**RECORD NO. 14-1329**

In The
# United States Court of Appeals
For The Fourth Circuit

**CALLA WRIGHT; WILLIE J. BETHEL; AMY T. LEE; AMYGAYLE L. WOMBLE; JOHN G. VANDENBERGH; BARBARA VANDENBERGH; AJAMU G. DILLAHUNT; ELAINE E. DILLAHUNT; LUCINDA H. MACKETHAN; WILLIAM B. CLIFFORD; ANN LONG CAMPBELL; GREG FLYNN; BEVERLEY S. CLARK; CONCERNED CITIZENS FOR AFRICAN-AMERICAN CHILDREN, d/b/a Coalition of Concerned Citizens for African-American Children; RALEIGH WAKE CITIZENS ASSOCIATION,**

***Plaintiffs – Appellants,***

**v.**

**STATE OF NORTH CAROLINA;**
**WAKE COUNTY BOARD OF ELECTIONS,**

***Defendants – Appellees.***

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF NORTH CAROLINA**
**AT RALEIGH**

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## REPLY BRIEF OF APPELLANTS

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**Anita S. Earls**
**SOUTHERN COALITION FOR SOCIAL JUSTICE**
**1415 West Highway 54, Suite 101**
**Durham, North Carolina 27707**
**(919) 323-3380**

***Counsel for Appellants***

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

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No. 14-1329

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# REPLY BRIEF OF APPELLANTS

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## INTRODUCTION

Calla Wright and the other voters and associations of voters who filed this action live in overpopulated election districts drawn by the North Carolina General Assembly. They brought this case to vindicate their constitutional right to cast

ballots in elections for the Wake County Board of Education (hereinafter "Wake Cty. Bd. of Ed.") that carry the same weight as the ballots cast by every other Wake County voter. Equal protection guarantees under both the Fourteenth Amendment to the United States Constitution and Article 1, Section 19 of the North Carolina Constitution protect every voter's right to cast a ballot that is counted equally and carries equal weight to the ballots of all other voters. *Daly v. Hunt*, 93 F.3d 1212, 1216-17 (4th Cir. 1996); *Blankenship v. Bartlett*, 363 N.C. 518, 522, 681 S.E.2d 759, 762 (2009).

Deviations from the one person, one vote requirement are permitted for certain non-discriminatory, legitimate governmental goals, such as to respect city boundaries, to make a district more compact, or to preserve the core of a prior district. *Tennant v. Jefferson Cnty. Comm'n*, 133 S. Ct. 3, 8 (2012) (*per curiam*). However, the discriminatory and arbitrary factors that caused the population deviations here, including favoring voters from one political party over those of another, favoring rural voters over urban voters, and pairing incumbents in a discriminatory way are not legitimate governmental goals that justify deviation from the one person, one vote requirement. *See Cox v. Larios*, 542 U.S. 947, 949 (2004). It is a fundamental premise of equal protection jurisprudence that when determining the structure of the political process, the one person, one vote requirement is a limitation on the majority's ability to rig the system to

disadvantage the minority, and this has long been as true for local governments as it is for state legislatures and Congress. *Avery v. Midland Cnty.*, 390 U.S. 474, 484-85 (1968); *see also*, *Hadley v. Junior College Dist.*, 397 U.S. 50, 57 (1970) (striking down a voting scheme for the trustees of a junior college district because it resulted in "a systematic discrimination against voters in the more populous school districts.")

To avoid having a full and fair trial on this question, the State of North Carolina and the Wake County Board of Elections (hereinafter collectively "the State") argue that Calla Wright and the other voters who brought this case are simply sore losers who must find their remedy "at the ballot box and not at the courthouse." Br. of Appellees 23. In short, says the State, "[i]n elections, someone wins and someone loses." Br. of Appellees 19. On the contrary, how the Plaintiffs in this case vote is completely immaterial to their claim; what matters is how their votes are counted. And whatever they may have lost, they have not lost the right to have their vote count equally. The very nature of one person, one vote claims is that when voters are consigned to overpopulated districts, they have little chance of a remedy at the ballot box because their votes unfairly count less than those of voters in other districts. Moreover, a voter's constitutional rights do not depend on her ability to elect representatives who will respect them. Voters are entitled to seek remedies for the violation of their constitutional rights at the

courthouse so that when they cast a ballot, their ballot will be counted equally to that of every other voter.

Most importantly, the justiciability of one person, one vote claims under the equal protection clause was established in *Baker v. Carr*, 369 U.S. 186, 237 (1962), and the fact that this case involves a local governing body rather than the state legislature has no bearing on the applicability of the right to an equal vote. Indeed, as the Supreme Court held in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960):

> Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution. . . . The opposite conclusion, urged upon us by respondents, would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions. 'It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.'

*Gomillion*, 364 U.S., at 344-345 (quoting *Frost & Frost Trucking Co. v. R.R. Comm'n of Cal.*, 271 U.S. 583, 594 (1926)).

While the court below believed that *Cox v. Larios* is not applicable to this case because it involved a statewide redistricting plan rather than a local jurisdiction, neither the court below nor the State point to any authority supporting the proposition that one person, one vote claims do not apply to local governments. *See* J.A. 89; Br. of Appellees 22-23. In fact, the Supreme Court addressed this issue squarely in 1970, holding that:

> If one person's vote is given less weight through unequal apportionment, his right to equal voting participation is impaired just as much when he votes for a school board member as when he votes for a state legislator. While there are differences in the powers of different officials, the crucial consideration is the right of each qualified voter to participate on an equal footing in the election process.

*Hadley v. Junior College Dist.*, 397 U.S. at 55. Thus, *Larios* is applicable to this case, which means that political and other discriminatory bias (such as favoring rural voters) cannot justify the deviations from the one person, one vote requirement that occurred here. *See Cox v. Larios*, 542 U.S. at 949.

The complaint in this case contains clear and detailed allegations of a one person, one vote violation. Recognizing that a mere 0.2% separates their claim from a *prima facie* violation, the Plaintiffs are alleging with specificity the discriminatory and arbitrary reasons that caused the large population deviations in this redistricting plan for the Wake Cnty. Bd. of Ed. and thereby rebut the presumption of constitutionality enjoyed by districts that fall below 10% deviation.

The State argued that with regard to both the federal and state constitutional claims, "[t]he district court properly found that plaintiffs failed to make a *prima facie* case on these claims, which must therefore fail as a matter of law." Br. of Appellees 7. That is not what the district court held. The lower court explicitly followed *Daly v. Hunt*, 93 F.3d at 1220, and *Roman v. Sincock*, 377 U.S. 695, 710 (1964), in holding that where the maximum deviation of a redistricting plan is

under 10%, that is, where plaintiffs fail to state a *prima facie* case, "plaintiffs must allege facts showing that the populations deviations here are tainted by arbitrariness or discrimination." J.A. 86. Instead, the district court dismissed Plaintiffs' claims because it concluded that they are non justiciable. J.A. 90. The district court was correct that the deviations at issue here are subject to constitutional challenge if they are the result of arbitrary and discriminatory factors; and wrong to conclude that when the discrimination involves partisan considerations, it converts the claim to one of political gerrymandering.

Under the North Carolina Constitution, one person, one vote claims implicate the fundamental right to vote on equal terms and are reviewed under the strict scrutiny standard. *Stephenson v. Bartlett*, 355 N.C. 354, 377-78, 562 S.E.2d 377, 393 (2002). The district court erred in failing to apply strict scrutiny to the legislation at issue here. "[T]he people have mandated in their Constitution that all North Carolinians enjoy substantially equal voting power." *Stephenson*, 355 N.C. at 379, 562 S.E.2d at 394. Drawing a redistricting plan in which one district has 45,000 more people than the other in a way that is not narrowly tailored to a compelling governmental interest violates this constitutional mandate.

Without responding to the Plaintiffs' argument that the North Carolina Constitution affords even stronger protection to the right to an equal vote than the U.S. Constitution, the State argues that because the deviations are below 10%, the

Plaintiffs have failed to establish a *prima facie* violation of the North Carolina Constitution, and the federal courts cannot entertain claims of "impermissible political bias." Br. of Appellees at 13. However, there is simply no authority for the proposition that under the North Carolina Constitution, the 5% population deviation level is a "safe harbor" below which plans are immune from constitutional challenge. Rather, the North Carolina Supreme Court has endorsed the view that "[*e*]*qual voting power for all citizens is the goal*" of redistricting, *Stephenson*, 355 N.C. at 380, 562 S.E.2d at 395 (emphasis in original), and deviations from that goal require heightened scrutiny under the North Carolina Constitution.

The lower court's opinion also raises the question of the proper defendants in a constitutional challenge to a redistricting plan drawn by the state legislature. Because the law at issue here was enacted by the North Carolina General Assembly, over the objection of a majority of the Wake Cnty. Bd. of Ed., and with no involvement by the Wake County Board of Elections, Plaintiffs contend that the State is enforcing the redistricting plan and some representative of the State, under the *Ex Parte Young* doctrine, is a proper defendant for numerous reasons, all central to the need to vindicate their constitutional rights.

The entity that passed the law and imposes these districts is required as a party for discovery, where legislative intent is a relevant factor, for mediation and

possible settlement, for the implementation of a remedy should the Plaintiffs prevail, and for the appropriate payment of attorneys' fees. Again, neither the court below nor the State point to any legal authority for the proposition that the President *Pro Tempore* of the Senate and the Speaker of the House are not appropriate officials under *Ex Parte Young*. *See* J.A. 83-84; Br. of Appellees 27. The State's position in a nutshell is that while the State of North Carolina is entitled to notice of the case and to intervene as a party if they are not named as parties initially, *see* 28 U.S.C. § 2403, Plaintiffs are not entitled to sue them. The doctrines of 11th Amendment immunity do not stretch so far as to hold that when the state legislature passes an unconstitutional redistricting statute, it cannot be sued on equal protection grounds for an injunctive remedy. *See*, *e.g.*, *Tennant v. Jefferson County Comm'n*, 133 S. Ct. 3 (2012) (defendants in this one person, one vote case were the Secretary of State, the Governor, the President of the West Virginia Senate and the Speaker of the West Virginia House of Delegates); *Frew v. Hawkins*, 540 U.S. 431, 437 (2004) ("To ensure the enforcement of federal law, however, the Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law. This standard allows courts to order prospective relief, as well as measures ancillary to appropriate prospective relief.") Officials of the North Carolina General Assembly responsible for

imposing unconstitutional election districts on the Wake Cnty. Bd. of Ed. are proper defendants in this case.

## ARGUMENT

### I. Giving Greater Weight to Voters of One Political Party, Favoring Rural Voters and Targeting Certain Incumbents are Arbitrary and Discriminatory Factors that Do Not Justify Deviations from the Equal Population Requirement.

Divergences from the strict population equality standard must be based on "legitimate considerations incident to the effectuation of a rational state policy." *Reynolds v. Sims*, 377 U.S. 533, 579 (1964). The *Reynolds* Court went on to explain that "neither history alone nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation."[1] *Id.* The central issue in the Plaintiffs' federal constitutional claim here is whether the three factors identified in the complaint as the explanations for the population deviations in the new districts for the Wake Cnty. Bd. of Ed. are arbitrary and discriminatory. If the legal principles established in *Cox v. Larios* apply to local governing bodies, the answer is clear: "the drafters' desire to give an electoral advantage to certain regions of the State and to certain

[1] By "history" the Court was referring to arguments made by Elbridge Gerry that the number of Representatives from newer western states should never exceed the number from the original states. *See Reynolds*, 377 U.S. at 579 n.61 (citing *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964)).

incumbents (but not incumbents as such) did not justify the conceded deviations from the principle of one person, one vote." *Larios*, 542 U.S. at 949.

When drawing election districts, deviations from the equal population principle are only permitted when necessary to serve a neutral and legitimate goal such as creating districts that are compact or contiguous, respecting subdivision boundaries, or preserving the cores of prior districts. *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). In addition, the Supreme Court recently held that "[t]he desire to minimize population shifts between districts is clearly a valid, neutral state policy." *Tennant v. Jefferson County Comm'n*, 133 S. Ct. at 8. These neutral and legitimate state objectives are in stark contrast to the legislative goals alleged in the complaint in this case, all of which involve the desire to make sure that some voters have an advantage over other voters at the ballot box.

The State's argument does not distinguish among the three arbitrary and discriminatory factors identified by Plaintiffs, but groups them all together as "allegations of political motives," Br. of Appellees 5, 12, 15. The State then asserts that such allegations turn this claim into a non-justiciable one because the Supreme Court has ruled, in a four-Justice plurality holding, that political gerrymandering claims are non-justiciable because "no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged." *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (opinion by Scalia, J.,

Rehnquist, C.J., O'Connor and Thomas, JJ. joining). It should be noted that Plaintiffs' claim that the districts impermissibly favor Wake County's rural and suburban voters over Raleigh's urban voters is not necessarily tied to partisan factors and independently shows a discriminatory factor that cannot justify the deviations in this plan.

In addition, the State's argument on this point ignores the important distinction between the one person, one vote equality principle which does have judicially manageable standards and is justiciable, and a claim of partisan gerrymandering which depends on measures of partisan affiliation. In one person, one vote claims, people are counted as people, not as Democrats or Republicans. In these claims, the question is whether any deviation from the State's obligation to pursue equality of population among districts is justified by a neutral and rational state policy. In contrast, in partisan gerrymandering claims people are counted as members of one political party or another, and because those affiliations change over time or may not be reliably indicated, measuring partisan fairness is seen as more difficult. *See Vieth*, 541 U.S. at 287 ("[A] person's politics is rarely as readily discernible--and never as permanently discernible--as a person's race. Political affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the

party line.") When counting people as people, for one person, one vote purposes, the standard is clear, judicially manageable and constitutionally mandated.

In ruling on the Plaintiffs' claim in this case, it does not matter how Calla Wright votes; her partisan registration is immaterial. What matters is that she is in an election district that dilutes her voting strength for reasons that are arbitrary and discriminatory, namely that she lives in an urban area, the drafters of the plan believed the districts would favor one party over another, and they targeted certain incumbents. It does not matter if the General Assembly was right or wrong about whether the new districts will elect a Republican-majority Board of Education that favors certain policies, or whether the incumbents they target actually lose in the new plan. What matters is that the plan drafters were pursuing those goals, and they are not legitimate justifications for deviating from the one person, one vote requirement.

A. The Allegations in the Complaint Are Specific and Detailed

The Plaintiffs' complaint here is sufficiently detailed to meet the pleading standards established in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). As the Court in *Iqbal* explained, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. The court below did not dismiss the complaint because it failed to

contain sufficient facts to establish the grounds for a one-person, one-vote claim, but rather because the detailed factual allegations in the complaint amounted to a claim of "impermissible political bias" which it found to be non-justiciable. J.A. 89. However, on appeal the State makes the argument that the complaint simply contains formulaic recitations and legal suppositions, and that the stated cause of action is not "internally consistent" with the alleged facts. Br. of Appellees 15. Specific facts demonstrating a one person, one vote violation are contained in paragraphs 1, and 26 to 65 of the complaint. *See* J.A. 10-11, 16-28, Br. of Appellants 22-27.

Although there is an internal inconsistency in the facts alleged in the complaint, that inconsistency does not affect the proper resolution of the case. In paragraph 54 the complaint identifies the percentage population deviation in each district in the challenged redistricting plan. J.A. 26. As the State points out, the maximum or overall deviation is calculated by adding the deviation of the district with the smallest population and that of the district with the largest population. Br. of Appellees 9. Thus, paragraph 54 of the complaint alleges an overall deviation of +3.63% and -4.19%, or 7.82% for the seven numbered districts.[2] Paragraphs 1 and 53 erroneously allege this number to be 7.11%. All parties agree that the deviation of the numbered districts is lower than the 10% threshold and thus, to

[2] The Government reports that its calculation of this sum is 7.68%. Br. of Appellees 10.

state a claim for relief, Plaintiffs must allege facts to rebut the presumption of constitutionality and demonstrate that the plan "was the product of bad faith, arbitrariness, or invidious discrimination." *Daly v. Hunt*, 93 F.3d 1212, 1222 (4th Cir. 1996). Plaintiffs have made such allegations in the complaint, and the only question in this appeal is whether some of those specific allegations make the entire case non-justiciable because they involve partisan considerations. Plaintiffs contend that in redistricting, the General Assembly's discretion to award spoils to the victors is limited by the constitutional mandate to draw districts as nearly equal as possible.

### B. The Complaint Alleges Three Reasons Why the Deviation in Election Districts for the Wake Cnty. Bd. of Ed. are Arbitrary and Discriminatory

The Plaintiffs identify the following three impermissible considerations that they contend caused the 7.82% and 9.80% deviations among election districts in this plan:

> First, the super-districts are designed to favor the voting strength of rural voters over that of urban voters. J.A. 11.
>
> Second, overall the plan is designed to give disproportionately greater weight to the votes of Republican voters than that of Democratic voters. J.A. 18.

> Third, by pairing incumbents in districts disadvantageous to Democrats, the plan overall is designed to disfavor Democratic school board members and advantage Republican members.[3] J.A. 27-28.

Thus, the State is incorrect that Plaintiffs are relying on the fact that the current districts used for elections to the Wake Cnty. Bd. of Ed. have only a 1.66% overall deviation as sufficient to establish a violation of the one person, one vote requirement. *See* Br. of Appellees 11. Additionally, the State fails to respond to Plaintiffs' contention that favoring rural voters over urban voters is impermissible discrimination based on geographic location. The Supreme Court has made clear that "[d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status." *Reynolds v. Sims*, 377 U.S. at 566. The trial court's opinion granting a preliminary injunction in *Larios v. Cox* is instructive on this point, reviewing the holdings in no less than six United States Supreme Court cases in which the Court has never receded from the basic principle of constitutional jurisprudence that "all voters, as citizens of a State, stand in the same relation regardless of where they live." *See Larios v. Cox*, 305 F. Supp. 2d 1335, 1338 (N.D. Ga. 2004) (citing relevant cases and their holdings). Although the population deviations here just barely survive the *de*

[3] The Government asserts that this issue is not in this case; Br. of Appellees 23 n5. Plaintiffs contend that paragraphs 61 and 62 of the complaint squarely raise this issue. J.A. 27-28.

*minimis* standard, the complaint alleges three reasons why they are the result of an arbitrary and discriminatory policy. In short, "the state may not systematically dilute the weight of a citizen's vote based on the fortuity of where he or she may live." *Id.*, 305 F. Supp. 2d at 1341; *see also*, *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 653 (1964) ("However complicated or sophisticated an apportionment scheme might be, it cannot, consistent with the Equal Protection Clause, result in a significant undervaluation of the weight of the votes of certain of a State's citizens merely because of where they happen to reside.").

Similarly, while a general policy of avoiding contests between incumbents may be a neutral and legitimate goal in redistricting, *see Karcher v. Daggett*, 462 U.S. 725, 740 (1983), a state policy that attempts to favor the incumbents of one party at the expense of incumbents of another is not a neutral policy. *See Larios v. Cox*, 300 F. Supp. 2d 1320, 1348-49 (N.D. Ga. 2004) *aff'd Cox v. Larios*, 542 U.S. 947 (2004).

The State argues that *Larios* does not apply to this case because it involved a statewide redistricting plan that gave electoral advantage to certain regions of the state and the geographic differences found within a state are not found within the single county at dispute here. Br. of Appellees 22. First, this is wrong because the Supreme Court's summary affirmance in *Larios* was broader than merely finding that the overall deviation of 9.98% in Georgia's state legislative redistricting plans

was arbitrary and discriminatory because the plans favored certain geographic regions of the state. Justice Stevens' concurrence, which Justice Breyer joined, did not simply rely on rural versus urban distinctions, but also pointed out the evidence from the trial court that the population deviations in Georgia's plans were designed to allow Democrats to maintain or increase their representation through the under population of Democratic-leaning "rural and inner city" areas of the state and through the protection of Democratic incumbents. *Larios*, 542 U.S. at 949. Justice Stevens further concluded that the "District Court correctly held that the drafters' desire to give an electoral advantage to certain regions of the State and to certain incumbents (but not incumbents as such) did not justify the conceded deviations from the principle of one person, one vote." *Id.* Thus, unfair partisan advantage and discriminatory incumbent protection were also a part of the impermissible goals found to be arbitrary and discriminatory in that case.

Second, the State's argument here is wrong because, as previously noted, *see* Br. of Appellants 32-33, the same argument was rejected by the Supreme Court in *Avery v. Midland County*, 390 U.S. 474 (1986). In addition, other courts have applied *Larios* to local governing bodies. *See, e.g.*, *Crumly v. Cobb County Bd. of Elections*, 892 F. Supp. 2d 1333, 1346 (N.D. Ga. 2012).

Third, whatever the consequences of "drawing systematic distinctions between urban and rural areas" in a statewide versus a county plan, *see* Br. of

Appellees 22, the principle that a voter's vote should not count for less because of where she lives remains true. Disputes over attendance zones, school siting decisions, the locations of magnet or other specialized programs and even bus routes are all issues of great concern to parents and voters when deciding who they want to represent them on their local board of education and each of those issues is significantly impacted by geography. Where a voter lives matters for school board issues just as it does for statewide issues. Geographic differences within a county can have huge implications for school board policies and the State's attempt to distinguish *Larios* on these grounds is unsupported by precedent. *See Hadley v. Junior College Dist.*, 397 U.S. 50, 55 (1970).

Finally, the State argues that "[t]he plaintiffs' interpretation of the facts and the law would ensure a lawsuit after every election." Br. of Appellees 23. This is not true. Once the new election districts for the Wake Cnty. Bd. of Ed. are drawn with an "honest and good faith effort to construct districts . . . as nearly of equal population as is practicable," *Reynolds v. Sims*, 377 U.S. at 577, then those districts are constitutional and no additional challenge can be made until after the 2020 Census produces new population numbers. Once the one person, one vote constitutional violation alleged in this case is remedied, an election in the new districts will not trigger a new claim.

## II. Favoring One Political Party, Rural Voters and Certain Incumbents are Not Compelling Governmental Interests that Satisfy Strict Scrutiny under the North Carolina Constitution.

Defending its authority to "construe [the State Constitution] differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision," *Stephenson v. Bartlett*, 355 N.C. 354, 381, 562 S.E.2d 377, 395 (2002) (quoting *State v. Carter*, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988)), the North Carolina Supreme Court has held that under the State Constitution, the right to vote is a fundamental right and that strict scrutiny applies when the fundamental right to vote on equal terms is at issue. *Stephenson*, 355 N.C. at 377-78, 562 S.E.2d at 393. Thus, the North Carolina Supreme Court concluded that a legislative redistricting plan cannot contain both single member districts and multi-member districts, even though federal courts have not so held. *Stephenson*, 355 N.C. at 380-81, 562 S.E.2d at 395. Similarly, the North Carolina Supreme Court has held that the one person, one vote requirement applies to state judicial elections and that deviations from that requirement must be justified by neutral governmental principles. *Blankenship v. Bartlett*, 363 N.C. 518, 525-27, 681 S.E.2d 759, 763-66 (2009).

The North Carolina Supreme Court has made clear that partisan advantage can be a goal of redistricting decisions, but only within the confines of State Constitutional requirements:

> The General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions, but it must do so in conformity with the State Constitution. To hold otherwise would abrogate the constitutional limitations or 'objective constraints' that the people of North Carolina have imposed on legislative redistricting and reapportionment in the State Constitution.

*Stephenson*, 355 N.C. at 371-72, 562 S.E.2d at 390 (citing *Gaffney v. Cummings*, 412 U.S. 735 (1973)). Thus, logically, partisan considerations cannot justify deviations from the equal population principle in districts from which voters elect their representatives. The state constitutional mandate of substantially equal voting power requires the State to establish districts in which every voter's vote carries the same weight. *See Stephenson*, 355 N.C. at 379, 562 S.E.2d at 394.

In *Blankenship*, the North Carolina Supreme Court identified the types of neutral governmental interests that might justify deviations from the population equality requirement for judicial districts, holding that:

> Judicial districts will be sustained if the legislature's formulations advance important governmental interests unrelated to vote dilution and do not weaken voter strength substantially more than necessary to further those interests. We have already noted several important governmental interests, but decline to fashion an exhaustive list. In addition to compliance with federal voting rights laws, legitimate factors for the legislature's consideration include geography, population density, convenience, number of citizens in the district

> eligible to be judges, and number and types of legal proceedings in a given area.

*Blankenship*, 363 N.C. at 527, 681 S.E.2d at 766 (citations omitted). It is only logical to conclude that the state constitutional right to equal voting power for all citizens extends to local elections and that neutral governmental interests are required to justify deviations from population equality for local governing bodies.

The State's only argument with regard to Plaintiffs' State Constitutional claim[4] is that because the deviations in the challenged plan are within plus or minus five percent, Plaintiffs' claims "amount to a claim of impermissible political bias, which the federal courts may not entertain." Br. of Appellees 13. However, the North Carolina Supreme Court has never held that population deviations below a certain level create a 'safe harbor' free from the possibility of constitutional challenge. Instead, the Court has repeatedly emphasized that the State Constitution provides a robust protection for the right of every North Carolina citizen to enjoy equal voting power, and that strict scrutiny applies when the right to an equal vote

[4] The State does note that the Plaintiffs' complaint did not specifically list 28 U.S.C. § 1367 as a basis for jurisdiction over Plaintiffs' state constitutional claim. However, this is in no way a bar to the court exercising supplement jurisdiction over that claim. *See, e.g. Crosby v. Gastonia*, 635 F.3d 634, 644 (4th Cir.) *cert. denied*, 132 S. Ct. 112 (2011) (Federal Court properly exercised supplement jurisdiction over state law claims in case removed from state court where amended complaint did not identify 28 U.S.C. § 1367 as basis for supplemental jurisdiction); *Century Southwest Cable Television v. CIIF Assocs.* 33 F.3d 1068 (9th Cir. 1994) (District court had discretion to exercise its supplemental jurisdiction to consider pendent state law claims along with federal claim over which it exercised original jurisdiction without indicating basis for jurisdiction).

is at issue. Thus, the district court erred in dismissing Plaintiffs' State Constitutional claim.

### III. State Legislative Officials Are Proper Defendants.

The Plaintiffs contend that in a federal constitutional challenge to a redistricting plan such as this one, where the State of North Carolina asserts its 11th Amendment immunity, the legislative officials responsible for enacting the redistricting plan are proper defendants. Their purposes and intent are crucial to determining whether it passes constitutional muster, and they are the only entity other than the court with any ability to enact, impose and enforce a remedy. Additionally, they are the entity that should be responsible for responding to discovery, negotiating any settlements, bearing the cost of litigation generally and paying for attorneys' fees if Plaintiffs are entitled to such fees as prevailing parties.

The State argues that the state officials that Plaintiffs seek to add as Defendants in this case do not meet the standards of *Ex Parte Young*, 209 U.S. 123 (1908) because they do not have sufficient connection to the enforcement of the redistricting plan at issue here. Br. of Appellees 26-27. Plaintiffs concede that this may be correct with regard to the Governor, but not with regard to the legislative officials.

In light of the fact that S. L. 2013-110 was a local bill that did not require the Governor's signature, and taking into account this court's prior holding that "[t]he mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute," *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001) (quoting *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir. 1979)), the Governor's role in appointing the State Board of Elections is a step removed from the direct enforcement of this redistricting scheme.

The legislative officials, however, are in an entirely different situation because they are responsible for the one person, one vote violation that occurred here and the one party that the State agrees is a proper party, namely the Wake County Board of Elections, has no authority under state law to enact a redistricting plan for the Wake Cnty. Bd. of Ed.

The Fourth Circuit interprets *Ex parte Young* to require "a 'special relation' between the state officer sued and the challenged statute to avoid the Eleventh Amendment's bar." *Waste Mgmt. Holdings, Inc.*, 252 F.3d at 331. "'[S]pecial relation' under *Ex parte Young* has served as a measure of *proximity to* and *responsibility for* the challenged state action." *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 333 (4th Cir. 2008) (emphasis in original). The "special relation" requirement ensures that the appropriate party is before the federal court, so as not

to interfere with the lawful discretion of state officials. *Ex parte Young*, 209 U.S. at 158-59. The requirement appropriately bars injunctive actions against state officials whose relationship to the enforcement of the state statute is significantly attenuated. *See S.C. Wildlife Fed'n*, 549 F.3d at 332-33. However, the special relation requirement also ensures that "in the event a plaintiff sues a state official in his individual capacity to enjoin unconstitutional action, '[any] federal injunction will be effective with respect to the underlying claim.'" *McBurney v. Cuccinelli*, 616 F.3d 393, 399 (4th Cir. 2010) (quoting *S.C. Wildlife Fed'n* 549 F.3d at 333).

In this case, where the other proper defendant, the Wake County Board of Elections, administers elections but has no authority to alter election district boundaries, the State entity whose policies, priorities and actions are properly subject to constitutional scrutiny is the entity with a special relation to, proximity to and responsibility for the challenged statute.

The State argues that the numerous cases cited by Plaintiffs in which legislative defendants are sued in federal court in one person, one vote cases, *see* Br. of Appellants 46 and *supra* at 8, are "unavailing" because Plaintiffs did not specify that 11th Amendment issues were raised in those cases and some of them are from states other than North Carolina where state law might have made those officials proper parties. Br. of Appellees 27. Without getting sidetracked into a

detailed comparison of local redistricting laws and procedures in other states, which Plaintiffs submit would yield more relevant similarities than differences,[5] it is clear that the North Carolina case of *Daly v. Hunt*, challenging the redistricting plan for the Mecklenburg County Board of Commissioners and Board of Education established by Senate Bill 613, 1993 N.C. Sess. Laws 167, is directly analogous to the circumstances here. *See Daly v. Hunt*, 93 F.3d 1212, 1215 (4th Cir. 1996). In both *Daly* and this case, the Plaintiffs challenge the constitutionality, on one person, one vote grounds, of a bill enacted by the North Carolina General Assembly establishing election districts for a local board of education.

It is true that the 4th Circuit opinion in *Daly* does not address whether the Governor, Lieutenant Governor, and Speaker of the House who were sued in that case were proper parties under the *Ex Parte Young* doctrine. *See Daly*, 93 F.3d at 1212. However, that case and those from other jurisdictions demonstrate that these parties have sufficient connection to, interest in, and responsibility for the challenged redistricting plans to defend the action in federal court. Those precedents are relevant to the question of whether these defendants are proper

[5] For example, in *Adamson v. Clayton Cnty. Elections and Registration Bd.*, 876 F. Supp. 2d 1347 (N.D. Ga. 2012), involving a one person, one vote challenge to the districts for the Clayton County Board of Education, the State of Georgia was a party as a representative of the Georgia Legislature. Under Georgia law, the Georgia General Assembly uses a local bill process to redraw districts for local elections when new census data becomes available. *See Adamson*, 876 F. Supp. 2d at 1351.

parties. Equally relevant is the fact that the State points to no case from any jurisdiction in which a court has held that the state is not a proper party in a constitutional challenge to a redistricting plan passed by that state's legislature.

The State neglected to address Plaintiffs' concerns regarding the conduct of discovery, the possibility of negotiating a settlement resolving plaintiffs' claims at any stage of the litigation prior to a final judgment, and the proper responsibility for attorneys' fees should the Plaintiffs' prevail. *See* Br. of Appellants 47. These are not speculative concerns, they go to the heart of the factual question of whether the State is sufficiently connected to the legislation at issue to properly be a party. For example, in a recent one person, one vote challenge to a redistricting scheme for the Guilford County Board of County Commissioners enacted by the North Carolina General Assembly in 2011, the District Court for the Middle District of North Carolina determined that Plaintiffs were entitled to a preliminary injunction. *See NAACP-Greensboro Branch v. Guilford Cnty Bd. of Elections*, 858 F. Supp. 2d 516, 531 (M.D.N.C. 2012). In fashioning the appropriate remedy, the district court relied heavily on representations made by counsel for the legislative defendants in that case. The court explained as follows:

> This court recognizes that this remedy still leaves at least two issues unresolved: 1) the role of the two commissioners currently residing in new District 3, and 2) whether the currently serving commissioners are to remain as single-member district representatives between the 2012 and 2014 general elections. . . . Although this court has considered ordering a stay of the entire election until the legislature

> remedied the due process and equal protection concerns in SL 2011-407, counsel for the Legislative Defendants has assured this court during various oral arguments that the legislature will move to address any constitutional problems with SL 2011-407 at the earliest possible date. Because reapportionment is a legislative matter, this court finds that further action in Plaintiffs' motion for a preliminary injunction is not appropriate and should be denied.

*NAACP-Greensboro Branch*, 858 F. Supp. 2d at 531, (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)) ("Legislative reapportionment is primarily a matter for legislative consideration and determination, and judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so."). If the legislative defendants were not parties to the case, the court's hands would be tied to a much greater extent and evaluating the best course to ensure a full remedy for Plaintiffs would be more difficult.

To be sure, a federal district court cannot order legislative defendants to pass a redistricting statute. When the legislature decides not to act, the court has the power to step in and order the use of a redistricting plan that complies with federal law. *See, e.g., Adamson v. Clayton Cnty. Elections and Registration Bd.*, 876 F. Supp. 2d 1347 (N.D. Ga. 2012) (court implements redistricting plan for Clayton County Board of Education in one person, one vote case where Georgia Legislature fails to act in time). Nevertheless, the statue passed by the North Carolina General Assembly in this case specifically bars the Wake County Board

of Education from changing its election district boundaries until after 2021, 2013 N.C. Sess. Laws 110, § 5(c) (reproduced in Addendum C to Br. of Appellants). The General Assembly's official representatives have the capacity to provide a remedy for the constitutional defects in the statute they have enacted. Their responsibility for the redistricting plan at issue here makes them proper parties under the *Ex Parte Young* doctrine.

## CONCLUSION

The Plaintiffs' complaint in this action adequately and with specificity alleges a one person, one vote violation under the United States and North Carolina Constitutions. The state legislative defendants are proper parties in the case. This Court should reverse the judgment of the district court, and remand for further proceedings on both of Plaintiffs' claims.

This the 17th day of July, 2014.

Respectfully submitted,

/s/ Anita S. Earls
N.C. State Bar No. 15597
Southern Coalition for Social Justice
1415 West Highway 54, Suite 101
Durham, North Carolina 27707
919-323-3380, ext. 115

Counsel for Appellants

## CERTIFICATE OF COMPLIANCE

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Dated: July 17, 2014

/s/ Anita S. Earls
*Counsel for Appellants*

## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 17th day of July, 2014, I caused this Reply Brief of Appellants to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Alexander M. Peters
NORTH CAROLINA DEPARTMENT OF JUSTICE
114 West Edenton Street
Post Office Box 629
Raleigh, North Carolina 27602
(919) 716-6900

*Counsel for Appellee State of North Carolina*

Roger A. Askew
Claire A. Hunter
Kenneth R. Murphy, III
WAKE COUNTY ATTORNEY'S OFFICE
Post Office Box 550
Raleigh, North Carolina 27602
(919) 856-5500

*Counsel for Appellee Wake County Board of Elections*

I further certify that on this 17th day of July, 2014, I caused the required copies of the Reply Brief of Appellants to be hand filed with the Clerk of the Court.

/s/ Anita S. Earls
*Counsel for Appellants*