IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL ACTION No. 1:15-cv-559

THE CITY OF GREENSBORO, LEWIS A. BRANDON III, JOYCE JOHNSON, NELSON JOHNSON, RICHARD ALAN KORITZ, SANDRA SELF KORITZ, CHARLI MAE SYKES, MAURICE WARRREN II, and GEORGEANNA BUTLER WOMACK, *Plaintiffs*, v. THE GUILFORD COUNTY BOARD OF ELECTIONS, *Defendant*.	)	**PLAINTIFFS' PROPOSED SUPPLEMENTAL CONCLUSIONS OF LAW**

Pursuant to Local Civil Rule 40.1(c), Plaintiff the City of Greensboro[1] (hereinafter, "The City"), and Lewis A. Brandon III, Joyce Johnson, Nelson Johnson, Richard Alan Koritz, Sandra Self Koritz, Charli Mae Sykes, Maurice Warren II, and Georgeanna Butler Womack (hereinafter collectively "Individual Plaintiffs") submit the following proposed supplemental conclusions of law.

PROPOSED SUPPLEMENTAL CONCLUSIONS OF LAW

[1] The City joins in these proposed supplemental conclusions of law only with regard to matters directly relating to the claim alleging that the legislature's decision to deprive the citizens of Greensboro, alone among all other municipal jurisdictions, of the right to use the initiative and referendum provisions of Chapter 160A of the North Carolina General Statutes, constitutes unconstitutional disparate treatment.

- **For insertion after Conclusion of Law #33, ECF No. 122 (Jan. 17, 2017)**

1. Specifically, in *Roman v. Sincock*, the Court indicated that minor deviations from exact population equality would only be acceptable if such "minor deviations" are "free from any taint of arbitrariness or discrimination." 377 U.S. 695, 710 (1964).
2. In *Daly v. Hunt*, the Fourth Circuit followed that rule, explaining that the plaintiff challenging a redistricting plan with less than 10% deviation has to "produce further evidence to show that the apportionment process had a taint of arbitrariness or discrimination," or, stated a slightly different way, that the "apportionment plan at issue . . . was the product of bad faith, arbitrariness, or invidious discrimination." 93 F.3d 1212, 1220, 1222 (4th Cir. 1996) (internal quotations omitted).
3. In *Raleigh Wake Citizens Association v. Wake County Board of Elections*("*RWCA*"), the Fourth Circuit, reviewing a similar challenge to partisan-driven, mid-decade redistricting for the Wake County Board of County Commissioners and Board of Education, discussed the evidence that demonstrated that the legislature's asserted justifications for the bill were pretextual and, indeed, irrational. 827 F.3d 333, 349-351 (4th Cir. 2016). The Fourth Circuit did so not because it was engaging in rational basis review—it explicitly denied that standard of review applied, *see id*. at 342—but because that evidence was relevant. *Sincock* and *Daly* are still good law, and evidence that the legislature's purported justifications are pretextual, although not an

essential element of the claim, can suggest that the apportionment process was tainted by bad faith, arbitrariness, and discrimination (and thus that plans with overall deviations of less than 10 percent are nevertheless unconstitutional). *See Sincock*, 377 U.S. at 710; *Daly*, 93 F.3d at 1222.

- **For insertion after Conclusion of Law #65, ECF No. 122 (Jan. 17, 2017)**

4. Dr. Chen's analysis additionally showed that racial discrimination motivated the high deviations seen in the enacted plan, in addition to the partisan motivations previously described. An overwhelming 79.1% of white voters were placed into underpopulated districts, conferring on them enormous electoral advantage. Ex. 133, Chen Report, at 13. It is not possible to create such advantage for white voters if a smaller overall population deviation is used. Only when the overall deviation is expanded to that seen in the enacted plan was Dr. Chen able to recreate such racial favoritism. *Id.*
5. This motivation, determined via circumstantial statistical analysis, is not inconsistent with the partisan motivations Dr. Chen identified (favoring Republican voters by placing them into underpopulated districts and ensuring a maximum number of Republican-controlled districts). *See* Ex. 133, Chen Report, at 7, 10, 13. Unlike in a racial gerrymandering claim, it is not necessary to parse the causes between race and politics in a one-person, one-vote case. That is, it does not matter whether race or politics were more influential in driving the deviations to their enacted level: under Fourth Circuit precedent, an attempt to obtain advantage is not a legitimate reason for

deviating from equal population among districts. *See RWCA*, 827 F.3d at 351. Likewise, favoring or disfavoring voters on the basis of race is not an acceptable legislative motivation absent some compelling governmental interest. See *Richmond* v. *J. A. Croson Co.*, 488 U.S. 469, 493-94 (1989). It is Plaintiffs' burden to show that the deviations in the enacted plan were motivated by impermissible considerations, which can include multiple illegitimate motives activing in concert. *See RWCA*, 827 F.3d at 351.

6. Moreover, the Fourth Circuit has also recognized the "inextricable link between race and politics in North Carolina." *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016) ("*NAACP*"). For that reason, a court may not accept "politics as usual" as a justification for race-based discrimination. *Id*. at 225.

7. "Using race as a proxy for party may be an effective way to win an election. But intentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose. This is so even absent any evidence of race-based hatred and despite the obvious political dynamics. A state legislature acting on such a motivation engages in intentional racial discrimination in violation of the Fourteenth Amendment and the Voting Rights Act." *Id.* at 222-23.

8. "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." *Harris v. McCrory*, 159 F. Supp. 3d 600, 621 (M.D.N.C. 2016). This does not, however, require a court to excuse race-based redistricting. *Id.*

9. Here, the evidence makes plain that two illegitimate motivations drove the overall population deviation in the enacted plan: partisanship and racial discrimination. The fact that the two are "highly correlative" does not matter, nor does it excuse either motivation. *Id.*

- **For insertion after Conclusion of Law #73, ECF No. 122 (Jan. 17, 2017)**

10. Lastly, in emails to constituents, Senator Wade asserted that one of the goals of the legislation was to bring Greensboro in line with the manner in which other municipalities conduct their local elections. *See, e.g.*, Ex. 167. However, data provided to legislators who supported the bill during the legislative process makes clear that the revision does precisely the opposite: It moves Greensboro out of the most common category of municipal election methods. *See* Ex. 252. For example, almost all municipalities use all or some at-large districts to elect city and town council members, so an all-district format does not bring Greensboro in alignment with the method other cities use to elect their local leaders. *Id.*

11. Thus, in this case, the fact that all or most of the purported justifications appear to be pretextual and without any substance is strong evidence that illegitimate factors were the predominant motive behind the plan's deviations and indeed tainted the reapportionment process. *RWCA*, 827 F.3d at 349.

12. Ultimately, this case, like any one-person, one-vote case, requires an assessment of legislative intent, which can be determined, just as in racial gerrymandering cases, using circumstantial evidence like the Chen analysis. That kind of evidence is more than sufficient. *See Cromartie v. Hunt*, 526 U.S. 541, 546-47 (1999) ("*Cromartie I*") ("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))).

13. Further examining whether the process as a whole was tainted by arbitrariness, bad faith, or discrimination helps confirm that the motivations driving the deviations were, in fact, illegitimate. That is, a court, employing a variant of the *Arlington Heights* analysis, looks to the types of circumstantial evidence that might help ascertain intent where direct evidence is limited. Of course, challengers need not disprove every purported legislative justification in order to prevail; that would transform the analysis into simple rational basis review, which is not the governing standard. *See RWCA*, 827 F.3d at 341. But if some of the asserted or potential/theoretical justifications appear wholly pretextual, and simply mask illegitimate motives, then the court can safely conclude that the deviations were motivated by improper goals. *Id*. at 349.

14. This conclusion is further confirmed by an examination of the extremely unusual legislative process that marked the enactment of the challenged law. House Bill 263 is a local bill that was advanced and passed in a manner that departed markedly from the way the legislature usually approaches local bills. *See* Tr. Test. Robinson, Harrison. Appointment of members to the conference committee did not conform with legislative rules and norms. *Id*. Moreover, the conference report did not reflect what was agreed upon in conference committee, as indicated by Rep. Blust's comments on the House floor on July 2, 2015. Ex. 31. There is strong evidence in the record that the Senate was pressuring House members who were opposed to the bill on principle to support it. *See* Ex. 166. These factors, among others, are compelling *Arlington Heights* factors, indicating that the legislative history of the bill supports a conclusion that discriminatory motives were at play in the enactment of this law. *See Arlington Heights*, 429 U.S. at 267-68.

15. Finally, the fact that the legislature rejected alternatives that would have mitigated the discriminatory effect observed in the enacted plan is further evidence that discriminatory factors predominated in the redistricting process. Both Representative Hardister and Senator Rucho offered maps to the conference committee that would have paired fewer Democratic and African-American incumbents, but those alternatives were rejected in favor of a plan that maximized the pairings of such incumbents. Ex. 28; Ex. 225. The rejection of alternatives that would advance legitimate legislative goals, in

favor of an enacted plan that does nothing but further discriminatory purposes, is "evidence that the stated rationales were pretextual and fail to justify the population deviations in the challenged redistricting." *RWCA*, 827 F.3d at 350.

- **For insertion after Conclusion of Law #113, ECF No. 122 (Jan. 17, 2017)**

16. The inclusion of a severability clause in a statute demonstrates a "clear statement of legislative intent" that the remainder be enforced should a provision fall away as unconstitutional. *In re Appeal of Springmoor, Inc.* 348 N.C. 1, 13, 498 S.E.2d 177, 184-85 (1998). Conversely, the absence of a severability clause provides evidence that no part of the statute may be separated from the whole (though its absence is not conclusive). *Id.* at 14, 498 S.E.2d at 185.

17. Without a severability clause, "'[w]here a part of a statute is invalid, the remainder, if valid, will be enforced, provided it is complete in itself and capable of being executed in accordance with the apparent legislative intent; but if the void clause cannot be rejected without causing the statute to enact what the Legislature did not intend, the whole of it must fall . . . [T]he rule applies only when it is plain that the Legislature would have enacted the legislation with the unconstitutional provisions eliminated.'" *Parker v. Stewart*, 29 N.C. App. 747, 749, 225 S.E.2d 632, 633-34 (1976) (quoting *Commissioners v. Boring*, 175 N.C. 105, 112, 95 S.E. 43, 46 (1918)).

18. Here, the statute at issue does not contain a severability clause. *See* 2015 N.C. Sess. Law 138.

19. Because there is no severability clause, the Court must look instead to the legislative intent behind the bill, "considering its legislative history and the circumstances of its enactment." *Lanvale Props., LLC v. County of Cabarrus*, 336 N.C. 142, 164, 731 S.E.2d 800, 815 (2012) (quoting *Shaw v. U.S. Airways, Inc.*, 362 N.C. 457, 460, 665 S.E.2d 449, 451 (2008)). The evolution of the bill indicates that the legislature would *not* have enacted the legislation with the unconstitutional provisions eliminated.

20. S.B. 36, as first introduced, repealed N.C. Gen. Stat. 160A-101 through -111, eliminating all North Carolina cities' right to modify their form of government. *See* Ex. 14. The second version of S.B. 36 removed the right to "alter or amend the form of government" only from the City of Greensboro. *See* Ex. 4.

21. Several speakers highlighted the constitutional frailty of the referendum provision during the senate redistricting committee hearing, yet its presence persisted in every iteration of the bill without compromise. Ex. 13.

22. An amendment requiring that the City of Greensboro approve the bill through referendum before it could take effect was tabled, and the bill was allowed to die in the House to prevent even this minor procedural change from taking effect. *See* Ex. 15.

23. Both the Senate committee substitute and conference committee substitute to H.B. 263 removed from the City of Greensboro the right to modify its form of government. *See* Ex. 20; Ex. 30.

24. Absent the unconstitutional referendum provision, the statute cannot be enacted "in accordance with apparent legislative intent," *Parker*, 29 N.C. App. at 749, 225 S.E.2d at 633, because each iteration of the bill included revocation of the right to referendum, and procedure and debate surrounding the bill show that its proponents would have forgone the bill in its entirety before allowing the City of Greensboro the immediate right to approve or modify its form of government. It would be illogical to conclude that the legislature intended a version of this bill to stand with the provision removed.

25. The legislature further demonstrated its intent that the bill not be severable following this Court's issuance of a preliminary injunction finding that Plaintiffs were likely to succeed on their claim that the referendum provision was unconstitutional. In a technical corrections bill, the legislature chose to limit the time that the City of Greensboro would be subject to disparate treatment but chose not to add a retroactive severability clause, Ex. 36, even though such a clause was added to the technical corrections bill itself, and another bill passed earlier in the session within the same technical corrections bill which in fact appeared on the same page of the bill as ratified. *Id.* § 81.(e) (amending language and adding a severability clause to 2015 N.C. Sess. Laws 258, An Act to Establish Procedures for the Conduct of the 2016 Primaries).

26. There is no indication whatsoever that the General Assembly intended that any portion of the Greensboro statute be implemented without the challenged provisions. It is therefore not possible to implement the new electoral scheme

contemplated by the statute in its entirety without the challenged provisions. The entire statute must fall.

- **For insertion after Conclusion of Law #115, ECF No. 122 (Jan. 17, 2012)**

VI. Remedy

27. Because they have proven their claims at trial, Plaintiffs are entitled to a permanent injunction of all of the Greensboro provisions of S.L. 2015-138 and a corresponding continuation of the constitutional election system currently in effect. *See, e.g.*, *Perry v. Perez*, 132 S. Ct. 934, 940 (2012) (when a newly-enacted redistricting plan fails to pass constitutional muster, "in most circumstances, the . . . last enacted plan simply remains in effect" unless "an intervening event—most commonly, as here, a census—renders the current plan unusable"); *Cleveland Cnty. Ass'n for Gov't by the People v. Cleveland Cnty. Bd. of Comm'rs*, 142 F.3d 468, 478-79 (D.C. Cir. 1998) (where existing method of election was not contrary to federal law, its continued use was an appropriate remedy).

28. In this unusual case where a mid-decade redistricting has occurred, the districts currently in use for Greensboro City Council elections remain fully constitutional and have remained in continuous use since they were precleared by the U.S. Department of Justice and adopted in 2011. *See* Prelim. Inj. Order, ECF No. 36 at 3 (preliminarily enjoining S.L. 2015-138 and ordering that the current election system remain in effect); Ex. 223, 2011 Adopted Map (listing

population deviations for current districts); Ex. 224, 2011 Redistricting Overview Webpage (noting federal preclearance of current districts).

29. The current districts are known to the voters of Greensboro and have previously been implemented by the Defendant Board of Elections. *See Johnson v. Halifax County*, 594 F. Supp. 161, 171 (E.D.N.C. 1984) (an ideal redistricting remedy "does not unduly burden the defendant and/or cause confusion among the voting populace").

30. In these circumstances, the proper remedy is to permanently enjoin use of the unconstitutional election system provided for in the Greensboro provisions of S.L. 2015-138 and to allow the Defendant Board of Elections to administratively maintain the current constitutional system of election in effect, including the current council structure and district boundaries. *See Cleveland Cnty.*, 142 F.3d at 468 (vacating decree entered where existing method of election was not contrary to federal law); *Dillard v. Baldwin Cnty. Comm'n*, 222 F. Supp. 2d 1283, 1287 & Judgment ¶¶ 2-3 (M.D. Ala. 2002) (having ruled that a change in the method of election was not required by federal law, ordering that "unless or until state or federal law requires or allows otherwise, the Baldwin County Commission shall return to the system of four members elected at-large used before the court's 1988 injunction" and denying all parties' requests to submit alternative remedial plans). *Cf.* Prelim. Inj. Order, ECF No. 36 at 3 (ordering that 2015 municipal elections in Greensboro "take

place using the electoral districts, method of election, and form of government that existed prior to the enactment of Session Law 2015-138").

Respectfully submitted this 3rd day of March, 2017.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this day electronically filed the foregoing in the above-titled action with the Clerk of the Court using the CM/ECF system, which will serve via electronic mail the following:

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