VOTER REGISTRATION | 163-82.6(c), (c1) | No later than 25 days before the election |
| 02/19/16 | Friday, February 19, 2016 | | Last day to challenge voter's registration | Statewide Primary | CHALLENGES | 163-85 | No later than 25 days before an election |
| 02/20/16 | Saturday, February 20, 2016 | | Begin sending late registration notices (until Election | Statewide Primary | VOTER REGISTRATION | Best Practice | Starting day after voter registration deadline |
| 02/21/16 | Sunday, February 21, 2016 | | Notices of Report Due mailed for 2016 First Quarter | Administration | CAMPAIGN FINANCE | 163-278.23; 163-278.40H | Must be sent no later than 5 days before |
| 02/23/16 | Tuesday, February 23, 2016 | 5:00 PM | Absentee Board Meeting 1 | Statewide Primary | ABSENTEE | 163-230.1(c1) | Each Tuesday at 5:00 p.m., commencing on |
| 02/24/16 | Wednesday, February 24, 2016 | | Voter Registration deadline - Exception for missing or | Statewide Primary | VOTER REGISTRATION | 163-82.6(c), (c1) | No later than 20 days before the election |
| 02/25/16 | Thursday, February 25, 2016 | | Complete Logic & Accuracy testing | Statewide Primary | VOTING SYSTEMS | Best Practice | 7 days before the start of one-stop voting |
| 02/27/16 | Saturday, February 27, 2016 | 10:00 AM | One-stop observer list due | Statewide Primary | OBSERVERS | 163-45(b) | By 10:00 a.m. on the 5th day prior to start of |
| 02/29/16 | Monday, February 29, 2016 | | Deadline to Setup a Referenda Contest | Administration | VOTING SYSTEMS | Best Practice | No later than the end of candidate filing for a |
| 03/01/16 | Tuesday, March 01, 2016 | 5:00 PM | Absentee Board Meeting 2 | Statewide Primary | ABSENTEE | 163-230.1(c1) | Each Tuesday at 5:00 p.m., commencing on |
| 03/01/16 | Tuesday, March 01, 2016 | | Begin publishing Absentee Resolution | Statewide Primary | ABSENTEE | 163-234 | Once a week for two weeks prior to the |
| 03/03/16 | Thursday, March 03, 2016 | | One-stop voting begins | Statewide Primary | ABSENTEE ONESTOP | 163-227.2(b) | Second Thursday before election |
| 03/07/16 | Monday, March 07, 2016 | | Update NVRA Survey Report | Administration | NVRA | 163-82.20 | By the 7th of each month |
| 03/07/16 | Monday, March 07, 2016 | | 2016 Pre-Primary Campaign Finance Report due (covers | Statewide Primary | CF REPORTING | HB 373 | |
| 03/07/16 | Monday, March 07, 2016 | | 2016 First Quarter Reports Due | Administration | CAMPAIGN FINANCE | 163-278.9(a)(5a); H373 Sec 2(g) | |
| 03/08/16 | Tuesday, March 08, 2016 | 5:00 PM | Absentee Board Meeting 3 | Statewide Primary | ABSENTEE | 163-230.1(c1) | Each Tuesday at 5:00 p.m., commencing on |
| 03/08/16 | Tuesday, March 08, 2016 | 5:00 PM | Last day to request an absentee ballot by mail | Statewide Primary | ABSENTEE | 163-230.1(a) | Not later than 5:00 p.m. on the Tuesday |
| 03/08/16 | Tuesday, March 08, 2016 | 5:00 PM | Late absentee requests allowed due to sickness or | Statewide Primary | ABSENTEE | 163-230.1(a1) | After 5:00 p.m. on the Tuesday before the |
| 03/10/16 | Thursday, March 10, 2016 | 10:00 AM | Election Day Observer/Runner list due | Statewide Primary | OBSERVERS | 163-45(b) | By 10:00 a.m. on the 5th day prior to Election |
| 03/12/16 | Saturday, March 12, 2016 | 1:00 PM | One-stop voting ends | Statewide Primary | ABSENTEE ONESTOP | 163-227.2(b) | Not later than 1:00 p.m. on the last Saturday |
| 03/14/16 | Monday, March 14, 2016 | | Absentee Voting - Date By Which Absentee Ballots Must | Second Primary - No Federal | ABSENTEE | 163-227.3(a); Best Practice | As soon as possible or at least 30 days before |
| 03/14/16 | Monday, March 14, 2016 | | Receive voter registration totals and add them to vote | Statewide Primary | VOTING SYSTEMS | | 1 day before election day |
| 03/14/16 | Monday, March 14, 2016 | 5:00 PM | UOCAVA Absentee Ballot Request Deadline | Statewide Primary | ABSENTEE | 163-258.7 | No later than 5:00 p.m. on the day before |
| 03/14/16 | Monday, March 14, 2016 | 5:00 PM | UOCAVA Voter Registration Deadline | Statewide Primary | VOTER REGISTRATION | 163-258.6 | No later than 5:00 p.m. on the day before |
| 03/14/16 | Monday, March 14, 2016 | 5:00 PM | Absentee Board Meeting Pre-Election Day | Statewide Primary | ABSENTEE | 163-232 | After 5:00 p.m. on the Monday before |
| 03/15/16 | Tuesday, March 15, 2016 | | Remove Ineligible Voters | Administration | LIST MAINTENANCE | 163-82.14 | 15th of each month |
| 03/15/16 | Tuesday, March 15, 2016 | | Update county board website of election schedule and | Second Primary - No Federal | PRECINCTS | Best Practice | 7 weeks prior to election day |
| 03/15/16 | Tuesday, March 15, 2016 | 6:30 AM | ELECTION DAY | Statewide Primary | ELECTION DAY | 163-1 | Tuesday after the first Monday in May |
| 03/15/16 | Tuesday, March 15, 2016 | 12:00 PM | Period to challenge an absentee ballot | Statewide Primary | CHALLENGES | 163-89 | No earlier than noon or later than 5:00 p.m. |
| 03/15/16 | Tuesday, March 15, 2016 | 5:00 PM | Begin counting absentee ballots (Cannot announce | Statewide Primary | ABSENTEE | 163-234 | 5:00 p.m. on election day unless an earlier |
| 03/15/16 | Tuesday, March 15, 2016 | 5:00 PM | Civilian Absentee return deadline | Statewide Primary | ABSENTEE | 163-231(b)(1) | Not later than 5:00 p.m. on day of the primary |
| 03/15/16 | Tuesday, March 15, 2016 | 10:00 AM | Distribute certified executed absentee list | Statewide Primary | ABSENTEE | 163-232 | No later than 10:00 a.m. on election day |
| 03/15/16 | Tuesday, March 15, 2016 | | Distribute Election Day Absentee Abstract to SBE | Statewide Primary | ABSENTEE | 163-234(6) | Election Day |
| 03/15/16 | Tuesday, March 15, 2016 | 10:00 AM | Election Day tracking (10 am, 2 pm, 4 pm) | Statewide Primary | ADMINISTRATION | | Election Day at 10 am, 2 pm and 4 pm |
| 03/15/16 | Tuesday, March 15, 2016 | 8:30 PM | Election Night finalize activities | Statewide Primary | VOTING SYSTEMS | | Election Night |
| 03/15/16 | Tuesday, March 15, 2016 | 7:30 PM | UOCAVA absentee ballot return deadline - electronic | Statewide Primary | ABSENTEE | 163-258.10 | Close of polls on Election Day |
| 03/16/16 | Wednesday, March 16, 2016 | | Sample Audit Count - Precincts Selection | Statewide Primary | CANVASS | 163-182.1(b)(1) | Within 24 hours of polls closing on Election |
| 03/18/16 | Friday, March 18, 2016 | 5:00 PM | Civilian Absentee Return Deadline - Mail Exception | Statewide Primary | ABSENTEE | 163-231(b)(2) | If postmarked on or before election day and |
| 03/19/16 | Saturday, March 19, 2016 | | Notice of Precinct/Voting Place Change | Second Primary - No Federal | PRECINCTS | 163-128(a) | 45 days prior to next primary or election |
| 03/21/16 | Monday, March 21, 2016 | 12:00 PM | Deadline for provisional voters subject to VIVA ID to | Statewide Primary | CANVASS | 163-166.13; 163-182.1A(c) | Not later than 12:00 noon the day prior to the |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 03/21/16 | Monday, March 21, 2016 | 5:00 PM | UOCAVA Absentee Ballot Return Deadline - Mailed | Statewide Primary | ABSENTEE | 163-258.12 | By end of business on the business day before |
| 03/22/16 | Tuesday, March 22, 2016 | 11:00 AM | County Canvass | Statewide Primary | CANVASS | 163-182.5(b) | Seven days after each election (except a |
| 03/22/16 | Tuesday, March 22, 2016 | | Deadline for election protest concerning votes counted | Statewide Primary | CANVASS | 163-182.9(b)(4)a | Before the beginning of the county canvass |
| 03/22/16 | Tuesday, March 22, 2016 | 10:00 AM | Distribute Supplemental Certified Executed Absentee List | Statewide Primary | ABSENTEE | 163-232.1; 163-234 (10) | No later than 10:00 a.m. of the next business |
| 03/22/16 | Tuesday, March 22, 2016 | | Mail Abstract to SBE | Statewide Primary | CANVASS | 163-182.6 | Seven days after each election (except a |
| 03/23/16 | Wednesday, March 23, 2016 | 5:00 PM | Deadline for candidates in CBE jurisdictional contests to | Statewide Primary | CANVASS | 163-182.7(b) | 5:00 p.m. on the first business day after the |
| 03/24/16 | Thursday, March 24, 2016 | | Receive Election Coding from VS vendor target date | Second Primary - No Federal | VOTING SYSTEMS | Best Practice | 28 days before absentee one-stop |
| 03/24/16 | Thursday, March 24, 2016 | 5:00 PM | Deadline for candidates in SBOE jurisdictional contests to | Statewide Primary | CANVASS | 163-182.7(c); 163-182.4(b)(5) | 5:00 p.m. on the second business day after |
| 03/24/16 | Thursday, March 24, 2016 | 12:00 PM | Deadline for candidates to request Second Primary | Statewide Primary | CANVASS | 163-111(c2) | No later than 12:00 noon on the ninth day |
| 03/24/16 | Thursday, March 24, 2016 | 5:00 PM | Deadline to file election protest concerning any other | Statewide Primary | CANVASS | 163-182.9(b)(4)c | 5:00 p.m. on the second business day after |
| 03/24/16 | Thursday, March 24, 2016 | 5:00 PM | Deadline to file election protest concerning manner in | Statewide Primary | CANVASS | 163-182.9(b)(4)b | 5:00 p.m. on the second business day after |
| 03/25/16 | Friday, March 25, 2016 | | STATE HOLIDAY - GOOD FRIDAY | | | | |
| 03/28/16 | Monday, March 28, 2016 | | CBE issues certificates of nomination or election if no | Statewide Primary | CANVASS | 163-182.15(a); 163-301 | Six days after the county canvass (In a |
| 03/28/16 | Monday, March 28, 2016 | | Send SBOE Certification of Late or Delinquent Campaign | Administration | CAMPAIGN FINANCE | 163-278.22(11) | Certification forms available in County |
| 04/01/16 | Friday, April 01, 2016 | | Order Election Supplies | Administration | ADMINISTRATION | Best Practice | 90 days before end of fiscal year or before |
| 04/03/16 | Sunday, April 03, 2016 | | Notification to Voters of Precinct/Voting Place Change | Second Primary - No Federal | PRECINCTS | 163-128(a) | 30 days prior to the primary or election |
| 04/03/16 | Sunday, April 03, 2016 | | Last day to mail notice of polling place changes. | Second Primary - No Federal | PRECINCTS | 163-128 | No later than 30 days prior to the primary or |
| 04/05/16 | Tuesday, April 05, 2016 | | Update county board website of election schedule and | Second Primary - Federal Contest | PRECINCTS | Best Practice | 7 weeks prior to election day |
| 04/05/16 | Tuesday, April 05, 2016 | | Prepare machine delivery schedule/chain of custody plan | Second Primary - No Federal | PRECINCTS | Best Practice | 4 weeks before Election Day |
| 04/07/16 | Thursday, April 07, 2016 | | Update NVRA Survey Report | Administration | NVRA | 163-82.20 | By the 7th of each month |
| 04/07/16 | Thursday, April 07, 2016 | | Mock Election | Second Primary - No Federal | VOTING SYSTEMS | Best Practice | 14 days before absentee one-stop begins in a |
| 04/09/16 | Saturday, April 09, 2016 | | Absentee Voting - Date By Which Absentee Ballots Must | Second Primary - Federal Contest | ABSENTEE | 163-227.3(a) | For a second primary that includes a federal |
| 04/09/16 | Saturday, April 09, 2016 | | Deadline for UOCAVA Absentee Ballots to be Available | Second Primary - Federal Contest | ABSENTEE | 163-258.9 | No later than 45 days before an election with |
| 04/09/16 | Saturday, April 09, 2016 | | Notice of Precinct/Voting Place Change | Second Primary - Federal Contest | PRECINCTS | 163-128(a) | 45 days prior to next primary or election |
| 04/12/16 | Tuesday, April 12, 2016 | 5:00 PM | Absentee Board Meeting 1 | Second Primary - No Federal | ABSENTEE | 163-230.1(c1) | Each Tuesday at 5:00 p.m., commencing on |
| 04/14/16 | Thursday, April 14, 2016 | | Complete Logic & Accuracy testing | Second Primary - No Federal | VOTING SYSTEMS | Best Practice | 7 days before the start of one-stop voting |
| 04/15/16 | Friday, April 15, 2016 | | Remove Ineligible Voters | Administration | LIST MAINTENANCE | 163-82.14 | 15th of each month |
| 04/15/16 | Friday, April 15, 2016 | | One-stop Implementation Plans Due | Second Primary - Federal Contest | ABSENTEE ONESTOP | 163-227.2 | Deadline set by SBOE staff |
| 04/15/16 | Friday, April 15, 2016 | | One-stop Implementation Plans Due | Second Primary - No Federal | ABSENTEE ONESTOP | 163-227.2 | Deadline set by SBOE staff |
| 04/16/16 | Saturday, April 16, 2016 | 10:00 AM | One-stop Observer List Due | Second Primary - No Federal | OBSERVERS | 163-45(b) | By 10:00 a.m. on the 5th day prior to start of |
| 04/19/16 | Tuesday, April 19, 2016 | 5:00 PM | Absentee Board Meeting 2 | Second Primary - No Federal | ABSENTEE | 163-230.1(c1) | Each Tuesday at 5:00 p.m., commencing on |
| 04/19/16 | Tuesday, April 19, 2016 | | Publish Absentee Resolution | Second Primary - No Federal | ABSENTEE | 163-234 | Once a week for two weeks prior to the |
| 04/21/16 | Thursday, April 21, 2016 | | Receive Election Coding from VS vendor target date | Second Primary - Federal Contest | VOTING SYSTEMS | Best Practice | 21 days before absentee one-stop begins in a |
| 04/21/16 | Thursday, April 21, 2016 | | One-stop voting begins | Second Primary - No Federal | ABSENTEE ONESTOP | 163-227.2(b) | Not earlier than the second Thursday before |
| 04/24/16 | Sunday, April 24, 2016 | | CBE gives public notice of buffer zone information | Second Primary - Federal Contest | PRECINCTS | 163-166.4(c) | No later than 30 days before each election |
| 04/24/16 | Sunday, April 24, 2016 | | Last day to mail notice of polling place changes. | Second Primary - Federal Contest | PRECINCTS | 163-128 | No later than 30 days prior to the primary or |
| 04/24/16 | Sunday, April 24, 2016 | | Notification to Voters of Precinct/Voting Place Change | Second Primary - Federal Contest | PRECINCTS | 163-128(a) | 30 days prior to the primary or election |
| 04/26/16 | Tuesday, April 26, 2016 | | Prepare machine delivery schedule/chain of custody plan | Second Primary - Federal Contest | PRECINCTS | Best Practice | 4 weeks before Election Day |
| 04/26/16 | Tuesday, April 26, 2016 | 5:00 PM | Absentee Board Meeting 3 | Second Primary - No Federal | ABSENTEE | 163-230.1(c1) | Each Tuesday at 5:00 p.m., commencing on |
| 04/26/16 | Tuesday, April 26, 2016 | 5:00 PM | Last day to request an absentee ballot by mail. | Second Primary - No Federal | ABSENTEE | 163-230.1(a) | Not later than 5:00 p.m. on the Tuesday |
| 04/26/16 | Tuesday, April 26, 2016 | 5:00 PM | Late absentee requests allowed due to sickness or | Second Primary - No Federal | ABSENTEE | 163-230.1(a1) | After 5:00 p.m. on the Tuesday before the |
| 04/28/16 | Thursday, April 28, 2016 | | Mock Election | Second Primary - Federal Contest | VOTING SYSTEMS | Best Practice | 14 days before absentee one-stop begins in a |
| 04/28/16 | Thursday, April 28, 2016 | 10:00 AM | Election Day Observer/Runner List Due | Second Primary - No Federal | OBSERVERS | 163-45(b) | By 10:00 a.m. on the 5th day prior to Election |
| 04/30/16 | Saturday, April 30, 2016 | 1:00 PM | One-stop voting ends | Second Primary - No Federal | ABSENTEE ONESTOP | 163-227.2(b) | Not later than 1:00 p.m. on the last Saturday |
| 05/02/16 | Monday, May 02, 2016 | | Receive voter registration totals and add them to vote tabulation software | Second Primary - No Federal Contest | VOTING SYSTEMS | | 1 day before election day |
| 05/02/16 | Monday, May 02, 2016 | 5:00 PM | UOCAVA Absentee Ballot Request Deadline | Second Primary - No Federal | ABSENTEE | 163-258.7 | No later than 5:00 p.m. on the day before |
| 05/02/16 | Monday, May 02, 2016 | 5:00 PM | Absentee Board Meeting Pre-Election Day | Second Primary - No Federal | ABSENTEE | 163-232 | After 5:00 p.m. on the Monday before |
| 05/03/16 | Tuesday, May 03, 2016 | 5:00 PM | Absentee Board Meeting 1 | Second Primary - Federal Contest | ABSENTEE | 163-230.1(c1) | Each Tuesday at 5:00 p.m., commencing on |
| 05/03/16 | Tuesday, May 03, 2016 | 12:00 PM | Period to challenge an absentee ballot | Second Primary - No Federal | CHALLENGES | 163-89 | No earlier than noon or later than 5:00 p.m. |
| 05/03/16 | Tuesday, May 03, 2016 | 5:00 PM | Civilian Absentee Return Deadline | Second Primary - No Federal | ABSENTEE | 163-231(b)(1) | Not later than 5:00 p.m. on day of the primary |
| | Tuesday, May 03, 2016 | 5:00 PM | Begin counting absentee ballots (Cannot announce | Second Primary - No Federal | ABSENTEE | 163-234 | 5:00 p.m. on election day unless an earlier |
| 05/03/16 | Tuesday, May 03, 2016 | 10:00 AM | Distribute Certified Executed Absentee List | Second Primary - No Federal | ABSENTEE | 163-232 | No later than 10:00 a.m. on election day |
| 05/03/16 | Tuesday, May 03, 2016 | | Distribute Election Day Absentee Abstract to SBOE | Second Primary - No Federal | ABSENTEE | 163-234(6) | Election Day |
| 05/03/16 | Tuesday, May 03, 2016 | 6:30 AM | ELECTION DAY | Second Primary - No Federal | ELECTION DAY | 163-1; 163-111 | 7 weeks after the first primary if there is not a |
| 05/03/16 | Tuesday, May 03, 2016 | 10:00 AM | Election Day Tracking (10 am, 2 pm, 4 pm) | Second Primary - No Federal | ADMINISTRATION | | Election Day at 10 am, 2 pm and 4 pm |
| 05/03/16 | Tuesday, May 03, 2016 | 8:30 PM | Election Night finalize activities | Second Primary - No Federal | VOTING SYSTEMS | | Election Night |
| 05/03/16 | Tuesday, May 03, 2016 | 7:30 PM | UOCAVA absentee ballot return deadline - electronic | Second Primary - No Federal | ABSENTEE | 163-258.10 | Close of polls on Election Day |

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|---|---|---|---|---|---|---|---|
| 05/04/16 | Wednesday, May 04, 2016 | | Sample Audit Count - Precincts Selection | Second Primary - No Federal | CANVASS | 163-182.1(b)(1) | Within 24 hours of polls closing on Election |
| 05/05/16 | Thursday, May 05, 2016 | | Complete Logic & Accuracy Testing | Second Primary - Federal Contest | VOTING SYSTEMS | Best Practice | 7 days before the start of one-stop voting |
| 05/06/16 | Friday, May 06, 2016 | 5:00 PM | Civilian Absentee Return Deadline - Mail Exception | Second Primary - No Federal | ABSENTEE | 163-231(b)(2) | If postmarked on or before election day and |
| 05/07/16 | Saturday, May 07, 2016 | | Update NVRA Survey Report | Administration | NVRA | 163-82.20 | By the 7th of each month |
| 05/07/16 | Saturday, May 07, 2016 | 10:00 AM | One-stop Observer List Due | Second Primary - Federal Contest | OBSERVERS | 163-45(b) | By 10:00 a.m. on the 5th day prior to start of |
| 05/09/16 | Monday, May 09, 2016 | 12:00 PM | Deadline for provisional voters subject to VIVA ID to | Second Primary - No Federal | CANVASS | 163-166.13; 163-182.1A(c) | Not later than 12:00 noon the day prior to the |
| 05/09/16 | Monday, May 09, 2016 | 5:00 PM | UOCAVA Absentee Ballot Return Deadline - Mailed | Second Primary - No Federal | ABSENTEE | 163-258.12 | By end of business on the business day before |
| 05/10/16 | Tuesday, May 10, 2016 | 5:00 PM | Absentee Board Meeting 2 | Second Primary - Federal Contest | ABSENTEE | 163-230.1(c1) | Each Tuesday at 5:00 p.m., commencing on |
| 05/10/16 | Tuesday, May 10, 2016 | | Publish Absentee Resolution | Second Primary - Federal Contest | ABSENTEE | 163-234 | Once a week for two weeks prior to the |
| 05/10/16 | Tuesday, May 10, 2016 | 11:00 AM | County Canvass | Second Primary - No Federal | CANVASS | 163-182.5(b) | Seven days after each election (except a |
| 05/10/16 | Tuesday, May 10, 2016 | | Deadline for election protest concerning votes counted | Second Primary - No Federal | CANVASS | 163-182.9(b)(4)a | Before the beginning of the county canvass |
| 05/11/16 | Wednesday, May 11, 2016 | 10:00 AM | Distribute Supplemental Certified Executed Absentee List | Second Primary - No Federal | ABSENTEE | 163-232.1; 163-234 (10) | No later than 10:00 a.m. of the next business |
| 05/11/16 | Wednesday, May 11, 2016 | 5:00 PM | Deadline for candidates in CBE jurisdictional contests to | Second Primary - No Federal | CANVASS | 163-182.7(b) | 5:00 p.m. on the first business day after the |
| 05/12/16 | Thursday, May 12, 2016 | | One-stop voting begins | Second Primary - Federal Contest | ABSENTEE ONESTOP | 163-227.2(b) | Not earlier than the second Thursday before |
| 05/12/16 | Thursday, May 12, 2016 | 5:00 PM | Deadline for candidates in SBOE jurisdictional contests to | Second Primary - No Federal | CANVASS | 163-182.7(c); 163-182.4(b)(5) | 5:00 p.m. on the second business day after |
| 05/12/16 | Thursday, May 12, 2016 | 5:00 PM | Deadline to file election protest concerning any other | Second Primary - No Federal | CANVASS | 163-182.9(b)(4)c | 5:00 p.m. on the second business day after |
| 05/12/16 | Thursday, May 12, 2016 | 5:00 PM | Deadline to file election protest concerning manner in | Second Primary - No Federal | CANVASS | 163-182.9(b)(4)b | 5:00 p.m. on the second business day after |
| 05/12/16 | Thursday, May 12, 2016 | | District Relations Report distributed to counties | Statewide General Election | VOTING SYSTEMS | Best Practice | 120 days before start of absentee voting by |
| 05/14/16 | Saturday, May 14, 2016 | | Report Results by Voting Tabulation Districts (VTD) | Statewide Primary | VOTING SYSTEMS | 163-132.5G | No later than 60 days after Election Day |
| 05/15/16 | Sunday, May 15, 2016 | | Remove Ineligible Voters | Administration | LIST MAINTENANCE | 163-82.14 | 15th of each month |
| 05/17/16 | Tuesday, May 17, 2016 | 5:00 PM | Petition for Formulation of New Political Party - | Administration | PETITIONS | 163-96(b1) | No later than 5:00 p.m. on the 15th day |
| 05/17/16 | Tuesday, May 17, 2016 | 5:00 PM | Absentee Board Meeting 3 | Second Primary - Federal Contest | ABSENTEE | 163-230.1(c1) | Each Tuesday at 5:00 p.m., commencing on |
| 05/17/16 | Tuesday, May 17, 2016 | 5:00 PM | Last day to request an absentee ballot by mail. | Second Primary - Federal Contest | ABSENTEE | 163-230.1(a) | Not later than 5:00 p.m. on the Tuesday |
| 05/17/16 | Tuesday, May 17, 2016 | 5:00 PM | Late absentee requests allowed due to sickness or | Second Primary - Federal Contest | ABSENTEE | 163-230.1(a1) | After 5:00 p.m. on the Tuesday before the |
| 05/18/16 | Wednesday, May 18, 2016 | | CBE issues certificates of nomination or election if no | Second Primary - No Federal | CANVASS | 163-182.15(a); 163-301 | Six days after the county canvass (In a |
| 05/19/16 | Thursday, May 19, 2016 | 10:00 AM | Election Day Observer/Runner List Due | Second Primary - Federal Contest | OBSERVERS | 163-45(b) | By 10:00 a.m. on the 5th day prior to Election |
| 05/21/16 | Saturday, May 21, 2016 | 1:00 PM | One-stop voting ends | Second Primary - Federal Contest | ABSENTEE ONESTOP | 163-227.2(b) | Not later than 1:00 p.m. on the last Saturday |
| 05/23/16 | Monday, May 23, 2016 | | Receive voter registration totals and add them to vote | Second Primary - Federal Contest | VOTING SYSTEMS | | 1 day before election day |
| 05/23/16 | Monday, May 23, 2016 | 5:00 PM | UOCAVA Absentee Ballot Request Deadline | Second Primary - Federal Contest | ABSENTEE | 163-258.7 | No later than 5:00 p.m. on the day before |
| 05/23/16 | Monday, May 23, 2016 | 5:00 PM | Absentee Board Meeting Pre-Election Day | Second Primary - Federal Contest | ABSENTEE | 163-232 | After 5:00 p.m. on the Monday before |
| 05/24/16 | Tuesday, May 24, 2016 | 12:00 PM | Period to challenge an absentee ballot | Second Primary - Federal Contest | CHALLENGES | 163-89 | No earlier than noon or later than 5:00 p.m. on Election Day |
| 05/24/16 | Tuesday, May 24, 2016 | 5:00 PM | Begin counting absentee ballots (Cannot announce | Second Primary - Federal Contest | ABSENTEE | 163-234 | 5:00 p.m. on election day unless an earlier |
| 05/24/16 | Tuesday, May 24, 2016 | 5:00 PM | Civilian absentee return deadline | Second Primary - Federal Contest | ABSENTEE | 163-231(b)(1) | Not later than 5:00 p.m. on day of the primary |
| 05/24/16 | Tuesday, May 24, 2016 | 10:00 AM | Distribute Certified Executed Absentee List | Second Primary - Federal Contest | ABSENTEE | 163-232 | No later than 10:00 a.m. on election day |
| 05/24/16 | Tuesday, May 24, 2016 | | Distribute Election Day Absentee Abstract to SBOE | Second Primary - Federal Contest | ABSENTEE | 163-234(6) | Election Day |
| 05/24/16 | Tuesday, May 24, 2016 | 6:30 AM | ELECTION DAY | Second Primary - Federal Contest | ELECTION DAY | 163-1; 163-111 | 10 weeks after the first primary if there is a |
| 05/24/16 | Tuesday, May 24, 2016 | 10:00 AM | Election Day Tracking (10 am, 2 pm, 4 pm) | Second Primary - Federal Contest | ADMINISTRATION | | Election Day at 10 am, 2 pm and 4 pm |
| 05/24/16 | Tuesday, May 24, 2016 | 8:30 PM | Election Night finalize activities | Second Primary - Federal Contest | VOTING SYSTEMS | | Election Night |
| 05/24/16 | Tuesday, May 24, 2016 | 7:30 PM | UOCAVA absentee ballot return deadline - electronic | Second Primary - Federal Contest | ABSENTEE | 163-258.10 | Close of polls on Election Day |
| 05/24/16 | Tuesday, May 24, 2016 | | Confirm with polling place contacts use of facility | Statewide General Election | PRECINCTS | Best Practice | 24 weeks prior to election day |
| 05/25/16 | Wednesday, May 25, 2016 | | Sample Audit Count - Precincts Selection | Second Primary - Federal Contest | CANVASS | 163-182.1(b)(1) | Within 24 hours of polls closing on Election |
| 05/27/16 | Friday, May 27, 2016 | 5:00 PM | Civilian Absentee Return Deadline - Mail Exception | Second Primary - Federal Contest | ABSENTEE | 163-231(b)(2) | If postmarked on or before election day and |
| 05/27/16 | Friday, May 27, 2016 | 12:00 PM | Deadline for provisional voters subject to VIVA ID to | Second Primary - Federal Contest | CANVASS | 163-166.13; 163-182.1A(c) | Not later than 12:00 noon the day prior to the |
| 05/27/16 | Friday, May 27, 2016 | 5:00 PM | UOCAVA Absentee Ballot Return Deadline - Mailed | Second Primary - Federal Contest | ABSENTEE | 163-258.12 | By end of business on the business day before |
| 05/30/16 | Monday, May 30, 2016 | | STATE HOLIDAY - MEMORIAL DAY | | | | |
| 05/31/16 | Tuesday, May 31, 2016 | 11:00 AM | County Canvass | Second Primary - Federal Contest | CANVASS | 163-182.5(b) | Seven days after each election (except a |
| 05/31/16 | Tuesday, May 31, 2016 | | Deadline for election protest concerning votes counted | Second Primary - Federal Contest | CANVASS | 163-182.9(b)(4)a | Before the beginnning of the county canvass |
| 05/31/16 | Tuesday, May 31, 2016 | 10:00 AM | Distribute Supplemental Certified Executed Absentee List | Second Primary - Federal Contest | ABSENTEE | 163-232.1; 163-234 (10) | No later than 10:00 a.m. of the next business |
| 06/01/16 | Wednesday, June 01, 2016 | 12:00 PM | Petition for Formulation of New Political Party | Administration | PETITIONS | 163-96(a)(2) | Before 12:00 noon on the first day of June |
| 06/01/16 | Wednesday, June 01, 2016 | 5:00 PM | Deadline for candidates in CBE jurisdictional contests to | Second Primary - Federal Contest | CANVASS | 163-182.7(b) | 5:00 p.m. on the first business day after the |
| 06/02/16 | Thursday, June 02, 2016 | 5:00 PM | Deadline for candidates in SBOE jurisdictional contests to | Second Primary - Federal Contest | CANVASS | 163-182.7(c); 163-182.4(b)(5) | 5:00 p.m. on the second business day after |
| 06/02/16 | Thursday, June 02, 2016 | 5:00 PM | Deadline to file election protest concerning any other | Second Primary - Federal Contest | CANVASS | 163-182.9(b)(4)c | 5:00 p.m. on the second business day after |
| 06/02/16 | Thursday, June 02, 2016 | 5:00 PM | Deadline to file election protest concerning manner in | Second Primary - Federal Contest | CANVASS | 163-182.9(b)(4)b | 5:00 p.m. on the second business day after |
| 06/06/16 | Monday, June 06, 2016 | | CBE issues certificates of nomination or election if no | Second Primary - Federal Contest | CANVASS | 163-182.15(a); 163-301 | Six days after the county canvass (In a |
| 06/07/16 | Tuesday, June 07, 2016 | | Update NVRA Survey Report | Administration | NVRA | 163-82.20 | By the 7th of each month |
| 06/09/16 | Thursday, June 09, 2016 | 5:00 PM | Unaffiliated Candidacy Petition Deadline - deadline to | Statewide General Election | PETITIONS | 163-122 | 15 days preceding the date petitions are due |
| 06/13/16 | Monday, June 13, 2016 | 12:00 PM | Soil & Water Candidate filing begins | Soil & Water | CANDIDATE FILING | 139-6 | No earlier than noon on the second Monday |
| 06/15/16 | Wednesday, June 15, 2016 | | Remove Ineligible Voters | Administration | LIST MAINTENANCE | 163-82.14 | 15th of each month |

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|---|---|---|---|---|---|---|---|
| 06/24/16 | Friday, June 24, 2016 | 12:00 PM | Unaffiliated Candidacy Petition Deadline - County Board | Statewide General Election | PETITIONS | 163-122 | Last Friday in June of even-numbered years |
| 06/24/16 | Friday, June 24, 2016 | 12:00 PM | Verified Unaffiliated Candidacy Petition Deadline - State | Statewide General Election | PETITIONS | 163-122 | Last Friday in June of even-numbered years |
| 06/27/16 | Monday, June 27, 2016 | | Notices of Report Due mailed for 2016 Second Quarter | Administration | CAMPAIGN FINANCE | 163-278.23; 163-278.40H | Must be sent no later than 5 days before |
| 06/29/16 | Wednesday, June 29, 2016 | | Schedule precinct official training schedule | Statewide General Election | PRECINCT OFFICIALS | Best Practice | 120 days prior to start of one-stop voting |
| 07/01/16 | Friday, July 01, 2016 | | Send NCOA Mailings | Administration | LIST MAINTENANCE | 163-82.14 | January 1 and July 1 of each calendar year. |
| 07/01/16 | Friday, July 01, 2016 | 12:00 PM | Soil & Water Candidate filing ends | Soil & Water | CANDIDATE FILING | 139-6 | No later than noon on the first Friday in July |
| 07/01/16 | Friday, July 01, 2016 | | One-stop Hours Reduction Requests Due | Statewide General Election | ABSENTEE ONESTOP | 163-227.2 | Deadline set by SBOE staff |
| 07/02/16 | Saturday, July 02, 2016 | | Report Results by Voting Tabulation Districts (VTD) | Second Primary - No Federal | VOTING SYSTEMS | 163-132.5G | No later than 60 days after Election Day |
| 07/04/16 | Monday, July 04, 2016 | | STATE HOLIDAY - 4TH OF JULY | | | | |
| 07/07/16 | Thursday, July 07, 2016 | | Update NVRA Survey Report | Administration | NVRA | 163-82.20 | By the 7th of each month |
| 07/12/16 | Tuesday, July 12, 2016 | | 2016 Second Quarter Reports Due | Administration | CAMPAIGN FINANCE | 163-278.9(a)(5a); H373 Sec 2(g) | |
| 07/14/16 | Thursday, July 14, 2016 | | Notices of Report Due mailed for 2016 Mid Year Semi- | Administration | CAMPAIGN FINANCE | 163-278.9(a)(6) | Must be sent no later than 5 days before |
| 07/15/16 | Friday, July 15, 2016 | | Remove Ineligible Voters | Administration | LIST MAINTENANCE | 163-82.14 | 15th of each month |
| 07/23/16 | Saturday, July 23, 2016 | | Report Results by Voting Tabulation Districts (VTD) | Second Primary - Federal Contest | VOTING SYSTEMS | 163-132.5G | No later than 60 days after Election Day |
| 07/26/16 | Tuesday, July 26, 2016 | | Deadline to Submit Precinct Change Proposal | Statewide General Election | PRECINCTS | 163-132.3 | 105 days prior to the next election that the |
| 07/26/16 | Tuesday, July 26, 2016 | 5:00 PM | Write-in Candidacy Petition Deadline - deadline to have | Statewide General Election | PETITIONS | 163-123 | 15 days before the date petition is due to be |
| 07/29/16 | Friday, July 29, 2016 | | One-stop Implementation Plans Due | Statewide General Election | ABSENTEE ONESTOP | 163-227.2 | Deadline set by SBOE staff |
| 07/29/16 | Friday, July 29, 2016 | | 2016 Mid Year Semi-annual Report Due | Administration | CAMPAIGN FINANCE | 163-278.9(a)(6) | Filed by committees not participating in 2016 |
| 07/31/16 | Sunday, July 31, 2016 | | Publication of UOCAVA Election Notice | Statewide General Election | ABSENTEE | 163-258.16 | Not later than 100 days before election day |
| 08/01/16 | Monday, August 01, 2016 | | Send SBOE Certification of Late or Delinquent Campaign | Administration | CAMPAIGN FINANCE | 163-278.22(11) | Certification forms available in County |
| 08/05/16 | Friday, August 05, 2016 | 12:00 PM | Deadline for Unaffiliated Presidential Candidate to | Statewide General Election | PETITIONS | 163-209 | No later than 12:00 noon on the first Friday in |
| 08/07/16 | Sunday, August 07, 2016 | | Update NVRA Survey Report | Administration | NVRA | 163-82.20 | By the 7th of each month |
| 08/10/16 | Wednesday, August 10, 2016 | 12:00 PM | Verified Write-in Candidacy Petition Deadline - State | Statewide General Election | PETITIONS | 163-123 | 90 days before the general election date in |
| 08/10/16 | Wednesday, August 10, 2016 | 12:00 PM | Write-in Candidacy Petition Deadline - County Board | Statewide General Election | PETITIONS | 163-123 | 90 days before the general election date in |
| 08/12/16 | Friday, August 12, 2016 | | District Relations Report approval needed from counties | Statewide General Election | VOTING SYSTEMS | Best Practice | |
| 08/15/16 | Monday, August 15, 2016 | | Remove Ineligible Voters | Administration | LIST MAINTENANCE | 163-82.14 | 15th of each month |
| 08/25/16 | Thursday, August 25, 2016 | | Deadline to Setup a Referenda Contest | Administration | VOTING SYSTEMS | Best Practice | No later than the end of candidate filing for a |
| 09/05/16 | Monday, September 05, 2016 | | STATE HOLIDAY - LABOR DAY | | | | |
| 09/07/16 | Wednesday, September 07, 2016 | | Update NVRA Survey Report | Administration | NVRA | 163-82.20 | By the 7th of each month |
| 09/09/16 | Friday, September 09, 2016 | | Absentee Voting - Date By Which Absentee Ballots Must | Statewide General Election | ABSENTEE | 163-227.3(a) | 60 days prior to a statewide general election |
| 09/09/16 | Friday, September 09, 2016 | | Party Nominee's right to withdraw as candidate | Statewide General Election | CANDIDATE FILING | 163-113 | No later than the date absente ballots |
| 09/15/16 | Thursday, September 15, 2016 | | Remove Ineligible Voters | Administration | LIST MAINTENANCE | 163-82.14 | 15th of each month |
| 09/20/16 | Tuesday, September 20, 2016 | | Update county board website of election schedule and | Statewide General Election | PRECINCTS | Best Practice | 7 weeks prior to election day |
| 09/23/16 | Saturday, September 24, 2016 | | Publish Election Notice 1 | Statewide General Election | LEGAL NOTICE | 163-33(8) | Publish weekly during the 20 day period |
| 09/24/16 | Saturday, September 24, 2016 | | Deadline for UOCAVA Absentee Ballots to be Available | Statewide General Election | ABSENTEE | 163-258.9 | No later than 45 days before an election with |
| 09/24/16 | Saturday, September 24, 2016 | | Mail No ID Letters | Statewide General Election | VOTER REGISTRATION | 163-166.12 | Within 45 days of the date of a general |
| 09/24/16 | Saturday, September 24, 2016 | | Mail Second Incomplete Notice | Statewide General Election | VOTER REGISTRATION | 163-82.4(e) | Within 45 days of the date of a general |
| 09/24/16 | Saturday, September 24, 2016 | | Notice of Precinct/Voting Place Change | Statewide General Election | PRECINCTS | 163-128(a) | 45 days prior to next primary or election |
| 09/24/16 | Saturday, September 24, 2016 | | Publish legal notice of any special election | Statewide General Election | LEGAL NOTICE | 163-287 | 45 days prior to the special election date |
| 09/29/16 | Thursday, September 29, 2016 | | Prepare machine delivery schedule/chain of custody plan | Statewide General Election | PRECINCTS | Best Practice | 4 weeks before Election Day |
| 09/29/16 | Thursday, September 29, 2016 | | Receive Election Coding from VS vendor target date | Statewide General Election | VOTING SYSTEMS | Best Practice | 28 days before absentee one-stop |
| 09/30/16 | Friday, September 30, 2016 | | Publish Election Notice 2 | Statewide General Election | LEGAL NOTICE | 163-33(8) | Publish weekly during the 20 day period |
| 10/07/16 | Friday, October 07, 2016 | | Update NVRA Survey Report | Administration | NVRA | 163-82.20 | By the 7th of each month |
| 10/07/16 | Friday, October 07, 2016 | | Publish Election Notice 3 | Statewide General Election | LEGAL NOTICE | 163-33(8) | Publish weekly during the 20 day period |
| 10/09/16 | Sunday, October 09, 2016 | | CBE gives public notice of buffer zone information | Statewide General Election | PRECINCTS | 163-166.4(c) | No later than 30 days before each election |
| 10/09/16 | Sunday, October 09, 2016 | | Last day to mail notice of polling place changes. | Statewide General Election | PRECINCTS | 163-128 | No later than 30 days prior to the primary or |
| 10/09/16 | Sunday, October 09, 2016 | | Notification to Voters of Precinct/Voting Place Change | Statewide General Election | PRECINCTS | 163-128(a) | 30 days prior to the primary or election |
| 10/10/16 | Monday, October 10, 2016 | | FEDERAL HOLIDAY - COLUMBUS DAY (NO MAIL) | | | | |
| 10/13/16 | Thursday, October 13, 2016 | | Mock Election | Statewide General Election | VOTING SYSTEMS | Best Practice | 14 days before absentee one-stop begins in a statewide primary or general election |
| 10/14/16 | Friday, October 14, 2016 | | Voter Challenge Deadline - last day to challenge before Election Day | Statewide General Election | CHALLENGES | 163-85 | No later than 25 days before an election. |
| 10/14/16 | Friday, October 14, 2016 | 5:00 PM | Voter Registration Deadline | Statewide General Election | VOTER REGISTRATION | 163-82.6(c) | 25 days before the primary or election day |
| 10/15/16 | Saturday, October 15, 2016 | | Remove Ineligible Voters | Administration | LIST MAINTENANCE | 163-82.14 | 15th of each month |
| 10/15/16 | Saturday, October 15, 2016 | | Send Late Registration Notices until Election Day | Statewide General Election | VOTER REGISTRATION | Best Practice | Starting day after voter registration deadline |
| 10/16/16 | Sunday, October 16, 2016 | | Notices of Report Due mailed for 2016 Third Quarter Plus | Administration | CAMPAIGN FINANCE | 163-278.23; 163-278.40H | Must be sent no later than 5 days before |
| 10/18/16 | Tuesday, October 18, 2016 | 5:00 PM | Absentee Board Meeting 1 | Statewide General Election | ABSENTEE | 163-230.1(c1) | Each Tuesday at 5:00 p.m., commencing on |

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|---|---|---|---|---|---|---|---|
| 10/19/16 | Wednesday, October 19, 2016 | | Voter Registration Deadline - Exception for missing or unclear postmarked forms or forms submitted electronically by deadline | Statewide General Election | VOTER REGISTRATION | 163-82.6(c) ; 163-82.6(c1) | No later than 20 days before the election |
| 10/20/16 | Thursday, October 20, 2016 | | Complete Logic & Accuracy Testing | Statewide General Election | VOTING SYSTEMS | Best Practice | 7 days before the start of one-stop voting |
| 10/22/16 | Saturday, October 22, 2016 | 10:00 AM | One-stop Observer List Due | Statewide General Election | OBSERVERS | 163-45(b) | By 10:00 a.m. on the 5th day prior to start of |
| 10/25/16 | Tuesday, October 25, 2016 | 5:00 PM | Absentee Board Meeting 2 | Statewide General Election | ABSENTEE | 163-230.1(c1) | Each Tuesday at 5:00 p.m., commencing on |
| 10/25/16 | Tuesday, October 25, 2016 | | Publish Absentee Resolution | Statewide General Election | ABSENTEE | 163-234 | Once a week for two weeks prior to the |
| 10/27/16 | Thursday, October 27, 2016 | | Absentee One Stop Voting Begins | Statewide General Election | ABSENTEE ONESTOP | 163-227.2(b) | Not earlier than the second Thursday before |
| 10/31/16 | Monday, October 31, 2016 | | Third Quarter Plus Report Due | Administration | CAMPAIGN FINANCE | 163-278.9(a)(5a) | |
| 11/01/16 | Tuesday, November 01, 2016 | 5:00 PM | Absentee Board Meeting 3 | Statewide General Election | ABSENTEE | 163-230.1(c1) | Each Tuesday at 5:00 p.m., commencing on |
| 11/01/16 | Tuesday, November 01, 2016 | 5:00 PM | Last day to request an absentee ballot by mail. | Statewide General Election | ABSENTEE | 163-230.1(a) | Not later than 5:00 p.m. on the Tuesday |
| 11/02/16 | Tuesday, November 01, 2016 | 5:00 PM | Late absentee requests allowed due to sickness or | Statewide General Election | ABSENTEE | 163-230.1(a1) | After 5:00 p.m. on the Tuesday before the |
| 11/03/16 | Thursday, November 03, 2016 | 10:00 AM | Election Day Observer/Runner List Due | Statewide General Election | OBSERVERS | 163-45(b) | By 10:00 a.m. on the 5th day prior to Election |
| 11/05/16 | Saturday, November 05, 2016 | 1:00 PM | Absentee One Stop Voting Ends | Statewide General Election | ABSENTEE ONESTOP | 163-227.2(b) | Not later than 1:00 p.m. on the last Saturday |
| 11/07/16 | Monday, November 07, 2016 | | Update NVRA Survey Report | Administration | NVRA | 163-82.20 | By the 7th of each month |
| 11/07/16 | Monday, November 07, 2016 | | Receive voter registration totals and add them to vote | Statewide General Election | VOTING SYSTEMS | | 1 day before election day |
| 11/07/16 | Monday, November 07, 2016 | 5:00 PM | UOCAVA Absentee Ballot Request Deadline | Statewide General Election | ABSENTEE | 163-258.7 | No later than 5:00 p.m. on the day before |
| 11/07/16 | Monday, November 07, 2016 | 5:00 PM | UOCAVA Voter Registration Deadline | Statewide General Election | VOTER REGISTRATION | 163-258.6 | No later than 5:00 p.m. on the day before |
| 11/07/16 | Monday, November 07, 2016 | 5:00 PM | Absentee Board Meeting Pre-Election Day | Statewide General Election | ABSENTEE | 163-232 | After 5:00 p.m. on the Monday before |
| 11/08/16 | Tuesday, November 08, 2016 | 12:00 PM | Period to challenge an absentee ballot | Statewide General Election | CHALLENGES | 163-89 | No earlier than noon or later than 5:00 p.m. |
| 11/08/16 | Tuesday, November 08, 2016 | 5:00 PM | Begin Counting Absentee Ballots (Cannot announce | Statewide General Election | ABSENTEE | 163-234 | 5:00 p.m. on election day unless an earlier |
| 11/08/16 | Tuesday, November 08, 2016 | 5:00 PM | Civilian Absentee Return Deadline | Statewide General Election | ABSENTEE | 163-231(b)(1) | Not later than 5:00 p.m. on day of the primary |
| 11/08/16 | Tuesday, November 08, 2016 | 10:00 AM | Distribute Certified Executed Absentee List | Statewide General Election | ABSENTEE | 163-232 | No later than 10:00 a.m. on election day |
| 11/08/16 | Tuesday, November 08, 2016 | | Distribute Election Day Absentee Abstract to SBOE | Statewide General Election | ABSENTEE | 163-234(6) | Election Day |
| 11/08/16 | Tuesday, November 08, 2016 | 6:30 AM | ELECTION DAY | Statewide General Election | ELECTION DAY | 163-1 | Tuesday after the first Monday in November |
| 11/08/16 | Tuesday, November 08, 2016 | 10:00 AM | Election Day Tracking (10 am, 2 pm, 4 pm) | Statewide General Election | ADMINISTRATION | | Election Day at 10 am, 2 pm and 4 pm |
| 11/08/16 | Tuesday, November 08, 2016 | 8:30 PM | Election Night finalize activities | Statewide General Election | VOTING SYSTEMS | | Election Night |
| 11/08/16 | Tuesday, November 08, 2016 | 7:30 PM | UOCAVA absentee ballot return deadline - electronic | Statewide General Election | ABSENTEE | 163-258.10 | Close of polls on Election Day |
| 11/09/16 | Wednesday, November 09, 2016 | | Sample Audit Count - Precincts Selection | Statewide General Election | CANVASS | 163-182.1(b)(1) | Within 24 hours of polls closing on Election |
| 11/11/16 | Friday, November 11, 2016 | | STATE HOLIDAY - VETERANS DAY | | | | |
| 11/14/16 | Monday, November 14, 2016 | 5:00 PM | Civilian Absentee Return Deadline - Mail Exception | Statewide General Election | ABSENTEE | 163-231(b)(2) | If postmarked on or before election day and |
| 11/15/16 | Tuesday, November 15, 2016 | | Remove Ineligible Voters | Administration | LIST MAINTENANCE | 163-82.14 | 15th of each month |
| 11/17/16 | Thursday, November 17, 2016 | 12:00 PM | Deadline for provisional voters subject to VIVA ID to | Statewide General Election | CANVASS | 163-166.13; 163-182.1A(c) | Not later than 12:00 noon the day prior to the |
| 11/17/16 | Thursday, November 17, 2016 | 5:00 PM | UOCAVA Absentee Ballot Return Deadline - Mailed | Statewide General Election | ABSENTEE | 163-258.12 | By end of business on the business day before |
| 11/18/16 | Friday, November 18, 2016 | 11:00 AM | County Canvass | Statewide General Election | CANVASS | 163-182.5(b) | 10 days after statewide general election |
| 11/18/16 | Friday, November 18, 2016 | | Deadline for election protest concerning votes counted | Statewide General Election | CANVASS | 163-182.9(b)(4)a | Before the beginnning of the county canvass |
| 11/18/16 | Friday, November 18, 2016 | 10:00 AM | Distribute Supplemental Certified Executed Absentee List | Statewide General Election | ABSENTEE | 163-232.1; 163-234 (10) | No later than 10:00 a.m. of the next business |
| 11/18/16 | Friday, November 18, 2016 | | Mail Abstract to State Board of Elections | Statewide General Election | CANVASS | 163-182.6 | 10 days after statewide general election |
| 11/21/16 | Monday, November 21, 2016 | 5:00 PM | Deadline for candidates in CBE jurisdictional contests to | Statewide General Election | CANVASS | 163-182.7(b) | 5:00 p.m. on the first business day after the |
| 11/21/16 | Monday, November 21, 2016 | | Send SBOE Certification of Late or Delinquent Campaign | Administration | CAMPAIGN FINANCE | 163-278.22(11) | Certification forms available in County |
| 11/22/16 | Tuesday, November 22, 2016 | 5:00 PM | Deadline for candidates in SBOE jurisdictional contests to | Statewide General Election | CANVASS | 163-182.7(c); 163-182.4(b)(5) | 5:00 p.m. on the second business day after |
| 11/22/16 | Tuesday, November 22, 2016 | 5:00 PM | Deadline to file election protest concerning any other | Statewide General Election | CANVASS | 163-182.9(b)(4)c | 5:00 p.m. on the second business day after |
| 11/22/16 | Tuesday, November 22, 2016 | 5:00 PM | Deadline to file election protest concerning manner in | Statewide General Election | CANVASS | 163-182.9(b)(4)b | 5:00 p.m. on the second business day after |
| 11/24/16 | Thursday, November 24, 2016 | | STATE HOLIDAY - THANKSGIVING | | | | |
| 11/25/16 | Friday, November 25, 2016 | | STATE HOLIDAY - THANKSGIVING | | | | |
| 11/28/16 | Monday, November 28, 2016 | | CBE issues certificates of nomination or election if no | Statewide General Election | CANVASS | 163-182.15(a); 163-301 | Six days after the county canvass (In a |
| 11/28/16 | Monday, November 28, 2016 | | Finalize Voter History | Statewide General Election | POST-ELECTION | Best Practice | 7 days after county canvass |
| 11/29/16 | Tuesday, November 29, 2016 | | State Canvass | Statewide General Election | CANVASS | 163-182.5(c) | 11:00 a.m. on the Tuesday three weeks after |
| 12/05/16 | Monday, December 05, 2016 | | SBOE Issues Certification of Nomination or Election | | | 163-182.15 | 6 days after the State Canvass |
| 12/07/16 | Wednesday, December 07, 2016 | | Update NVRA Survey Report | Administration | NVRA | 163-82.20 | By the 7th of each month |
| 12/15/16 | Thursday, December 15, 2016 | | Remove Ineligible Voters | Administration | LIST MAINTENANCE | 163-82.14 | 15th of each month |
| 12/23/16 | Friday, December 23, 2016 | | STATE HOLIDAY - CHRISTMAS | | | | |
| 12/26/16 | Monday, December 26, 2016 | | STATE HOLIDAY - CHRISTMAS | | | | |
| 12/27/16 | Tuesday, December 27, 2016 | | STATE HOLIDAY - CHRISTMAS | | | | |
| 12/27/16 | Tuesday, December 27, 2016 | | Notices of Report Due mailed for 2016 Fourth Quarter | Administration | CAMPAIGN FINANCE | 163-278.23; 163-278.40H | Must be sent no later than 5 days before |
| 01/02/17 | Monday, January 02, 2017 | | STATE HOLIDAY - NEW YEARS DAY OBSERVATION | | | | |
| 01/03/17 | Tuesday, January 03, 2017 | | Remove Inactive Voters; Remove Temporary Voters | Administration | LIST MAINTENANCE | 163-82.14 | 1st business day after New Year's Day |
| 01/07/17 | Saturday, January 07, 2017 | | Report Results by Voting Tabulation Districts (VTD) | Statewide General Election | VOTING SYSTEMS | 163-132.5G | No later than 60 days after Election Day |
| 01/11/17 | Wednesday, January 11, 2017 | | 2016 Fourth Quarter Report Due | Administration | CAMPAIGN FINANCE | 163-278.9(A)(5a) | |

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|---|---|---|---|---|---|---|---|
| 01/12/17 | Thursday, January 12, 2017 | | Notices of Report Due mailed for 2016 Year End Semi- | Administration | CAMPAIGN FINANCE | 163-278.23; 163-278.40H | Must be sent no later than 5 days before |
| 01/27/17 | Friday, January 27, 2017 | | 2016 Year End Semi-annual Report Due | Administration | CAMPAIGN FINANCE | 163-278.9(a)(6) | Filed by committees not participating in 2016 |
| 01/31/17 | Tuesday, January 31, 2017 | | Send SBOE Certification of Late or Delinquent Campaign | Administration | CAMPAIGN FINANCE | 163-278.22(11) | Certification forms available in County |
| 02/16/17 | Thursday, February 16, 2017 | | Send SBOE Certification of Late or Delinquent Campaign | Administration | CAMPAIGN FINANCE | 163-278.22(11) | Certification forms available in County |
| 09/12/17 | Tuesday, September 12, 2017 | 6:30 AM | ELECTION DAY | September Municipal Primary | ELECTION DAY | 163-279 | Second Tuesday after Labor Day |
| 09/19/17 | Tuesday, September 19, 2017 | 11:00 AM | County Canvass | September Municipal Primary | CANVASS | 163-182.5(b) | Seven days after each election (except a |
| 10/10/17 | Tuesday, October 10, 2017 | 6:30 AM | ELECTION DAY | October Municipal | ELECTION DAY | 163-279 | Fourth Tuesday before the Tuesday after the |
| 10/17/17 | Tuesday, October 17, 2017 | 11:00 AM | County Canvass | October Municipal | CANVASS | 163-182.5(b) | Seven days after each election (except a |
| 11/07/17 | Tuesday, November 07, 2017 | 6:30 AM | ELECTION DAY | November Municipal | ELECTION DAY | 163-279 | Tuesday after the first Monday in November |
| 11/14/17 | Tuesday, November 14, 2017 | 11:00 AM | County Canvass | November Municipal | CANVASS | 163-182.5(b) | Seven days after each election (except a |
| 11/06/18 | Tuesday, November 06, 2018 | 6:30 AM | ELECTION DAY | Statewide General Election | ELECTION DAY | 163-1 | Tuesday after the first Monday in November |
| 11/16/18 | Friday, November 16, 2018 | 11:00 AM | County Canvass | Statewide General Election | CANVASS | 163-182.5(B) | 10 days after statewide general election |
| | | | | | | | |
| **Total** | | | | | | | **408** |

# **Appendix F:**
*Stephenson v. Bartlett*, No. 1 CV 02885 (Johnston Co. Sup. Ct.), Plaintiffs' Memorandum Concerning an Appropriate Remedy (Feb. 19, 2002)

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|---|---|
| **NORTH CAROLINA** | **IN THE GENERAL COURT OF JUSTICE** |
| | 02 FEB 19 AM 11:26 |
| **JOHNSTON COUNTY** | **SUPERIOR COURT DIVISION** |
| | JOHNSTON CO., C.S.C. |
| Ashley Stephenson, et al.; | BY ... Civil Action No. 1 CV 02885 |
| Plaintiffs, | **PLAINTIFFS' MEMORANDUM CONCERNING AN APPROPRIATE REMEDY** |
| v. | |
| Gary Bartlett, et al.; | |
| Defendants. | |

Having declared the 2001 Senate and House statutes unconstitutional, this court should follow relevant North Carolina precedent and enjoin the elections for the State Senate and House under the 2001 redistricting statutes. Additionally, the court should ask the General Assembly to advise the court within five days, whether it plans to remedy the constitutional defects in the 2001 plans in time for the 2002 elections by creating redistricting plans that do not divide counties in creating Senate and House districts, except to the extent counties must be divided to comply with federal law. Hopefully, as it did in 1966, 1982, 1992, and 1998, the General Assembly will promptly correct the defects in the 2001 plans.

A constitutionally valid redistricting plan for the Senate and House must be put in place in order to ensure fair and timely redistricting for the 2002 elections. This court should not irreparably harm North Carolina's 4,990,081 registered voters by permitting elections to the Senate and House under the illegal 2001 plans or by permitting legislators elected under unconstitutional plans to serve for two years or gain the advantage of incumbency. Because sufficient time exists to remedy the illegal 2001 plans for the 2002 elections, plaintiffs are entitled to a permanent injunction.

I. THIS COURT HAS THE POWER TO PROVIDE RELIEF.

This court has the power to enjoin the 2002 elections for the State Senate and House under the 2001 plans given that the 2001 plans violate the North Carolina Constitution. *See* N.C. Gen. Stat. § 7A-245; N.C. Gen. Stat. § 1-259; *Moore v. Knightdale Bd. of Elections*, 331 N.C. 1, 3-12, 413 S.E.2d 541, 542-47 (1992) (affirming permanent injunction against enforcing "resign to run" statute because statute violated N.C. Constitution); *Thomas v. North Carolina Dept. of Human Resources*, 124 N.C. App. 698, 706-10, 478 S.E.2d 816, 821-23 (1996) (where statute declared facially unconstitutional, it may not be enforced against any citizen or entity), *aff'd*, 346 N.C. 268, 485 S.E.2d 295 (1997) (per curiam); *Simeon v. Hardin*, 339 N.C. 358, 373, 451 S.E.2d 858, 868-69 (1994); *accord Brooks v. Hobbie*, 631 So.2d 883, 887-90 (Ala. 1993) (collecting cases in the context of invalid reapportionment statutes); *see generally Lake v. State Bd. of Elections*, 798 F. Supp. 1199, 1204 (M.D.N.C. 1992) (three-judge court) (state court injunctions keeping the polls open for extended periods of time did not violate Section 5 of the Voting Rights Act).[1]

"[O]nce a State's legislative 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, 84 S. Ct. 1362, 1393, 12 L.Ed.2d 506 (1964) (emphasis added). In awarding or withholding immediate relief, a court should consider the proximity of forthcoming elections, the "mechanics and complexities of state election laws," and "general equitable principles." *Id.* In light of (1) general equitable principles, (2) the fact that elections

[1] Federal courts also have the power to enjoin state officials from using an unconstitutional apportionment plan. *See Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 194-96, 92 S. Ct. 1477, 1483, 32 L.Ed.2d 1 (1972) (per curiam); *Hellebust v. Brownback*, 42 F.3d 1331, 1332, 1336 (10th Cir. 1994); *Watson v. Commissioners Court of Harrison County*, 616 F.2d 105, 107 (5th Cir. 1980) (per curiam).

are not imminent, and (3) the fact that having the election pursuant to a constitutional, precleared plan is feasible and the paramount public interest, this court should enjoin the elections under the 2001 Senate and House redistricting plans. The court should then have the NCAG advise it by February 27, 2002, whether the General Assembly plans to reconvene (as it did in 1966, 1982, 1992, and 1998) to correct defects in the enacted plans.

II. PLAINTIFFS SHOULD RECEIVE RELIEF FOR THE 2002 ELECTIONS.

Plaintiffs should receive a permanent injunction for the 2002 elections. *See Moore*, 331 N.C. at 3-12, 413 S.E.2d at 542-47. The standard for a permanent injunction requires the court to examine: (1) the harm to the movant if the relief is denied; (2) the harm to the non-movant if the relief is granted; and (3) the public interest. *See Roberts v. Madison County Realtors Ass'n*, 344 N.C. 394, 399-401, 474 S.E.2d 783, 787-88 (1996).

A. The Plaintiffs and All Voters Will Suffer Irreparable Injury if Relief is Denied.

**The equal right to vote is fundamental, because it is preservative of all rights.** *See Martin v. Preston*, 325 N.C. 438, 455, 385 S.E.2d 473, 483 (1989) ("the right to vote *per se* is not a fundamental right under [North Carolina's] Constitution; instead, once the right to vote is conferred, the *equal* right to vote is a fundamental right"); *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S. Ct. 1064, 1071, 30 L.Ed. 220 (1886); *accord Shaw v. Reno*, 509 U.S. 630, 640, 113 S. Ct. 2816, 2822, 125 L.Ed.2d 511 (1993). "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. **Other rights, even the most basic, are illusory if the right to vote is undermined.**" *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S. Ct. 526, 535, 11 L.Ed.2d 481 (1964) (emphasis added). The "right to vote freely for the candidate of one's choice is of the essence of a

democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds*, 377 U.S. at 555, 84 S. Ct. at 1378.

"When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." 11A C. Wright, A. Miller, and M. Kane, *Federal Practice and Procedure*, § 2948.1, at 161 (1995). "The loss of [individual] freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690, 49 L.Ed.2d 547 (1976). Consequently, any impediment to the equal right to vote pursuant to a constitutional redistricting plan is, by its nature, a "significant and irreparable" harm. *See Johnson v. Mortham*, 926 F. Supp. 1540, 1543 (N.D. Fla. 1996) (three-judge court); *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1363 (M.D. Ala. 1986); *accord Cohen v. Coahoma County*, 805 F. Supp. 398, 406 (N.D. Miss. 1992) (collecting cases recognizing "that violation of constitutional rights constitutes irreparable harm as a matter of law").

The use of the 2001 redistricting plans in the 2002 elections will produce on-going and continuous irreparable harm. It occurs not only when elections are held under an unconstitutional scheme, but also every day that plaintiffs and all voters are forced to vote and then be governed for two years by legislators elected under illegal redistricting plans. What is particularly harmful is that these legislators elected under an unconstitutional scheme will then be given the opportunity in 2003 to revise the illegal redistricting plans and to resolve the public policy issues of this State. They also will have the significant political advantage of incumbency when they stand for re-election under a constitutional plan. Having an election this year under plans that violate the North Carolina Constitution will only serve to reinforce a harmful governmental message: it is okay to break the law. As Justice Brandeis reminded us:

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. **Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the government becomes a lawbreaker, it breeds contempt for the law**; it invites every man to become a law unto himself; it invites anarchy.

*Olmstead v. United States*, 277 U.S. 438, 485, 48 S. Ct. 564, 575, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting) (emphasis added). Holding elections under unconstitutional plans will further heighten cynicism among this State's 4,990,081 registered voters about the electoral process.

B. Balance of Hardships.

The balance of hardships tips decidedly in favor of awarding relief to the plaintiffs and all voters for the 2002 elections.

1. The Current Election Schedule.

The next general election for the State House and State Senate will be held on Tuesday, November 5, 2002. N.C. Gen. Stat. § 163-1. Primary elections currently are scheduled for Tuesday, May 7, 2002. *Id.* § 163-1(b).

On November 16, 2001, the General Assembly delayed the opening of the January 7, 2001, filing period and provided a mechanism for postponing the 2002 filing period and 2002 primary elections. Specifically, due to delays in enacting and obtaining precleared redistricting plans, the filing period for candidates began at noon on February 18, 2002, and is scheduled to end at noon on March 1, 2002. N.C. Sess. Law 2001-466, § 1(a).

Absent prompt relief, there is no possibility that a legislative plan for the Senate and House which meets North Carolina and federal constitutional criteria will be enacted and pre-cleared under the VRA and implemented for the 2002 elections. If the General Assembly plans to reconvene, the State Board of Elections will be able to use its authority under N.C. Gen.

Stat. § 163-22.2 to make reasonable interim rules with respect to holding the 2002 primary and general election for the Senate and House under constitutional plans enacted by the General Assembly, approved by the court, and precleared under the VRA. *See* Bartlett Dep. at 40-42; Pl. Ex. 68.[2] If the possibility of bifurcated elections "complicates" issues for the Board of Elections, the Board can postpone the primaries for **all** offices (as it did in 1982), instead of bifurcating the elections. *See* N.C. Gen. Stat. § 163-22.2; Bartlett Dep. at 40-41; Pl. Ex. 89. That decision is for the Board.

2. It is Feasible to Have the 2002 Senate and House Elections Pursuant to Constitutional, Precleared Plans.

Constitutional plans can be created, precleared, and implemented in time for the 2002 Senate and House elections. Gary Bartlett, the Executive Director of the State Board of Elections, testified that the North Carolina State Board of Elections could conduct a primary and run-off for all offices followed by the general election for all offices on November 5, 2002, if the filing period opened **as late as June 14, 2002**. *See* Bartlett Dep. at 69-85. The schedule assumes that the absentee voting period is shortened from 50 days to 30 days. *See* Bartlett Dep. at 70. North Carolina has previously shortened the absentee voting period to 30 days. *Id.* at 82-83. Moreover, North Carolina is now permitting those living overseas to return absentee ballots by

[2] N.C. Gen. Stat. § 163-22.2 (emphasis added) provides:

> **In the event** any portion of Chapter 163 of the General Statutes or **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** or is unenforceable because of objection interposed by the United States Justice Department under the Voting Rights Act of 1965 **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.

fax, which allows absentee voting to take place more quickly. *See* Bartlett Dep. at 144-45. The filing period could open even sooner than June 14th, if the General Assembly promptly corrects the plans and has them precleared.

Even if a primary is delayed until August or September, this is not unique. Numerous states have primaries in August or September. *See* Bartlett Dep. at 35 (27 out of 55 jurisdictions have Fall primaries); Pl. Ex. 46. In fact, numerous states covered by Section 5 hold August or September primaries. *See* Appendix to 28 C.F.R. Part 51 (1999). For example, Georgia will hold its initial primary on August 20, a run-off on September 10, and a general election on November 5, 2002. Bartlett Dep. at 34-35; Pl. Ex. 60. Likewise, Alaska and Arizona are states covered by Section 5, but Alaska does not hold its primaries until August 27 and Arizona waits until September 10. Pl. Ex. 46. Michigan (like North Carolina) has certain counties covered by Section 5, but does not hold its primary until August 6. Pl. Ex. 46. Similarly, Florida, New Hampshire, and New York contain counties covered by Section 5, but these states do not hold their primaries until September 10. Pl. Ex. 46.

A summer primary is not unique in North Carolina. In 1976, North Carolina held its primaries for all offices on the third Tuesday in August. *See* 1975 N.C. Session Law Ch. 884. Moreover, as explained *infra*, in 1982, North Carolina held its initial primary **for all offices** on June 29, 1982, and its run-off on July 27, 1982, as a result of USAG's December 1981, January 1982, and April 1982 objections to the Senate and House reapportionment plan. The effect of these objections was to enjoin the election process under the plans until plans were revised in February and again in April and precleared in late April 1982. Thus, even if there ultimately is a primary in the June-August timeframe and a run-off in the July-September timeframe, such a schedule has been used with no ill effect.

3. There is Sufficient Time to Correct the Plans.

a. Senate and House Plans Were Fixed in 1966, 1982, and 1992.

On November 30, 1965, a federal court concluded that the apportionment of the North Carolina Senate and House was unconstitutionally discriminatory under the "one person, one vote" requirement of the U.S. Constitution and therefore void. *See Drum v. Seawell*, 249 F. Supp. 877, 880-81 (M.D.N.C. 1965) (three-judge court). In terms of a remedy, the federal court stated: **"We cannot allow the regularly scheduled 1966 primaries and election to proceed under laws now held to be invalid."** *Id.* at 881 (emphasis added). The court, however, gave the General Assembly until January 31, 1966, to convene and rectify the defects. *Id.* If the General Assembly failed to correct the defects, the court would do so. *Id.*

The General Assembly promptly met in January 1966 and reapportioned the North Carolina Senate and House. *See* Pl. Ex. 5A (copy of plan enacted in 1966). On February 18, 1966, the federal court concluded that the revised redistricting legislation complied with the U.S. Constitution. *Drum v. Seawell*, 250 F. Supp. 922, 924 (M.D.N.C. 1966), *judgment aff'd*, 383 U.S. 831, 86 S. Ct. 1237, 16 L.Ed.2d 298 (1966) (per curiam). The revised Senate and House plans were then used in the 1966, 1968, and 1970 elections. Pl. Ex. 10, p. 27.

Likewise, on **December 7, 1981**, the USAG objected under Section 5 of the VRA to the Senate redistricting plan. On **January 20, 1982**, the USAG objected under Section 5 to the House redistricting plan. *Gingles v. Edmisten*, 590 F. Supp. 345, 350-51 (E.D.N.C. 1984), *aff'd in part and rev'd in part on other grounds*, 478 U.S. 30, 106 S. Ct. 2752, 92 L.Ed.2d 25 (1986). **The objection had the same effect as an injunction against using the 1981 Senate and House plans.**

In February 1982, the General Assembly convened in extra session in order to revise the Senate and House plans. On **February 11, 1982**, the General Assembly enacted a revised redistricting plan for both the Senate and the House. The General Assembly submitted the plans for preclearance. On **April 19, 1982**, the USAG again objected to the revised redistricting plans for both the Senate and the House. *Id.* at 351. **The objection essentially continued the "injunction" against using the Senate and House plans.**

The General Assembly once more reconvened in a second extra session on April 26, 1982. **On April 27, 1982**, the General Assembly enacted another revised plan for both the Senate and the House in order to address the USAG's objections. On **April 30, 1982**, the USAG precleared the revised Senate and House reapportionment plans. *Id.*; Pl. Ex. 98.

In 1982, after receiving preclearance of the plans on April 30, 1982, the North Carolina Board of Elections used its authority under N.C. Gen. Stat. § 163-22.2 to schedule elections for **all offices** under the following schedule: June 29, 1982 (first primary for all offices); and, July 27, 1982 (second primary for all offices). Pl. Ex. 89, 99, 100; Bartlett Dep. at 101, 106-07.

On **December 18, 1991**, the USAG objected to the Senate and House reapportionment plans. Bartlett Dep. at 8; Pl. Ex. 82. The General Assembly then convened in special session on December 30, 1991. Bartlett Dep. at 8. On **January 14, 1992**, the General Assembly enacted a revised Senate and House reapportionment plan. It submitted the plan for preclearance on **January 17, 1992**. *Id.* On **February 6, 1992**, the USAG precleared the revised reapportionment plan. *Id.* That plan was then used in the 1992 elections for the Senate and House.

b. Congressional Plans Were Fixed in 1992 and 1998.

The General Assembly not only has reconvened to promptly revise Senate and House reapportionment plans, but also congressional reapportionment plans. Specifically, on December 18, 1991, the USAG objected to the congressional reapportionment plan. *See Shaw v. Hunt*, 861 F. Supp. 408, 461-62 (E.D.N.C. 1994) (three-judge court), *rev'd on other grounds*, 517 U.S. 899, 116 S. Ct. 1894, 135 L.Ed.2d 207 (1996). The General Assembly then convened in special session in January 1992. On **January 24, 1992**, the General Assembly enacted a revised congressional reapportionment plan. It promptly submitted the plan for preclearance. *Id.* at 469. On **February 6, 1992**, the USAG precleared the revised reapportionment plan. That plan was then used in the 1992 elections. *See id.* at 469.

In 1998, North Carolina held congressional primaries in September. Specifically, in *Cromartie v. Hunt*, 34 F. Supp.2d 1029 (E.D.N.C. 1998)(three-judge court), *rev'd on other grounds*, 526 U.S. 541, 119 S. Ct. 1545, 143 L.Ed.2d 731 (1999), the district court granted summary judgment to plaintiffs **and entered an injunction on April 3, 1998**, and enjoined the defendants from conducting any primary or general elections for congressional offices under the 1997 redistricting plan. **The congressional primaries had been scheduled for May 1998 and the injunction was entered after the filing periods had closed, campaigns for Congress had begun, and ballots prepared**. The court then gave the General Assembly the opportunity to correct the constitutional defects in the 1997 plan and propose an election schedule providing for primary elections culminating in a general congressional election to be held on November 3, 1998. Both the trial court and the U.S. Supreme Court denied the State's request for a stay pending appeal. *Cromartie v. Hunt*, 34 F. Supp.2d 1030 (E.D.N.C. 1998); *Cromartie v. Hunt*, 523 U.S. 1068, 118 S. Ct. 1510, 140 L.Ed.2d 662 (1998).

The General Assembly thereafter convened in May 1998 and enacted a new plan on May 21, 1998. Bartlett Dep. at 8. **The new plan addressed the defects in the plan, but also provided that the existing plan would be used if the State prevailed on appeal**. Pl. Ex. 61, 1998 N.C. Sess. Laws Ch. 2, § 1.1, pp. 28-29 ("The plan adopted by this act is effective for the years 1998 and 2000 unless the United States Supreme Court reverses the decision holding unconstitutional G.S. 163-201(a) as it existed prior to the enactment of this act."). The new plan was submitted for preclearance on **May 22, 1998**. *Id.*; Pl. Exs. 76-78. The new plan was precleared on **June 8, 1998**. Pl. Ex. 79.

The court approved the revised plan. Pl. Ex. 80. The congressional elections then were held on the following schedule: July 6 - July 20, 1998 (filing period); September 15, 1998 (primary); and, November 3, 1998 (general election). Pl. Ex. 75.[3]

c. Other Cases From North Carolina.

Two federal court decisions from North Carolina in which courts issued **preliminary** injunctions also highlight the necessity and propriety of issuing a permanent injunction in this case. *See Republican Party of N.C. v. Hunt*, 841 F. Supp. 722 (E.D.N.C.), *aff'd* as *modified on appeal*, 27 F.3d 563 (4th Cir. 1994) (unpublished opinion) (hereafter "*RPNC*"); *Johnson v. Halifax County*, 594 F. Supp. 161 (E.D.N.C. 1984).

On November 29, 1993, plaintiffs in *RPNC* obtained a preliminary injunction in connection with the November 1994 elections for superior court judgeships. *RPNC*, 841 F. Supp. at 724, 727-29. Absent a preliminary injunction, another election cycle would have taken place in North Carolina under a system that **likely** violated the Fourteenth Amendment. *See id.*

[3] On May 17, 1999, the Supreme Court concluded that there needed to be a trial concerning whether the 1997 plan was an unconstitutional racial gerrymander. *See Hunt v. Cromartie*, 526 U.S. 541, 119 S. Ct. 1545, 143 L.Ed.2d 731 (1999). Pursuant to the 1998 legislation (Pl. Ex. 61), the 1997 plan was then used in the 2000 congressional elections. *See* Pl. Ex. 10, p. 33.

at 727-29. As for harm to the defendants, the court noted that if "provisional relief is granted, the likelihood that defendants will be harmed due to logistical or administrative changes that must be made prior to orchestrating the 1994 elections is insignificant." *Id.* at 728. As for the public interest at stake, the court stated that the **public interest "requires the furtherance of the constitutional protections that attach to the franchise" and "favors an electorate familiar with its candidates and elections conducted in an orderly way within easily understood boundaries.**" *Id.* at 732 (emphasis added).[4]

In *Johnson*, the district court entered a preliminary injunction in **July 1984** in connection with **November 1984** elections for county board of commissioners. Because Halifax County's electoral system **likely** violated Section 2 of the VRA. *Johnson*, 594 F. Supp. at 168-70. "The black citizens of Halifax County will suffer irreparable harm if, once again, they are unable to have an equal opportunity to elect county commissioners of their choice." *Id.* at 171. As for harm to the defendants, the court noted that it was instituting its plan for 1984 electoral process. *See id.* at 171. Although its plan would "place administrative and financial burdens" on the defendants, such burdens were not undue in light of the "irreparable harm to be incurred by plaintiffs." *Id.* Further, the public interest would "be served if black citizens are afforded an equal opportunity to elect county commissioners of their choice." *Id.*

Although the General Assembly must act promptly if it decides to draft plans, it dealt continuously with redistricting throughout 2001. It is very familiar with these issues. Moreover, given that the USAG has precleared the existing 2001 plans, the General Assembly can use the minority districts in a revised "whole county" plan. Further, constitutional

[4] On appeal, the Fourth Circuit affirmed the preliminary injunction but modified it to omit a requirement that the prevailing candidate in districtwide election shall be declared the winner of the election. *See RPNC*, 27 F.3d 563 (4th Cir. 1994) (per curiam) (unpublished opinion). Instead, the Fourth Circuit fashioned a different remedial scheme for determining how to determine a "winner" dependent on the outcome of the November 1994 elections.

redistricting plans can be drafted quickly. *See* Amended Affidavit of Joel Raupe ¶ 12, Pl. Exs. 16A, 17A, 23, and 24. The speed with which the General Assembly drafted revised plans in 1966, 1982, 1991-92, and 1998 bolsters this conclusion.

4. Cases from Other States Demonstrate that There is a Sufficient Time to Create Constitutional Plans and Have Them Precleared.

a. Cases from Other States in 2002.

Cases from other states demonstrate that there is sufficient time to remedy defects in the 2001 plans. For example, on **January 28, 2002**, the Colorado Supreme Court held Colorado's apportionment plan unconstitutional under the Colorado Constitution because the plan divided too many counties. *In re Reapportionment of the Colorado General Assembly*, 2002 WL 100555 (Colo. 2002). Accordingly, the Colorado Supreme Court set aside the Commission's action and remanded the plan to the Commission for further consideration, modification, re-adoption, and re-submittal by 5:00 p.m. on February 15, 2002. *Id.* Following resubmission on February 15, 2002, the Colorado Supreme Court will review the revised plan for constitutionality under the Colorado Constitution.

The litigation on-going in other states subject to Section 5 also illustrates that there is time to create constitutional, precleared plans for the 2002 elections. For example, in 2001, Georgia passed a congressional redistricting plan, a Senate redistricting plan, and a House-redistricting plan. On October 10, 2001, Georgia sought preclearance by filing suit in the U.S. District Court for the District of Columbia. Although the USAG did not object to the Georgia House or congressional plans, the parties are still litigating the validity of the Senate plan. *See* Pl. Ex. 129; Pl. Ex. 130 (copy of the docket sheet). Georgia has its first primary scheduled for August 20, 2002, any run-offs on September 10, 2002, and the general elections scheduled for November 2002. *See* Bartlett Dep. at 34-35; Pl. Exs. 46, 60.

In South Carolina (a Section 5 covered state), the South Carolina Legislature passed a plan in August 2001, but the Governor vetoed the plan. Pl. Ex. 131. Currently, federal litigation is on-going and it is anticipated that the three-judge court will draw plans in South Carolina. *See* Pl. Ex. 132 *(Colleton County Council v. McConnell*, No. 3:01CV03581 (D.S.C. 2002) (copy of docket sheet)). No plan is in place, yet the primary currently is scheduled for June 11, 2002, with a run-off on June 25, 2002. Pl. Ex. 46.

In Alaska (a Section 5 covered state), the Alaska Superior Court declared the 2001 redistricting plan for the Alaska House of Representatives unconstitutional under the Alaska Constitution **on February 1, 2002**. *See In re 2001 Redistricting Cases v. Redistricting Bd.*, No. 3AN-01-8914-CI, slip op. (Ak. Superior Ct., Feb. 1, 2002). The case has been appealed to the Alaska Supreme Court. *See id.* at 120. Alaska has its primary scheduled for August 27, 2002, and the general election scheduled for November 2002. Pl. Ex. 46.

In Arizona (a Section 5 covered state), the Arizona Independent Redistricting Commission completed its work in January 2002. On **January 24, 2002**, it submitted its Senate, House, and congressional reapportionment plans to the USAG for preclearance under Section 5. Pl. Ex. 133. The USAG has 60 days to review the plans. 28 C.F.R. § 51.48 (1999). Arizona's primary is scheduled for September 10, and its general election in November 2002. Pl. Ex. 46.

In Florida (a state which is not covered by Section 5, but which includes some Section 5 covered counties), the Florida Legislature is still drafting plans. The Legislature plans to complete its work not later than mid-March. Pl. Ex. 134. Pursuant to the Florida Constitution, the Florida Supreme Court then has 30 days to review the plan. Fla. Const. Art. III § 16. The

plan will then be submitted to the USAG for preclearance. Pl. Exs. 134, 135. The primaries are scheduled for September 10, 2002. Pl. Ex. 46.[5]

Given that it is now only mid-February, the cases in 2002 from Colorado, Georgia, South Carolina, Alaska, Arizona, and Florida demonstrate that there is ample time to revise redistricting plans, have them precleared, and have orderly elections for the Senate and House pursuant to constitutional, precleared plans. The cases also illustrate that, as with North Carolina in 1982, 1991-92, and 1998, the USAG acts very promptly in reviewing a revised redistricting plan. **Quick review should hold particularly true in this case given that the USAG already has precleared the minority districts in the 2001 plans and plaintiffs' whole county plans incorporate the State's minority districts.**

b. Examples from the 1996 Election Cycle.

In 1995 and 1996, courts in Georgia, Louisiana, Florida, and Texas declared racially gerrymandered congressional reapportionment plans unconstitutional. In Georgia, Louisiana, and Florida, the courts and/or the state legislatures promptly acted to remedy the

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[5] Florida's experience in 1992 also demonstrates that there is still plenty of time to revise the Senate and House plans and have them precleared. In mid-April 1992, the Florida Legislature passed apportionment plans for its Senate and House. Pursuant to Florida's constitutional review process, the apportionment plans were forwarded to the Florida Supreme Court. On **May 13, 1992**, the Florida Supreme Court approved the plan apportioning the Florida Senate and House. *See In re Constitutionality of Senate Joint Resolution 2G*, 601 So.2d 543, 544 (Fla. 1992).

On June 16, 1992, the USAG objected to the Senate apportionment plan under Section 5 of the VRA. The Florida Supreme Court promptly entered an order encouraging the Florida Legislature to adopt a plan that would address the USAG's objections. The Florida Legislature declined to reconvene. The Florida Supreme Court concluded that a legislative impasse had occurred. *Id.* at 544-45.

On June 25, the Florida Supreme Court revised the Senate apportionment plan in order to address the USAG's Section 5 objection. *Id.* On June 26, the USAG indicated its belief that the Florida Supreme Court's modification to the Senate apportionment plan satisfied the USAG's objection under Section 5. The USAG also stated that a preclearance decision would be made within days of Florida's submission of the plan to the USAG. *See De Grandy v. Wetherell*, 815 F. Supp. 1550, 1558 (N.D. Fla. 1992), *aff'd in part and rev'd in part on other grounds*, 512 U.S. 997, 114 S. Ct. 2647, 129 L.Ed.2d 775 (1994). Prior to the USAG's formal decision on preclearance, a federal court imposed the Florida Supreme Court's revised plan as its own plan for the 2002 elections. The effect of this federal court order was to eliminate the need for preclearance. *See id.* at 1558. The Florida Supreme Court's revised plans were then used in the 1992 elections in Florida.

situation. Specifically, in Georgia, the Georgia Legislature declined an opportunity to enact a constitutional plan. *Johnson v. Miller*, 922 F. Supp. 1556, 1559 (S.D. Ga. 1995) (three-judge court), *aff'd*, 521 U.S. 74, 117 S. Ct. 1925, 138 L.Ed.2d 285 (1997). Accordingly, the court adopted a remedy on December 13, 1995, for 1996 elections. *Id.* at 1569-70. In Louisiana, the district court declared the Louisiana congressional redistricting plan unconstitutional, declared that no future congressional elections would be held pursuant to the unconstitutional plan, and immediately imposed a court-ordered plan on January 5, 1996. *See Hays v. Louisiana*, 936 F. Supp. 360, 372 (W.D. La. 1996) (three-judge court).

In Florida, the district court held that a congressional redistricting plan was an unconstitutional racial gerrymander and enjoined its use. *Johnson v. Mortham*, 926 F. Supp. 1460, 1493 (N.D. Fla. 1996) (three-judge court). The court advised the Florida Legislature that it had five weeks to prepare a constitutional plan. *See id.* at 1494. On May 10, 1996, the Legislature revised Florida's redistricting plan and reset the qualifying periods for congressional elections. The Governor signed the act on May 21, 1996. *Johnson v. Mortham*, No. 94-40025-MMP, 1996 U.S. Dist. LEXIS 7199, *2 (N.D. Fla. May 24, 1996) (three-judge court). On May 31, 1996, the district court adopted the newly enacted statute as an interim plan for the 1996 congressional elections. *See Johnson v. Mortham*, No. 94-40025-MMP, 1996 U.S. Dist. LEXIS 7792 (N.D. Fla. May 31, 1996) (three-judge court).

Finally, in Texas, on June 13, 1996, the Supreme Court declared the Texas reapportionment statute unconstitutional. *Bush v. Vera*, 517 U.S. 952, 116 S. Ct. 1941, 135 L.Ed.2d 248 (1996). The Texas Legislature failed to remedy the problem. The three-judge court

in Texas then drew its own plan on **August 6, 1996**, for use in the 1996 congressional elections. *See Vera v. Bush*, 933 F. Supp. 1341, 1342 (S.D. Tex. 1996) (three-judge court).[6]

5. Many Courts with Much Less Time for Preparing a Remedial Plan Have Enjoined an Election Under an Illegal Redistricting Plan.

The U.S. Supreme Court has made clear that a federal court **must enjoin** an election rather than permit an election to take place under an unprecleared plan. *Lopez v. Monterey County*, 519 U.S. 9, 21, 117 S. Ct. 340, 347, 136 L.Ed.2d 273 (1996); *Clark v. Roemer*, 500 U.S. 646, 653-57, 111 S. Ct. 2096, 2101-03, 114 L.Ed.2d 691 (1991). The Court based this rule on the paramount need to prohibit "illegal elections to go forward in the first place." *Lopez*, 519 U.S. at 21, 117 S. Ct. at 347. This court should likewise reject the notion that compliance with the North Carolina Constitution should be subordinated to the State's desire to permit illegal elections to take place in an "orderly fashion" in 2002.

Tellingly, numerous other courts with general elections scheduled much closer than eight months from the date of an order have shown a willingness to protect the constitutional or statutory rights of voters and thereby recognize the paramount importance of having elections under a legal plan. *See McGhee v. Granville County*, 860 F.2d 110, 118-21 (4th Cir. 1988) (at-large electoral scheme violated Section 2 of the VRA; **October 21, 1988** order concerning the plan to be used in November); *Watson*, 616 F.2d at 106-07 (reapportionment plan violated Section 2; on **April 11, 1980**, the Fifth Circuit reversed the district court's decision to delay reapportionment until after the 1980 census and ordered the district court to enjoin the

[6] The three-judge court in *Shaw* issued an order in July 1996 declining to remedy North Carolina's constitutionally defective congressional plan in time for the November 1996 election. *See Shaw v. Hunt*, No. 92-202-CIV-5-BR, Order (E.D.N.C. July 30, 1996) (three-judge court). In declining the July 1996 request to remedy the constitutional violation in time for the 1996 elections, the court refused to cancel the results of the May 1996 primary. *Id.* Unlike the plaintiffs in *Shaw*, however, the plaintiffs seek relief in February **two days after** the opening of the filing periods for the Senate and House. Thus, *Shaw* does not assist defendants.

**May 3, 1980** primary election and to order the county to "formulate an equitable apportionment plan as speedily as possible"); *Clark v. Edwards*, 725 F. Supp. 285, 303-05 (M.D. La. 1988) (Louisiana's plan for electing certain judges violated Section 2; on **August 15, 1988**, the court converted the preliminary injunction to a permanent injunction and enjoined all family court, district court, and court of appeals elections scheduled for **October 1, 1988**, "until revisions in the electoral process are made"); *see also Jeffers v. Clinton*, 730 F. Supp. 196, 198 (E.D. Ark. 1989) (three-judge court) (the State would have no more elections under the "unlawful" apportionment plan and the State defendants were "enjoined from giving any further force or effect to that plan"), *aff'd*, 498 U.S. 1019, 111 S. Ct. 662, 112 L.Ed.2d 656 (1991); *Johnson*, 594 F. Supp. at 171; *Buskey v. Oliver*, 574 F. Supp. 41, 41-42 (M.D. Ala. 1983) (because the existing electoral scheme violated Section 2 of the VRA, the court issued an order on **June 10, 1983**, enjoining the elections then-scheduled for **October 11, 1983;** in an August 22, 1983 order, the court noted that the evidence showed that it would only take one or two days to devise an acceptable electoral scheme, but the city failed to devise one in the two months that had elapsed since the injunction issued; the court advised the parties that the court planned to adopt a remedy in time for the October 1983 election); *Latino Political Action Comm., Inc. v. City of Boston*, 568 F. Supp. 1012, 1018-20 (D. Mass. 1983) (**July 26, 1983**, order enjoining November Boston City Council elections; "the enormity of the constitutional defects" in the current apportionment plan dictates that this court "not allow the election to proceed on the basis of this patently illegal plan"), *aff'd*, 784 F.2d 409 (1st Cir. 1986).

The facts in this case are even stronger than in the above-referenced cases. There is much more time to devise a remedy than there was in the foregoing cases. It is only mid-February. Gary Bartlett admits that so long as he has a constitutional, precleared plan in time to

open the filing periods on June 14, 2002, then North Carolina can hold timely elections with a second primary. Bartlett Dep. at 69-85. Given that a constitutional, precleared remedy is feasible in time for the 2002 Senate and House elections, the could should issue the requested injunction and have the NCAG notify it whether the General Assembly will reconvene to draft a revised redistricting plan for the Senate and House and submit such plans for preclearance. *See Cromartie*, 34 F. Supp.2d at 1029 (declaring the 1997 congressional redistricting plan unconstitutional, enjoining primary or general elections under the plan, and ordering the parties to submit a written statement about whether the General Assembly would reconvene and revise the plan and how much time that the General Assembly would need; absent action by the General Assembly, the court notified the General Assembly that the court would revise the plan).

C. The Public Interest Favors the Requested Injunction.

The public interest will be served by enjoining the elections for the Senate and House under the unconstitutional plans. When the Constitution is violated, **"the public as a whole suffers irreparable injury."** *Dillard*, 640 F. Supp. at 1363 (emphasis added). Moreover, "[t]he public interest must be concerned with the integrity of our representative form of government." *Cook v. Luckett*, 575 F. Supp. 479, 485 (S.D. Miss. 1983), *vacated on other grounds*, 735 F.2d 912 (5th Cir. 1984). The injunction will ensure "that constitutional districts are decided upon and put into effect as soon as is practical, [and thereby ensure that] the people [of this State] have the opportunity to elect [members of the Senate and House] under a constitutional scheme." *Id.*; *see Johnson*, 594 F. Supp. at 171.

The public interest is served by all appropriate relief necessary to effect the removal of all barriers which affect the right to participate in a constitutionally sound political process. *See Dillard*, 640 F. Supp. at 1363. The bizarre, unconstitutional districts in the 2001

plans are one such barrier. There is sufficient time, however, to act in accordance with the Constitution, to revise the plans, to have them precleared, and to educate the voters and candidates of the new districts before the elections. Under revised plans, voter turnout would be higher because the results of the elections would not be pre-ordained. *Cf.* Davis Dep. at 52-53; Pl. Ex. 126 (under the 2001 plans, 150 of the 170 General Assembly elections essentially have pre-ordained outcomes). Indeed, because new districts would not be as bizarre as the current districts and would divide substantially fewer counties and precincts, voters would be more easily educated about voting pursuant to a constitutional "whole-county" plan. *See* Bartlett Dep. 50-58; Pl. Ex. 63-66. Moreover, the cost of ballots would decrease as would costs associated with the split precincts. Bartlett Dep. at 50-61. Thus, according to the State's own expert, **from an election administration point of view, the plaintiffs' whole county plans would be easier to implement, less costly than the 2001 Senate and House plans, and easier for voters to understand**. Bartlett Dep. at 50-61; *accord* Poucher Dep. at 15-17, 21-23, 28-30, 53-55.

The court has mentioned the "budget crisis" as a factor to be considered. The budget certainly is an important issue for the General Assembly. If saving money was the primary issue, however, plaintiffs' whole county plans would be used because they cost less than the 2001 plans. *Id.* In any event, the right to vote is preservative of all rights because it is the manner in which citizens elect representatives who are supposed to resolve such public policy issues. The right of North Carolina's 4,990,081 registered voters to vote under a constitutional plan and to be represented for two years by a legislature elected under a constitutional plan far outweighs the current budget crisis. *See* Pl. Ex. 125 (voter statistics).

In this case, any harm caused by the entry of an injunction enjoining defendants would be minimal. Indeed, most costs have not yet been incurred because the election cycle has

been "on hold" because the 2001 Senate and House plans were not precleared until February 11, 2002. Bartlett Dep. 19-20, 25-26, 61-62. For example, the county boards of election are responsible for printing ballots, but none have started that process for any office. Bartlett Dep. at 19-21, 26. Indeed, if costs were truly the State's concern, the State could eliminate any alleged additional costs by adopting whole county plans, adding a "reversion" provision as it did in 1998, and seeking an expedited appeal.[7] Such an expedited appeal could easily be resolved prior to the June 14th deadline for a constitutional, precleared plan.

In any event, "administrative inconvenience" "simply cannot justify denial of plaintiffs' fundamental rights." *Johnson*, 926 F. Supp. at 1542. After all, the General Assembly inflicted the current unconstitutional plan on North Carolina in November 2001, and the NCAG has spent several months seeking to avoid a state court from interpreting the North Carolina Constitution. *Cf.* Bartlett Dep. at 37 (because the General Assembly waited until November 2001 to enact the 2001 plans, election administration will be more difficult no matter what). Given that the 2001 plans are unconstitutional, the defendants should not be permitted to claim that it costs too much to fix the problem in time for the 2002 election. The "expense and disruption" that may occur are "nothing but a consequence of the wrong that has been done . . . . [F]airness and equal opportunity in voting are worth it." *Jeffers*, 730 F. Supp. at 203.

As for the General Assembly's "reliance" on poor legal advice in the Legislator's Guide (Pl. Ex. 10), that poor legal advice should not shield the General Assembly from advising the court whether it will immediately correct the plans. Just as the defense of unclean hands is

[7] The General Assembly enacted Session Law 1998-2 (Pl. Ex. 61) in May 1998 following the *Cromartie* court's April 3rd injunction. Section 1.1 provided that elections would revert to the plan declared unconstitutional if defendants prevailed on appeal. Thus, in this case, the State could follow the *Cromartie* precedent and Session Law 1998-2 and enact revised plans with a provision defaulting elections back to Senate 1C and Sutton 3, if defendants prevail on an expedited appeal to the North Carolina Supreme Court.

unavailable where the deprivation of a constitutional right is involved,[8] the defendants should not be able to use the erroneous legal advice of the NCAG and their staff to block relief for this election. Notably, when the USAG refused to preclear plans in 1982 and 1992, it did not then permit elections to go forward due to good faith reliance on "erroneous" legal advice that the General Assembly undoubtedly had received from the General Assembly's staff concerning Section 5. Rather, the General Assembly revised the plans in order to make them lawful.

Finally, assuming that a Senate or House candidate's interest should be considered (as distinct from the voters), all Senate and House candidates in North Carolina have been on notice since November 2001 that plaintiffs were challenging the 2001 redistricting plans. Moreover, the court indicated in its order of January 18, 2002, that plaintiffs were likely to succeed on their merits and that plaintiffs suffered irreparable injury. To the extent that such candidates "relied" on the existing Senate and House redistricting statutes, they did so at their own peril. Further, Senate and House candidates can claim no "vested" interest in districts created pursuant to an unconstitutional plan.

As for candidates for other offices, the court's injunction would not affect the filing dates for other offices. The injunction only would relate to the Senate and House. Of course, the State Board of Elections would have the discretion to postpone filing for **all** elections under N.C. Gen. Stat. § 163-22.2, as it did in 1982. *See* Bartlett Dep. 39-42; Pl. Ex. 75. Thus, as it did in 1982, the State Board of Elections could adopt a schedule so that all elections are held together on the same schedule.[9] If the General Assembly reconvenes, work could then begin immediately on crafting and seeking preclearance of a constitutional, precleared plan for use in the 2002 Senate and House elections.

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[8] *See Buford v. Mochy*, 224 N.C. 235, 239, 29 S.E.2d 729, 732 (1944).

[9] When the primaries and run-offs were delayed in 1982 for all offices, no calamities befell the State, the voters, or

## III. IF THE GENERAL ASSEMBLY FAILS TO ACT, THIS COURT SHOULD ADOPT PLANS AND HAVE THEM SUBMITTED FOR PRECLEARANCE.

Redistricting is a "legislative task" which courts should make every effort not to preempt. *See Wise v. Lipscomb*, 437 U.S. 535, 539, 98 S. Ct. 2493, 2497, 57 L.Ed.2d 411 (1978); *White v. Weiser*, 412 U.S. 783, 795, 93 S. Ct. 2348, 2354, 37 L.Ed.2d 335 (1973). It would be preferable for the General Assembly to submit revised plans for the Senate and House so that the 2002 Senate and House elections would be held under a constitutional districting scheme duly enacted by the General Assembly, approved by the court, and precleared by the USDOJ. The General Assembly promptly did so in 1966, 1982, 1992, and 1998 in response to constitutional or statutory defects in redistricting plans. Thus, the court should first ascertain whether the North Carolina General Assembly intends to redraw the lines for the 2002 elections.

Based upon statements that defendants' counsel made in open court on January 18, 2002, perhaps the General Assembly will decline to revise the plans. If told that the courts will draft interim, remedial plans for this election, however, the General Assembly may well "discover" that — as in 1966, 1982, 1992, and 1998 — it does have enough time to draft redistricting plans that comply with the North Carolina Constitution and federal law and seek preclearance of such plans. Indeed, the NCAG advised a federal court in December 2001 that **the General Assembly had always found a way to draft redistricting plans and have then precleared, instead of having a court draft redistricting plans**. *See* Pl. Exs. 50 & 51.

The principle of deference to the legislature does not mean that constitutional violations can go unremedied, so long as the legislature fails to act. *Roman v. Sincock*, 377 U.S. 695, 710, 84 S. Ct. 1449, 1458, 12 L.Ed.2d 620 (1964). Here, past practices in the State prove that the General Assembly (as it did in 1966, 1982, 1992, and 1998) has sufficient time to redistrict and

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any candidates.

have a plan precleared. Nevertheless, if the General Assembly advises the court that it will not reapportion the House and Senate consistent with the North Carolina Constitution in time for the 2002 elections, this court should seek proposed remedial plans, review and adopt a Senate and House plan, and seek preclearance of such interim, remedial plans for use in the 2002 Senate and House elections. *See Karcher v. Daggett*, 466 U.S. 910, 104 S. Ct. 1691, 1692, 80 L.Ed.2d 165 (1984) (Stevens, J., concurring) ("Once a constitutional violation has been found, a district court has broad discretion to fashion an appropriate remedy."); *Wyche v. Madison Parish Police Jury*, 769 F.2d 265, 268 (5th Cir. 1985) (per curiam); *Jordan v. Winter*, 604 F. Supp. 807, 813-15 (N.D. Miss.) (three-judge court), *aff'd*, 469 U.S. 1002, 105 S. Ct. 416, 83 L.Ed.2d 343 (1984). Upon preclearance, such remedial plans would be **a temporary measure** applicable only to the 2002 Senate and House elections and would **not** prevent the General Assembly from enacting new plans for the 2004 election cycle. *See Hathorn v. Lovorn*, 457 U.S. 255, 265 n.16, 102 S. Ct. 2421, 2428 n.16, 72 L.Ed.2d 829 (1982); *McDaniel v. Sanchez*, 452 U.S. 130, 153, 101 S. Ct. 2224, 2238, 68 L.Ed.2d 724 (1981).[10]

CONCLUSION

When there is time to provide a remedy, one election under an unconstitutional redistricting plan is one too many. This court should not be an accessory to making North Carolina's 4,990,081 registered voters endure elections in 2002 in illegal Senate and House districts. Likewise, it should not make the voters endure being represented for two years by illegally elected Senators and Representatives and then permit those same illegally elected

[10] A remedial order by a Superior Court in Johnston County (a non-covered county) enjoining state election officials in Wake County (another non-covered county) is not subject to preclearance under Section 5. *See Lake v. State Board of Elections*, 798 F.Supp. 1199 (M.D.N.C. 1992) (three-judge court). However, to avoid any possible conflict with federal law, plaintiffs suggest that the court stay defendants' obligations to comply with any injunction of elections until plaintiffs' counsel obtain preclearance of the order as the court's preclearance agent. *See* 28 C.F.R. 51.23 (1999).

legislators to revise the plans during the 2003 session of the General Assembly and then stand for re-election with the political advantage of incumbency gained under an illegal plan. Accordingly, this court should issue an injunction against using the 2001 redistricting plans and ask the NCAG to advise it within five days, if the General Assembly plans to enact constitutional redistricting plans for the Senate and House for the 2002 elections, submit them to the court for approval, and then seek to have the plans precleared. If the General Assembly will not enact plans that comply with the Constitution, this court promptly should hold a hearing to set a schedule to ensure that North Carolina's 4,990,081 registered voters will vote under constitutional, precleared plans for the 2002 Senate and House elections.

This the 19th day of February, 2002.

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# **Appendix G:**
# 1990s Redistricting Chronology – NCGA website

| Date | House | Senate | Congressional |
|---|---|---|---|
| January 30, 1991 | 1991 North Carolina General Assembly convenes. Dan Blue (BD) elected first black Speaker of the House. Henson Barnes (WD) elected President Pro Tem of Senate. House is 81-39 Democratic, with 14 black members and one Native-American member. Senate is 36-14 Democratic with 5 black and no Native-American members. | | |
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| February 4, 1991 | President Pro Tem appoints Senate Redistricting Committee: Sen. Dennis J. Winner (WD) chair, Sen. Russell Walker (WD) chair of Congressional Subcommittee; Sen. Joseph E. Johnson (WD) chair of Legislative Subcommittee. | | |
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| February 6, 1991 | | Sen. Winner introduces SB 17 as blank bill for Senate redistricting. | Sen. Winner introduces SB 16 as blank bill for congressional redistricting. |
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| February 14, 1991 | 1st meeting of full Senate Redistricting Committee. Chairman Winner says process should be completed by end of long session. Calls for six regional hearings within next 30 days. | | |
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| February 18, 1991 | P.L. 94-171 data arrives from U.S. Census Bureau on computer tape. | | |
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| February 22, 1991 | Notices sent to media for Senate regional public hearings. | | |
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| February 26, 1991 | Notices sent to mayors for Senate regional public hearings. Some notices sent February 27.<br><br>2nd meeting of full Senate Redistricting Committee. Chairman Winner urges members to work on designing plans, if they wish, but not to bother staff, which is loading Census data on computer. Mentions need for criteria for redistricting process. | | |
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| March 1, 1991 | Senate regional public hearing held in Elizabeth City. | | |
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| March 7, 1991 | Speaker appoints two House committees on redistricting:<br>• Congressional Redistricting; and<br>• Local and Legislative Redistricting.<br>Each committee has the same 3 co-chairs, Reps. Edward C. Bowen (WD), Milton F. (Toby) Fitch (BD), and R. Samuel Hunt (WD). | | |
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| March 11, 1991 | Senate regional public hearing held in Greensboro. | | |
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| March 13, 1991 | 1st joint meeting of House Redistricting Committees. Orientation, presentation of timetable for redistricting, presentation of 7 sites for regional public hearings. Williamston added as 8th site by vote of committee. Proposal for Salisbury as 9th site not adopted, but Statesville later added by Co-Chairs as 9th site. | | |
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| March 14, 1991 | Senate regional public hearings held in Asheville and Charlotte.<br><br>Notices begin going out for House regional public hearings. | | |

| | House | Senate | Congressional |
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| March 15, 1991 | Senate regional public hearing held in Wilmington. | | |
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| March 18, 1991 | Senate regional public hearing held in Wilson. | | |
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| March 20, 1991 | 2nd joint meeting of House Redistricting Committee. Overview of legal requirements by counsel. | | |
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| March 21, 1991 | House regional public hearing held in Jacksonville. | | Senators Winner and Walker visit N.C. Congressmen in Washington. |
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| March 25, 1991 | Joint Redistricting Computer and Public Access Plans signed by Speaker and President Pro Tem. | | |
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| March 26, 1991 | House regional public hearings held in Rocky Mount and Winston-Salem. | | |
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| March 27, 1991 | House regional public hearing held in Fayetteville.<br><br>3d joint meeting of House Redistricting Committees. Presentation on Census data and computers by Gerry Cohen, Director of Legislative Drafting. | | |
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| April 3, 1991 | 3d meeting of full Senate Redistricting Committee. Meeting schedule set. Proposed Redistricting Committee procedure adopted.<br><br>Co-Chairs and Vice Chairs of House Redistricting Committee meet to review computer access plan, committee procedure, and schedule of committee meetings. | Proposed criteria for Senate presented. Amendment by Sen. Cochrane (WR) to "maintain the integrity of political units" adopted. Staff directed to include her amendment in new draft. | |
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| April 4, 1991 | House regional public hearings held in Chapel Hill and Williamston.<br><br>7 one-hour orientation sessions begin to be held by computer staff for members of House Redistricting Committees. They continue through April 12. | | |
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| April 5, 1991 | House regional public hearings held in Statesville and Gastonia. | | |
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| April 6, 1991 | House regional public hearing held in Asheville. | | |
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| April 9, 1991 | | Full Senate Redistricting Committee adopts criteria for Senate redistricting. | |

| | House | Senate | Congressional |
|---|---|---|---|
| April 17, 1991 | | | Senate and House Redistricting Committees meet jointly, adopt criteria for congressional redistricting. No amendments proposed. |
| April 24, 1991 | House Legislative and Local Redistricting Committee meets to consider local bills. | | |
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| April 26, 1991 | General Assembly's computer software for redistricting released for use. Through February, March, and April, staff had cleaned and loaded P.L. 94-171 data, and had added 21 counties to the 48 counties whose voting precincts were contained in the Census Bureau's TIGER files.<br><br>Computer training begins for legislative staff. Continues through April 29, 1991. | | |
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| April 30, 1991 | | Senate Legislative Redistricting Subcommittee hold organizational meeting. | Senate Congressional Redistricting Subcommittee meets. No plans presented. Sen. Winner and staff discuss arrangements. |
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| May 1, 1991 | House Legislative and Local Redistricting Committee considers draft of criteria for redistricting the House. Committee rejects amendment by Rep. Larry Justus (WR) to forswear any intent or effect to dilute the voting strength of any group and not to favor incumbents. Rep. George Holmes (WR) presents amendment not to split political units, to be compact, and to preserve communities of interest – but no vote taken. | | |
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| May 2, 1991 | Computer access policy amended so that all legislators could be computer-trained, and so that public-access terminal hours are expanded from 20 hours a week in one-hour slots to 40 hours a week in four-hour slots. | | |
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| May 3, 1991 | Computer training for staff, counsel, and Committee chairs and vice chairs begins. Continues through May 6, 1991. | | |
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| May 7, 1991 | | Senate Legislative Redistricting Subcommittee meets, discusses computer-access plan. | Senate Congressional Redistricting Subcommittee meeting held. No plans offered. Meeting lasts 10 minutes. |

| | House | Senate | Congressional |
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| May 8, 1991 | House Legislative and Local Redistricting Committee meeting cancelled. | | |
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| May 14, 1991 | | Senate Legislative Redistricting Subcommittee meets to receive plans from public. Receives plans to redistrict Senate from:<br>•ACLU.<br>•Wake County GOP.<br>• Former Sen. Connie Wilson, WR-Mecklenburg, about Mecklenburg districts. | |
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| May 15, 1991 | | | Joint Senate and House Public Hearing on Congressional Redistricting held in Auditorium of State Legislative Building. When no one responds to offer to speak, hearing adjourned after 5 minutes. |
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| May 16, 1991 | House Legislative and Local Redistricting Committee adopts criteria after rejecting these amendments:<br>•#1 Holmes. Should not split municipalities.<br>•#2 Holmes. Should preserve communities of interest.<br>•#3 Justus. No intent/effect to dilute political parties.<br>•#4 Brubaker (WR) All single-member districts unless conflict with Voting Rights Act. | | |
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| May 17, 1991 | Computer training for all legislators other than Committee leadership. Continues through May 20, 1991. | | |
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| May 21, 1991 | | Senate Legislative Redistricting Subcommittee meets for 30 minutes. No plans offered. | Senate Congressional Redistricting Subcommittee meets. No plans presented. Sen. Winner says leadership may submit plan within two weeks. Meeting adjourns after 15 minutes. |

| | House | Senate | Congressional |
|---|---|---|---|
| May 22, 1991 | House Legislative and Local Redistricting Committee meets to hear plans from public. Native American PAC proposes 3 single-member districts in Robeson/Hoke/Scotland, one with Lumbee majority. Former Rep. Joy Johnson (BD) and other black speakers oppose 3 single-member districts for those counties, defend current three-member district. Announcement made that public will be welcome to present plans at any committee meeting before June 9. | | |
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| May 28, 1991 | | Senate Legislative Redistricting Subcommittee meets for 10 minutes. No plans offered. | |
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| May 29, 1991 | | | Rep. David Balmer (WR) unveils to media a black/Lumbee-majority district along State's southern border.<br><br>House and Senate co-chairs present "1991 CONGRESSIONAL BASE #1" at joint meeting of House and Senate committees.<br><br>Senate Congressional Redistricting Subcommittee, meeting separately, votes to adopt "1991 CONGRESSIONAL BASE #1," refer it to the full Senate Redistricting Committee, and present the plan at a public hearing to be held June 13. |
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| May 30, 1991 | | | House Congressional Redistricting Committee discusses upcoming public hearing and procedure for amending plan. |
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| June 1, 1991 | | | Notices mailed to media for public hearing on congressional plan June 13. |

| | House | Senate | Congressional |
|---|---|---|---|
| June 3, 1991 | | | "1991 CONGRESSIONAL BASE PLAN #2" presented to meeting of House Congressional Redistricting Committee. Rep. Balmer presents "BALMER CONGRESS 6.2," containing one black district and one black/Lumbee district. Rep. Peggy Wilson, WR-Rockingham, presents amendment to "1991 CONGRESSIONAL BASE #1" pertaining only to 5th, 6th, and 12th districts, seeks to update that to fit "1991 CONGRESSIONAL BASE PLAN #2." |
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| June 4, 1991 | | Sen. Winner presents "Senate Base #1" to Senate Legislative Redistricting Subcommittee, which adopts the plan after rejecting amendment by Sen. James Richardson (BD) to eliminate black single-member district in Cumberland. Sen. Richardson offered the amendment on behalf of Sen. Lura Tally WD-Cumberland. | House Congressional Redistricting Committee adopts "1991 CONGRESSIONAL BASE PLAN #2" for presentation at public hearing on June 13. Committee rejects motion by Rep. Justus to present Balmer plan and updated Wilson amendment. |
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| June 5, 1991 | Full Senate Redistricting Committee meets on floor of Senate. amends procedure concerning time between presentation of plan and public hearing. | | |
| | House Legislative and Local Redistricting Committee meets on local bills. | Maps on notices mailed to media, courthouses, and boards of elections for June 19 public hearing on "Senate Base #1," with request that maps be posted. | Maps for June 13 public hearing mailed to courthouses and boards of elections offices in every county, with request that they be posted beginning June 7. Maps are included for both "1991 CONGRESSIONAL BASE #1" and "1991 CONGRESSIONAL BASE PLAN #2." |
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| June 7, 1991 | House Legislative and Local Redistricting Committee meets on local bills. Ted Stone (white) of Durham speaks concerning districts for Durham County. | | |

| | House | Senate | Congressional |
|---|---|---|---|
| June 11, 1991 | House Legislative and Local Redistricting Committee meets on local bills. | | |
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| June 12, 1991 | House Legislative and Local Redistricting Committee meeting cancelled. | | |
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| June 13, 1991 | Co-Chairs present "1991 HOUSE BASE #1" to House Legislative and Local Redistricting Committee. Public notices mailed for public hearing on that plan June 21, 1991. | | Public hearing held in Auditorium of State Legislative Building on "1991 CONGRESSIONAL BASE #1" and "1991 CONGRESSIONAL BASE PLAN #2." Rep. Justus presents his congressional plan. Representatives of some counties & cities object to splits. Representatives of NAACP, Black Leadership Caucus, & Republican Party speak.<br><br>Four Republican Congress Members from N.C. send letter to U.S. Justice Department, asking for federal intervention in the redistricting process to prevent minority voting strength. |
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| June 15, 1991 | N.C. Legislative Black Caucus holds statewide meeting in Raleigh. Co-Chairs Fitch and legislative counsel discuss redistricting. | | |
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| June 17, 1991 | Rep. Bowen introduces HB 1303. | | |
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| June 18, 1991 | | Sen. Leo Daughtry (WR) introduces SB 959 ("DAUGHTRY SENATE PLAN 6/17-91"). | Joint House/Senate Congressional meeting cancelled.<br><br>"1991 CONGRESSIONAL BASE PLAN #3" presented and adopted by Senate Redistricting Committee. It is committee substitute for SB 16. Sen. Winner says that the final plan will probably be worked out between Senate and House in conference committee. |
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| June 19, 1991 | | Public hearing held on "Senate Base #1." | Joint House/Senate Congressional meeting cancelled. |

| | House | Senate | Congressional |
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| June 20, 1991 | | | "1991 CONGRESSIONAL BASE PLAN #4" presented to House Congressional Redistricting Committee.<br>"1991 CONGRESSIONAL BASE PLAN #3" (SB 16) passes second and third readings in Senate. |
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| June 21, 1991 | Public hearing held in Auditorum of State Legislative Building on "HOUSE BASE PLAN #1." | | "1991 CONGRESSIONAL BASE PLAN #4" adopted by House Congressional Redistricting Committee as committee substitute for SB 16. Committee rejects:<br>• "Balmer Congress – Block Level" (a refinement of "BALMER CONGRESS 6.2");<br>• "rep. Justus's cong plan" (S16-PCSRR-10); and<br>• Another updated plan from Rep. Wilson, S16-PCSRR-11. |
| | | | |
| June 25, 1991 | | | House passes SB 16 ("1991 CONGRESSIONAL BASE PLAN #4") on second reading, after rejecting Balmer floor amendment (Amendment #1). |
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| June 26, 1991 | | Sen. Winner presents "Senate Base #2" to Senate Redistricting Committee. The Committee rejects:<br>• Cochrane amendment for a 2-member district in Davie/Iredell/Rowan; and<br>• "DAUGHTRY SENATE PLAN 6/17/91," containing 8 minority districts.<br>Committee adopts amendment offered by Sen. Johnson (the Subcommittee Chair) to switch 2 precincts in Cumberland. Committee then gives favorable report to committee sub for SB 17, incorporating Johnson amendment. The plan reported is "SENATE BASE #3." | House passes on third reading SB 16 ("1991 CONGRESSIONAL BASE PLAN #4"), after rejecting Justus floor amendment (Amendment #2). |

| | House | Senate | Congressional |
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| June 27, 1991 | | | Senate fails to concur in House committee substitute for SB 16. |
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| June 28, 1991 | | | President Pro Tem appoints Senate conferees for SB 16. |
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| July 2, 1991 | | Senate passed SB 17 on second reading after rejecting those floor amendments:<br>• #1 DAUGHTRY SENATE PLAN 7/1/91," revised from earlier Daughtry plan with new minority district in Southeastern N.C.<br>• #2 Richardson, higher black percentage in the Mecklenburg minority district.<br>• #3 R.L. Martin (WD), lower black percentage in District 6 (Pitt).<br>• #4 Daughtry, affecting Districts 11/14/15 in Johnston/Franklin. | Speaker appoints House conferees on SB 16. |
| | | | |
| July 3, 1991 | Co-Chairs present "HOUSE BASE PLAN #2," with "Addendum 2A," to House Legislative and Local Redistricting Committee. | Senate passes SB 17 on third reading after rejecting Amendment #5 by Sen. Speed (WD) affecting Districts 11/14 in Johnston/Franklin. | Chairs of conference committee on SB 16 present "1991 CONGRESSIONAL BASE #5" to conferees. After making adjustments involving Johnston, Rockingham, and Stokes counties, conferees approve the plan, which becomes "1991 CONGRESSIONAL BASE #6." |
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| July 4, 1991 | | | Senate approves conference report on SB 16 ("1991 CONGRESSIONAL BASE #6"). |
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| July 8, 1991 | House Legislative and Local Redistricting Committee meeting cancelled. | | Rep. Balmer moves to suspend rules so that HB 1310, creating 2 majority-black districts, could be given first reading. Motion fails.<br><br>House approves conference report on SB 16 ("1991 CONGRESSIONAL BASE #6"). |

| | House | Senate | Congressional |
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| July 9, 1991 | House Legislative and Local Redistricting Committee gives favorable report to HB 1303 ("1991 HOUSE BASE PLAN #3") after rejecting amendments by:<br>• Rep. Brawley WR (on behalf of Rep. Church, WD-Vance), for a 3-member district in Vance/Granville.<br>• Rep. Hege, WR-Davidson, for Davie/Davidson changes.<br>• Rep. Justus, affecting Districts 35/83 in Rowan.<br>• Rep. Robinson (WR), on behalf of Rep. Pope (WR) for a statewide plan with 23 minority seats ("N.C. House 119 Districts V2").<br>• Rep. Gist, BD-Guilford, for 2 black districts in Guilford. | | SB 16 ratified as Session Law Chapter 601. |
| | | | |
| July 10, 1991 | Full House passes HB 1303 on second reading, after rejecting these floor amendments:<br>• #1 Pope, statewide plan with 23 minority seats.<br>• #2 Decker (WR), Districts 73/84 in Forsyth/Guilford.<br>• #3 Flaherty (WR), District 46, Caldwell.<br>• #4 Hasty, WD-Robeson, Dist. 16, Robeson, Hoke, Scotland.<br>• #5 Jones, WD-Pitt, Districts 8/9 in Pitt.<br>• #6 Pope, minority district in Union/Stanly.<br>• #7 Hege, WR-Davidson, Districts 37/74 in Davidson, Davie, Randolph.<br>• #8 Wilson, Districts 25/73 in Rockingham.<br>• #9 Gist, Dists 26-29/89, Guilfrd.<br><br>Rep. Hege introduces HB 1311. | | |

| | House | Senate | Congressional |
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| July 11, 1991 | Full House passes HB 1303 on third reading after rejecting these amendments:<br>• #10 Gardner, WR-Rowan, Districts 35/83, Rowan.<br>• #11 Rhyne (WR), Districts 10-14/96-99, minority districts in Southeastern N.C.<br>and after approving Amendment #12 (technical, offered by Rep. Fitch). | House Legislative and Local Redistricting Committee adopts of technical amendment and gives a favorable report to SB 17. | |
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| July 12, 1991 | Full Senate Redistricting Committee gives HB 1303 favorable report after rejecting one amendment:<br>• Sen. Shaw, WR-Guilford, identical to Gist floor Amendment #9 in House.<br><br>Senate passes HB 1303 on second and third readings. | House approves Committee's technical amendment and passes SB 17 on second and third readings.<br><br>Senate concurs in House technical amendment to SB 17 | |
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| July 13, 1991 | HB 1303 ratified as Session Laws Chapter 675. | SB 17 ratified as Session Laws Chapter 676. | |
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| July 16, 1991 | 1991 General Assembly adjourns until May 26, 1992. | | |
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| August 26, 1991 | House Plan submitted to U.S. Justice Department for preclearance under Section 5 of Voting Rights Act. | | |
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| September 3, 1991 | | Senate Plan submitted to U.S. Justice Department for preclearance under Section 5 of Voting Rights Act. | |
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| September 28, 1991 | | | Congressional Plan submitted to U.S. Justice Department for preclearance under Section 5 of Voting Rights Act. |

| | House | Senate | Congressional |
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| November 1, 1991 | *Daughtry v. State Board* filed in U.S. Middle District Court (N.C.). Plaintiffs, all Republican legislators, challenge as unconstitutional the three redistricting plans and ask the court to take over the redistricting process. Plaintiffs also challenge as against the U.S. Constitution the one-year residency requirement for legislators (Art. II, Sections 6 and 7 of N.C. Constitution. | | |
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| December 18, 1991 | U.S. Justice Department sends letter interposing objections to State House, State Senate, and Congressional plans. | | |
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| December 20, 1991 | Governor calls Extra Session of General Assembly to revise the three redistricting plans and to postpone the filing period for candidates. (Statute says filing must begin January 6 and end February 3.) | | |
| | | | Rep. Thomas Hardaway, BD-Halifax, meets with John Merritt, staff to Congressman Charlie Rose WD-N.C., at Howard Johnson's in Gold Rock, N.C. Hardaway presents to Merritt "OPTIMUM II-ZERO," a revision of "BALMER 8.1" with two majority-black districts, one urban and one rural. Merritt shows plan to Democratic N.C. congressional delegation. After further revisions, it is presented at public hearing January 8, 1992 by Mary Peeler, State Director of NAACP. |
| | | | |
| December 30, 1991 | Extra Session of General Assembly convenes. It ratifies SB 1, Chapter 1 of 1991Sess. Laws, Extra Session, postponing filing period until February 10-March 2. Session recesses until January 13, 1992.<br><br>Announcements sent to Senators and House members informing them of meeting and public hearings to be held during week of January 6 through 10. | | |
| | Reps. Fitch, Bowen, and Hunt introduce HB 2 as a blank bill.<br><br>Rep. Pope introduces HB 5 and HB 6. | Sen. Johnson introduces SB 2.<br><br>Sen. Daughtry introduces SB 5. | Sen. Walker introduces SB 3.<br><br>Reps. Fitch, Bowen, and Hunt introduce HB 3.<br><br>Rep. Balmer introduces HB 8, HB 9, HB 10, and HB 11, all different attempts to draw plans with two minority districts. |

| | House | Senate | Congressional |
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| December 31, 1991 | Notices to media and minority groups are completed for separate public hearings to be held January 8, 1992 concerning House, Senate, and congressional redistricting. | | |
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| January 7 1992 | House Legislative and Local Redistricting Committee meets. Rep.Gist presents proposal for 2 black single-member districts in Guilford. Rep. Pope presents 102-district plan with 26 minority seats. | | |
| | | | |
| January 8, 1992 | Public hearing held in Raleigh on House redistricting. | Public hearing held in Raleigh on Senate redistricting. | Public hearing held in Raleigh on congressional redistricting. Mary Peeler, State Director of NAACP, presents plan with two minority districts:<br>•Urban Piedmont; and<br>•Rural Eastern N.C.<br>(Peeler plan is later entered in General Assembly's computer as "92 CONGRESS 1.")<br><br>Five N.C. Democratic Congressmen meet with legislative leadership in Raleigh and urge drawing two minority districts rather than appeal to federal court Justice's rejection of initial plan. |
| | Speaker of House Dan Blue and President Pro Tem of Senate Henson Barnes expand hours on Public Access Terminal to include evening weekday hours of 5-9 p.m. on January 8-18, and on Saturday, January 11. | | |
| | | | |
| January 9, 1992 | House Legislative and Local Redistricting Committee meets. Committee votes to ask Co-Chairs to draw House plan that revises only those parts of 1991 Ratified Plan that Justice objected to. | Senate Legislative Redistricting Subcommittee meets. Chairs present "1992 SENATE BASE #4." No amendments offered. Subcommittee gives favorable report as committee substitute for SB 2.<br><br>Senate Redistricting Committee meets. "1992 SENATE BASE #4" explained. No amendments offered. No vote taken. | House Congressional Redistricting Committee meets. Rep. Justus presents plan with two minority districts, "COMPACT 2-MINORITY PLAN." No votes taken.<br><br>Senate Congressional Redistricting Subcommittee meeting cancelled. |

| | House | Senate | Congressional |
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| January 10, 1992 | House Legislative and Local Redistricting Committee meeting cancelled. | | |
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| January 13, 1992 | House Legislative and Local Redistricting Committee gives favorable report to HB 2 ("1992 HOUSE BASE #4"). The vote is 24-9. It occurs after the Committee defeats these amendments:<br>• Hege, defeated 11-21 (Pope's 102-district plan).<br>• Robinson, WR-Caldwell,defeated 6-25, to merge the single-member district and the 2-member district in Caldwell, Burke, Mitchell, and Alexander.<br><br>Full House passes HB 2 on second reading. After defeating these amendments:<br>• #1 Brawley, WR-Iredell, defeated 27-88, to split the 2-member district in Catawba, Lincoln, and Gaston.<br>• #2 Robinson, defeated 36-76, to merge the single-member district and the 2-member district in Caldwell, Burke, Mitchell, Alexander.<br>Rep. Pope objects to third reading being held on the same day, and the vote to suspend the rules and override his objection fails. | Senate Redistricting Committee favorable report to committee sub for SB 2. The Chair first presents "1992 SENATE BASE #5," changed from BASE #4 only in Lenoir and Iredell. The Committee adopts an amendment from Sen. Marvin shifting precincts in Gaston and Lincoln, and that amendment is incorporated into committee sub.<br><br>Full Senate passes SB 2 on second and third readings. After defeating one amendment:<br>• #1 Daughtry, defeated 15-34, to create 2 single-member districts in Southeastern N.C. he asserted were minority districts,<br>and approving two technical amendments:<br>• #2 Hyde (WD), approved 49-0, and<br>• #3 Sands (WD), approved 50-0.<br><br>House Legislative and Local Redistricting Committee gives favorable report to SB 2. | |

| | House | Senate | Congressional |
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| January 14, 1992 | Full House passes HB 2 on third reading. After defeating these amendments:<br>• #3 Pope, defeated 34-79, to draw 102 districts with 26 minority seats,<br>• #4 Hege, defeated 35-70, to switch one precinct in Davidson County,<br>• #5 Michaux, BD-Durham, defeated 39-77, to draw 3 single-member districts in Durham,<br>• #6 Rhyne, defeated 35-75,<br>• #8 Beard, WD-Cumberland,defeated 37-64, to change one single-member district and one 2-member district in Cumberland to 3 single-member districts,<br>and approving these amendments:<br>• #7 Russell (WR), approved 104-4, to shift white incumbent out of minority single-member district, raising black percentage in single-member district, and<br>• #9 Fitch, approved 105-1, technical.<br><br>Senate Redistricting Committee gives favorable report to HB 2.<br><br>Full Senate passes HB 2 on second and third readings.<br><br>HB 2 ratified as Chapter 5 of 1991 Extra Session Laws. | Full House passes SB 2 on second and third readings. After adopting technical amendment by Rep. Fitch. An amendment offered by Rep. Rhyne is withdrawn. It embodied the Daughtry plan.<br><br>SB 2 ratified as Chapter 4 fo 1991 Extra Session Laws. | Senate Congressional Redistricting Subcommittee meeting cancelled. |

| | House | Senate | Congressional |
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| January 17, 1992 | Chapter 5 submitted to U.S. Justice Department for preclearance under Sec. 5 of Voting Rights Act. | Chapter 4 submitted to U.S. Justice Department for preclearance under Sec. 5 of Voting Rights Act. | |
| | | | |
| January 18, 1992 | | | House leadership releases "1992 CONGRESSIONAL BASE PLAN #7" to House members and to public.<br><br>Senate leadership sends copies of "1992 CONGRESSIONAL BASE PLAN #8" to Senators. |
| | | | |
| January 21, 1992 | | | House Congressional Redistricting Committee meets. Members discuss "1992 CONGRESSIONAL BASE PLAN #7." Rep. Flaherty presents "REP. FLAHERY'S CONGRESS PLAN" containing 3 districts with large minority concentrations. |
| | | | |
| January 22, 1992 | | | House Congressional Redistricting Committee meets. Co-Chairs tell members they will make some changes in "1992 CONGRESSIONAL BASE PLAN #7" and present it at a Committee meeting the next day.<br><br>Senate Congressional Redistricting Subcommittee meets. Decision made that Senate will wait for House to pass a congressional plan.<br><br>Senate Redistricting Committee meeting cancelled. |

| | House | Senate | Congressional |
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| January 23, 1992 | | | House Congressional Redistricting Committee gives a favorable report to an amended version of HB 3. It is initially presented by Co-Chairs as "1992 CONGRESSIONAL BASE PLAN #9." The Committee then rejected these amendments:<br>• Decker, to take the 10th District out of Forsyth and the 5th District out of Burke;<br>• Flaherty, containing what he described as 2 minority districts and an influence district; and<br>• Justus, to create two minorities districts with the other districts allegedly more compact than the leadership plans.<br>The Committee adopted one amendment by Rep. Jones to move four Pitt precincts, including his own, from the 2nd District to the 1st.<br><br>Full House passes HB 3 on second and third readings. After defeating these floor amendments:<br>• #1 Flaherty, defeated 40-71, same amendment he offered in Committee.<br>• #3 Justus, defeated 35-72, same amendment he offered in Committee.<br>• #4 Green, defeated by voice vote, to return Pitt precincts – and Rep. Jones – to 2nd District.<br>(Amendment #2, offered by Rep. Kimsey (WR), is withdrawn. It would have created an advisory commission if the congressional plan was denied preclearance. |

| | House | Senate | Congressional |
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| January 24, 1992 | | | Senate Redstricting Committee gives HB 3 a favorable report. After defeating an amendment by Sen. Daughtry that embodied Rep. Flaherty's amendment in the House.<br><br>Full Senate passes HB 3 on second and third readings.<br><br>HB 3 ratified as Chapter 7 of 1991 Extra Session. |
| | | | |
| February 6, 1992 | U.S. Justice Department approves all three redistricting plans under Section 5 of Voting Rights Act. | | |
| | | | |
| February 10, 1992 | Special filing period opens for candidates in all elections, according to SB 1, Chapter 1 of Extra Session Laws. Period is set to close March 2. (Ordinarily, filing period would have run from January 6 to February 3.) | | |
| | | | |
| February 28, 1992 | | | *Pope v. Blue* filed in U.S. Western District Court (N.C.), challenging constitutionality of new congressional plan on grounds of lack of compactness and respect for communities of interest. State Republican Party is one of the plaintiffs.<br><br>U.S. Western District Court grants temporary restraining order. The order blocks the March 2 close of filing period for congressional candidates until March 10 so that a hearing can be held in *Pope v. Blue*. |
| | | | |
| March 2, 1992 | Filing period closes for candidates for State House and State Senate. | | |
| | | | |
| March 9, 1992 | | | 3-judge panel in U.S. Western District Court dismisses *Pope v. Blue* as failing to state a claim on which relief can be granted.<br><br>State Board of Elections closes filing period for congressional candidates. |

| | House | Senate | Congressional |
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| March 11, 1992 | | | Chief Justice Rehnquist denies emergency application for injunction and stay pending appeal in *Pope v. Blue*. |
| | | | |
| March 12, 1992 | | | *Shaw v. Barr* filed in U.S. Eastern District Court (N.C.) challenging congressional plan for unconstitutional failure to respect communities of interest. Plaintiff's attorney Robinson O. Everett contends that Barr (U.S. Attorney General) misinterpreted the Voting Rights Act to require racial quotas in representation. |
| | | | |
| April 27, 1992 | | | 3-judge panel in U.S. Eastern District Court dismisses *Shaw v. Barr* on ground that it states no claim on which relief can be granted. Also rules that it has no jurisdiction over claim against U.S. Attorney General. (Court issues its opinion August 7.) Plaintiffs appeal to U.S. Supreme Court. |
| | | | |
| May 5, 1992 | First primary held under new redistricting plans. The following results occur in minority districts: | | |
| | Of 19 seats in majority-minority districts,<br>• Blacks win Democratic nomination in 17,<br>• Native American in one<br>• White in one.<br>Black wins Democratic nomination in one majority-white multi-member district. | Of 7 majority-minority districts (including District 30, where blacks plus Native Americans equal a majority),<br>• Blacks win Democratic nomination in 5,<br>• Whites in 2.<br>In addition, 2 blacks win Democratic nomination in multi-member majority-white districts. | In Congressional District 12, Melvin Watt (BD) wins Democratic nomination against 3 black opponents.<br><br>In District 1, Walter Jones Jr. (WD), son of retiring incumbent, is frontrunner with 37.4% of vote, but faces runoff June 2 with Eva Clayton (BD), who won 30.7%. |
| | | | |
| June 2, 1992 | | | In District 1 runoff, Eva Clayton (BD) defeats Walter Jones Jr. (WD) 54.8% to 45.2%. |
| | | | |
| July 1, 1992 | Judge Ervin in U.S. Middle District Court dismisses *Daughtry v. State Board* as moot. | | |
| | | | |
| August 7, 1992 | | | U.S. Eastern District Court issues opinion for its April 27 ruling dismissing *Shaw v. Barr*. |

| | House | Senate | Congressional |
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| September 29, 1992 | | | U.S. Supreme Court affirms dismissal of *Pope v. Blue*. |
| | | | |
| November 3, 1992 | First general election held under 1990s redistricting plans. Following results occur in minority districts: | | |
| | HD5 -- Howard Hunter (BD)<br>HD7 -- Dock Brown (BD)<br>HD8 -- Linwood Mercer (WD)<br>HD17 – Nick Jeralds (BD)<br>Mary McAllister (BD)<br>HD21 -- Dan Blue (BD)<br>HD26 -- Herman Gist (BD)<br>HD28 -- Will Burton (BD)<br>HD59 -- Pete Cunningham (BD)<br>HD60 -- Howard Barnhill (BD)<br>HD66 -- Annie Kennedy (BD)<br>HD67 -- Pete Oldham (BD)<br>HD70 -- Toby Fitch (BD)<br>HD78 -- James Green (BD)<br>HD79 -- Wm. Wainwright (BD)<br>HD85 -- Ronnie Sutton (N-AD)<br>HD87 -- Frances Cummings (BD)<br>HD97 -- Jerry Braswell (BD)<br>HD98 -- Thomas Wright (BD) | SD2 -- Frank Ballance (BD)<br>SD6 -- R.L. Martin (WD)<br>SD7 -- Luther Jordan (BD)<br>SD30 – David Parnell (WD)<br>SD31 – Wm. Martin (BD)<br>SD33 – James Richardson (BD)<br>SD41 – C.R. Edwards (BD) | CD1 -- Eva Clayton (BD)<br>CD12 – Melvin Watt (BD) |
| | In addition, these black Democratic legislators were elected in multi-member, majority-white districts: Mickey Michaux in HD23, Ralph Hunt in SD13, and Howard Lee in SD16.<br><br>Total of 26 minority legislators is increase of 6 over the 20 serving in 1991. | | |
| | Total of 19 minority House members is increase of 4 over the 15 serving in 1991. | Total of 7 minority Senators is increase of 2 over the 5 serving in 1991. | Total of 2 minority Congress members is increase of 2 of the 0 serving in 1991. |
| | 78 Democrats, 42 Republicans elected to House. Shift of 3 seats from Democratic to Republican. | 39 Democrats, 11 Republicans elected to Senate. Shift of 3 seats from Republican to Democratic. | 8 Democrats, 4 Republicans elected to N.C. delegation to U.S. House. The 1989 delegation was 7-4 Democratic. |
| | | | |
| December 7, 1992 | | | U.S. Supreme Court agrees to hear *Shaw v. Barr*. |

| | House | Senate | Congressional |
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| April 20, 1993 | | | U.S. Supreme Court hears oral argument in *Shaw v. Barr*. |
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| June 28, 1993 | | | U.S. Supreme Court reverses dismissal of *Shaw v. Reno* (new name for *Shaw v. Barr*) and remands to District Court. In 5-4 opinion, Justice O'Connor rules that plaintiffs have stated an Equal Protection claim where a district plan is "so irrational on its face that it can be understood only as an effort to segregate voters into separate districts on the basis of race, and that the separation lacks sufficient justification." On remand, she says, the District Court must consider whether it is based on a compelling state interest, and if so whether the plan is narrowly tailored to serve that interest. |
| | | | |
| September 7, 1993 | | | U.S. Eastern District Court grants motion to intervene as defendants in *Shaw*.. The motion is filed by 22 black and white voters living in and near Districts 1 and 12. One of the defendant-intervenors is Ralph Gingles, who was plaintiff in the landmark Voting Rights Act lawsuit that overturned the N.C. legislative redistricting plan in the 1980s. |
| | | | |
| November 3, 1993 | | | U.S. Eastern District Court grants motion from 11 Republican voters to intervene as plaintiffs in *Shaw v. Hunt* (new name for *Shaw v. Reno*). Among the 11 are State GOP Chair Jack Hawk and former Rep. Art Pope. Motions to intervene are denied for State GOP and Americans for the Defense of Constitutional Rights (a group connected with the *Shaw* plaintiffs). |

| | House | Senate | Congressional |
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| March 1, 1994 | | | U.S. Eastern District Court grants motion allowing U.S. Department of Justice to file an *amicus curiae* brief on behalf of the defendants in ***Shaw v. Hunt***. |
| | | | |
| March 9, 1994 | | | U.S. Eastern District Court denies plaintiffs' motion for preliminary injunction in ***Shaw v. Hunt***. Effect is to allow congressional elections to proceed pending trial. |
| | | | |
| March 28 through April 4, 1994 | | | Trial held in Shaw v. Hunt before 3-judge panel in U.S. Eastern District Court in Raleigh. Judges are Dickson Phillips, Earl Britt, and Richard Voorhees. |
| | | | |
| April 18, 1994 | | | 3-judge panel in U.S. Eastern District Court hears oral arguments in ***Shaw v. Hunt***. |
| | | | |
| May 3, 1994 | Primary held under 1992 redistricting plans. The following results occur in minority districts:<br><br>Of 19 seats in majority-minority districts, blacks win Democratic nomination in 15, Native-American in one, whites in 3. (Reps. Brown and Green, both BD, both lose primary to white opponents.) Blacks win GOP nomination in 2 majority-white districts. | Of 7 majority-minority districts (including SD30, where Native-Americans plus blacks equal majority), blacks win Democratic nomination in 5, whites in 2. In addition, 2 blacks win Democratic nomination in multi-member, majority-white districts. One black candidate wins GOP nomination in multi-member majority-white district. | Incumbent black Congress members re-nominated without opposition in CD1 and CD12. |
| | | | |
| August 1, 1994 | | | 3-judge panel in U.S. Eastern District Court dismisses ***Shaw v. Hunt*** on remand. In 2-1 opinion, panel holds that plan is a racial gerrymander, but that it is narrowly tailored to serve a compelling state interest. Judge Voorhees is the dissenter. |

| | House | Senate | Congressional |
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| November 8, 1994 | Second general election held under 1990s redistricting plans. Following results occur in minority districts: | | |
| | HD5 -- Howard Hunter (BD)<br>HD7 -- L.W. Locke (WD)<br>HD8 -- Linwood Mercer (WD)<br>HD17 – Mary McAllister (BD)<br>Larry Shaw (BD)<br>HD21 -- Dan Blue (BD)<br>HD26 -- Alma Adams (BD)<br>HD28 -- F. Boyd-McIntyre (BD)<br>HD59 -- Pete Cunningham (BD)<br>HD60 -- Beverly Earle (BD)<br>HD66 -- Larry Womble (BD)<br>HD67 -- Pete Oldham (BD)<br>HD70 -- Toby Fitch (BD)<br>HD78 -- Stan Fox (WD)<br>HD79 -- Wm. Wainwright (BD)<br>HD85 -- Ronnie Sutton (N-AD)<br>HD87 -- Frances Cummings (elected as BD, but switches to GOP after election)<br>HD97 -- Jerry Braswell (BD)<br>HD98 -- Thomas Wright (BD) | SD2 -- Frank Ballance (BD)<br>SD6 -- R.L. Martin (WD)<br>SD7 -- Luther Jordan (BD)<br>SD30 – David Parnell (WD)<br>SD31 – Wm. Martin (BD)<br>SD33 – Charles Dannelly (BD)<br>SD41 – C.R. Edwards (BD) | CD1 -- Eva Clayton (BD)<br>CD12 – Melvin Watt (BD) |
| | In addition, these black legislators are elected in multi-member, majority-white districts: Mickey Michaux (BD) in HD23, Larry Linney (BR) in HD51, Jeanne Lucas (BD) in SD13, and Henry McKoy (BR) in SD14.<br><br>Total of 25 minority legislators is decrease of one from the 26 elected in 1992. | | |
| | Total of 18 minority House members is decrease of one from the 19 elected in 1992. | Total of 7 minority Senators is the same as the 7 elected in 1992. | Total of 2 minority Congress members is the same as the 2 elected in 1992. |
| | 68 Republicans, 52 Democrats elected to House. Shift of 26 seats from Democratic to Republican. First GOP majority in House since Reconstruction. | 26 Democrats, 24 Republicans elected to Senate. Shift of 13 seats from Democratic to Republican. | 8 Republicans, 4 Democrats elected to N.C. delegation to U.S. House. Shift of 4 seats from Democratic to Republican. |

| | House | Senate | Congressional |
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| June 29, 1995 | | | U.S. Supreme Court agrees to hear *Shaw v. Hunt* (hereinafter called "*Shaw II*") at the same time it will hear *Bush v. Vera*, an appeal by Texas from a lower court decision invalidating Texas's congressional districts on a *Shaw*-type gerrymandering claim. Also on this day, Supreme Court upholds lower-court invalidation of Georgia's congressional districts on a *Shaw*-type claim (*Miller v. Johnson*). |
| | | | |
| December 5, 1995 | | | U.S. Supreme Court hears oral argument in *Shaw II* and *Bush*. |
| | | | |
| May 7, 1996 | Primaries held under 1992 redistricting plans. The following results occur in minority districts: | | |
| | Of 19 seats in majority-minority districts, blacks win Democratic nomination in 16, Native-American in one, whites in 2. (Rep. Locke, WD, loses primary to black opponent.) One black candidate wins GOP nomination in majority-white district. Rep. Linney, BR, not seeking renomination, is replaced by a white nominee. Rep. Cummings wins GOP nomination in majority-black district.. | Of 7 majority-minority districts (including SD30, where Native-Americans plus blacks equal majority), blacks win Democratic nomination in 5, whites in 2. In addition, 2 blacks win Democratic nomination in multi-member, majority-white districts. One black candidate wins GOP nomination in multi-member, majority white district. | Incumbent black Congress members re-nominated without opposition in CD1 and CD12. |

| | House | Senate | Congressional |
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| June 13, 1996 | | | U.S.Supreme Court reverses 3-judge panel in *Shaw II*. Chief Justice Rehnquist, writing for 5-4 majority, holds that:<br>• Only the plaintiffs living in the 12th district have standing to challenge, so only the 12th is invalidated.<br>• Lower court was right in saying that race was the main reason for drawing the odd-looking district, and so State is subject to strict scrutiny and must have used narrowly tailored means to achieve compelling interest when it drew the district.<br>• Lower court was wrong in saying State used narrowly tailored means for compelling interest. Rehnquist discussed and rejected the following as compelling interests:<br>1. *Eradicating past discrimination* – Lower court rightly said that was not the real reason.<br>2. *Obtaining Sec. 5 VRA approval* – As with Georgia, the U.S. Justice Department was wrong in enforcing "maximization" policy and State was wrong to comply.<br>3. *Avoiding Sec. 2 VRA lawsuit* – Not a valid reason because compactness of minority population is a threshold test for a Sec. 2 claim and no group has a compact population in District 12.<br>Rehnquist does not remand case to lower court or suggest remedies.<br><br>On same day, Supreme Court upholds invalidation of congressional districts in Texas. Justice O'Connor writes 5-4 opinion. In concurring opinion not joined by all of majority, she states guidelines: States may intentionally use race in drawing districts, as long as they do not subordinate "traditional districting criteria" to race. |

| | House | Senate | Congressional |
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| June 14, 1996 | | | House Speaker Harold Brubaker (WR) appoints House Select Committee on Congressional Redistricting, headed by Rep. Robert Grady (WR). |
| | | | |
| July 3, 1996 | Jack W. Daly files original complaint in *Daly v. High*, using a Shaw-type theory to challenge certain State House, State Senate, and Congressional districts. He files the complaint in U.S. Western District Court in Statesville, but for months does not serve it upon the defendant, the State Board of Elections. | | |
| | | | Robinson O. Everett files *Cromartie v. Hunt* in U.S. Eastern District of N.C., using a *Shaw* theory to challenge the 1st congressional district. Action in the case is later stayed pending outcome of *Shaw*. |
| | | | |
| July 8, 1996 | | | Senate President Pro Tem Marc Basnight (WD) appoints Senate Select Committee on Redistricting, headed by Sen. Roy Cooper (WD).<br><br>Sen. Cooper writes letter to N.C. Attorney General Michael Easley saying that it is not feasible to redraw congressional districts in time for new districts to be used in 1996 congressional elections. |
| | | | |
| July 10, 1996 | | | Senate Select Committee meets to discuss *Shaw* decision and the feasibility of enacting a remedial plan before the 1996 congressional elections. |
| | | | |
| July 12, 1996 | | | 3-judge panel allows *Shaw* plaintiffs and plaintiff-intervenors amend complaint to add new parties and challenge District 1. |

| | House | Senate | Congressional |
|---|---|---|---|
| July 17, 1996 | | | House Rules Committee Chair Richard Morgan (WR) releases a congressional redistricting plan, "Congress-96-001", containing one majority black district in northeast and one majority black+Indian district in south. |
| | | | |
| July 19, 1996 | | | 3-judge panel issues order asking for opinions of Speaker, President Pro Tem, and committee leaders on whether it is feasible to adopt a remedial congressional plan for the 1996 elections.<br>Senate says no.<br>House says yes. |
| | | | |
| July 24, 1996 | | | House Rules Committee conducts a public hearing at which Rep. Morgan presents and explains "Congress-96-001". |
| | | | |
| July 30, 1996 | | | 3-judge panel issues order :<br>• Prohibiting State from conducting any congressional elections after 1996 under existing plan.<br>• Allowing State to conduct 1996 elections under existing plan.<br>• Giving the General Assembly until April 1, 1997 to propose remedial plan. |
| | | | |
| September 29, 1996 | | | Americans for Defense of Constitutional Rights, a group connected with the *Shaw* plaintiffs, announces it will award $1,000 to anyone who can draw a majority black congressional district that is ruled to be compact by expert judges. (It is later announced that $2,000 will be awarded to anyone who can draw two majority-black districts that pass the compactness test.) |

| | House | Senate | Congressional |
|---|---|---|---|
| November 5, 1996 | Second general election held under 1990s redistricting plans. Following results occur in minority districts: | | |
| | HD5 -- Howard Hunter (BD)<br>HD7 -- Thomas Hardaway (BD)<br>HD8 -- Linwood Mercer (WD)<br>HD17 – Mary McAllister (BD)<br>Theodore Kinney (BD)<br>HD21 -- Dan Blue (BD)<br>HD26 -- Alma Adams (BD)<br>HD28 -- F. Boyd-McIntyre (BD)<br>HD59 -- Pete Cunningham (BD)<br>HD60 -- Beverly Earle (BD)<br>HD66 -- Larry Womble (BD)<br>HD67 -- Pete Oldham (BD)<br>HD70 -- Toby Fitch (BD)<br>HD78 -- Stan Fox (WD)<br>HD79 -- Wm. Wainwright (BD)<br>HD85 -- Ronnie Sutton (N-AD)<br>HD87 -- Donald Bonner (BD)<br>HD97 -- Jerry Braswell (BD)<br>HD98 -- Thomas Wright (BD) | SD2 -- Frank Ballance (BD)<br>SD6 -- R.L. Martin (WD)<br>SD7 -- Luther Jordan (BD)<br>SD30 – David Weinstein (WD)<br>SD31 – Wm. Martin (BD)<br>SD33 – Charles Dannelly (BD)<br>SD41 – Larry Shaw (BD) | CD1 -- Eva Clayton (BD)<br>CD12 – Melvin Watt (BD) |
| | In addition, these black legislators are elected in multi-member, majority-white districts: Mickey Michaux (BD) in HD23, Jeanne Lucas (BD) in SD13, and Howard Lee (BD) in SD16.<br><br>Total of 25 minority legislators is same as the 25 elected in 1994. | | |
| | Total of 18 minority House members is the same as 1994.<br><br>61 Republicans, 59 Democrats elected to House. Shift of 7 seats from Republican to Democratic. | Total of 7 minority Senators is the same as 1994.<br><br>30 Democrats, 20 Republicans elected to Senate. Shift of 4 seats from Republican to Democratic. | Total of 2 minority Congress members is the same as 1994.<br><br>Republicans and Democrats divide the U.S. House delegation evenly, 6 and 6. Shift of 2 seats from Republican to Democratic.<br><br>In Georgia, black Congress members Sanford Bishop and Cynthia McKinney re-elected. Their initial elections were to districts that were majority black. Their 1996 re-elections are to majority-white districts drawn by a federal court in a ***Shaw***-type lawsuit. |

| | House | Senate | Congressional |
|---|---|---|---|
| December 17, 1996 | Study Committee on Election Laws Reform recommends that 1997 General Assembly propose a constitutional amendment to give redistricting decisions to an Independent Redistricting Commission. This would apply to congressional and legislative redistricting beginning in 2001. The Study Committeewill report January 3, 1997, to the Legislative Research Commission. The LRC will vote to transmit the request to the 1997 General Assembly. The proponent of the Independent Redistricting Commission, Rep. John Weatherly (WR), will introduce the Study Committee's recommendation February 5 as House Bill 52. | | |
| | | | |
| January 23, 1997 | Magistrate judge gives plaintiff in *Daly v. High* until February 14 to report why the suit has not been served on the defendant. | | |
| | | | |
| January 29, 1997 | 1997 General Assembly convenes. With House Republican majority of 61-59, Speaker Harold Brubaker re-elected. With Senate Democratic majority of 30-20, President Pro Tem Marc Basnight re-elected. | | |
| | | | Speaker Brubaker appoints new House Committee on Congressional Redistricting, chaired by Rep. Ed McMahan (WR).<br><br>President Pro Tem Basnight reauthorizes the Senate Select Committee on Redistricting, still chaired by Sen. Cooper. |
| | | | |
| February 5, 1997 | Rep. Weatherly introduces HB 52, calling for a constitutional amendment to give an Independent Redistricting Commission, rather than the General Assembly, the authority to redistrict State House, State Senate, and Congress. The amendment would go into effect for the 2001 redistricting. The bill, similar to one Rep. Weatherly had introduced in 1995, was recommended by the Legislative Research Commission's Study Committee on Election Law Reform. | | |
| | | | |
| February 10, 1997 | | | Deadline for submission of plans in the contest for compact minority districts conducted by Americans for Defense of Constitutional Rights. |
| | | | |
| February 12, 1997 | | | House CR Committee holds first meeting, hears from Edwin Speas, Senior Deputy State AG, on the *Shaw* litigation. |

| | House | Senate | Congressional |
|---|---|---|---|
| February 13, 1997 | | | Rep. Mickey Michaux (BD) removed from House Redistricting Committee by Speaker. Replaced by Rep. Toby Fitch (BD). Speaker Brubaker says change was made to correct an oversight: He had originally intended to appoint Rep. Fitch. |
| | | | |
| February 19, 1997 | First amended complaint filed in U.S. Western District Court for *Daly v. High*, asserting *Shaw*-type challenge to the following districts:<br>• House Dist. 28<br>• House Dist. 97<br>• House Dist. 98 | • Senate Dist. 4<br>• Senate Dist. 7 | • CD 1<br>• CD 3<br>• CD 6<br>• CD 7<br>• CD 8<br>• CD 9<br>• CD 10 |
| | | | |
| February 20, 1997 | | | Senate Select Committee meets. Sen Cooper presents "1997 Congressional Plan A," containing 2 minority districts. He says no vote will be taken on the plan, but that a public hearing will be held the next week. |
| | | | |
| February 24, 1997 | | | Six N.C. Democratic Congress Members meet in Legislative Building with Sen. Cooper. They express mixed feelings about the Senate proposal.<br><br>Robinson Everett announces there are no winners for the prize of $2,000 for drawing two compact majority-black congressional districts. But he awards $1,000 to Jack W. Daly for drawing the most compact majority-black single congressional district. Daly's plan, "Everett's Bane 3", split three counties and stretched from Durham to Pasquotank counties. Daly says he will use the money to further his lawsuit. John Sanders, retired director of the Institute of Government, is judge of the contest. |

| | House | Senate | Congressional |
|---|---|---|---|
| February 25, 1997 | | | Rep. Weatherly introduces House Joint Resolution 322, providing for an independent commission to draw a congressional redistricting plan to satisfy the court order in *Shaw*.<br><br>House CR Committee meets. Rep. McMahan presents "1997 House Congressional Plan A.1", similar in many ways to the Senate proposal. Rep. McMahan says no vote will be taken, but the plan will receive input at a public hearing. |
| | | | |
| February 26, 1997 | | | Joint House-Senate public hearing held in Legislative Building. Everett calls House and Senate proposals "fruit of the poisonous tree." Sen. Betsy Cochrane says Senate Republicans will present a plan that will have a minority district from Charlotte to the Sandhills. Rep. Weatherly promotes his idea of an independent commission. Several speakers address local matters. |
| | | | |
| February 27- March 18, 1997 | | | Sen. Cooper and Rep. McMahan negotiate over differences between their two plans. Chief issue is how Wake County would be divided between Districts 2 and 4. |
| | | | |
| March 17, 1997 | | | Irving Joyner, representing N.C. Association of Black Lawyers, sends letter to Sen. Cooper criticizing both House and Senate proposals. |
| | | | |

| | House | Senate | Congressional |
|---|---|---|---|
| March 19, 1997 | | | Sen. Cooper introduces SB 433, embodying "1997 Congressional Plan A".<br><br>Senate Select Committee meets, and Sen. Cooper presents SB 433 for a vote. Sen. Cochrane presents "Congress Cochrane" as an amendment; that amendment is defeated. Committee gives a favorable report to SB 433 as introduced.<br><br>House CR Committee meets. Rep. McMahan presents "97 House Congress Plan G" for a vote. Under House rules, a favorable vote by a committee constitutes authorization for the committee to introduce the bill. |
| | | | |
| March 20, 1997 | Rep. Cary Allred (WR) introduces HB 578 to elect legislators in multi-member districts by numbered seats. This would replace the existing method: multi-seat contests. | | |
| | | | |
| March 21, 1997 | State files answer in *Daly v. High*. | | |
| | | | |
| March 24, 1997 | | | Rep. Grady introduces HB 585.<br><br>Rep. McMahan introduces HB 586, embodying "97 House Congress Plan G", on behalf of his committee. The Speaker refers that bill back to the House CR Committee.<br><br>Rep. McMahan and Sen. Cooper negotiate the differences between their committees' two plans and agree to "97 HOUSE/SENATE PLAN". |

| | House | Senate | Congressional |
|---|---|---|---|
| March 25, 1997 | | | House CR Committee meets. Rep. McMahan presents the compromise, "97 HOUSE/SENATE PLAN", as a committee substitute for HB 586.<br>Two amendments are defeated:<br>• One from Rep. Dan Blue to change Dist. 4 so that Wake County would be predominately in Dist. 4. ("1997 CONGRESSIONAL PLAN D1")<br>• One from Rep. Ronnie Sutton to a majority Native American precincts of Robeson County in Dist. 7.<br>The Committee Substitute for HB 586 is given a favorable report without committee amendment.<br><br>Rep. Steve Wood (WR) introduces HB 599, ("Shaw Compliance Plan C"). |
| | | | |
| March 26, 1997 | | | HB 586 goes to House floor. Rep. McMahan presents an overview, saying that the plan is designed so that all incumbents, black and white, Democratic and Republican, have a fair chance at re-election. Four amendments are offered:<br>• One from Rep. Sutton, similar to one he offered in committee. It passes.<br>• Three amendments from Rep. Mickey Michaux, embodying "Fitch Michaux Plan A", "Fitch/Michaux Plan B", and "Fitch/Michaux Plan C". All have one majority-black district and three districts with minority populations between 30% and 40%. They are defeated.<br>House passes the bill on second reading 87-30. Bill passes third reading and is sent to Senate. |

| | House | Senate | Congressional |
|---|---|---|---|
| March 27, 1997 | | | Senate Select Committee on Redistricting takes up House-passed HB 586. No amendments are offered. Committee gives bill a favorable report.<br><br>HB 586 goes to Senate floor. Sen. Cooper gives an explanation, says that while the bill is not designed to protect incumbents that it gave all incumbents a fair chance at re-election. He said the authors took note of the 6-6 partisan split in the congressional delegation and felt that they should not use court-ordered redistricting to overturn that decision of the people.<br>One amendment is offered by Sen. Cochrane, embodying "Congress Cochrane". It is defeated.<br>Senate passes bill on second reading 32-14. |
| | | | |
| March 31, 1997 | | | HB 586 ratified as Chapter 11 of the 1997 Session Laws. |
| | | | |
| April 1, 1997 | | | AG Easley files the ratified plan with the 3-judge panel. He also moves requesting that the court delay ruling on the plan until the U.S. Justice Department has precleared or denied preclearance pursuant to Section 5 of the Voting Rights Act. |
| | | | |
| April 9, 1997 | | | Chapter 11 of 1997 Session Laws submitted to U.S. Justice Department under Section 5 of Voting Rights Act.<br><br>Rep. Michaux introduces HB 901 (with Reps. Fitch and Adams). |

| | House | Senate | Congressional |
|---|---|---|---|
| April 23, 1997 | House Congressional Redistricting Committee meets to consider HB 52 (Independent Redistricting Commission). After discussion, Committee votes to send bill to a subcommittee. | | |
| | | | |
| April 24, 1997 | House Election Law/Campaign Reform Committee gives favorable report to a committee substitute for Rep. Allred's HB 578. The new version would put before the voters in November 1997 a constitutional amendment requiring that all Senators and House members be elected from single-member districts beginning in 1998. It would require the General Assembly to break existing multi-member districts into single-member districts in time for use in 1998. | | |
| | | | |
| April 30, 1997 | The single-member-district bill, HB 578, runs into opposition on House floor, is re-referred to Election Law Committee. | | |
| | | | |
| May 6, 1997 | | | 3-judge panel denies fees to Maupin, Taylor, Ellis, and Adams, attorneys for plaintiff intervenors in *Shaw*. |
| | | | |
| May 16, 1997 | | | Reps. Michaux and Fitch meet with U.S. Justice officials in Washington to advocate for their congressional plan (embodied in March 26 House floor amendment) as alternative to enacted plan. (Date is 16th or earlier same week.) |
| | | | |
| May 28, 1997 | | | 3-judge panel denies motion to intervene in *Shaw* suit by several black voters and associations. They sought to assert dilution claims and offer alternative plans. |
| | | | |
| June 9, 1997 | | | U.S. Justice Department preclears Chapter 11.<br><br>3-judge panel directs *Shaw* plaintiffs and plaintiff-intervenors to tell court by July 19 whether they will object to dismissal of the suit and if so on what basis. |

| | House | Senate | Congressional |
|---|---|---|---|
| June 19, 1997 | | | *Shaw* plaintiffs and plaintiff-intervenors respond that they wish the lawsuit to be dismissed without prejudice against the filing of a new one. Robinson Everett, plaintiffs' attorney, urges the court to declare the new plan unconstitutional, but states that his plaintiffs no longer have standing to challenge the new 12th or 1st districts, because they do not live in them.<br><br>U.S. Supreme Court upholds court-ordered districting plan in Georgia. |
| | | | |
| July 3, 1997 | | | State argues to court that plaintiffs and plaintiff-intervenors do live in the districts, do have standing to continue the lawsuit, and are seeking dismissal simply so they can file a new lawsuit and shop for a more favorable 3-judge panel. |
| | | | |
| August 27, 1997 | 3-judge panel in *Daly v. High* transfers it from Western District to Eastern District. Panel is Sam J. Ervin III, Richard Voorhees, and Terrence Boyle. | | |
| | | | |
| August 28, 1997 | 1997 General Assembly adjourns until May 11, 1998. | | |
| | | | |
| September 12, 1997 | | | 3-judge panel dismisses the *Shaw* suit. In opinion accompanying its order, the court says the dismissal is only on the issue of the remedial adequacy of the violation of Equal Protection that the plaintiffs succeeded in showing against the former Dist. 12. |

| | House | Senate | Congressional |
|---|---|---|---|
| October 8, 1997 | *Daly v Leake* plaintiffs move to file second amended complaint. Proposed complaint says the following districts will be challenged on a *Shaw*-type claim: (Name change occurred because Larry Leake replaced Edward High as chair of the State Board of Elections.)<br>• HD 7<br>• HD 8<br>• HD 28<br>• HD 37<br>• HD 79<br>• HD 87<br>• HD 97<br>• HD 98 | • SD 4<br>• SD 6<br>• SD 7<br>• SD 23<br>• SD 31<br>• SD 38<br>• SD 39 | • CD 1<br>• CD 3<br>• CD 5<br>• CD 6<br>• CD 9<br>• CD 12 |
| | | | |
| October 10, 1997 | | | Robinson Everett, attorney for *Shaw* plaintiffs, lodges an amended complaint in *Cromartie v. Hunt*. The complaint uses a *Shaw* theory to challenge the March 31 congressional redistricting plan as "fruit of the poisonous tree" planted in 1992. Plaintiffs reside in the new 1st and 12th districts. |
| | | | |
| November 24, 1997 | | | Motion to amend *Daly* complaint allowed. |
| | | | |
| January 15, 1998 | | | *Cromartie v. Hunt* moved to jurisdiction of the same 3-judge panel as *Daly*: Ervin, Voorhees, and Boyle. |
| | | | |
| March 31, 1998 | | | 3-judge panel holds hearing in Morganton on *Cromartie* cross motions for summary judgment and plaintiffs' motion for preliminary injunction. |
| | | | |
| April 3, 1998 | | | 3 -judge panel grants summary judgment and preliminary injunction in Cromartie for 12th district only. Gives State until April 8 to report how long it will take to redraw the plan and to propose a special primary schedule that would allow the general election in the new congressional districts to occur on November 3. |
| | | | |
| April 8, 1998 | | | State tells 3-judge panel in *Cromartie* it needs more time to answer its questions. |

| | House | Senate | Congressional |
|---|---|---|---|
| April 9, 1998 | | | 3-judge panel in *Cromartie* extends State's deadline for responding to order. |
| | | | |
| April 13, 1998 | | | U.S. Supreme Court denies stay of 3-judge panel's order enjoining 1998 congressional elections and requiring redrawing of plan. Decision is 6-3, with Breyer, Ginsburg, and Stevens dissenting. |
| | | | |
| April 14, 1998 | | | 3-judge panel issues Memorandum Opinion in *Cromartie*. Says the new 12th district shows race as a predominant factor and is uncompact. Says those issues are clear enough to grant summary judgment for 12th, but not so clear in case of the new 1st. district. Judge Ervin dissents. |
| | | | |
| April 16, 1998 | 3-judge panel denies *Daly* plaintiffs' motion for temporary restraining order enjoining elections in challenged legislative and congressional districts. | | |
| | | | |
| April 17, 1998 | | | State submits proposed schedule to 3-judge panel, including May 29 deadline for General Assembly to enact corrective plan and September 15 special congressional primaries with no runoff.<br><br>State also moves that court allow May 5 primaries to proceed in congressional districts unaffected by redrawing District 12. |
| | | | |
| April 21, 1998 | | | 3-judge panel orders schedule for redrawing and for special congressional primaries:<br>• May 22 deadline for legislature to redraw.<br>• June 24 for Voting Rights Act preclearance of redrawn plan. If no preclearance by then, Court will assume sole responsibility.<br>• July 1 deadline for Court if Court must draw the plan.<br>• July 6-20 special congressional candidate filing period.<br>• September 15 special congressional primaries. |

| | House | Senate | Congressional |
|---|---|---|---|
| April 21, 1998 | | | 3-judge panel rejects State's motion to allow May 5 primary in "unaffected" congressional districts. |
| | | | |
| April 27, 1998 | | | 3-judge panel issues opinion for its April 16 order denying injunction in *Daly*. Says his delays in prosecuting his lawsuit were "inexcusable" and left him with no right to emergency relief. |
| | | | |
| May 5, 1998 | Regularly scheduled primaries held in state House and Senate districts. | | |
| | Of 19 seats in majority-minority districts, blacks win Democratic nomination in 16, Native-American in one, white in 2. One black candidate wins GOP nomination in majority-white district (37). | Of 7 majority-minority districts (including SD30, where Native-Americans plus blacks equal majority), blacks win Democratic nomination in 5, whites in 2. In addition, 2 blacks win Democratic nomination in multi-member, majority-white districts (13 and 16). One black candidate wins Republican nomination in multi-member, majority-white district (14). | Congressional primaries on the ballot in many places, but voters instructed that their votes in congressional primaries will not be counted. Elections officials instructed not to count or make public any congressional results. |
| | | | |
| May 11, 1998 | Regular 1998 Short Session of 1997 General Assembly convenes. | | |
| | | | |
| May 13, 1998 | | | House and Senate Committees hold joint public hearing on congressional redistricting:<br>• Robinson Everett urges legislators to redraw by creating a whole new plan, not simply by "tweaking" the 12th and leaving the 1st alone. He says Mecklenburg should not be split, and no district should run from Charlotte to Forsyth or Guilford.<br>• Reps. Wayne Goodwin, Larry Womble, and Linwood Mercer and Sen. Betsy Cochrane present plans of their own. |

| | House | Senate | Congressional |
|---|---|---|---|
| May 18, 1998 | | | House and Senate leaders agree upon "98 CONGRESSIONAL PLAN A." It changes only Districts 5, 6, 9, 10, and 12 from the 1997 plan. District 12 is removed from Guilford County and fills all of Rowan County. It goes from 46.67% black to 35.58% black. |
| | | | |
| May 19, 1998 | | | Agreed-upon plan introduced by Sen. Cooper as SB 1185.<br>Agreed-upon plan approved by House Congressional Redistricting Committee, which under House Rules can introduce it as a bill. |
| | | | |
| May 20, 1998 | | | House Congressional Redistricting Committee introduces its approved plan as HB 1394.<br><br>Full House takes up HB 1394. Adopts an amendment providing that plan will be effective for 1998 and 2000 elections unless U.S. Supreme Court reverses the decision invalidating the prior plan. House then passes bill 90-27 on 2nd reading. House rejects effort by Rep. Linwood Mercer to delay final vote, saying he wanted time to prepare an amendment revising the 1st district. Bill passes 3rd reading.<br><br>Senate Select Redistricting Committee approves SB 1185, after adopting the same amendment adopted on House floor. |

| | House | Senate | Congressional |
|---|---|---|---|
| May 21, 1998 | | | Full Senate takes up HB 1394 instead of its own identical SB 1185, passes it on 2nd and 3rd readings 30-17.<br><br>HB 1394 ratified as Session Law 1998-2. |
| | | | |
| May 22, 1998 | | | Session Law 1998-2 submitted to both 3-judge panel and to U.S. Department of Justice under the Voting Rights Act. |
| | | | |
| May 27, 1998 | | | Everett files objection to Session Law 1998-2 |
| | | | |
| June 8, 1998 | | | U. S. Department of Justice preclears Session Law 1998-2. |
| | | | |
| June 22, 1998 | | | 3-judge panel gives its approval to Session Law 1998-2 for 1998 election. |
| | | | |
| July 20, 1998 | | | Special congressional candidate-filing period ends. Six candidates file for Republican nomination for 12th District. |
| | | | |
| July 22, 1998 | State moves to consolidate *Cromartie* and *Daly* cases. | | |
| | | | |
| July 31, 1998 | Discovery completed in *Daly v. Leake*. In course of discovery, plaintiff residing in following districts take voluntary dismissals:<br>•House Dist. 8<br>•House Dist. 37<br>•House Dist. 79 | •Senate Dist. 23 | |
| | The effect is that only the following districts remain challenged in the lawsuit:<br>•House Dist. 7<br>•House Dist. 28<br>•House Dist. 87<br>•House Dist. 97<br>•House Dist. 98 | •Senate Dist. 4<br>•Senate Dist. 6<br>•Senate Dist. 7<br>•Senate Dist. 31<br>•Senate Dist. 38<br>•Senate Dist. 39 | •CD 1<br>•CD3<br>(CDs 5, 6, 9, and 12 still subject to challenge, but perhaps challenge mooted by fact that they were all changed in 1998 redistricting. CDs 1 and 3 were not changed.) |
| | | | |

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|---|---|---|---|
| September | | | Special Congressional Primaries held, using 1998 Congressional Plan.<br>Rep. Eva Clayton (B) wins Democratic nomination by 63.9% in District 1 over well-known white opponent, Linwood Mercer.<br>Rep. Mel Watt (B) wins Democratic nomination in District 12 by 84.3% over less-well-known opponent. Republicans in 12th nominate Scott Keadle with 28% of the vote. Second primary was eliminated in special election schedule. |
| | | | |
| November 3, 1998 | Of 19 seats in majority-minority districts, blacks win election in 16, Native-American in one, white in 2. Democratic nominees win all seats in minority districts. Incumbents re-elected in all minority districts except House District 8, where Edith Warren (WD) replaced Linwood Mercer (WD). One black member win re-election in multi-member white district (Michaux in 23).<br>Democrats regain control of House, 66-54. | Of 7 majority-minority districts (including SD30, where Native-Americans plus blacks equal majority), blacks win election in 5, whites in 2. In addition, 2 blacks win election in multi-member, majority-white districts (13 and 16). Incumbents and Democrats win in all minority districts.<br><br>Democrats strengthen control of Senate, 35-15. | Incumbent black Democrats easily defeat Republican opponents in Districts 1 and 12, even though majority percentage significantly reduced.<br>Eva Clayton (1st) – 62.2%.<br>Mel Watt (12th) -- 55.9%. |
| | | | |
| January 20, 1999 | | | U.S. Supreme Court hears oral arguments in *Hunt v. Cromartie*. |
| | | | |
| May 17, 1999 | | | U.S. Supreme Court reverses 3-judge panel in Cromartie. Vote is 9-0. Justice Clarence Thomas writes for majority that summary judgment is inappropriate in a redistricting case where circumstantial evidence could give rise to conclusion that predominate reason for drawing district was political gerrymandering rather than racial gerrymandering.<br>Because of language in the bill that enacted the 1998 plan, the Supreme Court's reversal reinstates the 1997 plan for the 2000 elections. |
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# **Appendix H:**
Declaration of Gary Bartlett

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**
**NO. 1:15-CV-00399-TDS-JEP**

| | |
|---|---|
| SANDRA LITTLE COVINGTON, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>THE STATE OF NORTH CAROLINA, *et al.*,<br><br>Defendants. | **DECLARATION OF**<br><br>**GARY O. BARTLETT** |

NOW COMES Gary O. Bartlett, who deposes and says:

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

2. From August 3, 1993 until May, 2013, I served as Executive Director of the North Carolina State Board of Elections. During that period and by virtue of that appointment, I was also the Chief Elections Officer for the State of North Carolina under the National Voter Registration Act of 1993. Professionally, I served as a board member of the Elections Center, a nonprofit national organization promoting the education of elections officials. I have served on the National Task Force on Election Reform created by the Elections Center and as Co-Chair of its National Task Force on Elections Accessibility. I was an active member of the National Association of State Elections Directors. In 2002 I was appointed to a two-year term on the Federal Elections Commission Advisory Panel, a body of 20 members with experience in election

administration from around the country. I also served as North Carolina's representative on the Standards Board of the United States Elections Assistance Commission.

3. My responsibilities as Executive Director of the State Board included election and campaign reporting administration for the State of North Carolina. The State Board also has supervisory responsibilities for the 100 county boards of elections. As Executive Director, I was responsible for implementing the election-related laws passed by the North Carolina General Assembly, supervising the conduct of orderly, fair, and open elections, and ensuring that elections in North Carolina are administered in such a way as to preserve the integrity of and protect the public confidence in the democratic process.

4. There are numerous times when election district boundaries change. The county boards of elections have primary responsibility for re-assigning registered voters to election districts, using the statewide SEIMS database. SEIMS stands for "State Election Information Management System" and it is the statewide election administration system. The State Board of Elections provides training, oversight, auditing and other support functions to assist the counties with correctly assigning voters.

5. While it is useful to "freeze" the SEIMS database system while voting is occurring, it is also possible to create a clone, or mirror image, of the SEIMS system to allow election district reassignments of voters to be entered into the system while voting is proceeding. In fact, this is considered standard procedure for counties in these circumstances and it has been done in the past. It allows for work to be performed within SEIMS that is then merged back into the system when the election has concluded.

6. For example, in 2015 the General Assembly mandated a new structure and new districts for the Greensboro City Council. This occurred shortly before, or during, the filing period for City Council positions. The Guilford County Board of Elections staff created a clone of SEIMS and entered the voter assignments for the new districts. It is my understanding these were then uploaded to the live SIEIMS database. Subsequently the General Assembly's statute was challenged in court and enjoined. The Guilford Board of Elections then reloaded the original district assignments back into SEIMS and conducted the election. Thus, it is entirely possible for county boards of elections to make voting district assignments for state house and state senate districts while voting is occurring in the June 7 primary for U. S. Congress in North Carolina.

7. In 2012, the State and county boards of elections had fewer than three weeks from the close of the filing period on February 29, 2012, to the beginning of the absentee voting period for the May 8, 2012 primary to complete ballot preparation. This was a presidential election year during which there were:

a. 170 legislative seats, including 50 State Senate offices and 120 State House of Representative offices

b. 13 seats for the Member of the House of Representatives

c. One seat for Supreme Court Justice

d. Three seats for Court of Appeals Judgeships

e. 16 Superior Court Judgeships

f. 152 District Court Judgeships

g. Approximately one thousand races for county offices, including County Commissioners, Clerk of Superior Court, Register of Deeds, Sheriff, School Board, and all other county offices filled by election by the people.

h. Eight municipalities had also postponed their elections, pursuant to N.C. Gen. Stat. § 160A-23.1 and were on the ballot.

i. In addition, one constitutional amendment was on the statewide ballot for the May primary.

8. In 2012 the process of designing the ballots, having each county's and municipality's ballots approved by the State Board of Elections, correcting and returning proofs, and having ballots printed and ready to distribute all occurred before the absentee voting process began in 2012 and was satisfactorily completed within less than three weeks.

9. It is not necessary to wait until the canvass from a primary election has been completed before beginning the process of preparing ballots for a general election. I know that in the past, some counties, including Mecklenburg, Wake, Guilford and Forsyth began the process of ballot preparation before the canvass was completed. It is usually fairly easy to determine whether an election protest, a close election or other irregularity might have an impact on the outcome of the primary election. In the vast majority of instances, there is a very high degree of certainty that the outcome as determined on election night will be the outcome once the results have been certified, and, in any event, the ballots will not be sent until after the primary results have been

certified. The process of preparing ballots reasonably can and often does begin before the canvass is concluded and official results are certified.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 6th day of May, 2016.

Gary O. Bartlett

Gary O. Bartlett

# **Appendix I:**
Deposition Testimony of Kelly Doss

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF WAKE 11 CVS 16896
11 CVS 16940

MARGARET DICKSON, et al.,
Plaintiffs,
vs.
ROBERT RUCHO, in his official capacity only as the Chairman of the North Carolina Senate Redistricting Committee, et al.,
Defendants.

NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP, et al.,
Plaintiffs,
vs.
STATE OF NORTH CAROLINA, et al.,
Defendants.

# DEPOSITION OF KELLY DOSS
## GUILFORD COUNTY BOARD OF ELECTIONS

10:05 A.M.

THURSDAY, MARCH 15, 2012

GUILFORD COUNTY ATTORNEY
301 WEST MARKET STREET
SUITE 310
GREENSBORO, NC 27401

By: Denise Myers Byrd, CSR 8340, RPR

different sets of redistricting plans have you had to assign voters to?

A. Okay. There was the U.S. Congressional. There was NC Senate, NC House, county commissioner and the Guilford County school board and that was all.

Q. Did the county commission and school board redistricting plans involve split precincts?

A. No.

Q. Can you explain how you go about assigning voters to districts when there's -- when there's no split precincts?

A. Within the geocode, the street database module, we can just pull up everybody who was within an entire precinct, all of the streets within that precinct, do what is called a group jurisdiction change where we go in and say, okay, everybody -- all of the streets that are in this precinct, we're just going to change to another district, so it's a one-step process.

Q. And how long does it take to do that?

A. For -- if I were -- just a matter of a few hours just going through and changing because we have 165 precincts that we have to review, so just going through and doing each of those and changing those, but it's just a one-step batch process for each

precinct.

Q. Then how do you -- or let's first establish for the Congressional -- U.S. Congressional, Senate and House plans, were there split precincts in those redistricting plans?

A. Yes, in all of them.

Q. Can you explain how you go about assigning voters when a precinct is split?

A. Okay. How this works with the GIS is that I go in and bring up in the State software, in the street database, all of the streets that are within a precinct and I put them alphabetical, and then I can go into the GIS and select a precinct and then select all of streets within that precinct and then also bring up -- put it in an alphabetical list, and I just compare the GIS to the street database street by street, range by range, and would just look at the different districts that that street is supposed to be in. If the street happens to be split, I have to split the range for that so I can assign them to their correct districts.

Q. And did you -- in doing this for Guilford County, in any of the three plans did you encounter any situations where the split of the precinct didn't follow a street completely?

# **Appendix J:**
Deposition Testimony of Joseph Fedrowitz

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF WAKE 11 CVS 16896
11 CVS 16940

MARGARET DICKSON, et al.,
Plaintiffs,
vs.
ROBERT RUCHO, in his official capacity only as the Chairman of the North Carolina Senate Redistricting Committee, et al.,
Defendants.

NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP, et al.,
Plaintiffs,
vs.
STATE OF NORTH CAROLINA, et al.,
Defendants.

# DEPOSITION OF JOSEPH FEDROWITZ
## DURHAM BOARD OF ELECTIONS

9:35 A.M.

TUESDAY, MARCH 6, 2012

SOUTHERN COALITION FOR SOCIAL JUSTICE
1415 W. HIGHWAY 54, SUITE 101
DURHAM, NC 27707

By: Denise Myers Byrd, CSR 8340, RPR

that are split in the redistricting plans and also wanting to know how many precincts, the unit that voters use, the number of precincts that are split, that in Durham county that number is the same?

A. That is correct.

Q. In Durham county, the redistricting following the release of the 2010 census data, how many different sets of districts or how many different governmental bodies redistricted in Durham county?

A. The North Carolina House and Senate, Congressional Districts, School Board Districts and City Wards, Durham City Wards.

Q. But not -- did you have county commission --

A. County commissioners in Durham are all at large.

Q. Can you describe the process that you followed to assign voters to their new districts following the redistricting for those bodies?

A. For districts such as School Board, city wards and for Durham County, Congressional, U.S. Congressional districts were all done on a whole precinct or whole VTD basis, so the process for those was all exactly the same.

I simply called up in our geocode module in SEIMS all the streets that were in the precincts that were supposed to be in a certain district. In

other words, if Precincts 1, 2, 7 and 8 were in U.S. Congressional District 1, I called up -- you can do a search based on precincts. So I would search for all geocodes that were in those precincts, and then I would do a mass update and change those to the U.S. Congressional District 1.

And it was -- it's an easy process. I did most of that in an afternoon.

I also for the districts such as the -- specifically the U.S. -- I mean, the North Carolina Senate and North Carolina House, the first -- which had many split precincts, I first did for those all the precincts that were not split, so I changed all those. I had my list of all the precincts that were not split and did those. I did those the same afternoon. And then I -- well, then I spent the rest of the time working on split precincts.

Q. Talking now just about the non-split precincts, if you would take a look at Exhibit 4.

A. Uh-huh.

Q. And can you explain page 5? What's on page 5 of Exhibit 4?

A. Oh, this is data that I extracted from the data that was provided by the North Carolina General Assembly on their redistricting home page. It was

the voters?
A. That's correct.
Q. Is there any other way this task of assigning voters to districts continues through the decade?
A. Besides adding new streets, no, no.
Q. You said earlier on that you were involved in this process following the 2000 census and the 2001 redistricting.

How does what you had to do this time around compare to what you had to do ten years ago?
A. Ten years ago, when it finally settled, which was actually not until 2004, Durham ended up with six precincts that were split by either the North Carolina Senate or the North Carolina House, so that was six splits that I had to deal with instead of 55 different splits.

And the splits were all -- again, I'm fortunate I can use my precinct. We have a major north-south street that runs through our precinct, Anderson Street. It happened to be one of the splits. On one side of the street was Senate District 18. On the other side was Senate District -- well, still is Senate District 18 and Senate District 20.

And so I could -- looking at the maps, it

was much easier to separate those streets because I knew that everything on this side of Anderson was this and everything on that side was this other district, and I didn't have to worry about split parcels or anything like that or apartment complexes because it was all street center lines.

Q. And in the prior round of redistricting, that is, 2004, after the 2000 census, were the same kinds of interconnection between districts being split in one way in a House plan and a different way -- precincts being split one way in a house plan and a different way in a Senate plan?

A. No.

Q. If you would just give me one moment, I may be done.

(Discussion held off the record.)

BY MS. EARLS:

Q. Do you have knowledge of how many ballot styles are going to be required in the 2012 primary election?

A. No. I mean, filing just ended. We were fortunate in Durham in that there's many uncontested seats or that there's nobody running in a certain party or that there's only one person so a primary is not required.

We're starting to figure that out. And

# **Appendix K:**
Deposition Testimony of Gary Sims

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF WAKE 11 CVS 16896
11 CVS 16940

MARGARET DICKSON, et al.,
Plaintiffs,
vs.
ROBERT RUCHO, in his official capacity only as the Chairman of the North Carolina Senate Redistricting Committee, et al.,
Defendants.

NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP, et al.,
Plaintiffs,
vs.
STATE OF NORTH CAROLINA, et al.,
Defendants.

# DEPOSITION OF GARY SIMS
## WAKE COUNTY BOARD OF ELECTIONS

9:30 A.M.

TUESDAY, MARCH 27, 2012

POYNER SPRUILL
301 FAYETTEVILLE STREET
SUITE 1900
RALEIGH, NC 27601

By: Denise Myers Byrd, CSR 8340, RPR

precinct is all within a particular House or Senate or Congressional district, you grab that.

And Cherie just handed me, and this is available to you also, but this is also the information that we receive from the legislature and the changes. And what we do is we grab the Voter Tabulation Districts and/or the precincts and we do group mass changes first, so it's multiple stages as far as grabbing whole precincts and pulling them in.

Then we go through -- after that we break them down into their census block elements, and that's where we work with our GIS. And basically we start taking them on one precinct at a time, and that's really the way it works.

And that's the process. Numbers -- we didn't look at numbers because numbers didn't really mean anything to us. We just new we had X number that were split. We just tackled them one at a time. And as we went through precinct by precinct, it literally in some cases was a street-by-street research, but again, it was just one of those things we did.

But we had already done all this, so it was kind of, again, just another day at the office.

And thankfully we had electronic resources. 99.9 percent of everything I did was electronic where you just basically make changes, you apply them, and once you apply the changes, you go back in, you do another analysis to see did I get all the streets, did I get all the voters in that particular section.

So I hope I answered your question, but I don't have an answer as far as numbers. And we -- I'm sure somebody has gone in and done an analysis. We just don't just because we think in terms of whole data, not, you know, one-by-one data.

Q. Can I look at the document you were just referring to.

MS. POUCHER: It's a session log.

THE WITNESS: And that really was the first part that we started looking at, you know, which precincts are all in a particular precinct or what jurisdictions are all in a precinct.

Q. So talking specifically about the Congressional, House and Senate assignment of voters, you've described how you were doing redistricting for other types of districts prior to getting those districts.